Trade unionism is attempting to bring its traditional hiring hall process into compliance with section 8(a)(3) of the Taft-Hartley Act. Although it is maintaining a legal position that disgorgement is an abuse of NLRB remedial power and that the law does not require that hiring hall contracts contain express guarantees against discrimination, affirmative steps in the form of contract revisions are being taken lest inaction mean a multitude of serious financial consequences. In this article, Mr. Sherman points out that the final solution to the problem primarily requires the understanding of an entire industry and the understanding of the needs and interests of those who function in that industry.

Employers and unions in the building and construction industry are currently engaged in the revision of written agreements and unwritten practices with respect to the industry's basic method of hiring, namely, the channeling of manpower through a hiring hall. The principal pressure for such a revision is the re-invocation by the National Labor Relations Board of the Brown-Olds remedy.¹ The Board has taken the position that if presented with an illegal hiring practice inconsistent with the provisions of section 8(a)(3) of the Taft-Hartley Act,² it will order employer and union alike to reimburse to all employees covered by such practice the amount of initiation fees, dues and other charges which they may have paid into the union from a date six months prior to the filing of the unfair labor practice charge. The extension of the period during

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* Chairman of the Legal Advisory Committee, Building and Construction Trades Dept., AFL-CIO; General Counsel, International Brotherhood of Electrical Workers. A.B., LL.B., Columbia University; Member of the Bar of the District of Columbia.


which the remedy would not be applied expired on November 1, 1958. On November 4, 1958, the National Labor Relations Board issued its decision in Los Angeles-Seattle Motor Express, Inc. (Teamsters Local 357)\(^8\) in which the Brown-Olds remedy was actually applied to both the employer and the union.

A legal analysis of the current problem requires an understanding of the pertinent facts with respect to hiring practices in this industry and the course of legal developments with respect to such practices. First, the building and construction trades unions, which are among the oldest unions in America, perform a number of functions in the building and construction industry. In addition to the usual function of a trade union in negotiating collective bargaining agreements which establish the terms with respect to wages, hours and conditions of work, these unions also participate through apprenticeship programs in the development of the industry’s required skills; and they are the principal source of the industry’s supply of manpower. Secondly, because of its mobility, because of the requirements of its production process, which call for the use of different crafts at different times, and because of the short duration of many jobs, the nature of the industry itself establishes the need for the central administration of the labor pool in a particular geographical area. Consequently, there has arisen a hiring process that has met the needs and interests of both parties.

On October 26, 1949, the construction employer representatives serving on the Joint Board for the Settlement of Jurisdictional Disputes made a statement to the National Labor Relations Board which set forth the applicable economic facts of the industry. These employer representatives described construction employment procedure in the construction industry as follows:

1. Each employer constructs on numerous separate projects in each year.
2. Until a project is started he has no manual “employees.”
3. On each project there are usually several “employers” frequently using different crafts of workmen.
4. On each project there is a constant shifting of crews on and off the job as the work progresses.
5. In each crew there are frequent changes in the men when the crew returns to the job.
6. There is not a time on the job when all men and all crews eventually employed will be so employed at the same time.
7. The workmen are drawn from an “area pool” of available workmen who will work for many or all employers in the area, or may drift from one area pool to another area pool.

\(^8\) 121 N.L.R.B. No. 205 (Nov. 4, 1958).
8. When a workman's function on a job is temporarily or permanently finished they [sic] are laid off and returned to the pool for use on other jobs or by other construction employers.
9. A vast number of projects in the industry are of but a few days' or hours' duration for a given craft.
10. This quick need and rapid shifting of men in and out of the pool to various projects requires a previously established and uniform understanding of employment terms for all jobs and for all contractors in order to avoid delays in hiring and misunderstandings as to the terms of employment.
11. Each employer's policy as to wages and working conditions must be comparable to that of other employers of the men in the pool.4

The employer representatives described the customary hiring practices in the construction industry as follows:

It has been the traditional custom in the Construction Industry, whether or not the workmen were union members, for the employer to have the right to select the workmen best suited for the work to be done.

It was his traditional custom in selecting men to consider necessary qualifications, such as—

A. Basic training for the work: For quality of work and good production he must be assured that he has had sound basic training.

B. Experience: He should have had experience in performing that kind of function, on that kind of construction, and with similar contractors and other crews.

C. Skill: He should have a degree of skill such as has been required by other contractors for similar work.

D. Safety training: He should have worked where proper precautions against accidents are taken and safety practices have been recognized—otherwise he will endanger himself and the safety and morale of the entire working force.

E. Cooperation: He should be cooperative in his attitude to the other workmen on other trades on the job.

F. Permanent connections: It must be possible to locate him on such short notice for employment and after employment.

G. Character reference: In many operations reputation for good character is essential.

It is obvious that the quick need for workmen in construction makes the use of men not previously employed by this management frequent. It is likewise obvious that some agency would be used which could identify men of the qualifications required except in the few cases where the operations were so limited as to require only a small standard crew constantly performing similar work. (Emphasis added.)

It has been the custom in many communities where union men are employed to measure these qualifications to large degree by the workman's ability to hold a membership in a union. Under many circumstances the union did function as the only recruiting agency which could obtain quickly the qualified men required by the employer. (Emphasis added.)

The use of employment agencies—At one time in some areas the employers of nonunion construction workers found it necessary to recruit through an employment agency to obtain the qualified workers needed.

The service of furnishing contractors qualified and trained workmen—The function of training and recruiting qualified men for an area pool, and identifying the qualifications for certain work, is a most important service to the employer.

The selection of workmen because of their qualifications should not be construed as unfair discrimination.—The men are generally selected for their qualifications, not for the kind of card they carry, or the absence of one. If, however, the selection of a workman solely because he can furnish evidence of training, experience, skill, safety training, cooperation, permanent connections, and character references—in a given community by virtue of being a member of a given union which can vouch for these qualifications—in place of some workmen without substantiated evidence of such qualifications for the work to be performed, then the employer's choice must not be regarded as discrimination in favor of union membership and he must not be deprived of the right to use his own criteria in judging the qualifications. To do otherwise will destroy the production, quality, and efficiency of construction operations.

The construction employer should not be deprived of his right to select his source of labor supply, just as he selects his source of the various materials without charges of discrimination unless it is shown that the intent was to discriminate for or against membership in a certain union.5

A representative of a large construction company has testified before a Senate committee to the value of the union as a recruiting agency from the employer's point of view in the following language:

As you will note by a study of our agreements, basically they all provide that the contractor has freedom of selection, so that when the men are sent to him he has control of how long they stay on the job. He can pick the men he wants.

But the manner of bringing the men in, certifying as to their qualifications, and bringing them to the job generally is best handled by the representatives of the workmen themselves.6

The union in the building and construction industry thus has a dual aspect in fact. First, it is a collective bargaining agency with responsibility for negotiating wages, hours and conditions of employment, and having the object of developing maximum legal union security. Secondly, it is a manpower agency having the responsibility of recruiting, training, qualifying and making available the appropriate craftsmen for the employers having jobs in the geographical area.

Prior to the Taft-Hartley Act, this dual aspect of the union was embodied in the single form of the closed shop agreement. Under this type of agreement, the employer promised that he would hire only members

5 Id. at 158-59.
6 Id. at 173-74.
of the union. It is apparent that this is the maximum form of union security. It must be realized, however, that the requirement that an employee be a member of the union prior to his employment also permitted the union to perform its functions as a manpower agency. A prospective employee could not become a member of the union until he had become fully qualified and had gone through the necessary procedures to establish such qualifications. The closed shop was a legal form of agreement under the Wagner Act. The proviso to section 8(3) of the Wagner Act stated:

That nothing in this Act . . . shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in this Act as an unfair labor practice) to require as a condition of employment membership therein . . . .

The Taft-Hartley Act retained the language of the Wagner Act, making it an unfair labor practice for an employer "by discrimination in regard to hire or tenure of employment, or any term or condition of employment to encourage or discourage membership in any labor organization," but substituted for the proviso allowing the closed shop the proviso which authorized the limited type of union shop, which is permissible under the Taft-Hartley Act.

It is entirely clear that the Taft-Hartley Act was intended to abolish

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7 National Labor Relations Act, § 8(3), 49 Stat. 449 (1935). (Emphasis added.) During the Wagner Act period the Board exercised its administrative discretion to decline to assert jurisdiction over the building and construction industry. Brown & Root, Inc., 51 N.L.R.B. 820 (1943); Johns-Manville Corp., 61 N.L.R.B. 1 (1945). The difficulties created by the application of the Taft-Hartley Act, including the Wagner Act provisions not previously applied, gave rise to an early demand for legislative relief. The Senate Committee on Labor and Public Welfare in its report on S. 249, S. Rep. No. 99, pt. 1, 81st Cong., 1st Sess. 16 (1949), adverted to the fact that the closed shop had been traditional in the building and construction industry, "not merely for the purpose of providing adequate security for employees, who must by the nature of things move frequently from one job to another, but, in addition, to provide a ready pool of available labor for employers." The Senate Committee recommended the restoration of the Wagner Act provision. A similar recommendation was made by the House Committee on Education and Labor in its Report on H.R. 2032, H.R. Rep. No. 317, 81st Cong., 1st Sess. (1949). In later years more limited legislative proposals were advanced by the affected parties.

8 The Taft-Hartley Act proviso in section 8(a)(3) states: "Provided, That nothing in this Act, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in section 8(a) of this Act as an unfair labor practice) to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment or the effective date of such agreement, whichever is the later . . . ."
the closed shop. This, of course, struck down the first aspect of the trade union in terms of its maximum legal union security objective. There is no evidence, however, in the legislative history of the act to show that Congress intended to strike down the second aspect, that is, the manpower functions of the trade union. Indeed, there is clear evidence to show that the Congress did not intend to affect the status of a union in its capacity as a manpower agency. Senator Taft stated on the floor of the Senate that "there are not very many closed shops," and "if in a few rare cases, the employer wants to use the union as an employment agency, he may do so; there is nothing to prohibit his doing so. But he cannot make a contract in advance that he will only take the men recommended by the Union."

The clash between the central position of the union in the economic system of production in the building and construction industry and the provisions of section 8(a)(3) produced complex, vexing and difficult litigation for employers and unions in this industry. The problem became more acute as a result of the decision of the National Labor Relations Board in the latter part of 1957, to refuse to accept settlements unless Brown-Olds remedy provisions were included.

On February 7, 1958, Jerome D. Fenton, General Counsel of the National Labor Relations Board, issued a letter which was generally construed to amount to an extension of the date upon which the Brown-Olds remedy would be fully applied to June 1, 1958. In this letter, which was addressed to Richard J. Gray, President of the Building and Construction Trades Department, AFL-CIO, the General Counsel of the Board pointed out the desirability of having the parties to the so-called "illegal hiring arrangements" correct these arrangements on a voluntary basis. The General Counsel of the Board also suggested that during a period of three months, commencing March 1, 1958, employers and unions who are party to illegal hiring arrangements vigorously undertake to correct such arrangements by bringing them into compliance with the provisions of the Labor Management Relations Act of 1947.

On February 20, 1958, the President of the Building and Construction Trades Department sent a communication to the General Presidents of the National and International Unions affiliated with the Department, which advised that appropriate steps be taken to communicate with the many thousands of local unions involved to apprise them of the legal

situation. In this letter, the President of the Department made it clear that, although there was no agreement with the legal validity of the Brown-Olds remedy, nevertheless it would be desirable to advise the constituent units of the need for compliance with the law. The letter noted that many local unions had already brought their union security agreements and practices into compliance with the law, but urged that those who had not taken such action should do so at this time. In accordance with this recommendation of the Department, the International Unions affected advised their local unions of the problem and the need for taking appropriate action where necessary.

On April 2, 1958, the National Labor Relations Board issued its decision in the case of Mountain Pacific Chapter of the Associated General Contractors. This decision set forth the general ground rules which the Board deemed applicable to the establishment of legal union hiring halls. On April 15, 1958, President Gray advised the General Counsel of the Board that further time would be required for consideration of the problems raised by the invocation of the Brown-Olds doctrine and the decision in the Mountain Pacific case. It was also pointed out that additional time would be required to assure orderly and informed negotiations for revisions in clauses and practices where such revisions appear to be required. On April 21, 1958, the General Counsel of the Board advised the President of the Building and Construction Trades Department that "in view of the actions thus far taken by the interested parties," the Board was agreeable to an extension of the full application of the Brown-Olds remedy to September 1, 1958, in order to permit the completion of the revisions in clauses and practices necessary to conform with the requirements of the act.

In answer to a number of inquiries addressed to the General Counsel for further enlightenment on the subject of the objectives, standards and criteria required by the Board in union hiring hall plans, the General Counsel of the Board issued a public statement on June 26, 1958. This statement, although not an advisory opinion or ruling, was intended to assist all parties concerned with the problem by commenting on representative inquiries concerning the scope and the implications of the Mountain Pacific decision. The statement of the General Counsel com-

prises forty-six pages of mimeographed material discussing the specific issues involved in the establishment of union hiring halls and containing extensive citations to decisions by the National Labor Relations Board and the courts.\textsuperscript{15} On August 6, 1958, the first plan for a union referral system was recommended by an International Union.\textsuperscript{16} Thereafter, other parties involved in this problem issued plans which they had formulated.\textsuperscript{17}

The extensions previously granted by the General Counsel were given further extension, on a limited basis, to November 1, 1958. This final extension was made available "where the parties have initiated steps and have made genuine efforts to correct their union security and hiring arrangements prior to the September 1 deadline . . . ."\textsuperscript{18} The negotiations between the parties on exclusive hiring hall arrangements produced discussion and dispute as to the appropriate rules of law. It is,

\begin{itemize}
  \item \textsuperscript{15} 1 Lab. Rel. Rep. 261 (1958).
  \item \textsuperscript{17} Plans setting forth detailed clauses and procedures are as follows:
    \begin{enumerate}
      \item International Ass'n of Bridge, Structural and Ornamental Iron Workers, 156 Constr. Lab. Rep., C-1 (Sept. 17, 1958).
    \end{enumerate}
  \item General clauses relating to hiring practices are set forth in the following agreements and proposals:
    \begin{enumerate}
    \end{enumerate}
\end{itemize}
of course, quite clear that the questions involved will not be finally settled until the National Labor Relations Board has issued its rulings and the matter has been fully litigated in the courts. The public statement of the General Counsel of the National Labor Relations Board issued June 26, 1958, did not, as stated by the General Counsel, constitute a formal advisory opinion. It became necessary for the General Counsel, on October 16, 1958, to issue a further public statement that he "has not furnished any employer or labor organization an opinion or ruling to the effect that a particular form of exclusive hiring hall agreement is lawful or unlawful."  

In view of the severity of the Brown-Olds remedy, which is applicable to employer and union alike, the interested parties cannot await a final judicial ruling but must formulate their arrangements on the basis of the available legal materials. The legal issues involved in the utilization of the Building and Construction Trades Union as a manpower agency must, therefore, be analyzed in the light of the decision of the Board in the Mountain Pacific case, other decisions of the Board, and the statement of the General Counsel of the Board dated June 26, 1958.

**The Rule of the Mountain Pacific Case**

The Board ruled in this case that the language of the hiring clause in itself, entirely apart from evidence of actual discrimination, tended to encourage membership in the union. The hiring clause read as follows:

(a) the recruitment of employees shall be the responsibility of the Union and it shall maintain offices or other designated facilities for the convenience of the employers when in need of employees and for workmen when in search of employment.

(b) the employers will call upon the local union in whose territory the work is to be accomplished to furnish qualified workmen in the classifications herein contained.

(c) should a shortage of workmen exist and the employer has placed orders for men with the Union, orally or written, and they cannot be supplied by the Union within forty-eight (48) hours . . . the employer may procure workmen from other sources.

The Board took the view that although exclusive union hiring halls are legal, the vice in this particular arrangement was that "the contract is

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20 Broderick Wood Products Co., 118 N.L.R.B. 38 (1957), aff'd, No. 5781, 10th Cir. Nov. 12, 1958.
silent as to methods or criteria to be followed by the Union in performing its function as hiring agent."  

On the basis of the decision of the Supreme Court of the United States in \textit{Radio Officers' Union v. NLRB}, the Board took the view that the contract or hiring arrangement need not explicitly limit employment to \textit{union members} to be unlawful. The statutory phrase "encourage membership in a labor organization" is not to be minutely restricted to enrollment on the union books; rather, it necessarily embraces also encouragement towards compliance with obligations, or supposed obligations, of union membership and participation in union activities generally.  

The Board recognized, however, the economic utility of the union as a manpower agency and stated:  

It was to eliminate wasteful, time-consuming and repetitive scouting for jobs by individual workmen and haphazard uneconomical searches by employers that the union hiring hall as an institution came into being. It has operated as a crossroads where the pool of employees converges in search of employment and the various employers' needs meet that confluence of job applicants. In some industries such basic hiring with the assistance of the union has served to excuse conduct which runs counter to the express proscriptions of the statute which we must enforce.  

Supporting the above view was the following statement by Senator Taft:  

The majority report proceeds on the erroneous assumption that unless the closed shop prohibition of the Taft-Hartley Act is removed from maritime unions, such unions cannot continue to have hiring halls in that industry but must go back to a complete open shop, or even recruitment by "crimps" and "shape up." The National Labor Relations Board and the courts did not find hiring halls as such illegal, but merely certain practices under them. The Board and the Court found that the manner in which the hiring halls operated created in effect a closed shop in violation of the law. Neither the law nor these decisions forbid hiring halls, even hiring halls operated by the union, as long as they are not so operated as to create a closed shop with all of the abuses possible under such an arrangement, including discrimination against employees, prospective employees, members of union minority groups, and operation of a closed union.  

In drawing the line between permissible and nonpermissible union hiring halls, the Board stated that: "The basis for a union's referral of one individual and refusal to refer another may be any selective standard or criterion which an employer could lawfully utilize in selecting from

\begin{flushleft}
\begin{enumerate}
\item Id., 41 L.R.R.M. at 1461.
\item 347 U.S. 17, 45 (1954).
\item 119 N.L.R.B. No. 126-A (April 1, 1958).
\item Id., 41 L.R.R.M. at 1461 n.8.
\item Id., 41 L.R.R.M. at 1461-62 n.9.
\end{enumerate}
\end{flushleft}
among job seekers.”  Further, the Board pointed out that it would find an agreement to be nondiscriminatory on its face, only if the agreement explicitly provided that:

(1) Selection of applicants for referral to jobs shall be on a nondiscriminatory basis and shall not be based on, or in any way affected by, union membership, by-laws, rules, regulations, constitutional provisions, or any other aspect or obligation of union membership, policies, or requirements.

(2) The employer retains the right to reject any job applicant referred by the union.

(3) The parties to the agreement post in places where notices to employees and applicants for employment are customarily posted, all provisions relating to the functioning of the hiring arrangement, including the safeguards that we deem essential to the legality of an exclusive hiring agreement.

The Board stated the above rule as a valid means of establishing the legal union hiring hall, although it noted that literally speaking such a hiring hall “might tend to encourage Union membership.” The Board considered it necessary to draw a line between lawful encouragement and unlawful encouragement:

We recognize that a procedure requiring application for employment through a union tends to encourage union membership—in fact it gives to unions a ready forum for organizational activities. However, appraisal of the statute as a whole and the large body of decisional law based upon it, shows that there are many literal forms of encouragement to union membership that are not prohibited. The better representation a union affords, the more successful it is in wresting economic advantage from the employer for the employees, the more it will attract members to it; i.e., “encourage Union membership.” Clearly such encouragement alone does not always violate Section 8(a)(3); a line must be drawn between lawful and unlawful encouragement.

The opinion of the Board in the Mountain Pacific case issued on April 1, 1958. The decision of the Board, however, was actually known on December 14, 1957, when Member Murdock issued his dissenting opinion. The basic point of the dissenting opinion is that the Board is not authorized to require the inclusion of objective standards in a contract providing for an exclusive nondiscriminatory hiring hall. The dissent states:

For more than 7 years it has been well-established Board law, judicially approved in every Circuit Court of Appeals in which the issue was raised, that an exclusive nondiscriminatory hiring hall is not per se unlawful. . . .

The majority indeed admits that the statute does not prohibit an exclusive hiring hall, pointing to the salutary objective served by such institutions and a statement

27 Id., 41 L.R.R.M. at 1462.
28 Ibid.
by Senator Taft that the closed shop provision of the Taft-Hartley Act was not aimed at the hiring hall of the type administered in the maritime industry. But the majority would add something new to the law as understood by Senator Taft. The majority now says that a nondiscriminatory hiring hall, which the Board, the courts, and Senator Taft regarded as perfectly legal, runs counter to the express proscription of the Statute unless objective standards are included in the hiring hall contract.\footnote{30}

Member Murdock was of the view that where the contract provided for a nondiscriminatory exclusive hiring hall, it then became the duty of the General Counsel of the Board to assume the burden of proof to show that the hiring hall was being administered in fact on a discriminatory basis. It was his view that the majority had no legal authority to presume that the union would administer an otherwise lawful contract in an unlawful manner.

The dissenting opinion relied on the decision of the Circuit Court of Appeals for the Ninth Circuit in \textit{NLRB v. Swinerton}.\footnote{31} In that case the court said:

The Board has contended that adoption of a system of union referral or clearance also violates the Act absent a "guarantee that the union does not discriminate against non-members in the issuance of referrals." We do not believe National Union of Marine Cooks and Stewards, 90 N.L.R.B. 1099 (1950) supports this view. Although it was there noted that the provisions of an applicable labor contract prohibited such discrimination, the Board did not indicate that a referral system was \textit{per se} improper absent a "guarantee" of non-discrimination. Such a rule would in practical effect shift the burden of proof on the question of discrimination from the General Counsel of the Board to the respondent. The rule which we deemed proper was recognized by the Board in Hunkin-Conkey Const. Co., 95 N.L.R.B. 433 (1951), where it was said an agreement that hiring of employees be done only through a particular union's offices does not violate the Act "absent evidence that the union unlawfully discriminated in supplying the company with personnel." 95 N.L.R.B. at 435. Cf. Del E. Webb Const. Co. v. N.L.R.B., 8th Cir., 1952, 196 Fed. 2d 841, 845.\footnote{32}

In addition to the above-noted decisions of the Board and the court, the dissenting opinion relied upon \textit{Eichleay Corp. v. NLRB},\footnote{33} and \textit{NLRB v. E. H. McGraw & Co.}\footnote{34}

The majority and the minority in the \textit{Mountain Pacific} case are thus agreed that a union can be utilized as a manpower agency under an exclusive hiring hall arrangement. They are also agreed on the proposition that any hiring hall arrangement which is administered on a discrimina-
tory basis is unlawful, where valid proof of such discrimination is ad-
duced in the record of the case. The difference between the majority and
the minority is to be found in the single issue of whether the Board is
authorized to require the parties to write into the hiring hall or referral
system arrangement the safeguards and objective standards specified in
the majority decision of the Mountain Pacific case. This question is
presently pending before the Court of Appeals for the Ninth Circuit
in the Board's petition for enforcement of the order which it set forth
in the Mountain Pacific case.

Pending a final judicial ruling on this point, the current discussion in
the industry necessarily centers on specific objective standards and pro-
cedures involved in the establishment of union hiring halls or referral
systems under the Mountain Pacific decision.

**Objective Standards and Procedures**

It is apparent that there is no single form of union hiring hall or referr-
al system which would automatically suit the varied situations in the
different trades and numerous localities in the building and construction
industry. Each case requires informed negotiation between employers
and unions on the basis of the legally available standards and procedures.
The principal factors involved in the formulation of these plans are
as follows:

1. **Employers' right to reject any applicant for employment.** The
Mountain Pacific decision requires that such right be written into the
agreement. Inclusion of this provision serves to negate any legal duty or
obligation on the employer to accept the applicants referred by the
union. Where the parties agree, however, on a fixed seniority system
which is otherwise lawful, a question arises as to whether the unfettered
right to reject would be consistent with such plan, and also whether the
Board has the legal power to prevent the establishment of such seniority
systems in the building and construction industry when they are legally
valid in other industries. An additional question is whether a procedure
can be established requiring the employer to "show cause" for his re-
jection of the applicant.

2. **Express Denial of Discrimination by Reason of Membership or
Non-membership in the Union.** This is another specific requirement of
the Mountain Pacific decision and is an issue in the case pending before
the Court of Appeals for the Ninth Circuit.

3. **Posting.** The purpose of this third specific requirement of the
Mountain Pacific decision is, obviously, to bring to the attention of
prospective applicants for employment, whether union members or non-union members, the applicable standards and procedures of the referral system. The legal issue is similar to the issues raised by the preceding requirements of the Mountain Pacific decision.

It may be observed that, pending a final judicial ruling on the Mountain Pacific decision, unions agreeing to formal hiring hall and referral systems have accepted the above three requirements as essential elements of their plans. A degree of variation exists as to the item of "cause." Some of the plans establish a procedure under which the issue of whether the employer had cause to reject an applicant for employment can be adjudicated.

4. "Objective Standards." The most comprehensive general expression of views on the question of what constitute objective standards or criteria for referral purposes is to be found in the comment on question one in the General Counsel's statement of June 26, 1958:

QUESTION 1: Assuming that an exclusive job referral plan is established on a basis of proper standards or criteria of residence, experience, qualification or past employment by contracting employers and is operated on a non-discriminatory basis as to union or non-union membership, would such a plan be legal?

COMMENT. . . . Assuming these requirements [i.e., the three requirements of the Mountain Pacific decision specified above] are met, the exclusive job referral plan described above—i.e., a plan based on "proper standards or criteria of residence, experience, qualification, or past employment by contracting employers" and "operated on a non-discriminatory basis"—viewed alone and apart from other considerations as, for example, practice or custom, would not appear to be unlawful in itself. I might add, in this connection, that establishing such a plan in conformity with Mountain Pacific would appear to entail the execution of a written contract between the parties embodying the requirements indicated in that case.35

5. Experience. As a manpower agency, the union should be entitled to use relative number of years of experience in the trade as a standard for determining the order of priority for reference.

6. Qualifications. Some of the published plans establish priority for reference on the basis of whether the applicant has passed a journeyman's examination given by a local union of the particular trade. As has been noted above, the trade unions in the building and construction industry have been relied on by many employers as the agency to qualify applicants for employment. This provision for local union examination carries forward this traditional function. As safeguards against abuse of the function, the plans provide that such examinations be given at rea-

sonable intervals and provide for an appeal to a tripartite Appeals Committee composed of a representative of the union, a representative of the employers, and a public member. Such appeal may be directed to the type of examination given, or to the grade of the particular applicant. It should be noted that an applicant having the requisite number of years of experience to qualify for the examination is eligible to take the examination, even though he is not a member of the union. Furthermore, a member who has passed the examination does not lose his position in the order of priorities, even though he should lose his membership.

7. Seniority. The establishment of a difference in employment status or priority in referral for consideration for employment based upon length of service under the applicable collective bargaining agreement is in accordance with the seniority principle in industry. Such a standard was validated by the National Labor Relations Board in the maritime industry, even though a membership preference provision had been operative during the "seniority period." The tripartite Appeals Committee, previously referred to, has been made available in a number of the plans for the purpose of permitting an aggrieved applicant to secure a determination on his seniority status if he is dissatisfied with the action of the union.

In this regard, it should be noted that the Appeals Committee should serve a useful function in providing a fair tribunal to decide rapidly the question raised by aggrieved applicants with respect to seniority and any other matters in the referral system which are of interest to nonunion and union applicants. The agreement between the employer and the union should empower the Appeals Committee to correct a just grievance in a matter of days where it would take the Board years to accomplish the same result through its administrative processes and subsequent litigation in the courts. An incidental benefit which should result from the establishment of such Appeals Committees is that many complaints in this area can be disposed of by private means, thus reducing the load on the overtaxed facilities of the Board. Of course, if any particular Appeals Committee does not function in a fair and proper manner, the aggrieved applicant will have the right to file his charge under the law with the National Labor Relations Board.

8. Residence. The economic facts of the building and construction industry are such that workers normally consider themselves attached

to a particular trade in a particular area rather than as employees of a particular employer. 37 It will be recalled that when the National Labor Relations Board was experimenting with union authorization elections it finally centered on the geographical "area pool" concept as the unit for the election. 38

It is apparent that employers operating in a particular geographical labor area have a direct interest in the maintenance of an adequate and permanent supply of labor in that particular geographical area. Some of the published plans seek to accomplish this objective, with consequent benefit to employees having family responsibilities in the particular community, by establishing residence in the "geographical area constituting the normal construction labor market," as a preference factor. "Normal construction labor market" is defined in these plans as including the areas defined by the Secretary of Labor to be the appropriate prevailing wage areas under the Davis-Bacon Act to which the labor agreement applies, plus the commuting distance adjacent thereto, which includes the area from which the normal labor supply is secured. "Resident" is defined as meaning a person who has maintained his permanent home in the "normal construction labor market" for a period of not less than one year or who, having had a permanent home in the area, has temporarily left with the intention of returning to the area as his permanent home.

Under these plans, residence is a separate factor and is not the equivalent of membership in a given local union. A person who is not a member of the local union and who does not become such member may nevertheless be or become a resident in the particular geographical area. A resident union member who loses his union membership does not lose the preference attributable to his residence. The residence requirement in these plans is quite different from the residence provision ruled invalid by the Board in Bickford Shoes, Inc. 39 There the Board reversed the trial examiner, stating that: "The Trial Examiner also attributed the preference to the residency of those preferred. As between unemployed qualified shoe workers residing in Milford, the contract extended top priority in hiring to residents who were members of the Association." 40 The Board also stated that: "We are not ruling on what would be the

40 Id. at 1348 n.2. (Emphasis added.)
result if the contract had merely required Bickford to give preference in employment to residents of a given area. This, however, the contract did not do. The contract required Bickford to prefer Association members in hiring. This, as indicated, the statute prohibits.  

9. Registration. The plans usually provide for registration of applicants for employment in priority groups based on a combination of the above and other factors.

10. Out-of-Work List. A number of the plans provide for preference within a priority group based upon relative periods of unemployment as determined by the date the applicant registers his availability for employment. In other words, the applicant longest unemployed within a particular priority group is the first person sent to the employer to be considered for employment. This procedure is an important reason for exclusive hiring halls or referral systems. Unless all applicants are processed through a central source in the area, the allocation of opportunities for employment cannot be maintained on a fair basis for such applicants. Under these plans the employer is not required to hire on the basis of relative degree of unemployment. He retains the privilege of rejecting any applicant for any reason.

11. "Temporary" Employees. It is also provided in some of these plans that if the referral list is exhausted, the employer may secure applicants without using the referral procedure, but such applicants, if hired, shall have the status of "temporary" employees subject to replacement by registered employees. Ordinarily, such temporary employees will not be able to satisfy the minimum qualifications specified for the lowest priority group. If these employees do possess minimum qualifications they can be registered and are not subject to replacement by other registered applicants. In a few of these plans the minimum qualification for registration is one year of work at the trade. The distinction in such cases between an employee subject to replacement and an employee not subject to replacement is dependent upon whether he has had one year of experience.

In answer to question number thirteen relating to replacement of "temporary employees" by "qualified" employees, the General Counsel's statement of June 26, 1958 commented: "As noted in the comment on Question 3, supra, and subject to the qualifications there expressed, a standard according preference in job retention or acquisition based on competency and/or seniority with the contracting employer or employers  

41 Id. at 1349. (Emphasis added.)
—viewed alone and apart from any other considerations such a practice or custom—would not appear to be unlawful in itself.\textsuperscript{42}

12. \textit{Special Categories}. The plans also provide for satisfying employer requests outside the normal order of preference in the case of key men, employees with special skills and abilities, and those previously employed by the particular employer within a stated period of time. Many collective bargaining agreements in this industry require a certain ratio of over-age men to be employed. The referral plans provide for preference on the basis of age to satisfy these ratios.

13. \textit{Reporting or "Show Up" Time}. The agreement by the parties upon a payment to rejected applicants, in the nature of reporting time, appears to be covered by the following questions and comments in the General Counsel’s statement of June 26, 1958:

\textbf{QUESTION 15(\textsuperscript{43}).} . . . If an employee is rejected by a contractor, may the contractor and the union agree to pay the rejected applicant reporting time, such as one-half day’s wages?

\textbf{COMMENT.} . . . There would seem to be no reason to assume, however, that the matter of paying rejected applicants for reporting time could not properly be made the subject of collective bargaining between the union and the contracting employer.\textsuperscript{43}

\textbf{QUESTION 17.} . . .

2. Where an employer exercises his right of rejection, can the union insist that the reporting time provision of a collective bargaining agreement be complied with?

\textbf{COMMENT:} In order to be valid, such a provision would have to apply equally to non-members and members. The amount would also have to be reasonable under all the circumstances, i.e., it must not be so high as to limit, as a practical matter, the employer’s right to reject any applicant referred.\textsuperscript{44}

The General Counsel’s statement of June 26, 1958 to the extent quoted in this article and in its full text as published in the services is subject to a general caveat expressed by the General Counsel at the end of his comments on question number three:

It must also be borne in mind, of course, that in subsequent cases one or all of the above standards [\textit{i.e.,} the standards set forth in questions one to three of the statement] might be deemed discriminatory even though on their face they appeared to be unrelated to union membership or fealty. For example, it might be concluded that a standard based on past employment or experience was in fact designed to give preference to union members because of the closed shop history of a particular em-

\textsuperscript{42} 1 Lab. Rel. Rep. at 273. Previously decided Board cases on this point are: Glove Workers’ Union, 116 N.L.R.B. 681 (1956); New York Shipping Ass’n, Inc., 114 N.L.R.B. 1556 (1955); UMW Local 6281, 100 N.L.R.B. 392 (1952).

\textsuperscript{43} 1 Lab. Rel. Rep. at 276-77.

\textsuperscript{44} Id. at 279.
plozy or industry. It might also be concluded that when the standards are read in the light of the union's constitution and by-laws, they are revealed to assure that only union members will be referred. In short, it is impossible to say in advance that any standard will be found to be valid since each case must be decided on all the facts with the result that some standard may be valid in one case and invalid in another.45

It is understandable that the law officer having responsibility to issue complaints under the act should not wish to limit his future exercise of administrative discretion. On the other hand, it must also be recognized that parties engaged in the complex task of changing practice and procedures of many years' standing are compelled to place some reliance upon the specific comments made in the General Counsel's statement.

RIGHT-TO-WORK STATES

An exclusive union hiring hall or referral system which has been established on a nondiscriminatory basis should not be in violation of a state "right-to-work" law. A typical provision in such a law prohibits:

any agreement or combination whereby persons are denied the right to work for an employer because of membership . . . in [a] Union . . . or whereby such membership or non-membership is made a condition of employment or continuation of employment by an employer.46

It is apparent that an exclusive union referral system which satisfies the rule of the Mountain Pacific case does not infringe upon the above prohibition. Indeed, the statutory test of the Taft-Hartley Act is broader than the above-quoted provision of the right-to-work law. The key phrase in the federal law prohibits acts of discrimination which "encourage or discourage membership in any labor organization."47 Since even the majority decision in the Mountain Pacific case recognizes that an exclusive union hiring hall or referral system with the indicated safeguards does not violate the federal prohibition against acts of discrimination which "encourage or discourage membership in any labor organization" it would be an a fortiori proposition that such hiring hall or referral system does not deny the right to work because of membership in a union or make membership a condition of employment or continuation of employment.

If, however, such state law should be written or be interpreted as pro-

45 1 Lab. Rel. Rep. at 266-67. But see National Union of Marine Cooks & Stewards, CIO, 90 N.L.R.B. at 1101-02. But the comment would appear to be inapplicable if non-union members were employed under the agreement during the period preceding the establishment of the hiring hall or referral system.
hibiting a union hiring hall or referral system allowable under the *Mountain Pacific* rule or otherwise allowable under the federal law, it would appear that such provision or interpretation falls outside the scope of section 14(b) of the Taft-Hartley Act which reads as follows: “Nothing in this Act shall be construed as authorizing the execution or application of agreements requiring membership in a labor organization as a condition of employment in any State or Territory in which such execution or application is prohibited by State or Territorial law.”48 Such provision or interpretation would be in direct conflict with a federal policy, not saved by section 14(b), and under the preemption doctrine would be invalid.49

CONCLUSION

The unions in the building and construction industry have tradition-
ally performed the manpower function of recruiting, training, qualifying
and referring employees for employment in many trades, as well as nego-
tiating and administering labor agreement provisions relating to wages,
hours and similar terms of employment. This function has arisen be-
cause of the intermittent nature of employment in this industry, the
absence of a fixed location of employment, and the fact that employees
are generally more attached to their trade in a particular geographical
area than to a particular employer. The maintenance of this manpower
function would appear to be necessary to the maintenance of an efficient
system of production in the industry.50

49 The limited scope of § 14(b) has been evidenced in other connections by Farnsworth
& Chambers Co. v. IBEW Local 429, 353 U.S. 969 (1957), and Baumgartner’s Elec. Constr.
50 The vital importance of the union’s functions with respect to supply of manpower
in time of emergency is evidenced by the statement of James P. Mitchell (then in charge
of the Labor Relations Division, Quartermaster Corps, United States Army; now Secretary
of Labor) at the Thirty-Fifth Annual Convention of the Building and Construction Trades
Department (AFL) on October 2, 1941:

As you know, most all these camps and munitions plants are picked not because they
are near a labor market, but because for military reasons they must be where they are—That meant that the contractors on the job had to secure from metropolitan
centers qualified mechanics to do the job, qualified mechanics that did not exist in the
locations that were selected for the construction of the camps and munitions
buildings.

Your organization, and each one of your Internationals and Locals were called upon
to supply men to remote places, and the record stands that these men were supplied,
that the job was done.

1440. See also, statement of Rear Admiral Ben Morrell, Chief of the Bureau of Yards and
Docks, Navy Department, concerning the recruiting function of the building and construc-
Convention of Bldg. & Constr. Trades Dept., AFL 137.
The application of the Taft-Hartley Act to the building and construction industry and the consequent abolition of the closed shop has caused substantial litigation and operating difficulties in the industry.

The decision of the National Labor Relations Board in the Mountain Pacific case and the General Counsel’s statement of June 26, 1958 have produced some affirmative guide lines for the establishment of legally valid exclusive union hiring halls or referral systems.51

Many unions and employers, although not necessarily agreeing with either the rule of the Mountain Pacific case or the General Counsel’s statement, have undertaken a cooperative effort to develop hiring halls and referral systems which are consistent with law.52

If these efforts are successful, the economic function of the union may be preserved without infringing upon the policy of the act—"to insulate employees’ jobs from their organizational rights,"53 except as otherwise authorized by law, namely, section 8(a)(3). The forms of the approved procedures which will finally emerge will of course be dependent upon the outcome of the collective bargaining negotiations, with their attendant dispute and controversy, and further Board and judicial rulings.

If the problem proves too complex, it may be expected that the efforts of the interested parties will be directed to more simple legislative remedies.

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51 See also, Address by John H. Fanning, Member, NLRB, Providence College Industrial Relations Institute, Providence, R. I., November 30, 1958, for the following general statement made concerning the effect of the decision of the National Labor Relations Board in the Mountain Pacific case:

The Mountain Pacific decision, of course, is of most importance in the construction and maritime industries, where the unions have operated hiring halls many years. But it is also notable for the fact that, in this decision, the Board undertook to spell out in detail the precise conditions under which a union might lawfully operate a hiring hall from which the employer could agree to hire all his work force. The Board held that this could be lawfully done if the employer did not delegate to the union the actual power to hire but clearly retained the right to reject any applicant recruited by the union. Furthermore, the Board ruled, the hiring hall must be open to all qualified applicants regardless of their union affiliation and the referral of jobseekers must not be based upon their union membership or activities. These things must be clearly set forth in the contract between the union and the employer. The third requirement is that the rules and standards for operating the hiring arrangement must be posted where job applicants will be able to read them. Meeting these requirements makes the hiring hall lawful, but of course it still must be operated without discrimination between union and non-union applicants.


53 Radio Officers' Union v. NLRB, 347 U.S. 17, 40 (1953).
COMPETITION IN REGULATED INDUSTRIES:
INTERSTATE NATURAL GAS PIPELINES

JOHN T. MILLER, JR.*

The passage of the Natural Gas Act in 1938 heralded a new era for the interstate natural gas transmission industry. Prior to that time there were public complaints of discrimination, unreasonable charges and unfair competition. Mr. Miller's analysis of the industry after twenty years of federal regulation reveals the Gargantuan, constantly mushrooming size of the industry, the near-disappearance of public complaints, and the peculiar character of competition fostered by the act. The author, for several years a practitioner in this field, concludes with the observation that the antitrust laws must be applied with caution to the natural gas transmission industry if competition of the type envisaged by Congress under the act is to be maintained and the industry is to meet the expanding fuel needs of a growing nation.

I

INTRODUCTION

The Congress, by special legislation, has singled out certain industries for regulation on the ground that they are affected with the public interest. The character and purpose of the regulation as well as its success are shaped by the nature of the industry affected.

Competition has long been deemed a necessary condition of a free enterprise economy. It is expected to provide goods and services of good quality at the lowest reasonable price. As a by-product society expects to obtain the rewards incident to the energetic, imaginative, resourceful management of business. The form which competition takes and the nature of its results are moulded by the type of industry concerned, the opportunities available for the practice of that type of business relationship which might be called competitive, and the character of the persons exercising executive functions.

The interstate transmission of natural gas for public consumption is an industry found by Congress to be affected with the public interest and for that reason requiring regulation designed to protect the consumer against unreasonable rates and charges.¹ Congress did not find that it would be in the public interest for the companies affected to become monopolies completely sheltered from the competitive practices of others.

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Through the years since the enactment of regulatory federal legislation, the natural gas transmission industry has developed a type of competition\(^2\) which is both real and successful. It is the purpose of this article to explore the function of competition within the applicable legislative framework and as formed by the nature of the industry.

II

Nature of the Industry

The natural gas industry is normally considered to consist of three parts: production and gathering, transmission and distribution. Generally speaking, production and gathering facilities are subject to regulation by the state in which the gas reserves are located; distribution is regulated by the state in which the natural gas is consumed, and transmission, if interstate, is regulated by the Federal Power Commission under the Natural Gas Act.\(^3\)

The natural gas transmission industry regulated by the Federal Power Commission is one of the largest enterprises in the United States today. As of December 31, 1956, the assets of the companies reporting to the Commission totaled approximately 9 billion dollars, of which net gas utility plant amounted to 6.4 billion dollars.\(^4\) In the same year, 150,000 miles of pipeline used to transport natural gas were classified as "transmission."\(^5\) Of this total, 115,000 miles or 77 percent belonged to com-

\(^2\) Competition is here used in the sense of striving for or seeking after the same thing, position or reward for which another is striving.

\(^3\) Natural Gas Act § 1(b), 52 Stat. 821 (1938), 15 U.S.C. § 717(b) (1952). The Natural Gas Act applies to "transportation of natural gas in interstate commerce, to the sale in interstate commerce of natural gas for resale for ultimate public consumption for domestic, commercial, industrial or any other use, and to natural gas companies engaged in such transportation or sale . . . ."

The Commission has decided that it shall not exercise jurisdiction over the gathering pipelines extending from the wells to a central gathering point in the field where the gas is produced. However, it treats as jurisdictional a pipeline from a well directly into a main transmission line. Barnes Transp. Co., 18 F.P.C. 369 (1957). See Deep South Oil Co. v. FPC, 247 F.2d 882 (5th Cir. 1957). As the industry applies a broader definition of gathering line, the Commission's jurisdiction covers more pipeline than industry data might indicate.

Under the Hinshaw Amendment of 1954, 68 Stat. 36, 15 U.S.C. § 717(c) (Supp. V, 1958), the Commission was deprived of jurisdiction over a person whose transmission lines transporting in interstate commerce were located wholly in the state of distribution, provided that all of the gas transported through such pipeline was consumed within the state and the person's rate and service were regulated by a state commission.

\(^4\) 1956 FPC Statistics of Natural Gas Companies, viii.

\(^5\) American Gas Ass'n, 1957 Gas Facts 57.
panies regulated by the Federal Power Commission. Of the 9.4 trillion cubic feet of gas marketed in the United States in 1955, 5 trillion cubic feet or 53 percent was transported in interstate commerce.

The pipeline companies dealt with here are engaged in the transportation and sale of a natural resource which is produced by individual gas and oil wells. Such individual sources of supply are normally rapidly depleted.

Natural gas was produced and consumed in the neighborhood of the oil and gas wells in Pennsylvania as early as 1870. As local supplies of gas became exhausted distributors were obliged to construct transmission mains to more distant fields. In this way interstate pipelines spun a web across the gas producing areas of the Appalachians, Kansas and Oklahoma. When the gas reserves in these areas became inadequate to meet increased requirements, pipelines reached out to the more distant supplies of Texas, Louisiana, Canada and Mexico. As a consequence, most of the natural gas resources in the United States are located at some distance from the large industrial areas and heavy population centers of the north and northeast. Their demand for natural gas as a convenient, inexpensive fuel made long distance transmission mains necessary and feasible.

The supply of natural gas in large volumes from distant fields was obliged to wait upon the development of seamless pipe in the 1920's. When this technological hurdle was crossed, the first long distance pipeline was built from the Texas Panhandle to Chicago in 1931. Other long distance pipelines soon followed.

The wasting character of the fuel they carry and the long distances involved have shaped the financing, contractual arrangements and competitive activities of the pipelines. As the gas reserves become exhausted in one area, the pipeline companies are obliged to move their gathering lines. Hence, the specter of exhaustion of gas reserves haunts the industry into a constant restlessness, a continuing search for new gas supplies within economic reach of existing transmission facilities.

As might be expected, construction of long distance transmission lines calls for heavy financial outlays. For example, the cost of mainline

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6 1956 FPC Statistics of Natural Gas Companies, xviii.
7 American Gas Ass'n, 1957 Gas Facts 32, 70.
construction of 30” or 36” pipe may exceed $100,000 per mile. Such heavy investments in the presence of a wasting asset oblige the pipeline company to depreciate its facilities at high rates and to seek a stability in its operations both as to gas supply and as to sources of revenues which might assure the pipeline company that it can liquidate the investment during the reasonable life of the project and make a reasonable profit at the same time.

From the point of view of financial structure, the pipelines tend to have a large portion of debt which makes the equity investment very sensitive to fluctuations in net income. The average pipeline corporation has a capital structure containing approximately 60 per cent debt. Several of the largest pipelines have as much as 75 per cent debt. The Federal Power Commission has been reluctant to sanction any higher proportion of debt.

To assure themselves of a gas supply over a long period of time, the pipelines have generally entered into long term (twenty year) purchase contracts with the producer. Such contracts contain an obligation on the part of the producer to deliver volumes which are usually dependent upon the volume of gas reserves remaining and an obligation on the part of the pipeline to take or pay for a certain volume each month or year. This has been necessary for two reasons. First, the Federal Power Commission has been unwilling to authorize the construction of transmission lines which do not have behind them gas reserves extending over a period many years in the future. Also, the lenders of the large amounts of debt money have required that the pipelines demonstrate their access to a gas supply over a long enough period to assure repayment of borrowed funds.

Pipeline companies obtain the bulk of their revenues by reselling gas purchased in the field from producers or from other pipeline companies interconnecting with their systems. The gas is resold either to dis-

10 See Transcontinental Gas Pipe Line Corp., No. G-13143, FPC, March 11, 1958, exhibit 2. In this as well as all subsequent citations to FPC proceedings only the first docket number in a consolidated matter will be cited.
11 1956 FPC Statistics of Natural Gas Companies, xi.
12 Id. at 201-14.
14 Except in instances where the reserves available warrant only short-term agreements, it should be obvious to natural gas companies, to the natural gas industry generally, including producers and owners of natural gas reserves selling gas to interstate pipe lines such as the Tennessee Co.'s system, that natural gas pipe-line facilities of the character proposed in this proceeding cannot be authorized, constructed and operated feasibly on short-term commitments by the producers supplying gas . . . .

tribution companies which are public utilities or directly to industrial consumers.\(^\text{15}\) A small but growing part of revenues comes from transportation in interstate commerce of gas purchased by a distribution company or an industrial customer directly from the producer in the field.\(^\text{16}\) In this latter case, the sale by the producer is not subject to the jurisdiction of the Commission if the purchaser is also the consumer of the gas, because there is no sale for resale in interstate commerce.\(^\text{17}\)

In short, the pipeline companies obtain their revenues by performing a transmission function. Their assets are the pipeline and the services which can be rendered through use of it. Their success in competing with others depends upon their ability to operate that pipeline throughout the year at as near full capacity as possible, and consequently at the lowest possible unit cost. In attempting to achieve this end, the pipeline company must wrestle with the problems created by the fact that those who use gas to heat homes, stores and industrial buildings need a gas supply only in the winter time. A pipeline is designed with sufficient capacity to meet the largest possible demand of the company’s customers under properly authorized contract service. In order to utilize the pipeline most efficiently and fully throughout the entire year, the pipeline company must find an interruptible market for the gas in off-peak periods, especially the summer time. Industries provide excellent outlets.

Where several fuels can serve their purposes, industries will purchase whichever is offered at the lowest price. To improve their bargaining positions, they may install alternate fuel burning equipment which permits them to shift from coal to oil or from coal or oil to natural gas on very short notice. The engineer’s slide rule is the baton. If interruptible gas is available and cheaper than the alternate fuel, it is purchased as long as it is available. The gas may be sold to industry directly by the pipeline company or it may be sold by the local public utility distribution

\(^{15}\) In 1956 the interstate pipelines made 60% of their sales (representing 61% of gas operating revenues) to other gas utilities and 22% (16% of gas operating revenues) directly to industrial customers. The remaining sales were made directly to residential, commercial and other customers. 1956 FPC Statistics of Natural Gas Companies, xvi, table 7.

\(^{16}\) Revenues from transportation of gas for others in 1956 amounted to 1.8% of total gas operating revenues.

\(^{17}\) Panhandle Eastern Pipe Line Co. v. Public Serv. Comm’n, 332 U.S. 507, 516 (1947). However, the courts hold that the Commission has jurisdiction over the transportation of the gas purchased under non-jurisdictional sales contracts, at least to the extent necessary to assure that the transportation (1) will not impair the pipeline company’s ability to serve its other customers and (2) will not result in a discriminatory situation. Panhandle Eastern Pipe Line Co. v. FPC, 232 F.2d 467 (3d Cir.), cert. denied, 353 U.S. 891 (1956).
company. Proximity to the pipeline or distribution system may determine the seller. Some pipelines make very few sales directly to industry, leaving such markets to the local distribution companies which can, through making interruptible sales, improve the load factor of their purchases from the pipeline company.

In some instances a pipeline company is able to attach to its transmission system a storage field which is located near its markets. It fills the storage field with gas purchased from producers when some of its pipeline capacity is otherwise idle during the summer. The gas injected into the storage pool in the summer is taken out on the cold winter days and transported the remaining short distance to the local public utility which resells it for househeating and other cold weather uses.

The constant quest for uses of pipeline capacity at the highest possible load factor has caused the pipeline companies to design special services available for short periods of time on a firm or interruptible basis. Such service must be attractive enough from an economic point of view to be sold to industries. At the same time the rates and service must meet the strict standards of the act relating to discrimination and reasonableness of rates.

In an effort to assure the receipt of revenues sufficient to meet their heavy fixed charges and high obligatory gas purchase costs, the pipeline companies require their customers to enter into long term contracts, usually for twenty years. In most cases the customer is obliged to take a certain volume of gas each month or each year and if it fails to take this minimum volume it must pay a specified minimum bill. Rarely is the customer obliged to take the contract volume every day even though the pipeline must stand ready and able to deliver that volume on any day the customer is entitled to call for it. Since the minimum bill is insufficient by itself to meet the pipeline's fixed charges and obligatory gas purchases, these long-term contracts do not assure that the pipeline will remain solvent. It is obliged to keep its rates at a level which will make resale economically feasible and design types of service which will fully utilize the transmission facilities even when some major customer cuts back on its purchases within the contract terms.

The failure of the pipelines to obtain a better contractual assurance of revenues stems from two factors. First, the utility customer may not have a market which can absorb the same volume of gas every day in the year. As househeating is one of the major uses of gas, the utilities

18 In 1956, 188 storage pools were in operation, located in twenty states, with an estimated storage capacity of 3 trillion cubic feet. American Gas Ass'n, 1957 Gas Facts 72.
tend to have a heavy demand for gas in the winter and a lower demand in the summer. Second, the utilities are unable to estimate with any great accuracy long-range market requirements and consequently seek to limit their future commitments as much as possible while at the same time assuring a gas supply from the pipeline sufficient to meet the requirements of customers they cannot refuse to serve.

Before embarking on any discussion of competition in the industry, it is necessary to understand the regulatory statute.

III
THE NATURE AND PURPOSE OF REGULATION
BY THE FEDERAL POWER COMMISSION

The Natural Gas Act was enacted in 1938.19 Prior to that time several long distance interstate pipelines were constructed, but state regulatory commissions were unsuccessful in their attempts to regulate the charges and rates of these interstate pipeline companies.20 This situation led to a Senate resolution in 1929 directing the Federal Trade Commission to undertake a thorough investigation of the industry.21 In 1935 the Commission made its report to Congress.22 In this report the Commission noted that fifty-six per cent of interstate transmission of natural gas was controlled by four holding companies and fifteen holding companies controlled eighty-one per cent of the transmission.23 This holding company domination was highlighted by charges of discrimination and overcharging of customers and highhandedness against producers who were obliged to market their gas by selling it to what often proved to be the only pipeline connecting a vast gas field with any market.

In the absence of regulation the interstate pipelines bargained separately with each customer. The agreements reflected the relative bargaining position of buyer and seller without statutory safeguards to protect the ultimate consumers against unreasonable rates or discriminatory arrangements.

22 S. Doc. No. 92, supra note 8, pt. 82-A.
23 Id. ch. xii.
In general the act has allowed the pipeline companies and their promoters to decide when and where the pipelines will be built, and the nature of the service to be rendered.\textsuperscript{24} It is up to the pipeline company to decide, for example, whether to offer a firm sales service, a transportation service, a storage service, a peaking service or any other particular type of service which the pipeline company believes will be attractive to its potential customers. Of course any jurisdictional construction, service or rate proposed must meet the standards of the act.

The Natural Gas Act was designed primarily to "protect consumers against exploitation at the hands of natural gas companies"\textsuperscript{25} by removing rate and service preferences and discriminations by the pipeline companies and establishing standards to assure that the rates charged were just and reasonable by public utility standards.

The pipeline company is obliged to file with the Commission all of its agreements and contracts relating to the jurisdictional service which it is performing or is authorized to perform.\textsuperscript{26} The pipeline company may not change its rates or charges without first notifying the Commission, and the Commission has the power to suspend the change for a short period in order to give the Commission time to investigate the merits of the proposal. At the end of the suspension period, and upon notice of the pipeline company, the Commission must place the rate change in effect, subject to an undertaking by the pipeline company to refund any part of the new rate found in a subsequent hearing to be unjustified.\textsuperscript{27} The Commission also has the power on its own initiative or on complaint to investigate the rates and charges of a pipeline company and if such rates are found to be unlawful to establish lawful rates.\textsuperscript{28}

In the beginning the Federal Power Commission was given very little jurisdiction over the issuance of certificates of public convenience and necessity. The Commission functioned in this area only when it was presented with a proposal by a second pipeline company desiring to enter an area already served by an existing pipeline company.\textsuperscript{29} In 1942 the

\textsuperscript{24} "Recognizing the need these circumstances create for individualized arrangements between natural gas companies and distributors, the Natural Gas Act permits the relations between the parties to be established initially by contract, the protection of the public interest being afforded by supervision of the individual contracts, which to that end must be filed with the Commission and made public." United Gas Pipe Line Co. v. Mobile Gas Serv. Corp., 350 U.S. 332, 339 (1956).

\textsuperscript{25} FPC v. Hope Natural Gas Co., 320 U.S. 591, 610 (1944).

\textsuperscript{26} Natural Gas Act \textsection 4(c), 52 Stat. 822 (1938), 15 U.S.C. \textsection 717c(c) (1952).

\textsuperscript{27} Natural Gas Act \textsections 4(d), (e), 52 Stat. 823 (1938), 15 U.S.C. \textsections 717c(d), (e) (1952).

\textsuperscript{28} Natural Gas Act \textsection 5(a), 52 Stat. 823 (1938), 15 U.S.C. \textsection 717d(a) (1952).

\textsuperscript{29} Natural Gas Act \textsection 7(c), 52 Stat. 825 (1938), 15 U.S.C. \textsection 717c (1952).
The necessity.\textsuperscript{30} As the statute now reads, a pipeline company may not undertake any construction enlarging its capacity or undertake a new jurisdictional service without the prior consent of the Commission expressed through issuance of a certificate of public convenience and necessity.\textsuperscript{31} The pipeline company may not abandon a service or transmission facilities without obtaining the consent of the Commission.\textsuperscript{32}

The Commission has statutory authority to compel a pipeline company to undertake a service to a local distribution company despite the fact that the pipeline company is unwilling to provide that service, provided that the new service will not place an undue burden upon the pipeline company or impair its ability to render adequate service to its other customers.\textsuperscript{33} The Commission may not order a pipeline company to enlarge its transportation facilities for such a purpose.\textsuperscript{34}

The Natural Gas Act does not give a pipeline company a monopoly. Section 7(g) of the act specifically provides that the Federal Power Commission may certificate competing pipeline projects.\textsuperscript{35} Moreover, as will be seen later, the fact that the pipelines are expensive has not in itself always made them monopolies. This is especially true where a pipeline company serves a large market area capable of absorbing additional gas supplies in volumes large enough to justify the investment required for a competing pipeline.

Pipeline companies enjoy no special subsidy by virtue of their status as public utilities. They do have the right of eminent domain which accompanies the issuance of a certificate of public convenience and necessity authorizing the construction of transmission facilities.\textsuperscript{36} While the power of eminent domain is not essential to pipeline construction, since pipelines were built prior to the Natural Gas Act, it does help make construction less expensive by keeping right-of-way payments down to what an appropriate court will award. The pipelines also enjoy the tax

\textsuperscript{30} Natural Gas Act § 7(c), as amended, 56 Stat. 83 (1942), 15 U.S.C. § 717f(c) (1952).
\textsuperscript{31} Ibid. See Note, Control of Entry into the Natural Gas Pipeline Industry: The FPC and the Certificate of Public Convenience and Necessity, 28 Ind. L.J. 587 (1953).
\textsuperscript{32} Natural Gas Act § 7(b), 52 Stat. 824 (1938), 15 U.S.C. § 717f(b) (1952).
\textsuperscript{34} Panhandle Eastern Pipe Line Co. v. FPC, 204 F.2d 675 (3d Cir. 1953).
\textsuperscript{35} “Nothing contained in this section shall be construed as a limitation upon the power of the Commission to grant certificates of public convenience and necessity for service of an area already being served by another natural gas company.” Natural Gas Act § 7(g), added by 56 Stat. 83 (1942), 15 U.S.C. § 717f(g) (1952).
advantages of accelerated amortization and liberalized depreciation. These advantages are allowed not by virtue of the fact that the pipelines are federally regulated public utilities, but because they are industries termed essential to national defense.\(^{37}\)

The Natural Gas Act does not assure a pipeline company that it will earn a profit or that it will be a successful economic venture.\(^{38}\) Lacking monopoly status, pipeline companies must successfully sell their product and service in competition with others selling the same product or a substitute product if they are to be profitable ventures.

Within the framework of the regulation imposed on the industry by the Natural Gas Act, the pipeline companies have of necessity shown a large degree of competitive spirit. The form taken by the competitive effort as shaped by the nature of the industry and the fact of regulation will now be examined.

IV

THE SCOPE OF COMPETITION

When two suppliers seek to meet a requirement for goods or services, one thinks of the competitive process as commencing when more than one supplier strives to meet the need and terminating at the time the purchaser executes a contract for the volume required with the successful seller. Any intentional interference with the contract by the unsuccessful seller subsequent to the time it is executed may constitute an actionable tort,\(^{39}\) or in an appropriate case an injunction will issue.\(^{40}\) The unsuccessful seller must seek a new area of competition—another requirement of the purchaser which might be satisfied. Perhaps the purchaser has a present need for goods or services over and above those covered by the executed contract. Possibly the purchaser can be induced

\(^{37}\) See 23 Fed. Reg. 4164 (1958), which amends the uniform system of accounts prescribed for natural gas companies to provide for the accounting and reporting of deferred taxes on income.


And today there is no question but that there may be prima facie liability for interference with contract relations without inducing breach of contract by, for example, injuring persons under contract so that they are disabled from performing, or by destroying or damaging property which is the subject matter of a contract, or by doing other acts which make performance more burdensome, difficult or impossible or of less or no value to the one entitled to performance.

\(^{40}\) Metropolitan Opera Ass'n v. Wagner-Nichols Recorder Corp., supra note 39.
to accept the unsuccessful seller as the replacement source after the purchaser's obligations under the executed contract have terminated.

The competitive position of the regulated natural gas pipeline company is quite different. The competitive process begins when a market for natural gas is discovered. The market may be a public utility distribution company which resells gas locally to homeowners, commercial establishments and industries, or an industry desirous of purchasing directly from the pipeline. The market may involve towns, cities or industries not theretofore served by natural gas or, indeed, with any type of gas distributed through underground pipes.

How is the market for natural gas identified? The market estimating may be carried out by many persons: the local distribution company already selling natural gas or manufactured gas, the pipeline company's own marketing experts, promoters seeking to introduce natural gas into a new area, or the purchaser of fuel for an industry. The character of the estimate depends to some extent on the gas supply sought. An industry seeking interruptible gas from a pipeline company need only be concerned that it has a reasonable prospect of obtaining gas at an economic price from the pipeline company in sufficient quantities to warrant investment in a gas purchase lateral pipeline, meter and gas burning equipment. Public utilities and those who propose to obtain a long term supply of gas from the pipeline company have a more difficult task. They will be entering into a twenty year contract with the pipeline company, requiring the utilities to pay a minimum bill even if gas purchases are reduced below the contract minimum. As between the public utilities and their customers, no such long-term contracts are made. Householders, for example, may stop using gas anytime they please. Therefore, long range estimates of gas requirements must be based on a fluctuating customer list and reflect judgment factors as to weather conditions, competition from other fuels, diversification of the market and long term economic trends. Past experience is usually utilized in this process.

As pipeline companies become aware of the size of a market, computations must be made as to the impact on the pipelines' rates of the cost of acquiring needed additional gas supplies from producers, and the added costs of pipeline construction and operation. These calculations may show that the rate will have to be increased. The estimated higher rate may shrink the market in which the gas may be resold. It is a cut and fit process.

Once the customer is located and the size of the market determined, one of the pipeline companies seeks to firm up its position by negotiating
a contract with the customer for a certain volume of gas. If the sale is to be one that is subject to the jurisdiction of the Commission, it might be governed by the pipeline company's tariff which is already on file with the Commission. In that event the pipeline is carefully circumscribed in the give and take of negotiation. If the proposed sale will be jurisdictional but is not covered by the present tariff, then the pipeline company must draw up a rate schedule which will be satisfactory to the potential customer and at the same time stand the subsequent scrutiny of the Commission in light of the provisions of the act forbidding undue preference, unreasonable differences in rates or the charging of rates which are not just and reasonable.41

Assuming that the pipeline company has surmounted these hurdles and bested its competitors, it then executes a contract with the customer. But this does not terminate the competitive process. The pipeline company must ordinarily obtain Commission authorization before it can commence the sale or service for which it has contracted.42 This may be the case even where the sale itself is not subject to the jurisdiction of the Commission because made directly to the consumer.43 The procedures required by the statute lengthen the period of competition and place in competitors' hands an arsenal of weapons which may effectively eliminate the contracting pipeline company as a supplier of the market.

After receiving an application for authorization to construct facilities and/or to undertake a new sale or service, the Commission must issue public notice of this fact and afford competitors an opportunity to participate in a public hearing on whether the public convenience and necessity requires that a certificate issue to the applicant.44 The unsuccessful competitors may then reappear upon the scene and continue the competitive process throughout the entire administrative proceeding and on into the courts should any party appeal the final order of the Commission. If the competitor is another pipeline company proposing a competing project to serve the same market, it is entitled to a comparative hearing, as will be brought out later.

44 Natural Gas Act §§ 7(c), 15(a), 52 Stat. 824, 829 (1938), as amended, 56 Stat. 83 (1942), 15 U.S.C. §§ 717f(c), n(a) (1952). Section 15(a) reads in part: "In any proceeding before it, the Commission in accordance with such rules and regulations as it may prescribe, may admit as a party . . . any competitor of a party to such proceeding. . . ." See National Coal Ass'n v. FPC, 89 U.S. App. D.C. 135, 191 F.2d 462 (1951).
In a contested certificate hearing the pipeline company must make "a showing of an adequate gas supply, economic and engineering feasibility, ability to finance the project, and a market for the gas." It is not enough for the pipeline company to demonstrate that it has a contract for the proposed service or sale. The competitor may probe any of these interrelated areas of proof in an effort to block the proposed sale. It may employ experts, put on detailed and time consuming evidence and file pleadings of a complexity and variety which would arouse the admiration of an old equity lawyer. Should the competitor find an appropriate legal technicality, it may exploit it through lengthy court proceedings in an effort to reverse the Commission. Meantime the pipeline company is effectively blocked from undertaking the service which has been contracted for.

A typical example of a hotly contested certificate hearing arose where two corporations filed complementary applications in August 1955 and February 1956 seeking authorization to build 2,600 miles of pipeline extending from Texas to Miami, Florida to supply Florida markets not then being served with natural gas. Public hearings commenced in July 1956. There was bitter opposition from fuel oil interests among others. It was December 28, 1956, before the Commission issued its final opinion and order authorizing the projects. In support of its order the Commission found:

This is a case of contrasts. On the one hand there is unmistakably a real desire and need for natural gas on the part of the Florida markets. Florida is a fuel have-not

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46 In National Coal Ass'n v. FPC, 101 U.S. App. D.C. 95, 96, 247 F.2d 86, 87 (1957), the court noted that:

[P]etitioners complain that Northern Natural failed to make on the record of the proceedings the necessary showing that such gas service is required in the public interest, or that the price proposed for the sales would return its properly allocable costs. They also say they were unlawfully deprived of a fair hearing because the Commission relied on matters covered in independent proceedings relative to jurisdictional sales, in which proceedings the petitioners were not eligible to participate.

47 In some instances of emergency the Commission "to assure maintenance of adequate service or to serve particular customers," without notice or hearing, grants temporary certificates authorizing the pipeline company to construct facilities and undertake service without prejudice to final determination of the pending certificate application. Natural Gas Act § 7(c), as amended, 56 Stat. 83 (1942), 15 U.S.C. § 717f(c) (1952).

48 Coastal Transmission Corporation proposed to build a pipeline system designed to carry gas from sources in Texas and Louisiana to a point of delivery on the banks of the Mississippi River where the pipeline system of Houston Texas Gas & Oil Corporation would originate. Houston's proposed system extended to Florida. For all practical purposes it was one pipeline system from Texas to Florida.
area of the nation, possessing practically no native usable energy supplies. Although it has a growing population and a considerable industrial potential, it is almost entirely dependent on imported energy to meet its domestic, industrial and power generating requirements. Florida's dependency on imports consisting chiefly of petroleum products brought in by tanker and barge makes its economy vulnerable to interruptions of this single source of supply and is moreover undesirable from the competitive standpoint. Supplies of gas are available, however, in reasonably accessible gas fields and terrain features are favorable to the construction and operation of natural gas pipeline facilities for carrying gas to Florida. These are some of the factors which favor making natural gas available to markets in this State.49

Nor did this end the matter. The competitors appealed to the United States Court of Appeals for the District of Columbia. When the Commission was affirmed by that court,50 the competitors applied for a writ of certiorari. Only with the denial of the writ of certiorari on May 19, 1958,51 almost three years after the first application was filed, were the pipeline applicants in a position to undertake the financing of the project before commencing the authorized construction. Actual service is still many months away.

V

COMPETITION IN THE ADMINISTRATIVE ARENA

The pipeline company's competition in a particular market may come from several sources. The most obvious are persons who produce and sell alternative fuels such as coal, fuel oil and liquefied petroleum products. Competition may also be provided by persons who transport the alternative fuels into that market: railroads, barge and motor truck carriers. Finally, there is the competition which may come from another interstate natural gas pipeline company. As the first two sources of competition involve alternative fuels they will be discussed together, leaving the last category for separate consideration.

A. Competition with alternative fuels.

Experience shows that whenever a pipeline brings natural gas into a new area for the first time, it replaces fuels already being sold to consumers in the area and thereafter supplies a large share of any increase in energy requirements, especially for cooking, water heating and house-heating. Its ability to take over, hold and expand sales of gas as a fuel

51 356 U.S. 959.
to industry depends upon the ability of the local utility and the pipeline to underprice alternative fuels.

The most vigorous and persistent opposition to natural gas pipeline expansion has come from those who mine, transport and sell coal. For many years some or all of the following intervenors have appeared in pipeline certificate proceedings involving proposed new or enlarged sales to customers in the Middle Atlantic seaboard states: United Mine Workers of America; Anthracite Institute, a trade association of anthracite coal producers; National Coal Association, a trade association of bituminous coal producers; and Fuels Research Council, Inc., a voluntary non-profit corporation. Fuels Research Council, Inc. had the following membership in 1956 at a time when it was vigorously participating in a certificate proceeding: National Coal Association, Anthracite Institute (both of which usually appear in their own right), Baltimore and Ohio Railroad, Cambria and Indiana Railroad, Pittsburgh and Lake Erie Railroad, Reading Company, The Pennsylvania Railroad, Union Pacific Railroad, Norfolk and Western Railroad and The Virginian.52

In those cases in which they vigorously participate, it appears that the primary goal of these competitors is the denial of a certificate sought by the pipeline company, since a new or enlarged sale cannot be made without a certificate of public convenience and necessity. Failing in this, the competitors seek to load down the certificate with conditions which will either hamstring or hobble the pipeline company in making the sale, thereby making it easier for alternative fuels to recover the market. If the competitors are driven back from both these lines, they attempt to imbed in the examiner’s decision or in the Commission’s opinion certain obiter dicta which may be used against the pipeline company or other pipeline company applicants in subsequent certificate proceedings. A study of actual cases will serve to point up these conclusions.

In 1956 the Commission entertained a certificate proposal which involved the sale of gas for resale in some forty cities and towns located in the eastern portions of North Carolina and South Carolina not then served with natural gas.53 Competing fuel interests attacked the project on several fronts. They alleged that the percentage of industrial sales to total estimated sales was so high that the public interest could not be served by construction of pipelines which might be lamed by the price fluctuations of competing alternate fuels available to local indus-

52 Transcontinental Gas Pipeline Corp., No. G-10,000, FPC, Transcript 5993-94, June 8, 1956.
53 Ibid.
tries which might easily supplant natural gas in the future. The competing fuel interests also presented witnesses who showed estimates of possible displacement of rail freight (coal and other fuels) if gas were introduced, calculations of coal tonnage displaced by the proposed sale of gas to industries (600,000-700,000 tons per annum), and estimated resultant losses in revenues to unidentified railroads, coal producers, coal miners, suppliers of equipment to mine operators and the UMW retirement fund. No estimate of net loss to any competing fuel interest was shown.

The competitors did not attempt to show that they could more economically serve the markets to which the gas was destined for sale. Lacking this latter proof, the competing fuel interests attempted to pull down the project on other grounds. In their briefs they argued that industrial sales essential to the economic feasibility of the project had not been proved by proper comparative fuel cost studies; market surveys were inadequate and estimates of market requirements erroneous; proposed rate schedules of the local pipeline purchasers were unjust and unreasonable, produced unlawful discriminations and were contrary to the public interest; the local pipeline projects were not economically and financially feasible; local distribution agencies were uneconomic; boiler fuel sales relied upon were contrary to the public interest; and resultant revenue losses to railroad and coal interests were an injury to the public interest. In this instance the presiding examiner authorized the sale and was affirmed by the Commission. The competing fuel interests chose not to appeal the final order.

There is no doubt that the intervention and participation of the competing fuel interests lengthened the hearing. Caution dictated that applicants place in evidence voluminous data which competing fuel interests insisted be made available. Cross-examination was more drawn out. Days were occupied in hearing and cross-examining the witnesses presented by the competing fuel interests. The significance of all of this is evident from the fact that the Commission may and frequently does apply a shortened procedure in non-contested cases after careful investi-

54 Trans-Carolina is dependent upon industrial sales for approximately 70% of its third year sales volume and for about 48% of its third year revenues. Similarly, North Carolina Natural depends upon industrial sales for over 66% of its third year sales volume and for over 41% of its third year revenues. Carolina Pipeline relies upon industrial sales to absorb approximately 70% of its estimated third year volume and over 58% of its estimated third year revenues are to be derived from industrial sales.

igation by the Commission's staff. Hearings in such cases require five to ten minutes. Contested hearings may occupy weeks, months and even years.

Final orders of the Commission issuing certificates to pipeline companies are often appealed when competing fuel interests conclude that the matter has significance, measurable by the coal tonnage being displaced.\textsuperscript{56} While the cases cited represent victories by the pipeline companies after time consuming, hard-fought battles, the competing fuel interests sometimes achieve their ultimate objective.

In several cases in which competing fuel interests have vigorously participated the Commission has denied certificate applications. It would be incorrect to give them sole credit with success in those cases, but there is no denying that the end result left the competitors victors in the competitive struggle.

An order issued by the Commission in 1950 denying a certificate to Piedmont Natural Gas Corporation is a case in point.\textsuperscript{57} Piedmont applied for authority to construct a new 1,300 mile pipeline extending from gas fields in Texas to Virginia, estimated to cost $88,500,000. The Commission found that proposed sales to Duke Power Company for use as boiler fuel in steam electric generating stations would constitute over 75 percent of total sales in the fifth year. Competing fuel interests presented witnesses who claimed that the project would displace 2,000,000 tons of coal used by Duke in the first year, with the annual displacement declining to 1,300,000 tons in the fifth year. After finding that there were many potential demands for residential, commercial and industrial service in communities which Piedmont did not plan to serve, the Commission stated:

Furthermore, we think that it is not in the public interest to authorize a pipeline which would be so largely devoted to the supply of boiler fuel gas, particularly under the conditions of the Duke contract which provide for continuation of large boiler fuel deliveries for an indefinite period in the future and in view of the evidence of record showing a considerable demand in the area for gas for other uses.\textsuperscript{58}

The Commission found that the contract between Piedmont and Duke

\textsuperscript{56} National Coal Ass'n v. FPC, 101 U.S. App. D.C. 95, 247 F.2d 86 (1957) (displacement of 630,000 tons of coal a year in a steam electric generating station); Charleston & W. Carolina Ry. v. FPC, 98 U.S. App. D.C. 241, 234 F.2d 62 (1956) (displacement of 347,000 tons of coal a year by natural gas to be used in a steam electric generating station); National Coal Ass'n v. FPC, 89 U.S. App. D.C. 135, 191 F.2d 462 (1951) (displacement of 700,000 tons of coal a year in an Atomic Energy Commission plant).

\textsuperscript{57} Commonwealth Natural Gas Corp., 9 F.P.C. 70 (1950).

\textsuperscript{58} Id. at 87.
discriminated against other potential industrial customers in the area which Piedmont proposed to serve, and that while the actual sale by Piedmont to Duke was not subject to the jurisdiction of the Commission, the price provisions in the contract might operate in the future to jeopardize the feasibility of the entire project. The Commission also found that Piedmont had an inadequate gas supply to support the proposed sales "for a reasonable period of years." As to the arguments of competing fuel interests, the Commission stated:

From the evidence in this record it appears that the displacement of coal to the extent here marked, would have an adverse effect on the coal and railroad industries. We do not say, however, that this alone would be determinative of the question of whether or not a certificate should issue in a proceeding where considerations of the broad public interest—the interest of all potential consumers, the public welfare or national defense—outweigh the adverse effect that natural gas service might have on competitive fuels. We are always guided by the concepts of "public convenience and necessity" as enunciated by the Courts and by this and other regulatory bodies.59

Other examples of ultimate success by competing fuel interests may be cited. In 1951 the Commission denied a pipeline company's proposed interruptible sale to the Tennessee Valley Authority where the gas by displacing coal in a steam electric generating station would have reduced TVA's fuel costs by amounts ranging from $238,000 to $600,000 per year, depending upon the volumes of natural gas available to TVA during the year.60 The Commission also denied a proposed interruptible sale for use in a power plant in Missouri in 1953 where the use of gas in place of some of the coal used as fuel would reduce fuel costs by $23,000 a year.61

When the competing fuel interests fail to block the issuance of the certificate authorizing the proposed sale or service, they seek to hedge the certificate with conditions which will aid them in regaining the market or holding on to some sales which would otherwise be displaced. The Natural Gas Act itself aids the competitors in these attempts since it empowers the Commission to attach to the certificates of public convenience and necessity which it issues "such reasonable terms and conditions as the public convenience and necessity may require."62 The Commission has often used this power to attach price conditions to certifi-

59 Id. at 90.
cates. This is the lever by which competing fuel interests attempt to weaken the competitive position of the pipeline company and make the issuance of the certificate a Pyrrhic victory. A price condition is one of the most effective leg irons which can be clamped on a pipeline company's certificate, especially when it raises the cost of gas to the industrial consumer to a point where the use of gas is such a marginal proposition that a competing fuel can displace it by offering only a slight reduction in price.

Before Transcontinental Gas Pipe Line Corporation was able to commence operation of its new 1,800 mile Texas-New York pipeline in 1950 it was obliged to file a tariff with the Commission which would be satisfactory to the Commission. This permitted the Commission to adjust the proposed rates to its own satisfaction in a certificate case. The Commission set the proposed rates to discourage the resale of gas sold by Transcontinental for use as boiler fuel by industries in the New York, New Jersey and Philadelphia area, stating:

In the instant proceeding the rate schedule proposed by the company removed all restrictions on the use of gas for boiler fuel. While the staff's cost allocation classi-


The Commission lacks rate jurisdiction over direct sales in interstate commerce, i.e., sales where the purchaser is the consumer. Panhandle Eastern Pipe Line Co. v. Public Serv. Comm'n, 332 U.S. 507, 516 (1947). "Direct sales for consumptive use were designedly left to state regulation." Panhandle Eastern Pipe Line Co. v. Michigan Public Serv. Comm'n, 341 U.S. 329, 334 (1951). However, the Federal Power Commission has two very effective sources of influence on the non-jurisdictional rates of the pipeline company. First, it is empowered in a rate proceeding to allocate costs between jurisdictional and non-jurisdictional sales. Colorado Interstate Gas Co. v. FPC, 324 U.S. 581 (1945). Thus it is incumbent on the pipeline company to charge enough for direct sales to cover the costs which might reasonably be assigned to such sales. This serves as a brake on low prices in long term contracts. Second, the pipeline company may be obliged to obtain a certificate before it undertakes the non-jurisdictional sale, Panhandle Eastern Pipe Line Co. v. FPC, 232 F.2d 467 (3d Cir. 1956), and the Commission may decline to certificate the transportation involved if the sale price is too low. See Commonwealth Natural Gas Corp., 9 F.P.C. 70, 88 (1950).

64 The Commission has refused to allow representatives of the coal industry to participate in rate proceedings on the ground that the effect of a gas rate upon a competing fuel industry is not a factor which the Commission may consider in a proceeding for the establishment of a gas rate. In this view it has been upheld by the courts. Alston Coal Co. v. FPC, 137 F.2d 740 (10th Cir. 1943).

65 Trans-Continental Gas Pipe Line Co., 7 F.P.C. 24, 39-40 (1948). The assets of Trans-Continental, a Texas corporation, were subsequently transferred to Transcontinental Gas Pipe Line Corporation, a Delaware corporation.
In a more recent certificate proceeding, a witness presented by the staff of the Commission actually recommended a rate which, if made effective, would wipe out all of the anticipated savings which a power company expected to enjoy through using natural gas in its power station.\textsuperscript{67} Competing fuel interests vigorously supported the merits of this proposal.

There are conditions relating to matters other than price which may be attached to a certificate and which will serve to restrict the ability of the successful pipeline company to compete. The Commission might be persuaded to limit the sale to a short period of time, \textit{e.g.}, five years. The sale, if interruptible, might be given so low a delivery priority that the pipeline company will be unable to make the sale for extended periods of time. Or the tariff might be modified to permit partial or complete interruption of sales where the end use is boiler fuel in order to use such volumes of gas to develop storage pools. So the law allows the competing fuel interests to persuade the Commission, if they can, to tie one arm of the pipeline company behind its back in the competitive struggle.

For years the competing fuel interests have advanced several arguments which have made the sales by natural gas companies of gas for boiler fuel use more difficult.\textsuperscript{68} The vigor of opposition to this type of use is understandable as it often involves the displacement of large quantities of coal. Such large single markets are easily served by the coal interests, without great sales promotion or distribution expense. The seller need not stockpile the coal. The deliveries are made directly from the mine to the extensive stockpile yards of the customer.

As fuel cost constitutes a large item of expense, industries using boiler fuel shop around for the most economic fuel. They often find it to their interest to convert their boilers to the use of natural gas. The conversion from one fuel to another may take but a few minutes. To discourage


\textsuperscript{68} "Boiler fuel" refers to the use of natural gas to underfire boilers which convert water into steam. The steam may be utilized for many purposes—generating electricity, heating buildings and industrial processes.
such displacement competing coal interests may take two tacks. First they attempt to persuade the Commission to attach price conditions to the certificate which raise the price which must be charged to industrial customers, thereby making gas less attractive.\textsuperscript{69} Second they attempt to discourage the issuance of any certificate for such sales by emphasizing the paucity of discovered gas reserves in the United States and the consequent need to restrict gas usage to "superior uses," such as cooking, refrigeration, air conditioning, water heating, chemical processes and special heat treating of metals and glass where rigid temperature control is required. As a part of the argument, the use of natural gas as boiler fuel is denominated an "inferior use."

It is clear from a reading of the Natural Gas Act that the Commission is not a "conservation" agency. It has not been given the power either to establish a national fuels policy or to allocate energy sources between end uses.\textsuperscript{70} Conservation, however, has an important part to play in the production of natural gas where, by state regulation, the flaring of natural gas into the air is arrested and measures are taken to ensure that natural gas is economically and equitably produced.\textsuperscript{71} It has at best a limited function under the statutory standards of "public convenience and necessity" contained in the Natural Gas Act.\textsuperscript{72}

When the end use or conservation argument was broached in 1943 to

\textsuperscript{69} Coal interests have attempted to achieve this same result by legislation which would in effect keep at a high level the price which may be charged by pipeline companies to industries in direct sales. See H.R. 8168, 85th Cong., 1st Sess. (1957).


\textsuperscript{71} State conservation regulations have been upheld by the courts. Ohio Oil Co. v. Indiana, 177 U.S. 190 (1900). In FPC v. Hope Natural Gas Co., 320 U.S. 591, 613-14 (1944), it was held that in the Natural Gas Act:

Congress recognized the legitimate interests of the States in the conservation of natural gas. By § 11 Congress instructed the [Federal Power] Commission to make reports on compacts between two or more states dealing with the conservation, production, and transportation of natural gas. The Commission was also directed to recommend further legislation appropriate or necessary to carry out any proposed [conservation] compact and "to aid in the conservation of natural-gas resources within the United States and in the orderly, equitable, and economic production, transportation, and distribution of natural gas." § 11(a). Thus Congress was quite aware of the interests of the producing states in their natural gas supplies. But it left the protection of those interests to measures other than the maintenance of high rates to private companies.

\textsuperscript{72} The Commission lacks power to regulate production and gathering of natural gas under § 1(b) of the act although it does regulate producers' sales for resale in interstate commerce. Phillips Petroleum Co. v. FPC, 347 U.S. 672, 678 (1954); FPC v. Panhandle Eastern Pipe Line Co., 337 U.S. 498 (1949).
stop the construction of a pipeline from Texas to Kentucky, the Commission held:

It is contended that the use of natural gas for industrial and space-heating purposes constitutes a dissipation of the natural-gas resources, and threatens the coal industry with ruinous competition. Considerable evidence was adduced by these interveners for the purpose of supporting such contentions.

We recognize the force of these arguments and are not unmindful of the economic and social aspects of the problem posed by these interveners. We are not authorized, however, to regulate rates for natural gas sold directly to industrial consumers, which class of gas sales furnishes the keenest competition to the coal industry. Nor does our power to suspend rates extend to indirect sales of natural gas for industrial purposes. It appears, therefore, that the Natural Gas Act does not vest the Commission with complete and comprehensive authority which would permit us to act as arbiter over the end uses of natural gas.\(^{73}\)

The courts have recognized that conservation or end use might be one element of consideration in determining whether the public interest requires authorization of the proposed construction, operation and sale. It has been held that conservation is not a determinative factor.\(^{74}\)

The Commission early interpreted its duties to mean that it must consider the economic impact of a pipeline company's certificate proposal on competing fuel interests as one of the factors to be considered in determining the public interest.\(^{75}\) But under the constant pounding of the arguments of competing fuel interests, the Commission has established what appears to be a more difficult standard for authorization of boiler fuel sales than that which applicants must meet in certificate proceedings involving other types of sales. "We have repeatedly held that the use of natural gas as boiler fuel is an inferior usage and that, while it is not to be denied in all situations, it should be permitted only on a positive showing that it is required by public convenience and necessity."\(^{76}\) It is apparent that application of this doctrine has resulted in denial of certificates where the major effect was to protect competing fuel interests from competition.\(^{77}\)

\(^{73}\) Tennessee Gas and Transmission Co., 3 F.P.C. 574, 578 (1943).

\(^{74}\) National Coal Ass'n v. FPC, 191 F.2d 462, 467 (D.C. Cir. 1951); Department of Conservation v. FPC, 148 F.2d 746 (5th Cir. 1945).

\(^{75}\) Natural Gas Pipe Line Co., 5 F.P.C. 85, 109 (1946).

\(^{76}\) Mississippi River Fuel Corp., 12 F.P.C. 109, 112 (1953).


The gist of the coal interests' conservation argument may be found in McGrath, Federal Regulation of Producers in Relation to Conservation of Natural Gas, 44 Georgetown L.J. 676 (1956). For an economist's view of this problem see Koplin, Conservation and
B. Competition among pipeline companies.

So long as a pipeline company is sole supplier of natural gas to a market, it enjoys a monopoly in the supply of that commodity. If the market is small, not located along the route of another existing pipeline or adjacent to the route of a proposed pipeline, the existing supplier has a monopoly position unlikely to be disturbed by the Federal Power Commission. Factors such as terrain, distance, the size of the market, its proximity to large potential users of natural gas, and the price at which gas may be economically sold may all conspire to make it economically infeasible for another pipeline supplier to enter the market. This situation is the counterpart of that which occurs when a market is so remote or so small that it cannot attract any natural gas pipeline service, leaving present fuel suppliers sheltered from natural gas competition.

Competition between pipeline companies may arise at the instance of either the pipeline company or the customer. The applicable law is different in each situation.

1. Where the pipeline initiates the competition.

The first big step promoting competition between pipeline companies occurred in 1943 when the Commission authorized a new company, Tennessee Gas and Transmission Company, to construct a pipeline from Texas to the Appalachian area of Kentucky and West Virginia despite shaky financing and a questionable gas supply. The new company was opposed by existing natural gas pipeline companies which had been producing, transporting and distributing gas in the Appalachian area for over fifty years. Born in a competitive fight, Tennessee’s relatively short history has been marked by several competitive struggles with other pipelines, as a result of which it successfully entered the New England market and the New York City-New Jersey market.


It is apparent that Congress does not intend that conservation measures serve to suppress competition. In approving the Interstate Oil Compact, designed to encourage conservation through proper production and development of oil and gas reserves, Congress has directed the Attorney General to make an annual report as to whether the compact serves to limit the production of oil and gas for the purpose of stabilizing or fixing the prices thereof. See 1956 and 1957 Report of the Attorney General, Pursuant to Section 2 of the Joint Resolution of July 28, 1955, consenting to an interstate compact to conserve oil and gas.

78 Tennessee Gas and Transmission Co., 3 F.P.C. 574 (1943).
When Transcontinental Gas Pipe Line Corporation's predecessor company sought authorization in 1946 to build a new 1,800 mile pipeline from southern Texas along the eastern foothills of the Appalachians to New York City, it was opposed by Texas Eastern Transmission Corporation which served the Philadelphia-New Jersey area via the big and little inch pipelines which it had purchased as surplus property from the federal government. Texas Eastern did not offer a competitive proposal to serve the new markets. Instead, it argued that the Transcontinental project would "have a disruptive effect on the orderly and economic development of Texas Eastern's system to meet the market requirements of the Eastern Seaboard area and would have a detrimental effect on the potential natural gas consumers in the area to be served." The Commission issued a certificate to Transcontinental after finding: "It is manifest that Texas Eastern seeks to obtain a monopoly of the natural gas markets in the Middle Atlantic Seaboard area. We cannot subscribe to the thought that Texas Eastern is entitled to preempt such markets or that recognition of such prospective monopoly is in the public interest. It is therefore concluded that the position taken by Texas Eastern in this regard is without merit."

When an existing pipeline is faced with the prospect that its market area is to be invaded by a competing interstate pipeline company, it has several defensive weapons at its command. Since the prospective competitor must apply for appropriate certificate authorization in order to enter the market, the existing pipeline may intervene in the certificate proceeding and attempt to destroy the project by proving that it does not meet the statutory standards. Gas supply, financing, engineering, cost and revenue estimates, lawfulness of proposed rates and charges, adequacy of market, economic feasibility—all are fair game for attack. It would be extraordinary, however, if the promoters of the new project had not put together at least a prima facie case which would withstand the existing pipeline's sharpest cross-examination and rebuttal assaults. Therefore the only prudent course for the existing pipeline is to offer a competing project wherein it proposes to serve the same market requirements, thus forcing the Commission to grant a comparative hearing.

82 Ibid. (Emphasis added.)
83 See Iroquois Gas Corp., Opinion No. 279, FPC, Dec. 28, 1954. "There is nothing in the natural Gas Act which allows distributors or territory to be barred to an applicant because another supplier has expressed its desire to service them but does not prove its ability to do so." Northeastern Gas Transp. Co. v. FPC, 195 F.2d 872, 880 (3d Cir. 1952). See also Kentucky Natural Gas Corp. v. FPC, 159 F.2d 215 (6th Cir. 1947).
A good example of this occurred in 1953 and 1954. At that time Transcontinental was sole natural gas pipeline supplier to the gas distribution companies in New York City and on Long Island. Tennessee Gas Transmission Company filed an application in late 1953 seeking authorization to interconnect its existing system in north central Pennsylvania with that of its affiliate in New England near Greenwich, Connecticut. Enroute Tennessee proposed to tie into the New York City market and to sell a large volume of gas to the local gas companies under long term contracts. The local utilities were willing to have this second pipeline supplier. To safeguard its market Transcontinental filed a competing application offering to sell the identical volumes to the same local companies. A comparative hearing was ordered. There followed an energetic struggle between the giant pipeline companies. Experts were employed by each side to probe, find and exploit the weaknesses of the other's case which would warrant denial of the certificate authorization requested. In the end the battle of the titans was settled under the aegis of the general counsel of the Commission and Tennessee was allowed to tie into the New York City market and to sell to the local gas companies a portion of the volumes it had offered to sell.84

An interesting feature of this struggle lies in the fact that the local utilities and the New York Public Service Commission wanted New York City to have a second supplier, even though it was clearly demonstrable that Tennessee's rates were higher than those of Transcontinental for the same service. Ostensibly the primary reason was security of supply, as the Tennessee project would involve another crossing of the Hudson River and a separate transmission system extending back to Texas and Louisiana. Actually the local utilities looked forward to the benefits which might accrue to them once two major pipeline companies were obliged to offer competitive propositions to meet the growing gas requirements of the area.

The following case history illustrates the character of the competition between pipeline companies for the right to serve a market not theretofore served by any natural gas pipeline company.

After the first certificate application was filed in 1949, Tennessee Gas Transmission Company and Texas Eastern Transmission Corporation struggled for four years before the Commission was able to finally determine who should serve New England.85 At one point Algonquin,

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85 Tennessee proposed to construct pipeline facilities and make sales through its wholly-owned subsidiary, Northeastern Gas Transmission Company. Texas Eastern had a heavy financial interest in and was the immediate gas supplier of the competitor, Algonquin Gas Transmission Company.
Texas Eastern's affiliate, appeared to have the upper hand when it obtained a certificate and speedily installed transmission lines costing $50,000,000. Northeastern Gas Transmission Company, Tennessee's subsidiary, turned the tables when it persuaded the court of appeals to nullify the order granting the certificate on the ground that the Commission had not provided a comparative hearing. In the end the Commission divided the market between the competing companies in such fashion that neither pipeline serves the same cities served by the other.

Competitive struggles to serve new areas do not always end in compromises or division of markets. As the court of appeals stated in Kentucky Natural Gas Corp. v. FPC: "Where two competing applicants are both qualified to perform the proposed service, the Commission is necessarily called upon to rule in favor of one and against the other. Such a ruling can not be set aside on this review unless shown to be arbitrary."

2. Pipeline competition initiated by the customer.

A customer of a pipeline company may desire a second pipeline supplier for any of several reasons: security of supply, lower gas purchase costs, or to obtain additional volumes of gas which the present supplier will not provide.

Assuming that a second pipeline passes through or near the service area of a distribution company which is seeking another supplier, the second pipeline is sometimes unwilling to apply to the Commission to serve the distribution company. This often happens when the present pipeline supplier is itself a customer of the second pipeline whose policy is against direct competition with its own customers. How may the distribution company obtain gas volumes from this second pipeline?

Section 7(a) of the act provides that the Commission may direct a natural gas company to interconnect with the facilities of a local distribution company and sell natural gas to such company provided that such action (1) does not require the pipeline company to enlarge its transportation facilities for that purpose and (2) will not impair the pipeline company's ability to render adequate service to its customers. As a

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88 159 F.2d 215, 218 (6th Cir. 1947).
practical matter this means that the distribution company will not be successful unless the second pipeline company has unallocated capacity in its system. Of course the distribution company must be able to demonstrate that it requires this second source and that the service sought is economic.\footnote{Town Gas Co. of Ill., 19 F.P.C. 143 (1958).} Furthermore the present pipeline supplier has the right to appear in the proceeding and, as competitor,\footnote{Natural Gas Act § 15(a), 52 Stat. 829 (1938), 15 U.S.C. § 117n(a) (1952).} oppose the new service.

There is another and in practice more effective way in which a distribution company can force a second pipeline supplier to serve it. It is the method most often used by distribution companies and municipalities seeking an original gas supply from a pipeline company which does not seek authorization to serve them. The distribution company or municipality waits until the pipeline company files an application for a certificate to expand its system capacity. It then intervenes in the proceeding, presents evidence of its needs, and requests that the Commission attach a condition to any certificate issued to the pipeline applicant requiring the pipeline company, as a prerequisite to accepting the certificate,\footnote{"The Commission shall have the power to attach to the issuance of the certificate and to the exercise of the rights granted thereunder such reasonable terms and conditions as the public convenience and necessity may require." Natural Gas Act § 7(e), 56 Stat. 84 (1942), 15 U.S.C. § 717f(e) (1952).} to agree to make available to the distribution company an additional supply of gas. The present supplier may also intervene and oppose the attaching of the condition, but it must argue the same case it would present if the other pipeline company were seeking voluntarily to serve its customer. It must overcome the proposition that "nothing in the Natural Gas Act suggests that Congress thought monopoly better than competition or one source of supply better than two, or intended for any reason to give an existing supplier of natural gas for distribution in a particular community the privilege of furnishing an increased supply."\footnote{Panhandle Eastern Pipe Line Co. v. FPC, 169 F.2d 881, 884 (D.C. Cir.), cert. denied, 335 U.S. 854 (1948); accord, Home Gas Co. v. FPC, 97 U.S. App. D.C. 300, 231 F.2d 253 (1956).} Unless the present supplier has filed a timely application for authorization to serve the increased gas requirements of its customer (which would bring on a comparative hearing), it must demonstrate either (1) that its customer does not have sufficient additional requirements to make it economically feasible and in the public interest for the second interconnection to be made or (2) that the second pipeline company lacks the pipeline capacity

\begin{itemize}
\item \footnote{250 The Georgetown Law Journal [Vol. 47: p. 224}
required to render the requested service without impairing its ability to provide adequate service to its customers. 95

In 1958 Washington Gas Light Company which serves the District of Columbia and environs sought to obtain a second pipeline supplier by intervening in the certificate proceeding of another pipeline company whose system crosses the Potomac near Rockville, Maryland enroute to New York. The presiding examiner conditioned the certificate so as to require the pipeline applicant to serve Washington Gas Light. 96 The present pipeline supplier vigorously opposed this. The matter is pending before the Commission.

Competition between pipelines seeking to serve a new territory may end when one or the other receives a certificate from the Commission authorizing service to the whole area. The same result may follow should the Commission divide the territory between the applicants in such fashion that neither pipeline serves the other's customers. However, once a condition arises where two pipeline companies serve the same market, particularly a market having an expanding need for natural gas calling for additional service from time to time, a condition of tension and striving is created which never eases. Every subsequent expansion by either pipeline, though not designed to serve the competitive market, must take into consideration the impact of the new costs on its rates in the area where it competes with the other pipeline.

VI

Observations on the Function of the Antitrust Laws

It is not possible, even through close observation, to determine the precise role played by the existence of the antitrust laws in bringing about and maintaining competition in the interstate natural gas transmission industry. The projects undertaken, amended, or abandoned, and the rates proposed or changed because of antitrust implications ordinarily involve decisions also justifiable on other grounds. The weight given to antitrust elements in managerial decisions is not a matter of public record. Therefore this discussion will be limited to general observations on the application of the antitrust laws to the industry.

Only three antitrust suits have been brought by the federal government against regulated interstate natural gas pipeline companies since enact-

ment of the Natural Gas Act in 1938. None provides any real guidance to industry management.

A complaint was filed in 1938 against Columbia Gas & Electric Corporation, twenty-five of its officers and directors and a subsidiary corporation, charging Columbia with attempting to block the construction of a competing pipeline from gas fields in Kentucky across Ohio to Detroit. In 1943 by stipulation of the parties the antitrust suit was removed from the trial calendar subject to the rights of either party to move it be restored.

The other two Government actions, which are still pending in the trial courts, merit a brief description. On June 22, 1957, the United States brought a civil action against El Paso Natural Gas Company and Pacific Northwest Pipe Line Corporation. The Government sought a judgment that the acquisition by El Paso of the common stock of Pacific Northwest was a violation of Section 7 of the Clayton Act and that El Paso be required to divest itself of the stock of Pacific Northwest. El Paso delivered gas to California by its gas system extending from fields in Texas and New Mexico. Pacific Northwest served Washington, Oregon, Idaho and Colorado from gas fields in New Mexico and Canada. On August 7, 1957, El Paso and Pacific Northwest filed applications with the Federal Power Commission for certificates of public convenience and necessity approving the merger of Pacific Northwest into El Paso. These matters were set down by the Commission for hearing in September 1958.

In the other Government action an indictment was filed on April 30, 1958, against three natural gas pipeline companies and three persons alleging combinations and conspiracies to monopolize and restrain trade, an attempt to monopolize, and monopolization of the transmission and sale of natural gas in the states of Wisconsin, Minnesota and parts of Illinois and Michigan. This indictment arose from the competitive

struggle between these three existing pipeline companies and Midwestern Gas Transmission Company, a paper corporation. Midwestern proposed to construct a new $110,000,000 interstate pipeline from the system of Trans-Canada Pipe Lines, Ltd. near Emerson, Manitoba, Canada to Tennessee where it was to intersect the existing pipeline system of its parent, Tennessee Gas Transmission Company. One of the defendant companies, directly or through subsidiaries, delivered and sold natural gas in the area around Chicago which Midwestern was attempting to serve. The other two defendants served areas adjacent to the new markets Midwestern was attempting to serve with natural gas for the first time. The three defendant companies or their subsidiaries filed applications with the Commission proposing competitive projects which would provide roughly the same service that Midwestern proposed. After extensive hearings the Commission refused to authorize any of the competitive proposals. However, it recognized the need for new gas supplies in the cities and towns concerned and invited the submission of new pipeline proposals.103

To what extent do the antitrust laws apply to the regulated interstate natural gas transmission industry? This is a difficult question to answer with any definiteness since there are very few precedents. Decisions relating to other regulated industries are of some assistance, but caution must be exercised in this comparison because of the fundamental differences between the interstate transmission of natural gas and other regulated industries.

Regulated industries are not per se exempt from the antitrust laws, but they are exempt to the extent that the regulatory statute is clearly repugnant to the antitrust laws. Repeals of the antitrust laws by implication are not favored.104

These principles, first applied to railroads105 regulated by the Interstate Commerce Commission, have been employed by the courts in recognizing that the antitrust laws applied to some degree, despite the existence of regulatory statutes, to dairymen,106 export trade associations,107 the telephone industry,108 the gas and electric industry prior to

105 United States v. Joint Traffic Ass'n, 171 U.S. 505 (1898); United States v. Trans-Missouri Freight Ass'n, 166 U.S. 290 (1897).
1938,113 fishermen's cooperatives,110 insurance,111 motor carriers,112 the airlines118 and interstate electric public utilities.114

The repugnance between the regulatory statute and the antitrust laws may be found in a specific statutory exemption from the antitrust laws or from an irreconcilable conflict between the means and purposes of the regulatory statute and the antitrust laws.115

Unlike certain other regulatory statutes,116 there is no exemption from the antitrust laws specified in the Natural Gas Act.117 But there is an applicable provision in the Clayton Act. Section 7 of that act, which relates to mergers and acquisitions, provides that "nothing contained in this section shall apply to transactions duly consummated pursuant to authority given by the . . . Federal Power Commission . . . under any statutory provision vesting such power in such Commission . . . ."118 This


115 The Natural Gas Act was enacted after the basic antitrust statutes had become law. See McLean Trucking Co. v. United States, 321 U.S. 67, 79-80 (1944).


117 The only mention of the antitrust laws found in the Natural Gas Act reads as follows: "The Commission may transmit such evidence as may be available . . . concerning apparent violations of the Federal antitrust laws to the Attorney General, who, in his discretion, may institute the necessary criminal proceedings." Natural Gas Act § 20(a), 52 Stat. 832 (1938), 15 U.S.C. § 717s(a) (1952). This provision has been mentioned in recent decisions of a presiding examiner without being dispositive of any issue. Transcontinental Gas Pipe Line Corp. No. G-12059, FPC, Feb. 21, 1957, initial decision filed May 29, 1958; Pacific Northwest Pipeline Corp. No. G-13018, FPC, Aug. 7, 1957, initial decision filed July 21, 1958. However, there is no record of referrals to the Department of Justice under this provision.

is the only exemption found in the antitrust laws which is specifically applicable to the interstate natural gas pipeline companies.

It is clear that the Commission has not been given the power by statute to enforce the antitrust laws.119 However it has been suggested that the Commission cannot ignore those laws. In City of Pittsburgh v. FPC, the court of appeals stated: "Although the [Federal Power] Commission has no power to enjoin conduct as illegal under the Sherman Act or even to declare such illegality, it certainly has the right to consider a congressional expression of fundamental national policy as bearing upon the question whether a particular certificate is required by the public convenience and necessity."120

The function of recognizing and respecting the supersession of the antitrust laws by a regulatory statute is a substantive question and rests with the courts.121 In some areas this task is relatively simple. Mergers and acquisitions which fall within the protection of section 7 of the Clayton Act are clearly exempt. Non-jurisdictional ventures of a pipeline company which do not involve the use of the transmission system, however, are not regulated by the Federal Power Commission and consequently enjoy no immunity under the Natural Gas Act.122 Once these extremes are passed the landmarks become less reliable.

The merger and acquisition exemption is clearly not the only repugnancy between the Natural Gas Act and the antitrust laws. Many more inhere in the purpose of the statute,123 the scope of the Commission's authority under the act, and the manner of regulation provided.

The Federal Power Commission may and does sanction many acts and agreements which but for regulation would constitute antitrust violations.124 Monopolies, even though lawfully achieved, may violate the Sherman Act.125 Yet it is not unlawful for an interstate natural gas

122 The Natural Gas Act clearly does not regulate every root, branch and leaf of the pipeline company's activities. Such companies are not forbidden by the act to conduct any business authorized by their charters. See United States v. Trans-Missouri Freight Ass'n, 166 U.S. 290, 316 (1897).
123 Section 1(a) of the act concludes: "it is declared that . . . Federal regulation in matters relating to the transportation of natural gas and the sale thereof in interstate and foreign commerce is necessary in the public interest." 52 Stat. 821 (1938), 15 U.S.C. § 717(a) (1952).
125 United States v. Griffith, 334 U.S. 100 (1948); United States v. Aluminum Co. of America, 148 F.2d 416 (2d Cir. 1945).
pipeline company to enjoy a monopoly position which has been authorized by a certificate of public convenience and necessity issued by the Federal Power Commission.\textsuperscript{126} Attempts to monopolize may also violate the antitrust laws.\textsuperscript{127} But it is not unlawful for an applicant to seek authorization from the Commission to build the one and only pipeline to serve a new market.\textsuperscript{128} Nor is it unlawful for an existing pipeline to fight to preserve its monopoly by vigorous participation in a competitor’s certificate proceedings.\textsuperscript{129}

A refusal to deal may constitute a violation of the antitrust laws in a monopolistic situation.\textsuperscript{130} But a pipeline cannot be compelled to expand its system to serve new customers.\textsuperscript{131} And in the absence of a section 7(a) order, it can lawfully refuse to sell even though it has the capacity, provided the would-be purchaser has access to the Commission for the purpose of seeking such an order requiring service.\textsuperscript{132}

Exclusive dealing contracts are unlawful when their effect “may be to substantially lessen competition or tend to create a monopoly.”\textsuperscript{133}

\textsuperscript{126} Except in very rare instances, certificates of public convenience and necessity are unlimited as to time. The resultant foreclosure from serving the base load in an area may exclude competitors who cannot economically enter the market solely to serve new or peak day market requirements as they develop.


\textsuperscript{128} Section 7(e) of the act authorizes such an application. Natural Gas Act § 7(e), as amended, 56 Stat. 83 (1942), 15 U.S.C. § 717f(e) (1952).

\textsuperscript{129} Section 15(a) of the act authorizes the Commission to allow competitors to participate in certificate proceedings. 52 Stat. 829 (1938), 15 U.S.C. § 717n (1952).

The regulation of competing pipelines by requiring certificates of public convenience and necessity was justified by Congressman Clarence F. Lea, of California, sponsor of the Natural Gas Act, despite the opposition of municipal authorities who feared that competition would be suppressed. Hearings on H.R. 4008 Before the House Committee on Interstate and Foreign Commerce, 75th Cong., 1st Sess. 81-83 (1937).

\textsuperscript{130} See Lorain Journal Co. v. United States, 342 U.S. 143 (1951).


\textsuperscript{132} In that event there would not be a restraint of trade. Unlike the oil and products pipeline companies regulated by the Interstate Commerce Commission (Interstate Commerce Act § 1(1)(b), as amended, 41 Stat. 474 (1920), 49 U.S.C. § 1(1)(b) (1952)), the natural gas companies serve specified customers with definite allocations of gas under long term contracts. They do not operate the pipelines as common carriers. See Interstate Natural Gas Co. v. Southern Cal. Gas Co., 209 F.2d 380 (9th Cir. 1953).

Yet an interstate pipeline company may make a contract with a customer which covers all of the customer’s reasonably foreseeable natural gas requirements and after Commission approval be the exclusive seller to the extent of the volume authorized.\(^{134}\)

In the matter of jurisdictional rates and charges the Commission’s review authority is complete and exclusive.\(^{135}\) This is not changed by a failure to file a rate, agreement or tariff applicable to a regulated service.\(^{136}\) In *Montana-Dakota Utils. Co. v. Northwestern Pub. Serv. Co.*, Mr. Justice Jackson speaking for the majority stated:

> Petitioner cannot separate what Congress has joined together. It cannot litigate in a judicial forum its general right to a reasonable rate, ignoring the qualification that it shall be made specific only by exercise of the Commission’s judgment, in which there is some considerable element of discretion. It can claim no rate as a legal right that is other than the filed rate, whether fixed or merely accepted by the Commission, and not even a court can authorize commerce in the commodity on other terms.

> We hold that the right to a reasonable rate is the right to the rate which the Commission files or fixes, and that, except for review of the Commission’s orders, the courts can assume no right to a different one on the ground that, in its opinion, it is the only or the more reasonable one.\(^{137}\)

However, it has been held in cases involving the railroad industry that a combination or conspiracy to fix and file reasonable rates with the Interstate Commerce Commission may violate the antitrust laws. In *Keogh v. Chicago & N.W. Ry.*, the Court stated:

> All the rates fixed were reasonable and non-discriminatory. That was settled by the proceedings before the [Interstate Commerce] Commission. . . . But under the Anti-Trust Act, a combination of carriers to fix reasonable and non-discriminatory rates may be illegal; and if so, the Government may have redress by criminal proceedings under § 3, by injunction under § 4; and by forfeiture under § 6. . . . The fact that these rates had been approved by the Commission would not, it seems, bar proceedings by the Government. . . .\(^{138}\)

As a general proposition the regulatory statute is not repugnant to

\(^{134}\) Many pipeline companies offer a “requirements-type” service agreement to customers who have only one source of natural gas supply. Such a contract does not ordinarily contain a minimum bill. By contrast, customers having more than one source of natural gas supply are often required to enter into an obligation to take-or-pay for a minimum annual quantity in order to assure that one pipeline will not be left unused and resorted to only in emergencies or during only the coldest days of the year.


\(^{136}\) *Interstate Natural Gas Co. v. Southern Cal. Gas Co.*, 209 F.2d 380, 384 (9th Cir. 1953).

\(^{137}\) 341 U.S. 246, 251-52 (1951).

the antitrust laws in a case where the relief sought in the antitrust suit is not available under the regulatory statute. Thus, when a person is injured by actions of the regulated industry violative of the antitrust laws, and the regulatory statute does not provide for the award of damages, the courts will hear the matter. The courts will not award damages, however, where the injury alleged is caused by regulated rates and tariffs.

Where the action or agreement complained of in an antitrust action has been approved by the Commission and is attacked on grounds which could properly have been raised in the proceedings before the Commission, the courts have declined to annul the action taken by the Commission. Such collateral attacks on Commission orders and actions are improper because the Natural Gas Act provides a procedure for reviewing the actions of the Federal Power Commission relating to this regulated industry.

The proper decision is less clear when the action complained of in the antitrust suit arises out of a matter not yet heard or ruled upon by the Commission. A few hypothetical situations might help point up the difficulty. The elements of proof requisite to the issuance of a certificate of public convenience and necessity have already been considered. Does a pipeline company violate the antitrust laws if it takes any or all of the following measures in preparing a project so that it may meet the Commission's standards successfully:

(a) Executes precedent agreements with all customers who are to take the proposed service and those customers decline to execute similar agreements with a competing pipeline company;

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140 The legal rights of shipper as against carrier in respect to a rate are measured by the published tariff. Unless and until suspended or set aside, this rate is made, for all purposes, the legal rate, as between carrier and shipper. The rights as defined by the tariff cannot be varied or enlarged by either contract or tort of the carrier. . . . This stringent rule prevails, because otherwise the paramount purpose of Congress—prevention or unjust discrimination—might be defeated.


(b) Executes agreements with producers of natural gas for sufficient gas reserves to support the new service, but the gas reserves required are so large that an incipient competitor is unable to obtain similar agreements for the gas supply it requires for a competitive project;

(c) Obtains a promise of early delivery from pipe rolling mills which permits it to offer service to the new market twelve months earlier than gas service would be available from a competitor who, due to placing its pipe orders tardily, cannot enjoy early pipe delivery;

(d) Acquires the only undeveloped gas storage pool available in the vicinity of the new market after determining that a combination of pipeline and storage is the least expensive way to serve the new market and as a consequence the competitor can only offer the same service at a higher rate;

(e) Settles its pending rate case with its existing customers in order to clarify its revenue and income position and to permit lower cost of financing a new project while its competitor is tied up in a heavily litigated rate case which casts a cloud over its estimated net income and makes new financing more difficult;

(f) Buys the assets of the major existing gas distribution company in a new market area, where no new pipeline project into the area can be proven economically feasible, without serving the gas requirements of that distribution system and declines to enter into a service agreement for a gas supply from the competitor proposing to serve the area;

(g) Designs its proposed pipeline through the new area so that it can serve to loop the existing main pipeline and so be used to transport gas to more distant markets in such fashion that it can offer proposed rates in the new area below those any competitor could proffer who is designing a pipeline solely to serve the new area;

(h) Induces another pipeline company located one hundred miles to the west to seek authorization to serve the western one-fourth of an adjacent new territory while it (the pipeline company under discussion) seeks authorization to serve the eastern three-fourths of the new territory because (1) a third pipeline company proposes a project serving all of the new territory, and (2) the first pipeline company is unable alone to propose a project to serve all of the new territory because of a shortage of new gas supply and physical limitations imposed by the design of its existing pipeline system.

A careful reading of these situations will carry in its wake a desire to know more facts. Nor is this surprising since antitrust cases turn on the particular facts involved. Not only are all of the facts surround-
ing the actions or agreements complained of in an antitrust suit essential to a correct disposition of the case, but also any antitrust suit against a regulated industry must be considered in the context of the nature of the industry and the character and purpose of the applicable regulatory statute.\(^{143}\) Harnessing the antitrust laws and the regulatory statute together so that the public interest may best be served is no simple matter.

When an act or agreement does not fall clearly within the statutory exemption from the antitrust laws—the status of most of the above hypotheticals—it raises two problems, one substantive, the other procedural.

The question is posed: has the regulatory statute superseded the antitrust laws in regard to the present action? Obviously the court cannot, by proceeding first, assert power it does not have. In other words, if the regulatory statute has superseded the antitrust laws insofar as the matter alleged in the antitrust suit is concerned, then the court can grant no relief. The matter is for the Commission to handle. But the court in a borderline case still has the problem of deciding whether the matter is properly within the Commission’s exclusive jurisdiction.

Should the court proceed to hear the antitrust suit or wait for the Commission to act? The doctrine of primary jurisdiction has been developed by the courts in an attempt to resolve this procedural difficulty.\(^{144}\) It has been defined by Mr. Justice Frankfurter as

a principle, now firmly established, that in cases raising issues of fact not within the conventional experience of judges or cases requiring the exercise of administrative discretion, agencies created by Congress for regulating the subject matter should not be passed over. . . . Uniformity and consistency in the regulation of business entrusted to a particular agency are secured, and the limited functions of review by

\(^{143}\) As has been discussed elsewhere the obligation to consider regulation, both as applied and as contemplated, in the broad context of the industry concerned is economy wide. See Kronstein & Miller, Regulation of Trade 16 (1953).

\(^{144}\) The role which the doctrine of primary jurisdiction will play in any antitrust suit involving a regulated industry is not always clear in advance. However, there are those who think the rule as recently defined has already been over-extended. Convisser, Primary Jurisdiction: the Rule and Its Rationalizations, 65 Yale L.J. 315 (1956); Schwartz, Legal Restriction of Competition in the Regulated Industries: An Abdication of Judicial Responsibilities, 67 Harv. L. Rev. 436 (1954); Schwartz, Primary Administrative Jurisdiction and the Exhaustion of Litigants, 41 Georgetown L.J. 495 (1953). See also Staff of Sub-Committee No. 5, House Committee on the Judiciary, 84th Cong., 2d Sess., Judicial Doctrine of Primary Jurisdiction as Applied in Antitrust Suits (Comm. Print 1956). Others hold that the doctrine is essential to effective regulation where members of a regulated industry may be called to account by two masters—the agency and the court. See Von Mehren, The Antitrust Laws and Regulated Industries; the Doctrine of Primary Jurisdiction, 67 Harv. L. Rev. 929 (1954).
the judiciary are more rationally exercised, by preliminary resort for ascertaining and interpreting the circumstances underlying legal issues to agencies that are better equipped than courts by specialization, by insight gained through experience, and by more flexible procedure.146

The present thinking of a majority of the Supreme Court regarding the role of the regulatory agency and the respect due its findings in light of this doctrine was expressed in Federal Maritime Bd. v. Isbrandtsen Co.148 Primary jurisdiction means prior or preliminary jurisdiction. Being a matter of procedure, application of the doctrine does not cause the reviewing court to be bound to accept the Commission’s interpretation of the regulatory statute. The Court said: “It is recognized that the courts, while retaining the final authority to expound the statute, should avail themselves of the aid implicit in the agency’s superiority in gathering the relevant facts and in marshaling them into a meaningful pattern.”147

Court decisions indicate that some pipeline companies’ actions and agreements involving jurisdictional business may come under the antitrust laws. For example, if a regulated and a non-regulated company combine to perform or to refrain from performing an act which would be exempt if done by the regulated company acting alone, the combination may lose its exemption if the effect is otherwise to violate the antitrust laws.148

Assume that a pipeline company contracted to refrain from serving the territory now being served by another pipeline, but the Commission had not sanctioned the action. The Commission would not allow such a contract to stand in the way of authorizing the second pipeline to serve customers in the contractually forbidden area, regardless of whether the request for gas service was made on the initiative of either the customer or the second pipeline company.149 But so long as the “division of territory” contract serves as an effective bar to the second pipeline proposing an economic extension of its system into the forbidden territory, then the antitrust laws might well be applicable.150 In other words the antitrust laws may provide the only available remedy to dissolve an anti-competi-
tive situation which arises out of an agreement not to compete which is not and would not be sanctioned by the Commission. 151

But logic would appear to require that the courts refrain from attempting to grant antitrust relief where the matter complained of arises out of the preliminary steps which are taken prior to seeking Commission review and approval. 152 This is necessary for one basic reason. As the Natural Gas Act regulates an industry which involves enormous capital expenditures based on a wasting asset, the Commission must constantly deal with a panoramic picture, often looking many years into the future in weighing the merits of a proposal. Antitrust laws, on the other hand, are intended to apply to ad hoc situations, to particular facts. Like a mechanic the courts step in to tighten what appears to be a loose bolt in the competitive machinery. But such a single minded wrench could destroy competition in the interstate natural gas transmission industry. This can be illustrated by considering one of the two pending antitrust suits against pipeline companies.

In the El Paso-Pacific Northwest antitrust case the trial judge was asked in 1957 to postpone consideration of the matter until the pending merger certificate applications before the Commission had been heard and decided. He refused. 153 The judge reasoned that the stock acquisition complained of was not a matter that the Commission could pass upon, as its power was limited to authorizing acquisition of assets. His position sounds reasonable until studied in the light of facts generally known in the industry.

El Paso is at present the only out-of-state supplier of natural gas to California. Pacific Northwest and El Paso do not serve the same markets. Therefore it would appear that their merger does not tend to create a monopoly. 154 Furthermore, although El Paso is a giant corporation, the Federal Power Commission has been reluctant to allow it to expand its capacity to meet California requirements because of evidence that El Paso would experience in 1958 a deficiency in its system gas deliverability. 155 Consequently El Paso has turned to Canada for a new gas supply, investing there in leases and drilling programs.

153 The Supreme Court subsequently denied motions for leave to file petitions for writs of certiorari directed to the trial judge. 355 U.S. 950 (1958).
In 1955 El Paso tried to build a pipeline to carry Canadian gas to the California market via Idaho and Nevada, but was successfully blocked in this endeavor by the refusal of Pacific Gas and Electric Company to take gas from El Paso at any point other than the Arizona-California border. This pipeline will parallel that of El Paso. Furthermore Pacific Gas and Electric Company has, with others, set up a new corporation, Alberta and Southern Gas Company, which is actively engaged in a project to build a pipeline from the gas fields of Canada to the San Francisco Bay Area. This project offers interesting competitive possibilities if El Paso is ever allowed to be its competitor by also acquiring direct access to Canadian gas reserves.

The Commission has had relatively little experience with mergers of natural gas pipeline companies. All prior cases have involved parents and subsidiaries or affiliates. But in each instance the same standard of public convenience and necessity governs the disposition of the case. The usual justifications are economy and efficiency of operations. Absent the affiliated relationship, the Commission must as part of the entire picture judge the merits of stock acquisition as a prerequisite to the acquisition of the assets of the merged company. As the Commission recently stated:

In a word, public convenience and necessity is a "complex" encompassing numerous elements which in diversity and importance vary with the circumstances of particular cases; and in determining whether a certificate should issue, we must weigh the relative importance of the several factors involved, as well as balance the favorable against the unfavorable, if any. Furthermore, in evaluating the circumstances of a particular case it may well be that in the judgment of the agency to which decision is entrusted, an aspect of a proposal not wholly desirable standing alone should be ac-

158 See address by H. S. Welch, Esq., before the Public Utility Law Section of the American Bar Association, Aug. 26, 1958.
cepted where offsetting favorable features exist which would in sum total yield a greater public good, so long as all minimal requirements are satisfied.\textsuperscript{160}

Consequently, it was difficult to see the wisdom of the trial judge's decision in the El Paso-Pacific Northwest case to proceed with the antitrust suit.\textsuperscript{161} Grant of the divestiture relief requested by the Government could easily injure the public interest by eliminating El Paso as an effective competitor in serving California markets with gas from fields in Canada and the northern oil and gas producing states of this country.

VII
CONCLUSION

A wariness and restraint in applying the antitrust laws to the inter-state natural gas transmission industry should arise from a study of its history. Prior to federal regulation in 1938 this industry was heavily concentrated in the hands of a few holding companies. Exposure to the antitrust laws did not allay public complaints of discrimination, unreasonable charges, unfair competition, and injury to the consumer and the producer of natural gas. Remedial federal regulation was demanded and obtained. Since enactment of the Natural Gas Act, these complaints have practically disappeared and vigorous multi-million and even billion dollar corporations have driven the web of pipelines over the entire nation. This is no coincidence.

Physical circumstances have favored the growth of the natural gas transmission industry. The discovery of new gas reserves in the field, the technology of pipeline construction, and the supply of capital have kept abreast of the developing markets for gas. But the outstanding factor has been the catalytic contribution of energetic organizers and corporate directors and executives in the industry. Giant transmission companies have sometimes been created from an idea largely through the efforts of a very few persons, sometimes by those of a single imaginative individual assisted by a small loyal staff. Old companies have shaken off their somnolence. Competition has been the product of the drive to fructify every available opportunity. The activities of these

\textsuperscript{160} Transcontinental Gas Pipe Line Corp., Opinion No. 315 at 5, FPC, Sept. 4, 1958. While the stock acquisition may be bad on its face, "it properly might, under full consideration of all the attending circumstances, be approved or allowed to stand with modifications." United States Nav. Co. v. Cunard S.S. Co., 284 U.S. 474, 487 (1932). (Footnotes omitted.)

\textsuperscript{161} The trial judge, in ruling on a request for a continuance, subsequently suspended further proceedings until the Federal Power Commission determines whether the proposed merger is in the public interest. Wall Street Journal, Oct. 17, 1958, p. 6, col. 5.
persons have driven natural gas pipe lines into new geographical areas, unsettled business patterns in areas served for many years by old pipe line companies, and goaded competitors (whether sellers or transporters of other fuels, or other natural gas pipe line companies) to rise to the challenge.

Although the role of the Federal Power Commission has been designedly passive, it has moulded the industry by carrying out its statutory duties of review without eliminating competition and without stifling the vigor with which the industry pushed ahead. Pipeline companies have come to the Commission year after year for authorization to add new capacity and to serve new markets. Annual $50,000,000 to $100,000,000 expansion programs are frequent. These applications and interrelated rate proceedings have led to frequent public hearings as well as perennial, intimate Commission reviews of company activities. To forward their projects pipeline presidents and high ranking policy officers have been obliged to take the stand under oath in public hearings each year and there, under oftentimes hostile cross-examination of competitors and customers, explain and justify the company’s past and current activities and discuss in detail future plans. So long as such intimate public scrutiny prevails, activities and agreements which are criticized because they fall within the scope of the antitrust laws are discouraged—a healthy by-product of regulated competition.
UNION ORGANIZATION ON COMPANY PROPERTY — A DISCUSSION OF PROPERTY RIGHTS

Dexter L. Hanley, S.J.*

Under section 7 of the Taft-Hartley Act employees are given the right to organize collectively. Whether or not that right is so paramount that the NLRB may order an employer to allow his property to become a campaign arena for the union activities of his own employees or for the activities of union organizers in a manner that would result in the deprivation of the employer's right to maintain plant discipline and control his property raises complex constitutional and statutory problems. The complexity has been increased by the relatively recent question concerning the effect of the employer's exercise of his privilege of free speech. This entire field has been closely surveyed by Father Dexter L. Hanley, S.J., who presents an analysis of the considerations involved.

In the first years of the twentieth century, the right of property served to immunize employers and their agents from federal statutory restrictions forbidding under criminal sanctions the discharge of any employee because of membership in a labor organization. Absent contractual relations between the parties, it was held in Adair v. United States2 that an employer had a right to discharge an employee for any reason whatsoever,3 and that no legislation could interfere with the liberty of contract and the right of property thus exercised, not even under the claim of regulating commerce.4 This power to discriminate against labor unions

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1 Interstate Commerce Act, ch. 370, § 10, 30 Stat. 428 (1898) (regulating railroads engaged in interstate commerce).

2 208 U.S. 161, 174-80 (1908).

3 The right to discharge employees for union activities had been recognized by state courts as a legitimate control of business concomitant to the right of property. Gillespie v. People, 188 Ill. 176, 58 N.E. 1007 (1900); Coffeyville Vitrified Brick & Tile Co. v. Perry, 69 Kan. 297, 76 Pac. 848 (1904); State v. Julow, 129 Mo. 163, 31 S.W. 781 (1895); People v. Marcus, 185 N.Y. 257, 77 N.E. 1073 (1906); State ex rel. Zillmer v. Kreutzberg, 114 Wis. 530, 90 N.W. 1098 (1902).

4 It should be noted that the legislation, though directed toward railroads engaged in interstate commerce, was held not to be a regulation of “commerce.” 208 U.S. at 176-80. However, it is clear that the case does not depend on an assertion of a limited scope to the federal power over commerce, but on the protected nature of the rights. See 208 U.S. at 191 (Holmes, J., dissenting). See also Coppage v. Kansas, 236 U.S. 1, 11 (1915), where, on the authority of the Adair case, the state regulation of the contractual relation was invalidated, although a state possesses a general police power and does not need to justify its enactments on the ground of enumerated powers.

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by discharge received support in *Coppage v. Kansas,*\(^5\) when a state statute was found to contravene the fourteenth amendment by forbidding an employer to require, as a condition of employment, that the employee agree not to join any labor organization. And, finally, in *Hitchman Coal & Coke Co. v. Mitchell,*\(^6\) the agreement not to join a labor union was raised to the status of a “contract” and the employer’s rights therein were protected by injunction from any interference by union organizers.

These opinions were based on the theory that the property rights and personal liberties of the employers, especially in making contracts of employment, are paramount to union needs and legislative regulation. Although the cases all professed that property rights are not immune from reasonable control,\(^7\) the Court determined that there were no reasonable grounds for limiting the right to make contracts of employment.\(^8\) In spite of the fact that union rights were for the most part chimerical because unenforceable even by economic pressures, the Court held that legislation and self-help designed to balance bargaining power was directly violative of employer rights under the fifth and fourteenth amendments, and not merely incidental to the advancement of the general welfare.\(^9\) The only equality of rights upon which the Court insisted was one whereby employer and employee are free to contract on their own terms.\(^10\) Inequality of bargaining power was said to be a necessary and protected incident of property.\(^11\) The dissents in *Adair* and *Coppage,* however, rested on a conviction that otherwise valid legislation which extends statutory protection to labor unions is justified by the public interest, and that any dislocation of property rights which follows from this is merely incidental.\(^12\)

In spite of these judicial barriers, there were continued attempts to

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\(^5\) 236 U.S. 1 (1915).

\(^6\) 245 U.S. 229 (1917).

\(^7\) Liberty and property are “subject to the fundamental condition that no contract, whatever its subject matter, can be sustained which the law, upon reasonable grounds, forbids as inconsistent with the public interests or as hurtful to the public order or as detrimental to the common good.” *Adair v. United States,* 208 U.S. at 172. See *Coppage v. Kansas,* 236 U.S. at 18.

\(^8\) *Adair v. United States,* 208 U.S. at 174; *Coppage v. Kansas,* 236 U.S. at 18-19; *Hitchman Coal & Coke Co. v. Mitchell,* 245 U.S. at 253-54.

\(^9\) *Coppage,* 236 U.S. at 18-19. See *Adair,* 208 U.S. at 176; *Hitchman,* 245 U.S. at 251, 254.

\(^10\) See *Adair,* 208 U.S. at 174-75; *Coppage,* 236 U.S. at 19-21; *Hitchman,* 245 U.S. at 250-51.

\(^11\) *Coppage,* 236 U.S. at 17-18.

\(^12\) Holmes, J., dissenting in the *Adair* case, 208 U.S. at 191, and in the *Coppage* case, 236 U.S. at 27; Day, J., dissenting in the *Coppage* case, 236 U.S. at 34-35, 40.
provide governmental protection for labor organizations, and in 1926 Congress passed the Railway Labor Act, which provided that employees were free to designate their representatives "without interference, influence, or coercion" by the carrier. This legislation came before the Supreme Court in *Texas & N.O.R.R. v. Brotherhood of Ry. Clerks.* The Court, reading the statutory language as imposing a legal obligation on the carrier, distinguished *Adair* and *Coppage* by saying that the Railway Labor Act "does not interfere with the normal exercise of the right of the carrier to select its employees or to discharge them." But, since legislation aimed at all interference with the right freely to choose one’s representative also embraces all attempts to prohibit the employees from joining a union, it appears that Railway Clerks does in fact destroy the authority of *Adair* and *Coppage.* The Court, by here finding that the congressional power to regulate commerce extends to the prohibition of interference with union organizations, implicitly has found that such prohibition is a reasonable restraint upon property rights.

In a changing climate for labor relations, unions prospered under the freedom from injunctions obtained through the Norris-LaGuardia Act and gained strength under the short-lived National Industrial Recovery Act. After the passage of the Wagner Act, the Court decided two important cases. In *Virginian Ry. v. System Fed'n, AFL,* the Railway Labor Act was construed to require the employer to enter into negotiations with the representatives of his employees for the settlement of labor disputes. After deciding that the legislation was an exercise of the commerce power, the Court upheld it against the claim that it was violative of the fifth amendment and destructive of property rights. The Court argued that this was a reasonable choice of means for a permissible end.

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14 Ch. 347, § 2, 44 Stat. 577 (1926).
15 281 U.S. 548 (1930).
16 Id. at 571.
21 300 U.S. 515 (1937).
23 300 U.S. at 557-59.
But the more decisive case for the purposes of this paper is *NLRB v. Jones & Laughlin Steel Corp.*24 Here the Court met first the challenge that industrial disputes in production industries were not sufficiently related to commerce to enable the federal government to exercise control;28 and, secondly, against claims of protection under the fifth amendment, it asserted that the rights hitherto enjoyed by employers in these industries were reasonably restrained by the requirement that employers should not interfere with the self-organization of the employees.28 However, both this case and *Virginian Ry.* distinguished *Adair* and *Coppage.*27 In an apparent effort to support the distinction, the Court in *Jones & Laughlin* emphasized that employees have a correlative right to organize28 and justified the restraints of the NLRA as "preventing an unjust interference with that right."29 In the light of the failure to overrule *Adair* and *Coppage*, this emphasis on the employee rights may be criticized on three grounds. (1) It is misleading. The existence of these rights, called into question by the earlier judicial theory, is here assumed. Since the legislation is said to recognize the rights, it does not create them; yet the opinion offers no standard other than the statute for demonstrating the existence of the rights or for measuring the injustice of the interference. (2) The effort to maintain the fiction that the NLRA does not interfere with "the normal exercise of the right of the employer to select its employees or to discharge them,"30 but merely protects the rights of both, leads the Court into error. It states that the act does not prevent the employer from taking unilateral action in determining the employment contract.31 This error had subsequently to be corrected in *J. I. Case Co. v. NLRB.*32 (3) The theory that the legislation is a recognition of antecedent legal rights obscures the real reason which is stated by the Court as justifying the legislation. Congress acts, not to balance rights, but to promote "industrial peace."33

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24 301 U.S. 1 (1937).
25 Id. at 41-43.
26 Id. at 43-46.
27 Id. at 45-46; *Virginian Ry.*, 300 U.S. at 559.
29 301 U.S. at 44.
30 Id. at 45; see *Virginian Ry.*, 300 U.S. at 559; *Railway Clerks*, 281 U.S. at 571.
31 Ibid. See also *Virginian Ry.*, 300 U.S. at 548 n.6, 557. The error of the Court was due, perhaps, to the Government's concessions in argument. See 300 U.S. at 548 n.6.
33 See *Jones & Laughlin*, 301 U.S. at 45; *Virginia Ry.*, 300 U.S. at 553-58; *Railway Clerks*, 281 U.S. at 570.
end, in the exercise of its power to regulate commerce, Congress may restrict employer activities, even though the employees have no antecedent or correlative rights recognized by law. Congress may limit, regulate, and restrict property rights and the liberty of contract so long as it does not act arbitrarily, but looks to the quality of the action compelled, to its reasonableness or appropriateness for the end, and to the conditions which have occasioned the use of governmental power.  

The ghost of Adair and Coppage remained to plague the law with the notion that employer property rights could not be restricted. Nevertheless, with the major constitutional issues settled, the National Labor Relations Board undertook to effectuate the policies of the Wagner Act, which forbids the employer to interfere, restrain, and coerce the employees in the exercise of their rights of concerted action, to dominate or assist any labor organization, and to encourage or discourage union membership by discrimination in hiring or in conditions of employment. Under these provisions of the act, a wide variety of employer practices are regulated, but we are interested primarily in the principles which govern union organization upon employer premises. We seek to define how far the employer may limit or forbid these organizational activities.

1. Access to Employees.—The philosophy of the Board began to be articulated in Harlan Fuel Co., where the company attempted to justify its exclusion of union organizers from a company town by appealing to its property rights. It was asserted by the company that the organizers had a license to cross the town, but that they had abused it and were therefore ejected as trespassers. The Board stated, first, that the rights of entry passed with the leasehold to the tenants and extended "to all third persons visiting the tenant under express or implied invitation for any lawful purpose. Persons transacting matters of interest with tenants in company towns have a right to use the private ways in doing so." It will be noted that this is not an argument that the company must make property available to organizers, for the property right of entry pertained to the employees living in the company town. Furthermore, the Board refused to decide whether the right of entry extended to the

34 See Virginian Ry., 300 U.S. at 558-59.
36 For a discussion of the developments affecting the fundamental right to hire, see Daykin, Effect of NLRA and Taft-Hartley on the Employers' Right To Hire, 4 Lab. L.J. 677 (1953).
37 8 N.L.R.B. 25 (1938).
38 Id. at 32.
organizers as such. However, the Board did affirm that the basic rights of the NLRA include "full freedom to receive aid, advice, and information from others, concerning those rights and their enjoyment." Thus the Board equated the right of organization with the right to receive information. One could conclude, then, that where neither of these rights can be accomplished except by entry upon company-owned land, the Board would accommodate the right of property to the statutory right of organization.

In *Cities Serv. Oil Co.*, the Board enlarged on this point when union representatives of some employees were refused passes to board oil tankers in order to speak with the union personnel. It was held that, considering the short time available for shore leave, the union representatives should be granted access to the vessels for the purpose of conferring about grievances. The Board stated that access was a necessary and customary part of an effective grievance procedure in the shipping industry and rejected other methods which were suggested by the shipping company. However, it should be noted that this argument presupposes the antecedent choice of a majority bargaining representative and does not define the problem of the rights of organizers. To the contention that the employer, in excluding nonemployee union representatives, validly exercised a property right protected under the fifth amendment, the Board replied that incidental property damage is *damnum absque injuria* where an order is "reasonably calculated to effectuate the policies of the Act." The Board order was enforced by the Second Circuit which said: "The Union must have the members of the crew readily accessible in order to work to any real advantage and the complaints

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39 Id. at 32 n.11.

The cases cited are not pertinent to the issue whether the employer may restrict on his own property activities which are permissible elsewhere. The debates and House report deal with the question whether a union's organizational activity should be forbidden as coercive when it conflicts with the desire of the employee to refrain from joining the union. Although from the fact that the Wagner Act placed no restrictions on unions it may be proper to conclude that the unions have a statutory right to communicate, an argument so derived loses force in the face of the amendments in the Taft-Hartley Act.
41 25 N.L.R.B. 36 (1940).
42 Id. at 57 n.37.
43 Id. at 57 n.36 (citing: Jones & Laughlin; Railway Clerks, 281 U.S. at 568-71; Art Metals Constr. Co. v. NLRB, 110 F.2d 148, 150 (2d Cir. 1940)).
44 NLRB v. Cities Serv. Oil Co., 122 F.2d 149 (1941).
frequently relate to conditions on and even of the vessel itself."\textsuperscript{45} The court opinion was also bottomed, not on the need for organization, but on the need for an effective grievance procedure after the employees had freely chosen a representative.\textsuperscript{46} But it does indicate an awareness of shaping the conditions for activities on company property to the goal expressed in the national labor policy. Since negotiations would otherwise be too slow or cumbersome, the court required that the company grant access to the vessels. Though the Board was entitled to "weigh the inconvenience, risk or damage imposed upon the employer against any mere convenience to the Union,"\textsuperscript{47} where the inconvenience is slight and the right of collective bargaining demands it, some dislocation of property rights may be essential.\textsuperscript{48}

2. \textit{Rules Limiting Employee Activities}.—A different problem than that of access to company property was faced by the Board when employers maintained that in virtue of the contract of employment they could institute rules of conduct during all working hours, thus barring all union activities by employees during this time. The Board hesitantly approached the problem,\textsuperscript{49} but its position was soon made clear\textsuperscript{50} in \textit{Peyton Packing Co.}\textsuperscript{51} This case clearly presented the question of what constitutes a valid, nondiscriminatory no-solicitation rule. The company posted a notice prohibiting all solicitation "while on property of this company, or while working on company time . . . ."\textsuperscript{52} The trial examiner

\textsuperscript{45} Id. at 151.
\textsuperscript{46} The court modified the Board's order so as not to require access to be granted for the purpose of soliciting new members or of collecting dues. Id. at 152.
\textsuperscript{47} Id. at 152.
\textsuperscript{48} Ibid.
\textsuperscript{49} In \textit{Mid-State Gummed Paper Co.}, 11 N.L.R.B. 354, 357-58 (1939), the Board stated that a rule prohibiting discussion of union matters during lunch hours was permissible where the intent was merely to avoid having the property serve as an arena for union activities.

In the earliest cases before the Board, where the company in defense argued that the violation of company rules justified disciplinary action and discharge, the Board rested its findings of violations of §§ 8(1) and (3) upon discrimination and did not enter into a discussion of the validity of the rules themselves. Martin Dyeing Co., 2 N.L.R.B. 403, 412-14 (1936) (where the organizational activity took place during working hours, and the Board found the discharge motivated by antiunion bias); Ford A. Smith d/b/a Smith Cabinet Mfg. Co., 1 N.L.R.B. 950, 954-55 (1936).

\textsuperscript{50} For the development of the Board's position, see Daykin, Employees' Right To Organize on Company Time and Company Property, 42 Ill. L. Rev. 301, 313-16 (1947). For the judicial development, see id. at 316-27.
\textsuperscript{51} 49 N.L.R.B. 828, 50 N.L.R.B. 355 (1943), enforcement granted, 142 F.2d 1009 (5th Cir.), cert. denied, 323 U.S. 730 (1944).
\textsuperscript{52} 49 N.L.R.B. at 843.
upheld the company’s claim of right to investigate violations of this company rule and to discharge for violations. But the Board, overruling the examiner, stated:

The Act, of course, does not prevent an employer from making and enforcing reasonable rules covering the conduct of employees on company time. Working time is for work. It is therefore within the province of an employer to promulgate and enforce a rule prohibiting union solicitation during working hours. Such a rule must be presumed to be valid in the absence of evidence that it was adopted for a discriminatory purpose. It is no less true that time outside working hours, whether before or after work, or during luncheon or rest periods, is an employee’s time to use as he wishes without unreasonable restraint, although the employee is on company property. It is therefore not within the province of an employer to promulgate and enforce a rule prohibiting union solicitation by an employee outside of working hours, although on company property. Such a rule must be presumed to be an unreasonable impediment to self-organization and therefore discriminatory in the absence of evidence that special circumstances make the rule necessary in order to maintain production or discipline.53

There are three elements to be specially noted in this opinion: (1) the employer must have a reason for any restrictions which he places by rule on union activities by employees on his property; (2) during working hours, a presumption favors the validity of no-solicitation rules; during nonworking hours, the presumption is against the validity; (3) an invalid no-solicitation rule is an interference with statutory rights within the meaning of section 8(1) of the Wagner Act.

The judicial position on this question was not, however, so clear. The Board in Peyton Packing relied upon NLRB v. William Davies Co.,54 but other circuits had ruled against the Board’s position.55 Because of this judicial indecision and the fact that the previous supporting cases were based at least in part upon findings of the discriminatory application of rules,56 it was not until Republic Aviation Corp.57 that the doctrine

53 Id. at 843-44.
54 135 F.2d 179 (7th Cir. 1943). See Peyton Packing Co., 49 N.L.R.B. at 844 n.13.
55 Midland Steel Prods. Co. v. NLRB, 113 F.2d 800 (6th Cir. 1940).
56 See NLRB v. William Davies Co., 135 F.2d at 181. The order in Peyton Packing Co. was also enforced because of the discriminatory application of the rule. 142 F.2d at 1009-10. There were two cases antecedent to Peyton Packing in which the Board found that the prohibition of solicitation in working and nonworking time was unlawful. Carter Carburetor Corp., 48 N.L.R.B. 354, 355-56 (1943); Denver Tent & Awning Co., 47 N.L.R.B. 586, 590-93 (1943) (intermediate report). The cases were later enforced by courts which, while apparently adopting the view of Midland Steel Prods. Co. v. NLRB, supra note 55, that the employer could validly prohibit such activity, held that the rule was applied so as to discriminate against union activity. Carter Carburetor Corp. v. NLRB, 140 F.2d 714, 716-17 (8th Cir. 1944); NLRB v. Denver Tent & Awning Co., 138 F.2d 410 (10th Cir. 1943).
to be applied was clearly settled. In this case there was a company rule prohibiting all solicitation and it was applied without discrimination toward union activity. Nevertheless, since the rule prohibited union activity on company property during nonworking time, it was held to constitute "an unreasonable impediment to self-organization" and discharges for the violation of the rule were found to be "discriminatory" within the meaning of section 8(3) of the Wagner Act. It is important to evaluate the reasons which support this conclusion. The Supreme Court based its conclusion upon the fact that the rule itself was invalid, and the invalidity of the rule, in turn, follows from "an adjustment between the undisputed right of self-organization . . . and the equally undisputed right of employers to maintain discipline in their establishments." It was not necessary to show that the employees could not otherwise reach prospective union members except by soliciting on company property, on the contrary, the Court, adopting the view of the Peyton Packing case, accepted the Board's conclusion that the no-solicitation rule hinders "effective" self-organization, and hence is an "unreasonable impediment." The Second Circuit had been more precise in its analysis of this particular point. After having established the special right of an employee to be on the premises, the opinion declared that an order prohibiting the rule against solicitation must be preceded by an evaluation of the prejudice to the employer and of the benefit to the employee, and a finding that the benefit shall prevail over the prejudice. Though the Board had not made these clear findings, the circuit court held that the general knowledge of the NLRB was a sufficient support for its conclusions, and that the employer would have to overcome the presumption against the rule.

At the same time Republic Aviation was decided, the Supreme Court dealt with the question of the distribution of union literature on company property in NLRB v. Le Tourneau Co. There was a parking lot ad-

67 51 N.L.R.B. 1166 (1943), enforcement granted, 142 F.2d 193 (2d Cir. 1944), aff'd, 324 U.S. 793 (1945).
68 51 N.L.R.B. at 1187; 324 U.S. at 795, 805.
69 51 N.L.R.B. at 1187; 324 U.S. at 805.
70 324 U.S. at 797-98.
71 Id. at 798-99.
72 See citations, 324 U.S. at 802 n.8, 803 n.10.
73 142 F.2d at 195-96.
74 The best discussion of the Board's evaluation is found in the intermediate report, 51 N.L.R.B. at 1195.
75 324 U.S. 793 (1945), reversing 143 F.2d 67 (5th Cir. 1944), and enforcing 54 N.L.R.B. 1253 (1944).
joining the main entrance and between the entrance and a highway. A series of thefts from the automobiles and littering of the lot had led the company to issue a rule that no distribution of literature could take place on company property without permission of the personnel department. A request for permission to distribute union handbills was refused; an employee who had distributed some handbills in the parking lot after his day's work was suspended. The Board found that the rule was impartially enforced in both incidents, but it did not adopt the argument that an interest in keeping the plant in order was sufficient to justify the restriction. The Board evaluated the "conflicting rights and policies—the employer's right to regulate the use of his own property, on the one hand, as against the employees' right to receive information to enable them to exercise their right to self-organization, which it is the policy of the Act to encourage." Somewhat at length, the Board then examines the extent to which the company's rule hinders the effective exercise of the right to self-organization, pointing out how the very geography of the plant made effective communication difficult. It was made clear that other means of communication than the distribution of literature were available, but this was rejected as a possible defense. After weighing the reasons for the rule as against the requirements for effective self-organization, the Board held that the rule was "an unreasonable impediment on the freedom of communication essential to the exercise of its employees' right to self-organization . . . ."

The court of appeals, in a brief opinion, denied enforcement of the board order, holding that impartial enforcement of the rule was not violative of the act. The basis of the court's decision seems to be that it could find "no provision, express or implied, in the National Labor Relations Act which requires an employer to permit organization efforts on his premises . . . ." This seems to be a reversion to the old theory of property rights insofar as it fails to give weight to the notion that the

66 54 N.L.R.B. at 1259. In Tabin-Picker & Co., 50 N.L.R.B. 928, 930 (1943), the Board had stated a broad principle that cleanliness and good order was a justification for a prohibition at all times against distributing literature.

67 54 N.L.R.B. at 1259. The Board also made a broad statement as to the right of access of "persons whose presence is necessary there to enable the employees effectively to exercise their right of self-organization and collective bargaining . . . ." Id. at 1260. This is of interest in evaluating the mind of the Board in a case to be discussed later, Babcock & Wilcox Co., 109 N.L.R.B. 485 (1954).

68 54 N.L.R.B. at 1260-62.

69 Id. at 1262.

70 143 F.2d at 68.
act itself is a limit upon property to the extent required for effective self-organization and collective bargaining. To support its stand, the court referred to *Midland Steel Prods. Co. v. NLRB*, wherein it was held that it was a matter of law and for judicial decision to determine the reasonableness of a rule prohibiting solicitation on company property at all times. In *Midland Steel*, the rule was said to be reasonable on the ground that the employer had the right to demand the full attention of his employees while they are on his premises. Here, too, there was no effort to balance the right of property and the statutory right of self-organization.

The Supreme Court, in overruling the court of appeals in *Le Tourneau*, by implication overruled *Midland Steel* and similar cases. Thus it would seem to be settled law that property rights are subject to all reasonable restrictions required for effective self-organization. But this case does not decide for all situations how the balance is to be made in determining what are reasonable restrictions. Nor does it decide what is required for effective self-organization. It does recognize that the act leaves to the Board the application of the statutory prohibitions “in the light of the infinite combinations of events which might be charged . . . .”

3. Use of Company-Owned Facilities.—There is one final case to be considered here for the light it throws upon the relationship between the policies of the labor act and property rights. In *Stowe Spinning Co.*, the Board dealt with the refusal of a company to permit a union to use one of its buildings, located in a mill village and controlled by, though not leased to, a fraternal organization. Though permission had been granted by the fraternal organization to the union to use the hall on payment of a janitor’s fee, it was rescinded on order of the company. The company had told the lodge that the building had been built for their exclusive use. As a matter of practice, however, the building had been used by community and employee meetings, all with the permission of the lodge alone. The Board found that this action of the company constituted unlawful discrimination, and, in reliance on the Supreme Court in *Le Tourneau*, rejected the claim that the employers were within the constitutional guarantees to private property in refusing the use of the

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71 113 F.2d 800 (6th Cir. 1940).
72 The Board had not reached this question, for it found that the rule had not been violated. *Midland Steel Prods. Co.,* 11 N.L.R.B. 1214, 1223 (1939).
73 324 U.S. at 798.
74 70 N.L.R.B. 614 (1946).
75 Id. at 623. The Board also quotes Marsh v. Alabama, 326 U.S. 501, 506 (1946), to the effect that an owner's right in property is conditioned by the use he makes of it.
building. Failing to demonstrate that the use of the building would prejudice them substantially, the employer's bare rights could not stand before the paramount need for a general meeting place. And, in the circumstance of a company town, there were no other meeting places reasonably available. But it is clear that the Board's opinion rests, not just upon a denial of employer facilities, but upon the discriminatory and arbitrary action of the company in refusing the facility, generally available to all, to the union alone. And yet, the Board alleges as a separate and independent ground the denial of the facilities where other suitable property is not available.

The court of appeals denied enforcement to the board order, holding that there is no obligation on the employer to treat unions the same way he treats other organizations. The discrimination in this case was not viewed as falling within the prohibitions of the act. However, the Board had not found that the Stowe Company had violated section 8(3) of the act; the only finding was a violation of section 8(1), alleging interference, restraint, and coercion. To this the court responds that the employer need only refrain from positive acts to the detriment of union activities, that he is not obliged to perform any affirmative acts which will aid a union in its organizational efforts. Indeed, the court emphasizes that the statute obliges the employer to refrain from assisting a union.

The court thus highlights the question as to whether affirmative acts may be commanded under the guise of balancing the property rights of the employer and the statutory policy. Were the Government, the court says, to use the property for its own purposes, there would be a violation of the fifth amendment. The court concludes, then, that no right of the employee to receive information can compel the employer to make his property available for the exercise of this right, except under those

76 70 N.L.R.B. at 622-23. The Board considers the fact that, in other circumstances, the action of an employer in furnishing a meeting place might be viewed with suspicion, but when, as here, no other place was available, the employer permission was not only not violative of the act, but commanded by it. But see dissent, id. at 634-35. For later discussion of this point, see Phillips Petroleum Co., 92 N.L.R.B. 1344 (1951).

77 70 N.L.R.B. at 624.

78 Ibid.

79 NLRB v. Stowe Spinning Co., 165 F.2d 609 (4th Cir. 1947).

60 It was said not to be a discrimination in regard to hire or condition of employment, § 8(3), nor against an employee for having given testimony, § 8(4), nor a discrimination in favor of one union over another. 165 F.2d at 611.

81 See 70 N.L.R.B. at 624, 631.

82 165 F.2d at 611.

83 Ibid. But see note 76 supra.
special circumstances (which have been discussed above) where employees may solicit or representatives may gain access. Certainly, in view of the fact that the right of entry and use is so basic to property rights, it may be said that such a use can be compelled, if at all, only where some real necessity exists. Since the employer interest is so basic, mere convenience in effecting the statutory policy will not outweigh it. But a distinction should be made between a decision based on an evaluation of the facts of the case (that basic property rights outweigh the asserted inconveniences in organization) and one based on a constitutional principle (that the right to enter and use property cannot be compelled because it is immune under the fifth amendment). Though the court is not clear on this distinction, it would appear that it does base its denial of enforcement upon the asserted constitutional principle, stating that such rights of entry as had been permitted by the courts were not substantial interferences with the business of the employer or his property.84

Nevertheless, in a divided decision, the Supreme Court upheld the Board,85 but only on the ground that the company had treated the union differently from other organizations. The Court did not neglect to weigh the requirements for effective organization against the prejudice to property right. Both because of the difficulty of organizing in a company town and because an isolated company-owned community must of its nature furnish some public meeting place, the Court sustained the board finding. However, the Court makes it clear that it is the discrimination in these circumstances which is the basis for the order, and it modified the order so as not to make the company subject to contempt proceedings merely for the denial of facilities. Since the company had engaged in activity contrary to the act, under the powers of section 10(a) the Board seems to have the authority to compel the company to make the hall available, even though this would be to compel affirmative action. Nevertheless, the Court required a modification of the order, and Mr. Justice Jackson, dissenting in part,86 would have modified the order so as merely to forbid the company from interfering with whatever use the lodge might want to make of the hall. The argument made by the court of appeals based on the fifth amendment was casually treated, as the Court said: "The Wagner Act was adopted pursuant to the commerce clause, and certainly can authorize the Board to stop an unfair

84 165 F.2d at 614.
86 Id. at 233, 234-36.
labor practice as important as the one we are considering." Though this dismisses the constitutional objection as without merit, it substitutes a statutory problem, since the crux of the matter is in this: Is this an unfair labor practice?

The case proves difficult of analysis. The recognition of the difficulty of organization in a small company town and of the importance of a place for assembly appears unnecessary and irrelevant—if not inconsistent—when the holding rests upon the fact that the company, moved by antiunion bias, treated the union differently from other organizations and thus adversely affected employee interests under the act. However, these elements can be reconciled if one sees that a denial of employer facilities to the union is thought to have this adverse effect only when discriminatory, and only in these circumstances. Absent the discrimination, the union would have no right to demand a hall from the employer; absent the particular circumstances of the case, even a discriminatory refusal of a recreation hall off the plant property would not be a violation of the act. So read, the case becomes a rather narrow approval of the Board's decision and is based upon the evaluation of benefit to the union, prejudice to the employer, and the effect of antiunion activity upon the policies of the act. If the first two elements alone are not sufficient in these circumstances to warrant the protection of the act for union activity, it follows that the Court will not easily require employers to make their facilities available for organizational purposes nor easily find that "effective" self-organization is impossible when facilities are denied. The Court quotes with approval *NLRB v. Lake Superior Lumber Corp.* and its own statements in *Republic-Le Tourneau* to the effect that, in a mining or lumber camp, where employees spend working and nonworking hours on company premises, organization must take place on company premises or not at all. By adding the requirement of discrimination in the *Stowe* case, the Court would seem to restrict these other cases to their facts.

A word here about presumptions. A rereading of *Republic-Le Tourneau* indicates that the Supreme Court did not require the Board to make any showing that solicitation away from the company property was ineffec-

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87 Id. at 232.
88 Indeed, absent the antagonism to the union, it becomes pertinent to inquire whether the offer of or the permission to use a hall owned by the company would not be unlawful assistance under the act.
89 167 F.2d 147 (6th Cir. 1948).
90 324 U.S. at 798-99, citing several other cases.
tive. As a matter of fact, it was stated that the cases were not like those in the mining and lumber camps. Nevertheless, the Supreme Court upheld the Board's presumption against restrictions during nonworking time, including those against the distribution of literature on the parking lot by employees during nonworking time. Now, in Stowe, it seems the Court would not uphold a presumption against the denial of a hall owned by the company, but off plant property, even though other facilities were not easily available. As a matter of fact, even though there was a showing that the hall was needed for effective organizing, the Court concerned itself with manifestations of an antiunion sentiment. Why the difference? It seems to be that, in the Republic-Le Tourneau cases, the statutory rights had been clearly established and incidental dislocations of property rights had to be tolerated. But, in Stowe, it is the property right which is so clear and basic that the statutory right must be accommodated to it. This conclusion will be evaluated later.

Having made this survey of constitutional arguments as developed during the conflict between property rights and employee rights, we should at this point turn to those cases which mark out the line of balance and separation. The cases may all be treated under the rubric of "right to information" and may be subdivided into the rights of those legitimately on the company property and the rights of those who seek admission to the property.

But, in concluding this section of this paper, a word should be added: what has been said about the rights of solicitation is subject to the condition that the union does not freely enter into a collective agreement limiting its rights. It does not seem to be contrary to public policy to permit the union to waive its right to solicit. But, since a

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91 324 U.S. at 798-99.
92 See May Dep't Stores Co., 59 N.L.R.B. 976, 981 n.17 (1944); North Am. Aviation, Inc., 56 N.L.R.B. 959, 962 n.2 (1944).
93 It is a well-settled principle that the policy of the act may not be thwarted by contractual agreement. As regards collective bargaining rights, see J. I. Case Co. v. NLRB, 321 U.S. 332, 337 (1944), affirming 134 F.2d 70 (7th Cir. 1943), enforcing 42 N.L.R.B. 85 (1942); National Licorice Co. v. NLRB, 309 U.S. 350 (1940), affirming 104 F.2d 655 (2d Cir. 1939), enforcing 7 N.L.R.B. 537 (1938); NLRB v. Poultrymen's Serv. Corp., 138 F.2d 204 (3d Cir. 1943), enforcing 41 N.L.R.B. 444 (1942); NLRB v. Reed & Prince Mfg. Co., 118 F.2d 874 (1st Cir.), cert. denied, 313 U.S. 595 (1941), enforcing 12 N.L.R.B. 944 (1939); Hartsell Mills Co. v. NLRB, 111 F.2d 291 (4th Cir. 1940), enforcing 18 N.L.R.B. 268 (1939); Scripto Mfg. Co., 36 N.L.R.B. 411 (1941); Duffy Silk Co., 19 N.L.R.B. 37, 47-48 (1940).
94 See note 92 supra; Clinton Foods, Inc., 112 N.L.R.B. 239, 263-64 (1955) (intermediate report); Fruitville Canning Co., 90 N.L.R.B. 884, 885 (1950); W. T. Smith
waiver could successfully negative the efforts of a minority to change its union affiliation, there is reason to query whether a contractual prohibition of all solicitation would be effective at a time preceding the choice of representatives—assuming it is not then against public policy.95

I. RIGHT TO INFORMATION: PERSONS ON COMPANY PROPERTY

The principles governing rules which forbid solicitation by employees have been rather well codified. We will postpone till later the more perplexing question as to the effect upon these rules of an employer's speech. A general rule96 may be tentatively stated that an employer may not unreasonably restrict the activity of those who are permitted on the property. A restriction upon employees directed to working time, if not discriminatory, is presumptively valid, for it is a reasonable means of assuring uninterrupted production. But, where a rule prohibits solicitation during nonworking hours, it is presumptively invalid. It will not be sufficient that the employer can show some business reason for the prohibition; there must be such special circumstances as will counterbalance the fact that solicitation by employees during free time is an ordinary and valuable union right.


The right to solicit may be compared with the right to strike, which may also be waived. Shell Oil Co., 77 N.L.R.B. 1306, 1349-51 (1948) (employer may bargain in good faith for no-strike agreement); see Bethlehem Steel Co., 89 N.L.R.B. 341, 345 (1950) (a no-strike clause has a "salutary objective"); Shirley-Herman Co. v. International Hod Carriers, 182 F.2d 806, 809 (2d Cir. 1950), citing National Elec. Prods. Corp. [which may be found at 80 N.L.R.B. 995, 1000 (1948)]. However, although an employer may insist upon the inclusion of a no-strike clause in the contract, Shell Oil Co., supra, it would seem he may not insist to impasse on a no-solicitation clause, cf. South Carolina Granite Co., 58 N.L.R.B. 1448, 1460-62 (1944) (semble); NLRB v. Wooster Div. of Borg-Warner, 356 U.S. 342 (1958).


The General Counsel has ruled that a minority group may be prohibited from circulating a petition asking to invalidate an amendment to collective-bargaining contract. Administrative Ruling of Gen. Counsel, No. K-521, 38 L.R.R.M. 1133 (1956).

96 This statement of principles is adapted from Peyton Packing Co., 49 N.L.R.B. 828, 843-44 (1943), which was approved by the Supreme Court in Republic-Le Tourneau and in NLRB v. Babcock & Wilcox Co., 351 U.S. 105 (1956).
The presumption in favor of the validity of rules regulating working time has been overcome by evidence to the effect that a no-solicitation rule has been adopted only as an antiunion measure. Where, for instance, a company posts new rules immediately after organizational activities begin, a failure to show a reasonable relation to production or efficiency may make invalid even the rules governing working time.97 On the other hand, the presumption against restrictions during nonworking time may be overcome where the restriction is necessary to prevent a disruption in production. Where, for instance, the wearing of inflammatory union insignia is likely to exacerbate feeling among the employees and destroy industrial harmony, the employer may validly forbid for a time the wearing of the insignia even during nonworking hours.98 But there must be evidence of a situation which will actually lead to violence or to loss of production while at work,99 and mere warnings by one union that work stoppages will occur unless members of another union cease wearing buttons are insufficient evidence.100 Rest periods and lunch periods, even though an employee is paid during this time, have been held to be nonworking time and are not subject to restriction except under special circumstances.101 Such periods are nonworking time even if no set hours are assigned and the employees are free to leave their working

97 Ford Radio & Mica Corp., 115 N.L.R.B. 1046, 1070-72 (1956) (intermediate report); Delta Finishing Co., 111 N.L.R.B. 659, 661 (1955). This question will be discussed more fully later.

98 Boeing Airplane Co. v. NLRB, 217 F.2d 369, 374-75 (9th Cir. 1954), setting aside on this point 103 N.L.R.B. 1025 (1953); Caterpillar Tractor Co. v. NLRB, 230 F.2d 357 (7th Cir. 1956), setting aside 113 N.L.R.B. 553 (1955) (use of the word "scab" on union button).

99 It is evident, see note 98 supra, that the Beard and the courts have disagreed, not on the principles stated above, but on what constitutes sufficient evidence. Compare Caterpillar Tractor Co., supra note 98, 113 N.L.R.B. at 557, with the opinion of the court, supra note 98, 230 F.2d at 358-59, and with NLRB v. Aintree Corp., 135 F.2d 395, 397 (7th Cir. 1943).

100 Kimble Glass Co., 113 N.L.R.B. 577, 579-81 (1955), enforcement granted, 230 F.2d 484 (6th Cir.), cert. denied, 352 U.S. 836 (1956). The Board, in the majority opinion, points out that interference with production through work stoppages arising out of labor disputes is not a justification for employer rules modifying employee organizational rights. 113 N.L.R.B. at 580.

positions for these purposes when they desire.\textsuperscript{102} Although the burden of proving the need for restrictions during nonworking hours is upon the employer,\textsuperscript{103} proof of the need may be difficult. Where, for instance, an employer showed that production had declined and that discipline was poor, but could not show that this was caused by union solicitation, a no-solicitation rule during nonworking time was held violative of the act.\textsuperscript{104} Even a showing of occasional instances of disorder may not be sufficient to support a ban on all solicitation during nonworking hours.\textsuperscript{105}

Besides the element of time, place is another relevant factor to be considered in weighing the legitimacy of a ban upon solicitation. For instance, it has been held that a prohibition limited to dangerous areas is permissible by way of a safety measure.\textsuperscript{106} A more common and permissible limitation is upon solicitation in the selling areas of retail stores. This doctrine was first enunciated in \textit{May Dep't Stores Co.},\textsuperscript{107} where, while forbidding a rule which prohibited all solicitation on the premises, the Board said that a rule limited to the selling area was proper. For to permit interruptions there in order to carry on union affairs, even during employees' nonworking time, was viewed as disruptive of the employer's business. In forbidding the more general no-solicitation rule, the Board overturned an earlier decision\textsuperscript{108} wherein such a ban had been upheld as tending to serve the interest of the public. The doctrine has been recognized\textsuperscript{109} and applied\textsuperscript{110} in succeeding cases. Even though employees are permitted generally to make luncheon appointments on the selling floor, this privilege may be denied to union organizers on the


\textsuperscript{103} See, e.g., Keystone Steel & Wire Co., 62 N.L.R.B. 683, 699 n.31 (1945), enforcement granted, 155 F.2d 553 (7th Cir. 1946); Illinois Tool Works, 61 N.L.R.B. 1129, 1130 n.3 (1945), enforcement granted, 153 F.2d 811 (7th Cir. 1946).

\textsuperscript{104} Union Mfg. Co., 63 N.L.R.B. 254, 254 n.2 (1945).

\textsuperscript{105} Cf. Scullin Steel Co., 49 N.L.R.B. 405, 411 (1943).

\textsuperscript{106} NLRB v. Kentucky Util. Co., 191 F.2d 858 (6th Cir. 1951).

\textsuperscript{107} 59 N.L.R.B. 976, 981 (1944), enforcement granted, 154 F.2d 533 (8th Cir.), cert. denied, 329 U.S. 725 (1946).

\textsuperscript{108} Marshall Field & Co., 34 N.L.R.B. 1, 10-11 (1941).

\textsuperscript{109} American Tube Bending Co., 102 N.L.R.B. 735, enforcement granted, 205 F.2d 45 (2d Cir. 1953); Bonwit Teller, Inc., 96 N.L.R.B. 608 (1951), enforcement denied on other grounds, 197 F.2d 640 (2d Cir. 1952), cert. denied, 345 U.S. 905 (1953).

ground that something more is involved than the making of the appointment.\footnote{Meier & Frank Co., supra note 110.}

Although the ban cannot be extended to nonworking time off the selling floor,\footnote{Ibid.; May Dep't Stores Co., 59 N.L.R.B. 976 (1944).} attempts to solicit employees in a company restaurant may be forbidden where the nonworking employees and the working employees of the restaurant mix and the working employees are also eligible for membership in the soliciting union.\footnote{Goldblatt Bros., 77 N.L.R.B. 1262 (1948).} By reason of the effect on the working employees, the solicitations are considered to be disruptive of business.

The question of accurately defining the territorial limits of the prohibition was not really faced until \textit{Marshall Field & Co.}\footnote{98 N.L.R.B. 88 (1952), modified and enforced, 200 F.2d 375 (7th Cir. 1952).} The store area was divided by the Board\footnote{Id. at 90, 98.} into:

1. selling area;
2. nonselling public areas:
   a. corridors and passageways not immediately adjacent to selling areas,
   b. elevators, escalators, stairways,
   c. public waiting rooms,
   d. public rest rooms,
   e. a private street open to and used by the public,
   f. public restaurants in the store;
3. nonselling closed areas:
   a. open generally for the employees (\textit{e.g.}, employee restaurant),
   b. working areas.

The company permitted solicitation by off-duty employees in the nonselling closed areas which were open for the general use and by both employees and nonemployees in the public restaurants.\footnote{Id. at 92.} The fact that the ban upon solicitation elsewhere was impartial, was not in itself a defense, for the right of soliciting for a union, unlike other soliciting, has a statutory guarantee. And, in line with its \textit{Peyton Packing} and \textit{May Dep't Stores} decisions, the Board was not prepared to justify a ban throughout the store on the ground that solicitation away from the immediate selling area disrupted business. Nevertheless, the Board upheld the ban insofar as it pertained to the corridors and stairways and similar areas.\footnote{Id. at 90, 98.} The avoidance of congestion and traffic hazards was considered sufficient justification for the rule. The Board ordered that the company permit solicitation in the public waiting rooms and rest rooms, as well as
in the restaurants, subject to reasonable regulations to insure that "solicitation is carried on only as an incident to normal use of such facilities," and that these areas were not converted into "organizational arenas."\(^{118}\) In speaking of the restaurants, the Board stated that, though a restaurant was in a sense a selling-area, the use of the facilities for the solicitation of off-duty employees was a permissible incident, but that organizers need not be permitted to go from table to table.\(^{119}\) The ban as applied to the private street was also found to be invalid.\(^{120}\) On the other hand, the ban as applied to employees in working areas to which they were denied free access was upheld.\(^{121}\) The Board also discussed at length the question whether nonemployees who were organizers should be permitted access to employee areas, but this problem will be considered later in this paper. At this point, though, it can be seen that the Board does insist that, where a nonemployee is permitted on the property, limitations upon his activity must be reasonable and supported by legitimate need, just as in the case of an employee. The court of appeals, however, rejected that part of the Board’s order which would require the company to permit solicitation in the public waiting rooms and rest rooms, on the ground that the employees did not use the facilities in great numbers at any one time and that those who used these facilities were not off duty.\(^{122}\)

Besides time and place, a third relevant factor to be considered in evaluating a ban upon solicitation is the kind of activity which is permitted, whether it is conversation or the distribution of literature. It will be recalled that in the Le Tourneau case the right of employees to distribute literature in the parking lot was upheld as a valid exercise of the right of communication for the purpose of self-organization. This was so, even though the case was "barren of special circumstances" indicating unusual difficulty in organization.\(^{123}\) No distinction was drawn by the Supreme Court between the right to solicit orally and the right to distribute literature. Although the opinion of the Board in Le Tourneau had limited the scope of an earlier case, the Board continued to adhere to that case wherein, for reasons of order and cleanliness, it was said not to

\(^{118}\) Id. at 93, 106.
\(^{119}\) Id. at 94. In so holding, the Board distinguished Goldblatt Bros., 77 N.L.R.B. 1262 (1948), see note 113 and accompanying text, by pointing out that in this instance the restaurant employees who were serving were not the object of solicitation.
\(^{120}\) 98 N.L.R.B. at 93.
\(^{121}\) Id. at 99.
\(^{122}\) 200 F.2d at 380.
\(^{123}\) 324 U.S. at 801, 798-99. The Board, however, seems to have required a showing that distribution elsewhere was difficult.
be unreasonable to prohibit the distribution of literature "at all times."\textsuperscript{124} A series of cases\textsuperscript{125} supported this broad no-distribution rule, though some cases supported rules prohibiting distribution in certain areas on the ground that distribution was permitted in other areas.\textsuperscript{126} Later, the Board began to revise its position and forbade "in plant" or "on the premises" rules which prohibited all distribution.\textsuperscript{127} But the impetus to find no-distribution rules generally invalid was slowed by Newport News Children's Dress Co.,\textsuperscript{128} where a rule forbidding distribution on a parking lot was distinguished from Le Tourneau on the ground that in the present case it was easily possible to distribute elsewhere. Hence, it was said, there was no serious impediment to the freedom of communication. In reconsidering the cases in Monolith Portland Cement Co.,\textsuperscript{129} the Board made the following distinctions:\textsuperscript{130} (1) a prohibition on oral solicitation during nonworking hours must be justified by special reasons; (2) the ban on distribution is justified by reasons of order and cleanliness, at least where the employees may distribute easily and effectively elsewhere, either on or off the company property. Therefore, since the company permitted distribution in the parking lot and at the entrances, there was no objection to a rule forbidding it in the plant. Of course, other reasons, too, may enter into consideration to justify a ban. For instance, in Kimble Glass Co.,\textsuperscript{131} a ban upon distribution in the company

\textsuperscript{124} Tabin-Picker & Co., 50 N.L.R.B. 928, 930 (1943). In Le Tourneau, 54 N.L.R.B. at 1259-61, the Board had distinguished Tabin-Picker on two grounds: (1) in that case, distribution was permitted at the plant gates; hence the Board sustained the no-distribution rule in the plant; (2) reasons of efficiency which would justify the no-distribution rule in the plant did not have the same force when applied to parking lots.


\textsuperscript{126} Brown Shipbuilding Co., 66 N.L.R.B. 1047, 1059-60 (1946) (where distribution was forbidden in the parking lot, but had been permitted at the entrances to the yard); cf. Bausch & Lomb Optical Co., 72 N.L.R.B. 132, 134 (1947) (where, for security reasons, organizers were barred from a particular street).

\textsuperscript{127} Chicopee Mfg. Co., 85 N.L.R.B. 1439, 1440 & n.4 (1949) (violation where rule covered nonworking time in the plant); American-Book-Stratford Press, Inc., 80 N.L.R.B. 914, 915, 931-32 (1948) (a no-distribution rule adopted because of anti-Semitism is invalid). See also NLRB v. American Furnace Co., 158 F.2d 376, 380 (7th Cir.) (dictum), enforcing 65 N.L.R.B. 247 (1946), where it is said that a no-distribution rule is invalid unless special circumstances require it.

\textsuperscript{128} 91 N.L.R.B. 1521 (1950).

\textsuperscript{129} 94 N.L.R.B. 1358 (1951).

\textsuperscript{130} Id. at 1365-66.

\textsuperscript{131} 113 N.L.R.B. 577, 582 (1955), enforcement granted, 230 F.2d 484 (6th Cir.), cert. denied, 352 U.S. 836 (1956).
parking lot was upheld where "parking facilities were inadequate for the large numbers of employees using them, and . . . at shift-changing hours conditions were hazardous."\(^{132}\) Again, in the selling area of a retail store, there are reasons which justify a ban upon distribution as well as upon oral solicitation.\(^{133}\) Finally, where the material to be distributed is scurrilous, insulting, and lampooning in nature, its distribution may be prohibited even though there is no general rule against distributing literature.\(^{134}\) But, where special circumstances are lacking, the Board may hold invalid a rule prohibiting distribution on company property outside the working premises. This was decided in *Monarch Mach. Tool Co.*,\(^{135}\) In that case, however, the Board, as it seems to have done in *Le Tourneau*, required a showing that distribution elsewhere was ineffective or difficult in order to establish that the ban was an unreasonable impediment to effective self-organization.

The principles applied to no-distribution rules have grown out of the same cases which deal with oral solicitation. The common origin of the principles, however, does not obscure the fact that prohibitions of oral solicitations and of the distribution of literature have been differently treated by the Board. The relevant factor in this differential is that the employer has a valid interest in the order and cleanliness of his plant and premises. Since this factor is always present, there seems to be a shifting of the presumption of which the Board spoke in *Peyton Packing* and which was approved by the Supreme Court in *Republic-Le Tourneau*. For, even during nonworking hours, the employer may on these grounds forbid distribution. The burden then seems to be upon the union to show a special need, that is, that distribution cannot easily and effectively be carried on outside the plant. If this showing is made, then the presumption in favor of the rule is rebutted and the Board will require some other special circumstances favoring the rule if the rule is to stand. Yet, even if there be no other circumstances, the Board will strike down

\(^{132}\) 113 N.L.R.B. at 594 (intermediate report).
\(^{133}\) W. T. Grant Co., 94 N.L.R.B. 1133, 1146 (1951).
\(^{134}\) Maryland Drydock Co. v. NLRB, 183 F.2d 538 (4th Cir.), setting aside 88 N.L.R.B. 1305 (1950). But in Caterpillar Tractor Co., 113 N.L.R.B. 553, 557-58 (1955), the Board explains Maryland Drydock on the basis that the conduct prohibited had "no reasonable connection with any proper union activity" in that the epithets were directed against an organization of supervisors whom the union could not represent.

NLRB v. Aintree Corp., 135 F.2d 395 (7th Cir. 1943), denying enforcement to 43 N.L.R.B. 1 (1942).
the rule only so far as to require that distribution be permitted somewhere.

However, the Board has in fact treated solicitation and distribution as essentially different. Although the Board makes mention in its opinions of an employer interest in order and cleanliness, this seems to be in fact treated as irrelevant in circumstances where the employees can distribute outside the plant. In effect, the employer's bare property right is preferred over the employee interest, except when the distribution of literature by the employees would otherwise be very difficult or impossible. However, it is here submitted that the rationale which attempts to distinguish solicitation from distribution is inadequate. Distribution of literature is a traditional organizational activity which, when engaged in during nonworking time, requires that the employer must produce countervailing reasons before he can limit it. The fact that it may be presumed that reasons of order and cleanliness will justify the rule does not change the need for justification when these reasons are challenged. Assuming that it can be demonstrated that there are no reasons supporting the prohibition, it should be concluded that any property right which may be involved may be incidentally curtailed so as to accommodate this traditional employee method of communication. To hold otherwise is not to accommodate employer and employee rights, but to sacrifice a real right and traditional activity to the bare assertion of a property right unsupported by any reasons.

II. RIGHT TO INFORMATION: PERSONS OFF COMPANY PROPERTY

Although few of the cases expressly dealt with the situation, the principles thus far enunciated seem to apply equally to employees and to nonemployees in the area to which they have been permitted access. But a different problem arises in the case of nonemployees to whom the company denies all access. Can the company be required to grant access? If so, under what conditions?

Here we face, in its sharpest form, the constitutional objections which have previously been studied. A reference to *Marsh v. Alabama* and

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136 This statement, which may be derived from Monolith Portland Cement Co., 94 N.L.R.B. at 1365-66, is clearly developed in the Brief for NLRB, pp. 8-12, 16-24, NLRB v. United Steelworkers, CIO, 357 U.S. 357 (1958).

A court of appeals has questioned the tendency of the Board to permit a no-distribution rule "simply because the premises are company property," and has stated that the Board's position is not sustained in any case under the NLRA. United Steelworkers, CIO v. NLRB, 100 U.S. App. D.C. 170, 175, 243 F.2d 593, 598 (1956), setting aside on this point, 112 N.L.R.B. 1153 (1955).

to *NLRB v. Lake Superior Lumber Corp.* may put the problem into immediate perspective. In the former case it was held that a privately owned town could not bar persons who were freely admitted to the town from exercising the right to distribute religious literature. The right of property did not absolve the town from the same constitutional restraints which bind municipalities. The Court said: "The more an owner, for his own advantage, opens up his property for use by the public in general, the more do his rights become circumscribed by the statutory and constitutional rights of those who use it." Mr. Justice Reed, in dissent, calls it a novel doctrine to require a property owner to make his property available for the use of others, and suggests that the case must be limited to cases where the owner "for his own advantage has permitted a restricted public use by his licensees and invitees." But such a limitation, he says, is difficult to define and is a matter of degree.

In *Lake Superior*, the situation was quite different. The employees of the company lived in a lumber camp, rather inaccessible, with the nearest town about eighteen miles away. They spent all their time at the camp, with an occasional Sunday in town. The company restricted the activities and numbers of union representatives, permitting them to visit with union men and to solicit only in the camp hall and only at certain times. Arguing that it would not hurt production, the union demanded the right to visit the men in the bunkhouses. This right was affirmed by the Board and enforced by the court of appeals. Both Board and court relied upon the dictum of the Supreme Court in *Republic-Le Tourneau*, where it was stated that access must be permitted to isolated premises where "union organization must proceed upon the employer's premises or be seriously handicapped."

These cases were contrasted to the issue in *Stowe Spinning Co.* by Mr. Justice Reed, again dissenting. He points out that, in *Stowe*, the question was whether the company could refuse the use of property which was neither part of the premises used by the employees in the business nor an area made available to the employees by reason of their employment. His distinction seems to be valid, no matter what be said of the

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138 167 F.2d 147 (6th Cir. 1948), enforcing 70 N.L.R.B. 178 (1946).
139 326 U.S. at 506.
140 Id. at 512.
141 324 U.S. at 799. See *Lake Superior Lumber Corp.*: 70 N.L.R.B. at 179; 167 F.2d at 151. The court, though, recognized that the Supreme Court opinion was not decisive of this case. 167 F.2d at 150.
merits of the dissent as a whole. For, in Republic-Le Tourneau and Marsh v. Alabama, the basic issue was the right of one on the property to make reasonable use of the property; and, although in both Stowe and Lake Superior the question was one of access, these last two cases are also distinct. In Stowe, the access requested was to private property for the purpose of organizing; in Lake Superior, the access requested was really to the employees.\textsuperscript{143} When the primary purpose of access is to be able to meet employees who themselves already have access to the property in question, it would seem that the use of the property by the organizer may be properly termed incidental.

Thus, from a consideration of the preceding cases, at least three different issues appear: (1) right of the use of property by those already present thereon (Marsh v. Alabama)—a question already discussed; (2) the right to make use of other property for the purpose of organizing by those who have access to the employees (Stowe); (3) the right to have access to property for the purpose of having access to the employees (Lake Superior).

There are several cases dealing with isolated lumber camps and company towns in which this third right was affirmed. In Harlan Fuel Co.,\textsuperscript{144} as we have seen, the right of union organizers to enter into and solicit in a company town was assimilated to the rights of the tenants to invite visitors. In West Kentucky Coal Co.,\textsuperscript{145} without a discussion of property rights, the company was ordered to cease its surveillance of union organizers who entered into the company town. The order was so worded as to forbid any interference with the rights of the employees to receive union organizers and with the right of organizers to meet with employees. In Weyerhaeuser Timber Co.,\textsuperscript{146} an isolated lumber camp was again the site of the dispute. Even though their presence was requested by employees, union representatives were denied free access; this was held to be an unfair labor practice. The Board also found that, even without regard to the employees' request, it was an unfair labor practice to exclude union representatives out of a motive of hostility. Subsequently, in American Cyanamid Co.,\textsuperscript{147} it was determined that a company could

\textsuperscript{143} This distinction was made by the court of appeals in Lake Superior, 167 F.2d at 152, referring to the Stowe decision in the lower court.

\textsuperscript{144} 8 N.L.R.B. 25 (1938).

\textsuperscript{145} 10 N.L.R.B. 88, 105-07, 133 (1938), enforced with modifications not material here, 116 F.2d 816 (6th Cir. 1940).

\textsuperscript{146} 31 N.L.R.B. 258, 264-67 (1941), modified by consent and enforced, 9 L.R.R.M. No. 660-B (9th Cir. 1941).

\textsuperscript{147} 37 N.L.R.B. 578, 585-89 (1941).
not bar some of its employees from access to other employees for motives of race segregation and antiunion bias. This action of the company was viewed as interfering with the right of full freedom to receive aid, advice, and information from others.\(^{148}\) This board decision was emphatically affirmed in Ozan Lumber Co.,\(^{149}\) in which the right of access to other persons living on the property was stressed,\(^{150}\) as well as the right to receive information.

The question of access is not, however, limited solely to company towns and lumber camps. It arose in Marshall Field & Co.\(^{151}\) over whether union organizers should be allowed access to nonselling closed areas of the store. The Board balanced the property right of control against the right of self-organization. Finding that organization was difficult because of the privileged no-solicitation rule in the selling area and because of the staggered relief periods of the employees, the Board ordered that the company permit nonemployee organizers to have access to the employee cafeterias in reasonable numbers and under reasonable restrictions.\(^{152}\) In an effort to establish the right of the union to organize, rather than merely the right of the employees to receive information necessary for self-organization, the Board quoted Thomas v. Collins\(^{153}\) to the effect that the employee and the union have correlative rights of discussion. However, the Thomas case at this point deals not only with statutory guarantees, but with rights of free speech under the first amendment; and it is inapposite when applied to the question of whether the right of organization includes a right of access. Lacking this right to organize, access might rightly be denied in the reasonable exercise of property control. The right of information stems from the employees' right of self-organization, and it is neither necessary nor proper to try to establish an independent right on the part of the union. This digression aside, it should be noted that Marshall Field was the first case in which the Board dealt directly with a right of entry of nonemployees into closed areas of department stores. The Board recognized that the geographical limitations were not so severe upon the unions as in a lumber camp, but found,

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\(^{148}\) Id. at 586. See Harland Fuel Co., 8 N.L.R.B. 25, 32 (1938).

\(^{149}\) 42 N.L.R.B. 1073 (1942).

\(^{150}\) Id. at 1079.

\(^{151}\) 98 N.L.R.B. 88 (1952), enforcement denied on this point, 200 F.2d 375 (7th Cir. 1952).

\(^{152}\) 98 N.L.R.B. at 95-98, 98 n.23, 106.

\(^{153}\) 323 U.S. 516, 533-34 (1945), quoted in 98 N.L.R.B. at 97 n.21. The court of appeals also cites Thomas v. Collins to the same effect in the Lake Superior opinion. 167 F.2d at 151.
nevertheless, as it had in Republic-Le Tourneau, that there was a severe impediment to the basic right of self-organization.

Yet, the court gave little weight to this board finding. It seems the court overruled the Board because it thought that there was ample opportunity for solicitation outside the closed area, and that organization was, therefore, not "seriously handicapped."\(^{154}\) On the other hand, the court emphasizes that in Republic and Le Tourneau the organizers were employees, and it may be ruling that nonemployees have no right of entry, that the right of organization and of information is directly the right of the employees. But it does not rule out the possibility that under some circumstances a dislocation of property rights may be required in favor of nonemployees.\(^{155}\)

Again, cases have arisen regarding access to tankers while in port.\(^{156}\) The Cities Serv. Oil Co. case has already been discussed. It will be recalled that, in order to permit shore delegates to process grievances, the court enforced a board order that shore delegates be given access; but it will also be recalled that the delegate was not given the opportunity to solicit union membership or to collect dues. In Richfield Oil Corp.,\(^{157}\) the Board ordered and the court enforced the order that the delegates be permitted to collect union dues and to distribute the union newspaper, but did not require access for the purpose of soliciting membership. In Cities Serv. Oil Co., it was affirmed that the company could take reasonable precautions to see that safety was not endangered and that discipline was not destroyed and that the pass was not abused.\(^{158}\) In both cases, the Board adverted to whether the admission of a union for the purpose of handling grievances would require that the vessel be open to access by all unions lest discrimination be charged.\(^{159}\) But the Board refused to decide this question, as being irrelevant to the case.\(^{160}\) However, it would seem improper that the company should be required to admit union representatives for the purpose of processing grievances of their own

\(^{154}\) 200 F.2d at 379, 382.

\(^{155}\) Id. at 382.

\(^{156}\) Richfield Oil Corp., 49 N.L.R.B. 593 (1943), enforced in part, 143 F.2d 860 (9th Cir. 1944); Cities Serv. Oil Co., 25 N.L.R.B. 36 (1940), enforced in part, 122 F.2d 149 (2d Cir. 1941).

\(^{157}\) Supra note 156.

\(^{158}\) 25 N.L.R.B. at 51-55; 122 F.2d at 151-52.

\(^{159}\) Richfield, 49 N.L.R.B. at 603; Cities Serv., 25 N.L.R.B. at 57.

\(^{160}\) However, in Cities Serv. Oil Co., 25 N.L.R.B. 36, 57 n.37 (1940), the Board cites a number of earlier cases wherein, for reasons of discrimination, the company was ordered to give equal treatment to all unions.
members, and to find as a consequence that all unions should be permitted to board ship to solicit.\textsuperscript{161} Nor did the Board decide whether access must be made available to all unions which are the representatives of some employees on board;\textsuperscript{162} its findings are limited to situations involving unions representing a majority of the seamen or an appropriate unit thereof. Insofar as the board argument is based on the need of making effective collective bargaining over grievances, it would seem proper to exclude minority unions with whom the company has no duty to bargain and to exclude other unions which wish access for purposes of solicitation.\textsuperscript{163}

Discrimination between unions, however, is a valid reason for intervention under the labor act. Thus, during an election campaign an employer is forbidden to permit the use of company facilities by his employees organized in a company union while denying equal facilities

\textsuperscript{161} The cases cited in Cities Serv. Oil Co., see note 160 supra, do not require this result when they are compared to Cities Serv. Oil Co. and to Richfield. One of the cases, Texas Co., 19 N.L.R.B. 835, 840 (1940), stated that a company was privileged to deny access to all unions. However, this would seem to be in part overruled by Cities Serv. and Richfield. Two cases dealt with elections where one union was permitted aboard (though nothing is said as to the scope of the privileges accorded the union) and the other was denied access. Isthmian S.S. Co., 19 N.L.R.B. 16, 20 (1940); American France Line, 3 N.L.R.B. 64, 76, 78-79 (1937). In two other cases, it is made clear that one union had free access to the vessels and another was not allowed to board. American-West African Lines, Inc., 21 N.L.R.B. 691, 705-06 (1940) (even a valid closed-shop agreement is not grounds for permitting one union to have access for "organizational purposes" while denying access to the other); South Atl. S.S. Co., 12 N.L.R.B. 1367, 1379-80 (1939) (the privileged union had "free access").

The more difficult case to explain is Waterman S.S. Co., 7 N.L.R.B. 237, 240-42 (1938), enforcement denied, 103 F.2d 157 (5th Cir. 1939), rev'd and enforcement granted, 309 U.S. 206 (1940). Here the company claimed that it permitted access to one union solely for the purpose of collecting union dues, and that it did not discriminate unlawfully when it refused to grant passes to all unions for the purpose of soliciting. The Board found that in fact the privileged union gained an advantage, and the Supreme Court affirmed an order requiring that union representatives of both unions should receive equal treatment. However, it would seem that the company, by more careful supervision, could prevent the abuse of the pass, see Cities Serv. Oil Co., 122 F.2d at 152, or could revoke it. By enforcing the requirement that there be no solicitation by the one union, the company could rightly refuse access to other unions.

\textsuperscript{162} Cities Serv. Oil Co., 23 N.L.R.B. 36, 57 (1940).

\textsuperscript{163} The ground for argument is clearly different from that in Lake Superior. Here, it is to make collective bargaining effective; there, it was to make organization possible. But, even where unions may have access for purposes of solicitation, the frequency of visits to closed areas may be subject to reasonable restrictions when many wish to enter. See the preceding discussion and Lake Superior, 167 F.2d at 151.
to the outside union.\textsuperscript{164} By stating that the employer was not under an obligation to make the facilities available to either union,\textsuperscript{165} the court helped to point out the distinction between gaining access to the employees on an equal footing and gaining access to property for the purpose of influencing the employees. For the purpose of clarifying what has been said about discrimination, we might turn to \textit{Phillips Petroleum Co.},\textsuperscript{166} a case closely paralleling \textit{Stowe Spinning Co.}, where the union was denied the use of a company hall in a company town. Hence, it deals with the right of access to property, rather than to employees. It was argued in \textit{Phillips} that \textit{Stowe} stands for the proposition that an employer may not out of antiunion motives deny the use of facilities to a union when he grants them to others. But the Board held that motive is immaterial;\textsuperscript{167} it is the denial to the union when others are not denied that is the discrimination and, in the circumstances, constitutes an interference with the rights of the employees under section 7 of the act.

A reading and comparison of the cases just above will indicate that many factors enter into the weighing of statutory rights of organization as against rights of property. Some factors which have been prominent are: (1) \textit{Location} of the employees. Is it extremely difficult or impossible to organize unless others enter upon the property? Have the employees invited the organizers or union representatives? Have the employees a property right of ingress and egress at tenants? Does this right extend to those visiting them on express or implied invitation? (2) \textit{Degree of organization}. Do the union representatives wish to see only members of their union? To fulfill the statutory right of bargaining over grievances? Does the union wish to solicit new members? (3) \textit{Purpose of union}. Does it seek access to \textit{employees}, either union members or not? Or does it seek access to the \textit{property} for the purpose of organizing? (4) \textit{Discrimination}. Antiunion bias? Disparate treatment of unions as between themselves? Disparate treatment of unions as compared with other organizations? (5) \textit{Reasons} for limiting access. Discipline? Safety? (6) \textit{Right of self-organization}. Does the union have a correlative right to organize?

There is another major factor which will now be considered, that of the \textit{status} of the party seeking access, \textit{i.e.}, whether he be employee or nonemployee. The Board has been accused of having neglected this

\item[\textsuperscript{164}] Westinghouse Elec. & Mfg. Co., 18 N.L.R.B. 300, 311 (1939), modified and enforced, 112 F.2d 657 (2d Cir. 1940), aff'd without opinion, 312 U.S. 660 (1941).
\item[\textsuperscript{165}] 112 F.2d at 660 (dictum).
\item[\textsuperscript{166}] 92 N.L.R.B. 1344 (1951).
\item[\textsuperscript{167}] Republic Aviation and Le Tourneau illustrate that, regardless of motive, unreasonable rules may be a serious impediment to organization.
factor. In both *Caldwell Furniture Co.* \(^{169}\) and *Carolina Mills*,\(^ {170}\) without discussing extensively whether the rights of employees and non-employees differed, the Board clearly affirmed the right of nonemployees to distribute literature on company property, grounding its opinions on one of the factors in *Le Tourneau*, that is, that distribution off the plant site was difficult. There was no evidence in *Le Tourneau*, however, that the means of communication in general were ineffective for self-organization, and the Supreme Court commented that no difference was shown between the company plant and other large plants.\(^ {171}\) As we have seen, the Board has really treated no-distribution rules (*Le Tourneau*) differently from solicitation rules (*Republic Aviation*) in that the board cases have had a tendency to rely upon the fact that distribution away from the plant was ineffective before the Board would hold the no-distribution rule to be invalid. Hence, in relying on this factor in *Caldwell* and *Carolina Mills*, the Board did not offer any novel relevant factors to counterbalance the claim that the company owed no duty to nonemployee organizers.

Whether or not one thinks that the showing of a difficulty in distributing was decisive in the Supreme Court opinion in *Le Tourneau*, the Board would still face a new problem in trying to fit the *Le Tourneau* rationale to the case of nonemployees. What balance of rights is to be made? What factors will be relevant in determining this balance? The problem was made concrete in three cases\(^ {172}\) which were finally decided by the Supreme Court in *NLRB v. Babcock & Wilcox Co.*\(^ {173}\)

The Board did not seem at all to realize that status was a relevant factor, and, in one report approved by the Board, it was stated that a distinction between employee and nonemployee in this matter "would be a differentiation not only without substance but in clear defiance of the


\(^ {169}\) 97 N.L.R.B. 1501, 1509-10, enforcement granted, 199 F.2d 267 (4th Cir. 1952), cert. denied, 345 U.S. 907 (1953).

\(^ {170}\) 92 N.L.R.B. 1141, 1149, 1168-69, enforcement granted, 190 F.2d 675 (4th Cir. 1951).

\(^ {171}\) 324 U.S. at 801, 798.


To these cases may be added Monsanto Chem. Co., 108 N.L.R.B. 1110 (1954), enforcement denied, 225 F.2d 16 (9th Cir. 1955), cert. denied, 351 U.S. 923 (1956).

\(^ {173}\) 351 U.S. 105 (1956). The Seamprufe and Ranco cases, supra note 172, were decided together with Babcock & Wilcox.
rationale given by the Board and the courts for permitting solicitation.\textsuperscript{174} It may be said that the rejection of this distinction was decisive in all the cases,\textsuperscript{178} for, except for the fact that union representatives were involved rather than employees, the cases are on all fours with \textit{Le Tourneau}. In each instance, the plant was located some distance from the city; distribution at the exits to the highways was difficult and hazardous;\textsuperscript{178} the employees lived in a wide area and at a great distance from the plant; the union sought access to a parking lot for the purpose of distributing literature; the plant had in effect a no-distribution rule, impartially applied.\textsuperscript{177} And, in each case, having found that distribution by the union off company property was virtually impossible,\textsuperscript{178} the Board ordered that the company cease barring the nonemployee union representatives from distributing literature on the parking lot. Moreover, other than the asserted right of the unions to engage in these activities as a part of the right of information and self-organization guaranteed under the act, there are no elements presented which are favorable to the union claim. It is a question of the distribution of literature, rather than of solicitation; and we have seen that the Board is more likely to give weight to the employer's interests in this situation. The rules were impartially enforced, leaving no claim of discrimination to support the union.\textsuperscript{179} The employees are not so isolated as in a mining or lumber camp, making it difficult to show that organization must proceed upon the employer's premises or not at all.\textsuperscript{180} Nor was the union here


\textsuperscript{175} It appears that this can be asserted also of Ranco, Inc., supra note 174. Although the concurring opinion takes cognizance of the existence of employees and nonemployees and speaks of the nonemployee as having the burden of proof, it seems that a nonemployee union organizer need show no more in order to justify his entrance upon the property than an employee need in fact show before the Board will declare a no-distribution rule invalid.

\textsuperscript{176} But see Monsanto Chem. Co., 108 N.L.R.B. 1110, 1111 (1954) (dissent).

\textsuperscript{177} But see Ranco, Inc., 109 N.L.R.B. 998, 1001-02, 1004 (1954) (dissent and intermediate report) (employees could distribute in parking lot).


\textsuperscript{179} As, for instance, in NLRB v. Stowe Spinning Co., 336 U.S. 226 (1949).

\textsuperscript{180} See Republic Aviation Corp. v. NLRB, 324 U.S. 793, 799 (1945); NLRB v. Lake Superior Lumber Corp., 167 F.2d 147, 151 (6th Cir. 1948).
in question the bargaining agent for the employees,181 nor present at the invitation of its members.182

On the issue whether employers were guilty of an unfair labor practice in refusing to allow nonemployees to use parking lots for distributing literature when it was difficult for the union to distribute it off the company property, the Supreme Court overruled the Board. Yet Babcock & Wilcox183 cannot be read as establishing the rule that nonemployees need never be given permission to enter upon private property for the purpose of solicitation and for the distribution of literature. A rule so broad would be clearly opposed to Lake Superior Lumber Co.,184 which was cited with approval in Babcock & Wilcox.186 Indeed, the Court itself makes clear that the access of nonemployees to company property is not per se outside the scope of the act, though it is governed by principles different from those in Le Tourneau.186 In Le Tourneau, the Court dealt with a right which was given directly to the employees, that of self-organization. The right to speak about this and to distribute literature is so clearly protected by the act that an employer has to show special circumstances before he can limit such activities during nonworking time. But it seems that any right of the nonemployee union organizer is derivative, for the act is directed to the protection, not of union organization as such, but of the men in the organizations—to protect them from reprisals by their employers. Nevertheless, "if the location of a plant and the living quarters of the employees place the employees beyond the reach of reasonable union efforts to communicate with them, the employer must allow the union to approach his employees on his property."187 And, again, "when the inaccessibility of employees makes ineffective the reasonable attempts by nonemployees to communicate with them through the usual channels, the right to exclude from property has been required to yield to the extent needed to permit communication of information on the right to organize."188

This language is not limited solely to cases where men are isolated in

181 See NLRB v. Cities Serv. Oil Co., 122 F.2d 149 (2d Cir. 1941). In NLRB v. Seam-prufe, Inc., 222 F.2d 858, 861 (10th Cir. 1955), this is also pointed out.
182 See Weyerhaeuser Timber Co., 31 N.L.R.B. 258, 266 (1941).
184 NLRB v. Lake Superior Lumber Corp., 167 F.2d 147 (6th Cir. 1948).
185 351 U.S. at 111. And see Republic Aviation Corp. v. NLRB, 324 U.S. 793, 799 n.3 (1945).
186 351 U.S. at 113.
187 Ibid.
188 Id. at 112. (Emphasis added.)
lumber camps and mining camps, as in cases already discussed. But, where a nonemployee union man wishes entry to private property, he has a burden of showing, not just that distribution off the premises would be ineffective, but that reasonable attempts through all other means are ineffective. And what are reasonable attempts? Though it may be unreasonable to expect an employee to have recourse to other means when his right of conversation or distribution is limited under ordinary circumstances during nonworking hours, it is not unreasonable that the union be first required to have recourse to these other means. In Le Tourneau and Republic it was thought immaterial that other means might be available to the employees; in Babcock & Wilcox this is a pertinent issue. The distinction between employee and nonemployee is, then, "one of substance." The nonemployee has no rights which are infringed merely by denying him access or the right to solicit on company property. On the other hand, the same is not true of the employee; he has a right and his right to solicit may not be infringed without reason; he is on the property and may, special circumstances being absent, exercise his right during nonworking time. But the nonemployee must show that a particular situation is such that only by admission to the property can employees enjoy the right "to learn the advantages of self-organization from others." But, assuming that such a showing is made, the employer may be required to grant entry.

The major defect, then, in the Board's approach to these cases was a failure to show that the employees could not effectively organize unless nonemployees could enter upon the property. Even in the case which recognized a distinction between employee and nonemployee rights, the only showing required on the part of the union was that distribution off the premises was difficult for the union. From the fact, however, that the Court rejected an argument that employee and nonemployee rights were equated in this way, it does not follow that, in somewhat similar circumstances, a showing cannot be made that the exchange of infor-

190 Le Tourneau stands at least for the proposition that, even though other means of communication may be easy and effective, where distribution to employees is difficult off the property, a company may not validly enforce a no-distribution rule during nonworking hours against employees.
191 351 U.S. at 113.
192 Ibid. If, however, the company order discriminates against the union by allowing other distribution, this showing would not be required. Id. at 112.
193 The Court said the Board made no showing. 351 U.S. at 112.
mation which the act envisages is virtually impossible through any other means of communication than hand-to-hand distribution. Personal contact is one of the most effective of organizing devices, and it might be unreasonable to make the union carry on a hopeless campaign by phone and mail over scattered areas. This, however, is the kind of decision which the Board cannot intuit without reference to particular facts; it must investigate these other possibilities so as to arrive at a solid conclusion that “reasonable attempts by nonemployees to communicate with . . . [employees] through the usual channels” are “ineffective.”

The Court has also made it clear that “the Board has the responsibility of ‘applying the Act’s general prohibitory language in the light of the infinite combinations of events which might be charged as violative of its terms.’” Hence, it would seem that the Board’s decision in these cases was reversed, not because it cannot be sustained in these circumstances, but because “no such conditions are shown in these records,” and because the opinions were founded on “erroneous legal foundations.”

At this point in this survey, it may be stated that there is no constitutional ground for asserting that, under proper statutory authority, the courts cannot command even an affirmative action in derogation of property rights. An objection to this effect was made by the court of appeals in Stowe, apparently on constitutional as well as statutory grounds. But, in the light of constitutional doctrine, it seems clearly established

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195 351 U.S. at 112. The usual channels include “personal contacts on streets or at home, telephones, letters, or advertised meetings.” Id. at 111.

196 351 U.S. at 111-12, citing Republic Aviation Corp. v. NLRB, 324 U.S. 793, 798 (1945).

197 351 U.S. at 113. However, some of the courts of appeals had gone further, and had found that there was in fact “no impediment to union solicitation off company property amounting to a deprivation of the right of self-organization.” NLRB v. Seamprufe, Inc., 222 F.2d 858, 861 (10th Cir. 1955); NLRB v. Monsanto Chem. Co., 225 F.2d 16, 21 (9th Cir. 1955). It would seem that this is a finding of fact more properly within the competence of the Board, unless the availability of some method of communication, even though in fact useless, as a matter of law constitutes a means for “effective self-organization.” But, in the lumber-camp cases, the union was not remitted to the device of mailing literature to the camps.

198 351 U.S. at 112.


that Congress has the power, in its regulation of commerce through the labor act, to command that property be made available to union organizers, provided that it be shown that this is necessary or appropriate to the achievement of a permissible legislative end. In exceptional circumstances, such as shown by Lake Superior Lumber Co., this has already been done. Perhaps it can be shown to be necessary in geographical circumstances similar to those in Babcock & Wilcox. In weighing this necessity and striking a balance, the Board should consider how much or little the admission of nonemployees to a property under reasonable restrictions will prejudice the interest of the owner. First, the interest in order and cleanliness is less persuasive at the parking lot than in the plant proper. Second, if the employer must permit employees in these circumstances to distribute, the use of the property will not be substantially different if the hand-out is done by others. Third, reasonable restrictions would protect the employer from abuse. There is no reason to suppose that he would have to make the lot available at every request, nor permit the lot to become the arena in an organizational struggle. Expenses of cleaning up could be charged. As a final comment on this point, the opening of the property to nonemployees could be limited as to time; once there had been an adequate chance to communicate with the employees, the right of self-organization and of receiving information would seem to have been satisfactorily exercised. Thereafter, it might be proper to expect that employees, rather than nonemployees, carry on the program of developing union interest.

At the same time, the Board and courts must give full weight to the fundamental right of control over property. This should not be sacrificed to the convenience of the union, except where necessary for the accomplishment of the legislative purpose. The mere fact that organizational work can be more expeditiously carried out at the hands of nonemployee union specialists than by interested employees, is no reason to require that a company open its gates to these organizers. As long as an accepted means of communication is available to the union—one which enables

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261 However, a problem could arise where permission to use the lot was given to employees who belong to one union at a time when an outside union began to organize. This problem was hinted at in Cities Serv. Oil Co., 25 N.L.R.B. 36 (1940), but there was no question there of granting access for the purpose of soliciting. The same problem would exist if two different groups of employees were engaged in organizational work for two different unions. But in these cases, as well as where the competing unions used only nonemployees, it seems that the employer may validly restrict nonemployee distribution to the extent that, once effective communication of information is established, further distribution may be prohibited, if prohibited to all.
the union successfully to inform, though, perhaps, not to persuade—and as long as the employees who wish to do so may solicit and distribute effectively in their free time, it would seem that employee interests are sufficiently safeguarded under the terms of the act.

It might be helpful here to re-evaluate the major preceding cases in the light of the discussion which has taken place. The Republic and Le Tourneau cases have stood the test both of analysis and of time; without displacing any substantial property right, the statutory rights of the employees have been safeguarded both as to oral solicitation and, in general, as to the distribution of literature. The Board has been careful to balance the opposing rights in the particular circumstances of each subsequent case, and, although one may disagree with some cases as to what inference is to be drawn from the facts, the Board seems to have proceeded in a reasonable manner with the approval of the courts. The Lake Superior case seems likewise to deserve approval. It deals with exceptional circumstances, and, in spite of an apparent assault on the right of entry, is supported by both the statutory logic of the need for effective self-organization and by the constitutional reasoning which requires that an employer permit freedom of entry to tenants and employee residents. In like fashion, Cities Serv. Oil Co. may be said to be based on a sound understanding of the statute. The case is carefully limited so as to permit entry necessary for the carrying out of the collective bargaining function of the union over grievances; but, lacking any showing of need, the courts have refused to permit access for the purpose of solicitation. Babcock & Wilcox, therefore, is also to be commended for insisting upon the preservation of property rights, lacking any showing of need for effective self-organization. It is not a direct object of the labor act to protect the desire of unions for the most effective and simple organizational techniques; the act does not guarantee success, but only that the avenues of communication are open enough so that the employees may be informed adequately of their rights. Assuming though that a showing of the impossibility of effective self-organization were made, the case indicates that a limitation of the property right could be soundly derived from the statute and would not be prohibited by the Constitution.

The most difficult case to assess is Stowe Spinning Co. Should a company be required to make available to the union property which is made available to other organizations? Stowe Spinning Co. may be approved if the holding be limited to the circumstances of the case, i.e., a situation wherein: (1) ordinary facilities are under the control of the company; (2) facilities are not available elsewhere; and (3) the company makes
the facilities available to other groups. This limited holding would not require generally that companies make facilities available for union organizing. Where other facilities may be easily found, or where the company does not have facilities for this purpose, no company property will be subjected to union interests. Mere need on the part of the union is not enough, under the terms of the act, to require that the company turn over, for instance, a factory warehouse to a union meeting. Nor is it required that the company build a meeting place where there is none. If, however, it wishes to attract personnel into a company town by building a meeting place, then, assuming other facilities are not available, it cannot deny the use of the hall to the union. It is the combination of union "needs" and employer "discrimination" which constitutes the restraint upon union and concerted activities. This may properly be called a "restraint," because unions and employees should be entitled to use facilities generally available; a refusal discourages and retards the process of self-organization. Though a known hostility toward the union is more likely to produce this restraining effect, hostility is not required.202

III. RIGHT TO INFORMATION: DISCRIMINATION

The final problem pertaining to the subject of this paper involves the balance which should exist between lawful no-solicitation rules and expressions of antiunion sentiment by the employer. In a larger sense, this problem is concerned with the notion of "discrimination,"203 which should here be analyzed, although it will not be possible to discuss all the problems to which this element gives rise.204

A starting point for discussion may be found in the origins of Livingston Shirt Corp.205 The case grew out of free-speech cases,206 rather than

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203 The Board has said: "Discrimination involves an intent to distinguish in the treatment of employees on the basis of union affiliations or activities, . . . and it is immaterial whether this be done by the means of discriminatory company rules, or of the discriminatory application of non-discriminatory rules, or in the absence of any rule." Botany Worsted Mills, 4 N.L.R.B. 292, 300 (1937), enforcement granted, 106 F.2d 263 (3d Cir. 1940).
204 For the development and application of this question in general, see Millis & Brown, From the Wagner Act to Taft-Hartley 101-03, 190-203, 428-30 (1950); Cox, Some Aspects of the Labor Management Relations Act, 1947, 61 Harv. L. Rev. 1, 20-24 (1947); Daykin, Employees' Right To Organize on Company Time and Company Property, 42 Ill. L. Rev. 301, 306-10 (1947); Ward, "Discrimination" Under the National Labor Relations Act, 48 Yale L.J. 1159 (1939); Annot., 100 L.Ed. 984, 994-97 (1956).
205 107 N.L.R.B. 400 (1953).
206 An evaluation of the free-speech problems, which are inherent in these cases, is beyond the scope of this paper.
property-rights cases. It will be recalled that, in the beginning of the administration of the act, the Board required that the employer remain neutral\textsuperscript{207}; he was not permitted to express antiunion sentiments. But, in \textit{NLRB v. Virginia Elec. & Power Co.},\textsuperscript{208} the Supreme Court stated that the employer was free to take sides on the issue of organization in his plant. The Board, however, remained free to decide whether the “totality of conduct” of the employer was such as to be coercive. Though, in the years prior to the adoption of the Taft-Hartley Act, the lines of permissible conduct were not clearly defined, the Board did clearly restrict the employer’s right to speak in cases where he called his employees together to address them in a group during working time.\textsuperscript{209} The Board found that a talk given to such a “captive audience” was in itself coercive. The court did not go so far; it suggested that the action would not be an unfair labor practice if the employer would give the union an equal chance to reply. After the passage of the Taft-Hartley Act, the “captive audience” doctrine was overruled.\textsuperscript{210}

Then, in \textit{Bonwit Teller, Inc.},\textsuperscript{211} the question of a company speech on company time and property took on a different posture. At this point, the Board’s theory impinges upon the issues of this paper. The issue which was faced was not whether an employer speech was coercive either in itself or because of the captive audience; it was held that it was not. The issue was not whether the rules were valid which had been promulgated by the company, a retail store, forbidding solicitation during working hours and on the selling floor; these rules had not been attacked. But the Board found that there was an unfair labor practice in the refusal of the company to grant the union an opportunity to reply to the antionunion speech which had been given on company time and property. Two reasons were advanced for the finding.\textsuperscript{212} First, the Board found discrimination in the application of the valid no-solicitation rules; this discrimination consisted in the employer’s use of the premises to urge the employees to reject the union while forbidding solicitation by the union.\textsuperscript{213} This discrimination was found, not in the mere denial of equal

\textsuperscript{207} For a discussion of the free-speech developments in this area, see Millis & Brown, From the Wagner Act to Taft-Hartley 174-89, 422-25 (1950).

\textsuperscript{208} 314 U.S. 469 (1941).

\textsuperscript{209} Clark Bros., 70 N.L.R.B. 802 (1946), modified and enforced, 163 F.2d 373 (2d Cir. 1947).

\textsuperscript{210} Babcock & Wilcox Co., 77 N.L.R.B. 577 (1948).

\textsuperscript{211} 96 N.L.R.B. 608 (1951), enforcement denied, 197 F.2d 640 (2d Cir. 1952), cert. denied, 345 U.S. 905 (1953).

\textsuperscript{212} 96 N.L.R.B. at 611-15.

\textsuperscript{213} Id. at 622 (intermediate report).
facilities, but in an "abuse" of the privilege "to promulgate the broadest type of rule against union solicitation." The second reason advanced was the broader one that "an employer who chooses to use his premises to assemble his employees and speak against a union may not deny that union's reasonable request for the same opportunity to present its case, where the circumstances are such that only by granting such request will the employees have a reasonable opportunity to hear both sides." The Board states that a case-by-case approach will be necessary in determining what particular "circumstances" give rise to such a duty. The court of appeals accepted the first reason and rejected the second in enforcing the Board order. In a subsequent case, the court of appeals reaffirmed its reasoning. Then, in Livingston Shirt Corp., the Board also adopted this reasoning, rejecting its wider rule of "equal opportunity" and stating that, in the absence of a privileged no-solicitation rule, the refusal to grant the union an opportunity to reply to a company antiunion speech was not violative of the act.

At the risk of anticipating some comments about subsequent cases, it will prove helpful to analyze here the argument of the preceding cases. The word "discrimination" may mean many things: the exercise of economic power in reprisal for concerted activities; marks of preference for one union over another; refusal of permission to a union which is granted to others—whether out of union hostility or not; refusal to permit the union or the employees to make the same use of plant property as the employer. But in 8(a)(1) cases, "discrimination" may well be a makeweight, an expression which gives a semblance

214 Id. at 612.
215 Ibid.
216 NLRB v. American Tube Bending Co., 205 F.2d 45 (2d Cir. 1953).
217 A privileged no-solicitation rule is one by which retail stores may prohibit solicitation in sales areas even during working time.
218 Consider the confusion which the term "discrimination" can sow when, in the same case, it is said that a rule is not discriminatorily enforced against named parties and also that a suspension of these same parties for violation of the rule was discriminatory. Compare Le Tourneau Co., 54 N.L.R.B. 1253, 1259 (1944), with id. at 1262.
219 This is primarily in reference to § 8(a)(3) cases. For a discussion of the meaning of the term "discrimination" in § 8(a)(3), see Radio Officers Union, AFL v. NLRB, 347 U.S. 17, 23, 42-52 (1954) and the cases and articles there cited.
220 See, e.g., note 161 supra.
of reason to cases not properly bottomed on fundamentals.\textsuperscript{225} For, violations of 8(a)(1) are not founded upon discrimination, but upon interference, restraint, or coercion. Some acts directly interfere with rights guaranteed by the labor act to the employees, and it is immaterial whether these acts are "discriminatory" or not.\textsuperscript{226} Discrimination and antunion motivation enter into the consideration of the Board for two purposes: (1) as an element to be considered in deciding whether or not there is interference, restraint, or coercion under the act;\textsuperscript{227} (2) as evidence that there is no substantial foundation for an asserted justification for a no-solicitation rule which would be invalid without the justification.

Further, I submit that "discrimination" in the application of no-solicitation rules and "equal opportunity" to speak on company time and property are reductively the same, in that each is really based upon the notion that effective self-organization is protected by the act. Where the employer speaks on his own property, even absent any rules about solicitation, he is "discriminating" if he refuses the same opportunity to others. And, where he does have rules in effect and yet takes an opportunity to speak on company time and property, he is denying equal opportunity to the employees and the union. There is this difference only between the two theories as applied: in weighing the needs of the union and the employees for effective self-organization, the lack of opportunity which follows upon a no-solicitation rule is one more element to be weighed. Hence, it is possible that one may conclude that, where solicitation is possible, there is no serious impediment to the right of organization, even if the employer speaks; and yet hold that, where solicitation is forbidden, there is an interference. But the conclusions are to be drawn from the facts, and are not dependent upon the choice of words, whether there was "discrimination" or not.

The fundamental issue seems to have been recognized by the Board in \textit{Livingston Shirt}. Granting that the employer has the right to express antiunion sentiments, both majority and minority opinions ask whether the expression of these views on company time and premises would unduly hinder the union in carrying on organizational activities. It is submitted that it is really upon this issue, rather than any other, that analysis should begin. The majority states:

\textsuperscript{225} Early cases are poor sources for an understanding of this problem, as they were based, at least in part, on the conviction that the employer had to remain neutral.\textsuperscript{226} E.g., prohibitions against solicitations in nonworking time in the circumstances of Republic Aviation, 324 U.S. 793 (1945).\textsuperscript{227} NLRB v. Stowe Spinning Co., 336 U.S. 226 (1949).
We do not believe that unions will be unduly hindered in their right to carry on organizational activities by our refusal to open up to them the employer’s premises for group meetings, particularly since this is an area from which they have traditionally been excluded, and there remains open to them all the customary means for communicating with employees. These include individual contact with employees on the employer’s premises outside working hours (absent, of course, a privileged broad no-solicitation rule), solicitation while entering and leaving the premises, at their homes, and at union meetings. These are time-honored and traditional means by which unions have conducted their organizational campaigns, and experience shows that they are fully adequate to accomplish unionization and accord employees their rights under the Act to freely choose a bargaining agent.228

The minority opinion, however, after discussing several available surveys of union organizational activities, states:

Accordingly, it is clear from the 18-year experience of this Agency, as well as from the evidence and expert opinion available, that once the pressures inherent in employer antilabor speeches delivered on company time and property are exerted, other methods of communication with those employees are not adequate for purposes of reply. This being so, the assertion of the majority that union use of these unequal and subsidiary methods and media is sufficient to dispel the harmful effects of such employer speeches is clearly erroneous.229

Hence, in the cases up to Livingston Shirt, the real questions before the Board were: (1) Is it an interference with the right of self-organization to refuse to give to the union an opportunity to reply, on equal terms, to a company speech on company time and property? (2) Is it an interference with the right of self-organization to refuse to give to the union an opportunity to reply, on equal terms, to a company speech on company time and property, where a valid privileged no-solicitation rule is in effect?

The basic issue, then, is where to draw the line between asserted claims of “effective self-organization” and claims of “property” and “free speech.” Though each proceeds from clear authority, that is, from statute and the Constitution, neither is absolute in the sense that it need not heed the clams of the other.230 Just as property rights may be dislocated, so may the statutory right of self-organization be limited in its logical extension where the conflicting claims of property or employer rights are the stronger. Thus, effective self-organization does not mean that the employee and the union are entitled to demand affirmative aid whenever it proves helpful or convenient. Nor does it mean that the statutory right given to the employer under section 8(c), whereby he is permitted to

228 107 N.L.R.B. at 406.
229 Id. at 424 (dissenting opinion).
230 See Republic Aviation Corp. v. NLRB, 324 U.S. 793, 797-98 (1945).
engage in noncoercive antiunion speech, is to be whittled down merely because it imposes additional hardships upon the union. While a final and complete theory of the balance of rights and of statutory policy will have to await further development by the Board and the pinpricks of judicial decision, it seems proper that any working out of the balance should give consideration both to traditionally established patterns of conduct and to special protections granted under the act. In this process, there is not much place for a per se rule which can be followed for all cases, although, in line with the previous analyses, broad areas may be described in which the limits of allowable employer conduct are rather clearly marked.

Thus, it may be said that the employer need not make his premises available to the union every time he makes a speech. A coercive speech is, of course, itself a violation of the act, and the Board should protect union interests against such pressures. Although it is true that an anti-union, but noncoercive, speech by the employer will slow down union organization, nevertheless, where the usual means of union activity are available, the refusal of a chance to reply does not seem to be the kind of interference with union activity which is forbidden by the act. The union is still free to pursue its traditional activities. These traditional activities have not included a right to solicit during working time; therefore, the existence of a valid rule prohibiting solicitation during working time is irrelevant. The act was not intended to guarantee the success of organization, but only to protect employees against unfair actions on the part of the employer, while affording a fair opportunity for organization.

Hence, we assume with the majority of the Board in Livingston Shirt that a union can effectively organize, even after an antiunion speech by the employer, by utilizing traditional means. The difficulty occasioned by the speech, though great, is not such as of itself to constitute a virtual impossibility to organize, and, hence, the refusal of equal opportunity to reply does not constitute an unfair labor practice. Any objection to this position should be, it seems, directed to the fact that the law permits the antiunion speech itself. Considering the strong economic position of the employer, it might be argued that the law should be changed so as to permit the Board more easily to find the speech itself is coercive and an unfair labor practice—so far as this does not run afoul of constitutional guarantees. But, once it is admitted that the speech is a proper exercise of a constitutional or statutory right, then, in the light of the fact that there is no interference with traditional union means of communication, it would seem that there is no obligation of permitting a union rebuttal. The employer may be restrained from showing preference to one union
over another, or to antiunion elements over union sympathizers. But, when he himself speaks, interference cannot be found. The union still has the same means at hand to communicate effectively, although it may be that it will not do so persuasively.

The anomaly of this position is clear. An employer may not, for instance, invite or permit other parties to make antiunion speeches, nor permit facilities to be used by one union group in preference to another. At the same time, since the employer’s right to speak against the union was affirmed by the adoption of section 8(c) of the Taft-Hartley Act, the employer is enabled to try to accomplish the same ends himself.

It may be of some significance, however, that the Board in Livingston Shirt assumed that nonemployees were permitted on the premises. Among the customary means of communication, the Board lists “contact with employees on the employer’s premises outside working hours . . . .” Perhaps, then, in cases where the nonemployees are completely barred from the premises and the employer speaks on company time and premises, the Board may find that the employees do not have adequate means for self-organization. On the other hand, in the light of Babcock & Wilcox, it is clear that a nonemployee organizer as such has no right to demand entry to the premises; and, if the means of communication before available are deemed “effective” under the tests of that case, it is difficult to see how a company speech would do more than make the union appeal less persuasive.

When a case presents a privileged no-solicitation rule, the same elements must be again evaluated. One such recent case, actually antedating Livingston Shirt, was F. W. Woolworth Co. This case, like that of Bonwit Teller, involved a retail store and a rule prohibiting solicitation at any time in the retail area. Although the rule itself is valid, it was questioned whether it was an unfair labor practice for the company to refuse to allow the union an opportunity to address the employees on company time and property after the company had addressed them. On the authority of Bonwit Teller and based on the “discrimination” which the company manifested by its action, the Board held that the company

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231 NLRB v. American Furnace Co., 158 F.2d 376 (7th Cir. 1946).
234 Livingston Shirt Corp., 107 N.L.R.B. at 406.
235 102 N.L.R.B. 581 (1953), enforcement denied, 214 F.2d 78 (6th Cir. 1954).
236 See text accompanying notes 108-22 supra.
had violated section 8(a)(1). Thus the Board applied a per se rule, disregarding the argument of the company that the union possessed other means of communication. The court of appeals, hearing the case after the Board’s decision in Livingston Shirt, refused to enforce the board order.

It is profitable to compare the reasoning of the courts in both Bonwit Teller and Woolworth. In the first case, the Second Circuit accepted the argument of “discrimination,” but found the Board’s order too broad. The court said that, if the company were to abandon its rule against solicitation, it would not be required to permit a union reply each time it addressed its own employees. “Nothing in the Act nor in reason compels such ‘an eye for an eye, a tooth for a tooth’ result so long as the avenues of communication are kept open to both sides.”

The Sixth Circuit, in Woolworth, rejecting the arguments for “equal opportunity” and “discrimination,” emphasized the employer’s right under section 8(c) to engage in antiunion, noncoercive speeches, and refused to enforce the Board’s order. After pointing out that the employer speeches were given during working time and that there had been no showing that the employees were denied the right to speak for the union during free time, the court said:

In the light of the sweeping statutory provision and the legislative history [of section 8(c)] a no-solicitation rule cannot prevent an employer from conferring with his own employees on his own premises and on his own time and the rule is not discriminatorily applied because of the employer’s refusal to permit the union to campaign on its premises when there are adequate facilities for access to the employees.

Although it seems clear that the Second Circuit accepted the theory that “discrimination” was per se an interference with employee rights and although it seems clear that the Sixth Circuit based its holding of no violation on an argument for free speech, nevertheless, in line with the preceding analysis, it is suggested that the real question which demands an answer is twofold: (1) Does the justification for a privileged no-solicitation rule cease when the company chooses to speak? (2) Absent

237 102 N.L.R.B. at 581 n.2, 585.
238 Id. at 585 n.4.
239 197 F.2d at 646.
240 214 F.2d at 79.
241 Id. at 81.
242 Id. at 78.
243 Id. at 81.
244 Ibid.
the opportunity for solicitation and present the fact of an antiunion speech, can the employees still organize "effectively"? This issue is, in fact, implied even in the court decisions just discussed, where it is recognized that the avenues of communication are to be kept open for both sides and that there should be adequate facilities for access to the employees.

If the issue as proposed is accepted, it becomes clear that the "discrimination" of which the Board spoke in Woolworth is irrelevant. The employer's speech took place during working time, and, in line with the analysis suggested for Livingston Shirt, any discrimination which may be found in refusing the union an opportunity to reply during working time is still not violative of the act. But it may be asserted that the emphasis on freedom to speak is also not to the point. Although this argument clearly indicates that the employer is not required to offer a return engagement to the union merely because he speaks, his freedom to speak does not immunize him if he otherwise interferes with the traditional means of communication and self-organization or with the statutory policy of the act.

If, then, the question is framed in terms of justification for the privileged no-solicitation rule, it will be seen that, although the same reasons in support of the rule may still be urged after a speech, the Board faces a new problem in weighing competing claims. The company argument is still strong; it is still interested in efficient saleswork and may still expect that union solicitation upon the sales floor during nonworking or working time would injure sales. These reasons are not the less real merely because the company was willing to take a loss of business revenue by devoting some working time of the day to an antiunion speech. Nevertheless, these reasons are not sufficient to establish an absolute constitutional or statutory right to maintain discipline in this fashion. Indeed, it will be recalled that the general rule forbids employers to prohibit solicitation during nonworking time; the privileged no-solicitation rule is an exception "in order to prevent undue interruption or disturbance of the customer-salesperson relationship . . ." Arguing from Peyton Packing Co., the employer may be called upon to justify his

245 Bonwit Teller, Inc. v. NLRB, 197 F.2d 640, 646 (2d Cir. 1952).
246 NLRB v. F. W. Woolworth Co., 214 F.2d 78, 79 (6th Cir. 1954). Consider also the attention which the court gave to existing facilities for organization. Id. at 79.
247 See id. at 85 (concurring opinion).
249 49 N.L.R.B. 828, 843-44 (1943).
rule in the light of all the circumstances. In circumstances of antilunion action by the employer on his own premises, the Board would be justified in re-evaluating the legitimacy of the privileged rule. Where the company makes its store an arena of union combat (as it may legitimately do), a new dimension enters into its claim legitimately to interfere with traditional employee activities because of economic reasons. The legitimacy vel non of the rule depends, not upon the antilunion activity of the employer as such, but upon a factual question whether the employees can effectively communicate. Any interference which may be found will be the result of the restrictions upon employee activity by the no-solicitation rule, and not because of an employer speech or the refusal to permit a reply. Hence, the Board will not be justified in adopting a per se rule, but will have to attend to the particulars of each case.

Thus, it may be seen that in this instance the second question proposed above is merely a variant of the first. For, if the Board finds that the employees are unable under these circumstances to communicate effectively, then the no-solicitation rule may be found invalid. In making its evaluation, the Board will be called upon to elucidate the concept of "effective" organization. While it may be a matter of degree for the Board, still "effective" organization does not mean the same thing as "successful." The interjection of an antilunion speech, it would seem, goes generally to the prospect of success rather than to the capability of the union and of the employees to engage in concerted activities. Nevertheless, an evaluation of all the facilities available to the employees and the union under the circumstances may indicate that the company is unjustified, no matter how valid its economic reasons, in restricting employee activity during free time in an arena dedicated to antilunion solicitation.

The Board thus may not avoid the obligation in particular cases of determining the needs of self-organization, of appreciating the value of competing claims of property and free speech, and of measuring the

251 "Effective" organization is not a univocal concept. Where there is a showing of interference with traditional means of employee communication, there need not be a showing that solicitation through other means is ineffective. Republic Aviation Corp. v. NLRB, 324 U.S. 793, 798-99 (1945). But where the Board balances the statutory policy with managerial needs, the Board considers the effectiveness of other means. However, where the union or employee claim is not tied to traditional activities, a greater need is required. See, e.g., NLRB v. Babcock & Wilcox Co., 351 U.S. 105, 112-13 (1956) ("reasonable" union efforts); Republic Aviation Corp. v. NLRB, supra at 799 (dictum) (union organization is "seriously handicapped").
relative importance of the sacrifices which may be required. The National Labor Relations Act "did not undertake the impossible task of specifying in precise and unmistakable language each incident which would constitute an unfair labor practice. On the contrary, that Act left to the Board the work of applying the Act's general prohibitory language in the light of the infinite combinations of events which might be charged as violative of its terms."252 However, in Woolworth, the Board contended that the adequacy of facilities is irrelevant.253 Since, however, it is precisely this point which the Board must evaluate, it is not surprising that the court of appeals rejected the arguments presented by the Board. This basic issue as here proposed has not yet been subjected to the Board's analysis and to judicial scrutiny. This was pointed out in the concurring opinion in Woolworth:

[T]he act complained of dealt with working time only. That portion of the rule pertaining to non-working time was not involved and was not enforced. That portion of the rule which was enforced was a valid regulation. Whether that portion of the rule dealing with non-working time is invalid, and whether an attempt by respondent to enforce it against the Union would constitute an unfair labor practice, presents an entirely different and separable controversy, to be properly determined in a separate proceeding when and if such an act occurs.254

Thus, while the Board's own rationale in Livingston Shirt is applicable where the complaint is in relation to working time, the issue of the validity of the privileged no-solicitation rule remains to be argued.

If the Board directs its attention to this issue, it will find that a showing of invalidity will be made more difficult by the holding of the Supreme Court in Babcock & Wilcox. For the Board has consistently given weight in these cases to its belief the nonemployee union organizer has a right to enter upon the property equally with the employee.255 On the other hand, a showing of invalidity may be more easily supported by pointing out, first, that in the case of retail stores the union representative is already permitted on the property and is not seeking access, and, second, that the privileged rule is a to-be-justified restriction upon a traditional means of employee communication, namely, the right of solicitation during free time. Hence less reason would be required to prohibit this interference than would be required, for instance, to command an affirmative act such as affording ingress to nonemployee organizers

252 Republic Aviation Corp., supra note 251, at 798.
253 214 F.2d at 83. See also 102 N.L.R.B. at 585 n.4 (intermediate report).
254 214 F.2d at 84 (concurring opinion).
255 See, e.g., F. W. Woolworth Co., 102 N.L.R.B. at 585 (intermediate report) and cases already discussed in this paper.
in lumber camps. The Board should consider the advisability of orders in the alternative.

Other facets of the problems introduced by the notion of "discrimination" are presented in Nutone, Inc., and Avondale Mills. The first of these cases involved a no-distribution rule which the company enforced even during nonworking time. The Board, considering that its conclusion was a logical consequence of Livingston Shirt and of section 8(c), refused to find that the company violated the act by not following the rule itself and by distributing noncoercive antunion literature and posting signs on its own property. "Valid plant rules against solicitation and other forms of union activity," said the Board, "do not control an employer's actions.

However, other charges of unlawful interrogation of employees and of unlawful assistance were sustained. On petition by the union for review, a stipulated issue was presented to the court of appeals:

Whether an employer commits an unfair labor practice if, during a pre-election period, it enforces an otherwise valid rule against employee distribution of union literature in the plant, while during that same period, itself distributing non-coercive antiunion literature within the plant in a context of other unfair labor practices . . .

The court reversed the Board for two reasons. First, the court stated that no justification for the rule is to be found, since the distribution of material by the company negatives any justification arising out of an interest in cleanliness, order, or discipline. Second, the court held that section 8(c) afforded no protection in this matter, since the employer remains under an obligation to justify his prohibition.

The Supreme Court, in reversing the court of appeals, stated first that there was "no indication in the record . . . that the employees, or the
union on their behalf, requested the employer, himself engaging in anti-
union solicitation, to make an exception to the rule for pro-union solici-
tation"; and second that "no attempt was made . . . to make a show-
ing that the no-solicitation rules truly diminished the ability of the labor
organizations involved to carry their message to the employees." But,
in the light of the Court's statement that the party attacking the enforce-
ment of the no-distribution rule did not contest its validity and of its
statement that the record is barren of ingredients which could show that
the enforcement of the rule is an unfair labor practice, it may be ar-
gued that the holding of the Court is a narrow one. The fundamental
issues which are inherent to the case may still be litigated on a proper
record.

In *Nutone*, the Steelworkers argued in general terms that an employer
is bound by his own rules, that a failure to observe them is unlawful
"discriminatory" action. This argument is directed primarily to the
principle that "the right to speak freely, given by Section 8(c), should
not affect the established doctrine that a rule forbidding or limiting
employee solicitation constitutes a violation of the Act *unless it is appli-
cable to all.* That doctrine, which is wider than the issues of *Nutone*
and involves *Livingston Shirt, Bonwit Teller*, and *Woolworth*,
seems incompatible with the reasoning of the Supreme Court in *Nutone*.
But this is the issue which the conflict of the circuit courts and
the petition for certiorari presented to the Court. It is submitted that
*Nutone* must be read as rejecting the argument so far as it is founded on
"equal opportunity" or "discrimination" and would in all circumstances
bind the employer by his own rules. On the other hand, it need not be
concluded that section 8(c) protects the employer in any and all anti-

266 357 U.S. at 363.
267 Id. at 363.
268 Id. at 362.
269 Id. at 364.
270 Brief for Respondent, pp. 5-9, 12, 13-14, 30-32, 37, NLRB v. United Steelworkers,
CIO, 357 U.S. 357 (1958); Memorandum for Respondent, p. 4; see also 100 U.S. App. D.C.
at 175, 243 F.2d at 598.
271 Brief for Respondent, p. 7. (Emphasis added.)
273 Labor organizations are not "entitled to use a medium of communication simply
because the employer is using it." 357 U.S. at 364.
274 See Petition for Cert., pp. 8-11, NLRB v. United Steelworkers, CIO, 357 U.S. 357
(1958).
275 See the statement of the Court as to the "narrow and almost abstract question"
presented for review. 357 U.S. at 362.
union noncoercive solicitation. The narrow holding of the Supreme Court seems to be that, regardless of 8(c), it cannot be concluded that the failure of an employer to follow his own restrictive rules is *ea ipso* an unfair labor practice. The case so read is consistent with and confirmative of the analysis so far presented in this paper.

The issue of the validity of the rule was discussed by the parties. It was not, however, an issue independently presented to the Supreme Court. The basic invalidity of the rule was not challenged in the proceedings except insofar as it was argued that the failure of the company to follow the rule invalidated it. In addition, even were the union arguments to be read as squarely presenting the issue, the record would not sustain a judgment against the company on this ground. For, as was suggested in an earlier analysis, there is this difference between no-distribution and no-solicitation rules, that a presumption may properly exist in favor of a no-distribution rule even during nonworking time. The failure to rebut the presumption or to challenge the validity of the rule before the trial examiner leaves the record “barren of the ingredients for such a finding” in the Supreme Court. Therefore, it is concluded that the only issue decided by the Court was that a valid rule is not made invalid merely because the employer does not choose to follow it.

Thus, the issue of the basic validity of the rule is still to be determined. At the threshold of discussion, however, a challenge is presented by the assertion of the General Counsel in *Nutone* that the distribution of literature is essentially a different activity from oral solicitation and that the distribution of literature during nonworking time is not a normal

276 "We do not at all imply that the enforcement of a valid no-solicitation rule by an employer who is at the same time engaging in anti-union solicitation may not constitute an unfair labor practice. All we hold is that there must be some basis . . . for such a finding." 357 U.S. at 364.

277 Brief for NLRB, pp. 2, 8-12, 16-24, 40-43; Brief for Respondent, pp. 9-12, 16, 18-24, 38-51.

278 "[T]he party attacking the enforcement of the no-solicitation rule [did not] contest its validity." 357 U.S. at 362. The acceptance by the parties of the rule as valid is also indicated by the trial examiner, 112 N.L.R.B. at 1165, by the Board, 112 N.L.R.B. at 1154 n.2, and by the General Counsel, Brief for NLRB, pp. 4, 17.

279 Although much of the argument presented by Steelworkers before the Supreme Court is persuasive and pertinent to the issue of the basic validity of the rule, the issue is always dealt with in a context of the broad argument referred to above. See also Brief for NLRB, pp. 4-5, 8-9, 30 (explaining the theory of the case).

280 See pp. 287-88 supra.

281 357 U.S. at 364.
and customary means of employee communication.\textsuperscript{282} It follows that, in the absence of a showing of special need on the part of the employee, the employer may always forbid distribution of literature at all times.\textsuperscript{283} If this be true, then, according to the analysis we have made of \textit{Livingston Shirt}, there would be no unfair labor practice involved in publishing noncoercive expressions of opinion, since there is no interference with traditional methods of organization. However, as explained previously,\textsuperscript{284} it is consonant with neither reason\textsuperscript{285} nor authority\textsuperscript{286} to distinguish in this fashion between solicitation and distribution. Therefore, the assertion is to be rejected that the bare claim of property right (unsustained by reasons of economic interest in order, cleanliness, or discipline) justifies a no-distribution rule during nonworking time. Both solicitation and distribution are entitled to the same protection.

If this be admitted, then a solution of the issue presented can follow upon the application of the tests suggested before. Indeed, it will not be necessary, perhaps, for the Board to reach the second test, that is, of deciding whether the employees can "effectively" organize. For, in this set of circumstances unlike that in \textit{Woolworth}, the union can probably show that the reasons which ordinarily justify the rule cease when the employer violates the rule. In \textit{Woolworth}, the company suspended operations and was willing to take a loss in so doing; but it did not want to take a further loss by giving the union a chance to reply. Since its \textit{reasons} remained valid (though no longer decisive), the Board, we said, is put to re-evaluating organizational needs in order to see whether the

\textsuperscript{282} Brief for NLRB, pp. 8-12, 12-14, 16-24.
\textsuperscript{283} Id., p. 17.
\textsuperscript{284} See p. 288 supra.
\textsuperscript{285} The reasons offered in the Board's opinions and in the argument of the General Counsel in the brief in NuTone point out some differences in these organizational techniques, but these are insufficient to prove that an employee's use of free time is entitled to substantial protection when he speaks, but not when he hands out literature.
\textsuperscript{286} See NLRB v. Le Tourneau Co., 324 U.S. 793 (1945). For the analysis of this case, see notes 65-73, 123, 190 supra and accompanying text. "No restriction may be placed on the employees' right to discuss self-organization among themselves unless the employer can demonstrate that a restriction is necessary to maintain production or discipline." NLRB v. Babcock & Wilcox Co., 351 U.S. 105, 113 (1956) (dealing with a no-distribution rule). See NLRB v. American Furnace Co., 158 F.2d 376, 380 (7th Cir. 1946) (dictum); cf. NLRB v. Carolina Mills, Inc., 190 F.2d 675 (4th Cir. 1951); Maryland Drydock Co. v. NLRB, 183 F.2d 538, 542 (4th Cir. 1950) (dictum).

The authorities cited by the General Counsel, Brief for NLRB, p. 19 n.5, NLRB v. United Steelworkers, CIO, 357 U.S. 357 (1958), do not support the argument for which they are cited, id., pp. 19 n.6, 19-24, 42.
rule remains valid. But, in NuTone, the employer's reasons based on cleanliness and order would seem generally to be nonexistent where he, too, distributes. At least, were the employees permitted to distribute at the same time, it seems that no additional hardship can be claimed by the employer. If the rule can thus be shown to be unjustified and invalid in its application, there will be no need for the union to make a showing of its own special disability.

However, let it now be supposed that, in analogy to Woolworth, a company by distributing during working hours is able to preserve its reasons for objecting to union distribution during nonworking time. Were that the case, the Board must be ready to re-evaluate organizational needs. The restriction on distribution is known to be an interference with a basic organizational right. The employer's title to interfere with that right becomes less entitled to recognition when he chooses to arm himself with the weapons he would deny to his employees. Thus, in certain cases, the restriction on distribution during nonworking time may be found violative of the act. The employer is not penalized; he is merely prohibited from interfering with a basic employee right. In other words, his privilege to interfere with that right depends on a balancing of all relevant factors. In making an evaluation of the conflicting claims, weight should perhaps be given to the efficacy of the traditional means involved. Thus, if it be accepted that distribution of literature is more effective than oral solicitation,287 there will be more reason here than in Woolworth to strike down the prohibition.

If the above analysis is correct, what is to be said of the arguments in NuTone288 about the interpretation of 8(c)? As has been explained, section 8(c) protects an employer in his antiunion utterances and does not require that he refrain from activities merely because he prohibits them to his employees. When this be conceded and when the protections thus afforded be guarded, the free-speech argument becomes irrelevant to the other question as to whether the prohibitions themselves are valid or whether they unlawfully interfere with traditional means of employee communication.

Avondale Mills289 was decided by the Supreme Court together with NuTone. The question proposed by the Board to the Court was:

287 To this end, the arguments proposed in Brief for Respondent, pp. 42-50, NLRB v. United Steelworkers, CIO, 357 U.S. 357 (1958), will be found persuasive.
288 See Brief for NLRB, pp. 12-15, 25-40; Brief for Respondent, pp. 30-37. See also the court opinions in NuTone, Woolworth, and Bonwit Teller.
Whether a rule prohibiting employees from engaging in pro-union solicitation during working hours, otherwise valid under the tests enunciated by this Court, is invalidly applied if the employer himself is engaged in unlawful, coercive, anti-union solicitation during working hours.\textsuperscript{290}

Since in this case the employer activity was admittedly unlawful,\textsuperscript{291} no claim was made that section 8(c) protected the company.\textsuperscript{292} The common denominator of argument in \textit{Avondale} and \textit{NuTone} is the assertion that an employer may not engage in activity which he forbids to his employees.\textsuperscript{293} In \textit{Avondale}, the Board emphasizes this argument by pointing to the coercive and unlawful nature of the company activity.\textsuperscript{294} This question, characterized as "strictly a legal one" by the Board,\textsuperscript{295} received a twofold answer: (1) employees are not entitled as a matter of law to use a medium of communication merely because the employer uses it;\textsuperscript{296} and, (2) there is no evidence in the record for invalidating the rule in question on the ground that it truly diminishes the ability of the union to communicate with the employees.\textsuperscript{297}

However, by having not foreclosed the issue, the Court's opinion suggests that the Board may appraise whether an imbalance in organizational opportunities is created and whether, in these circumstances, the union may effectively reach the employees with pro-union messages.\textsuperscript{298} It may be argued that where coercive antiunion solicitation is promoted

\textsuperscript{290} Brief for NLRB, p. 3, NLRB v. Avondale Mills, 357 U.S. 357 (1958). (Emphasis added.)


It is interesting to note that the Board's order, as finally enforced by the court of appeals, see Petition for Cert., p. 20, NLRB v. Avondale Mills, 357 U.S. 357 (1958), required that the company cease from soliciting employees "to withdraw their membership from the said Union." This order, which seems so broad in view of the employer's right of free speech, can be explained on the ground that the company did not contest it, see 242 F.2d at 670, or on the ground that the solicitation referred to is limited to coercive solicitation.

\textsuperscript{292} See 357 U.S. at 365 (Warren, C.J., dissenting); Brief for NLRB, p. 17 n.6.

\textsuperscript{293} "The very narrow and almost abstract question here derives from the claim that, when the employer himself engages in anti-union solicitation that if engaged in by his employees would constitute a violation of the rule—particularly when his solicitation is coercive or accompanied by other unfair labor practices—his enforcement of an otherwise valid no-solicitation rule against the employees is itself an unfair labor practice." 357 U.S. at 362.

\textsuperscript{294} See Brief for NLRB, pp. 13, 18-19.


\textsuperscript{296} 357 U.S. at 364.

\textsuperscript{297} Id. at 363.

\textsuperscript{298} See id. at 364.
by a company, the employees and the union cannot effectively communicate for the purpose of answering these attacks and for organizing, unless they have a chance to reply in the same surroundings. The best reply—or, as it must here be argued, the only effective reply—is to be able to stand up against attack and to show publicly that the union is strong enough to meet the company's coercion. If this showing could be made, the Board could certainly weigh the statutory policy against the claimed rights to manage property and production without interference.

Two points are to be noted, however. First, the rule of the company prohibiting solicitation during working time does not interfere with any normal or traditional organizational activity. Second, the company's reasons for the rule—efficiency and production—remain valid. Hence, the Board must here find that "union organization must proceed upon the employer's premises or be seriously handicapped." In addition, the availability under the labor act to the employees of a remedy against coercive and unlawful solicitation limits the need for a reply in kind. It is the statutory duty of the Board, not of the union, to protect the employees from unlawful interference. When to all this is added the difficulty that the Board would face in framing any suitable remedy, it would appear that it will at least be difficult for the Board to prove a violation of section 8(a) (1).

299 The General Counsel argued that "if the employer's concern in promulgating a no-solicitation rule was the valid one that working time is for work, he would not utilize the same working time to engage in coercive anti-union solicitation." Brief for NLRB, p. 17. It is irrelevant to this argument that the solicitation is coercive. Even so, the loss of production which might follow upon the employer's action is not indicative that he might not wish to avoid further loss of production. Further, the company argued persuasively that the supervisors were able to engage in solicitation without the harm to production which would follow upon an employee's leaving his post. Brief for Respondent, pp. 44-46.

300 See Republic Aviation Corp. v. NLRB, 324 U.S. 793, 799 (1945). This test, applied to lumber camps in Republic, would seem applicable in this instance, too. The Board, of course, will be called upon to evaluate the standard.

301 The Board, for instance, could hardly permit the employees to leave their work at any time to solicit. The departure of employees from their machines is both a hazard and a hindrance to production.

In the lumber-camp cases, it was sufficient for the Board to order that organizers be admitted to the property under reasonable conditions. Lake Superior Lumber Corp., 70 N.L.R.B. 178, 180 (1946), enforcement granted, 167 F.2d 147, 151-52 (6th Cir. 1948). But, in ordering a relaxation of a no-solicitation rule during working time, it is the reasonableness of this very restriction which must be measured, and the Board would be required to propose an alternative.

302 But it also appears that this is a matter for the Board to attempt, and not the courts. Mr. Chief Justice Warren in dissent, 357 U.S. at 365-68, treated the balance of interests as a question of law, for the Board's opinion in Avondale did not attempt the task.
However, the Board has discussed at length another possible line of attack upon the company's action, an attack upon the basic validity of the rule by reason of discrimination. This line of argument was, however, not successfully presented to the Supreme Court. The argument, based upon *Peyton Packing Co.*, holds that a prohibition covering working time is invalid if adopted for a discriminatory purpose. The cases cited in support of the argument all support the principle, but the decisions may be as readily analyzed in terms of prohibitions upon nonworking time as in terms of discrimination. While the court of appeals in *Avondale* held that the principle was not applicable, it also relied upon it as a statement of the law, a reliance concurred in by Avondale Mills. Nevertheless, insofar as the principle suggests that a rule is invalid whenever prompted "by a desire to prevent unionization of its employees rather than by consideration of plant production and efficiency . . .", it is open to question.

First, the statement is indifferent to the existence of reasons which could support the rule, so long as the motive be antiunion. Yet it would seem that the exercise of an admitted property right which can be justified for economic reasons, should no more be declared unlawful because of an antiunion motive than is the corresponding exercise of the right of free speech. Discrimination is a many-hued word; but it seems inadvisable to extend it so that, in the promulgation of rules, an antiunion motive becomes the sole determinant of the issue of validity. If the

303 115 N.L.R.B. at 841-43; Brief for NLRB, pp. 14-19.
304 The analysis of the Board's argument can be extended by considering the cases which were cited in Avondale Mills, 115 N.L.R.B. at 843 n.9: Delta Finishing Co., 111 N.L.R.B. 659, 661-62 (1955); Cullman Elec. Co-op., 99 N.L.R.B. 753, 754 (1952); Standard-Coosa-Thatcher Co., 85 N.L.R.B. 1358, 1364-65 (1949).
305 The analysis of this factor is similar to what was said in the preceding discussion of NuTone. The question presented, see note 290 supra and accompanying text, the statement of the Court, "[T]he party attacking the enforcement of the no-solicitation rule [did not] contest its validity," 357 U.S. at 362, and the argument as stated by the General Counsel, Brief for NLRB, pp. 18-19, all indicate that the Court was not asked to pass upon the validity of the rule in itself.
306 Carter Carburetor Corp. v. NLRB, 140 F.2d 714, 716-17 (8th Cir. 1944); NLRB v. Denver Tent & Awning Co., 138 F.2d 410 (10th Cir. 1943); NLRB v. William Davies Co., 135 F.2d 179, 181 (7th Cir. 1943). These cases are cited in Brief for NLRB, pp. 15-16, NLRB v. Avondale Mills, 357 U.S. 357 (1958).
307 242 F.2d at 671. The court said that the fact that the company was opposed to the union did not furnish substantial evidence of an unlawful and discriminatory purpose. Ibid.
309 Avondale Mills, 115 N.L.R.B. at 842. (Emphasis added.)
310 See notes 219-24 supra and accompanying text.
rule is "otherwise valid," the employee can (and, for the other valid reasons which could be proposed, should) observe the rule, and this without detriment to ordinary union activities. The imposition of an economic penalty upon an individual employee for the violation of a rule presents a different question when the employer could, but does not, then rely on these valid reasons or does not enforce the rules impartially.311 Such action should be unlawful, whether the rule concerns solicitation or something else. For, disparity of treatment among individuals does restrain them from other concerted activities. But, as regards the promulgation of a rule even out of antiunion motives, if the rule is adopted and enforced impartially, there seems to be no unlawful discrimination nor any interference with or coercion of employees in the exercise of their rights. Adequate protection will be assured if it be required that there be no interference with traditional means of communication, that there be valid reasons which could support the rule, that the rule be impartially enforced. Unions and employees are not so sensitive to antiunion attitudes that they are helpless, vacillating, or timid merely because the employer expresses his distaste for unions by insisting on his "otherwise" acceptable prerogatives.312

However, it may then be asked whether an "otherwise valid" rule is unlawfully enforced when it is not enforced against all. This test, too, cannot be the sole determinant. While, for instance, a rule against distribution cannot be enforced even against nonemployee organizers if the employer generally allows other distribution,313 it may be questioned whether he must open his property to the union when he opens it to a Red Cross drive,314 or to the Cancer Fund, the Community Chest, and the Heart Foundation.315 The Board does not always conclude from these factors that the rule is necessarily invalid.316 This is a reasonable

311 In this case, even though the employer appeal to § 10(c), 61 Stat. 147 (1947), 29 U.S.C. § 160(c) (1952) forbidding an order of reinstatement where the discharge is for "cause," the Board may find the discharge to be a violation of § 8(a)(3) and order reinstatement. NLRB v. Dixie Shirt Co., 176 F.2d 969, 973-74 (4th Cir. 1949).
312 At this point it may be hesitantly suggested that, even where the employer cannot show reasons for a rule (limited to working time), he does not violate the act merely because he promulgates the rule out of antiunion motives. Not only would a conclusive presumption that reasons exist adhere rather closely to industrial reality, but (assuming the employees can show no special needs) the employees have only a bare claim themselves.
314 See, e.g., Avondale Mills, 115 N.L.R.B. at 851.
315 See, e.g., NuTone, Inc., 112 N.L.R.B. at 1164.
interpretation of the requirement of impartiality. Rather than discriminate against unions, the company gives preferred treatment (at some cost to itself) to worthwhile civic and nonindustrial groups. There is reason for this preference. But, if the company forbids only union solicitation, it is properly required to show not only a relation of its rule to plant efficiency, but also special reasons why only the union activity was banned. But, assuming that the company can do this, there is no need to require that the rule ban all activity.317

The imprecision of the principles used by the Board gives rise to a suspicion that the proof of antiunion motivation has in some instances been permitted to substitute for the statutory requirement of interference, restraint, or coercion. In cases dealing with the promulgation of rules, it is suggested that the Board should either refine the principles or demonstrate directly that the normal means of employee organization and communication are inadequate in the particular case in the face of employer displeasure. The indiscriminate adoption of the principle of discrimination seems to be an effort to legitimate under another name the one-time requirement that the employer remain neutral.

Before concluding the analysis of NuTone and Avondale, one brief reference may be made to the suggestion that, before the company can be said to violate the act by enforcing its rules, the union should make a request for the relaxation of the rule.318 If a rule is shown to be invalid because it cannot be justified in the circumstances, there would be no need to make the request. But where the rule becomes invalid because its enforcement in certain circumstances causes an imbalance of organizational opportunities, there are two reasons which suggest that a request would be pertinent. First, since the rule is thus assumed to have been valid when promulgated, the request affords the company an opportunity to make reasonable adjustments to redress the balance. Second, the request indicates that, under these circumstances, the union views this opportunity of communication as a valuable auxiliary means of organization. The company, at risk of being charged with unlawful support of a labor organization,319 should not have to balance the scales against


319 Ibid.
a negligible and neglected right. Certain actions, however, taken by the company under the rule might obviate the need for a request. If the rule is promulgated simultaneously with the activity which is said to cause the imbalance, or, if the company takes affirmative action to enforce the rule,\(^{320}\) it could perhaps be concluded in particular cases that a request would be bootless. This, it seems, would be a matter for the Board to decide in the first instance.\(^ {321}\)

**Conclusion**

One of the primary tasks of the Board is to adjust property rights to valid claims of effective self-organization. In doing this, the Board must determine the benefit to the employee, the prejudice to the employer, and the relative merits of the claims in the light of the policies of the labor act. The ordinary activities of employees on company premises are protected, and, unless other reasons than a bare claim of property can be shown, cannot be limited or restricted by the employer. Where necessary for self-organization, and not merely convenient, property rights may be subjected to the policy of the act, even in favor of nonemployees. The doctrines of “equal opportunity” and “discrimination” as applied to an employer’s refusal to follow his own rules are both confusing and erroneous. Nevertheless, the problem remains in this situation of balancing employer and employee rights under the act. For this purpose, a consideration of the justification for a rule and of the possibility of “effective” organization remain pertinent issues. The circumstances which follow upon the employer’s actions may be considered in giving weight to the special reasons he proposes for limiting traditional union activity on the property.

Thus, the principal elements to be considered in passing upon the validity of a limitation upon employee activities are these: (1) *Does the rule interfere with traditional union activities?* (2) *Has the employer valid reasons for proposing this limitation?* If the answer to both questions is yes, the Board must reweigh the needs of effective organization (*Woolworth*). If the answer to the first is yes, and to the second no, the rule is invalid (*NuTone*). If the answer to the first is no, and to the second yes, the rule is valid, at least where the employer does not engage in coercive actions (*Livingston Shirt*). If the employer’s action is coercive, the Board may at least investigate the existence of any possible imbalance (*Avondale*). Even if the answer to both is no, the Board should look

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\(^{320}\) This was done in the Avondale case. See 115 N.L.R.B. at 856-60.

\(^{321}\) See NLRB v. United Steelworkers, CIO, 357 U.S. at 363.
further than a bare assertion that discriminatory action is invalid. Although disparity of treatment is a proper consideration in the preceding cases, it is specially pertinent here. Lacking reasons for a restriction during working time (even though not interfering with traditional activities), an employer should not be permitted to discharge an employee for violation of the rule, if the rule is not equally applied to all employees. Yet, where the treatment of employees is equal, and justified, then, even if the employer permits other organizations upon the property for charitable purposes, it is at least difficult to find interference, coercion, or restraint in the promulgation of the rule or, indeed, in the enforcement of it similarly for all employees.
NOTES
A SURVEY OF PROCEDURAL PRESUMPTIONS IN
THE DISTRICT OF COLUMBIA
PART IV*

THE PRESUMPTION OF CONSIDERATION IN NEGOTIABLE
INSTRUMENTS IN THE DISTRICT OF COLUMBIA

INTRODUCTION

The purpose of this note is to analyze the presumption of consideration as accepted in the field of negotiable instruments. Along with an analysis of the procedural effects and application of this presumption, special emphasis has been placed on the demonstration that the presumption of consideration, though treated as a true presumption, more readily qualifies as an affirmative defense.

The courts and text writers have recognized a considerable number of presumptions in the field of negotiable instruments. The vast majority of these presumptions, however, seldom arise in litigation involving commercial paper, and a review of the case decisions in the District of Columbia revealed that the presumptions of consideration and due course holding were the only two presumptions which appeared with any frequency. Only the former will be treated here.

The District of Columbia has adhered to the original Uniform Negotiable Instruments Law since its enactment by Congress in 1901, 2

* Part I of this survey can be found in 45 Georgetown L.J. 410 (1957), containing the following notes: A General Discussion of the Theory of Presumption, at 412; Motor Vehicle Presumptions Imputing Tort Liability in the District of Columbia, at 429; and, Res Ipesa Loquitur in the District of Columbia, at 475. Part II can be found in 46 Georgetown L.J. 73 (1957), containing the following notes: Presumptions and the Burden of Proof in Will Contests in the District of Columbia, at 73; and, Presumptions of the Negligence of a Bailee in the District of Columbia, at 146. Part III can be found in 46 Georgetown L.J. 474 (1958), containing the following notes: Presumptions in Domestic Relations in the District of Columbia, at 474; and, The Presumption Against Suicide in Insurance Cases in the District of Columbia, at 503.

1 Brannan, Negotiable Instrument Law (7th ed. 1948) (hereinafter cited as Brannan), lists thirty-three presumptions in the general index. The presumptions of consideration, holder in due course, delivery, agency and date have received the most attention by the courts and textwriters. In the District of Columbia the cases involving presumptions are predominantly those dealing with consideration and holder in due course. The remaining presumptions have received little if any attention.


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and no modification has occurred since that time. Throughout the note, the terms "NIL" and "Negotiable Instruments Law" are used interchangeably, and in the text the NIL sections are employed. The appropriate District of Columbia Code citation for each section of the NIL is indicated by footnote.³

**Basic Principles**

The presumption that a valuable consideration supports the contract of every party is statutory. The statute reads: "Every negotiable instrument is deemed prima facie to have been issued for a valuable consideration, and every person whose signature appears thereon to have become a party thereto for value." The want or failure of consideration is made a matter of defense as against any person not a holder in due course; and partial failure of consideration is a defense pro tanto, whether the failure is an ascertained and liquidated amount or otherwise."⁴ These statutes represent sections 24 and 28, respectively, of the Negotiable Instruments Law, which in turn is a codification of the law merchant which developed in the common law.⁷

An action on a simple contract differs from one on a negotiable instrument because of the existence of the above presumption. Unlike an action on the former, the holder bringing suit on a negotiable instrument need not, in the first instance, plead or prove consideration.⁸ This is a presumed fact which arises after the holder has met his initial burden of alleging and evidencing sufficient facts to constitute a cause of action. When lack or failure of consideration is affirmatively pleaded, the defendant has the initial burden of offering proof in rebuttal of the presumed fact. Therefore, the presumption does have a procedural effect in

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⁵ Rule 8(c), Federal Rules of Civil Procedure, makes failure of consideration an affirmative defense. Section 28 of the NIL makes both the absence and the failure of consideration matters to be pleaded affirmatively. It can be seen then, that § 24 causes the absence, lack or want of consideration to be treated much the same as an affirmative defense in actions dealing with negotiable instruments.
⁷ Brannan § 24; Britton, Bills and Notes § 3 (1943) (hereinafter cited as Britton).
assisting the holder in making out his case without having to plead or prove consideration initially. The defense of lack or failure of consideration, being a personal one, is not available against a holder in due course. It is available between parties in direct privity, whether they be maker-payee, payee-indorsee, drawer-payee or indorser-indorsee.  

As a preliminary consideration it should be noted that the cases discussed in this part of the note were all decided after the passage of the Negotiable Instruments Law.  

Creating the Presumption

To create the presumption, the holder must establish certain basic facts. These are (1) execution of a negotiable instrument by the defendant, and (2) the plaintiff's right to sue. Once the holder of the

11 There are no reported cases involving these parties, but personal defenses are available between parties in direct privity to the instrument.
13 The Model Code of Evidence, rule 702 (1942), sets forth the methods by which the basic facts may be established. These are by (1) pleadings, (2) stipulations of the parties, (3) judicial notice, (4) evidence which compels a finding of the basic fact, or (5) a finding of the basic fact from the evidence. See Morgan, Presumptions, 12 Wash. L. Rev. 255, 257 (1937).
16 The applicable section of the statute states that a holder is the payee or indorsee of a bill or note, who is in possession of it or the bearer thereof. D.C. Code Ann. § 28-101 (1951). Normally the plaintiff is in possession of the instrument and introduces it in evidence upon authentication of defendant's signature. Plaintiff's right to sue may be based on the fact that he is a holder, a beneficial owner in possession of the instrument which lacks a necessary indorsement, or the beneficial owner of a lost instrument.

Since the distinctions between these are not significant in this section of the note, the term "holder" will be applied to the proponent in these three situations.

In Bonuso v. Shroyer Loan & Fin. Co., 37 A.2d 760 (Munic. Ct. App. D.C. 1944), plaintiff brought suit on a promissory note against the maker. The plaintiff was neither payee nor indorsee and the note was not bearer paper. The note was produced and the signatures were authenticated. The court said:
note has established these basic facts, the presumption of consideration arises. The holder having met his initial burden of proceeding, this burden now shifts to the defendant. In *Catholic Univ. v. Waggaman*, the holder brought suit on a number of promissory notes against the maker. The notes had been indorsed to the holder, but the indorsement was undated. The notes were produced at the trial and the signatures thereon being unchallenged, the court said:

With the introduction of the notes bearing the unchallenged signatures of the parties and the undated indorsement, the plaintiff had made such a prima facie case as called for a defense. . . . It was not necessary to prove the actual consideration in the first instance, because a presumption of fact arises, from the usual course of dealing in commercial paper, that it was based upon a good consideration; and, in case of indorsed commercial paper, when the indorsee or holder brings suit upon it by proving the signatures of the maker and indorser, a presumption arises that the note is supported by a good consideration . . . which presumption is sufficient prima facie evidence to authorize a recovery, in case the fact of consideration . . . is not controverted . . . .

When there is evidence introduced which is sufficient to support a finding of these basic facts, the holder has made out a prima facie case. Should such a finding be made, the defendant will lose unless he has established a defense. But if a contrary finding be made, the defendant will win without having to offer any evidence of a defense. Further, such contrary finding may be directed, upon the defendant's motion, where the evidence is not sufficient to establish the basic facts as a matter of law.

However, plaintiff, to maintain its action, was required to offer evidence of the transfer to it by the payee of the note, and that this transfer was "for value." Production by a plaintiff of a note payable to the order of another does not alone prima facie establish his title or ownership. It is said that in such a case the presumption is that ownership remains in the payee.

Id. at 761.

A negotiable instrument unlike a simple contract must be delivered in order to create a contract thereon. D.C. Code Ann. § 28-117 (1951). There is no necessity to allege or prove delivery, however, because such is "presumed" where the instrument is no longer "in possession" of the defendant. That this is not a true presumption is clear from the fact that mere evidence of nondelivery does not destroy the "presumption"; instead the defendant has the burden of proving nondelivery. The so-called presumption of delivery becomes conclusive where the instrument is in the hands of a holder in due course, thus making it clear that the "presumption" of delivery is truly a rule of substantive law.

18 Id. at 314-15.
The term "prima facie," so often used by the courts, is employed in two senses. First, the term is used in the sense of a "true presumption"; i.e., once the basic facts are established, a presumption arises enabling its proponent to receive a directed verdict if the opponent does not controvert the presumed fact. The essence of a true presumption is its mandatory effect; i.e., it requires a directed verdict if the basic facts are established, and there is no substantial evidence contrary to the presumed fact. Secondly, the term "prima facie" is used to denote an inference or what McCormick calls a "permissive presumption." In this sense the proponent still has the initial duty of establishing the basic facts. But, whether or not there is substantial evidence contrary to the presumed fact, the jury is not directed to find the existence of the presumed fact. Instead, the jury may infer such existence from the basic facts, or find to the contrary. Since the statute uses the term "prima facie," it will be necessary to determine the meaning of this phrase. It will be demonstrated that neither of the above two meanings is the correct one, but that the statute requires the opponent to establish lack of consideration rather than requiring the proponent to establish even a "prima facie" consideration. That is, we are dealing with a rule of substantive law and not construing a procedural term.

But is consideration truly such a "presumed fact"? The title of section 24 of the NIL so indicates ("presumption of valuable consideration"), and the language reads "deemed prima facie to have been issued for a valuable consideration." In applying the normal rules of presumptions to this problem these two results would follow: (1) the presumed fact of consideration would be destroyed by the mere introduction of evidence contrary thereto, and (2) thereafter the holder would have the ultimate burden of persuasion of showing there was consideration. On the other hand, if the statute is laying down a rule of substantive law, the opponent would have both the initial burden of proceeding with the evidence of lack or failure of consideration and the ultimate burden of persuasion thereof. It would operate as a normal affirmative defense to be established by a preponderance of the evidence.

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20 9 Wigmore § 2494(1).  
24 Ibid.  
25 Id. at 419; Britton § 99.
A discussion of the cases in the District of Columbia will indicate a certain confusion regarding the procedural effect attributed to this presumption as it is defined in the NIL. Exploration reveals that both the affirmative defense concept and the true presumption concept have received judicial approval. Adherence to one or the other of these theories is important since the choice determines the allocation of the ultimate burden of persuasion on the issue of consideration. The District of Columbia courts have frequently treated section 24 as embodying a presumption. In the Catholic Univ. v. Waggaman\(^\text{26}\) opinion and in Holley v. Smalley,\(^\text{27}\) a landmark case to be discussed later, the word "presumption" was used. The two cases are parallel in ultimate results. In each the basic facts were undisputed, and hence no evidence was necessary to establish the defendant's liability or the plaintiff's right to sue. Therefore, the plaintiff made out a prima facie case by the mere introduction of the note. The court in each case apparently felt they were dealing with a true presumption.

In Holley v. Smalley,\(^\text{28}\) the payee's executor brought suit on a promissory note against the maker. The basic facts were undisputed. The court commenting on this aspect of the plaintiff's case restated the procedural effect attributed to the presumption: "When the plaintiff introduced the note and rested, he had made a prima facie case, which, if unchallenged, would have been sufficient to sustain a verdict and judgment in his favor."\(^\text{29}\) This is substantially the same wording that the court used in the Catholic University case.\(^\text{30}\) The presumption then is mandatory, and is what Wigmore calls a "true presumption."\(^\text{31}\) The holder by establishing the basic facts is entitled to have the fact of consideration presumed. The burden of proceeding has shifted to the defendant, who must now introduce evidence of a defense. If he should remain silent and offer no defense at all, the holder will recover, the presumption supplying the necessary but unproved element of his case.\(^\text{32}\) The defendant


\(^{27}\) 50 App. D.C. 178, 269 Fed. 694 (1921).

\(^{28}\) Ibld.

\(^{29}\) Id. at 179-80, 269 Fed. at 695-96.


\(^{31}\) 9 Wigmore § 2487.

\(^{32}\) Record, p. 45, McReynolds v. National Woodworking Co., 58 App. D.C. 197, 26 F.2d 975 (1928), the trial judge in his instructions to the jury stated:

The Plaintiff did all it had to in the way of proof when it offered that note in evidence and proved the signatures of the Defendant on it; and if the case had stopped there, there would be nothing for me to do but to direct a verdict in favor of the Plaintiff on the note.

See 9 Wigmore § 2490; McCormick, § 308.
may not, therefore, remain silent and run only the risk of nonpersuasion of the jury.

The court of appeals has said that "no particular sanctity attaches to a promissory note. It is subject, at the suit of the original payee, to any of the defenses available against the enforcement of written contracts."33 "But a defendant must do more than merely suggest a defense. He must come forward with evidence to sustain the burden which the law casts upon him. That is the law in contract cases when the defense is want of consideration or mistake; it is likewise the law in suits upon promissory notes."34 It is submitted that the law of contracts is not the law of negotiable instruments. In a suit on a simple contract the plaintiff does not make out his claim until his allegation of consideration is either admitted or until there is sufficient evidence to support a finding thereof. Consideration is a necessary element of his case. There is no burden on the defendant to come forward with any evidence on the lack or failure of consideration until the plaintiff has made out a prima facie claim. In a suit on a negotiable instrument, there is no burden on the plaintiff to allege or introduce evidence of consideration since "absence or failure of consideration is matter of defense."35 It can be said then, that the defendant must do more than merely suggest a defense. He must affirmatively plead it and offer sufficient evidence to substantiate it.36 The courts, however, have not clearly stated the quantum of evidence necessary to satisfy defendant's burden of proceeding. The term "preponderance" was found in the Holley opinion and in several jury instructions.37

In Holley v. Smalley,38 the maker of a series of promissory notes executed a new note covering all the previous notes with the stipulation that the payee return the latter. This was not accomplished and later the payee brought suit on the new note. The maker interposed the defense of lack of consideration, for which evidence was offered. The issue was submitted to the jury39 which returned a verdict for the payee. On appeal this decision was reversed; the court stated:

37 See text accompanying notes 71 and 76 infra.
39 Ibid. No jury instructions were contained in the transcript of the record.
The case should not have been submitted to the jury on the case made by the plain-
tiff. When the plaintiff introduced the note and rested, he had made a prima facie
case, which, if unchallenged, would have been sufficient to sustain a verdict and
judgment in his favor.\footnote{40}{Id. at 179-80, 269 Fed. at 695-96.}

The court then cited the statute setting forth the presumption,\footnote{41}{D.C. Code Ann. § 28-201 (1951).} and
continued:

This amounts, however, to a mere legal presumption, which disappears when con-
fronted by facts setting up either absence or failure of consideration. Here the
failure of consideration was established . . . .

The court is not justified in submitting to a jury a case, where they are only
called upon to weigh a mere legal presumption against all the facts adduced at the
trial.\footnote{42}{50 App. D.C. at 180, 269 Fed. at 696.}

The defendant-maker here challenged the presumed fact of consideration
and offered evidence to rebut it. The court held that the presumption
was destroyed. This is the prevailing view regarding the status of a
presumption which has been rebutted.\footnote{43}{9 Wigmore § 2491; Model Code of Evidence, rule 704 (1942). But see, 1 Jones, Evi-
dence § 104(a) (4th ed. 1938); Annots., 121 A.L.R. 1078 (1939); 95 A.L.R. 878 (1935).} Although the basic facts remain
for whatever probative value they may have, what was once a true
presumption because of its mandatory character is now defunct. What
was once a presumption of law is now merely one of fact which the
jury may or may not believe, and although the basic facts may still raise
an inference of fact, there are no procedural consequences.\footnote{44}{9 Wigmore § 2491.} It is ap-
parent from the latter part of the Holley opinion that the court treated
consideration as an element of the plaintiff's case which is temporarily
satisfied by the presumption. The court said that this presumption
disappears when confronted by facts setting up an absence or failure of
consideration. Had the court stopped there, it would be evident that
they were applying the normal rules of true presumptions; namely, that
evidence contrary to the presumed fact destroys the presumption.

The vast majority of courts have held that it is not enough for the
defendant merely to introduce evidence of no consideration. He has
the burden of establishing lack or failure of consideration by the pre-
ponderance of the evidence.\footnote{45}{Britton § 99.} The court in the instant case, however,
went further, by stating "the failure of consideration was established."\footnote{46}{50 App. D.C. at 180, 269 Fed. at 696.}
If the inference from this is that the defendant must not only introduce evidence contrary to the presumed fact but must actually establish it, then the opinion is in line with the majority view. That is, lack or failure of consideration is an affirmative defense to be pleaded and proved by the defendant.

It has already been seen that where the basic facts are established the holder will receive a directed verdict unless the defendant establishes a defense. Evidence of the defense must satisfy the court's evidentiary requirements. In *Kiess v. Baldwin*47 the payee brought suit on a note against the maker. The basic facts were undisputed. The maker defended on the ground of lack of consideration. The maker's husband had executed his promissory note to the payee-bank as security for a loan. Later the payee requested the husband to execute a note with his wife's name on it for additional security. She executed the note, her husband indorsed it, and the prior note was returned by the payee. The maker offered only one witness, an employee of the bank, who testified substantially to the facts just stated. At the close of the maker's evidence, the payee asked for and received a directed verdict.

On appeal the defendant raised the question of the propriety of a directed verdict where she had introduced "some" evidence from which a jury could have found in her favor.48 The court held that since the surrender of one note for the taking of another is valid consideration, "there was no evidence from which a jury could have concluded that there was an absence of consideration."49 The court here found that there was consideration, and hence it is immaterial whether a presumption is involved or not. Assuming a presumption was involved and assuming further it was destroyed by some evidence contrary thereto, still the court found that what was once presumed was actually proved. If an affirmative defense was involved, the court's finding that consideration existed flows directly from the defendant's failure to meet her burden of proceeding.

In *Belfiore v. B. J. Crivella, Inc.*,50 a similar factual pattern was presented. The plaintiff and defendant's wife entered into an agreement to purchase real estate jointly, each sharing the costs. The plaintiff failed to put up his half of the price and the wife was forced to pay the full price. The defendant then bought out the plaintiff's interest in the

48 Id. at 148, 90 F.2d at 393.
49 Id. at 150, 90 F.2d at 395.
property, giving his note for 2,500 dollars. There was nonpayment and plaintiff-payee brought suit. The basic facts were unchallenged. The defendant claimed want of consideration in that the plaintiff gave up nothing since he failed in the first instance to abide by his agreement with the wife. The evidence consisted of testimony by the parties. At the close of the evidence both parties moved for directed verdicts. These were denied, and the issue was submitted to the jury with instructions.\textsuperscript{51} A verdict was returned for the defendant. On motion, the court entered judgment n.o.v. for the plaintiff.

On appeal the judgment was affirmed. The court found as a matter of law that there was consideration.\textsuperscript{52} The defendant offered no substantial evidence which controverted the plaintiff's prima facie case. Therefore he failed in his burden of proceeding, which resulted in the judgment n.o.v. The court in the Belfiore case, in its instruction to the jury, stated that the plaintiff had the benefit of a presumption of consideration.\textsuperscript{53} This would be in line with the prevailing view that the basic or presumed facts must be rebutted before the presumption is destroyed.\textsuperscript{54} Since the defendant failed to rebut the presumption it continues in effect and is proper material for submission to the jury.\textsuperscript{55}

The burden on the defendant during the trial is a stronger one than that applied at pre-trial. In Brice v. Herrmann,\textsuperscript{56} the holder of a note brought suit against the maker alleging that the note had been negotiated to him by the payee. The basic facts were not disputed. The defense raised by the maker was that he was an accommodation maker, a "straw party," and that the plaintiff knew this and was not a holder for value

\textsuperscript{51} Id., Record, pp. 112-13.

\textsuperscript{52} 60 A.2d at 544.

\textsuperscript{53} The court said:

Still discussing the burden of proof, the negotiable instrument act in effect in the District of Columbia provides as follows: Every negotiable instrument is deemed prima facie to have been issued for a valuable consideration and every person whose signature appears thereon to have become a party thereto for value. That is true, but on the other hand where the suit is between the original parties to the note, as this is, that presumption is not conclusive. It may be attacked by testimony on the other side. Record, pp. 112-13, Belfiore v. B. J. Crivella, Inc., 60 A.2d 542 (Munic. App. D.C. 1948).

\textsuperscript{54} See authorities cited note 43 supra.

\textsuperscript{55} Under the Wigmore rule, if the defendant in the Belfiore case had established a defense, the jury instructions would not mention the presumption, since rebuttal evidence renders it defunct. It is apparent the lower court wished to avoid a peremptory ruling for the plaintiff as a matter of law. Therefore, the issue was submitted to the jury. Their verdict was set aside because as a matter of law the defendant failed to establish a defense.

or a holder in due course. At the pre-trial proceedings, the judge ruled the defendant's answer raised no material issue of fact and asserted no defense cognizable at law against either a holder or holder in due course. The defendant rested on his answer, and the judge entered judgment on the pleadings for the plaintiff. On appeal the judgment was reversed, the court saying:

A holder for value may recover against an accommodation maker, although at the time of taking the instrument he knew it to be such paper. However appellant, claiming to be an accommodation maker, denied in her answer that appellee was a holder for value. If this defense is not controverted by admissions contained in the answer nor by undenied recitals of consideration on the instrument itself, it constitutes a triable issue. Of course, the instrument prima facie imports a valuable consideration for its issuance and every signatory is deemed "to have become a party thereto for value." But this presumption of consideration does not by itself entitle appellee to a judgment on the pleadings.\(^57\)

The *Brice* decision requires only that the defense be affirmatively raised in the pleadings. No proof of consideration need be offered at pre-trial. If the defense is uncontroverted, a triable issue has been raised and the parties proceed to trial.\(^58\)

**Effect of the Presumption on the Burden of Persuasion**

It has been seen that initially the plaintiff-holder of a negotiable instrument has the so-called "burden of proof." He must prove the basic facts, and when this is done, a presumption operates in his favor. This throws the burden of proceeding on the defendant, who must now come forward and dispute the plaintiff's prima facie case. If he fails, a verdict is directed against him since the presumption has a mandatory effect. But the term burden of proof has a double-edged meaning.\(^59\) On the

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\(^{57}\) Id. at 791.

\(^{58}\) In *Walker v. Traylor Eng'r & Mfg. Co.*, 12 F.2d 382 (8th Cir. 1926), a similar action arose between the payee and indorser of a note. The payee brought suit and the indorser defended on the ground that the note was wholly without consideration. Payee received a judgment on the pleadings. The circuit court in reversing this judgment stated:

Where an answer, though unverified, admits the execution of an instrument, and admits the legal effect of such instrument, but does not admit any facts extraneous to the instrument itself, and alleges other facts which, if true, would destroy the legal purport and effect of such instrument, or which would constitute a defense to its legal purport and effect, such allegations raise an issue distinct from the instrument itself. [Citation omitted.] A plea of want or failure of consideration, setting up facts which, if true, would support that plea, raises an issue which cannot be ignored; and a motion for judgment on the pleadings should not be sustained, where the pleadings of defendant set up a substantial and issuable defense.

Id. at 385.

\(^{59}\) McCormick §§ 306-07.
one hand it means the burden of proceeding; the burden of producing sufficient evidence to support a finding of fact. On the other hand it refers to the burden of persuasion; the burden of inducing the trier to make that finding. It is said that this burden of persuasion never shifts, but is normally on the party whose duty it is to plead the particular fact.⁶⁰

What effect then does the presumption of consideration have on the burden of persuasion? Does the ultimate burden of persuasion remain on the plaintiff? Or is the burden on the defendant since he must affirmatively raise the defense of lack or failure of consideration? There is considerable conflict on this point in the United States and, as we shall see, in the District of Columbia.

Prior to the Negotiable Instruments Law the majority of courts placed the ultimate burden of persuasion on the plaintiff.⁶¹ Once the presumption of consideration was raised, the defendant had to offer evidence tending to show a lack or failure of consideration. When this was done, the plaintiff had to prove he gave a valid consideration. This would give the presumption the procedural effect of a “true presumption.” But with the advent of the Negotiable Instruments Law at the turn of the century, many courts felt that section 28 placed the ultimate burden on the defendant.⁶² Since the defendant must affirmatively plead the defense of lack or failure of consideration, he must bear the burden of persuasion on that issue.⁶³ Therefore, the procedural effects of a “true presumption” would not operate, and the defendant would have the same burden as in any affirmative defense. The allocation of the ultimate burden of persuasion is of prime importance because if the trier of fact finds the evidence evenly balanced on both sides, he must find against the party who has the burden of persuasion on that issue.⁶⁴

The only case to take a positive stand on the question in this jurisdiction is Holley v. Smalley, referred to earlier in this note.⁶⁵ This case

⁶⁰ Thayer, A Preliminary Treatise on Evidence, 336-37, 365-66, 378-84 (1898); 9 Wigmore § 2489; McCormick § 307.
⁶² The trend would seem to be in this direction; the ultimate burden of proving a lack or failure of consideration is on the defendant. See Annots., 152 A.L.R. 1331 (1944); 127 A.L.R. 1003 (1940); 65 A.L.R. 904 (1930); 35 A.L.R. 1370 (1925).
⁶³ This is the view followed by three of the leading textwriters on the subject. See Brannan § 24; Britton § 99; Ogden, Negotiable Instruments § 391 (5th ed. 1947).
occurred some twenty years after the District of Columbia adopted the Uniform Negotiable Instruments Law.\textsuperscript{66} The payee had sued the maker on a note, the latter offering substantial evidence that there was a lack of consideration. The court stated: “as between the original parties there-to, upon proof of want or failure of consideration, the burden is upon the plaintiff to prove by a preponderance of the evidence, without the aid of the presumption of consideration, that he is a holder for value.”\textsuperscript{67} This language creates a logical inconsistency. “[U]pon proof of want or failure of consideration,”\textsuperscript{68} it would be difficult for the plaintiff “to prove . . . that he is a holder for value.”\textsuperscript{69} For how can one prove the contrary of what has already been proved? It seems likely that the court meant “upon evidence of want or failure of consideration.” If so, then the Holley case lines up squarely with the cases discussed earlier where it would seem that consideration is merely presumed until there is some evidence of lack or failure of consideration. The plaintiff has the benefit of the presumption only so long as it remains unchallenged. When the challenge is presented, then he must prove he gave a valid consideration by a preponderance of the evidence and bear the ultimate burden of persuasion on the issue.

It appears from a search of the cases in the District of Columbia that the Holley decision is still the law. It has never been expressly overruled or modified. But it seems that the lower courts have taken a contrary view in their instructions to the jury. In \textit{McReynolds v. National Woodworking Co.},\textsuperscript{70} the defendant contracted to have the plaintiff lay a linoleum floor. The latter warranted that it was feasible to lay linoleum on cement and that the company would stand behind its work. The defendant executed a 1,500 dollar promissory note in partial payment for the work. The flooring later buckled because of moisture seeping through the cement. The defendant refused to pay the note, and claimed setoff damages for failure to lay the floor as per contract. The applicable part of the instruction to the jury read:

The Plaintiff did all it had to in the way of proof when it offered that note in evidence and proved the signatures of the defendant on it; and if the case had stopped there, there would be nothing for me to do but to direct a verdict in favor of the plaintiff on this note. But the Defendant here, while admitting in his plea the execution of the note, says that there was a failure of consideration, that is to

\textsuperscript{67} 50 App. D.C. at 181, 269 Fed. at 697. (Emphasis added.)
\textsuperscript{68} Ibid.
\textsuperscript{69} Ibid.
\textsuperscript{70} 58 App. D.C. 197, 26 F.2d 975 (1928).
say, the job was done and the note given in partial payment for this job, but that it turned out that the job was not properly done, and, therefore, the consideration for the note by way of performance of the contract, has failed. If that be true, then the Defendant is entitled to set-off against the amount which you are bound to find is due on the note, as a note, such damage as he has suffered by virtue of bad work.

Now, I say, if there was bad work. The burden of proof is upon the Defendant to satisfy you by a preponderance of evidence that the work was not done in a first-class, workmanlike manner. 71

The plaintiff received judgment in the trial court.

On appeal it was held that the trial court erred in giving a mandatory instruction on the note itself. The jury was instructed to find for the plaintiff on the note, and the issue of failure of consideration was left to the jury. The court in effect treated the note itself and the defendant’s set-off as two separate claims. This was error, and in reversing the trial court, the court of appeals stated: “The whole issue here was one of fact for the jury, under proper submission by the court, as to whether or not on the issue raised by the defendant’s second plea, or indeed by the plea of not indebted, there was a lack of consideration for the note, and if so, whether or not there was a total or partial lack of consideration.” 72

The instruction in the trial court does point out, however, that the defendant has the burden of persuasion on his defense of failure of consideration. But since this part of the instruction was not an issue on appeal, 73 it can be taken as law only for the McReynolds case.

A more recent case, that of Belfiore v. B. J. Crivella, Inc., 74 discussed earlier, 75 also placed the burden of persuasion on the defendant, although this express term was not used. The trial court instructed the jury as follows:

Of course this is what is ordinarily called a negotiable instrument or promissory note. There are certain rules applying to such notes which I shall give you in a moment. In general the rules as to the burden of proof and so forth are the same as in other civil cases. That is to say that the party who asserts the affirmative of an issue must carry the burden of proving it. Such burden of proof is established by the preponderance of the evidence which is determined not alone by the greater number of the witnesses testifying to a particular state of facts. It means that the testi-

71 Id., Record, pp. 45-46.
72 58 App. D.C. at 200, 26 F.2d at 978.
73 Record, p. 15, 58 App. D.C. 197, 26 F.2d 975 (1928).
74 In Bowles v. Marsh, 82 A.2d 135 (Munic. Ct. App. D.C. 1951), the trial judge in his instructions to the jury also placed the burden of persuasion on the issue of failure of consideration on the defendant-maker of several promissory notes.
75 See text accompanying note 50 supra.
mony on behalf of the party carrying the burden must have greater weight in your estimation, have a more convincing effect than that opposed to it. If you believe that the testimony on any essential point is evenly balanced then your finding as to that point must be against the party carrying the burden of proof.

Still discussing the burden of proof, the negotiable instrument act in effect in the District of Columbia provides as follows: Every negotiable instrument is deemed prima facie to have been issued for a valuable consideration and every person whose signature appears thereon to have become a party thereto for value. That is true, but on the other hand where the suit is between the original parties to the note, as this is, that presumption is not conclusive. It may be attacked by testimony on the other side. On the other hand, as in this case, where there is a defense of no consideration, that is what is ordinarily called an affirmative defense and with respect to such a defense the burden of proof of showing there was no consideration for this note is on the defendant.76

The jury brought in a verdict for the defendant after these instructions, and the court granted a judgment n.o.v. for the plaintiff. On appeal this was affirmed. Again, however, jury instructions were not in issue on appeal; therefore, the fact that the court placed the burden of persuasion on the defendant is law only for the Belfiore case.

This instruction illustrates that in the District of Columbia the term "burden of proof"77 is used when the court is referring to the "burden of persuasion." It is evident from the judgment n.o.v. that the defendant failed to establish a defense. Therefore, the presumption was not destroyed, and the jury was properly instructed on it.

The rule in the District of Columbia regarding the procedural effect of the presumption of consideration would seem to be that found in the Holley decision. Under that rule to support an action on a negotiable instrument the plaintiff must establish that he is the holder of an authentic negotiable instrument which has been given for a valid consideration. Proof that he is a holder of such instrument creates a presumption of consideration, which relieves the plaintiff of his duty of coming forward with any actual evidence on that issue. The initial burden of proceeding with evidence showing a failure or lack of consideration is on the defendant. If he offers contrary evidence of a substantial and credible nature, then the burden of proceeding shifts to the plaintiff. The plaintiff must then produce direct evidence that he gave a valid consideration for the instrument, and he bears the ultimate burden of persuasion on this issue. Since this point has not been squarely adjudicated since the Holley case, it is apparently still the law. The fact that juries are

77 See authorities cited notes 59 and 60 supra.
being instructed to the contrary, however, raises doubt as to the status of the Holley rule today.

Possibly the courts are swinging over to the opposite position, which places the burdens of proceeding and persuasion on the defendant since consideration is not considered a necessary element in plaintiff’s initial cause of action. This opposite position, it is submitted, presents a more logical rule since the party who must plead a particular fact to sustain his cause of action or defense should bear the full burden of proceeding and persuasion. This is the general rule, and there appears no reason to treat negotiable instruments differently. The language of section 28 is clear and explicit. The framers of the Uniform Negotiable Instruments Law undoubtedly intended to place on the defendant the full burden of establishing the absence or failure of consideration. The purpose of section 24 was to eliminate the necessity of alleging and proving consideration by the plaintiff, who ordinarily bears this duty in an action on a simple contract. Section 28, however, negates any real procedural effect section 24 might have because no actual burden of proceeding is shifted to the defendant by the so-called presumption stated in section 24. The burden of proceeding is initially on the defendant for the defense of absence or failure of consideration. Therefore, it is unnecessary to refer to a presumption on the plaintiff’s side of the case. A more realistic approach would be to treat section 24, construed with section 28, as a rule of substantive law rather than as a true procedural presumption. It is interesting to note that the 1957 edition of the Uniform Commercial Code aligns itself squarely with this position, which is the majority rule in the United States. The Code combines sections 24 and 28 of the NIL into one section dealing with the defense of want or failure of consideration.

In this manner, the instructions now being used would properly allocate the respective burdens of persuasion of each party. The jury would be properly guided on the law to be applied under the law in sections 24 and 28. There would be no necessity to refer to a presumption or to use the language of presumptions. The Belfiore instructions would be a correct statement of what the law should be were the words “that presumption is not conclusive” deleted, and the words “lack of consideration may be proved” inserted.

79 Uniform Commercial Code § 3-408 (1957). See in particular, Comment (3) after this section.
The presumption of consideration is well recognized in the District of Columbia. It should be noted that the applicable sections of the Negotiable Instruments Law are cited or referred to in almost every case. The presumption of consideration itself has a strong foundation since the exigencies of a vast commercial world would make the negotiability of paper of prime importance. The presumption that a valid consideration has been given for a negotiable instrument is a necessary and common sense conclusion in the business world.

It has been seen that when the plaintiff-holder produces a negotiable instrument, and the basic facts are not disputed, or, if they are, he proves the basic facts, a presumption of consideration arises which shifts the burden of proceeding to the defendant and relieves the plaintiff of his duty of coming forward with evidence on that issue.

If the defendant rebuts the presumed fact, the burden of proceeding shifts to the plaintiff who must now prove that there was consideration, and the plaintiff must bear the burden of persuasion on this issue. Once the presumption is rebutted, it is destroyed and is not made a part of the jury instructions.

Since the Holley case is still the law in the District of Columbia, the fact that lower courts are instructing juries to the contrary creates a confusing situation. It is submitted that the better and more logical rule would treat the absence or failure of consideration as a strict affirmative defense without referring to the presumption as an element of the plaintiff's case. The defendant would bear the full burden of proceeding and persuasion as he would on any affirmative defense he presented.

TERENCE J. CREIGHTON

JURISDICTION OVER NONRESIDENT CORPORATIONS BASED ON A SINGLE ACT: A NEW SOLE FOR INTERNATIONAL SHOE

I

INTRODUCTION

In 1945 the Supreme Court of the United States handed down a landmark decision in International Shoe Co. v. Washington1 which became "undoubtedly the most important case in the field of judicial jurisdic-

1 326 U.S. 310 (1945).
tion."2 The Court held that "due process requires only that in order to subject a defendant to a judgment in personam, if he be not present within the territory of the forum, he have certain minimum contacts with it such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.' 326 The Court demolished the century old house of fictions built on the unstable foundation of some dicta in Bank of Augusta v. Earle4 regarding the nature of corporations, a house which had been remodeled many times but whose basic appearance had remained the same. At the same time the Court compromised again the once ironclad rule of Pennoyer v. Neff5 that, in order to exercise in personam jurisdiction over a defendant, he must either be physically present before the court or must have consented to the court's taking jurisdiction.

Four years later Judge Goodrich predicted that "this decision may have great significance if its theory is followed and developed."6 During the past term (1957-1958) the Supreme Court announced two decisions which portend even more significant developments in the field of judicial jurisdiction over nonresident defendants. In the earlier of the two cases, McGee v. International Life Ins. Co.,7 the Court upheld a California statute8 which permits its residents to sue nonresident insurance companies in California courts on policies solicited by mail from outside the state. Noting that "a trend is clearly discernible toward expanding the permissible scope of state jurisdiction over foreign corporations and nonresidents,"9 the Court held it "sufficient for purposes of due process that the suit was based on a contract which had substantial connection with that State."10 The startling aspect of this case is the fact that the insurance company had never solicited or done any insurance business in California apart from the one policy involved here. Thus for the first time the Supreme Court approved a state's taking jurisdiction over a nonresident corporation on the basis of a single act or transaction without

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3 326 U.S. at 316.
4 A corporation "must dwell in the place of its creation, and cannot migrate to another sovereignty." 38 U.S. (13 Pet.) 519, 588 (1839).
5 95 U.S. 714 (1878).
9 355 U.S. at 222.
10 Id. at 223.
predicating this approval upon the right of the state to exercise its police power in that particular area.\textsuperscript{11}

Considered alone, \textit{McGee} would seem to represent the ultimate in the expansion of the \textit{International Shoe} doctrine of "minimum contacts" with a state, and as such it might be susceptible to criticism as too broad a rule, which could easily create undue hardships for nonresident defendants.\textsuperscript{12} However, the sweeping language of Mr. Justice Black in \textit{McGee} was tempered by the more explicit opinion of Mr. Chief Justice Warren in a case decided later in the same term, \textit{Hanson v. Denckla}.\textsuperscript{13}

The \textit{Hanson} case involved a contest over the right to part of the corpus of a Delaware trust established by a settlor who later became domiciled in Florida. The Florida probate court attempted to exercise personal jurisdiction over the Delaware trustee, a corporation, by means of constructive service under a Florida statute\textsuperscript{14} allowing service by publication. The only connection which the corporate trustee had with Florida was some correspondence between the settlor and the trustee, the exercise in Florida by the settlor of a power of appointment over the trust, and the fact that the settlor had received some trust income in that state. Denying that Florida could take jurisdiction over a nonresident under these facts, the Court said:

However minimal the burden of defending in a foreign tribunal, a defendant may not be called upon to do so unless he has had the "minimal contacts" with that State that are a prerequisite to its exercise of power over him.\textsuperscript{15}

\textit{\ldots}

The unilateral activity of those who claim some relationship with a nonresident defendant cannot satisfy the requirement of contact with the forum State. The application of that rule will vary with the quality and nature of the defendant's activity, but it is essential in each case that there be some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protection of its laws.\textsuperscript{16}

Thus we find the Court saying that before the question of "substantial contact" with the state can even arise, the defendant must have done something to subject himself to the jurisdiction of the forum. Otherwise,


\textsuperscript{13} 357 U.S. 235 (1958).

\textsuperscript{14} Fla. Stat. Ann. §§ 48.01(1), (5), 48.02(1), (2) (1943).

\textsuperscript{15} 357 U.S. at 251.

\textsuperscript{16} Id. at 253.
he cannot be called on to defend there. A vitally necessary curtailment of the almost unlimited language in McGee is the result. In addition Hanson re-emphasizes that there is a further requisite which must be satisfied before the forum may take personal jurisdiction over a non-resident on the basis of his “contact” with the state, i.e., the cause of action must be one that arises out of the nonresident’s activity within the forum.17

That these two cases represent a considerable expansion of the International Shoe doctrine cannot be denied; that they were not entirely unexpected is a truism.18 But the real impact of these decisions is their effect on the “substantial or minimal contact” test. Together with International Shoe they provide the basis for a practical formula which can be applied to similar cases in the future. A workable test has never before materialized because the standards which existed were based on legal fictions created in order to stay within the imaginary lines of the due process clause as drawn by Pennoyer v. Neff. It is the purpose of this note to set out the standards of this new test in concrete form and then to compare them with the state statutes and decisions which antedated and paved the way for McGee and Hanson. To aid in comprehension of an admittedly confusing and often conflicting area of the law, a brief discussion of the necessary jurisdictional concepts is set out first together with a short history of the development of jurisdiction over nonresident corporations.

II

Basic Concepts of Jurisdiction

A. In General

One of the basic principles of Anglo-American jurisprudence is that a judgment rendered by a court without jurisdiction is void.19 "Jurisdiction" has been defined as "the power to hear and determine controversies involving legal relations of parties"20 and "the power to create legal interests."21 For our more limited purposes its meaning today is best expressed by Professor Reese who has stated that "judicial jurisdiction exists whenever a state has sufficient contact with a person or thing to make it consistent with the requirements of due process for the

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17 Id. at 251; cf. Simon v. Southern Ry., 236 U.S. 115, 130 (1915); Old Wayne Mut. Life Ass'n v. McDonough, 204 U.S. 8, 22-23 (1907).
18 See part IV infra.
19 Restatement, Judgments § 5 (1942).
20 Stumberg, Conflict of Laws 69 (2d ed. 1951).
state to try in its courts a particular case relating to that person or thing."22

The problem of complying with the mandates of due process is especially demanding where jurisdiction over nonresidents is concerned.23 In order to establish a valid personal judgment against a nonresident three prior conditions must be met: (1) the court rendering the judgment must have judicial jurisdiction;24 (2) the defendant must have reasonable notice of the action;25 and (3) the defendant must be afforded a reasonable opportunity to be heard.26 Lack of any one of these is fatal.

The test for a valid personal judgment was not always this broad. It was originally predicated on physical power over the defendant27 and required service upon him within the territorial limits of the forum.28 The expansion of this concept has been a considerable one over the course of the years.

From this basic notion that a state has judicial jurisdiction over those persons and things physically within its borders29 other rules have evolved as follows:

(1) a state has jurisdiction over those parties consenting to such jurisdiction by means of a general appearance or otherwise;30

(2) a state has jurisdiction over its domiciliaries, wherever they may be;31

22 Reese, supra note 2, at 139.


24 Restatement, Judgments § 5 (1942).

25 Id. § 6.

26 Ibid. See Old Wayne Mut. Life Ass'n v. McDonough, 204 U.S. 8, 23 (1907).


(3) a state has jurisdiction over persons and corporations doing business within its borders;\textsuperscript{32} and finally

(4) a state has jurisdiction over persons and corporations on the basis of a single act within that state.\textsuperscript{33}

This note is concerned primarily with this last and most recent development of the basic rule. The other developments, however, continue to have a considerable, if indirect, effect. This note is also concerned principally with jurisdiction over foreign corporations, but it should be noted that nonresident individuals, partnerships and other business associations are very often subject to the same rules of jurisdiction as nonresident corporations. The extent to which this is so depends of course on the statutes of the various states.\textsuperscript{34}

\section*{B. Jurisdiction over Foreign Corporations}

For many years it was felt that the only way personal judgment against a corporation could be obtained outside the state of its incorporation was through the appointment by the corporation of an agent for service in the forum state or through voluntary appearance in an action there.\textsuperscript{35} When commercial activities began expanding to the point that corporations were operating in many states with relative immunity from suit, the states invented the first of several legal fictions, that of consent. Recognizing the right of a state to exclude foreign corporations from carrying on business there unless certain conditions were met, statutes were passed which required, as a condition precedent to doing business, that the nonresident corporation appoint an agent for service of process.\textsuperscript{36} When such agent was not appointed, the corporation was held to have impliedly consented to service on a specified state official. Such an obvious

\begin{itemize}
  \item\textsuperscript{32} Cf. Riverside & Dan River Cotton Mills v. Menefee, 237 U.S. 189, 194 (1915);
  \item Green v. Chicago, B. & Q. Ry., 205 U.S. 530, 532 (1907);
  \item Goldey v. Morning News, 156 U.S. 518, 521–22 (1895);
  \item St. Clair v. Cox, 106 U.S. 350 (1882);
  \item Comment, 37 Cornell L.Q. 458, 460 (1952).
  \item Hess v. Pawloski, 274 U.S. 352 (1927);
  \item Restatement (Second), Conflict of Laws § 84 (Tent. Draft No. 3, 1956). For discussion see part IV infra.
  \item Reese, supra note 2, at 148. See Restatement (Second), Conflict of Laws §§ 88, 91a, comment a (Tent. Draft No. 3, 1956);
  \item The Growth of the International Shoe Doctrine, 16 U. Chi. L. Rev. 523, 534–36 (1949);
  \item But see Goodrich, Conflict of Laws 216 n.193 (3d ed. 1949).
  \item Reese, supra note 2, at 143.
  \item See also Beale, Foreign Corporations §§ 264–65 (1904);
  \item Goodrich, Conflict of Laws 210 (3d ed. 1949);
  \item Restatement (Second), Conflict of Laws § 91 (Tent. Draft No. 3, 1956).
\end{itemize}
fiction was, of course, criticized.37 In addition it could easily have become a burden on interstate commerce if not prudently applied.38 Because of these difficulties, the states next adopted the concept of corporate presence in the forum.39 But the idea that a legal entity could be present in several places at the same time was susceptible of much confusion in application.40 This notion of “presence” led easily to the next concept that a state could base its jurisdiction on the fact that a foreign corporation was doing business there.41 This theory, which has been the basis of many state statutes and which has been extensively developed by the courts, remains in our law today42 where it has not been replaced by the International Shoe doctrine of jurisdiction based simply on activity within the state. The “doing business” theory of jurisdiction is a quantitative one which seeks to measure the amount of activity which the foreign corporation conducts in the forum. Its standard is a nebulous one. “[T]he business must be of such nature and character as to warrant the inference that the corporation had subjected itself to the local jurisdiction, and is by its duly authorized officers or agents present within the State or district where service is attempted.”43

It remained for Mr. Chief Justice Stone, speaking for the Court in International Shoe, to set forth what is today the basic theory of jurisdiction over nonresidents. Rejecting the “simply mechanical or quantitative” tests, he said that “whether due process is satisfied must depend rather upon the quality and nature of the activity in relation to the fair and orderly administration of the laws which it was the purpose of the due process clause to insure.”44 Thus the quantitative standard was replaced with a qualitative one.

37 See Smolik v. Philadelphia & Reading Coal Co., 222 Fed. 148, 151 (S.D.N.Y. 1915); Goodrich, Conflict of Laws 211 (3d ed. 1949); Stumberg, Conflict of Laws 93 (2d ed. 1951); Restatement (Second), Conflict of Laws § 92, comment a (Tent. Draft No. 3, 1956); Cahill, Jurisdiction Over Foreign Corporations and Individuals Who Carry On Business Within the Territory, 30 Harv. L. Rev. 676, 689-94 (1917).
38 See, e.g., Davis v. Farmers Co-op. Equity Co., 262 U.S. 312 (1923). See also Stumberg, Conflict of Laws 87-91 (2d ed. 1951).
40 Compare Hutchinson v. Chase & Gilbert Inc., 45 F.2d 139, 141 (2d Cir. 1930), with Stumberg, Conflict of Laws 93-94 (2d ed. 1951).
41 See International Harvester Co. of America v. Kentucky, 234 U.S. 579 (1914).
42 MacInnes v. Fontainebleau Hotel Corp., 257 F.2d 832 (2d Cir. 1958); see Corporation Trust Co., What Constitutes Doing Business 95-118 (1958).
44 326 U.S. at 319.
International Shoe Co. v. Washington involved an attempt by that state to enforce an assessment of contributions to the state unemployment fund. The shoe company resisted on the theory that Washington had no jurisdiction to enforce such assessment. Although the defendant, a Delaware corporation, maintained no offices in Washington, it retained from eleven to thirteen salesmen who solicited orders and relayed them to the firm’s St. Louis office for acceptance or rejection. Annual commissions of these salesmen averaged over thirty-one thousand dollars. All merchandise was shipped f.o.b. from points outside the state. On the basis of these facts the Supreme Court of Washington had concluded that “the regular and systematic solicitation of orders in this state by appellant’s agents, resulting in a continuous flow of appellant’s product into this state . . . is sufficient to constitute doing business in the state so as to make appellant amenable to process . . . .”

After reviewing much of the earlier law in this area and distinguishing many of the cases, the United States Supreme Court upheld the decision of the Washington court. “It is evident that these operations establish sufficient contacts or ties with the state of the forum to make it reasonable and just, according to our traditional conception of fair play and substantial justice, to permit the state to enforce the obligations which appellant has incurred there.”

With these words the Court launched the so-called “minimum contacts” theory which played such an important role in the McGee and Hanson decisions. This test based on reasonableness and fair play was more realistic than prior ones, but just as hard to reduce to tidy rules as “presence” or “doing business.”

III
McGee, Hanson and the International Shoe Doctrine

Wherein, then, lies the importance of McGee and Hanson, if International Shoe had already established the “substantial minimum contacts” theory of jurisdiction? The answer to this question requires a recognition that the holding of International Shoe was nothing more than a synthesis of the older tests put in new and less fictional terms. It takes no divining rod to find “implied consent,” “solicitation plus something else,” “presence,” or “doing business” lurking beneath the words of the Court. What was new was the approach. The imaginary boundaries of due

46 326 U.S. at 320.
process were abolished and replaced with a direct limitation, i.e., before a state may take jurisdiction over a nonresident corporation that state must have some reasonable connection with the corporation because of its activities within the state. As if in anticipation of the day when McGee would come before it for decision, the Court pointed out that ordinarily "single or occasional acts of the corporate agent in a state" are not sufficient to subject the corporation to the process of the state, but added that "other such acts, because of their nature and quality and the circumstances of their commission, may be deemed sufficient to render the corporation liable to suit."48

After International Shoe only one obstacle remained before McGee could become a foregone conclusion. In the above quotation concerning the doing of a single act within a state the Court mentioned the "acts of the corporate agent." Until the case of Travelers Health Ass'n v. Virginia49 it was apparently assumed that unless a human agent of the corporation was present within the state it would be impossible for the corporation to act there.50 But in Travelers, which involved the right of Virginia to prevent an unauthorized Nebraska company from soliciting insurance in Virginia by means of the mails, the principal opinion by Mr. Justice Black held that there were sufficient "contacts and ties of appellants with Virginia residents" to give that state jurisdiction,51 and indicated that the presence of human agents was not required.52 But the concurring opinion of Mr. Justice Douglas, which was necessary to constitute a majority, found unofficial agents in the persons of the member policy holders through whose efforts new members were acquired.53 It remained for McGee to erase the doubt created by the diversity of opinion in Travelers as to the necessity of a physically present agent. Not only does McGee clarify Travelers in this respect, but it further extends the application of Travelers to a suit by an individual plaintiff, as well as to a suit by a state in the exercise of its visitorial powers.

With this increasing nationalization of commerce has come a great increase in the amount of business conducted by mail across state lines. At the same time modern

48 326 U.S. at 318. The Court here cited Young v. Masci, 289 U.S. 253 (1933); Hess v. Pawloski, 274 U.S. 352 (1927); and Kane v. New Jersey, 242 U.S. 160 (1916). These cases all involved jurisdiction over nonresidents based on the doing of a dangerous act within the state and on the theory that the state may regulate such activity as a valid exercise of its police power.
51 339 U.S. at 648.
52 French v. Gibbs Corp., 189 F.2d 787, 790 (2d Cir. 1951).
53 339 U.S. at 654.
transportation and communication have made it much less burdensome for a party sued to defend himself in a State where he engages in economic activity.

It cannot be denied that California has a manifest interest in providing effective means of redress for its residents when their insurers refuse to pay claims. These residents would be at a severe disadvantage if they were forced to follow the insurance company to a distant State in order to hold it legally accountable.\textsuperscript{54}

While McGee is helpful in these respects, its language is almost too broad, and apparently for this reason Mr. Chief Justice Warren was considerably more explicit in his remarks in Hanson. But Hanson serves to do more than anchor McGee against a possible current of misinterpretation; it reiterates rules which once were well established but which had been forgotten in the excitement over International Shoe.

There are three rules which can be drawn from a combined reading of International Shoe, McGee and Hanson against which all future litigation of a like nature may be tested. Where the other bases of jurisdiction are lacking, it must be assumed that in each case there is adequate statutory authority for taking jurisdiction over a nonresident on the basis of a single act.\textsuperscript{55} The rules are:

(1) The nonresident defendant must do some act or consummate some transaction within the forum.\textsuperscript{56} It is not necessary that defendant's agent be physically within the forum, for this act or transaction may be by mail only.\textsuperscript{57} A single event will suffice if its effects within the state are substantial enough to qualify under Rule Three.\textsuperscript{58}

(2) The cause of action must be one which arises out of, or results from, the activities of the defendant within the forum.\textsuperscript{59} It is conceivable that the actual cause of action might come to fruition in another state, but because of the activities of defendant in the forum state there would still be a "substantial minimum contact."

(3) Having established by Rules One and Two a minimum contact between the defendant and the state, the assumption of jurisdiction based upon such contact must be consonant with the due process tenets

\textsuperscript{54} 355 U.S. at 223.
\textsuperscript{56} Hanson v. Denckla, 357 U.S. at 253.
\textsuperscript{58} McGee v. International Life Ins. Co., 355 U.S. at 223.
of "fair play" and "substantial justice." If this test is fulfilled, there exists a "substantial minimum contact" between the forum and the defendant. The reasonableness of subjecting the defendant to jurisdiction under this rule is frequently tested by standards analogous to those of forum non conveniens.

Upon careful examination of these rules, it can be seen that they are in reality only subdivisions of a whole—a broad rule requiring substantial minimum contact. However, for ease in application it is suggested that in any given fact situation these rules be considered separately and in this order. It will be found that, if Rule One is not satisfied, Rule Two and Rule Three cannot properly arise. Similarly, if Rule One is satisfied but Rule Two is not, it is unnecessary to consider Rule Three. Finally, there may be compliance with the first two rules but the factors to be weighed under Rule Three may be insufficient to merit the conclusion that there was in fact a substantial contact between the defendant and the forum. It is submitted, however, that in any given set of circumstances where the necessary elements of all three rules are present, it is virtually impossible to find that the defendant is being denied any basic rights. Under these rules the action of the defendant itself causes subjection to the jurisdiction of the forum, the same forum which stands ready to protect defendant's rights and claims should it choose to invoke the aid of the forum for that purpose. This is due process; no defendant can ask for more.

Rule One: The Activity of Defendant in the Forum

When examined in detail, this rule is perhaps the most simple of the three to understand and to apply. It is based on the theory that until the defendant actually does something within the forum, it is absolutely impossible to say that there has been any contact with the forum. Certainly this conclusion seems reasonable. It was unnecessary to state it as a rule, however, until the Travelers and McGee cases established that a defendant could act within a state by mail. Prior to that time the non-resident corporation could only act through a human agent who was physically present in the forum and who performed acts for the benefit of the corporation.

Under the older tests there was always a problem in determining the amount of business activity required to make the defendant present.


It is clear that the quantum of activity by the defendant is relatively unimportant for purposes of this rule; it may have considerable effect under Rule Three, however, when viewed with other factors.

The test is merely this. If the defendant transacts any business within the forum state, by mail or through agents, by which it would acquire a legally protected right, it has acted within the state and the rule is satisfied. Thus, in the Hanson case, where the nonresident trust company actually did nothing more than correspond with the trust settlor concerning an already vested right, the company was not acting within the state. All of the actions in the state of Florida were those of the settlor and not the trustee. Therefore, it cannot be said that the trustee "purposely availed itself of the privilege of conducting activities within the forum state." If merely corresponding by mail in regard to a previously established trust were enough to subject nonresidents to the jurisdiction of the forum, much organized commercial activity would be impeded. Projecting this further, it would seem that advertising in the forum, when considered alone, would not be a sufficient act to satisfy this rule.

McGee's contribution to Rule One is substantial. In that case a single contract, which was made in California when the decedent accepted the insurance company's offer of reinsurance, served as the basis for the contact with the state. It could be argued that the payment of premiums after the policy was issued made this more than a single contract or transaction of business, but the Court's language in Hanson tends to negative this idea. It is very significant that the McGee opinion cites the leading state cases relative to jurisdiction over nonresidents based on single acts or transactions.

Once the requirements of this rule have been satisfied, it is then possible to progress to the next. But in the absence of this necessary act by the defendant within the forum state, no jurisdiction can be obtained by compliance with subsequent rules.

**Rule Two: A Cause of Action Arising Out of Defendant's Activity in the Forum**

The rule that the cause of action must arise out of, or result from,
the activities of the defendant within the forum is not new.\textsuperscript{69} It is re-emphasized, however, in\textit{ Hanson}.\textsuperscript{70} The earlier case of\textit{ Perkins v. Benguet Consol. Mining Co.}\textsuperscript{71} intimated that the cause of action need not arise out of the activity of the nonresident within the state. But that case is distinguishable on its facts from the present topic.\textsuperscript{72} It arose during the war when suit could not be brought in the place where the cause of action matured. Moreover, service in the\textit{ Benguet} case was upon the president of the corporation,\textsuperscript{73} not upon a state official, a fact to which the Court gave great weight. As a matter of fact, statutes authorizing the taking of jurisdiction on the basis of a single transaction usually require that the cause of action arise out of the activity of the defendant in the state.\textsuperscript{74} The Court recognized this in the\textit{ Benguet} opinion.

The omission of this rule would be a violation of the reasonableness which American jurisprudence has always demanded of due process. The right of a state to protect its citizens from the operations of nonresidents is a natural\textsuperscript{75} but not an unlimited one. The fact that a nonresident corporation sells insurance in California by mail, for instance, would not make it reasonable that the company should be subject to suit there by a California furniture manufacturer on a contract made in Texas to purchase equipment for an office building in Texas. The nonresident’s insurance activities in California would be clearly unrelated to the contract to buy furniture. The seller should be required to resort to the courts of Texas, the defendant’s own jurisdiction, where the contract was made. On the other hand, if the insurance company operates in California by mail, and thus has all the advantages of any resident of the state, including access to its courts to enforce bargains made there, it is perfectly reasonable for the insurance company to expect to defend law suits in the courts of that state based on its insurance policies sold there. The defendant seeking immunity from suit in the forum, while accepting the fruits of its business activities there, is in the position of wanting the


\textsuperscript{70} 357 U.S. at 251-52.

\textsuperscript{71} 342 U.S. 437 (1952).

\textsuperscript{72} Id. at 438.

\textsuperscript{73} Ibid.


\textsuperscript{75}\textit{ McGee v. International Life Ins. Co.}, 355 U.S. at 223.
benefits without the attendant liabilities, an intention which the law will frustrate whenever possible.

An interesting question is posed when the cause of action matures in another jurisdiction, but arises from defendant's activities in the forum where litigation is brought.\footnote{76} Suppose, for example, that a California resident orders an electric blanket from a New York mail order house as a result of direct-mail advertising. The blanket is used during a trip to Montana where the purchaser is severely burned from its use. May he sue the New York firm in the California courts? If the minimum contacts theory were applied, it would seem that such a suit could be entertained in California. From the standpoint of fairness it should make no difference where the cause of action matured, so long as it could not have arisen but for the activities of the nonresident firm in the forum where it is ultimately sued. There could of course be valid reasons for a denial of jurisdiction under such circumstances. The main reason might be the preferability of suit in the state where the injury occurred and where the witnesses would be most readily available. The court then would have to weigh the equities and consider the convenience of the parties. This is the basis for the requirements of Rule Three.

\textit{Rule Three: A "Substantial Minimum Contact" Between Defendant and the Forum}\footnote{77}

Once the preceding rules are satisfied in any given circumstance, the full impact of Rule Three becomes apparent because it, more than anything else, is the determinative factor in the jurisdictional question. Unless the contact of the nonresident defendant with the forum meets a certain minimum requirement, any attempt on the part of the forum to take jurisdiction is a violation of the due process concept of "fair play" and "substantial justice."\footnote{78} Basically, the rule must reduce to this. The facts connecting the nonresident with the forum must be such that, when weighed against (1) the inconvenience to plaintiff of a refusal to entertain the action, (2) the benefits which defendant has derived from its activities within the forum, and (3) the basic equities of the situation, it would be fair and just to both parties that the suit be heard in the forum.

One of the earliest explicit recognitions of this concept appeared in


\footnote{77} See Hanson v. Denckla, 357 U.S. at 251.

\footnote{78} International Shoe Co. v. Washington, 326 U.S. at 320.
Hutchinson v. Chase & Gilbert, Inc.\textsuperscript{79} where Judge Learned Hand, in discussing the real meaning of the "presence" test, stated:

When we say, therefore, that a corporation may be sued only where it is "present," we understand that the word is used, not literally, but as shorthand for something else. . . . There must be some continuous dealings in the state of the forum; enough to demand trial away from its home.

This last appears to us to be really the controlling consideration, expressed shortly by the word "presence," but involving an estimate of the inconveniences which would result from requiring it to defend, where it had been sued. We are to inquire whether the extent and continuity of what it has done in the state in question makes it reasonable to bring it before one of its courts.\textsuperscript{80}

This idea that the basic jurisdictional test in these cases must be "an estimate of the inconveniences" was expressly approved by the Supreme Court in International Shoe.\textsuperscript{81} Judge Hand expanded his concept even further in Bomze v. Nardis Sportswear, Inc.\textsuperscript{82} and finally in the same year brought it to its proper light in Kilpatrick v. Texas & P. Ry.\textsuperscript{83} Speaking of International Shoe, he said:

[I]t did give a new explanation to corporate "presence," for it held that in order to determine that question the court must balance conflicting interests involved: i.e., whether the gain to the plaintiff in retaining the action where it was, outweighed the burden imposed upon the defendant; or vice versa. That question is certainly indistinguishable from the issue of "forum non conveniens."\textsuperscript{84}

This contribution to an otherwise confusing area is invaluable. By examining the elements considered in determining whether or not the doctrine of forum non conveniens is to be applied to a specific case, it is possible to establish definite standards which will indicate the existence or nonexistence of the "substantial minimum contact," and the question of Rule Three will be resolved.

It should be obvious that Judge Hand's statement that the question of jurisdiction over nonresidents is "indistinguishable from" the question of forum non conveniens does not mean that the two issues are one and the same, but rather that similar considerations will often be relevant to both.\textsuperscript{85} The doctrine of forum non conveniens is an equitable rule

\textsuperscript{79} 45 F.2d 139 (2d Cir. 1930).
\textsuperscript{80} Id. at 141. (Emphasis added.)
\textsuperscript{81} 326 U.S. at 317.
\textsuperscript{82} 165 F.2d 33, 35 (2d Cir. 1948).
\textsuperscript{83} 166 F.2d 788 (2d Cir. 1948).
\textsuperscript{84} Id. at 790-91. (Emphasis added.)
embracing the discretionary power of a court to decline to exercise jurisdiction over a transitory cause of action when it believes the action may be more appropriately and justly tried elsewhere. This doctrine starts with the assumption that the forum has jurisdiction to try the case. In establishing jurisdiction over a nonresident, however, no such assumption exists. It is rather a question of law—may the court take jurisdiction? It should also be noted that the tests used for forum non conveniens are not the only considerations for valid jurisdiction over a nonresident. They do go a long way, however, toward indicating whether there has been a substantial contact with the forum. If, for example, a court would feel obliged to reject jurisdiction under the forum non conveniens doctrine, there would be a rather insubstantial contact with that forum by the defendant. It is in this context that an examination of the forum non conveniens analogy is made.

The classic case of Gulf Oil Corp. v. Gilbert set out some of the factors to be weighed under the forum non conveniens doctrine.

Important considerations are the relative ease of access to sources of proof; availability of compulsory process for attendance of unwilling, and the cost of obtaining attendance of willing, witnesses; possibility of view of premises, if view would be appropriate to the action; and all other practical problems that make trial of a case easy, expeditious and inexpensive. There may also be questions as to the enforceability of a judgment if one is obtained. The court will weigh relative advantages and obstacles to fair trial. . . . [P]laaintiff may not, by choice of an inconvenient forum, "vex," "harass," or "oppress" the defendant by inflicting upon him expense or trouble not necessary to his own right to pursue his remedy . . .

Factors of public interest also have place in applying the doctrine. . . . There is a local interest in having localized controversies decided at home. There is an appropriateness, too, in having the trial . . . in a forum that is at home with the state law that must govern the case, rather than having a court in some other forum untangle problems in conflict of laws, and in law foreign to itself.

Essentially, the Court was saying that the forum must be the most reasonable and logical place for the trial. This is what "substantial contact" really means. Therefore, all of the factors catalogued by Mr. Justice Jackson in the Gulf Oil case become highly relevant, whether the purpose

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see Comment, Expanding Jurisdiction Over Foreign Corporations, 37 Cornell L.Q. 458, 475-76 (1952).


88 Id. at 508-09.
is to reject jurisdiction under the forum non conveniens doctrine or to take jurisdiction over a nonresident under the doctrine of International Shoe, McGee and Hanson.

It should be apparent that no one factor can be determinative of the substantial contact; an aggregate of circumstances must decide the issue. Although law can never be a precise science, there is a mathematical aspect to this problem. In each case there must be a listing and totalling of all the factors weighing on each side, and then a comparison of the result.

Consider again the New York mail order house which solicits a California resident by mail and thereby sells him an electric blanket. Whether or not the injury from the blanket occurs in California, it would seem that the fair and just thing would be to allow suit in California on the theory that the New York firm put itself within the jurisdiction of the forum by sending the blanket to a California customer, thus reaping the benefits of its advertisement. This is a substantial contact. Assume on the other hand that the defendant was not a mail order house but a manufacturer of electric blankets with advertisements in national magazines. If a Californian purchases a blanket from a California retailer solely on the strength of such national advertising, and then suffers injuries therefrom, either in California or elsewhere, should he be able to sue the manufacturer in the California courts? Here it would seem unfair and unjust to allow such an action because, even though defendant's product has been shipped into the state, there has been no mail solicitation, no truly substantial contact. Then, too, the element of convenience of the parties is important here. Assuming that the injury occurred in California and that all of plaintiff's witnesses were there, the court must consider that, since defendant is a manufacturer, its expert witnesses will be at the place of manufacture three thousand miles away, and therefore, that the cost of defending such an action would be very burdensome. The court must weigh in the balance the fact that plaintiff has a local remedy against the retailer who sold him the blanket, and that this remedy would ordinarily satisfy the interest of California in affording relief to its citizens.

In applying the standards of Rule Three it is important to remember that some considerations may be more important and more weighty in one case than in another. For instance, in a tort action the availability of witnesses and the applicable law may be the vital factors. While in an action for breach of contract the expense of transporting business

records and the inconvenience of having company personnel away from
their usual place of work may be the significant considerations.

In analyzing Rule Three it becomes very apparent that it is a flexible
standard indeed. This is a necessary quality, however, because the rule
must fit widely varying fact patterns. Yet it still stands as a very helpful
guidepost in the legal maze which has existed in this area. This is true
of the other rules as well. It is an admitted folly to attempt to compartmentalize the law with mechanical precision, but the language of *International Shoe, McGee* and *Hanson*, which is necessarily ambiguous because of the variable nature of the constitutional concept of due process, demands some tangible nature of application if it is to have any value to the practitioner of the law.

**IV**

**The "Single Act" and State Statutes**

Although *McGee* is the first case in which the Supreme Court has said
that a single act or transaction in a state may be sufficient to give that
state jurisdiction over a nonresident,1 such a theory is not novel at the
state level. For many years states have been legislatively creating juris-
diction over nonresidents in the area of contract, tort and state regulations,
sometimes with regard only to a specific activity, and sometimes with comprehensive statutes extending to all areas of the law. This is the
environment which engendered *McGee* and *Hanson*. As has been indi-
cated, the Court relied on several state cases as part of its authority for
*McGee*.2

In the area of specific activity, the right of a state to subject a de-
fendant to in personam jurisdiction because of a single act received an
early impetus from the Supreme Court’s decision in *Hess v. Pawloski*.3 For this reason the state statutes in this area are not quite so unique or startling as those which relate to miscellaneous torts or contracts or to just plain “acts” where no approbation from the high court led the way. They do show, however, an important evolution in attitude. Origin-
ally, for instance, statutes which provided for jurisdiction over nonresident motorists, insurers and dealers in securities were predicated upon the police power of the state, i.e., the power to regulate these activ-
ities. Gradually the states abandoned this position. Whether the activity of a nonresident was potentially dangerous or relatively harmless, his liability to suit in personam came to be based on the extent to which he

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2 355 U.S. at 223.
3 274 U.S. 352 (1927).
availed himself of the privileges and protection of the state, the connection between his activity and the cause of action, the burden to the plaintiff of bringing action elsewhere, the relative convenience of the parties—in other words, the same criteria which later emerged in the McGee and Hanson decisions. This change in attitude led eventually to the more general "single act" statutes. Therefore, it is expedient to examine first the state statutes directed at specific activity and then progress to those not restricted to a particular type of activity.

A. Nonresident Motorist Statutes

The most familiar state statute which renders nonresidents subject to the jurisdiction of the enacting state on the basis of a single act of a particular type is the nonresident motor vehicle statute. The type of legislation which achieved such notoriety in Hess v. Pawloski is now common to all jurisdictions. It was originally felt that such statutes were justifiable only because they were based on the defendant's implied consent, but it is now generally recognized that consent plays no part in such jurisdictional matters, and that a state legislature may simply create a basis of jurisdiction from the single act of operating a motor vehicle within the state, provided of course that such statute indicates a procedure whereby notice will be reasonably certain to reach the defendant. The nonresident motor vehicle statutes have generally been made applicable to corporations as well as individuals. They seem to fall well within the jurisdictional limits defined by the rules of International Shoe, McGee and Hanson.

There have been some interesting extensions of the nonresident motorist laws. The Louisiana Watercraft Statute, for instance, provides for service on nonresident vessel owners and operators for claims arising

97 See Scott, Hess and Pawloski Carry On, 64 Harv. L. Rev. 98 (1950); Scott, Jurisdiction Over Nonresident Motorists, 39 Harv. L. Rev. 563 (1926).
out of navigation, operation or maintenance of ships in Louisiana waters. The statute was challenged in *Tardiff v. Bank Line, Ltd.*\(^{101}\) wherein the defendant asserted that the constitutional basis of the nonresident motorist statutes was an "implied consent to service" based on the "state's right to exclude the nonresident from its highways,"\(^{102}\) and that, since a state did not have the right to exclude ships from its waterways, the parallel between the two statutes failed, leaving the watercraft law unconstitutional. The court dismissed the implied consent notion and found in addition that "the right of the state to exclude nonresidents, as such, from its highways is a myth, unsupported in our constitutional jurisprudence."\(^{103}\) The watercraft law was held to be constitutional on the same ground as the motor vehicle law, *i.e.*, the right of the state to protect its citizens. In this decision the notion that jurisdiction must be based on the state's police power over dangerous activity still predominated.\(^{104}\)

New York attempted to extend the nonresident vehicle statute to owners and operators of aircraft which landed at, or departed from, any airfield in New York.\(^{105}\) This statute was held to be unconstitutional as applied to an airline whose plane took off from a New York airport and crashed in California before its scheduled landing there.\(^{106}\) The court based its ruling on the ground that the accident occurred outside of New York and was not caused by any act which took place in New York. This is Rule Two in application. The case illustrates clearly the necessity for the requirement set out in the *Hanson* decision that the cause of action must arise out of defendant's activity in the forum. This statute has now been amended to meet the requirements of the due process clause; it is directed against "the use or operation by a nonresident of an aircraft within or above" New York, and provides that injuries to persons or property must occur within the state.\(^{107}\)

### B. State Statutes and Unauthorized Insurers

Another particular area where the states have long enacted legislation granting jurisdiction over nonresidents is insurance. A state usually regulates very carefully those insurers authorized to do business within

102 Id. at 946.
103 Id. at 948.
104 Ibid.
its borders, and these insurers are amenable to suit in the forum on the basis of this certification or authorization. For many years, however, there was the problem of the unauthorized insurance company that wrote an insurance policy on a state resident by mail solicitation or otherwise, but was out of reach of suit by the insured or his beneficiary because the state had no basis of jurisdiction over such insurer. (This of course was the problem facing the California court in McGee.) A few courts conquered this problem very early by finding that a failure to comply with the registration laws was no defense to jurisdiction. A consent to jurisdiction was therefore implied from the doing of business in the forum.

That the stipulation was not, in fact, filed with the auditor, is of no consequence if the company has done those things which imposed upon it the obligation and duty to file it... [T]he company will not be permitted to relieve itself from a liability which the written stipulation would have imposed by pleading its own fraud on the law of the state and her citizens.108

Because of its fictional nature, such a basis of jurisdiction was very tenuous and unrealistic.109

The real solution began to evolve as legislatures declared that certain acts by an unauthorized insurer amounted to "doing business." After the term "doing business" was stripped of its magic by the International Shoe decision, there was a tendency to minimize this and to state simply that certain acts within a state by an unauthorized insurer would subject it to the jurisdiction of that state.

In 1938 the Uniform Unauthorized Insurers Act110 was approved and a few states have adopted it more or less as written.111 Many others have enacted laws which are substantially similar in certain sections;112 these are usually labelled "The Unauthorized Insurers Process

110 For discussion see Note, 39 Va. L. Rev. 966 (1953).
Act." Section 5 of the uniform statute, which is one of the sections most frequently emulated, provides that an unauthorized insurer can be reached by personal service on the Commissioner of Insurance if he transacts business in the state and issues or delivers an insurance contract to a citizen or resident of the state, or to a corporation authorized to do business therein. The statute also provides that personal service on one who solicits insurance or makes, issues or delivers a policy or collects premiums will constitute personal service on the insurance firm for whose benefit these activities are conducted. It is interesting to note that the statute uses the general term "transacting business" when discussing service on the Commissioner, but it mentions very specific activity in designating others who may be agents for service of process. The use of this general term has put the burden of interpretation on the courts, but it also has left them free to follow the lead of the Supreme Court in extending jurisdiction to certain minimal activity.

There has been some conjecture regarding the wording of the statute which provides for transaction of business and the issuance or delivery of a contract.\textsuperscript{113} It is difficult to determine whether a true conjunctive is intended, \textit{i.e.}, whether the insurer in question must both transact business and deliver or issue a contract. If this is the intention, the insurer would not be liable to personal service where a single contract was made and delivered to the insured citizen while he was residing in another state, but where he continued to receive notices and remit payments after resuming residence in the forum. It is possible, however, that this conjunctive intent is required by due process when the statute also refers to a contract issued or delivered to a "citizen or resident." If the statute said that the contract had to be issued or delivered to a resident only, then there would be assurance of at least some contact between defendant and the state, and the requirement of "transacting business" would be superfluous. But use of the term "citizen" implies that the statute covers a contract made with a domiciliary while he is resident out of the state. If he does not return before the caution of action matures, then some other contact of defendant with the state would be necessary.

In \textit{American Farmers Ins. Co. v. Thomason},\textsuperscript{114} an action to recover on an insurance policy was instituted under an Arkansas statute similar

\textsuperscript{113} See Annot., 44 A.L.R.2d 416, 427-29 (1955).
\textsuperscript{114} 217 Ark. 705, 234 S.W.2d 37 (1950).
to the above,115 as a result of an injury which occurred in California. The contract of insurance was made in California while the insured, an Arkansan, was living there temporarily. The court found that jurisdiction over the insurer could not be sustained because there was no evidence that it was transacting any business in Arkansas at the time the policy was executed and the statute required such a finding.116 In light of the tests hereinbefore stated, jurisdiction over the defendant in this case could not have been sustained even if the statute had not made such a requirement, or even if the defendant had been transacting some business in Arkansas at that time. The elements of Rule Two were wanting in that the cause of action did not arise from any activity of defendant in Arkansas.117

Florida has a statute118 which is also similar to the uniform law, but which shows more clearly the trend toward the single act as a basis for jurisdiction.

(1) Any of the following acts in this state, effected by mail or otherwise, by an unauthorized foreign or alien insurer: (a) the issuance or delivery of contracts of insurance to residents of this state or to corporations authorized to do business therein, (b) the solicitation of applications for such contracts, (c) the collection of premiums ... for such contracts, or (d) any other transaction of the business of insurance, is equivalent to and shall constitute an appointment by such insurer of the insurance commissioner of this state ... to be its true and lawful attorney, upon whom may be served all lawful process in any action ... arising out of any such contract of insurance ... 119

The liberal appearance of this law is deceptive; by use of the words "for such contracts" its drafters gave it a very limited scope. Accordingly, in Parmalee v. Iowa State Traveling Men's Ass'n120 it was held applicable "only to policies of insurance delivered in Florida to Florida residents."121 "While the statute refers to 'any of the following acts,' we understand it to mean rather the doing of any of the prescribed acts from which results the issuance or delivery of a contract of insurance in the state."122 This construction was of only slight significance in that case because the contract in question complied therewith. But on the same day the court used this reasoning to dismiss another claim by Mrs.

116 217 Ark. at 706, 708, 234 S.W.2d at 38, 39.
120 206 F.2d 518 (5th Cir.), cert. denied, 346 U.S. 877 (1953).
121 Id. at 522.
122 Ibid.
Parmalee against a different insurer\textsuperscript{123} because the contract was made with the insured while he was living in Kentucky, even though he subsequently moved to Florida before enactment of the statute. Surely the rule that the cause of action must arise from defendant's acts within the jurisdiction does not require such a narrow scope. The case does not indicate whether the defendant solicited and collected premium payments or had any other connection with the insured after his change of residence. If there were such acts, the requirements of due process could have been satisfied by a much broader statute.

One of the more far-reaching statutes in the insurance area today is a Tennessee law which provides as follows:

"Doing of business in Tennessee" by any foreign or alien insurance company, shall be deemed to mean and include the doing in this state by such company of any act whatsoever, whether interstate or intrastate in nature, including the soliciting, making, or delivering of insurance contract in Tennessee, by agent, mail or otherwise. . . .\textsuperscript{124}

The applicability and validity of this statute were questioned three years after the Parmalee decisions in the similar case of Schutt v. Commercial Travelers Mut. Acc. Ass'n,\textsuperscript{125} where it was asserted that full faith and credit should not be afforded a Tennessee judgment in New York because the contract of insurance had been issued while the insured was living in Kentucky. Judge Medina found that the Tennessee statute was clearly applicable by virtue of the premium notices which were sent to the insured after he became domiciled in Tennessee and by the mailing to insurer from Tennessee of insurance premiums and proofs of death,\textsuperscript{126} and that the statute did not violate the due process guaranteed to the insurer.\textsuperscript{127} A slight doubt was thrown on the opinion by the judge's reliance upon the continuous and systematic activity of the defendant in the forum,\textsuperscript{128} a doubt which was understandable in light of the long history of quantitative tests. That doubt can now be erased by the McGee decision.

New York's similar "single act" insurance statute\textsuperscript{129} was interpreted and defined in 1953 in Zacharakis v. Bunker Hill Mut. Ins. Co.,\textsuperscript{130} a case which certainly went as far with nonresident jurisdiction as McGee;

\textsuperscript{123} Parmalee v. Commercial Travelers Mut. Acc. Ass'n, 206 F.2d 523 (5th Cir. 1953).
\textsuperscript{124} Tenn. Code Ann. § 56-319(4) (1955). (Emphasis added.)
\textsuperscript{125} 229 F.2d 158 (2d Cir. 1956).
\textsuperscript{126} Id. at 161.
\textsuperscript{127} Id. at 162.
\textsuperscript{128} Ibid.
\textsuperscript{129} N.Y. Ins. Law § 59-a 2(a) (1949).
\textsuperscript{130} 281 App. Div. 487, 120 N.Y.S.2d 418 (Sup. Ct. 1953).
indeed many feel that it went further. Defendant was a Pennsylvania insurance carrier. The insurance was written in Pennsylvania on a hotel located in New Hampshire which was destroyed by fire there. The Bunker Hill Company was not doing business in New York. Jurisdiction was based entirely on the issuance to plaintiff, a New York resident, of an insurance policy and on the mail and phone negotiations between plaintiff's broker in New York and the defendant in Pennsylvania. The court said:

When the defendant mailed its contract of insurance issued to a resident of New York, addressed to a New York broker; when it collected a premium for this policy by mail, sent from New York, and when by its manager it entered into correspondence as to the terms and conditions of the policy moving by mail in and out of New York, it came literally, we think, within the terms of the statute . . . .

The court was not unaware that its upholding of the statute here was a somewhat bold move, but it was influenced by a clearly enunciated legislative intent to aid New York citizens in litigating claims, and it concluded: "We might be willing to limit too radical an extension of the idea; but at this state of our legal development we are scarcely willing to turn our backs on it entirely. It has proved fair, useful and convenient, and is highly reciprocated among the states."

It is extremely doubtful that the Zacharakis decision would be upheld today in the light of the McGee and Hanson rules. It might be argued initially that the cause of action did not arise from the activities of defendant in New York, but rather from events which transpired in New Hampshire where the insured's property was at all times located. This position, however, could be too easily rebutted. The stronger attack on the Zacharakis decision would be its failure to comply with Rule Three. The court should have looked to the convenience of the parties and should have seen that all of the information concerning the care of the hotel and the circumstances of the fire, all of the witnesses and the fire authorities were in New Hampshire. Whatever advantages the plaintiff sought in choosing a New York forum, convenience was not one of them.

C. Ownership and Occupation of Real Property as a Basis for In Personam Jurisdiction

A third specific area of legislative jurisdiction over nonresidents is

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131 Id. at 490, 120 N.Y.S.2d at 420.
133 281 App. Div. at 491, 120 N.Y.S.2d at 422.
ownership and use of real property. Here the change in legislative purpose mentioned earlier may be seen more clearly. The state legislature is not merely exercising its police power to regulate a dangerous activity (ownership of land is not per se dangerous); it is trying to balance the right of a landowner to use the civil processes of the state where his land is located against the liability of that landowner to be sued. It is trying to make convenience of the parties the true test.

A Pennsylvania statute provides that an owner, tenant or user of real estate in that state will be amenable to personal jurisdiction where there is an accident or injury involving that real estate. The full import of the term “user” was clarified in Chong v. Faull. This was an action against a New Jersey building contractor for negligent excavation of land in Pennsylvania with resultant damage to the adjacent real estate. Defendant was held to be a user of the property because: (1) he was in rightful, though temporary, possession of the property, (2) he was “clothed by the owner of the real estate with the right to control it to the extent of radically altering its condition,” and (3) he was “not a mere casual business guest or invitee.”

Another aspect of the term “user” was defined earlier in Rumig v. Ripley Mfg. Corp. Firemen were injured because of negligent repairs made on a building in Pennsylvania by a corporate lessee which was wholly owned by the defendant New York corporation. The Pennsylvania firm had its main office and all records with the parent corporation in New York. Prices and advertising methods were determined there. The Pennsylvania corporation sold only merchandise manufactured by its New York owner. All excess funds from the Pennsylvania business went to the New York corporation, making satisfaction of a personal judgment against the former almost impossible. The Supreme Court of Pennsylvania held that “the owner of the New York corporation could not by creation of an alter ego in form of a Pennsylvania corporation divorce itself from the fact of use of the premises within this Commonwealth.” It is significant here that ownership or use of realty is a

135 See introduction to part IV, supra.
138 Id. at 560.
139 Ibid.
140 Ibid.
142 Id. at 346, 77 A.2d at 362.
basis for personal jurisdiction only where the injury is in some way connected with the property. We see again that Rule Two represents a well instilled notion of reasonableness and fair play.

D. The General "Single Act" Statutes

It is necessary now to consider statutes which are not directed to one specific area, but which relate to any activity by a nonresident within the forum. That such jurisdictional statutes are a recent innovation in the law can be seen by alluding to a 1932 New Jersey case\textsuperscript{143} where the plaintiff was injured through the negligence of the nonresident's salesman in demonstrating firearms. The only activity of defendant in the state was occasional solicitation by its salesmen and their demonstration of guns. The court found that it had no jurisdiction because there was no consent and no "doing business."\textsuperscript{144} Under a modern "single act" statute jurisdiction could validly be sustained because the requirements of all three rules would be satisfied. The defendant through its agent has done something within the forum; the injury was a direct result of this activity; and by the criteria of forum non conveniens defendant's connection with the state appears to be a substantial one.

In 1947 Arkansas enacted a sweeping statute\textsuperscript{145} which seemed to indicate a desire on the part of the legislators to abolish all the old tests and follow the new ones set out in \textit{International Shoe}.

Any non-resident person, firm, partnership, general or limited, or any corporation not qualified \ldots as to doing business herein, who shall do any business or perform any character of work or service in this State shall \ldots be deemed to have appointed the Secretary of State \ldots to be the true and lawful attorney or agent of such non-resident, upon whom process may be served in any action accrued or accruing from the doing of such business, or the performing of such work \ldots.\textsuperscript{146}

But while this reads like a "single act" statute, it was not so construed. In \textit{Henderson v. Rounds & Porter Lumber Co.}\textsuperscript{147} jurisdiction was sustained, but only because the activities of defendant were more than casual and occasional.\textsuperscript{148} The old quantitative test was still very much in evidence.

Vermont and Maryland pioneered the true "single act" statutes with

\textsuperscript{144} Id. at 159, 158 Atl. at 330.
\textsuperscript{146} Ibid.
\textsuperscript{147} 99 F. Supp. 376 (W.D. Ark. 1951).
\textsuperscript{148} Id. at 384.
regard to torts and contracts. In 1937 Vermont enacted a provision as follows:

If a foreign corporation makes a contract with a resident of Vermont to be performed in whole or in part by either party in Vermont, or if such foreign corporation commits a tort in whole or in part in Vermont against a resident of Vermont, such acts shall be deemed to be doing business in Vermont by such foreign corporations and shall be deemed equivalent to the appointment by such foreign corporation of the secretary of the state of Vermont . . . to be its true and lawful attorney upon whom may be served all lawful process in any actions or proceedings . . . arising from or growing out of such contract or tort.149

Smyth v. Twin State Improvement Corp.,150 decided thereunder, has come to be regarded as the landmark case in the area of jurisdiction based on single torts.151 Defendant, a Massachusetts corporation, damaged plaintiff's house while negligently repairing the roof. The Supreme Court of Vermont, having no prior cases in point on which to rely, found that the statute was constitutional by a careful analysis of the International Shoe and Travelers Health opinions. Although the United States Supreme Court has not yet ruled on this precise point (torts), it is felt that McGee affirms the correctness of the Vermont decision. The court in the Smyth case did not use anything as formal as rules, and yet the substance of its reasoning paralleled closely the standards outlined above.

Common ideas of justice require that a foreign corporation be subject to suit in the courts of a state where it does a tortious act [Rule One], when the state so elects, and when the suit is based on such an act. Where the cause of action arises out of the act done [Rule Two], the court of the locus is normally the forum of convenience for the settlement of the dispute [Rule Three] . . . .152

In the same year the Maryland legislature extended personal jurisdiction in a similar way by declaring that "every foreign corporation shall be subject to suit in this State by a resident of this State . . . on any cause of action arising out of a contract made within this State or liability incurred for acts done within this State, whether or not such foreign corporation is doing or has done business in this State."153 Two

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149 Vt. Stat. § 1562 (1947). (Emphasis added.)
150 116 Vt. 569, 80 A.2d 664 (1951).
152 116 Vt. at 575, 80 A.2d at 668. (Emphasis added.)
principal cases have served to define and interpret the extent of this statute. In *Johns v. Bay State Abrasive Prod. Co.* Judge Chestnut upheld this statute as applied to a Texas corporation because defendant’s soliciting agent made a “careless or ignorant misrepresentation as to the safety and utility” of the machinery which injured plaintiff, and because this agent was engaged in a continuous course of solicitation in Maryland. The decision seems to be a correct one. Even though solicitation alone may not be considered a basis for jurisdiction, it is at least an act done within the forum. The continuousness of this solicitation enlarged it into a substantial connection with the state. An important factor here, of course, was the fact that the cause of action could not have arisen but for the recommendation of defendant’s agent.

In *Compania de Astral v. Boston Metals Co.* this same statute was applied to a contract between a Panamanian corporation and a Maryland corporation for the purchase of three ships. The court first established that the contract was made in Maryland by noting that the ships were in Maryland, Maryland law was to apply to the contract, an escrow fund was to be set up in Maryland, and the vessels were to be delivered

155 Id. at 662.
156 Id. at 663.
157 See Comment, 18 U. Chi. L. Rev. 792 (1951) for a discussion of the case and the statute.
159 In Ericksson v. Cartan Travel Bureau, Inc., 109 F. Supp. 315, 319 (D. Md. 1953), it was contended that the Maryland statute conferred jurisdiction over defendant, an Illinois tourist agency, because plaintiffs had made reservations with the Illinois firm through an independent Baltimore travel agent to which defendant paid a commission of 10%. The action was for injuries received in Mexico during an automobile tour conducted by defendant. The court found that the statute could not apply because (1) defendant was not doing business in Maryland, and (2) the contracts between the Maryland plaintiffs and the Illinois defendant were made in Illinois. Then, as if to emphasize that the new concepts in jurisdiction were not without bounds, Judge Chestnut added: “While the relative convenience of the parties to a suit with respect to the particular forum is a factor which may be considered in a close case, I am not disposed to think that there is any great preponderance of convenience here to one or the other of the parties with respect to the forum. The ultimate merits of the case would seem to depend necessarily upon what occurred in Mexico . . . .” 109 F. Supp. at 319.
and payment was to be made in Maryland. Then the court went on to find that it had jurisdiction under the statute. "All of these things ... it is true, related to what was but a single transaction; but all told, they add up to considerable contact with this State and considerable reliance upon its laws and the protection which they afforded."  

Following the path blazed many years earlier by Maryland and Vermont, Illinois adopted in 1955 a most comprehensive statute.

Any person, whether or not a citizen or resident of this State, who in person or through an agent does any acts hereinafter enumerated, thereby submits ... to the jurisdiction of the courts of this State as to any cause of action arising from the doing of any of said acts:

(a) The transaction of any business within this State;
(b) The commission of a tortious act within this State;
(c) The ownership, use, or possession of any real estate situated in this State;
(d) Contracting to insure any person, property or risk located within this State at the time of contracting.  

In Nelson v. Miller defendant challenged the constitutionality of subsection (b) on the grounds, inter alia, that jurisdiction was predicated on ultimate liability in tort, that in order for the defendant to argue against jurisdiction at a special appearance he would have to disprove his liability, and that this imposition of burden of proof was discriminatory against nonresidents. The court denied such construction of the statute. Following the Vermont court's reasoning in Smyth, it found that "an act or omission within the State, in person or by an agent, is a sufficient basis for the exercise of jurisdiction to determine whether or not the act or omission gives rise to liability in tort." While the statute is a liberal one in its approach to the problem of jurisdiction over nonresidents, it seems to be well within the standards prescribed by International Shoe, McGee and Hanson.

In 1957 an unusual problem arose under subsection (a) in Orton v. Woods Oil & Gas Co. James L. Woods had a sole proprietorship in Louisiana where he engaged the plaintiffs to assist him in incorporating this business in the state of Delaware and in registering the securities

162 205 Md. at 260-61, 107 A.2d at 367.
163 Id. at 261-62, 107 A.2d at 367. There was judgment for defendant on other grounds and this judgment was challenged in a dissent. The dissenters, however, agreed with the majority that there was valid jurisdiction over defendant. 205 Md. at 272, 108 A.2d at 372.
165 11 Ill. 2d 378, 143 N.E.2d 673 (1957).
166 Id. at 393-94, 143 N.E.2d at 681.
167 249 F.2d 198 (7th Cir. 1957).
with the Securities and Exchange Commission. Plaintiffs' offices were in Illinois and they therefore did most of their work there; consequently they alleged that Woods' corporation was subject to the Illinois statute. The court found that the statute could not apply since neither Woods himself nor his corporation had had any relationship with Illinois which could be called transacting business.\textsuperscript{168} Moreover, the defendant corporation was totally nonexistent until the plaintiffs had completely performed their work for Woods. Apparently the work could have been done anywhere; it was plaintiffs' choice to work in Illinois. The decision might possibly have been different if plaintiffs had been required to work in Illinois, but there would still have been the problem of defendant's corporate existence.

North Carolina has made what is probably the most ambitious attempt thus far to impose its jurisdiction on nonresident corporations. The statute\textsuperscript{169} was enacted in 1955, the same year as the Illinois act, and is similar in that it predicates jurisdiction upon a single tort or single contract within the state.\textsuperscript{170} Section (a)(3) is the most surprising, however; it provides for jurisdiction where the action arose,

Out of the production, manufacture, or distribution of goods by such corporation with the reasonable expectation that those goods are to be used or consumed in this State and are so used or consumed, regardless of how or where the goods were produced, manufactured, marketed, or sold or whether or not through the medium of independent contractors or dealers . . . .\textsuperscript{171}

This section was held unconstitutional in its application in \textit{Erlanger Mills, Inc. v. Cohoes Fibre Mills, Inc.}\textsuperscript{172} and in \textit{Putnam v. Triangle Publications, Inc.}\textsuperscript{173} In the latter case a North Carolina resident sued a foreign publisher for libel and invasion of privacy. Defendant's publications were brought into North Carolina by wholesale newsdealers who purchased them from defendant outside the state. The court held that the activity was not covered by section (a)(3),\textsuperscript{174} but said that, even if the statute applied, it would be compelled to suspend its effect because defendant did not have sufficient contact with North Carolina to meet the requirements imposed by the Constitution and by the Inter-

\begin{itemize}
\item \textsuperscript{168} Id. at 202.
\item \textsuperscript{169} N.C. Gen. Stat. § 55-145 (Supp. 1957).
\item \textsuperscript{170} N.C. Gen. Stat. § 55-145(a)(4) (Supp. 1957).
\item \textsuperscript{172} 239 F.2d 502 (4th Cir. 1956).
\item \textsuperscript{174} 245 N.C. at 437-38, 96 S.E.2d at 449-50.
\end{itemize}
national Shoe doctrine. After McGee one wondered if Putnam was no longer law and if the "reasonable expectation" by defendant that its goods would be used in North Carolina gave it a substantial connection with the state. Since Hanson this doubt has considerably abated.

V

CONCLUSION

Without assuming the role of the oracle or the expert, it is possible to predict with fair certainty the effect which the McGee and Hanson decisions will have on the law created by their illustrious predecessor, International Shoe.

First of all, it is now clear that, given the right factual pattern, a state can and will take jurisdiction over a nonresident on the basis of a single act done within that state. This is not something without precedent on the state level, as has been shown. The importance of McGee and Hanson is that the Supreme Court has at last put its stamp of approval on such an exercise of jurisdiction.

In the second place these decisions will lead to considerable legislative activity on the part of the various states, because of a natural interest in providing their residents with a means of redress for wrongs committed against them by nonresidents. Statutes such as those of Vermont, Maryland and Illinois will become more common. In all likelihood they will not be limited to nonresident corporations.

Third, the sweeping away of the old legal fictions and the clarification of International Shoe will go a long way toward simplifying a much clouded area of the law. It is hoped that the three rules drawn from these cases will provide an even further understanding of the concepts propounded and will be of assistance in applying their doctrines to future cases as they arise.

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THE BISHOP OF PRATO AND AMERICAN LAW: DEFAMATION AND THE CLERGY

I
INTRODUCTION

On March 1, 1958, the Roman Catholic Bishop of Prato, Monsignor Pietro Fiordelli, was convicted of criminal defamation of character by an Italian penal court. He was fined the equivalent of sixty-four dollars, ordered to pay costs, and was held liable to pay damages to the injured complaining witnesses who were Mauro Bellandi, a professed atheist formally baptized a Catholic, and his wife, Loriana, a practicing Catholic. Their marriage was performed before the civil authority rather than before a priest. Consequently the Bishop, in a pastoral letter, branded them "'public sinners' entering 'scandalous concubinage.'" The Bishop argued that the courts had no authority to try a bishop for words spoken within the framework of the Church's divine rights since the Bishop's words were true according to Catholic doctrine.

Although the fact pattern of the Prato case poses interesting legal points of comparative law which may be explored in relation to American precedent and presents problems relating to the Italian Concordat of 1929 between Italy and the Vatican, the scope of this article shall be limited to an investigation of more local interest. Prato shall be merely the point of departure on a tour of that part of the American law of defamation which bears a relationship to the basic questions arising therefrom.

Of primary concern is the extent to which a clergyman in this country may commit defamation without liability. When acting within the scope of his authority he may enjoy a privilege to utter defamatory statements. It is the contention of this note that a clergyman would be granted such privilege, qualified by the absence of malice. The privilege could have its foundation in two distinct theories: first, it could be granted as a matter of public policy or secondly, it could be derived from a constitutional guarantee. The basis for granting the qualified privilege becomes important if an attempt is made to remove it, since a privilege founded upon public policy considerations, rather than upon a constitutional right, could be rejected by a mere change in policy by the courts or the

1 Repubblica Italiana v. Fiordelli, il deciso de Tribunale Penale de Firenze, March 1, 1958.
2 Ibid.
3 Concordato Fra La Santa Sede e L'Italia, 1929, Leggi e Decreti, Vol. 4, p. 3979; Binchy, Church and State in Fascist Italy (1941).
legislatures. Were this to occur, the clergyman must be prepared to prove the objective truth of his statements. The difficulty of this position is readily seen when the jury does not share the beliefs of the particular church represented by the clergyman but uses a different standard of evaluation.

Fortunately some of the problems posed have been solved. American case law sheds further light on still unanswered questions. After a brief review of the Prato case this note will examine the concept and basis of the privilege which is granted when religious beliefs are involved. This investigation will conclude with a consideration of the extent to which a court may adjudicate a religious matter of this nature in light of constitutional church-state problems.

II

THE HISTORY OF THE PRATO CASE

The Bishop of the town of Prato was charged with criminal defamation of character after he publicly censured the Bellandis for marrying in a purely civil ceremony.4 Prior to the ensuing trial the Bishop explained the purpose of his statement:

The Catholics of the Parish . . . were gravely disturbed by all these proceedings. . . . Therefore, to prevent a repetition of similar sad cases involving young Catholic women who at the last moment contract a civil marriage, it was deemed necessary to intervene and make a statement in strong terms to the faithful, inviting them to take their choice: either they intend to remain Catholics and cannot contract a civil marriage, or they contract a civil marriage and accept the fact that they are no longer considered faithful members of the Church.5

Further clarification of the Bishop’s position came with his announcement that in the letter:

every opinion has been given exclusively on religious grounds, in consideration of Catholic morals and of the laws of the Catholic Church. It contains no reference to any ethical concept, save the morals of the Catholic religion.

The document concerned two people who had been baptized. It was meant only for the faithful. All the terms of the document, and especially those terms having a juridic meaning such as “public sinner”, “public concubinage” and the words “scandal” and “sin”, were taken letter for letter from Canon Law.6

Despite the allegation of good faith the lower court found the Bishop guilty of defamation, concluding that the Bishop intended to harm the

4 Repubblica Italiana v. Fiordelli, il deciso de Tribunale Penale de Firenze, March 1, 1958.
reputation of the Bellandis and that such actions transgressed the constitutional rights of these citizens. Even though an act of the Holy See would enjoy immunity and acts of religious authorities concerned with purely spiritual and disciplinary matters would not fall within the court's competency, the circumstances surrounding the Bishop's letter did not come within that category. The court did recognize mitigating circumstances "since there is no doubt that the accused acted through a highly moral purpose, that of leading the uncertain and bewildered faithful to faith in God and to the comforts of religion."

On appeal the defense urged that the Bishop's letter attacked only religious reputation because the Bellandis had clearly violated a major law of the Church. In so doing the Bishop acted within his authority concerning a matter which does not come within the competence of the criminal code because it does not constitute a crime. The defense also set out the good faith of the Bishop and the absence of intent to harm even though the Bishop was aware of the full meaning of the statements made in his letter. They reasoned that this knowledge could not be considered tantamount to intent to harm since this intention is nonexistent when a person considers his act to be within the real or supposed limits of a just cause.

These contentions were well taken by the court of appeals which reversed the conviction and held that what the Bishop had said did not constitute a crime. However the prosecution has announced an intention to carry the case to Italy's highest court. Only after that review will the case reach its final conclusion.

Of more immediate concern is the probable result of such a trial in the United States were an American clergyman in the Bishop's position. This is not merely a matter of academic conjecture. In the light of such agitation as the public offer of assistance, financial and legal, to anyone who would bring a similar suit in the United States, a Prato-like prosecution could become a reality at any time. However the vast majority of American law reveals that a clergyman would enjoy a qualified privilege based on public policy and thus escape liability if he defames a member

7 Repubblica Italiana v. Fiordelli, il deciso de Tribunale Penale de Firenze, March 1, 1958.
8 Ibid.
10 Ibid.
12 N.Y. Times, March 3, 1958, p. 4, cols. 4-5.
of his congregation but does so within the scope of his authority, while acting in good faith, and without malice.13

III

THE QUALIFIED PRIVILEGE: PUBLIC POLICY

In order that the qualified privilege attach to situations involving defamation, certain elements must be present. The privilege, which has its motivating spirit in public policy considerations of the various states, is recognized where the publisher and the recipient have a common interest and the communication is of a kind reasonably calculated to protect or further it; frequently in such cases there is a moral, if not legal, obligation to speak.14 Moreover the communication must be made upon a proper occasion from a proper motive, and must be based upon reasonable and probable cause.15 Generally it is the occasion and not the language that creates the privilege, but the law requires both an occasion of privilege and the use of that occasion in good faith, the latter to be determined by the jury and the former by the judge.16 Whether the privilege is available as a defense may depend on the circumstances of the particular case, that is, the situation of the parties, the persons to whom the publication is made, and the circumstances under which, and the manner in which, the communication is made.17 The falsity of the communication will not destroy the privilege and the publication will be protected if the defendant honestly believes his statement to be true regardless of whether he has good grounds for such belief.18

Procedurally speaking, when the qualified privilege is established, the question is not as to truth or falsity, but only whether the defendant, in making the publication, acted in good faith or was inspired by malice. If the occasion is such that the law grants the privilege, the prima facie presumption of implied malice is rebutted and actual or express malice

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17 53 C.J.S. Libel and Slander § 90 (1948).
18 Coleman v. MacLennan, 78 Kan. 711, 726, 98 Pac. 281, 286 (1908).
must be proved. Nevertheless the burden is upon the defendant in the first instance to establish the privilege.

A member of the clergy holds a unique position as a guardian of the spiritual welfare of society. The duty to offer correction to his congregation flows from this status. For the effective discharge of this duty the clergyman must be free to speak out boldly in the exercise of his proper function without fear of unreasonable retaliation. The laws of this country are founded on the recognition of the predominance of this socially desirable end over the hardship and disadvantage to the defamed individual. For the promotion of this public policy a qualified privilege has been granted to the clergyman.

The scope of the privilege and the extent to which a clergyman may censure a member of his congregation is delineated in Farnsworth v. Storrs. The plaintiff was sentenced to be excommunicated from the church on facts similar to Prato. This action was consummated by a publication on Sunday and in the presence of the congregation. The Supreme Judicial Court of Massachusetts held that the use of the words “fornication” and “uncleanliness” in the publication did not import the crime of adultery in its legal and technical sense as an indictable offense. In speaking of the privilege in general terms the court acknowledged:

churches have authority to deal with their members, for immoral and scandalous conduct; and for that purpose, to hear complaints, to take evidence and to decide; and, upon conviction, to administer proper punishment by way of rebuke, censure, suspension and excommunication. To this jurisdiction, every member, by entering into the church covenants, submits, and is bound by his consent.

Since the privilege is qualified it may be defeated by malice. As used in this context, malice means more than the mere fact of publication, but can be less than the desire to harm. Personal ill will does not defeat the privilege if there is no other evidence of malice. Malice which does defeat the privilege may be shown by intrinsic evidence, such as the exaggerated language of the libel, or by extrinsic evidence. Examples of such extrinsic evidence are excessive publication and the use of primarily temporal sanctions to punish a religious wrong.

The extent to which a publication may be deemed privileged and yet

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20 Zollman, American Civil Church Law 392 (1917).
22 Id. at 415-16.
venture near the point beyond which words would be considered excessive, is demonstrated in *Kuryer Publishing Co. v. Messmer*.

The court held that the publication by Bishops of the Roman Catholic Church of a pastoral letter warning members of the Church against reading certain newspapers was entirely within the scope of church discipline. However, "it might be otherwise if they attempted to forbid social or business intercourse . . . or something which ordinarily could not affect the faith of the members."

The cases are sprinkled with instances where the privilege was lost because the cleric attempted to forbid business intercourse or place a similar predominantly economic sanction upon the religious wrongdoer. An example of this type of case is seen in *Fitzgerald v. Robinson*.

Here the clergyman not only called the plaintiff anathema and excommunicated him, but also told his parishioners to keep away from plaintiff's house of ill-repute. In *Morasse v. Brochu* a priest lost the privilege when he told his congregation that a civil marriage by a divorced doctor excommunicated him from the Church, and that the members, under penalty of loss of the sacraments, were not to employ the individual. Still more obviously the privilege is lost when the cleric's sole purpose is defamatory.

The fact that privilege-destroying malice is present when the sole purpose of the defamation is to injure one's professional status needs little illustration.

Excessive publication is a common means by which malice may be shown since the proper purpose of publication is to reach interested parties. However the fact that the publication may be incidentally brought to the attention of nonmembers will not remove the privilege.

An obvious example of excessive publication occurred in *Brewer v. Second Baptist Church*, in which defamatory statements were read at the church meeting, sent to a local newspaper, and published in the national church organ. *Lathrop v. Sundberg* is also illustrative of the fact that

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24 162 Wis. 565, 156 N.W. 948 (1916).
25 Id. at 568, 156 N.W. at 949.
26 112 Mass. 371, 377, 381 (1873).
28 Hellestern v. Katzer, 103 Wis. 391, 396-97, 79 N.W. 429, 430 (1899); see Piper v. Woolman, 43 Neb. 280, 287, 61 N.W. 588, 590 (1895); Servatius v. Pichel, 34 Wis. 292, 297 (1874).
30 Zollman, op. cit. supra note 20, at 392.
31 32 Cal. 2d 791, 197 P.2d 713 (1948).
32 Id. at 794-96, 197 P.2d at 715-17.
33 55 Wash. 144, 104 Pac. 176 (1909); see Zollman, op. cit. supra note 20, at 329-30.
a qualified privilege does not extend to defamatory matter which goes beyond the necessities of the case. The defendants in Lathrop unnec-
sarily gave the defamatory information to newspapers for general pub-
lication. Even though a publication occurs in a religious magazine, the
courts will find excessive publication if the magazine is also one of gen-
eral circulation. In Moyle v. Franz the expulsion of a witness of Jeho-
vah was published in the The Watchtower, a religious publication cir-
culated to nonmembers, on three separate occasions over a period of months. The court found this action was unprotected.

Furthermore, communication can be tantamount to excessive publi-
cation even though it is not printed in a newspaper of general circulation. A priest who merely requested local newspapers to publish defamatory statements previously made from the pulpit was held liable to the plaint-
tiff even though the priest’s statement was not actually printed in the paper. It is thus evident that the downfall of the privilege lies within the rather specialized meaning of malice. Only if the privilege were absolute would malice be of no significance.

As related to Prato, the weight of American law establishes that the
privilege will not be lost by the specific reference to the member’s name, the use of a pastoral letter, or by the fact that the individual no longer considers himself a member. These peculiar issues of the Prato case thus resolved, coupled with the open admission of the Bishop’s good faith by the court itself, as well as the fact that none of the other rudimentary requirements of this privilege were breached, lead to the conclusion that the Bishop of Prato would have incurred no liability if he were to be tried under American jurisprudential concepts of defamation.

IV

THE QUALIFIED PRIVILEGE: CONSTITUTIONAL COMPULSION

A constitutional problem under the first amendment will not arise so
long as the courts deem the qualified privilege outlined above to be con-
sistent with public policy. However a judicial or legislative rejection of

35 Id. at 429-30, 432, 46 N.Y.S.2d at 672-73, 675.
36 Hassett v. Carroll, 85 Conn. 23, 37, 81 Atl. 1013, 1019 (1911).
433, 440 (1883).
39 N.C.W.C., April 7, 1958 at p. 10.
this policy could occur. Were the privilege to be removed, the truth of
the cleric's statements would be his only defense. In viewing the merit
of this defense the jury would be forced to determine the validity of a
tenet of the Church. Thus in a Prato-like case, if the cleric must dem-
onstrate truth, he must show that the couple were living in scandalous
concubinage in the eyes of the law. Since a civil ceremony was per-
formed in Prato, the jury could find that the cleric did not tell the
truth. The cleric would certainly be liable because it would be untenable
to argue that the couple had not been defamed.

The very fact that the jury would be permitted to question the validity
of a particular religious belief poses a still greater problem—one of con-
stitutional proportions. The problem lies in the fact that while many
churches as a part of their essential doctrine do not believe in imposing
sanctions on their members, other churches with equal doctrinal fervor
maintain that sanctions such as excommunication are necessary to effec-
tuate their ultimate aims, and necessary to the maintenance of their
church as a hierarchical organization. This difference in approach did
not occur by chance; it is an approach deeply rooted in the philosophical
and dogmatic tenets of the particular church. Legislative or judicial
limitations on the right of a church to punish its members by proper
means would, it is submitted, invade that area within which the church
is entitled to free exercise under the first amendment. It thus follows
that the clergyman would be entitled to at least a qualified constitutional
privilege in the area of defamation—a privilege with limits identical to
those placed on the privilege based on public policy, but with a rationale
based on the first amendment of the Constitution.

The first amendment provides that "Congress shall make no law re-
specting an establishment of religion, or prohibiting the free exercise
thereof. . . ." Since the guarantees of these clauses of the first amend-
ment have been made applicable to the states by the fourteenth amend-
ment,40 no state could remove the privilege.41 However, a qualified con-
stitutional privilege founded in the first amendment might be attacked
by those who would consider its grant as the establishment of religion
and repugnant to the first clause of the first amendment. Thus it is im-
portant to note whether the two clauses clash and if so, which should
prevail.

40 Cantwell v. Connecticut, 310 U.S. 296, 303 (1940). But see Snee, Religious Disestab-
296, 303 (1940).
It can be argued by way of analogy that the Court would recognize a qualified constitutional privilege of the clergy in defamation cases. The holding in *United States v. Ballard* \(^{42}\) lends weight to this contention. In that case the defendants, the Ballard family, were indicted and convicted for using and conspiring to use the United States mails to defraud by organizing and promoting the "I Am" movement through the mails. The indictment covered the defendants' alleged religious doctrines which were based on the belief that Guy Ballard, the founder of the movement, who had on various occasions identified himself as St. Germain, Jesus, George Washington and Godfrey King, would transmit to mankind the words of St. Germain, and that the Ballard family was possessed of supernatural healing powers. The indictment was followed by the charge that the defendants "well knew" that the representations were false. \(^{43}\) The defendants demurred and moved to quash the indictment on the ground that it attacked the religious belief of the defendants and therefore restricted the free exercise of their religion in violation of the Constitution. The district court denied the motion.

In a pre-trial conference the trial judge restricted the triable issue to the defendants' good faith belief in their representations. What the defendants preached or wrote or taught was immaterial. "Therefore, the religious beliefs of these defendants cannot be an issue." \(^{44}\) The Ballards appealed from the verdict rendered against them. The circuit court reversed and granted the defendants a new trial on the ground that the trial court was in error by restricting the issue to their good faith. The circuit court claimed that the truth of defendants' representations was also in issue. The Supreme Court reversed and remanded, \(^{46}\) agreeing with the district court that "the truth of respondents' religious doctrines or beliefs should not have been submitted to the jury. . . . [T]he first amendment precludes such a course. . . ." \(^{46}\)

The Court thus decided that the objective truth or falsity of the defendants' beliefs was beyond the pale of jury inquiry, and more importantly that the reason for its ruling was the first amendment of the Constitution.

In speaking generally of the free exercise clause Mr. Justice Douglas, citing *Cantwell v. Connecticut*, \(^{47}\) distinguished the absolute freedom of

\(^{42}\) 322 U.S. 78 (1944).
\(^{43}\) Id. at 80.
\(^{44}\) Id. at 81.
\(^{45}\) Id. at 88.
\(^{46}\) Id. at 86.
\(^{47}\) 310 U.S. 296 (1940).
thought from the qualified freedom to act in accordance therewith.\textsuperscript{48} He further illustrated this principle by a reference to the Court's opinion in \textit{Davis v. Beason}:\textsuperscript{49} "With man's relations to his Maker and the obligations he may think they impose, and the manner in which an expression shall be made by him of his belief on those subjects, no interference can be permitted, provided always the laws of society, designed to secure its peace and prosperity, and the morals of its people, are not interfered with."\textsuperscript{50}

Mr. Justice Douglas had ample authority in endorsing this view. As early as 1878 the Supreme Court took occasion in \textit{Reynolds v. United States}\textsuperscript{51} to announce that "laws are made for the government of actions, and while they cannot interfere with mere religious beliefs and opinions, they may with practices."\textsuperscript{52} The defendant was a devout Mormon who believed that he had to practice polygamy in order to be saved. He contended that the statute which forbade polygamous marriages was unconstitutional since it abridged the free exercise of religion. In view of the qualified nature of the freedom to act and the public interest in the preservation of the social and moral welfare of society, the statute's constitutionality was upheld.\textsuperscript{53}

The Court in the \textit{Ballard} case, relying on the first amendment, did not reach the question of fraud because necessary to a finding of fraud was a determination that the statements made by the Ballards were false. This the Court refused to do. The dissenters did meet the problem and concluded that the first amendment gave no immunity for fraudulently procuring money simply because false statements concerned religious beliefs.\textsuperscript{54} They saw no reason why the objective falsity of statements made could not be shown. Whether Ballard shook hands with St. Germain in San Francisco on a day named and cured hundreds of people could be objectively proven without reference to doctrine.\textsuperscript{55}

The doctrine in the \textit{Reynolds} case appears inconsistent with \textit{Ballard} if the only determination which is necessary following the \textit{Ballard} ra-
tionale is the subjective genuineness of the belief of the defendant. There is no doubt that the inconsistency is a result of the weighing of conflicting interests—the individual's right to free exercise of religion as against the interests of government in the preservation of the social, moral and economic welfare of its people. Perhaps the apparent inconsistency can be explained by a reference to the evils to be avoided in each case. In Ballard the Court refused to consider whether fraud had been perpetrated on the public, while in Reynolds the monogamous nature of marriage was under attack. If the Ballard Court had reached the issue of fraud, it may have determined that the balance was in favor of religious freedom. In Reynolds the contrary was true. It should be noted that the Ballard case dealt with the right of an individual to express his religious beliefs and nothing more. Much more is involved in a Prato-like case because a church organization's doctrine concerning its right to discipline its entire membership is under attack, and not only the religious expressions of an individual.

In Baxley v. United States, the circuit court similarly sought to evaluate the importance of free speech which resulted in the violation of a valid criminal statute. Defendant urged his listeners to evade military service or registration as required by the Selective Service Act. The defendant was found guilty even though he was preaching a cardinal tenet of his religion. On the Reynolds rationale the court constricted the right to hold religious views "which result in external conduct when such views are put into practice which is fraught with clear and present danger to the safety, morals, health or general welfare of the community and is violative of laws enacted for their protection."

Perhaps a more potent analogy upon which the constitutional privilege in defamation cases can be supported is one based on two leading cases involving the use of church property—Kedroff v. St. Nicholas Cathedral and Watson v. Jones. This is so because the area is the last upon which the Supreme Court has made a pronouncement concerning state interference with the free exercise clause and more specifically with civil jurisdiction over church adjudications.

The Watson case, decided many years prior to Kedroff, was also concerned with a dispute regarding the elections of church hierarchy. As

56 See Annot., 96 L.Ed. 968, 973-74 (1952).
57 134 F.2d 937 (4th Cir. 1943).
58 Id. at 938.
60 80 U.S. (13 Wall.) 679 (1871).
in *Kedroff* the dispute was aired in terms of the use of church property. Each of two groups claimed the use of the property. But a decision on this issue would necessitate a finding concerning the properly elected group. The Court supported the group which had been elected by the church governing body because the secular courts are bound by the determination of the highest governing body of the church in regard to questions of discipline, faith or ecclesiastical law.\(^{61}\)

The right to organize voluntary religious associations to assist in the expression and dissemination of any religious doctrine, and to create tribunals for the decision of controverted questions of faith within the association, and for the ecclesiastical government of all the individual members, congregations, and officers within the general association is unquestioned. All who unite themselves to such a body do so with an implied consent to this government, and are bound to submit to it. But it would be a vain consent and would lead to the total subversion of such religious bodies, if anyone aggrieved by one of their decisions could appeal to the secular courts and have them reversed. It is of the essence of these religious unions, and of their right to establish tribunals for the decision of questions arising among themselves, that those decisions should be binding in all cases of ecclesiastical cognizance, subject only to such appeals as the organism itself provides for.\(^{62}\)

The holding in *Watson* was elevated to a constitutional plane in *Kedroff*.\(^ {63} \) Mr. Justice Reed, speaking for the majority, stated that *Watson*

was decided without depending upon prohibition of state interference with the free exercise of religion. It was decided in 1871, before judicial recognition of the coercive power of the fourteenth amendment to protect the limitations of the first amendment against state action. . . . Freedom to select the clergy, when no improper methods of choice are proven, we think, must now be said to have federal constitutional protection as a part of the free exercise of religion against state interference.\(^ {64}\)

The *Kedroff* Court also cites the language of *Watson* which condemns civil interference in church cases whenever the dispute concerns ques-

\(^{61}\) Id. at 727.

\(^{62}\) Id. at 728.

\(^{63}\) On February 22 and 23, 1957, a conference was held at the law school of Villanova University to discuss among other things the juridical status of churches in the United States. One of the speakers, Mark DeWolfe Howe of Harvard University, an authority on church-state relations, stated: "In essence, what the *Kedroff* case did was to convert the principles of *Watson v. Jones*, which . . . were not constitutional at the time of their promulgation into constitutional principles. By virtue of the decision in the *Kedroff* case, it seems clear that it is now required that the rule of *Watson v. Jones* be accepted, and no longer can states continue to reject it as they had in many instances." The Institute of Church and State Conference Proceedings, The Juridical Status of Churches, 20, Villanova Press, 1958.

\(^{64}\) *Kedroff* v. St. Nicholas Cathedral, 344 U.S. 94, 115-16 (1952). (Footnote omitted.)
tions of discipline, faith, ecclesiastical rule, custom, or law. Since *Kedroff* approves this broad language of *Watson* it can be inferred that a constitutional guarantee would have been recognized even if the *Kedroff* decision were not strictly confined to the appointment of clergy.

The broad principle conceived in *Kedroff* can be seen in its statement that legislation which interferes with "the operation of churches" prohibits the free exercise of religion. It follows that the elimination of a policy of non-interference with church doctrine regarding ecclesiastical sanctions to be placed on members who violate church law would directly limit church operation, discipline, and beliefs. It would thus appear that a judicial or legislative rejection of the cleric's privilege based on public policy would be unconstitutional according to the *Kedroff* rationale. What would emerge from this line of cases is a qualified constitutional privilege for the clergyman in the defamation area.

V

**The Establishment Clause**

The cases reviewed above seem to give judicial sanction, at least by analogy, to the theory that the qualified privilege could be based on a constitutional mandate—the free exercise clause of the first amendment. Although this would eliminate most of the difficulty of the cleric who makes defamatory statements, it would be small comfort indeed if the constitutional mandate itself falls under fire. In *Everson v. Board of Educ.* the Supreme Court sustained the right of New Jersey to provide free transportation for children attending parochial schools. But the Court suggested that the constitutional privilege provided for by the free exercise clause is in conflict with the second clause of the first amendment, the establishment clause. Mr. Justice Black, who rendered the majority opinion, set out a startling view of the scope of the establishment clause. He asserted:

The "establishment of religion" clause of the First Amendment means at least this: Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another. . . . No tax in any amount . . . can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion. Neither a state nor the Federal Government can, openly or secretly, participate in the affairs of any religious organizations or groups . . . .

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65 Id. at 115.
66 Id. at 107.
67 Ibid.
69 Id. at 15-16.
The dissenters agreed with Mr. Justice Black’s statement in so far as the establishment clause means “not simply an established church, but any law respecting an establishment of religion,”70 and that “every form of public aid or support for religion”71 is forbidden.

Carrying the language of the majority and dissent to its logical conclusion, it would seem that the federal government in advocating a constitutional privilege would be aiding, or at least giving support to, all religions and thus would come into conflict with the establishment clause.

In the following year the Court was called upon to decide McCollum v. Board of Educ.72 This case concerned the constitutionality of released time from public school classes for religious instruction. The Court, speaking through Mr. Justice Black, stood squarely behind its opinion in Everson that the state cannot constitutionally use the public school system’s time and property to aid any or all religious groups in the spread of their faith.73 Mr. Justice Reed, acknowledged to be the “first amendment justice,” wrote a telling dissent in which he laid bare the fallacy of the Court’s interpretation of the establishment clause in Everson and the perpetuation of this error here.

The phrase “an establishment of religion” may have been intended by Congress to be aimed only at a state church. . . . Passing years, however, have brought about the acceptance of a broader meaning, although never until today . . . has this Court widened its interpretation to any such degree as holding that recognition of the interest of our nation in religion . . . was equivalent to establishment of religion.

. . . .

This Court summarized the amendment’s accepted reach into the religious field, as I understand its scope, in Everson v. Board of Education . . . . The Court’s opinion quotes the gist of the Court’s reasoning in Everson. I agree that they cannot “aid” all or any religions or prefer one “over another”. But “aid” must be understood as a purposeful assistance directly to the church itself or to some organization doing religious work of such a character that it may fairly be said to be performing ecclesiastical functions. “Prefer” must give an advantage to one over another.74

In the Court’s opinion Mr. Justice Black scoffed at the idea that the first amendment was intended to forbid governmental preference of one religion over another, not governmental assistance to all religions. He gave assurance that the limitations on state aid to all religions do not evidence a governmental hostility to religion:

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70 Id. at 31 (dissenting opinion).
71 Id. at 32 (dissenting opinion).
72 333 U.S. 203 (1948).
73 Id. at 209-10.
74 Id. at 244, 248.
A manifestation of such hostility would be at war with one national tradition as embodied in the First Amendment’s guaranty of the free exercise of religion. For the First Amendment rests upon the premise that both religion and government can best work to achieve their lofty aims if each is left free from the other within its respective sphere. Or, as we said in the Everson case, the First Amendment has erected a wall between Church and State which must be kept high and impregnable.75

In his concurring opinion Mr. Justice Frankfurter sanctioned the “wall of separation between Church and State,” but noted a divergence of views on what it is the wall separates.76 He agreed that a complete separation between the state and religion is best, for “good fences make good neighbors.”77 Despite the assurance that limitations on state aid, as set out in Everson and McCollum, are in keeping with the national tradition, the language of the Court belies such fact. The language of Mr. Justice Black clamors for complete severance between church and state.

Several years later the sweeping statements made in Everson and McCollum gave the Court cause for discomfort. At that time the Court upheld the constitutionality of released time for religious instructions in the case of Zorach v. Clauson.78 The religious instructions in Zorach were not held on public school property; therefore, the case is factually distinguishable from McCollum. But the language of the Court, speaking through Mr. Justice Douglas, indicates a re-evaluation of the position taken in Everson and McCollum. Verities of America’s religious heritage were again articulated:

When the state encourages religious instructions or cooperates with religious authorities, . . . it follows the best of our traditions. For then it respects the religious nature of our people and accommodates the public service to their spiritual needs. To hold that it may not would be to find in the Constitution a requirement that the government show a callous indifference to religious groups. That would be preferring those who believe in no religion over those who do believe.79

In its recognition that there must be a friendly relationship between church and state, the Court echoed the dissent of Mr. Justice Reed in McCollum, where the “first amendment justice” noted instances of close association of church and state in American society,80 and recalled that “many of these relations are so much a part of our tradition and culture that they are accepted without more.”81 Throughout these cases only Mr.

75 Id. at 211-12.
76 Id. at 213 (concurring opinion).
77 Id. at 232 (concurring opinion).
79 Id. at 313-14.
81 Ibid.
Justice Reed seemed untroubled by the possibility of a clash between the free exercise clause and the establishment clause. Instead he interprets the establishment clause as a prohibition on state preference by direct preferential assistance.

The history of the establishment clause reveals that it was meant as a political limitation on the power of the federal government and consequently as a reservation of such power in the states.\(^8\) The clause was designed not to discredit but to protect from federal interference the state established religions which were firmly accepted when the first amendment was drafted. In his *Commentaries on the Constitution*,\(^9\) Mr. Justice Story gave valuable insight into this problem. He surmised that at the time the Constitution was adopted sentiment probably was that “Christianity ought to receive encouragment from the state, so far as was not incompatible with the private rights of conscience, and the freedom of religious worship. An attempt to level all religions, and to make it a matter of state policy to hold all in utter indifference, would have created universal disapprobation if not universal indignation.”\(^8\)

If the states were left free to foster established churches, the prohibition against establishment cannot be essential to religious freedom.\(^5\) In the light of this analysis the establishment clause cannot be read into the “liberty” protected by the fourteenth amendment. There could not be a clash between establishment and the free exercise of religion. The difficulties of the Court in the education cases stem from the assumption that there is such inclusion. But the establishment clause is not to be taken out of context and used to defeat the free exercise clause.

**VI**

**Conclusion**

In the present posture of American law, the clergyman need not fear a *Prato*-like prosecution. As a matter of public policy, state and federal courts extend a qualified privilege, presumably for the reasons expressed so ably in the *Watson* case. For this reason, there is no constitutional problem today.

A legislative or judicial rejection of this public policy would squarely present the constitutional question. A reading of the *Ballard* case which

\(^{82}\) 2 Story, Commentaries on the Constitution of the United States, § 1879 (3d ed. 1858). See also Snee, supra note 40, at 392-93.

\(^{83}\) Story, Commentaries on the Constitution of the United States (3d ed. 1858).

\(^{84}\) 2 Story, Commentaries on the Constitution of the United States, § 1874 (3d ed. 1858).

\(^{85}\) Snee, supra note 40, at 399.
prevented a jury from delving into the objective truth or falsity of a defendant’s religious views, together with the Kedroff case which elevated the public policy announced in Watson to a constitutional plane, lead to the conclusion that a clergyman would, if the case arose, be extended a qualified constitutional privilege in the area of defamation, based on the freedom of religion clause of the first amendment. Finally, in any real or imagined battle between the freedom of religion clause and an historically distorted and judicially extended notion of the establishment clause, the former must prevail.

DONALD J. BARDELL
WILLIAM R. DURLAND
Stephen Girard, by a will of 1831, left a fund in trust with the City of Philadelphia for the erection of a college which was to admit "poor white male orphans." Through the combined efforts of the state and city Girard College was opened in 1848. Since 1869 the trust has been administered, and the college operated, by the Board of Directors of City Trusts of the City of Philadelphia.

In 1954 two poor Negro male orphans applied for admission. The Board turned down their applications, asserting that it had no power to admit "other than white boys to Girard College." The Orphans' Court of Philadelphia County rejected the constitutional contention that exclusion because of race violated the fourteenth amendment, and denied admission. This action was affirmed by the Pennsylvania Supreme Court. On appeal the United States Supreme Court reversed the lower court and remanded the case, holding that the Board which operated Girard College was a state agency, and that its refusal to admit Negroes violated the equal protection clause of the fourteenth amendment. Interpreting this decision to mean only that the city trustees were incapable of administering the trust, the Orphans' Court removed them, and in their place substituted thirteen private individuals on the theory that they would not be subject to the restrictions of the fourteenth amendment. Once again the case was appealed to the Pennsylvania Supreme Court where the action was affirmed. Held, the substitution by the Orphans' Court of private trustees in order to give effect to the racial restriction in Stephen Girard's will was a valid exercise of its power. The United States Supreme Court denied a petition for certiorari, and subsequently a petition for rehearing.

Simply stated, the argument advanced by the petitioners was that this replacement of trustees by the Orphans' Court for the purpose of giving effect to
a racial restriction constituted the very type of state action prohibited by the equal protection clause of the fourteenth amendment. In evaluating the court's answer it is important to examine the background of case material surrounding the concept of "state action and the fourteenth amendment."

A case of particular significance is Shelley v. Kraemer,9 wherein an action was brought to enjoin the sale of real estate to a Negro in breach of a private restrictive covenant between white property owners. The Supreme Court held that such an injunction could not issue.10 A distinction was drawn between a private agreement to discriminate, which is not prohibited by the Constitution, and state discrimination, which is forbidden by the fourteenth amendment. The Court declared that the state cannot make its coercive powers available to individuals on the basis of color.11

A second case which must be considered with Shelley is Barrows v. Jackson.12 This was an action to enforce a covenant forbidding the use and occupancy of real estate by non-Caucasians, and for damages for breach of this covenant. Again the Court held that the action of a state court in sanctioning a racial restriction would constitute state action within the prohibition of the fourteenth amendment.13

Confronted with these two cases, the majority of the Pennsylvania Supreme Court attempted to distinguish them from the case at bar. The court felt "that the complained of discrimination in the instant case does not impinge," as it did in Shelley and Barrows, "upon any civil right to which the minor petitioners have a constitutional claim along with all other members of the community."14 Since the two Negroes did not come within the qualifications required by Girard's will for admission to the orphanage, they had no right to be beneficiaries in defiance of Girard's plainly expressed and legally valid testamentary provision.15

The court went on to say that nowhere in Shelley or Barrows were restrictive covenants denounced as void. "Such covenants are recognized as valid inter partes so long as they are adhered to voluntarily."16 The flaw in this reasoning is apparent, because the United States Supreme Court has stated no grounds upon which a restrictive covenant will be enforced by the judicial processes of the state. The language in Shelley and Barrows is plain. Both cases agree that the fourteenth amendment prohibits a state court from enforcing or sanctioning a restrictive covenant, and this prohibition has not been qualified in any way. It must be said, therefore, that at present a restrictive covenant is valid, but unenforceable if challenged.

9 334 U.S. 1 (1948).
10 Id. at 23.
11 Id. at 19-20.
12 346 U.S. 249 (1953).
13 Id. at 254.
14 391 Pa. at 450, 138 A.2d at 851.
15 Ibid.
16 Id. at 453, 138 A.2d at 852.
Another important group of cases which the Pennsylvania court had to consider were those dealing with segregation in public schools. The most recent of these cases was *Brown v. Board of Educ.*, the only case cited by the United States Supreme Court in reversing and remanding the original Pennsylvania decision. In *Brown*, Mr. Chief Justice Warren had stated that the separation of Negro children from others, solely because of their race, generates in them a feeling of inferiority which may have a lasting effect. This effect is particularly detrimental when it has the sanction of the law. He concluded that the Negro, by reason of segregation, is deprived of the equal protection of the laws guaranteed by the fourteenth amendment. *Brown*, therefore, reiterates the principles laid down by *Shelley* and *Barrows*, that the state may not give effect to racial restrictions.

The Pennsylvania Supreme Court deduced from *Shelley* and *Barrows* that restrictive covenants are valid as long as they are adhered to voluntarily. Applying this rationale to the racial restriction in Stephen Girard’s will, it follows that the state is not at liberty to enforce the restriction through its coercive power, nor to sanction it, once it has been challenged. When the Orphans’ Court removed the city trustees and substituted private trustees in order to give effect to this testamentary restriction, it was both enforcing and sanctioning it.

It is difficult to understand how the Supreme Court could have had the substitution of trustees in mind when it reversed and remanded the case. The Court held that the Board of City Trusts was a state agency and therefore incapable of excluding the Negroes. The Orphans’ Court, which is a state agency itself, removed the city trustees and substituted private trustees so that the latter could exclude the Negroes. If the Orphans’ Court had maintained the city trustees there could have been no discrimination. Therefore, even though it is the private trustees who will carry on the act of discrimination, it is the action of the Orphans’ Court which is making this discrimination possible. To hold that the Orphans’ Court is not using its coercive powers, and that it is not sanctioning a racial restriction is to close one’s eyes to the

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17 Brown v. Board of Educ., 347 U.S. 483 (1954); McLaurin v. Oklahoma State Regents for Higher Educ., 339 U.S. 637 (1950); Sweatt v. Painter, 339 U.S. 629 (1950). The Sweatt and McLaurin cases culminated in *Brown*. In the former the Court held that the state must provide equal education for the Negro as soon as it provides for the applicants of any other group. McLaurin went a step further. Although the facilities are equalized, the state may still not discriminate even in seemingly minute matters, such as causing a Negro to use a separate cafeteria table.
19 Id. at 494.
20 Ibid.
21 Id. at 495.
23 353 U.S. at 231.
obvious. This is the very type of state action which the Supreme Court has held to be prohibited by the equal protection clause of the fourteenth amendment.

Aside from the constitutional issue involved, the court faced the problem of effectuating the intent of the will. Girard’s over-all concern was clearly for the public welfare of the City of Philadelphia. However, he expressed two specific intentions in his will over which this controversy arose. The first was to restrict admission to Girard College to “poor white male orphans.”24 The second was to perpetuate city officials as trustees of the college.25 After the United States Supreme Court held that public officials could have no part in racial discrimination, the Orphans’ Court of Philadelphia was faced with a dilemma which could not be solved without frustrating one of the intentions of Stephen Girard. It elected to remove the city trustees in order to give effect to the racial restriction. This choice would seem to be erroneous for two reasons. No one knows how important it was to the testator that Negroes be excluded from Girard College; but it can be seen from the general tenor of his will, and from his many provisions for public welfare, such as new streets, slum clearance, water supply, and the establishment of a police force,26 that it was very important to him that the city trustees be maintained in office. Private trustees would have had no authority to carry out these provisions; this could only be done by the governing body of the city. Furthermore, it is a well settled principle of Pennsylvania trust law that the removal of a trustee is a drastic action to be taken only when the estate is actually endangered and intervention is necessary to save trust property.27 Such is not the situation with Girard’s estate which is in thriving financial condition.28

However, the constitutional issue still overrides all. Recent Supreme Court decisions have held the equal protection clause of the fourteenth amendment to mean that a state agency cannot give effect to a restrictive covenant or a racial restriction. Since this has not been qualified in any way, it seems to indicate that a court should never enforce a racial restriction, even in the indirect manner utilized by the Orphans’ Court. If this interpretation is too broad, then it is incumbent upon the Supreme Court in future cases to define by way of exception the doctrine they have already expounded. Since this has not yet been done, the decision of the Pennsylvania Supreme Court appears to be inconsistent with constitutional precedent.

CHARLES J. MONAHAN

24 391 Pa. at 438, 138 A.2d at 845.
25 Id. at 476, 138 A.2d at 863.
26 Id. at 457, 138 A.2d at 854.
28 391 Pa. at 461, 138 A.2d at 856.
CONSTITUTIONAL LAW—The President Does Not Have the Power To Remove a Member of a Quasi-Legislative or Quasi-Judicial Commission From Office Without Cause When the Statute Which Established the Commission Does Not Specify Any Causes for Removal. Wiener v. United States, 357 U.S. 349 (1958).

Myron Wiener was appointed a member of the War Claims Commission by President Truman in 1950. The Commission had been established by the War Claims Act of 1948 to receive and adjudicate claims of certain individuals and organizations who had suffered damage at the hands of the enemy during World War II. The act provided in section 2 that the three members would hold office for the duration of the life of the Commission and it made no provision for their removal. In 1953, President Eisenhower asked Wiener to resign in order that the Commission could be staffed with the President's own appointees. When he refused, the President removed him from office. A recess appointment was made to fill his vacancy but the Senate had not confirmed this nomination when the Commission was abolished in 1954. Wiener thereupon brought suit in the Court of Claims to recover his salary from the date of his removal until the last day of the Commission's existence, alleging that the President had no authority to remove him from office. This suit was dismissed by a divided court on the ground that the President has the power to remove a member of a quasi-legislative or quasi-judicial commission at his discretion in the absence of evidence of congressional intent to place a limit on this power. Certiorari was granted by the Supreme Court. Held, the President does not have the power to remove a member of a quasi-legislative or quasi-judicial commission from office without cause when the statute which established the commission does not specify any causes for removal.

Although the Constitution makes provision for the appointment of federal officials, it is entirely silent as to the power to remove them from office other than by impeachment. As a consequence, the extent of the President's power to remove officials he has appointed with the advice and consent of the Senate has long been a disputed constitutional issue. The Supreme Court did not undertake to issue a definitive ruling on this question until its decision in Myers v. United States. This case set forth the doctrine that the President has the inherent constitutional power to remove executive officials he has appointed with the Senate's consent and Congress cannot validly place any limits on this power. The issue before the Court in the Myers case concerned the power

1 Ch. 826, 62 Stat. 1240.
3 352 U.S. 980 (1957).
5 U.S. Const, art. II, § 2.
6 272 U.S. 52 (1926).
7 Id. at 163-64.
of the Chief Executive to remove a postmaster from office, but the Court went considerably beyond this in its decision. It held that the President's illimitable removal power extended not merely to those officials who were subordinate to him in the executive branch of Government but also to those who had "duties of a quasi-judicial character . . . the discharge of which the President can not in a particular case properly influence or control." 8

The sweeping powers indicated by the Myers dictum were short-lived, however. Humphrey's Ex'r v. United States, 9 decided less than ten years later, disapproved the Myers dictum and confined the scope of that decision to "purely executive officers." 10 The Humphrey case involved the discretionary removal of a member of the Federal Trade Commission by the President in the face of a statute which fixed a definite term of office and specified causes for removal. The decision drew a sharp distinction between an official who is "merely one of the units in the executive department and, hence, inherently subject to the exclusive and illimitable power of removal by the Chief Executive, whose subordinate and aid he is," 11 and a member of a body which is "independent of executive authority . . . and free to exercise its judgment without the leave or hindrance of any other official or any department of the government." 12 The Court concluded that when Congress has established causes for which these latter officials may be removed from office, the President does not have the power to remove them at his discretion but rather may remove them from office only for one or more of the causes specified. 13

The essential distinction between the Humphrey and Wiener cases lies in the fact that the statute creating the War Claims Commission made no provision for removal of its members from office. In all other material respects the two cases present a strikingly similar set of facts. Both men were members of quasi-judicial, quasi-legislative commissions who had been appointed to serve for definite terms, and both were removed from office because the President wished to staff the commission with personnel of his own selection. Although the Government urged that the War Claims Commission performed purely executive functions, both the Supreme Court and the Court of Claims found that the Commission functioned in a quasi-legislative and quasi-judicial capacity rather than a purely executive one. 14 Therefore, the basic issue presented by this case was the question of the extent to which the Humphrey ruling applied to a commissioner serving under a statute which was silent as to the power to remove him. The majority and dissenting opinions of the Court of Claims show the two possible interpretations of the Humphrey decision in this

8 Id. at 135.
10 Id. at 627-28.
11 Id. at 627.
12 Id. at 625-26.
13 Id. at 632.
regard. The majority ruled that the President has the power to remove quasi-judicial officers unless Congress limits it. The dissent, on the other hand, held that the President has no power to remove such officials unless Congress gives it to him.

The Supreme Court, agreeing in general with the latter, interpreted the Humphrey decision to mean that the "power of removal exists only if Congress may fairly be said to have conferred it." In deciding whether any congressional intent to confer such power on the President could be inferred in this case, the Court was careful to point out that it was determining the question only with regard to a removal without cause. It found that in such a situation a grant of removal power cannot be implied from the fact that Congress failed to say anything about it in the statute. The decision thus avoids a definite ruling as to whether the power to remove for cause can be implied when no specific authority is conferred by statute.

Although the War Claims Commission is no longer in existence, four major federal commissions still operate under statutes which establish a definite term of office but make no provision for removal of a member: the Federal Communications Commission, the Federal Power Commission, the Securities and Exchange Commission, and the United States Tariff Commission. Inasmuch as the Tariff Commission serves a dual function as adviser to the President and to Congress, it is not entirely independent of the executive branch and therefore would not necessarily fall within the scope of the Wiener decision. The other three commissions, however, are independent regulatory agencies of the same character as the Federal Trade Commission and as such would come within the scope of the Wiener ruling. Thus their members are now assured at least the same immunity from discretionary removal as is held by members of the other regulatory commissions whose tenure of office is guaranteed by the statutory safeguards which allow removal only for cause.

The failure of Congress to make provision for removal of the members of these three commissions is probably due to the fact that these agencies were established during the interval between the Myers and Humphrey cases, a period when it was not considered constitutionally possible to place any limitation on the President's removal power. Even after the Humphrey decision their status remained in some doubt and legal writers reached contrary conclusions as to

15 135 Ct. Cl. at 835, 142 F. Supp. at 915.
16 Id. at 835-36, 142 F. Supp. at 915 (dissenting opinion).
17 357 U.S. at 353.
18 Id. at 356.
19 Ibid.
the President's power to discretionally remove their members from office.\textsuperscript{25} The Hoover Commission, recognizing the uncertainty of their status, recommended that Congress pass legislation to insure the tenure of their members by making them removable only for specified causes.\textsuperscript{26}

With the advent of the \textit{Wiener} ruling, legislation for the purpose of insuring that the President could not remove these commissioners without cause would no longer seem to be necessary. However, amendment of the respective statutes to provide for removal from office for "inefficiency, neglect of duty, or malfeasance in office," the causes for removal common to most of the other independent regulatory agencies,\textsuperscript{27} would serve the useful purpose of clarifying the status of the President's power to remove them for cause. Even though the \textit{Wiener} decision leaves the way open for finding an implied presidential power to remove for cause, it makes no determination as to the nature or the extent of this power. Thus, if the President should attempt to remove a member of one of these commissions for misconduct or other cause, there could still be some question as to the basis for implying his authority to do so. A possibly greater problem would be the question of what causes for removal are to be included within this implied power. The fact that these questions have not been resolved would give the ousted official an opportunity to challenge his removal in what might well be a long court battle. Yet, the only alternative to removal by the President would be the cumbersome and equally time consuming process of impeachment. Amendment of the statutes as suggested above would solve this problem by establishing both a definite power of removal and definite grounds for which the power could be exercised. Although such a situation is not likely to arise very often, as long as the possibility exists, this simple legislative remedy would seem to merit consideration by the Congress.

\textbf{JOSEPH F. HEALY, JR.}


In 1953, Roosevelt Mitchell, the appellant, was convicted and sentenced for carnal knowledge of a seven-year-old girl. Mitchell was represented by a

\textsuperscript{25} See Cushman, The Constitutional Status of the Independent Regulatory Commissions, 24 Cornell L.Q. 163, 181 (1939) (inherent power to remove); Larson, Has the President an Inherent Power of Removal of His Non-Executive Appointees, 16 Tenn. L. Rev. 259, 262-72, 290 (1940) (no inherent power to remove).

\textsuperscript{26} Commission on Organization of the Executive Branch of the Government, The Independent Regulatory Commissions, A Report to the Congress, pp. 6-7 (1949).

court appointed lawyer. In 1956 he filed a motion under 28 U.S.C. § 2255 (1952) to discharge defendant or vacate or amend the judgment. The pertinent provisions of the section read as follows:

A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.

This motion was denied by the district court without a hearing. Mitchell then appealed the denial of his motion for a hearing to the United States Court of Appeals for the District of Columbia. The basis of the appellant's motion was that at his trial he was without "effective" assistance of counsel, which he alleged to be guaranteed by the sixth amendment. He claimed that counsel failed to (1) move for acquittal, (2) cross examine, (3) object to hearsay evidence, and (4) object to a patently erroneous charge to the jury. Taken separately, the acts of counsel are not sufficient to warrant a collateral attack. Mitchell, however, grouped them together and asserted that he did not receive "effective" assistance of counsel, and therefore his rights under the sixth amendment of the Constitution were violated. Held, the allegations of Mitchell even if proved refer only to errors of counsel's trial technique, and thus even in toto, do not constitute "ineffective" assistance of counsel, and therefore are not grounds for this motion under the sixth amendment. The relief desired in this motion is generally granted only when the counsel's assistance was so ineffective as to deny the accused a fair trial guaranteed by the due process clause of the fifth amendment.¹

The most significant aspect of the case in question was the majority's interpretation of the term "effective assistance of counsel." Judge Prettyman, speaking for the majority, asserted that the sixth amendment guarantee of "effective" assistance of counsel is satisfied if an indigent who desires counsel is appointed one who has no divergent interests and is given a reasonable amount of time to prepare a defense.² The majority relied on the rule set forth in Diggs v. Welch,³ where the court provided that the assistance of counsel must be lacking professional competence to such an extent as to render "the proceedings . . . a farce and a mockery of justice." This test limits the requirement of competency of counsel to a due process consideration. The sixth amendment's requirement of "assistance of counsel" has been supplemented by the Supreme Court's oft-repeated use and inference of the word

² Id. at 790.
"effective" in regard to assistance of counsel.\textsuperscript{4} The majority, however, stated that the Supreme Court’s use of the word "effective" relates to procedural due process. "It is clear . . . that the term 'effective' has been used by the Supreme Court to describe a procedural requirement, as contrasted with a standard of skill."\textsuperscript{5} On the other hand Judge Fahy, dissenting, asserted that effective assistance of counsel is not a formal requirement but rather indicates a minimum standard of skill.\textsuperscript{6} Thus the dissent takes issue with the majority's limitation of "effective" assistance to a fifth amendment due process requirement.

In general, the lower federal courts have also given the term "effective" the narrow interpretation of the majority.\textsuperscript{7} Such interpretation is possible in view of the absence of a specific stand by the Supreme Court on this issue. As pointed out by Judge Fahy, however, the language of the Supreme Court could warrant a contrary interpretation.\textsuperscript{8} This is evidenced in the case of \textit{Johnson v. Zerbst},\textsuperscript{9} where the court indicated that the defendant should have the protection of "professional legal skill"; in \textit{Powell v. Alabama},\textsuperscript{10} where it required the right of counsel in a "substantial sense"; and in \textit{Von Moltke v. Gillies},\textsuperscript{11} where it was stated that "this duty [appointment of counsel] cannot be discharged as though it were a mere procedural formality." It is interesting to note that the Court of Appeals for the District of Columbia, in the earlier decision of \textit{Johnson v. United States},\textsuperscript{12} stated that "the right to counsel is not formal, but substantial."

The "farce and a mockery of justice" rule of the \textit{Diggs} case has been adopted by other circuits.\textsuperscript{13} However, the stringency of the rule has been criticized.\textsuperscript{14} One of the bases for the adoption of the rule in the \textit{Diggs} case seemed to be that "in many cases there is no written transcript and so he

\textsuperscript{4} Hawk v. Olson, 326 U.S. 271, 274, 278 (1945); White v. Ragen, 324 U.S. 760, 764 (1945).
\textsuperscript{5} 259 F.2d at 790.
\textsuperscript{6} Id. at 794 (dissenting opinion).
\textsuperscript{7} See Pelley v. United States, 214 F.2d 597 (7th Cir. 1954), cert. denied, 348 U.S. 915 (1955); United States v. Wight, 176 F.2d 376 (2d Cir. 1949), cert. denied, 338 U.S. 950 (1950); Carvell v. United States, 173 F.2d 348 (4th Cir. 1949).
\textsuperscript{8} Mitchell v. United States, 259 F.2d 787, 795 (D.C. Cir. 1958) (dissenting opinion).
\textsuperscript{9} 304 U.S. 458, 462 (1938).
\textsuperscript{10} 287 U.S. 45, 58 (1932).
\textsuperscript{11} 332 U.S. 708, 722 (1948).
\textsuperscript{12} 71 App. D.C. 400, 401, 110 F.2d 562, 563 (1940).
\textsuperscript{13} See Taylor v. United States, 238 F.2d 409 (9th Cir. 1956), cert. denied, 353 U.S. 938 (1957); United States v. Pisciotta, 199 F.2d 603 (2d Cir. 1952); United States v. Ragen, 166 F.2d 976 (7th Cir. 1948); Maye v. Pescor, 162 F.2d 641 (8th Cir. 1947); Morton v. Welch, 162 F.2d 840 (4th Cir. 1947).
\textsuperscript{14} See Comment, 4 U.C.L.A.L. Rev. 400, 419 (1957); Note, 47 Colum. L. Rev. 115, 122 (1947).
[the prisoner] has a clear field for the exercise of his imagination."15 However, even if there is no transcript available, provision has been made for the availability of the reporter's stenographic notes for ten years.16

The mere charge that counsel was ineffective, without supporting factual allegations, is not enough to require a hearing.17 Therefore, the granting of a hearing turns on the sufficiency of the factual allegations. Generally, the courts have been unsympathetic to and suspicious of claims of dissatisfaction with trial counsel. Thus there have been few cases where the circumstances were held to result in the denial of effective assistance of counsel. Using the Diggs rule, the court found such a set of circumstances to exist in the case of Jones v. Huff.18 The allegations of the petitioner in the Jones case included (1) failure to object to a coerced confession, (2) failure to call necessary witnesses, and (3) failure to submit a handwriting sample of the defendant upon a juror's request. In the instant case, however, the majority asserted that even if Mitchell's allegations were true, they were still within the area of trial tactics and did not warrant a hearing. Only when the allegations are such as to constitute a violation of the due process clause would a hearing be granted.

The point raised by the dissent was that the right to assistance of counsel should not be restricted to a formal standard, but should require a standard of skill beyond the bare due process requirement.19 Using this standard, Judge Fahy claimed that the specific language of section 2255 cannot be avoided. The statute says: "Unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, the court shall . . . grant a prompt hearing thereon . . . ."20 In the instant case, with neither a hearing nor a transcript, it is not possible to say conclusively that Mitchell is entitled to no relief. As Judge Fahy asserts, "We simply do not know."21

The dissent pointed out that the petitioner in the instant case made more than bare allegations of incompetency. He alleged a conviction based on prejudicial hearsay evidence. Even if the failure to object to this incompetent evidence was, as the majority stated, only an error in counsel's trial technique, this cannot offset counsel's failure to enter an appeal. As Judge Fahy, relying on another case22 involving a similar crime, pointed out in his dissent, the Court of Appeals for the District of Columbia reversed on its own motion a conviction resulting from damaging hearsay evidence, admitted without objection, as constituting "plain error affecting substantial rights."23 The ma-

21 259 F.2d at 796 (dissenting opinion).
23 Id. at 395, 240 F.2d at 634.
The majority in the instant case, however, asserted that this matter should have been taken up via appeal. "The rule that questions open upon appeal must be raised by appeal is a rule of law, and it is a sound and solid rule."24 This statement strikes an ironical note in view of the fact that one of Mitchell's allegations was that his counsel failed to note an appeal. Federal courts recognize that a defendant not represented by counsel should be advised of his rights regarding appeal, and upon his request, would note one for him.25 Surely an effective counsel would afford a defendant an equal opportunity.

There appear to be two ways in which the result of the instant case can be questioned. First, it may be argued that the requirement of assistance of counsel in the sixth amendment necessitates a more thorough examination by the appellate court of the trial tactics of counsel. Second, it may be argued that the due process requirement of the fifth amendment or its interpretation in Diggs be expanded beyond a procedural or a strictly construed substantive requirement to include an examination of the trial tactics of counsel. This was done in the Jones case which the majority in the instant case limited to its facts. Whatever the rationale, however, it can be seen that these approaches are only two different roads leading to the same destination—a more realistic examination of whether there was a fair trial. The limit of appellate review of counsel's trial tactics is as incapable of definition as the concept of due process itself. It would seem, however, that at some point tactical errors of counsel are not irrelevant to considerations of due process or assistance of counsel. It is submitted that this point was reached and passed in the instant case.

Perhaps the drawing up of administrative rules apropos of the problems raised by the majority opinion would limit appeals under section 2255. An effective system might require the prisoner's affidavit at the end of the trial to ascertain whether or not he has any claims against counsel. If the prisoner does claim ineffective assistance, his charges could be examined immediately. Nevertheless, regardless of how cumbersome the administrative procedure, or how great the embarrassment to counsel, the life and liberty of the prisoner should be the prime consideration of the court. Inconvenience, discomfort or embarrassment is not too high a price to pay for constitutional safeguards.

JOSEPH L. STONAKER

24 259 F.2d at 791.

The defendants were convicted of attempting to evade the income tax of Allied Stevedoring Corporation for the year 1951 in violation of the Internal Revenue Code of 1939. After sentence was imposed the defendants learned that one of the jurors had been given a copy of "Handbook for Petit Jurors" and had read the handbook twice before being accepted as a juror in the case. Defendants' motion for a new trial upon this ground was denied and an appeal was taken from the order entered on the motion. Held, the handbook merely gives a general analysis of what happens at a jury trial and there is nothing improper in its use.

Such handbooks for jurors have been widely used in the federal district courts and state courts. The handbook in the instant case was the first edition drafted by a committee of the Judicial Conference of the United States and later authorized and introduced by the Conference to the federal courts in 1943. This handbook, which is illustrative of handbooks in use, contains the following typical excerpts:

The duty of a jury in trying a criminal case is to determine what are the true facts. On the basis of that determination, under the instructions by the judge, it finds the defendant guilty or not guilty. The jurors have no concern with the sentence which may be imposed if a defendant is found guilty, and they should not permit consideration of punishment to influence their decision.

Hearsay evidence primarily is testimony which consists of a narration by one person of matters told him by another. . . . Under ordinary circumstances, hearsay testimony will not be admitted as evidence in any case, either civil or criminal.

Prior to the instant case controversy over use of the handbook had arisen in two cases in the federal courts since adoption of the pamphlet. Most state courts which have considered the handbook have upheld its use. Foundation for the controversy was laid in United States v. Gordon, where, in its original opinion, the court reversed a conviction on the ground that a handbook distributed to the jury contained prejudicial statements. In addition, the court attacked the propriety of use of the handbook itself.

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1 United States v. Allied Stevedoring, 258 F.2d 104 (2d Cir. 1958).
3 Id. at 32.
5 26 U.S.L. Week 2043 (7th Cir. July 23, 1957).
6 Id. at 2044.
This opinion was superseded and withdrawn, and on rehearing en banc, the court, avoiding the question of propriety of the handbook, held that even if this particular handbook did contain prejudicial statements, the defendant had the right of challenge to the polls—a right which he had long since waived.7

An appeal was also taken in Horton v. United States8 on the grounds that use of the handbook was improper. There the court limited its consideration to the question of prejudice and upheld use of the handbook. It found nothing in the challenged language that was not a correct statement of the law and further that there had been no showing that any member of the jury had read the handbook.9

The opinion in the instant case finally reaches the central issue and upholds use of the handbook itself10—a necessary clarification because of the absence of vindication of the handbook in the Gordon and Horton decisions.

Three principal objections to the handbook evolve from the cases. It has been said that the handbook is equivalent to a set of instructions to the jury; secondly, that it is an impingement upon the constitutional right of trial by jury; and finally that a legislative act is necessary before such a pamphlet may be given a juror.

The difficulty which would arise if use of the handbook were to be construed as the giving of instructions is threefold. Under the Federal Rules and in most states, the jury is to receive instructions regarding the law applicable to the case after the arguments are completed.11 If the handbook is a set of instructions, it is clearly in violation of the rule as the handbook is generally distributed prior to impaneling. A second criticism is aimed at the violation of defendant’s right to be present at all stages of the trial and to have the jury instructed in his presence. This right is guaranteed by the bills of rights of most state constitutions.

A further objection if the handbook is to be regarded as a set of instructions is pointed out in a dissenting opinion in People v. Lopez,12 a state case upholding use of the handbook. After stating that for all practical purposes the pamphlet amounted to instructions, the dissent urged that the court should be reluctant to adopt a general set of instructions which would have to be applied to various situations and conditions.13 “[I]t is not the province of this court to pass upon, in advance of any controversy, the validity of a whole series of jury instructions in a criminal case.”14

Literally, the word “instruction” may apply to any direction given to the

7 253 F.2d 177, 185 (7th Cir. 1958).
8 256 F.2d 138 (6th Cir. 1958).
9 Id. at 142.
10 258 F.2d at 106-07.
13 Id. at 685, 197 P.2d at 766-67.
14 Id. at 687, 197 P.2d at 768.
jury by the court. The directions to retire with the bailiff, to separate for meals, to seal up the verdict, to abstain from talking among themselves or with others are not instructions to the jury within the meaning of the law. 16

By contrast, instructions are to be drawn with reference to the case at hand and are to contain the law by which the jury is to be guided and controlled in arriving at a verdict. 16 Mere definitions of abstract propositions may correctly state the law, but instructions to a jury must be connected and must state the law as applicable to the facts of the particular case. 17 Where a statute required instructions to the jury to be in writing, it was held that an oral statement or communication by the court to the jury which was in the nature of a cautionary direction, and not strictly a direction upon some rule of law applicable to the trial, need not be in writing. 18

In the Lopez case the majority opinion found no difficulty in stating: "The pamphlet was not intended to take the place of the required instructions, but to give the jurors background and general information concerning their duties and responsibilities . . . ." 19

The court in the instant case saw the handbook in the same light and concluded:
The whole book is so obviously a general explanation of courtroom procedure aimed at aiding a layman unfamiliar with judicial proceedings to grasp the nature of his function as a juror that we cannot avoid surprise at the kind of controversy and alarm exemplified in the dissenting opinions in the Gordon case. We find nothing improper in the use of the Handbook. 20

An added basis of criticism, were the handbook deemed to be a set of instructions, is a violation of the defendant's right to have the jury instructed in his presence. The court in Lopez directed itself to this objection, stating that where a handbook had been distributed, the constitutional guarantee was satisfied if the trial judge, in the presence of the defendant, instructed the jury as to the problems of his individual case. 21

Mere use of the handbook therefore would not seem to violate the defendant's right to be present during the giving of instructions even were the book deemed to be a set of instructions. Moreover, the inclusion of the handbook under the strict meaning of instructions is stretching that meaning excessively.

The original Gordon opinion also attacked the handbook on the ground that its use constituted an impingement upon the jury system as guaranteed by the

15 McCallister v. Mount, 73 Ind. 559, 567 (1881).
17 Leavitt v. Deichmann, 30 Okla. 423, 120 Pac. 983 (1911).
19 32 Cal. 2d at 676, 197 P.2d at 759.
20 258 F.2d at 107.
21 32 Cal. 2d 676, 197 P.2d 759.
Constitution, relying on People v. Schoos as authority for its contention. In the latter case the Supreme Court of Illinois found the distribution of a jury primer to be reversible error. The primer had been prepared and distributed to prospective members of a jury by the trial judge who stated that he would quiz the prospective jurors on their reading of the book. The court of review, although stating that a pamphlet in the nature of the jury primer might be used in certain circumstances, forbade this particular usage, remarking: "By distributing the jury primer to jurors prior to service in a particular case and, as in the present case, directing them to study the jury primer, the trial judge was, in reality, establishing a new method for the selection of jurors, a method certainly unknown at the common law and without any statutory basis in the laws of this State."

From the foregoing it is doubtful whether the Schoos decision can be taken as authority for the proposition that the mere use of a handbook violates the traditional or inherent rights of defendants in criminal cases. In the Schoos case reading of the jury primer was compulsory and was in reality an added qualification for jurors. In other cases the handbook was merely made available to prospective jurors and there was no requirement that it be read.

The constitutional amendment relating to trial by jury, moreover, was designed to preserve the basic institution of jury trial and did not bind federal courts to exact procedural incidents or details of jury trial according to common law. The aim of the seventh amendment is not to preserve mere matters of form and procedure but the substance of the right.

Finally, it has been urged that it is beyond the jurisdiction of the judiciary to prepare and have distributed any pamphlet or handbook to any person called for jury service. It is claimed that such is not a judicial act and that an act of the legislature is required to provide more qualified jurors.

As stated above, the federal courts are not bound to exact procedural incidents of jury trial according to common law. The propriety of adoption of the handbook by the courts without legislative act would appear to be within the inherent powers of the courts to make their own rules for the regulation of their practice and the conduct of their business, based on reasonableness and conformity to statutory and constitutional provisions.

Trial procedure is so foreign to the uninitiated that even an intelligent juror is apt to be bewildered. With some understanding of the operation of a court of law, it is submitted that the steps in the progress of a trial would hold more meaning for the juror educated by means of such a jury pamphlet than for the juror completely ignorant of procedure. The usual instructions at the end

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22 399 Ill. 527, 78 N.E.2d 245 (1948).
23 26 U.S.L. Week at 2044.
24 399 Ill. at 537, 78 N.E.2d at 250. (Emphasis added.)
of the arguments cannot impart retroactive understanding to the juror concerning what has gone before. There is no constitutional guarantee to trial by an ignorant jury. Neither the letter nor the spirit of the basic institution of trial by jury is violated by the giving of general preliminary information which will make jurors better able to perform their duties in deciding cases.

PAUL A. LENZINI


Samuel J. Hanna was convicted of housebreaking and larceny in the District of Columbia. The conviction was based on certain evidence, a quantity of money, which had been seized by Maryland police in a predawn search of his motel room.

The facts encompassing the arrest and subsequent conviction of Hanna are as follows. Maryland police responded to a call from a local motel keeper who informed them that he had witnessed two men counting money in one of his cabins and that they were acting in a suspicious manner. Upon arrival the police, without a search warrant, entered the cabin of Hanna's accomplice Robert Judd. Recognizing Judd as a person having past convictions for theft and currently being sought by his bondsman in the District of Columbia, they arrested him. The police then entered the adjoining cabin and discovered Hanna asleep. A search of Hanna's cabin produced a quantity of money which was seized by the police and subsequently used as evidence in Hanna's conviction. Hanna was thereupon placed under arrest on suspicion of possible housebreaking. The arrest was later determined to have been made without probable cause.

At trial in the District of Columbia, Hanna moved to have the evidence seized by the Maryland police suppressed on the grounds that the methods employed in its production violated his constitutional right to be secure from unreasonable searches and seizures. Upon the court's refusal to grant the motion, Hanna appealed. Held, evidence procured by state officers, without federal participation, by methods which violate the due process clause of the fourteenth amendment is inadmissible in a federal court.1

No previous federal circuit has excluded evidence obtained independently by state officers as a result of an unlawful search and seizure.2 The question of

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2 See Gaitan v. United States, 252 F.2d 256 (10th Cir. 1958); Jones v. United States, 217 F.2d 381, 383 (8th Cir. 1954); Fredericks v. United States, 208 F.2d 712 (5th Cir. 1953), cert. denied, 357 U.S. 1019 (1954); Parker v. United States, 183 F.2d 268 (9th Cir. 1950); Losieau v. United States, 177 F.2d 919 (8th Cir. 1949).
the admissibility of illicitly obtained evidence had little significance in the United States until 1914 when the Supreme Court decided *Weeks v. United States* which established the now familiar federal exclusionary rule. There the Court held that evidence procured by a federal officer as a result of an unreasonable search and seizure was inadmissible in a federal court since the means adopted to secure such evidence violated the fourth amendment. The rationale behind the Court's conclusion was that if it failed to give an efficacious sanction to the fourth amendment it would in reality become a dead letter. The *Weeks* case, however, specifically limited the application of the rule to federal officers and federal courts by holding that the fourth amendment applied only in the federal sphere.

Before tracing the application of this rule, its nature must briefly be examined. There are two conflicting approaches as to the nature of the federal exclusionary rule. The first approach expounds the theory that the rule itself is implicit in the fourth amendment and is therefore a constitutional command. On this point Mr. Justice Frankfurter remarked: "we have interpreted the Fourth Amendment to forbid the admission of such evidence . . . ."

The second approach considers the rule as merely a rule of evidence under the complete control of the Supreme Court. Following this reasoning, the Court of Appeals for the Eighth Circuit said: "The procedural rules relative to the exclusion or suppression of evidence obtained through unlawful searches and seizures are judge-made rules. The Supreme Court of the United States has the power to limit or to expand them." Even under this approach there exist conflicting thoughts as to the reason for the rule's promulgation. One school bases the validity of the rule on the Court's authority to impose sanctions upon constitutional violations. The other school contends that the purpose of the rule is to maintain judicial integrity, which simply means that the courts will not debase the judicial process by the admission of unconstitutionally obtained evidence.

Any expansion of the federal exclusionary rule beyond the circumstances as found in the *Weeks* case requires careful examination as to the nature of this rule. How far the rule can be applied in analogous situations is directly predicated on the approach adopted. Under either theory no problem arose concerning the application of the rule until *Wolf v. Colorado* was decided in 1949.

Here the Supreme Court refused to apply the *Weeks* doctrine to evidence unlawfully seized by state officers and introduced into a state court. For the first time, however, the Court ruled that the substance of the fourth amendment

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8 232 U.S. 383 (1914).
4 Id. at 398.
5 Ibid.
7 Jones v. United States, 217 F.2d 381, 383 (8th Cir. 1954).
is to be incorporated into the due process clause of the fourteenth amendment and therefore places a constitutional limitation on state police activity. In the Court's words: "The security of one's privacy against arbitrary intrusion by the police—which is at the core of the Fourth Amendment—is basic to a free society. It is therefore implicit in 'the concept of ordered liberty' and as such enforceable against the States through the Due Process Clause."\(^\text{10}\)

The Court, however, took the view that the states should be free to supervise their own judicial proceedings and to choose for themselves whatever sanctions they deem necessary to enforce those rights guaranteed by the federal constitution.\(^\text{11}\) In doing so, the Court left the implication that although the states could continue to avail themselves of evidence obtained unlawfully by state officers, the federal courts would now have a constitutional basis for excluding such evidence from their proceedings. At this point it should be noted that the Court seems to rebuke the idea that the rule is a constitutional implication by not enforcing it in the state courts after holding that an unreasonable search and seizure by state officers is a constitutional violation.

On the same day that the Supreme Court rendered its opinion in Wolf it also decided Lustig v. United States.\(^\text{12}\) There the Court found that evidence procured by state agents through an unreasonable search and seizure was inadmissible in a federal court if federal agents cooperated in the illicit state search. From this ruling arose the implication that now only unlawfully secured evidence obtained independently by state officers would be admitted into federal courts. This implication became known as the "silver platter" doctrine,\(^\text{13}\) truly a doctrine on a dictum. It would seem that such a doctrine would be superfluous if the Wolf case rendered all evidence secured in violation of the fourth amendment inadmissible in a federal forum.

Numerous circuit decisions have interpreted Lustig by permitting the admission into evidence of the fruits of seizures made by state officers without participation by federal officers.\(^\text{14}\) In the light of these holdings it seems that the purpose of the exclusionary rule is to impose a sanction upon federal officers to aid in the enforcement of constitutional rights secured by the fourth amendment and nothing more.

The "silver platter" doctrine stands in direct opposition to the ruling made by the court in Hanna. The Hanna court, however, by a process of examining the subsequent opinions of the individual Justices on the issue impliedly made the determination that this doctrine is no longer valid.\(^\text{15}\)

Another area of the evidentiary spectrum which lends its support to the ultimate conclusion reached in Hanna is to be found in the field of wiretapping.

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\(^{10}\) Id. at 27-28.

\(^{11}\) Id. at 31-32.

\(^{12}\) 338 U.S. 74 (1949).

\(^{13}\) Id. at 78-79.

\(^{14}\) See cases cited in note 2 supra.

\(^{15}\) No. 14462, D.C. Cir., Oct. 2, 1958; slip opinion at 7-10.
Section 605 of the Federal Communications Act has been interpreted to prohibit federal officers from tapping telephonic communication lines and using the information derived therefrom as evidence in the prosecution of crime. In *Nardone v. United States* the Supreme Court found that evidence procured by federal agents as a result of a wiretap was inadmissible in a federal court. This case established a similar exclusionary rule to that found in *Weeks v. United States*.

Subsequently an attempt was made to extend the wiretap rule to state proceedings. In the case of *Schwartz v. Texas*, however, the Supreme Court refused to apply the federal wiretap rule to state proceedings. Again it seemed that the Court had resolved the issue by a ruling which paralleled the development of the *Weeks* doctrine. For, as in the *Wolf* case, the Court declared that evidence procured as a result of a state wiretap could be introduced into a state proceeding.

The culmination of the wiretap cases was finally reached in *Benanti v. United States*. The Supreme Court held that evidence unlawfully obtained under section 605 of the act by state officers was inadmissible in a federal court. By its decision, the Court in *Benanti* reached a conclusion directly analogous to that reached by the court in *Hanna*.

It must be noted that the Supreme Court has used an analogy from the fourth amendment cases to support its holdings in the wiretap area. It would seem, however, from this parallel of decisions that the Supreme Court has viewed the two rules as co-extensive irrespective of their uncommon background. In light of this analogy it would appear that the holding in *Hanna* is in accord with the present view of the Court, for as Judge Learned Hand remarked in *United States v. Goldstein*, "it would be a curious result, if a violation of the section [section 605] were more sweepingly condemned than a violation of the Constitution."

The words of Mr. Justice Holmes in his famous *Olmstead* dissent are utilized by the court in *Hanna* as a final rationale of its decision. There he said: "Government ought not to use evidence obtained and only obtainable by a criminal act. . . . I think it a less evil that some criminals should escape than that the Government should play an ignoble part." In light of

17 302 U.S. 379 (1937).
18 232 U.S. at 383.
20 Id. at 201-02.
23 120 F.2d 485 (2d Cir. 1941), aff'd, 316 U.S. 114 (1942).
24 Id. at 490.
26 Id. at 469-70 (dissenting opinion).
this the Hanna court apparently takes the position that the prime concern of the courts in enforcing the federal exclusionary rule is to maintain judicial integrity. This seems to represent a fundamental change of position based on the approach that the exclusionary rule of evidence has as its foundation judicial integrity rather than judicial enforcement of the Constitution in the federal sphere.

As recently as 1956 it appeared that the Supreme Court viewed the federal exclusionary rule as a means of curbing the unconstitutional acts of federal officers. For, in the case of Rea v. United States,27 the Court held that a federal officer could be enjoined from introducing illicitly seized evidence into a state proceeding under the Court's supervisory powers. Comparing the "silverplatter" doctrine, which would permit state obtained evidence to be used in federal courts, with Rea, which would prohibit federally procured evidence to be used in state courts, it seems evident that the rule was being employed solely as a means to enforce constitutional adherence in the federal sphere rather than to maintain judicial integrity.

The significance of the Hanna approach is that it would completely clean the federal system of all evidence obtained as a result of an unreasonable search and seizure. Whether the Hanna doctrine, if adopted by the Supreme Court, will be used as a means of applying the exclusionary rule to the states is hidden in the underlying rationale of the rule. If it is in fact an implied command of the Constitution, then this extension should provide the necessary impetus to apply the rule to state proceedings. If it is a rule of evidence promulgated to impose a sanction upon violations of the Constitution in the federal sphere, then Hanna was decided incorrectly for the imposition of such sanctions on state officers is properly left with the individual states. It is submitted, however, that the federal exclusionary rule is properly a rule of evidence having its foundation in the concept of judicial integrity, thereby leaving Hanna as the ultimate extension of the rule.

LAWRENCE S. SCHAFFNER


Appellant, Guagliardo, was an electrical lineman employed by the Air Force in Morocco. He lived off the base with his wife, using commissary and base exchange facilities and receiving medical and dental care. On July 18, 1957, he and two enlisted men were charged with larceny of Government property in violation of article 121, Uniform Code of Military Justice4 and with conspir-
ing to commit larceny in violation of article 81, Uniform Code of Military Justice. They were tried by general court-martial and found guilty. Appellant was sentenced to pay a fine of one thousand dollars and to be confined at hard labor for three years. He petitioned the United States District Court for the District of Columbia for a writ of habeas corpus, denying the jurisdiction of the court-martial to try him. Relief was denied by the district court, from which decision an appeal was taken. The United States Court of Appeals for the District of Columbia Circuit reversed, Judge Burger dissenting. Held, the intended broad sweep of article 2(11) of the Uniform Code of Military Justice, giving courts-martial all-inclusive jurisdiction over civilians, is not sustained by article I section 8, clause 14 of the Constitution as expanded by the necessary and proper clause and is therefore unconstitutional. The severability clause of the statute does not authorize consideration of whether or not persons in the position of appellant might constitutionally be subject to court-martial jurisdiction.

The statute extending court-martial jurisdiction to the appellant is article 2(11) of the Uniform Code of Military Justice which reads:

The following persons are subject to this chapter:

(11) Subject to any treaty or agreement to which the United States is or may be a party or to any accepted rule of international law, persons serving with, employed by, or accompanying the armed forces outside the United States.

The court considered the contention of the appellant in the light of the decision of the Supreme Court in Reid v. Covert. There it was held by a divided Court that article 2(11) was unconstitutional as applied to the capital trial of a civilian dependent overseas. The court's rationale in the instant case was that the considerations which in Covert prevented a dependent from being tried on a capital charge would apply equally to prevent the similar trial of an employee and that since neither could be tried on a capital charge, "the existing congressional plan for extending court-martial jurisdiction to persons accompanying or employed by the armed forces outside the United States exceeds constitutional bounds." The court skirted the constitutional question squarely presented by the instant case as to whether Guagliardo was constitutionally amenable to court-martial for a noncapital offense by dismissing the

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8 354 U.S. 1 (1957).
9 No. 14304, D.C. Cir., Sept. 12, 1958; slip opinion at 3.
10 Ibid.
severability argument presented by government counsel who contended that since the Supreme Court had only declared the capital trial of dependents unconstitutional, the court could validly hold that portion of the statute applying to the noncapital trial of employees constitutional. The court held that the statute was not severable "into fragments which have not been specified by Congress or as to which Congress has not furnished criteria for a case-by-case judicial application."11 The very technical basis for the court's decision obviously stems from a reluctance to rule on the broad questions in this area which may be discussed by the Supreme Court in the near future. The worth of the decision lies, therefore, not in the non-severability approach taken by the court, but rather in the opportunity it presents for a re-examination of the various aspects of the problem of courts-martial jurisdiction over civilians created by Covert.

In the Covert case four members of the Supreme Court joined in an opinion by Mr. Justice Black to consider the power of Congress to "make Rules for the Government and Regulation of the land and naval Forces"12 as applied to civilian dependents.13 Since the Court found that dependents were not in the land or naval forces by any reasonable construction,14 it then considered whether the enumerated powers could be enlarged by the necessary and proper clause to subject dependents to court-martial. This extension was denied since it would encroach on the constitutional right of the dependent to trial by jury.15 Justices Frankfurter and Harlan did not restrict their analysis to any single part of the Constitution but examined it as a whole. Mr. Justice Frankfurter took an approach similar to that taken in due process cases, analyzing each case to determine whether the court-martial of civilians is sufficiently necessary for effective discipline in the armed forces to outweigh the resulting deprivation of jury trial. Since he felt that the absence of the safeguards considered necessary in capital cases and the absence of wartime circumstances did not outweigh the loss of jury trial in the case of a civilian dependent, he would declare article 2(11) unconstitutional to that limited extent.16 The Covert dissenters preferred to apply the test used in United States ex rel. Toth v. Quarles,17 that is, whether court-martial trial was "the least possible power adequate to the end proposed,"18 finding that it was the least power that Congress could have exercised.19 The dissent also found that historical precedent, the close nexus

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11 Id. at 7.
13 354 U.S. at 19.
14 Id. at 20.
15 Id. at 20-23.
16 Id. at 41-49.
18 354 U.S. at 86 (dissenting opinion).
19 Id. at 89 (dissenting opinion).
of the dependent to the military, and the lack of any practical alternative to court-martial were compelling reasons for affirming jurisdiction.\(^{20}\)

The need for clarification of the problem is strongly indicated by the wide divergence of opinion among the lower federal courts and the Court of Military Appeals in approaching the various aspects of the problem. These approaches have ranged from the practical effect of the instant decision that no civilians are subject to court-martial in peacetime,\(^{21}\) to the subjecting of civilian employees to trial for noncapital offenses.\(^{22}\)

The major areas of difficulty indicated by the cases of the past year have been the capital-noncapital distinction and the dependent-employee distinction. It has been stated that the former is without validity.\(^{23}\) Though military jurisdiction over civilians has always been asserted because of status\(^{24}\) rather than the magnitude of the crime committed, it is equally true that in capital cases additional safeguards are necessary, at least to the extent of a closer weighing of the facts and scrutiny of the conduct of the trial. This distinction gains validity if one adopts the due process balancing test of Mr. Justice Frankfurter.

There is much to recommend the position of Judge Burger in the instant case as to the validity of the dependent-employee distinction.\(^{25}\) In one of the leading cases on the subject Judge Latimer of the Court of Military Appeals expressed many cogent reasons for jurisdiction over employees, citing the morale, disciplinary and security problems in particular.\(^{26}\) Certainly, if the test is to be the closeness of the civilian to the armed forces, the words of the dissent in the instant case indicate the need for jurisdiction over employees: "It cannot be denied that many of the 'persons serving with or employed by . . . the armed forces outside the United States', are more essential than the uniformed soldier."\(^{27}\)

The great difficulty which confronts all commentators on the subject is the lack of any practical alternative to court-martial short of trial by the sovereign in whose territory the offense is committed.\(^{28}\) It has long been established that persons not subject to military law are within the exclusive jurisdiction of the

\(^{20}\) Id. at 80-83, 86-89 (dissenting opinion).
\(^{21}\) No. 14304, D.C. Cir., Sept. 12, 1958; slip opinion at 3.
\(^{24}\) Mayhew, Peacetime Jurisdiction of Courts-Martial over Civilian Components of the Armed Services in Foreign Countries: The Toth and Covert Decisions, 3 U.C.L.A.L. Rev. 279, 281 (1956).
\(^{25}\) No. 14304, D.C. Cir., Sept. 12, 1958; slip opinion at 13 (dissenting opinion).
\(^{27}\) No. 14304, D.C. Cir., Sept. 12, 1958; slip opinion at 13 (dissenting opinion).
\(^{28}\) See Note, 71 Harv. L. Rev. 712, 715-17 (1958).
It has been suggested that the only solution is to have the foreign sovereign prosecute the more serious offenses and to have the military handle the lesser ones by administrative sanctions like revocation of base privileges and dismissal. This alternative falls far short of the mark in the case of the employee who has far greater opportunity than the dependent to commit military offenses serious in nature but which would not be accepted for trial by the foreign sovereign. Problems arise here as to who will determine the seriousness of the offense and according to what standard.

The opinion of Mr. Justice Black in Covert did not close the door to the trial of some civilians by court-martial but did not lay down any criteria for determining who is a civilian and who is a member of the armed forces. "We recognize that there might be circumstances where a person could be 'in' the armed services for purposes of Clause 14 even though he had not formally been inducted into the military or did not wear a uniform." The majority opinion in the instant case also recognizes that a limited type of jurisdiction over employees might be proper. It cannot be said, therefore, that the Supreme Court would reject any attempt to make some civilians amenable to military trial, especially in view of the fact that it has already upheld the power of Congress to provide for the court-martial of another class of civilians, discharged servicemen serving sentences of confinement in the custody of the military and who commit further offenses therein. Since a valid distinction in practice may be drawn between the dependent and the employee and since four members of the Court probably would not be willing to extend jurisdiction to the dependent, it would seem that the dependent must be left to the jurisdiction of the foreign sovereign.

It is submitted, however, that a limited type of military jurisdiction over the employee is necessary and quite proper. Since it has been held that Congress may authorize trial without jury in the case of petty offenses punishable by short periods of confinement or small fines, a legislative solution seems possible. Congress could provide for the trial of employees by the special court-martial authorized by the Uniform Code of Military Justice as a practical compromise since the maximum punishment authorized for this type of court-martial is only six months. This alternative would meet the loss of jury trial argument and would solve to some degree at least the disciplinary, morale and security problems which would confront the overseas

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31 354 U.S. at 22-23.
commander if he were left without any jurisdiction at all. Since the present judicial review process for a special court-martial\(^37\) does not extend in most cases beyond the convening authority and a military legal specialist, a more thorough review of those cases involving employees should be provided for. Automatic review of all such cases by a board composed of civilian attorneys and/or the Court of Military Appeals could easily be established. The present table of punishments of the Manual for Courts-Martial\(^38\) is an adequate standard for the determination of which offenses are to be tried by the military and which by a foreign sovereign. All purely military offenses might be tried by the armed forces with a six-month maximum sentence.

It is submitted that a more specific judicial delineation of the permissible scope of court-martial jurisdiction over civilians is required. Although the above suggested statutory compromise might be inadequate to meet the military necessities, it is offered as capable of withstanding the constitutional challenge.

JOHN D. MATTHEWS

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My lawyer friend, Al Averbach is a mutant: besides being an outstanding trial lawyer, member of the imposing New York law firm of Gair, Finley, Averbach, Mahley and Hoffmann, and Past President of the International Academy of Trial Lawyers, he, like a number of others of this new breed, is a lecturer of note, a doctor of parts (almost all of them) and now proves himself an estimable author.

However, there is nothing new about his publishers, The Lawyers Cooperative Publishing Company of Rochester, New York. They are the Gutenbergs in the legal publishing field and as essential, with their A.L.R. and other works, to modern legal research as is the prayer of a complaint to the modern personal injury case.

In the last several years there have been more books brought out on personal injury law than on any other specialty. One of the most useful assets of Mr. Averbach’s book is his collation of all of the references to these works, whether medical or legal. This most thorough bibliography of itself would make his two volumes a necessity to any personal injury lawyer's library.

No one practicing today in any field of law knows the specialty of medical photography better than Al Averbach. Scott’s Photographic Evidence¹ was the first substantial work on legal photography, but Mr. Averbach has revised even this specialty into a sub-specialty of medical photography.

Every personal injury case requires some medical photography, whether X-rays, colored photographs, surgical stills or moving pictures. Mr. Averbach tells how to make these procedures available to the jury both legally and practically. He advises sources for obtaining everything required in medical photography, this field in which he excels; indeed, if his suggestions are taken, in many instances the material will be furnished free by pharmaceutical houses, surgical companies and photographic institutions.

Mr. Averbach’s generosity of explanation and his sharing of modern trial procedures with his brother lawyers runs all through his two volumes. As on the lecture platform, so in this writing he has lavishly ex-

¹ Scott, Photographic Evidence, Presentation and Preparation (1942).

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pended his "special reserve stock" procedures. However, I have no doubt that by pocket part and supplement time, he'll come up with new ones, although it is difficult to conceive what further could be "new" or yet remains to be "discovered" in personal injury procedural or substantive law after digesting the mass of material so well outlined in *Handling Accident Cases*.

In the first volume the reader is taken from a gentle introduction through a client's interview, then the "Retainer Agreement," followed by "Investigation and Preparation," "The Theory of Liability," the most thought provoking "Expanding Theories of Tort Liability," "The Trial Brief," "Preparing the Medical Phases of an Accident Case," "The Medical Trial Brief," and lastly, "Pleadings." Each of these headings comprises the title of a lengthy separate chapter.

Rather than incorporate anatomical illustrations or pictures in the main volumes, The Lawyers Co-operative Publishing Company has furnished a supplement "The Human," a little booklet with celluloid overlays that illustrate the human body in the successive plates from skin, through viscera, to skin.

Mr. Averbach writes so well himself that if any suggestions could be made regarding his two volume work, the principal one would be that he do more original rather than reference writing. However, if this were done, the book would have to be expanded because nothing could be cut from the bibliography or references or exemplars. It is in the exemplars of trial briefs, medical examinations and pleadings that the reader is not only told what to do, but actually shown how to do it.

Too many law books have been written telling how to try a case, but some of us are so constituted that we learn better when we are shown. Explanations come alive in these books. The exemplars of pleadings and trial briefs are from actual cases. While it would no doubt be a rewarding experience to have Mr. Averbach, while reading his book, at one's elbow or to hear him from the lecture platform, the manner in which he has written *Handling Accident Cases* seemingly brings him into one's library with actual demonstrations of what he is saying.

Were I being voir dired, I would have to admit prejudice since he is one of my law partners, but Lou Ashe's article on "Whiplash Injury,"2 found in the Chapter "Preparing the Medical Phases of an Accident Case," is a classic medicolegal text for this most frequently litigated trauma.

The contents of Volume Two are: "Examinations Before Trial," "Dis-

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We American lawyers have never thoroughly given A.L.R. the credit it deserves: find one’s case in A.L.R. (and most fact situations are) and one has the best possible and most up to date brief. In Mr. Averbach’s book A.L.R. fully blooms; I suspect that the sage of the law, Mr. Al Gans of A.L.R., had a hand in helping. One really begins to see the assistance this set contributes to the handling of an accident case. Indeed, every owner of A.L.R should place the two volumes of Handling Accident Cases alongside his A.L.R. set. For instance, in Mr. Averbach’s chapter “The Medical Trial Brief” the so frequently misunderstood rule that “possibilities” go to the weight, not the admissibility of the evidence is thoroughly discussed, then practical illustrations are given, then cases and secondary authorities are cited, and finally A.L.R. is brought up to survey authoritatively the whole field. The footnote reads: “See annotation on ‘could’ or ‘might’ at 135 ALR 516-546, entitled ‘Sufficiency of expert evidence to establish causal relation between accident and physical condition or death,’ and cases there cited.”

The following passage from “Investigation and Preparation” is exemplary of how basically practical and helpful is the work:

It is possible to send X-rays to medical illustrators and secure life-size, three-dimensional colored medical illustrations that are medically correct. Such a service is rendered by Betty Blaine, a medical illustrator, of 2339 Oregon Street, Berkeley 5, California, and by Mrs. H. H. Cowles, 1903 Broderick Street, San Francisco 15, California. The cost of such graphic illustrative work is far less expensive than generally believed. One of the medical illustrators named quotes a charge of $50 to $100 for her services.4

If the trial lawyer buys and reads Handling Accident Cases and thereafter can’t successfully try one, he’d better search out another specialty within the law for his livelihood—or send for Mr. Averbach to try his case for him.

MELVIN M. BELLI*

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3 Id. at 1:556-78.
4 Id. at 1:141.
* Member of the Bar of the State of California, Hollywood, San Francisco.

This small but significant book consists of four essays. These are based on papers which were delivered at the 1957 Conference on Law in Society held at Southern Methodist University under the joint sponsorship of the School of Law of that University and the Southwestern Legal Foundation. This volume is the fifth in a series of Studies in Jurisprudence presented under this sponsorship.

In prior volumes the emphasis was upon natural law and natural rights and their relation to history. But the present volume is concerned principally with certain contemporary aspects of natural law as they are related to such areas as the freedoms to believe, learn, form political associations and use property. It seeks "to determine to what extent they are accorded recognition in contemporary legal doctrine."\(^1\)

The first essay is by Dr. Merrimon Cuninggim, Dean and Professor at the Perkins School of Theology, Southern Methodist University, on the subject "Freedom to Believe." He defines this freedom as "the freedom to take one's religious belief into account, in his words and actions . . . ."\(^2\) Not everyone has such freedom in the United States. No one has it absolutely. According to Dean Cuninggim, "mainstream" Protestants have the fullest measure of it, while blasphemers, Sabbath-breakers, atheists, polygamists, Jehovah's Witnesses, conscientious objectors and Catholics have the least. He maintains that the extent of religious liberty has been determined by the state's understanding of Hebrew-Christian morality which, "as far as the law is concerned, consists in the main of certain rules found in the Ten Commandments . . . ."\(^3\)

The second essay was contributed by Dr. Samuel Enoch Stumpf, Professor of Philosophy at Vanderbilt University, on the subject "Freedom to Learn." He discusses order and the precarious nature of learning, the ambiguous nature of law and the complex nature of truth. He balances the social interest in the right of the individual to speak as he pleases against the needs of order and security. He locates the source of law in man's "moral constitution." While the state is the source of law in one sense, nevertheless "law is . . . a consciously formulated norm of behavior . . . ."\(^4\)

Professor Stumpf prefers the democratic idea of truth. "[W]e take it

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1 Harding, Free Man Versus His Government v (1958).
2 Id. at 3.
3 Id. at 23.
4 Id. at 40.
as a matter of absolute truth—that in a democracy each person possesses dignity and value and that he ought to possess equality and freedom."5 He rejects the two extremist positions, the first of which is the Soviet view that the state has the total absolute truth. This, he feels, stifles learning and results only in indoctrination. He also repudiates the Holmes-Sartre thesis that there is truth, but only that which we make. Under this thesis "freedom to learn is circumscribed by whatever may be the dominant mood of the community."6 This is a force concept.

The third essay is by Frederick K. Beutel, Professor of Law at the University of Nebraska, on the subject of "Freedom of Political Association." He prescinds from both the natural law doctrine and the weighing of interests theory, and considers the subject only from the point of view of legal rights. He derives the right of political association from freedom of assembly and the right to vote, both of which are absolutely guaranteed by the Constitution. These two rights are valid against federal and state governments. These governments may regulate the right of political association, however, "where the purpose is outside of the United States Constitution or statutes" provided that the methods of control are constitutional.7

Professor Beutel continues by stating that interference with the right of political association has been effected by such legal sanctions as injunction and criminal statutes, and also by extralegal means. However a civil remedy in tort is available in state courts against private individuals interfering with freedom of political association.

The fourth and last essay is by Arthur L. Harding, Professor of Law at Southern Methodist University and editor of this collection. His subject is "Freedom to Use Property." He defines property as the aggregate of legal means by which one excludes others. He proceeds to discuss ideas of property accepted by the primitive societies, the early Church, Feudalism, Scholasticism, John Locke, the nineteenth century and contemporary America. Professor Harding then analyzes the natural right of property, the right of occupancy, limitations on the amount of property and on its specific use, the labor theory, and new concepts of property. He concludes that "the concept of private property is in no serious danger in America,"8 and that "St. Thomas' idea that private property is subject to a requirement that it be employed in the public good ap-

5 Id. at 51.
6 Ibid.
7 Id. at 75.
8 Id. at 106.
pears to be making a comeback."9 Finally, Professor Harding believes that communism will not destroy capitalism.10

The reviewer commends the notable and scholarly contributions made in this volume by Professor Stumpf and Professor Harding to the literature on natural law jurisprudence. They have presented concepts of natural law which, though not clearly scholastic, inevitably tend toward vindication of the thinking of St. Thomas Aquinas, whom both have cited with approval. Professor Beutel also deserves commendation for the excellence of his analytical study of the Constitution, and of other authoritative legal materials, although his essay hardly achieves the purpose for which the Symposium was intended, namely, "to examine certain ideas of Natural Rights . . . ."11

But unfortunately Dean Cuninggim has reached certain conclusions based on a misapprehension of facts, such as the conclusion that Catholics, as Catholics, have less religious liberty in the United States than Protestants, as Protestants. The fact is that while blasphemers, Sabbath-breakers, atheists, polygamists, Jehovah’s Witnesses and conscientious objectors have all been actually prevented at one time or another by American law from doing something which their moral code dictated, Catholics have never been so prevented. Certainly Catholics have never worked for the union of church and state in the United States or for the abolition of the public school for the education of non-Catholics, nor is there anything in their religion which required that they should have done so. There can be no curtailment of a religious liberty which is neither claimed nor asserted. The authoritative Catholic Encyclopedia explains "that in States whose personality is constitutionally made up of every complexion of religious faith, much of it in its diversity sincere, there should be a governmental abstention from any specific denominational worship or profession of belief . . . ."12

Two observations will conclude the review. First, a title such as "Free Man and His Government" rather than the actual title Free Man Versus His Government would have emphasized that the state is good for man, not evil, and de-emphasized the element of conflict. Secondly, the controversy whether Locke or the Jesuit, Cardinal Bellarmine, exerted the greater influence upon the philosophy of the authors of the American state is still unresolved. In his well-written introduction Professor Hard-

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9 Ibid.
10 Ibid.
11 Id. at v.
12 Macksey, State and Church, in 14 The Catholic Encyclopedia 253 (1912).
ing maintains that "the Declaration of Independence reflected Locke and Hooker. The Constitution of 1787 was taken almost entirely from Locke."  

Now Locke formulated the contract basis of the state and of constitutional rights which rested on the mutuality of political obligations. Hence, according to Locke, the ultimate moral authority to support these rights is the will of the people. But this cannot explain the doctrine of inalienable rights founded on self-evident truth which is the most characteristic feature of the Declaration and the implementing Constitution. Hence the American dream of freedom ultimately rests on the authority of an immutable and objective natural law as explained and presented in the pre-Lockian doctrine of the Stoic and the Scholastic.

Brendan F. Brown*


In critical, uncompromising terms throughout this book, Mr. Rubin attacks many present forms of penal treatment and points out existing errors and hypocrisies in the handling of juvenile delinquents. He not only speaks out against practices that have existed for decades but also criticises untried methods which he feels will prove to be of little value. It is a pleasure to read the criticisms of a man who will not be cowed by the forces of precedent and existing practice, and who is willing to accept nothing but wholehearted and honest attempts towards corrective methods in delinquency and penology.

* Professor of Law, Loyola University of the South.

Crime and Juvenile Delinquency is composed of fifteen chapters, three of which were written especially for this book. The others are revised articles which have previously appeared in appropriate journals. Such a composite work unfortunately does not afford a full picture of the author's theory of criminology because the individual articles seem to have been written in response to some timely controversy or survey rather than as part of an integrated whole. Despite the overlap and repetition thus created, however, the impact of the individual chapters is a powerful plea for better rehabilitation methods.

Mr. Rubin shows himself to be an untiring evangelist for the positive  

13 Harding, op. cit. supra note 1, at vi.
14 See Del Vecchio, Philosophy of Law 82 (Martin transl. 1953).
* Professor of Law, Loyola University of the South.
rehabilitation of delinquents and criminals alike. He refuses to compromise with this end, and is not satisfied with the deterrent theory of penology. However, his strong contentions for rehabilitation as distinguished from punishment suffer from his failure to admit that some present methods of treatment which he advocates have not yet been proven. Although it is believed that they are sound, there is as yet little documented proof of their efficacy. Aside from this one important shortcoming (one that is common to many advocates), the book is unique in the field because of its pervasive, truthseeking argumentation, and the author’s refusal to mouth the sonorous platitudes that have carried too much weight for too long.

The initial section of the book concerns various general problems in the handling of juvenile delinquents. The second chapter deals with the punishment of parents. Mr. Rubin’s major contention is that parents should not be punished for the delinquencies of their children because such steps serve no positive function and are of doubtful wisdom and legality. In the next chapter Mr. Rubin analyzes some of the more commonly used definitions of delinquency and argues forcefully that, apart from the application of well-defined terms of criminal behavior, juvenile courts should be cautious in the exercise of jurisdiction which is founded on legislatively created standards of conduct. The following chapter is an excellent over-all look at “The Child in the Juvenile Court.” It is an example of how thought provoking Mr. Rubin can be. In brief sections devoted to the major aspects of a juvenile court proceeding he highlights many problems that need further study and modification if juvenile courts are to fulfill the high purpose for which they were intended. The final chapter in this section describes in narrative form the wide variety of courts throughout the nation that currently handle juvenile cases. It depicts the need for specialized personnel in juvenile courts and portrays, but without much conviction, the family court concept. This chapter seems to indicate that the author is at his best when he has a specific argumentative task before him.

In the two chapters on “Youthful Crime and Treatment,” the author explores various aspects of the existing programs and plans for the handling of youths who have violated criminal laws. In the latter half of the first chapter Mr. Rubin sharply criticizes the sections of the American Law Institute’s Model Penal Code applicable to youthful offenders for permitting, if not encouraging, long punitive sentences. The author makes the important comment that “sentencing is the framework of treatment” and argues that, if the sentence is improper for the

\[2\text{ Rubin, Crime and Juvenile Delinquency 102 (1958).}\]
individual offender, rehabilitation is improbable, if not impossible. The second chapter on youth offenders describes the major provisions of the American Law Institute's Model Youth Correction Act and tells of five state experiments with this Act and some of the defects discovered.

The materials on “Sentencing Adult Criminals” are mainly concerned with the harshness and severity of present sentencing practices in this country; throughout them Mr. Rubin castigates our punishment practices which all too frequently have little relation to the betterment of the individual offender. The first chapter is a full and excellent critique of the use of long sentences. Because of the lack of available statistics, however, Mr. Rubin has to fall back upon his faith to support his claim that shorter terms of imprisonment result in more effective rehabilitation of offenders. In all probability factual substantiation will be necessary before legislatures and judges are convinced of the efficacy of shorter sentences. The other chapter in this section is one of the few articles on the neglected topic of a criminal’s deprivation of civil rights. Mr. Rubin effectively attacks the practicality of such action and raises valid doubts as to the wisdom of continued use of these sanctions.

The first chapter in the section on “Probation and Parole” is devoted to a comparison of the 1955 Standard Probation and Parole Act to that issued by the National Probation and Parole Association in 1940. The second article discusses various practical problems of “The Man on Probation or Parole.” It is based on an article that appeared in a journal devoted to this single topic. Taken out of context, it loses some of its meaning. The final two chapters are excellent discussions of the legality and desirability of using presentence reports in sentencing.

The first chapter of the last section deals with research in criminology. Mr. Rubin suggests that life history studies “serve as the core of a scientific criminology.” This appears to be a very impractical, if not impossible, method of ascertaining the general nature and causation of crime. Under present circumstances it would be unlikely to result in much more than random guesses. If it were possible for a calculating machine to analyze and correlate thousands of such life histories, perhaps a scientific theory of causation would result. Until this is possible and practical, however, it seems best to continue studying delinquency causation factor by factor, using life histories only as a general backdrop and control for such factor analysis.

The final chapter of the book is a harsh attack upon Unravelling Juvenile Delinquency, a study by Doctors Sheldon and Eleanor Glueck.3

3 Id. at 209.
4 S. Glueck & E. Glueck, Unravelling Juvenile Delinquency (1950).
This chapter does not appear to be fully in line with the author's announced intention of writing on "A Rational Approach to Penal Problems." It has been included here with few changes from the way it appeared seven years ago, when it was a timely criticism of *Unravelling Juvenile Delinquency*, and hence seems of more historical than current interest. In all probability Mr. Rubin's book, which is dedicated to a rational and hardheaded approach to crime and delinquency, would have been just as good without this last chapter.

Progress in the field of criminology is a tortuous achievement accomplished only by overcoming those who have a vested interest in the *status quo*. Criminal theory and treatment have often been founded upon untested hypotheses and suppositions which, once adopted or accepted, have sternly resisted efforts at improvement. To combat such stubborn inertia, jurists and social workers alike need men like Mr. Rubin who can argue with conviction and logic. In this book he repeatedly denounces blind reliance on imbedded ideas and urges that acceptance of current shibboleths be withdrawn in order that objective appraisal can commence. While forcefully expressing his doubts on a wide variety of present procedures he maintains a buoyant faith in the principles of positive and scientific criminology.

ORMAN W. KETCHAM*
JAMES P. FELSTINER**


To his valuable contributions to the learning of unjust enrichment, Dean Wade has now added a casebook. It is a refreshing work, since it largely rejects the attitude that a casebook is an informational vehicle for long learned notes, copiously documented and filled with generalizations which, however carefully qualified, obscure classroom analysis of the many serious restitutionary problems. In short, the presentation is aimed at enhancing the value of the book as a teaching tool.

* Judge of the Juvenile Court of the District of Columbia.
** Law Clerk to Judge Ketcham; member of the Bar of the State of New York.

Practitioners, then, will not find the work a mine for local cases. In a way this is unfortunate for, as Dean Wade points out in the excellent short general bibliography at the close of the introductory chapter, there is neither a single text nor one digest system entry covering the whole subject of restitution. More importantly, however, the classroom student will not be overwhelmed by case citation and may even be tempted to leave the casebook to study the materials cited in the short, tightly drawn notes following most of the cases. These notes give leads to a wealth of material, and only occasionally do they fall into the error of starkly quoting judicial utterances meaninglessly torn from their factual context.

Structurally the book is divided into six chapters. The first briefly provides an historical sketch and a survey of the various restitutionary remedies. The inclusion of single cases illustrating implied-in-fact contracts, quasi-contracts, constructive trusts, subrogation and the equitable lien is possibly a mistake. It might be a useful framework for an introductory lecture kept wholly within the control of a forceful teacher. On the other hand, if students fulfill our hopes as careful case readers, a series of individual cases on each of the remedies will only provoke questions and discussions that can more profitably be left to later complete development. In the experience of this reviewer no words more quickly stifle lively classroom colloquy than the repetitive professorial admonishment “we'll look at that later on.”

Materials are allocated to the remaining chapters according to the means by which the defendant obtained the benefits. The second chapter treats the problems of the volunteer and offers at an early stage an opportunity to explore and compare the operation of the fictional implied-in-law contract and the often equally artificial contract implied in fact. Next, chapter three turns to the opposite end of the volitional spectrum and deals with benefits conferred under legal compulsion. Problems of mistake protrude in both of these chapters, but their positioning does not preclude a later examination of their relationship to the question of benefits conferred under mistake.

The fourth chapter is a workhorse. It packages in one major division the problems arising from wrongfully acquired gains. Questions are raised concerning the remedies at law and in equity for trespass, libel, invasion of privacy, fraud, breach of fiduciary obligation, duress and undue influence, as well as the peripherally developing new “wrongs.” The wonder of tracing is canvassed, and restoration, affirmance and election of remedies are examined in some detail. This reader’s initial reservations about such a large bundle of questions have diminished with
the realization that the treatment affords an excellent opportunity for probing the reason or lack of reason for different approaches in these varying factual situations.

The final chapters deal with benefits conferred in the performance of an agreement and through mistake. The approach here is more traditional, and only the rather scant thirty pages devoted to defenses in the mistake area caused any concern. In this reviewer's judgment, it is vitally important to consider carefully the available means of containing the expanding unjust enrichment remedies.

Reviewing an untaught casebook is not unlike reporting a prospective conversation. Alone, one can see only sketchily the patterns and insights that will unfold in the atmosphere of an intelligent dialogue. By thoughtfully interspersing old and new cases and interestingly weaving the legal and equitable remedies, Dean Wade has created a sound, scholarly foundation for a rewarding and stimulating course. Whether this expectation will be realized depends finally upon the hard glare of classroom experience.

WILLIAM E. HOGAN*


This is a very timely book. In June 1958 the United Nations Conference on International Commercial Arbitration adopted a Convention on Recognition and Enforcement of Foreign Arbitral Awards.¹ Thirty-nine delegations, including the delegation of the United States, endorsed the final version of the Convention. (This was the first major international conference on commercial arbitration attended by the United States.) Consequently, publication at this time of a collection of twenty-six short articles on various aspects of international commercial arbitration is particularly appropriate.

The general subject, of course, has previously been treated extensively. In addition to numerous books and articles published in many different countries, some symposia were devoted to the topic, including the 1952 session of the L'Institut de Droit International which discussed the problem of "L'arbitrage en droit international privé."² The Journal pub-

* Associate Professor, Boston College Law School.

lished by the American Arbitration Association has frequently con-
sidered issues of international commercial arbitration. But because of
the nonadherence of the United States to the earlier conventions, the
portion of the international literature dealing with treaty provisions was
of limited practical significance to the American lawyer. With the in-
sertion of clauses forbidding discrimination against foreign arbitration
awards in the United States Treaties of Friendship, Commerce and
Navigation since 1946, and with the endorsement of the recent multi-
lateral Convention of June 1958, the treaty problems of international
commercial arbitration may attain greater immediate importance. The
numerous conflict of laws problems existing independently of an inter-
national treaty are now of practical interest to the legal profession, es-
pecially in New York State where most of the litigation arises.

The articles collected in the present book deal with all these problems
—and many more. In fact the most valid criticism of the book under
review would be that the articles cover too wide a field and lack suf-
cient homogeneity. The topics include general public international
law, the history of commercial arbitration in England and the United
States, comparative law studies of British and American practices and of
arbitration laws in Western Europe, various conflict of laws problems,
issues created by the East-West trade and the emergence of State trad-
ing, and the practice of arbitrations by the New York Association of
Food Distributors and the Bremen Cotton Exchange.

As can be expected in a collection of twenty-six articles, there are
great differences in quality between the individual contributions. A
thought-provoking article by the British writer Ernst J. Cohn on “Eco-
nomic Integration and International Commercial Arbitration,” and the
articles on State trading, contributed by Professors Seidl-Hohenveldern
and Hazard, and by Mr. Pisar, an official of UNESCO, deserve special
mention. The latter subject, i.e., the requirement in contracts with
Soviet trading agencies that disputes be submitted to the Soviet Arbitra-
tion Court, found its latest and perhaps most important application
soon after publication of the present book. In June 1958 the Soviet

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6 See note 1 supra.
Arbitration Court rejected the effort of an Israeli corporation to collect damages on the ground that, following Israel’s invasion of Egypt, the Soviet Ministry of Foreign Trade had cancelled contracts by Soviet export agencies for the delivery of oil.7

Unfortunately much of the material presented is difficult to locate within the book. Probably the extremely wide and fluid scope of the subject matter impeded a coherent coverage by so many different experts. In any event, the use of much of the material is rendered difficult by the fact that the topics treated by the authors frequently overlap, a situation which is seriously accentuated by the lack of an index. Discussions of the problem of what is a foreign award and of its execution are found in many sections, and references to the new Friendship, Commerce and Navigation Treaties appear in articles other than the well-considered one by Walker on United States treaty policy from 1946 to 1957. Moreover, very valuable discussions of the proposal for the new Draft Convention, which compare it with the Geneva Protocol of 1923 and the Geneva Convention of 1927, and which furnish a comparative law background, are found in entirely unexpected places, namely in (1) an article entitled “The Arbitrator and Private International Law” (found in the group called “Special Legal Problems”); (2) an article on “Unification in the Enforcement of Foreign Awards” (which appears in the group entitled “Enforcement of Foreign Awards”); and, especially, (3) an article on “Conditions of Development of International Commercial Arbitration” (which, in turn, was allocated to the group entitled “Comparative Views on Arbitration Practice”).

All the contributors, many of them prominent in the practice of international arbitration, are strongly in favor of arbitration as a substitute for court proceedings. The plea for arbitration was perhaps expressed most persuasively by the Italian writer Mario Matteucci in an article entitled “Utopia and Reality in the Realm of Arbitration” where he referred to the expensive system of courts burdened with intricate rules of procedure and traditional habits and concepts.

Try to place yourself in the position of a good businessman who must entrust to such a machine the solution of his disputes with businessmen residing in other countries. He, or, on his behalf, his attorney, will be faced with a chain of puzzles; search for the competent court, for the applicable law, and, within the sphere of this law, search for the exact rule governing the disputed relationship. All this must occur, of course, within the framework of the procedural norms, including fatal time limitations and an array of possible incidents in the course of the proceedings.8

7 N.Y. Times, June 20, 1958, § 1, p. 1, col. 1.
Nevertheless, there still are some isolated voices sharply critical of international commercial arbitration. In an article illustrating the use of international arbitrations by cartels Professor Kronstein deplores what he calls the "lawlessness" of this form of "private government."9 Though not expressly answered, such criticism apparently is alluded to in an article by Professor Gardner on "Economic and Political Implications of International Commercial Arbitration" where he states broadly that abuses of the practice serving the enforcement of cartel practices can be prevented.10 A more specific answer is given in the above-mentioned article by Cohn to the effect that the danger of strengthening monopolistic tendencies through international commercial arbitration can be avoided by confining recognition of awards in the international field "to awards made under the auspices of bodies specifically recognized for this purpose by ECOSOC11 or by some other international agency, such as the International Chamber of Commerce, the American Arbitration Association or any other organization of a similarly high standing and of absolute and proven impartiality towards all litigants."12 In the informative article on the handling of arbitrations in the import business of the New York Association of Food Distributors, an answer is given to the criticism that because of the usual composition of arbitration boards (two domestic merchants and one agent) there might be some partiality to the domestic merchant as against the foreign shipper. It is urged that because of the competitive nature of the business no American importer will show any favors to his domestic competitor.13

Interesting as these statements may be, perhaps a more direct and explicit answer to the criticism of commercial international arbitration should have been provided. Probably this criticism is no more than an emphasis on the abuses to which a new and practical method of settling disputes lends itself; undoubtedly it is the kind of a charge which in the history of legal developments has often been made against reforms. Still, a more explicit and specific refutation of the detailed charge should have been attempted.

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10 Domke, op. cit. supra note 8, at 18.
12 Domke, op. cit. supra at 25.
13 Id. at 266.
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