SOCIALIST LAW AND THE NEW YUGOSLAV CONSTITUTION

THE PRIMACY OF COMPETITION AND THE BROWN SHOE DECISION

UNIONIZATION AND PROFESSIONAL SPORTS

QUALITY STABILIZATION AND THE CRISIS IN FAIR TRADE

CONDITIONS OF PROBATION: AN ANALYSIS

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CONTENTS

ARTICLES

Socialist Law and the New Yugoslav Constitution
By Branko M. Pešelj

651

The Primacy of Competition and the Brown Shoe Decision
By Irston R. Barnes

706

Unionization and Professional Sports
By Erwin G. Krasnow and Herman M. Levy

749

Quality Stabilization and the Crisis in Fair Trade
By George J. Alexander

783

Conditions of Probation: An Analysis
By Judah Best and Paul I. Birzon

809

DECISIONS


838

Government Contracts—Termination Provision Required By Armed Services Procurement Regulations Must Be Read Into Any Government Contract Omitting It (G. L. Christian & Associates v. United States, 312 F.2d 418 (Ct. Cl. 1963))

842


851


855

BOOK REVIEWS

International Law, Trade and Finance: Realities and Prospects—Stanley D. Metzger... 857
Reviewed by Walter S. Surrey

Law and Organization in World Society—Kenneth S. Carlston... 870
Reviewed by Stanley D. Metzger

BOOKS RECEIVED... 873
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SOCIALIST LAW AND THE NEW YUGOSLAV
CONSTITUTION

Branko M. Pešelj*

Pointing out the basic characteristics of socialist constitutionalism, the author traces the development of the new Yugoslav Constitution to its roots in history and communist ideology. Dr. Pešelj analyzes each pertinent provision of this, the newest of the socialist constitutions, pointing out the deliberate inconsistencies demanded by the Marxian dialectics. Giving particular attention to the many innovations of this constitution, he concludes that they mark the Yugoslav wish to become the innovators of new techniques of socialist legality, but he questions the ability of the Yugoslav nation to abide by and execute the intricacies of its new constitution.

INTRODUCTION

On April 7, 1963, the Federal People’s Assembly of Yugoslavia adopted the new Yugoslav Constitution. This Constitution is one of the longest and most unusual instruments of its type in the world. Its complexity reflects the efforts of the Yugoslav communists to demonstrate that Yugoslavia is different from other socialist states and that it has established its own road to socialism by applying correctly the Marxist-Leninist doctrine of the organization of a proletarian state.

The terms of the new Constitution are often unique, sometime conflicting, and in several instances legally superfluous or incomprehensible.

* LL.B., 1931, J.S.D., 1932, University of Zagreb; Ph.D., 1950, Georgetown University; M.Comp.L., 1954, George Washington University; Member of the Bar of the District of Columbia and of the Supreme Court of the United States; Adjunct Professor of Law, Georgetown University Law Center. This article was written on the basis of the preliminary text of the Constitution adopted by the Federal Assembly on September 21, 1962 and the discussion thereof published in the Yugoslav press. The final text approved on April 7, 1963 became available to the author only after the manuscript was sent to the printer. Although the final text in no way changed the concepts and principles of the Constitution, it did alter in some instances its language, phraseology and numerical order of the paragraphs. The new numbering was incorporated into this article and wherever feasible adaptations were made to correspond with the language and phraseology of the final text.
Yet, in spite of its experimental character and defects—or perhaps because of them—the Constitution is an interesting legal document of socialist law which deserves the attention of the lawyers who are interested in comparative law and in the evolution of socialist legal institutions.

This article will not scrutinize the intricate system of Yugoslav constitutionalism in its entirety. Its purpose is to point out the socialist character of the new Constitution and to indicate some of its most remarkable particularities which cannot be found in any other constitution.

A lawyer in the West, especially one trained in common law and not sufficiently familiar with the teachings of Marx and Lenin, has considerable difficulty in understanding socialist legislation. This difficulty is increased by the fact that socialist law distinguishes the form from the content of the law which in simple language means that identical legal terms do not have the same meaning when used in socialist and nonsocialist legislation. Thus, for instance, when a socialist constitution speaks about “democratic government,” or provides for “democratic elections,” or assures to its citizens “freedom of speech,” “freedom of press,” “freedom of assembly,” or guarantees “the independence of the courts,” these terms do not have the same significance as understood in the West. The content and character of these terms are political and must be appraised within the Marxist-Leninist doctrine of the state and law and the organization of the socialist state. Therefore, before any analysis of the new Yugoslav Constitution in the light of socialist law can be initiated, it seems appropriate to clarify some basic concepts of socialist law and its constitutional aspects. This will aid the reader in understanding the complex mechanism of the Yugoslav constitutional order and its position in the present stage of socialist constitutionalism.

Socialist constitutional law is the most important branch of socialist legal systems and is codified in the constitutions of socialist states. It

1 This most important difference between socialist and non-socialist law was for the first time revealed by the Soviet jurist, P. I. Yudin, in his article, “Socialism and Law,” published in September, 1937. Yudin defines it in the following statement:

The form of soviet law—as law differing in principle from bourgeois law—is expressed not in terminology but in its political character—in the fact that such law is created by the soviets as organs of the dictatorship of the proletariat. It is soviet law—that is to say, socialist law in content. Terms of bourgeois legislation are found in separate articles of soviet statutes, and in statutes in their entirety. That, however, is not the point. The essence of the matter is that the soviet character or the soviet form of the law is expressed in its political character; in its socialist content.

2 Soviet Legal Philosophy 294 (Babb & Hazard ed. 1951).

2 In this article the terms “socialist state” and “socialism” are used in their scientific con-
is the basic superstructure of the political, economic and social order of a socialist state and the source of separate laws and decrees that regulate in detail its organization. There are presently thirteen socialist constitutions in the world, nine in Europe, those of Albania, Bulgaria, Czechoslovakia, Eastern Germany, Hungary, Poland, Rumania, Soviet Union, and Yugoslavia, and four in Asia, those of the People’s Republic of China, Mongolia, North Korea and North Vietnam.

The first codification of socialist constitutional law was achieved by the enactment of the Constitution of the Socialist Federative Soviet Republic of Russia (R.S.F.S.R.), on July 10, 1918. In that constitution the fundamentals of a socialist legal order were established and formulated under the guidance of Lenin who participated actively in their drafting. Many formal changes have been subsequently introduced in the Soviet Constitutions of 1924 and 1936, and several new legal forms were devised to express the evolution of socialist order and to reflect its achievements, but the fundamentals laid down by Lenin have remained unaltered until today.

With the enactment of other constitutions in the communist orbit after World War II, the basic ideas of the Soviet constitutional law were also incorporated therein. They form the backbone of any socialist constitutional order and are the decisive factor in determining whether a particular constitution is socialist in character. Naturally, individual notation. These mean that only those states are considered socialist which are presently under the control of the respective communist party in which the political system is based on the dictatorship of the proletariat, and in which the means of production are nationalized and a planned economy introduced. Consequently, the recent forms of so-called socialism, such as Arab socialism or Algerian socialism, are not within the scope of this article.


Only the constitutions of the internationally recognized socialist states are enumerated. Each of the Soviet Union Republics and each of the Socialist Republics of Yugoslavia, being separate socialist state formations, have their own constitutions. Cuba, though basically a socialist country, does not as yet have a socialist constitution. The Cuban Constitution of February 7, 1959, is still in force, but its provisions were apparently superseded by the Declaration de la Habana, of February 4, 1962, (Gaceta Oficial, Extraordinaria Especial, of February 4, 1962). This Declaration lays the foundations of the new Cuban constitutional order and in its essence contains the basic principles of socialist constitutional law.


socialist constitutions differ in their terms, and some of them contain diversified provisions regulating the internal organization of a socialist state. This is true, for instance, in the cases of Red China, Eastern Germany, and especially, Yugoslavia. However, these variations do not change the socialist character of the respective constitution, but express only the endeavors of the individual communist regime to seek the most appropriate application of the Marxist-Leninist doctrine to the conditions prevailing in its country.

The socialist character of a constitution is represented by the following fundamental provisions:

(a) The power in the state belongs to the working people, that is, to those who participate in the construction of socialism;
(b) The working people are led by the working class which, in turn, is guided by its vanguard, the Communist Party. Thus, the dictatorship of the proletariat under the leadership of the Party and its political monopoly are secured;
(c) The classical doctrine of separation of powers is repudiated and instead the unity of the people's power established. This new concept regards the legislative, executive and judiciary only as three separate functions of a uniform people's power;
(d) The administrative and economic organization of the state rests on the system of democratic centralism based on the principle of double subordination;
(e) The Procuracy, a special, highly centralized agency is organized which serves as "the eye of the Party" in the execution of socialist legality;
(f) The nationalization of the means of production is proclaimed and planned economy introduced;
(g) The bill of rights is applicable only within the concept of socialist law which means that the political and economic rights of an individual are not abstract or absolute but limited by and related to the existing political and economic order.

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7 The English text of the majority of the constitutions of socialist states is printed in 1-3 Peaslee, Constitutions of Nations, (2d ed. 1956). The Albanian Constitution is available in the Library of Congress, translation by K. Vokopola; the Constitution of Red China is published in Blaustein, Fundamental Legal Documents of Communist China (1962); the Czechoslovak Constitution is printed in The Constitution of the Czechoslovak Socialist Republic (1960); the Constitution of North Vietnam is available in Russian in Konstitucia Demokraticheskoj Respubliki Vietnam 13 (1960).

8 Kardelj, New Fundamental Law of Yugoslavia 50 (1953). Edvard Kardelj is the Vice President of the Federal Executive Council and the chief Yugoslav communist theoretist.
These fundamental principles emanate from the three most important Marxist-Leninist views on state and law which are: first, state and law are but two facets of the class struggle; second, the material basis of the legal order of a state is its means of production; and third, the legal system of a state is not its base but its superstructure. It may be useful to comment briefly upon each of these three fundamentals.

Unlike the great majority of nonsocialist lawyers, who teach that the legal order of a modern state originates in natural law and who consequently hold that there are certain inalienable rights which are older than the state, socialist jurists maintain that:

Law and the state are not two distinct phenomena—one preceding the other—but are two sides of one and the same phenomenon: class dominance, which is manifested (a) in the fact that the dominant class creates its apparatus of constraint (the state), and (b) in the fact that it expresses its will in the shape of rules of conduct which it formulates (law) and which—with the aid of its state apparatus—it compels people to observe.9

This theory results in the class character of socialist state and law, that is, in the dogma that the ruling class in any state (in socialist states, the working class) imposes its will in the form of the legal order on the rest of the population.10 This theory leads to another principle of socialist law, that there is no such thing as natural, inalienable or vested rights of an individual but only those rights which the dominant class in the state is willing to grant to its citizens in a particular stage of development of the process of production.11

Since the main object of the class dominance is the control over the means of production, the economic order of a state, i.e., its material basis, is determined, in the opinion of socialist lawyers, by the ownership of the means of production. Therefore, in a socialist society the means of production cannot remain in private ownership but must be nationalized and put under control of the new ruling group, the working class, which utilizes them according to a uniform economic plan. Thus, the material basis of socialist law is created, without which this law could not attain its objectives.12

In view of the socialist legal doctrine that state and law are but two

10 Id. at 370. See also, Kelsen, The Communist Theory of Law 53 (1955); Schlesinger, Soviet Legal Theory 18-20 (1945).
11 Bartoš, Uvod u Pravo 166-67 (1950).
facets of one phenomenon, the class dominance, it is clear that socialist law is not the basis of the socialist state but its byproduct or superstructure. In consequence, socialist law is subject to modifications resulting from the changes of economic and social conditions of a socialist state which, in turn, depend upon a particular stage of socialist construction and international situation. This does not mean that socialist law as the superstructure of a socialist state merely reflects its base and does not by itself influence the further development of socialist order. On the contrary, "As soon as the superstructure comes into being, it becomes the most potent force which actively assists the basis to take shape and become strong."

In other words, while on the one hand, political and socio-economic conditions of a socialist state are reflected in its superstructure, the socialist legal order, on the other hand, socialist law expressed by this order influences the further development of the socialist state.

Soviet jurist Trainin defines this reciprocal process in the following statement:

In the dialectical unity of form and content of state and law, policy is the deciding factor in interaction, development and change. The legal norm reflects the demand of policy. Policy—developing in the contradictions of reality—leads to a changing of the functions of the state as well as and accordingly to a changing of the form of state and law.

The new Yugoslav Constitution is based on the Marxist-Leninist doctrine of state and law and therefore the three principles discussed above are its fundamentals. However, to understand better the Yugoslav efforts to create a new and original form of a socialist constitutional order, thus legalizing their own road to socialism, a brief examination of the Yugoslav constitutional development seems to be appropriate.

I

HISTORICAL BACKGROUND OF THE CONSTITUTION

Yugoslavia’s constitutional history is divided into two epochs: that
of the royal, centralist and "bourgeois" Yugoslavia\(^{17}\) from 1918 to 1945, and that of the republican, federative and socialist Yugoslavia from 1945 until today.\(^ {18}\) The beginnings of the socialist constitutional period go back as early as September 1941 when in the so-called liberated territories of occupied Yugoslavia, the people's liberation committees were created as the sole representatives of the newly emerging people's power. These committees were organized by the Communist Party of Yugoslavia according to the pattern used in the Bolshevik Revolution of 1917 when the state power in Russia was transferred into the hands of the soviets (councils) of workers and soldiers at the demand of the Communist Party.\(^ {19}\) The people's liberation committees in Yugoslavia were not merely reorganized agencies of the old political and social system but entirely new and revolutionary organs serving as the nucleus of the future Yugoslav socialist order.\(^ {20}\) One of the tasks of these committees was to form the legal basis for the post-war Yugoslav state anticipated by the Communists.\(^ {21}\)

The First Congress of The Anti-Fascist Council of the National Liberation of Yugoslavia (AVNOJ), held in November 1942 in the town of Bihac, Bosnia, did not discuss the constitutional form of a future Yugoslavia. It did affirm, however, the establishment and organization of the people's liberation committees in the liberated territories. They were indorsed as the foundations of the new people's authority,\(^ {22}\) and described as "the organs of the new democratic power and the expression of the uniform determination of the people to overthrow the yoke of fascism."\(^ {23}\)

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\(^{17}\) The adjective "bourgeois" is here used as a synonym for non-socialist but not necessarily capitalist in quality.

\(^{18}\) The pre-war Yugoslavia had two constitutions, that of June 28, 1921, and that of September 3, 1931. While in both constitutions the political influence of the King was decisive, the economic order of the country was organized on the basis of individual ownership of the means of production and private initiative. However, the state-owned property in the economy of the country was of great importance. The English text of the 1921 Constitution may be found in McBain & Rogers, The New Constitutions of Europe 348-78 (1922); the 1931 Constitution is published in Rao, Select Constitutions of the World 45-77 (1934).

\(^{19}\) Denisov & Kirichenko, op. cit. supra note 12, at 22; Vyshinsky 92. For the role of the Communist Party of Yugoslavia in the creation of the People's Liberation Committees, see Geršković, Historija Narodne Vlasti 85-105 (1955).


\(^{21}\) Djordjević, Ustavno Pravo i Politički Sistem Jugoslovije 105-07 (1961); Krbek, Razvitak narodnih odbora kao osnovnih organa vlasti radnoga naroda, Nova Jugoslovija 42 (1954); 1 Stefanović, Ustavno Pravo FNR Jugoslovije i Komparativno 164-71 (1956).

\(^{22}\) Krbek, op. cit. supra note 21, at 50.

\(^{23}\) Geršković, supra note 19, at 160. The First Congress of the AVNOJ also adopted
The constitutional order of postwar Yugoslavia was, in principle, proclaimed at the Second Congress of the AVNOJ, held in the town of Jajce, Bosnia, in November 1943. At this Congress a resolution was passed which said that postwar Yugoslavia shall be a democratic federal state based on the power of the working people organized in the people’s liberation committees. The Second Congress of AVNOJ thus laid the foundations of a new socialist Yugoslavia which, in their essence, have remained unchanged until today.24

The first Constitution after the War was enacted on January 31, 1946. Considering the fact that the new state power of Yugoslavia and its organization had been developing simultaneously with the country’s liberation from German occupation and immediately afterwards during 1945 along the lines adopted by the Second Congress of AVNOJ, the Constitution of 1946, in fact, ratified the conditions already existing in the country. It was therefore more of a declaratory than of a constitutive character.25 The Constitution of 1946 was a copy of the Soviet Constitution and, while it was socialist in character, it did not contain any original provisions of socialist constitutional law.26 Nevertheless, it was a powerful weapon in the hands of the Communist Party and was used in the execution of basic revolutionary changes needed for the creation of the socialist basis of the new Yugoslavia.27

After the split between Tito and Stalin, in June 1948, Yugoslavia began to seek original legal forms which would express its own road to socialism, different from “Stalin’s statism.” The turning point in these endeavors was attained by the enactment of the “Basic Law on the Workers Self-Management,” of July 5, 1950.28 The self-management by the workers of economic and other enterprises, with all its subsequent ramifications, became thereafter one of the pillars of the Yugoslav constitutional order and was directly responsible for the enactment of the Fundamental Law of January 13, 1953. The latter

a resolution calling for the establishment of the Regional Councils based on nationality principles which were supposed to act as “the free and democratic governments on the liberated territories of Yugoslavia within each of its future federal Republics.

25 Stefanović, supra note 21, at 322.
26 Djordjević, Ustavno Pravo FNRJ 31 (1953). The Yugoslav Constitution of 1946 was by chronological order the third socialist constitution in the world (after the Soviet Union and Mongolia), and the first of this type in Central-Eastern Europe.
27 Kardelj 71.
28 Published in the Yugoslav Official Gazette, Službene Novine, SL, 43-1950.
abrogated the Constitution of 1946 almost in its entirety, except for Chapter 1 (Articles 1-43) denominated as Fundamental Principles. The present Constitution abolishes entirely all constitutional laws heretofore in existence, and as the exclusive constitutional instrument became "the written, codified, uniform and supreme law of Yugoslavia." The preliminary work on the drafting of the present Constitution started as early as February 1959, but this action was not announced publicly at that time. The necessity for a new Constitution was revealed by Tito almost two years later, on November 28, 1960. He declared that the existing constitutional order of Yugoslavia was no longer adequate and that new and more appropriate forms of constitutional order should be devised to meet Yugoslavia's development and to identify its separate road to socialism. The Constitutional Commission formed by the Yugoslav Federal Assembly in November 1960 consisted of a number of prominent Yugoslav jurists of Marxist orientation. In drafting the Constitution they relied not only on the Marxist-Leninist doctrine of state and law and on the Yugoslav experience and accomplishments, but also followed the directives of the Executive Committee of the League of the Communists of Yugoslavia (Communist Party) which "at several of its meetings discussed the problems of the new Constitution and made the decisions of principles related thereto." The Preliminary Draft of

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30 The official commentary to the new Constitution called "Obrazloženje," Kardelj 131.

31 Radmilović, Kako se stvarao novi Jugoslavenski Ustav, Vjesnik, Nov. 29, 1962.


33 The Communist Party of Yugoslavia changed its name to the League of the Communists of Yugoslavia at the Sixth Party Congress, in Zagreb, in November 1952. The change of name was made at the moment when the dispute with Moscow was at its climax. It was intended to express the idea of the Yugoslav Communists that their aim is "to educate and persuade the people [rather] than to enforce their program by compulsive measures." The latter was the method of Stalin, they said, and therefore not acceptable in Yugoslavia. The change of name, however, did not affect either the character of the organization of the Communist Party of Yugoslavia which remained as heretofore the vanguard of the working class and the executor of the proletarian dictatorship. Of all the communist parties in the world, the Yugoslav Party is the only one which officially calls itself the League, although, conventionally, the name of the Party is still in general use. VI Kongress Komunističke Partije Jugoslavije 94-96 (1953). See also Zalar, Yugoslav Communism, 226 (1961).

34 Kardelj 69. Kardelj points out that Tito personally had been in permanent contact with the Constitutional Commission, giving to its members "his assistance in determining the ideological concepts of the new Constitution."
the new Constitution, after being adopted by the Federal People's Assembly, was submitted for public discussion on September 22, 1962, and the people throughout the country were "invited" by the press and Party members to participate at the meetings at which the draft was examined. The public discussion, of course, was a propaganda move only, since it was evident that nothing of importance could be changed by the people after the Party had already decided what should be enacted "in the interest of the people." 35

The principal reason for the enactment of the new Constitution was the desire of the communist leaders to legalize the evolution of Yugoslav socialism as a specific form of the contemporary socialist society. In their opinion, the Yugoslav brand of socialism gives to the working man more freedom and influence on the decisions of the government than any other existing socialist order. Naturally, the Yugoslav leaders add, the State must retain all the necessary means of revolutionary violence and compulsion because "total and absolute democratic freedom, on the present level of development of the forces of production and social consciousness, would revert the society to the system of exploitation and to a political terror of reactionary elements." 36

To emphasize the socialist status of Yugoslavia, the new Constitution changes the official name of the country from the Federal People's Republic of Yugoslavia into the Socialist Federal Republic of Yugoslavia. 37 "This name is more appropriate," says Kardelj, "in the present epoch when socialism is still in the world struggle for its eventual historical affirmation." 38

The Constitution consists of a Preamble, an Introduction, which con-

35 After the draft of the Constitution was adopted by the National Assembly, Tito declared that, in his opinion, the draft was good, that nothing was omitted, and that nothing essential should be added or changed by the public discussion. Kardelj 249. The public discussion of the Draft was an imitation of a similar public discussion which took place in the Soviet Union from June 12, 1936, when the draft of the Stalin Constitution was adopted by the Supreme Soviet, until December 5, 1936, when the Constitution was formally enacted. The purpose of the public discussion was to give the appearance of popular support to the constitution. When the final text was presented to the Federal Assembly for approval on April 7, 1963, Kardelj stated that "between the Preliminary Draft and the Final Text there are no essential differences either in the concepts presented or in the ideological basis and fundamental provisions." Kardelj, Politika, April 8, 1963.

36 Kardelj 80.

37 Only two other communist-controlled states are officially called socialist states: the Soviet Union and Czechoslovakia. All others are denominated either as People's Republics or Democratic Republics.

38 Kardelj 79.
tains Basic Principles enumerated into nine separate paragraphs, and three parts divided into fourteen chapters and 259 articles.38

II

SOCIALIST BASIS OF THE CONSTITUTION

(1) THE CONCEPT OF THE PEOPLE'S POWER

The new Constitution is based on "general theoretical Marxian tenets concerning the social role of the state, and especially the role of a socialist state in the period of transition."40 One of these tenets is that in the period of socialist construction and transition from socialism to communism, the power in the state must remain unconditionally and at all times in the hands of the working class.41 The Yugoslav Constitution expresses this dogma in article 1 which says that Yugoslavia is "a socialist democratic community based on self-government and on the power of the working people."42

As mentioned previously, the term "working people" in socialist law has a different connotation from the same term in nonsocialist legislation. The term "working people" expresses the class character of Yugoslavia and means that only those who participate in the construction of socialism are permitted to enjoy "democratic rights." This idea is clearly explained by the official commentary to the Yugoslav Constitution which, elucidating the provision that the power in the State belongs to the working people, says:

This provision indicates a new concept, indeed, a new and consistent form of democracy in which this political institution (the power of the working people) appears as a form of the state in which the directing role and the status of working men and citizens is affirmed. At the same time, by this provision our Constitution, in Art. 1, indicates the undisputed class character of the political and social system organized by the Constitution and removes all doubts about the concept of our community. This community is both society and political system [sic] in which the power of the state still occupies its predetermined, indispensable and important position.43

41 Stalin, Foundation of Leninism, 44-45 (1940).
42 This principle is also expressed in art. 71 of the Constitution which says: "The working people is the only bearer of political power and of government [sic] of social affairs."
43 Obrazloženje, Kardelj 135; Mratović "Što znači da je radni čovjek nosilac suvereniteta," Vjesnik, Oct. 25, 1962.
The provision that the power in the state belongs exclusively to the working people is found in every one of the socialist constitutions and is considered to be the cornerstone of socialist democracy.\(^{44}\) In this type of "democracy" all political and economic rights belong only to the working class and its vanguard, the Communist Party, and not to all strata of the population and to other political groups.\(^{45}\) Such a concept of democracy and democratic government is introduced by the new Yugoslav Constitution under the idea that a socialist state, in essence, is "the working class organized as a state in the transitory period from capitalism to socialism."\(^{46}\) It is clear, therefore, that the Yugoslav concept of democracy and democratic government has nothing in common with the same institutions in nonsocialist constitutionalism.

\(2\) THE LEGAL STATUS OF THE COMMUNIST PARTY
AND THE DICTATORSHIP OF THE PROLETARIAT

While the power of the respective communist party in every socialist state is total and unchallenged, its legal position is not always identical. There are three types of socialist constitutions: first, those in which the legal status of the Party is not mentioned at all;\(^{47}\) second, those in which the position and the role of the Party is mentioned only in the Preamble of the Constitution;\(^{48}\) and third, those in which the legal status of the Party and its role are assured by the Constitution.\(^{49}\) The new Yugoslav Constitution falls within the third group; it determines the legal position of the Party (League) twice, in the Preamble\(^{50}\) and in the text. Basic Principles, VI, reads:

The League of the Communists of Yugoslavia . . . . has become the organized leading force of the working class and working people in the development of socialism . . . [and] with its guiding ideological and political work is the

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\(^{44}\) See the Constitutions of Soviet Union (arts. 1-3), Mongolia (arts. 1-3), Bulgaria (art. 2), North Korea (art. 2), Hungary (art. 2), Albania (arts. 1-4), East Germany (art. 3), Poland (arts. 2-6), Rumania (arts. 1-2), Red China (art. 1), North Vietnam (art. 4), and Czechoslovakia (arts. 1-2).

\(^{45}\) Stalin, supra note 41, at 50-52.

\(^{46}\) Kardelj, supra note 21, at 169-82.

\(^{47}\) The Constitutions of Bulgaria, East Germany, North Korea and North Vietnam.

\(^{48}\) The Constitutions of Poland and Red China.

\(^{49}\) The Constitutions of Albania, Czechoslovakia, Hungary, Mongolia, Rumania, the Soviet Union and Yugoslavia.

\(^{50}\) The Preamble of the new Constitution, supra note 39, at 3, speaks about the historical role and the merits of the Party in creating the socialist revolution in Yugoslavia.
fundamental initiator of political activity necessary to protect and to promote
the achievements of the Socialist Revolution and socialist social relations...

The provision defining the constitutional status of the Communist
Party (League), though not uncommon in socialist constitutional law, is
an innovation in Yugoslav constitutionalism. The Constitution of 1946
and the Fundamental Law of 1953 did not contain such a provision, and
the strength of the Party was based only on its factual influence and
not upon its constitutional status as well. In light of the new conditions,
created by the self-management of the workers, the Yugoslav com-
munist leaders have believed that it was necessary to define the role and
the position of the Party in the Constitution as “the main executor of
the state power achieved through the dictatorship of the proletariat.”
The Yugoslav leaders emphasize at the same time that the revolutionary
methods of the proletarian dictatorship—though not its main weapon in
the present epoch—must nevertheless be preserved in order to prevent
“the political activity of those elements in the Yugoslav society which
still are trying to revert the wheel of history. Socialist democracy de-
defends by these revolutionary methods its own socialist foundations.”

However, the elevation of the Communist Party (League) to constitu-
tional status has no practical significance in Yugoslavia. The political
monopoly of the Party and its influence on the Yugoslav public life,
with or without its constitutional status, has been unchallenged since the
new Yugoslavia was established in 1945, and it will remain so unless
some fundamental changes take place in that country.

(3) THE UNITY OF THE STATE POWER
AND DEMOCRATIC CENTRALISM

Socialist constitutional law rejects the classical doctrine of the separa-
tion of powers and adheres instead to the principle of the unity of the
people’s power. In the opinion of the communist lawyers, the doctrine
of separation of powers is a bourgeois invention and is used by the capi-

51 Kardelj 90.
52 The theory of variable intensity of revolutionary methods of the dictatorship of the
proletariat in different periods, is not a Yugoslav peculiarity but an established principle of
53 Kardelj 90.
54 Tito, discussing the political and socio-economic problems of Yugoslavia with the
graduates of the Political Science Academy in Belgrade, said: “In your future work you
must always remember that there is only one conception which must be taken in consider-
atlon, and that is the directive of the Central Committee of the Communist Party.” Vecernji
List, June 22, 1962.
Socialist law holds instead that the power in the state is one and indivisible and belongs exclusively to the working people. This principle of the unity of people's power is expressed in the constitutional term which says that the highest political body "elected" by the working people is the sole bearer of the power in the state. This principle is legalized in all socialist constitutions and is codified also in the Yugoslav Constitution, article 163, which says: "The Federal Assembly is the supreme organ of the government and the organ of social self-government within the rights and duties of the Federation."

In simple English this provision means that there is only one indivisible power in socialist Yugoslavia—the power of the working people—and only one supreme organ of this power—the Federal Assembly. The two other powers in the State, the judiciary and the executive, are subordinated to the Federal Assembly, which is not only the highest legislative body but also the organ of supervision and coordination for the other two branches of the government. The system of checks and balances is thus eliminated and the judiciary and executive become merely two distinct functions of the united people's power. Therefore, the independence of the courts proclaimed by article 136 of the Yugoslav Constitution, should not be understood to mean that the courts are independent in the Western sense, i.e., that they are outside and above the existing political and social order. Rather they function within the framework of the socialist system and the laws passed by the Federal Assembly, and are conse-

55 Djordjević, supra note 21, at 432-35; Stefanović, supra note 21, at 52-56; Vyshinsky 166-67, 312-32.
56 The highest political body of the working people has a different name in the various socialist states. In the Soviet Union it is the Supreme Soviet; in Poland, the Seym; in Hungary, Parliament; in Red China, All China People's Congress. But its constitutional position and supreme authority is everywhere identical. See the Constitutions of Soviet Union (art. 30), Mongolia (art. 13), Bulgaria (art. 15), North Korea (art. 32), Hungary (art. 10), Albania (art. 41), East Germany (art. 50), Poland (art. 15), Rumania (arts. 4, 22), Red China (art. 21), North Vietnam (art. 43), and Czechoslovakia (arts. 2, 39).
57 This principle was also expressed in the two previous Yugoslav Constitutions, the Constitution of 1946, art. 6, and the Fundamental Law of 1953, art. 2. See also Stoyanovich, Le Régime Socialiste Yugoslave 186-208 (1961); Lukić, Prednacr Ustava i Problem Podele Vlasti, 3-4 Arhiv 338-46 (1962).
59 Obražlozenje, Kardelj 160.
quently subject to the control of the working people and their supreme organ.60

The principle of the unity of the people's power is the source of two additional features of socialist constitutional law: democratic centralism and the procuracy. Both of these institutions are legalized by the new Yugoslav Constitution.

Democratic centralism represents the systematic and authoritative management of all the affairs of a socialist state from one center with limited initiative granted, when necessary, to the lower organs of the government. It includes also the principle of double subordination which means that all the officials of a socialist system are subordinated both to the body which "elected" them and to the higher organs of authority which supervise this body.61 The institution of democratic centralism is sanctioned by all socialist constitutions62 and is of specific significance in Yugoslavia in view of its widely publicized decentralized system of the workers' self-management. The truth is that democratic centralism is not only preserved as one of the cornerstones of Yugoslavia's constitutional order but is also strengthened because—the Yugoslav leaders claim—the decentralized management of socialist enterprises by the workers can be realized only within the system of democratic centralism.63

The procuracy of the Office of Public Prosecutor is another institution of socialist constitutional law which approximates the role of the Attorney General's Office in a nonsocialist state.64 This office was created in Russia during the era of the rule of Peter the Great and was intended to be "the eye of the Tsar" over the legality and uniform application of

60 Id. at 156; Došen, Neka Pitanja Pravosudja i Sudskog Sistema, 3-4 Arhiv 428-35 (1962).
61 Ustavno Uredjenje FNRJ 41-43 (1951); Šnuderl, supra note 24, at 195-98. For a good description of the organization and functioning of democratic centralism, see, Gsovski & Grzybowski, supra note 14, at 68-69.
62 See the Constitutions of the Soviet Union (arts. 67-68), Mongolia (art. 47), Bulgaria (arts. 38, 49, 54), North Korea (art. 71), Hungary (arts. 29-35), East Germany (arts. 140-43), Poland (arts. 35, 44-45), Rumania (art. 60), Red China (art. 66), North Vietnam (arts. 4, 97), Czechoslovakia (arts. 88-96), and Yugoslavia, (art. 78).
63 Kardelj 98. This statement of Kardelj is a classical example of Marxian dialectics which often upholds two inconsistent and opposed concepts simultaneously in order to justify practical solutions.
64 The institution of procuracy is found in all socialist constitutions: Soviet Union (art. 113), Mongolia (arts. 57-60), Bulgaria (arts. 62-64), North Korea (arts. 90-94), Hungary (arts. 42-44), Albania (arts. 88-90), East Germany (art. 132), Poland (arts. 54-56), Rumania (arts. 73-76), Red China (art. 81), North Vietnam (arts. 105-08), Czechoslovakia (arts. 104-06).
the laws throughout the dictatorial Empire. It was abolished as a bourgeois institution in 1918 but reinstituted in 1922 by the Bolsheviks and made a part of their constitutional law. Of course, this time it became "the eye of the Party" with its functions and tasks basically unchanged. The Yugoslav Constitution of 1946 adopted the classical socialist definition of the procuracy, but the Fundamental Law of 1953 omitted any mention of it. The Law on the Public Prosecutor of November 24, 1954, had stressed the primary role of the Public Prosecutor in prosecuting crimes, while granting him only subsidiary rights as a watchman over socialist legality. The new Constitution redefines the role of public prosecutor (the procuracy) in its usual concept, entrusting his office with both the prosecution of crimes and with the general supervision of a uniform and correct application of socialist laws.

(4) THE NATIONALIZED MEANS OF PRODUCTION AND PLANNED ECONOMY

The material basis of socialist law is the collective ownership of the means of production. This principle is contained in all the constitutions of socialist states as the mainstay of their socio-economic order. The new Yugoslav Constitution codifies this principle in the following two provisions:

Art. 6 The foundation of the socio-economic order of Yugoslavia constitutes free associated labor with the means of production and other socially owned means of labor. . . .

Art. 8 The means of production and other means of social labor, as well as other mineral and other natural resources are social property. . . .

There is no socialist system in which the collective ownership and use

65 Berman, Justice in Russia 168-73 (1950); Morgan, Soviet Administration Legality 9-75 (1962).
67 Djordjević, supra note 21, at 705-09.
68 Art. 142; Obrazloženje, Kardelj 156; Vivoda, Javno Tužilaštvo u Prednacrtn Ustava, Arhiv 436-39.
69 Denisov & Kirichenko, Soviet State Law 111-12 (1960); Djordjević, supra note 21, at 196-97.
70 See the Constitutions of the Soviet Union (art. 4), Mongolia (arts. 4-8), Bulgaria (arts. 6-12), North Korea (arts. 6-10), Hungary (arts. 4-6), Albania (arts. 7-9), East Germany (arts. 21, 25-27), Poland (arts. 7-11), Rumania (arts. 6-9, 13), Red China (arts. 5-10), North Vietnam (arts. 9-17), and Czechoslovakia (arts. 7, 12).
71 In Yugoslavia, the collective ownership of the means of production was achieved mainly through two measures, nationalization and confiscation. See note 187 infra. Rakić, Društveno Ekonomsko Uredjenje, 3-4 Arhiv 235-42 (1962).
of the means of production are absolute and total. Every socialist state recognizes exceptions and permits limited ownership and use of the means of production by private individuals.\textsuperscript{72} On the other hand, the percentage of the total national income derived from the use of collectivized means of production indicates the economic power of the socialist sector in the state and its legal importance. In this respect, Yugoslavia, in spite of its socialist name, is one of the least socialized states in the communist orbit. In 1961 the socialist sector of the Yugoslav economy contributed only seventy-five per cent to the entire national income with less than forty-eight per cent of the total working population engaged in the collectively owned enterprises.\textsuperscript{73} The reason for this relatively low degree of economic socialization is the fact that Yugoslav agriculture is still based on small (up to ten hectares), privately owned peasant farms which comprise almost ninety per cent of the total arable land and employ approximately fifty per cent of the total active Yugoslav population.\textsuperscript{74}

The new Yugoslav Constitution does not try to change this economic picture by force of law, but it does make certain provisions which are intended to curtail further the private ownership and use of the means of production and to restrict the still-existing private occupations. Thus, for instance, article 22 of the Constitution orders that the exploitation of labor of others for personal income is prohibited. The aim of this provision is to make it hard, or impossible, for individual peasants and private handicraftsmen to employ hired labor in their economic operations, thus preventing their expansion and progress and forcing them eventually to join collective farms or government-controlled cooperatives. Even more interesting is the provision of article 20, paragraph 3, which says that "land, being of general social interest, shall be utilized in conformity with the general interest determined by law." This constitutional provision makes it clear that the individual peasant landowner shall in the future be subject to the control of the state in the cultivation of his holding as ordered by individual laws and decrees which shall determine

\textsuperscript{72} E.g., Constitution of the Soviet Union, art. 9; Constitution of Hungary, art. 4.

\textsuperscript{73} Kardelj 107-08. In the Soviet Union the socialist sector of the national income constitutes 99.1\% of the total. Zalkind, General Characteristics of the National Economy, in Information U.S.S.R. 263 (1962). In Poland the socialist sector of the economy contributes 76\% to the national income, Osteuropa Handbuch, Polen 373 (1959); in Bulgaria, 98.5\%, Statistical Yearbook of the Bulgarian People's Republic 133 (1962); in Czechoslovakia, 96\%, Statisticka Rocenka ČSSR 39 (1961); in Hungary, 87.6\%, Statisztikai evkomyv 56 (1961).

\textsuperscript{74} Kardelj 108.
what is in the common interest. While the principle of voluntary cooperation of the peasant farmers is still upheld, the far reaching provision of article 20, paragraph 2 will undoubtedly foster the collectivization of agriculture.

Private occupations are restricted by the Constitution and can be exercised only within the limits of the law. In fact, except for the attorneys, who are still allowed to work individually or in free partnerships, and a decreasing number of small handicraftsmen in urban communities, no private economic professions outside of agriculture exist today in Yugoslavia. In brief, the Constitution fortifies the existing economic basis of the socialist legal order, and at the same time it makes additional provisions which are intended to eliminate the remnants of the free economy in the country.

In a socialist state, which is administered by a system of democratic centralism and in which the bulk of the means of production is owned collectively, the planned economy is conclusive and is legalized by the socialist constitutions as the basis of the socio-economic order. Yugoslavia introduced a planned economy as early as 1945 and reaffirms this system in the new Constitution, in article 121, which says:

In order to promote most favorable conditions for the country's economic progress and for strengthening of socialist economic relations, the Federation shall determine the general course of the country's economic development and the basic relations in the distribution of the social products by means of economic planning . . .

Hence, in spite of the decentralized economic system, the planned economy and central economic plan are preserved. The drafters of the

77 Art. 22 of the Constitution says: "Subject to the restrictions and conditions determined by law, citizens may practise occupations with their own labour and with their own means of production, based on their professional, vocational and other personal labor."
78 The law on lawyers' cooperatives is in preparation and the individual craftsmen are persistently forced to join working cooperatives under collective management. The medical profession, private contractors and architects and other liberal vocations have long since been socialized. Šuklje, Advokatura u Novom Ustavnom Sistemu, 3-4 Arhiv 457 (1962).
79 See the Constitutions of the Soviet Union (art. 11), Mongolia (art. 4), Bulgaria (art. 12), North Korea (art. 10), Hungary (art. 5), Albania (art. 8), East Germany (art. 21), Poland (art. 7), Rumania (art. 13), Red China (art. 15), North Vietnam (art. 10), and Czechoslovakia (art. 7).
80 Obrazloženje, Kardelj 153-54.
Constitution point out that economic planning is one of the foundations of the constitutional order of any socialist state and cannot be abandoned. They say, the general economic plan assures not only the full utilization of all the production forces in the community but guarantees also that "nobody can consume more than that which is proportionate to his production, and which is recognized as a useful social product by the society."\footnote{Kardelj 94.}

(5) BILL OF RIGHTS

The bill of rights in socialist constitutional law, in its form, is similar to that contained in nonsocialist constitutions.\footnote{See the Constitutions of the Soviet Union (arts. 118-33), Mongolia (arts. 75-91), Bulgaria (arts. 71-94), North Korea (arts. 11-31), Hungary (arts. 45-61), Albania (arts. 14-40), East Germany (arts 6-18), Poland (arts. 57-97), Rumania (arts. 77-92), Red China (arts. 85-103), North Vietnam (arts. 22-42), Czechoslovakia (arts. 19-36).} Indeed, it is broader because it includes many so-called economic and cultural rights of an individual which, as a rule, are not found in the bourgeois constitutions enacted before World War I. However, the similarity between a socialist and nonsocialist bill of rights is incidental only. In fact, the pertinent provisions of a socialist constitution are in their meaning and application diametrically opposed to those in nonsocialist law. In a socialist bill of rights, more than anywhere else, the distinction between the form and the content of the law must be made. While a nonsocialist bill of rights originates in the idea of natural law and, therefore, its provisions have an absolute and independent value, similar provisions in socialist law are the product of the theory of class dominance.\footnote{For a Marxist critique of the bourgeois bill of rights and the meaning and application of these rights in socialist law, see Denisov & Kirichenko, op. cit. supra note 69, at 319-50; Hazard & Shapiro, The Soviet State 59-78 (1962); Jevremović, Položaj i Prava Ćoveka i Gradjanina, 3-4 Arhiv 305-08 (1962); Vyshinsky, 558-658.}

Therefore, the "rights" accorded by a socialist constitution, especially those of a political nature such as freedom of speech, freedom of press, and freedom of association, are not independent and absolute but are restricted and interpreted by the power which grants them. They can be used only within the established political and economic system and for its strengthening, but not for its change or destruction. The limitation of the use of the bill of rights is found in all socialist constitutions and is contained either in a provision which qualifies the use of these rights,\footnote{In the Constitution of the Soviet Union (art. 125), Hungary (art. 55), Czechoslovakia, (art. 19) and Rumania (art. 85) political rights are permitted to be used only to invigorate the socialist order.}
or in a prohibition against using them to the detriment of the political and socio-economic order established by the constitution. Yugoslavia uses the second variation and restricts the use of political rights by article 40 of the Constitution which orders: “These freedoms shall not be used to overthrow the foundations of socialist and democratic order established by this Constitution.”

Yugoslavia enumerates all the rights and duties of its citizens in articles 32-70 of the new Constitution. In addition to the usual rights and duties of citizens, the Constitution specifies also the so-called economical and cultural rights of an individual that are legalized by all socialist constitutions. Among the latter are: the right to work and leisure, the right to free education, the right to social security and retirement, and the protection of motherhood. Among special rights is the right of asylum granted to foreign citizens and stateless persons persecuted because of their democratic views or their struggle for social and national liberation of their nations (article 65).

However, the new Yugoslav Constitution also contains undetermined rights and imposes specific duties which cannot be found in any socialist or nonsocialist constitution. Among these are the right of the citizens to participate in the self-government of social enterprises (article 34), and their right to be compensated by the community for the damages suffered by tort actions committed by the organs of the state and the officials of the self-governing social organizations (article 69). One of the peculiarities of the Constitution is that it guarantees “the freedom of thought and conviction” (article 39). It is not clear, however, what is meant by this stipulation. Since there is no device, as yet, which would

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85 E.g., the Constitutions of Bulgaria (art. 87), Albania (art. 38), Poland (art. 72), North Vietnam (art. 38).
86 Obrazloženje, Kardelj 147.
88 The protection of citizens against unlawful arrest, search and seizure and their rights in criminal investigation, as codified in the Constitution and practiced in Yugoslavia, are not discussed in this article. The problems of the freedom of religion and of the separation of the state and church, are also omitted. All these subjects, in view of their complexity in the Yugoslav legal system, should be analyzed separately. See Brkić, Prava Ličnosti i Politička Prava Gradjana, Arhiv 308-15.
89 The so-called social and economic rights of an individual, such as the right to work, education, social security and collective bargaining, are also incorporated in some nonsocialistic constitutions. E.g., Constitutions of France of September 28, 1946; West Germany, August 3, 1950; Italy, December 22, 1947.
90 Neither official commentary nor Kardelj gives any explanation of the meaning of this unusual provision. See Brkić, supra note 88, at 310.
be able to control the unexpressed human thought, this provision seems to be legally superfluous. On the other hand, if this provision purports to mean the freedom to express thought and the freedom to manifest an open and visible conviction, then it is contradictory to and restricted by article 41 which prohibits the use of speech, press and association for "anti-democratic purposes."

Before the draft of the Constitution was published, the speculations persisted that the new Yugoslav Constitution would legalize the right of the workers to strike which is recognized in some modern constitutions of nonsocialist states. However, this right is not assured in the Constitution. It is obvious if such constitutional privilege were to be granted to the workers, even within the frame of a socialist legal order and under the surveillance of the political police, it would constitute too great a danger for the regime. Besides, it would be clearly in contradiction with the concept of social property and its management by the workers.

The Constitution also imposes certain duties on the citizens among which is the duty to defend the country (article 60), the duty to safeguard and protect socialist property (article 61), and the duty to render assistance to another citizen when he is in danger. Article 59 of the Constitution provides in part:

It is the duty of every person to render help and assistance to another person in danger . . .

This latter provision is unknown in any constitutional law since it declares a violation something which is not considered a criminal offense either by common law or by the criminal codes of the civil law countries. Nor is it specified as a crime in the Yugoslav Criminal Code of July 29, 1959, which adheres to the principles "nullum crimen sine lege" and "nulla poena sine lege." Indeed, this provision seems to contradict article 49 of the same Constitution which says that nobody can be punished for an act not declared to be a crime and for which punishment was not anticipated. Does this unusual constitutional provision mean that one may be punished because he did not save a drowning man, or did not rescue a child from a house on fire? The text of the provision

92 This duty is imposed by all socialist constitutions. See, e.g., the Constitutions of the Soviet Union (art. 133), Poland (art. 78), Czechoslovakia (art. 37), and Bulgaria (art. 90).
93 Obrazloženje, Kardelj 147.
implies such interpretation, but its practical implementation remains to be seen. At any rate, further legislation will be needed to clarify this strange constitutional provision.

III

PARTicular FEATURES OF THE CONSTITUTION

The particular features of the new Constitution originate either in the ambition of the Yugoslav communists to be the pioneers in the development of socialist constitutionalism, or in the multinational structure of the Yugoslav state. These particularities also express the Yugoslav views on practical implementation of the Marxist-Leninist doctrine on the organization and policy of a federative socialist state in the period of socialist construction and transition from socialism to communism. As we shall see, some of these traits are not entirely original because they are used in somewhat diversified forms in other socialist and nonsocialist states. However, all these specific features of the new Constitution, the Yugoslav leaders claim, are socialist in character and therefore contribute to the evolution of socialist constitutionalism.

(1) THE CODIFICATION OF INTERNATIONAL RELATIONS

The constitution of a state usually does not contain a provision concerning international relations or a codification of principles pertaining to foreign policy. This is true for all contemporary constitutions regardless of whether the state belongs to the communist orbit or is a member of the free world community. The new Yugoslav Constitution is an exception to this rule and in this sense it is unequaled. Introduction, Basic Principles, VII reads as follows:

Whereas peaceful coexistence and active cooperation between states and peoples regardless of the differences in their social structure are indispensable for peace and social progress in the world, Yugoslavia shall base its international relations on the following principles: respect of national sovereignty and equality, non-interference in the domestic affairs of other countries, peaceful settlement of international disputes, and socialist internationalism. In its international relations Yugoslavia shall adhere to the principles of the United Nations Charter, shall fulfil its international obligations and shall participate actively in the work of the international organizations of which it is a member.

In order to realize these principles, Yugoslavia advocates:

95 See 1-3 Peaslee, Constitutions of Nations (2d ed. 1956). Among the socialist constitutions only those of Czechoslovakia and East Germany contain a brief reference to international relations.
The establishment and development of every form of international cooperation which helps the consolidation of peace and strengthening of mutual respect and friendship between peoples and states and their rapprochment; the broadest and the most liberal exchange of material goods and intellectual achievements; the freedom of mutual information and development of other relations which contribute to the materialization of common economic cultural and other interests of states, nations and people, and especially those which develop democratic and socialist relations in international cooperation and social progress in general;

The repudiation of the use of force or threat of force in international relations and the realization of general and complete disarmament;

The right of every people to determine freely and to develop their social and political structure by ways and means which they are free to choose;

The right to every people to self-determination and national independence and their right to wage liberation war in order to attain these just aims;

The international support to the peoples who are waging a just struggle for their national independence and liberation from colonialism and national oppression;

The development of an international cooperation which assures equal economic relations in the world, sovereign disposition of national resources and the creation of the conditions which lead to a more rapid development of the under-developed countries.

By advocating an all-embracing political, economic and cultural cooperation with other peoples and states, Yugoslavia as a socialist community of nations, believes that this cooperation should contribute to the creation of new democratic forms of associations of states, nations and peoples which will correspond to the interests of peoples and social progress and in this respect Yugoslavia is a responsive community.96

Although the above declaration is found in the chapter entitled Basic Principles, it forms an integral part of the Yugoslav constitutional law.97 The reasons for its codification are given by Kardelj who said:

International cooperation (between independent countries) has attained such a level that today it has become impossible to disregard the necessity of formulating precisely in the constitution of an independent country the principles of its policy and its responsibility with regard to international cooperation, especially, if this is a constitution of a socialist state.98

It would appear that by codifying the foundations of foreign relations and by elevating them to the status of constitutional law, these principles

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96 The English text given here is the translation made by the author from the Serbo-Croatian. The translation published by the Union of Jurists Ass'ns of Yugoslavia, supra note 39, is incorrect, in the opinion of the author, in a number of its expressions and does not convey the true meaning of the original.
97 Obrazloženje, Kardelj 132.
98 Kardelj 79; Bartoš, Propiši o Medjunarodnim Odnosima, 3-4 Arhiv 527-37 (1962).
have ceased to be an ordinary government declaration on foreign policy which can be changed as needed in given conditions. In other words, it seems that these solemnly proclaimed principles have attained in the Yugoslav polity the highest degree of legal and political stability and are unchangeable except by the mode prescribed for the amending of the Constitution itself.

However, the Constitution, in the subsequent text, defines the rights of the Federal Assembly and specifies that one of its organs, the Federal Chamber, shall have the independent right to "consider basic policy, pertaining to international relations." The question arises: what is the meaning and scope of this second constitutional provision and what is its relationship to the declaration contained in the Basic Principles? Is the Federal Chamber authorized to change freely or to amend substantially the constitutional principles on foreign relations in view of its "independent right to consider basic policy on foreign relations," or is it restricted in its decisions by the previously mentioned constitutional declaration?

There is little doubt that these two provisions, found in two different parts of the Constitution, are legally inconsistent. But inconsistent legal provisions are not unusual in socialist legislation and are explained as the expression of Marxian dialectics. Since the new Constitution is socialist law in statutory form, it should be presumed that the aforementioned legal inconsistency is not accidental but deliberate. Of course, only the future will tell whether, by the use of Marxian dialectics, the Yugoslav rulers will find it more convenient to uphold the basic principles on foreign relations as stated in the declaration, or to change them, thus in fact amending the Constitution, by the independent power of the Federal Chamber in order to adapt them to a particular situation of future international developments.

The ideas expressed in the declaration on foreign relations are not new. They reflect the policy which the Yugoslav Government has pursued in the last decade, especially after its dispute with Moscow in 1948, and its endeavors to establish itself as an "independent communist regime." At the last Congress of the Yugoslav Communist Party (League), held in Ljubljana, in April 1958, a resolution was adopted which in Chapter X discusses the international relations of the Yugoslav Communist Party. The views contained in this Resolution are, in their essence,

99 Art. 178.
incorporated in the Constitution. However, the declaration on foreign relations is Marxist in terminology and aims, and its "translation" into simple English seems to be propitious.

The declaration emphasizes the necessity of peaceful coexistence and active cooperation, but these terms, in the minds of the Yugoslav communists, are not a pacifist slogan but a formula which expresses their deep conviction of the present supremacy of the communist orbit and of a necessity of communist ideological offensive against the nonsocialist countries, as well as their firm belief in the eventual victory of socialism. It is from this point of view that one of the foundations of the Yugoslav foreign relations, the adherence to international socialism, must be appraised.

Socialist internationalism, which means the world-wide solidarity of revolutionary socialist movements, has always been one of the principal foundations of the Yugoslav communists. This was reaffirmed in the aforementioned resolution adopted by the VIIth Congress in Ljubljana which said:

The working class of Yugoslavia, which has always consistently carried out its international duties, at the same time wholeheartedly supporting and assisting the struggle of the workers' movements and progressive forces in the world, shall also in the future—guided by the principles of international proletarianism—serve the great struggle of the workers in the whole world and of all progressive people for peace, freedom and socialism.

In view of this resolution it is clear that the Yugoslav concept of international socialism is not only inconsistent with, but also opposed to, the principle of noninterference in the internal affairs of other states, and that therefore both of these principles cannot be upheld simultaneously as the Constitution intends to proclaim. International socialism presumes and stimulates a close cooperation and mutual support of the communist parties and other revolutionary movements of different countries and therefore is incompatible with the principle of noninterference in domestic affairs.

The declaration specifies further that Yugoslavia shall support only those international organizations with which it is affiliated. This statement seems to indicate that Yugoslavia does not feel itself obliged to abide, for instance, by advisory opinions of the International Court of

102 Id. at 373-74; Zalar, Yugoslav Communism 273-76 (1961).
103 VII Kongres Saveza Komunista Jugoslavije 1141 (1958); Šahović, Načelo Miroljubive Koegzistencije, 3-4 Arhiv 537-43 (1962).
Justice since it is not a party to the compulsory jurisdiction of the Court, although it is a member of the United Nations.

The term "national independence," which is repeatedly used in the declaration, has in the Marxist dictionary a different connotation from that in the West. Therefore, Yugoslavia's recognition of a war for national independence as a just means in international relations, should not be taken to mean only an armed uprising of a people still under colonial rule. In the communist terminology the concept of the term national independence is much broader and is often coupled with the fight for the overthrow of the capitalist system within an otherwise independent nation. Thus, the national liberation war of the peoples of Yugoslavia under communist leadership has also been called the war for national independence in spite of the fact that Yugoslavia was an independent country. However, even if the term national independence is taken in its true meaning, it is clear that the recognition of war as a just means in international relations for the purpose of acquiring such independence does not come within article 51 of the Charter of the United Nations which Yugoslavia as a member is obliged to respect.

The clause that Yugoslavia shall support every nation's right to build its political and social organizations by ways and means which this nation is free to choose and to change, is ambiguous and no official explanation of its meaning is given. However, in view of the Marxian character of the declaration, this provision purports to indicate that Yugoslavia considers peaceful evolution and democratic process not the only way by which progress of a nation can be achieved. Consequently, it is prepared to support revolutionary movements organized to alter the political and social organization of a state toward the road of socialism.

105 Cf. Tito, Political Report of the CC of the Communist Party of Yugoslavia, 50-55 (1948). The same criterion is used today by the Yugoslav communists when they speak about the communist guerrillas in Vietnam whose fighting they call "the war of national independence in Vietnam," hence, justified. It is of interest to note that in spite of all the public quarrel between Yugoslavia and Red China, the Yugoslav attitude toward the "national liberation wars" is identical to the position taken recently by the Chinese communists. See "The Differences between Comrade Togliatti and Us," The Peking People's Daily, December 31, 1962, translated in the Washington Post, January 3, 1963.
107 The Yugoslav communists support Lenin's teaching that the establishment of socialism is impossible without a revolution. Although the position of the Yugoslav and the Soviet
The concept of the term “oppressed people” in the communist vocabulary is also different. It means any people who, so far, have not been able to overthrow their “capitalist yoke” and establish socialism. Therefore, when the Constitution declares that Yugoslavia shall support the right of every oppressed people to fight by all ways and means at their disposal for liberation and independence, it should be understood as meaning not only armed rebellions of colonial nations but any uprising of an organized group aimed at the overthrowing of a capitalist system in their country. Of course, only the international situation at a given moment and political opportunism will decide in which way and by what means Yugoslavia may or may not support the armed struggles of oppressed peoples, but this fact does not change the legal meaning of this constitutional provision.

The declaration states at its end that Yugoslavia, as a voluntary socialist community of peoples, believes that international cooperation, as envisaged by it, should contribute to the formation of new democratic forms of international unions. The term “democratic” must be taken in its Marxian connotation which means that only those international alliances are truly democratic which are formed between socialist states or with the purpose of following the path towards socialism. For the realization of this goal, Yugoslavia declares, it shall remain a responsive community. The meaning of the term “democratic international unions” and what is meant by the phrase “responsive community” is explained by Kardelj. He says:

Today, the process of international cooperation unites the peoples on a higher level of the development of production forces and of international division of labor in their new common interest which goes beyond national borders. In this respect

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108 For instance, the new Constitution in its Preamble says: “[T]he working people of Yugoslavia, under the leadership of the Communist Party, overthrew the pre-war class-society order based on exploitation, political oppression and national inequality by means of their struggle in the People’s Liberation War and the Socialist Revolution . . . .”

109 Whether Yugoslavia is a “voluntary” union of peoples is highly questionable. The fact is that the peoples of Yugoslavia have never been asked to freely decide whether they want to live in a union, and if so, what should be the political and sociop-economic structure of this composite state.

110 The expression “otvorena zajednica” which in Serbo-Croatian means “open community” has been translated as “responsive community” by the author because this translation corresponds to the meaning given to it by Kardelj.
the Constitution stresses that Yugoslavia is a responsive community of peoples and that it is ready to enter into every form of regional or global international cooperation which is based on the full equality of nations and common interest and which contributes to a peaceful and active coexistence. . . . It is clear that Socialist Yugoslavia especially favors all those relations which represent the realization of the new democratic and socialist principles in international relations.111

The constitutional codification of the principles of foreign relations is a novelty in any constitutional law and international law, and it is a genuine contribution to the development of socialist constitutional law. Yugoslavia is the first country to codify the principles of foreign relations as conceived by a socialist state, and it will be of interest to see whether other states of the socialist orbit which are presently engaged in preparing new constitutions will follow this example.112

(2) YUGOSLAV FEDERALISM

Several of the socialist states are multinational, but only two of them are federations: the Soviet Union and Yugoslavia. The three others, Red China, Czechoslovakia and North Vietnam, are by their constitutions uniform states in which all the nationalities are equal in rights.113

The idea of a federative socialist state was alien to Marx and Engels and was originally opposed also by Lenin. They taught that federalism is a bourgeois institution not acceptable by socialist law.114 As late as November 1917, the Communist Party of Russia advocated a uniform, proletarian and socialist Russia, fearing the nationalistic tendencies which had developed within various “national Soviets” that “used their influence upon the toilers to develop a policy of separation from the proletarian revolution and thereby to create a barrier between the proletarian center and the toilers of the borderlands.”115 The turning point in Lenin’s attitude towards federalism in the proletarian state was reached during the

111 Kardelj 80.

112 Certain constitutional changes, including the codification of the principles of foreign relations, are announced by the drafters of the new Soviet Constitution. Romashkin, A New Stage in the Development of the Soviet State, in 1 Hazard & Shapiro, supra note 85, at 33-35.

113 See the constitutions of Red China (art. 3), Czechoslovakia (art. 1), and North Vietnam (art. 3). Rumania is not a multinational state, but comprises a strong Hungarian minority to which the constitution grants a special autonomous status (arts. 19-21). East Germany, on the other hand, is nationally homogenous but is organized on a quasi-federal basis. Art. 1 of the constitution defines the German Democratic Republic as “an indivisible democratic republic, the foundations of which are the German Laender.”

114 Vyshinsky 220-28; Gsovski & Grzybowski, supra note 100, at 59-68.

115 Vyshinsky 223.
Civil War when it became clear to him that some kind of constitutional status had to be granted to numerous nationalities of Russia if they were to be kept within its borders. At the Tenth Party Congress, held in March 1921, the concept of socialist federation was adopted as "a transitory stage . . . of workers of all countries in a united world economy."116 In consequence, a federative structure for Russia was devised which was transformed after 1923 into the Federation of the Soviet Socialist Republics and reaffirmed by the Constitution of 1936.

When the Communist Party in the multinational Yugoslavia was formed in June 1920, its program also called for a uniform and centrally organized Yugoslav State. However, the subsequent political struggle of the Croats and Macedonians against the Serbian hegemony and centralism from Belgrade forced the Party to change its program with regard to the solution of the national question of Yugoslavia. At the Party's Congress in Vienna,117 in 1926, the principle of national individuality and the right of national self-determination for every nation of Yugoslavia, including the right of secession, was adopted as a part of the Party's program, and a federative structure for a socialist Yugoslavia was envisaged.118 The modification of the program did not affect the organizational unity of the Party; neither was it intended to mean its realization in the true sense. Modeled according to the Soviet pattern on Stalin's orders, the revision of the program was only a lure for the nationally oppressed peoples of Yugoslavia to support the struggle of the Party for its political affirmation.119

The Yugoslav federalism under the scheme of the Communist Party materialized in the Constitution of 1946. The first federative organization at the same time marked the end of the first phase of Yugoslav federalism which, from its beginning in 1943, has passed through four distinct stages. The first stage was the existence of the de facto federative Yugoslavia, which began with the creation of the Partisan Govern-

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116 Gsovski & Grzybowski, supra note 100, at 61. For a Yugoslav communist's view on the differences between federalism in bourgeois and socialist constitutional law, see, Krbek, Sovietski Federalizam Prema Gradjanskim Federacijama, Rad, 5-40 (1949).
117 In Yugoslavia, the Communist Party was outlawed in 1921 and its congresses in the period from 1921 to 1941 were held illegally, mostly abroad.
119 Schweissguth, Die Entwicklung des Bundesverfassungsrechts der Föderativen Volksrepublik Jugoslawien 31-40 (1960); Pešelj, Contemporary Croatia in the Yugoslav Federation, 2 Journal of Croatian Studies 82-84 (1961).
ments in the liberated territories of Croatia and Slovenia in the Summer of 1943 and lasted until the enactment of the Constitution on January 31, 1946.\textsuperscript{120} The second stage was the period in which the Constitution of 1946 was the sole constitutional instrument, and which ended with the enactment of the Fundamental Law of January 13, 1953.\textsuperscript{121} The Fundamental Law changed the federative structure of Yugoslavia considerably by emphasizing that Yugoslavia became a federation in a new sense, \textit{i.e.}, as a system founded on social self-government of the workers. The Yugoslav Federation, Kardelj said,

is no longer a federation of the old type. It is no longer only a union of nationalities and their states but has above all become the bearer of the social functions of a unified socialist community of the Yugoslav working people.\textsuperscript{122}

Thus began the third stage of Yugoslav federalism which lasted until the enactment of the new Constitution that marks the fourth and present stage of Yugoslav federalist development. The new Constitution reaffirms the socialist character of the Federation stressing that its unity is not founded on nationalistic ideology but on socialist, international and human conceptions.\textsuperscript{123} At the same time, the Constitution changes considerably the organization of the Federation from that established by the Fundamental Law.

While both federations in the communist orbit, the Soviet Union and Yugoslavia, are based on the Leninist-Stalinist doctrine of socialist federalism,\textsuperscript{124} formal legal differences do exist between their organiza-

\begin{itemize}
  \item \textsuperscript{120} In the opinion of professor Šnuderl, during this period individual republics of contemporary Yugoslavia, notably Croatia and Slovenia, were fully sovereign states. They were legally independent from higher authority, either in their organization or in their functions. since the Yugoslav federal power did not yet exist. 1 Šnuderl, Ustavno Pravo 249 (1956).
  \item \textsuperscript{121} In this period, the constitutional status of the individual Yugoslav Federal Republics is described by professor Djordjević as “state formations in which are embodied and expressed the principle of national individuality and national sovereignty and freedom of the Serbian, Croatian, Slovenian, Macedonian and Montenegrin nations.” Djordjević, Elementi Ustavnog Prava 55 (1951).
  \item \textsuperscript{122} Kardelj, Introduction, New Fundamental Law of Yugoslavia 27 (Union of Jurists Ass’ns of Yugoslavia ed. 1953).
  \item \textsuperscript{123} Kardelj 121.
  \item \textsuperscript{124} The theory of socialist federalism is based on the principle of nationality, that is, on the unification of several nations into one federation which is governed by the dictatorship of the proletariat and administered by democratic centralism. This theory was founded by Lenin and was further developed by Stalin. Though the name of the latter is not very popular today in the larger part of the communist orbit, especially not in Yugoslavia, the historical truth is that the idea of a socialist Yugoslav Federation was conceived by Stalin. He explained his position in the speech given on March 30, 1925, before the Executive
\end{itemize}
tions. The Soviet Union defines its constitutional basis as “the voluntary union of equal soviet socialist republics”.\textsuperscript{125} Yugoslavia, though composed also of individual socialist republics, emphasizes as its constitutional basis the right of national self-determination of its peoples.\textsuperscript{126} In consequence, the Soviet Union reserves for each Union Republic “the right freely to secede from the USSR,”\textsuperscript{127} while this right is not reserved in the Yugoslav Constitution for the individual republics, but rather is recognized as an historical right of peoples of Yugoslavia. Of course, the right of a Union Republic in the Soviet Union to secede is theoretical only, but the fact remains that it is stipulated in the Soviet Constitution as one of the proofs of the “voluntary” character of Soviet federalism. In Yugoslavia, on the other hand, the “voluntary unification” of its people is presumed by the Constitution and regarded as an historical fact by which the right of national self-determination was consummated once and for all.\textsuperscript{128}

Committee of the Communist International (Comintern), Stalin, Marxism and the National and Colonial Question 200-05 (1935), in the presence of the delegates of the Yugoslav Communist Party which, at that time, advocated a uniform and centralist Yugoslavia. Stalin ordered the Yugoslav delegates to accept his view or face expulsion from the Comintern. Id. at 221-28.

\textsuperscript{125} Soviet Constitution, art. 13.

\textsuperscript{126} Basic Principles, ch. 1, of the Yugoslav Constitution. The six constituent Socialist Republics of Yugoslavia are: Serbia, Croatia, Slovenia, Bosnia and Herzegovina, Macedonia, and Montenegro. In the new constitution, art. 2, the sequence of the Republics is given in alphabetical order and not as heretofore by their size, as listed above. This was done, the Yugoslavs say, to emphasize the equality of the Republics regardless of their size or historical significance. Radmilović, Redosljed Republike, Vjesnik, Oct. 17, 1962. However, this creates only unnecessary confusion since the sequence of names of the Republics is not the same if Latin or Cyrillic alphabets are used, or if their names are expressed in Serbo-Croatian or in a foreign language.

The nationality principle in Yugoslavia is not carried out consistently with regard to its federative structure. One of the Republics, Bosnia and Herzegovina, is common to the Croats and Serbs, and Montenegro, though historically an independent state, is populated by Montenegrin-Serbs. On the other hand, the Albanians, who equal in number the Macedonians, were not permitted to form their own republic or to join Albania on the basis of national self-determination, but were granted only a limited autonomy within Serbia. Pešelj, supra note 119, at 85-94.

\textsuperscript{127} Soviet Constitution, art. 17.

\textsuperscript{128} Basic Principles, ch. 1 of the Yugoslav Constitution; Šnuderl, Dve deklarativni normi naši ustave 161-206 (1950); Šnuderl, Jugoslovenski Federalizam, Borba, Oct. 11-12, 1962. Professor Geršković of Zagreb University expresses the view that the right of national self-determination, including the right of secession, is an inalienable right of every nation and can neither be granted or denied by a constitution. He claims that the Yugoslav Federation is the result of “a free and equal contract among the peoples of Yugoslavia.” This contract was
Another important difference between the Soviet and Yugoslav federalism lies in the different views concerning the character of sovereignty of the Federation and of the individual Republics. In this respect Soviet jurists have developed the theory of “split-sovereignty” which holds that:

Because of the socialist character of the Soviet multinational federation, the sovereignty of the Republics complements that of the Union, which would be incomplete but for the sovereignty of the Union Republics, vested with powers for the independent exercise of state authority in accordance with their national interests. Similarly, the sovereignty of the Union Republics would be deficient but for the sovereignty of the Union, which safeguards and ensures their sovereignty.129

This concept of sovereignty is formally supported by the constitutional provision that each Union Republic has the right to enter into direct relations with foreign states and to have its own Republican military formations.130 No such rights are provided for the individual Republics of Yugoslavia.

The Yugoslav lawyers do not accept the Soviet theory of sovereignty but adhere instead to the doctrine of one indivisible sovereignty vested exclusively in the Federation. Professor Šnuderl, discussing the problem of sovereignty in the Yugoslav Federation under the new Constitution, says:

Our Republics are sovereign in the sociological sense only but the individual state sovereignty of a Republic does not exist. The relations between our Republics are not international; the relationship between our Republics and the Federation is not that of an inter-state constitutional legal order but that of the mutual relationship between the political-social communities of a uniform political system.131

However, in spite of the fact that the Yugoslav constitutional experts reject the Soviet theory of sovereignty, the new Constitution defines the sovereignty of individual Republics in clear language. Basic Principles, I, states that the peoples of Yugoslavia exercise their sovereign rights in their Socialist Republics except the rights of common concern which are

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made, he contends, at the Second Congress of AVNOJ, in Jajce, in November of 1943. Geršković, Trajna osnova jugoslavenske federacije, Vjesnik, Nov. 29, 1961. Kardelj points out that the principle of national self-determination had been realized with the establishment of the Yugoslav Socialist Federation and that it cannot be revised or misused for reactionary and anti-socialist aims. Kardelj 120.

129 Kotok, Constitutional Law, in Fundamentals of Soviet Law 57 (Romashkin ed. 1961); see also Vyshinsky 277-80.

130 Soviet Constitution, art. 18-A, B.

entrusted to the Federation by this Constitution. This clear-cut provision of the Constitution seems to rebut the prevailing opinion among the Yugoslav lawyers that the sovereignty of Yugoslavia is vested exclusively in the Federation. It supports much more the Soviet theory of split-sovereignty which appears to be applicable also in the Yugoslav case.

The importance of the federal power in Yugoslavia is expressed by three constitutional provisions: (1) by the exclusive jurisdiction of the Federation over the most important political and socio-economic affairs of the state; (2) by the wide range of legislative power reserved to the Federation and by the supremacy of the federal laws; (3) by the organization and functioning of the federal organs of power.

The administration of the Federation covers the following affairs: national defense, foreign policy, internal security, foreign trade, customs and currency, and traffic with foreign countries. The matters within these departments are managed directly by federal departments and agencies and are regulated solely by federal laws. In this sector the individual Republics are permitted to pass legislation only if a prior permission of the Federation is granted in each individual case.

The range of federal legislation includes everything which is important for the political, socio-economic and cultural life of the country. This legislation is divided into three branches: the exclusive federal legislation, the basic federal legislation and the general federal legislation. The first pertains to the affairs under the jurisdiction of the Federation but in which the individual Republics are also permitted to legislate if a question is not regulated by a federal law. No previous permission from the Federation is required in such cases. The basic federal legislation also covers a wide range of laws enumerated in article 150 (2) of the Constitution. It differs from the exclusive federal legislation in that it enacts only general principles of a particular legal field, leaving the detailed regulation to individual Republics. The third branch of federal legislation is called general laws and is mentioned in article 161 (3) of the Constitution. However, it is not clear what is meant by this type of federal laws; neither is any explanation of this provision given in the official commentary. The legal spheres not enumerated in article

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132 Obrazloženje, Kardelj 151-52.
134 Art. 150.
161 (1), (2) and (3), if any, are left to the jurisdiction of the Republics which can enact their own laws which, however, must be in conformity with the Constitution and other federal legislation.138

The complexity of the Yugoslav legislative system is the result of the attempts to make socialist federalism work under democratic centralism. In other words, the Yugoslav rulers try to divide the legislative power in the State between the Federation and the individual Republics, but on the other hand, they are unwilling to abandon the socialist principle of democratic centralism. Some of the Yugoslav lawyers, commenting on the Constitution, express their misgivings about the practicability of the present legislative system, while others interpret variously the scope of the legislative jurisdiction left to the Republics.137 Be this as it may, the federal legislative powers are so broad that the Republican legislation in practice will have little or no influence on political, socio-economic and cultural life of the country.138

Federal laws are carried out either directly by the federal departments and agencies (article 127), or are executed through the local organs of administration for which individual Republics are responsible (article 126). Federal laws are valid throughout the country as soon as promulgated and supersede automatically any Republican law which may have regulated the same question previously (article 119).

The federal organs of power consist of the Departments (Ministries) of the Federal Government which are divided into two groups, Federal Secretaries of State and Federal Secretaries, and other independent federal agencies (article 233).139 The Federal Secretaries of State are for

138 The division of the Yugoslav federal legislation into four categories is more complex than the division of the federal legislation in the Soviet Union which is subdivided only into two categories and in which the Union Republics have a wider range of legislative activity. Arts. 149, 150. See also Kotok, supra note 129, at 55-64.

137 Tuturdjiev, supra note 135. The official commentary on the constitution interprets the Yugoslav legislative system as “a precise separation of jurisdiction between the Federation and individual Republics,” claiming that according to the new constitution the Republics are in a more advantageous legal position than heretofore. Obrazloženje, Kardelj 158-59.

138 The economic powers of the Federation are especially significant. The Federation is authorized to enact the uniform economic plan for the whole country, to create all types of investments and reserve funds, to limit the spending of individual Republics and of economic enterprises located in their territories, to control production costs and prices in the whole country, to determine public obligations, and to control the budgets of the Republics and other administrative units. Arts. 110-15. Geršković, Ekonomuske Funkcije Federacije, 3-4 Arhiv 469-73 (1962).

139 The division of the federal departments into two categories is legalized also by the
Foreign Affairs and National Defense (article 234). All other matters under federal jurisdiction such as internal affairs, agriculture or justice, are managed by Federal Secretaries and independent agencies, the number and jurisdiction of which is determined by federal law. The jurisdiction of the federal organs of power extends over the whole of the country and their orders must be obeyed by the administrative officials of individual Republics and local authorities (article 119).

The federative organization of Yugoslavia did not solve its most important political problem, the national question. On the contrary, the indications are that the national rivalry between the peoples of Yugoslavia, especially between the Croats and Serbs, has been intensified by all the defects of its federal structure and by the economic competition between the more prosperous and less advanced Republics. In reality, the pre-war, pan-Serbian nationalist and royal centralism has been replaced today by the socialist democratic centralism executed, as heretofore, from Belgrade, which is not only the capital of Yugoslavia but also the Serbian metropolis. This gives to the omnipotent federal power a predominantly Serbian character in the same manner in which the federal power in the Soviet Union executed from Moscow is Russian. In consequence, this new type of Serbian hegemony, carried out under the veil of "the brotherhood and unity," and achieved in a "voluntary socialist community of peoples equal in rights," is deeply resented by the Croats and other non-Serbian peoples of Yugoslavia.

From the legal point of view, the principal question is whether Yugoslavia is a federation after all. It is true that there are no rules which would determine in abstracto the indispensable requisites of a federal organization, and that each federal structure must be examined separately.


140 In addition to the federal departments (ministries), there are over sixty independent federal agencies, boards, councils, institutes and commissions controlling economic, social and cultural life of the country.


142 The Soviet Union and Yugoslavia differ in the distribution of their ethnic composition. While in the Soviet Union, the Russians (with Ukrainians) outnumber all other nationalities in the Soviet Union—of which there are almost one hundred—in a ratio of 2:1, in Yugoslavia the Serbs (with Montenegrins) do not constitute more than 44% of the total population. Maxwell, Information USSR 95-100 (1962); Pešelj, supra note 119 at 93-94. The ratio of the distribution of nationalities in Yugoslavia is taken from the latest census completed on April 1, 1962, Borba, Jan. 3, 1963.
and on its own merits. It is also true that, in final analysis, the federal power in any federation is higher than the power of individual units, especially in all matters which affect the vital interest of the community as a whole. Nevertheless, the question arises: can a state in which the total power is vested in a single, centrally organized political party, which is governed and administrated by the system of democratic centralism, and in which central economic planning is prevailing, be considered a federation in the legal sense, or is it so in its name only? All the facts indicate that the name and sham federative organization of the Yugoslav State are not sufficient to consider this country as a genuine federation. It is therefore more correct to denominate the Yugoslav federalism as a legal organization devised to give Yugoslavia a fiction of a federative state governed by democratic centralism and other general principles of socialist constitutional law.

(3) THE ORGANIZATION OF THE STATE POWER

The organization of the Yugoslav state power is novel among the socialist states and is expressed in the unusual composition of Yugoslavia's Federal Assembly and in the peculiar structure of its highest executive organs.

Yugoslavia, as a multinational state, has from its beginning adopted a bicameral system similar to that of the Soviet Union. In the Constitution of 1946, the National People's Assembly comprised two Houses, the Federal Council and the Council of Nationalities. The Federal Council was "elected" directly by the voters throughout the country and the Council of Nationalities was composed of the delegates "elected" by individual Republics and autonomous Provinces. This organization was basically changed by the Fundamental Law of 1953, which preserved the bicameral system, but put the emphasis on the economic rather than political-national structure of the country. The Council of Nationalities became a part of the Federal Council, and the second House was called the Council of Producers and was "elected" by those engaged in production, transport and commerce in proportion to the participation of the respective economic sectors in the total social product of Yugoslavia.

The establishment of the Council of Producers, equal in rights with the

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143 Kunz, Die Staatenverbindungen 595 (1929).
144 The Constitution of 1946, arts. 52-54.
145 This organization was copied from the pattern provided in the Soviet Constitution, arts. 33-35.
146 Fundamental Law of 1953, art. 25.
Federal Council, was also intended to secure the leading role of the working class in the State when this class was relatively small.\(^{147}\)

The new Constitution affirms the economic aspect of the state structure and stresses the working character of the Federal Assembly, which becomes not only the supreme political and legislative body of the land but also the highest working organization of the Federation.\(^{148}\) To achieve this purpose, the Federal Assembly is divided into five Chambers: the Federal Chamber, the Chamber of Economy, the Chamber of Education and Culture, the Chamber of Social Welfare and Health, and the Chamber for Political and Administrative Affairs.\(^{149}\) The legal position and rights of all the Chambers are not equal. The Federal Chamber is independent and predominant and, therefore, the Yugoslav lawyers insist that the new composition of the Federal Assembly is not multicameral but "a new bicameral political-social structure contained in a specific system of bicameralism."\(^{150}\) The Federal Assembly as a whole is described by Kardelj in the following words:

The Federal Assembly is an association of several assemblies, united and linked by a specific division of labor, reciprocal responsibility and adequate mechanism for a collective work and concurrence of decisions. Each of the assemblies has its specific functions and at the same time it is an organic part of the uniform social function of the Federal Assembly as a whole.\(^{151}\)

The Federal Chamber consists of 120 deputies "elected" by the voters throughout the country and 70 delegates "elected" by individual Republics and autonomous units. These 70 delegates, when meeting separately, form the Council of Nationalities.\(^{152}\) The latter convenes as a separate body when this is requested by the majority of the delegates of a Republic, by ten members of the Council, or by the President of the Federal Assembly (article 190 (2)). The Council of Nationalities meets also when an amendment of the Constitution is discussed or when a question of interest for the equality of the Yugoslav peoples is put on agenda (article 190).\(^{153}\)

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\(^{147}\) Kardelj 109.

\(^{148}\) Obrazloženje, Kardelj 161.

\(^{149}\) Art. 154. In this article the term "Chamber" is used as given by the official Yugoslav translation. The correct translation of the Serbo-Croatian term "vijeće" would be "Council," not "Chamber."

\(^{150}\) Obrazloženje, Kardelj 161.

\(^{151}\) Kardelj 110; Srnić, Veća Savezne Skupštine i Njihovi Medjusobni Odnosi, 3-4 Arhiv 355-63 (1962).

\(^{152}\) Individual Republics elect ten deputies each, and the autonomous provinces, Vojvodina and Kosmet, five each. Art. 155.

The Federal Chamber, in its essence, is the transformed Federal Council established by the Fundamental Law of 1953. It is considered primarily as a political body entrusted with independent powers to enact specific laws, to make political decisions and to coordinate the work of the other four Chambers (article 178). The latter participate individually with the Federal Chamber in the enactment of laws which fall within their respective spheres of activity, but they are not empowered to legislate independently (articles 183-87). However, they debate autonomously all the affairs affecting their interests and can submit recommendations for legislation and request reports of the Federal Executive Council and address questions to it (article 184). Each of the four Chambers consists of 120 members who are “elected” from the working people employed or active in the respective category of economic or social and cultural activity (article 168). The specific task of the four Chambers is “to work primarily as the organs of social self-government, that is, as the factors of voluntary understanding and coordination and free agreement of various elements of our socialist community.”

A law is enacted by the Federal Assembly when the bill is approved in identical text by the Federal Chamber and by the Chamber in which it originated (article 188). If differences arise, they are settled by a joint Commission formed from an equal number of deputies of the Federal Chamber and the Chamber in question (article 188).

The structure and operating mechanism of the Yugoslav Federal Assembly is extremely complex, and as much as the Yugoslav jurists deny it, it does contain the elements of a corporate system similar to that of Italy during the Fascist era. Only the future will tell how this intricate and bizarre legislative system will work in practice and whether it will meet the expectations of the Yugoslav rulers who claim that the Federal Assembly is a truly representative and working organ of self-government of the working people of socialist Yugoslavia.

The deputies of the Federal Chamber are not “elected” directly by the voters. They are first chosen as candidates by assemblies of the individual communes (municipalities) and then presented to the voters for approval. A candidate is considered elected if he received more than

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154 Obrazloženje, Kardelj 163.
156 Kardelj 125.
one-half of the votes of all the registered voters in the commune. If more than one candidate for the same position is presented, the candidate who receives the majority of the cast ballots is considered elected (article 169). Although the Constitution permits the presentation for popular approval of more than one candidate for the same position or office, their selection by the voters should not be construed as a genuine democratic political election, as practiced in free countries. In the first place, only those who have been screened for political reliability by the municipal assembly (which is under the control of the local Party organs) are ever appointed as candidates. Second, in the preliminary selection of the candidates the role of the Party is decisive. In this respect Kardelj very clearly says:

Though, according to the Constitution, the Communist Party (League) formally does not appoint the candidates—which is normal since as an organization it is not an integral part of the power mechanism—it must be clear to everybody that the Party shall not be idle when the candidates are selected for responsible positions in social organizations and in the organization of social self-government. The candidates appointed by the Party are, on the one hand, the guarantee of democratic elections, and, on the other, the guarantee that only qualified individuals will be elected.158

The Federal Assembly elects a President who has all the rights usually accorded to the president of a parliament (articles 194-96).

The head of the Yugoslav State is the President of the Republic. All of the socialist states are republics, but the office of the President of the Republic is not created by the constitution in all of them. In the majority of socialist states, the Presidium of the Parliament, as a collective body, respectively its Chairman, is the titular head of the state.159 The position of the President of the Republic exists only in Czechoslovakia, North Vietnam and Yugoslavia.160

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158 Kardelj 112; Čemelić, Prednacrta Ustava i Novi Izborni Sistem, Ahriv 363-68.

159 The head of the state in socialist states, in his actual political power, is not above the Party, which is the directing force in the state. Only in Czechoslovakia, North Vietnam and Yugoslavia, at the present moment, is the office of head of state and the office of Secretary General of the Communist Party held by the same person; Gottwald in Czechoslovakia, Ho-Chin-Minh in North Vietnam and Tito in Yugoslavia. In all other socialist states these two offices are held by different persons.

160 See the constitutions of Czechoslovakia (arts. 61-65) and North Vietnam (arts. 61-70). In East Germany the office of the President of the Republic was replaced recently by a collective body called "Der Staatsrat der Republik," by the Law of Sept. 12, 1960, Gesetzesblatt No. 53-1960. In Red China, the head of state is the Chairman of the People's Republic of China. He is at the same time the Chairman of the Standing Committee of
In the first period of the Yugoslav communist regime, from 1946 to 1953, the titular Head of the Yugoslav State was the President of the Presidium of the Federal People's Assembly. This was changed by the Fundamental Law of 1953 which created the position of the President of the Republic and combined it with the office of Chairman of the Federal Executive Council. The President of the Republic was given all the rights and privileges exercised heretofore by the Presidium as a collective. The new Constitution retains the office of the President of the Republic but separates it from the position of the Chairman of the Federal Executive Council (articles 215-24).

The President of the Republic is elected for a period of four years by the Federal Assembly at a joint session of all five Chambers; he cannot be removed unless impeached for violation of the Constitution. He is the supreme commander of the armed forces and the President of the Council of the Federation. This Council is an innovation in the Yugoslav constitutional structure and does not exist in any other socialist state. It is a body formed outside the Federal Assembly and consists of members appointed by the Federal Chamber upon the proposal of the President of the Republic. The members can be either high-ranking Federal or Republican officials or other representatives of social-political organizations or of public life (article 224). The purpose of the Council of the Federation is to provide an informal and direct means of consultation between the state, political and other responsible organs in the execution of policy. The Council has no legislative or executive power. Why this body was created, in addition to the five previously mentioned Chambers of the Federal Assembly, is not clear. It can be only speculated that its purpose is to create for some Party members and other favorites of the regime, a position which will give them the title of Federal Counsellors but no real political influence.

the All-China People's Congress, which in its duties and functions corresponds to the Presidium of the Supreme Soviet.

161 Constitution of 1946, arts. 73-74.
162 Fundamental Law of 1953 arts. 71-78. This change was made for two principal reasons: First, to differentiate Yugoslavia from the Soviet system. Second, to give to Tito the position of head of state and thus increase his authority and prestige in international relations.
163 Obrazloženje, Kardelj 167.
164 Kardelj 126.
165 The newly created position of Federal Counsellor appears to be similar to the position of "Hofrats" (royal counsellors) and "Geheimrats" (secret counsellors) which existed in the Austro-Hungarian Monarchy, and were titles freely granted by the Emperor, though of little political significance.
The Constitution entrusts the President of the Republic with the right to give the mandate for the formation of the Federal Executive Council to one of the members of the Federal Chamber. He also has the right to ask his removal from the Federal Assembly at any time (article 216). The President of the Republic can also veto the decrees and regulations issued by the Federal Executive Council (article 218), but has no right of veto over the laws passed by the Federal Assembly. This restriction is in conformity with socialist constitutional law which holds that the Federal Assembly (or in other socialist states the highest legislative body) is the supreme organ of the sovereign people's power which cannot be limited by any other power in the state.

The President of the Republic has the right to declare a state of war only in case of an armed attack on Yugoslavia or of an imminent danger thereof, and then only if the Federal Assembly is prevented from meeting. He can also, together with the Federal Executive Council, enact emergency legislation during the state of war, but must submit the laws thus proclaimed for the approval of the Federal Assembly as soon as it can meet (article 217). If the President of the Republic is absent or incapacitated, his duties are assumed by the Vice President who is elected by the Federal Assembly for the same term as the President but cannot be reelected.

The Federal Executive Council is the permanent executive organ of the Federal Assembly entrusted with political executive functions pertaining to the Federation (article 225). It consists of a President and a number of members established by law. The Constitution provides that the composition of the Federal Council must be in conformity with the multinational structure of Yugoslavia. The Presidents of the Executive Councils of individual Republics, Federal State Secretaries and Federal Secretaries are members of the Federal Executive Council by virtue of their offices (article 226). The President of the Federal Executive Council is responsible for the conduct of the Council's affairs.

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166 Kardelj 126; Obrazloženje, Kardelj 167. According to the new Constitution—if a comparison can be made—the position of the President of the Republic is formally closer to that of the President of France. According to the Fundamental Law of 1953 it was similar to that of the President of the United States, since the President was both the head of state and the Chairman of the supreme administrative body—the Federal Executive Council.

167 Obrazloženje, Kardelj 167; Kuščev, Politički Izvršni Organi Federacije, 3-4 Arhiv 373-79 (1962).

168 Obrazloženje, Kardelj 169.
and is, after the President of the Republic, the most important and powerful political figure in the Yugoslav communist regime.169

In the Yugoslav constitutional structure the Federal Executive Council corresponds roughly to the Presidium of the Supreme Soviet in the Soviet Union or similar collective bodies created by all other socialist constitutions. However, the Yugoslav peculiarity is that the Federal Executive Council combines the two functions usually separated in other socialist constitutions: the executive power of the Federal Assembly and the administrative duties of a federal cabinet. A Council of Ministers, which functions as a separate body in the Soviet Union, in Yugoslavia does not exist.170

(4) WORKERS’ SELF-MANAGEMENT AND SOCIAL PROPERTY

Workers’ self-management of economic and other socialist enterprises is considered as one of the most important achievements of the Yugoslav socialist order and has been widely discussed in the world literature.171 However, its significance was appraised mostly from the economic and social point of view, without paying adequate attention to its legal foundations. The new Yugoslav Constitution clarifies the legal basis and framework of the workers’ self-management, making it clear that this system has been created to operate only within the established organization of socialist law and that it cannot be regarded as an independent socio-economic institution. Discussing the legal basis and limitations of the workers’ self-management, Kardelj says:

Factories and enterprises, of course, are not the property of the workers’ collectives. These collectives only manage them on the behalf of the community. . . . Consequently, nobody is free to dispose of the social means of production and labor outside the frame and against the principles established by the socialist community. . . . In this respect, the Constitution defines the rights of the community assuring adequate execution of control which is aimed to compel everybody to abide by his obligations and to apply sanctions against the violators.172

While it is true that the Yugoslav Constitution is the first document that codifies in detail the rights and duties of the workers in the management of economic enterprises and other socialist organizations, the par-

169 Id. at 170. It is expected that either Kardelj or the other Vice President, Ranković, shall occupy this position.
171 Hoffman & Neal, supra note 141, at 239-64; Neal, Titoism in Action 118-59 (1958); Tochitch, Workers Management in Practice, Review 48-65 (1960); Schweissguth, supra note 119, at 157-61; McVicker, Titoism 64-77 (1957).
172 Kardelj 100.
ticipation of the workers in the conduct of economic concerns has not been entirely unknown in other socialist and nonsocialist countries. The Yugoslav lawyers admit that workers' self-management is neither a Yugoslav invention nor is it a system created for export to other states. "There are no perfect models and exclusive principles in socialism," says Djordjević, and he adds, "even the most successful forms of socialism in one country could prove to be inefficient or unjustified in different conditions." The Yugoslav theorists nevertheless insist that the workers' self-management, as organized in Yugoslavia, is of the highest type and is the genuine product of Marxism-Leninism, which is "not a dogma but instruction to work." In order to follow these instructions correctly and to justify their experiment, they go so far as to declare that the Soviets, established in Russia in 1917, were but "a form of self-government of the workers and working peasants of economic affairs, and at the same time, the bearers of the state power."

The new Yugoslav Constitution defines the workers' self-management in a twofold capacity: as a fundamental institution of the political and socio-economic order, and, as one of the basic rights of the citizens. As an institution, the workers' self-management is formulated in Basic Principles, II:

The socialist system of Yugoslavia is based on the relations between the people as free and equal producers and creators whose labor serves exclusively the satisfaction of their personal and common needs.

Accordingly, the inviolable foundation of the position and role of man comprise: Self-government exercised by the working people within the working organizations and in the socialist commune . . .

Similar provision is found in article 6 of the Constitution:

The foundation of the social-economic organization of Yugoslavia comprises free

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173 Id. at 98; Djordjević, supra note 131, at 219-20; Grzybowski, Workers Self-Government—New Style, 9 Highlights of Current Activities and Legislation in Mid-Europe 351-59 (Mid-European Law Project at Library of Congress 1959).

174 Djordjević, supra note 131, at 211.


176 Kardelj 84. This statement contradicts the Lenin theory on the character of the soviets, which he regarded as the basic units of the political power of the proletarian dictatorship, but never as socio-economic units of self-management. Vyshinsky 3-5.

177 The position of an individual as the central focus of the new Constitution was announced in 1960 by Tito when he said: "The cornerstone of the Constitution must be the man as a producer and administrator while the state should appear only as a factor of coordination." Vjesnik, Nov. 29, 1960. See also Kardelj 103.
associated labor with the means of production and other socially owned means of labor, and self-government of the working people in production and distribution of the social product in the working organization and socialist community.178

As a basic right of the citizens, the self-management is defined in article 34 of the Constitution which provides: “The right of the citizens to participate in social self-government is inalienable.”

The workers’ self-management in Yugoslavia is not limited to economic enterprises, but includes also other institutions which are not economic in character, such as hospitals, scientific institutes and educational associations. Therefore, the Constitution uses the term “working organization” in order to define any collective body which is managed by its workers. In practice, the working organizations are divided into two large groups: commercial concerns of all types, and nonprofit organizations. The legal position of each group in its relationship to the workers’ self-management is not identical. If a working organization is concerned with a public function, such as a hospital or an educational institution, the representatives of the community and of particular groups of citizens and organizations participate in its management together with the workers’ collective.179

The rights and the duties of the workers’ collectives are defined in the Constitution at great length. It is apparent that the Yugoslav rulers have tried to give, in theory, to the workers as much freedom as possible, in the management of socialist enterprises and yet are unwilling to relax the control of the state, in practice. For this reason, while, on the one hand, the Constitution in article 9 enumerates all the rights which belong to the working people in self-management, on the other hand, in subsequent provisions it limits the use of these rights, subjecting them to a rigid supervision of the government. Here are a few examples.

The workers have the right to elect freely the delegates to the workers’ councils and to the executive committees and to choose the manager of an enterprise (article 9 (1) ), but they must act within the statute of the enterprise which is approved by the political authority (article 91). The whole collective of the workers with all its committees can be dissolved

178 The term “free associated labor” is closely connected with the institution of the workers’ self-management. While the nationalized property creates the basis for the elimination of the system of hired labor, only in connection with the institution of self-government of the workers, the Yugoslavs insist, is the exploitation of man by man fully abolished. Kardelj 137; Vučković, Samoupravljanje Radnih Ljudi, U Privrednim i drugim Drustvenim Djelatnostima, Arhiv 282–87.

179 Art. 9. Obrazloženje, Kardelj 142.
by the political authority if the law is severely violated or socialist interests essentially damaged (article 18).\footnote{180}

The workers have the right to organize production and other activities of a working organization independently, and to determine plans and programs of activity and development of their enterprise, and to employ freely the economic resources at their disposal (article 9 (2) and (3)). However, they cannot dispose of, diminish or convert the basic assets of the concern and must abide by the central economic plan and other plans ordered by the Government (articles 15, 27).\footnote{181}

The workers have the right to distribute the income belonging to the working organization and to distribute the income belonging to the workers (article 9 (4)), but the Government shall determine the general principles of distribution proportionate to the productivity of labor of working organization and working people in accordance with the general conditions and requirements of the community (article 11). In addition, the Federation, individual Republic and the commune shall determine the portion of the social product created in their particular territories that shall be used for economic development and other purposes, and for satisfaction of general social requirements (article 27).\footnote{182}

The workers have the right to unite themselves in order to establish a working organization in a particular field of economic or other activity (article 13),\footnote{183} but the Government has the right to liquidate any working organization, at any time, if the organization is unable to utilize successfully the socially owned means of production and other means of labor put at its disposal, or if it fails to meet other obligations determined by law. Under the same conditions, the Government can put a working organization under receivership or compulsory administration (article 18).\footnote{184}

\footnote{180} It should be borne in mind that “the elections” for the workers’ councils and executive committees are also under the strict control of the local party branch.

\footnote{181} Kardelj 85; Obrazloženje, Kardelj at 137.

\footnote{182} Obrazloženje, Kardelj 141; Dragićević, Kriteriji i mjerila raspodjele in Vjesnik u Sirjedu, Nov. 14, 1962.

\footnote{183} The right of forming a working organization belongs also to any of the administrative units, the Federation, Republic, Autonomous Province, District and Commune, and to the social organizations.

\footnote{184} Obrazloženje, Kardelj 143. It is important to note that the control over the utilization of socially owned means of production and over the execution of the obligations of workers’ collectives is uniform in the whole of Yugoslavia and is exercised by a special federal agency called the Service of Social Accountancy. Art. 31.
Clearly, the workers' self-management of economic enterprises cannot be considered as a type of free economy, but rather must be considered a socialist economic organization *sui generis*. The control of the Government over the economy is strictly preserved in all aspects of the workers' self-management and its functioning is achieved under the unity of economic system and in accordance with the central economic plan.\(^{185}\)

Workers' self-management is undoubtedly an interesting experiment, not only from economic and social, but also from a legal point of view. It is devised to replace the private proprietor or the State in the management of economic enterprises. Whether this setup could successfully operate in an economic system in which not all of the means of production are nationalized and in which it would be obliged to compete with an efficient management attained under private ownership and individual initiative, is open for discussion. It is clear, however, that only in a free society, where no political pressures are exercised on either the election or the functioning of the workers collectives, could this institution demonstrate its viability, and, perhaps, be of certain advantage in given conditions.\(^{186}\)

Every working organization utilizes social property, the concept of which is unique in the Yugoslav constitutional law. Social ownership embraces all those means of production which were nationalized by the Yugoslav regime in the period from 1944 to 1959 and which were subsequently given to the working organizations for exploitation and self-management.\(^{187}\) As soon as the nationalized means of production were handed to the workers' collectives, discussion began among the Yugoslav lawyers concerning the legal nature of the property utilized and managed by the workers, who held the legal title thereof. One group of jurists contended that social ownership was only one of the forms of government property; the other group, which eventually prevailed, was of the opinion that social ownership is an entirely new type of property which is social and not

\(^{185}\) Kardelj 96-99; Hristov, Odnosi Društvene Zajednice Prema Radnim Organizacijama, 3-4 Arhiv 299-301 (1962).


\(^{187}\) The nationalization of the means of production was carried out in Yugoslavia under various forms: confiscation, nationalization and expropriation. The most important laws in this sphere were: The Law of November 21, 1944, SL 2-1945; The Law of December 5, 1946, SL 98-1946; and the Law of April 28, 1948, SL 35-1948. The nationalization was completed, so far, by the law nationalizing the apartment buildings and lots in urban communities. Law of December 26, 1958, SL 52-1958. The property given to the workers' collectives for management and utilization is called social ownership (društvena (svojina).
legal in character.\textsuperscript{188} The essence of the Yugoslav theory of the nonlegal character of social ownership is expressed in the following statement:

Social ownership of the means of production, by its essence, excludes the concept of the holder of its legal title because the property rights do not exist. The fact that the society is the subject of "property" means that neither the individuals nor the collective is the holder of its legal title. Property does not belong to anybody because it belongs to everybody.\textsuperscript{189}

Kardelj, in presenting the new Constitution, elaborates further upon this revolutionary Yugoslav theory:

Social ownership is, in principle, regarded as the negation of any type of property and not as a monopoly of the property rights in the hands of the State, or as an absolute right to disposal by the government apparatus.\textsuperscript{190}

The new Constitution attempts to articulate this approach to the problems of property rights in article 15 by providing: "Every working organization is a legal entity and is the bearer of legal powers in relation to social means of production under its administration."\textsuperscript{191}

It is evident that the Constitution is not fully consistent with the above exposed theory negating legal ownership of social property, but even greater confusion over this issue is created by the official commentary to the Constitution. The latter points out that the bearer of the rights and obligations, deriving from the legal authorization to administrate social ownership, is the working organization, which is a legal entity and the actions of which produce legal effects towards third persons.\textsuperscript{192} Yet, in view of the official Yugoslav doctrine, one may ask, can any rights and obligations towards third persons be created if the legal title of the property does not exist?

Undoubtedly, the theory of the nonlegal social ownership is an additional result of the Yugoslav obsession to create new ideas within the teaching of scientific socialism. However, this theory is not only a novelty

\textsuperscript{188} Pravni režim sredstava za proizvodnju u društvenoj svojini, 2-4 Arhiv 272-300 (1958), Djordjević, Ustavno Pravo i Politiki Sistem Jugoslavije 198-201 (1961).

\textsuperscript{189} Djordjević, id. at 198. Finžgar, Društvena Svojina u Prednacrto Ustava, 3-4 Arhiv 260-67 (1962).

\textsuperscript{190} Kardelj 72; Obrazloženje, Kardelj 138; Dragičević, Društveno vlasništvo kategorija društvenog samoupravljanja, Vjesnik u Srijedu, Oct. 24, 1962.

\textsuperscript{191} Art. 14. (Emphasis added.)

\textsuperscript{192} (Emphasis added.) Obrazloženje, Kardelj 139. Geršković admits that the Constitution was unable to provide a proper definition for the character of social ownership. Geršković, Slobodan udrug u samoupravljanje, Vjesnik, Oct. 7, 1962; Gams, Svojinska Prava u Okviru Društvene Svojine, 3-4 Arhiv 267-77 (1962).
in socialist legal concepts, but is entirely strange to and in conflict with any legal theory concerning property and its legal character.

Regardless of the fact that the Yugoslavs were unable to find a definition for their theory in the Constitution, all indications are that their views are also scientifically unfounded and should be repudiated.

In the first place, the Yugoslavs cannot avoid the term "ownership" for property relations, which term, whether they like it or not, has the same meaning in every legal system. Both socialist and nonsocialist law define the ownership as "the exclusive and unrestricted right to a thing." It follows, that somebody must be the bearer of this exclusive and unrestricted right because there is no right without its subject. In consequence, the difference between socialist and nonsocialist law with regard to the legal concept of property does not lie in the negation of an unrestricted and exclusive right to a thing, as the Yugoslavs try to construe it, but only in the question of who should be the holder of this right.

Second, the Yugoslav theory appears to contradict its own constitutional principle which holds that the working people are sovereign and the sole bearer of all the power in the state which, in turn, is the expression of this power. If the working people are the bearers of the total power in the state, then the product of this power, the state, must, in final analysis, be the holder of the legal title of socialist property located on its territory or put under its control. If this is denied—as Kardelj denies it—then the working people and their state are not fully sovereign, since one of the basic attributes of sovereignty, the right to hold property, is missing.

Soviet socialist law recognizes the legal character of socialist property and stresses that its title can be either in the State or in various socialist organizations. In particular, the Soviet socialist law has developed the concept of perpetual use of socialist property which is applied in land law in connection with the cultivation of land by collective farms. It seems that this particularity of socialist law has been used also in the Yugoslav economic order with respect to social property under workers’

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193 Black, Law Dictionary 1382 (1951); 2 Iuridicheskii Slovar 110 (1956).
194 2 Iuridicheskii Slovar 110 (1956).
195 Yugoslav theory is also in contradiction with art. 20, which, in final analysis, grants the full property rights over the social ownership to the "people's government."
self-management. We may say, therefore, that socialist ownership in Yugoslavia is legal in character, and in its essence it is state property given to the workers' collectives in perpetuity for utilization and management under specific conditions developed by the Yugoslav constitutional law.

(5) ROTATION IN OFFICE

The rotation in office is a novelty in socialist constitutional law and is also practically unknown in the constitutional systems of nonsocialist states.198 In the latter the changes of political leadership occur through free democratic elections and not by force of law. The Yugoslavs claim that the principle of rotation is fully in line with Marxism-Leninism, which, they say, teaches that the socialist state and society must be organized in a manner that will permit the greatest possible number of citizens to participate directly in the affairs of the state.199

In Yugoslavia, the rotation in office is achieved by the constitutional provision which decrees that one can be elected as a member of the same Chamber of the Federal Assembly for only a period of four years (article 82). The same limitation applies to the positions of Federal State Secretaries, Federal Secretaries and some other high federal offices determined by law. Only in exceptional cases and on "special grounds" is a highly qualified individual allowed a period of four additional years in office (article 236).

The rotation is applicable also to the office of the President of the Republic who can be elected consecutively for only two terms, that is for a total of eight years. However, the Constitution provides that this restriction shall not be applied "to the first President of the Republic, Josip Broz Tito."200

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198 An exception to this rule is the twenty-second amendment to the American Constitution, which provides that no person shall be elected to the office of President more than twice.

199 Kardelj 115.

200 It is of interest that the new Constitution proclaimed Tito as the first President of the Republic even before he was duly elected by the Federal Assembly, pursuant to art. 164. Kardelj reports that Tito was adamant in requesting that the Constitutional Commission should not except him from the principle of rotation. But the Commission, Kardelj says, rejected this demand because it was of the opinion that Tito's exclusion from rotation expressed only the recognition for his historical merits in the creation of the Yugoslav socialist community.

Therefore, concludes Kardelj, "this provision is not an exception to the rule of rotation but
The rotation in office is considered by the Yugoslav leaders to be one of the most advanced reforms of the contemporary socialist order. Its purpose is, they stress, to secure a systematic interchange of the ruling cadres of all legislative and important executive positions in the country. Tito pointed out the significance of rotation at one of the meetings of the Constitutional Commission when he said:

This rule is indispensable because it promotes the further development of political and economic structure of Yugoslavia and enables also a systematic transfer of our duties to those who shall be qualified to replace us.201

However, the present Yugoslav leaders make it clear that the rotation by no means intends to replace the present ruling group within the foreseeable future. This group, Kardelj says, had won the socialist revolution and has carried on its shoulders all the burden of creating the foundations of a socialist society. Therefore, the "tremendous experience of our leading cadres represents a great political force and a great wealth of our community which must be preserved and transferred gradually to younger generations."202

The principle of rotation is not carried out consistently, nor is it absolute. There are two conditions which moderate its rigidity considerably. First, though an individual cannot be elected consecutively for two terms in the same Chamber of the Federal Assembly, he can be reelected after the expiration of his first term, as a member of some other Chamber. Second, only his consecutive reelection to the same Chamber is forbidden, which means that after four years' service in some other Chamber, he can again be reelected as a deputy of the Chamber in which he served previously or to an office which he held before.203

The rotation applies only to political positions and not to the economic offices of workers' self-management. A manager of an economic enterprise or a director of a social organization, though elected for a fixed period, can be reelected to the same position without limitation (article 93).204 Also, rotation is exercised in the government apparatus and not in political organizations, the Communist Party (League) and the Socialist Alliance. The leadership of the Party, as heretofore, makes its own

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201 Kardelj 113.
202 Kardelj 117.
204 Obrazloženje, Kardelj 142.
decisions, concerning who will be elected to the most important positions in the political hierarchy and for how long. In view of the fact that the Party is the real power behind the Government, it seems immaterial which of the Party members is rotated to which position in the Government as long as he follows the Party line and abides by its discipline.

The real reason behind the adoption of the rotation principle is not clear and the arguments offered by the Yugoslav experts are not convincing. They give as the main reason the exchange of experience between the Federal and Republican organs and high officials who, if not rotated, are inclined to look differently at the problems of the Federation and of the Republics without a genuine desire to smoothen the conflicting interests. It is more likely that the invention of the principle of rotation is another result of the Yugoslav efforts to pioneer in the evolution of socialist constitutionalism, especially in Yugoslavia in view of its multinational composition. They recognize, however, that the rotation cannot be achieved outside of and without the directives of the working class and its vanguard, the Party. If this is so, it was hardly necessary to make the rotation a constitutional principle since it could have been accomplished in a much simpler way by political practice. However, by adopting the principle of rotation, it is also possible that the present Yugoslav leaders hope to channel the ambitions of individual Party members in the future and to control their aspirations for powerful positions in government.

Only the future will tell how the rotation in office, as ordered by the Constitution, will work in practice. So long as the old team of the Yugoslav Communist Party is in control of the country, and especially so long as Tito is alive and active, it will be more or less determined in advance which position in the Government shall be occupied by which member of the Party and for how long. But, once this changes, it is very doubtful that one who is able to concentrate in his hands all the power of the President of the Republic's Office or the power of the President of the Federal Executive Council, during a period of eight years, will be willing to relinquish his position and power and to step aside merely for the sake of the principle of socialist rotation.

(6) THE CONSTITUTIONAL COURT

The institution of a constitutional court is alien to socialist law but

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205 Kardelj 114-15.
206 Kardelj 117.
207 Ibid.
is not unknown in some of the nonsocialist states.\(^{208}\) The new Constitution establishes the Constitutional Court of Yugoslavia and grants to it the following jurisdiction: to decide the constitutionality of federal laws and the conflicts between the federal and Republican laws; to settle the disputes between the Federation and individual Republics and between the Republics and their political subdivisions; to adjudicate the conflicts of jurisdiction between the courts and administrative authorities; and, to discharge any other affairs which may be placed before it in accordance with the Constitution and other federal laws (article 241).\(^{209}\)

Inasmuch as the above jurisdiction is wide in scope and is similar to the jurisdiction of the constitutional courts in nonsocialist countries, it is important to repeat that the functioning of the Yugoslav Constitutional Court is not that of a court standing above the supreme organ of the people's power, the Federal Assembly, or separate from the socialist order of the country. Such a concept would be in contradiction to the basic principle of socialist law that the working people are the sole bearer of the state power. Therefore, the position and the role of the Constitutional Court of Yugoslavia is that of a benevolent supervisor and coordinator rather than of an independent controller.

If the Constitutional Court finds that a federal law is not in conformity with the Constitution, such law does not become null and void automatically. The Federal Assembly is authorized to enact the necessary adjustments within a period of six months which will make the law constitutional. Only if the Federal Assembly fails to act do those provisions of the law which are not in conformity with the Constitution, but not necessarily the law in its entirety, become void (article 245).\(^{210}\)

Explaining the function and specific character of the Yugoslav Constitutional Court, Kardelj says:

\(^{208}\) See the Constitutions of France (arts. 58-59), West Germany (arts. 92-94), Austria (arts. 137-48), and Italy (arts. 134-37).

\(^{209}\) In view of the federal structure of Yugoslavia, each of the Republics shall also have a constitutional court, the jurisdiction of which shall be similar in kind but lower in level than the jurisdiction of the Federal Constitutional Court. The Draft of the Constitution of the Socialist Republic of Croatia provides for a Constitutional court in art. 259.

\(^{210}\) An action can be instituted before the Constitutional Court either by any of the Federal Chambers, by the Federal Executive Council, by the Republican Assemblies or Republican Executive Councils, and by the Secretaries of the Federal Departments. Also such action may be instituted in certain instances by the Supreme Court of Yugoslavia and by the Supreme Courts of individual Republics, and by the assemblies of the working organization and the Federal Public Prosecutor. Art. 249. Individuals are not qualified to start an action before the Court. See Krbek, Ustavni Sudovi, 3-4 Arhiv 422-28 (1962).
The Court is more an integral part of our system of political representation than a judicial institution in traditional sense. It shall be composed of highly qualified experts and other public figures appointed by the Federal Assembly. This is understandable, because in our conditions, the Constitutional Court cannot be a strictly judicial organ that would make its decisions on the basis of a formal legal approach to the problems emerging from our constitutional order. The Court shall appraise these problems by their political and social content and in connection with the phenomena that caused their appearance.211

In this connection, another Yugoslav constitutional expert points out that the functioning and efficiency of the Constitutional Court will depend not only on formal laws regulating its jurisdiction, structure and procedure, but above all, on the effective relationship between the political factors and the Court.212

The above communist dialectics, when translated into simple language, confirm the opinion that the establishment of the Constitutional Court of Yugoslavia should not be interpreted as a deviation from the principle of socialist legality which, in essence, means that the dictatorship of the proletariat is above the law but is at the same time bound to respect the laws created by it until these have been changed at its discretion. It is clear that the Constitutional Court in Yugoslavia, though a particular feature of socialist constitutionalism, will operate within the present socialist order to strengthen its legality along the lines determined by the Party in a particular epoch of socialist construction. Needless to say, the members of the Court shall be only those individuals who adhere unconditionally to the Marxist ideology and who are devoted to the socialist community.213 It can be concluded, therefore, that the Constitutional Court in Yugoslavia, though an originality, will be but an additional instrument in the hands of the Party by which socialist legality shall be controlled and, when necessary, directed and formulated.

CONCLUSION

The duration of a constitution reflects the political stability of a state and the soundness of its socio-economic order. The Constitution of the United States has remained basically unchanged for a period of over 170 years. It is also true that some other nonsocialist constitutions have demonstrated their vitality and timelessness in the constantly changing conditions of our world.214

211 Kardelj 118; Obrazloženje, Kardelj 172-73.
213 Ranković, Zakon o sudovima sa objašnjenjima 19 (1956).
214 E.g., the present Constitution of Sweden was enacted on June 6, 1809; of Norway,
Although socialist order is relatively recent, its leaders have not hesitated to change frequently its constitutional structure by adapting it to the needs of a particular era of socialist construction and international development. The Soviet Union changed its constitution three times in less than twenty years and the indications are that the fourth constitution is in preparation for a "new historic period . . . of all-out building of communism."215 A great number of other socialist countries have enacted at least two constitutions. Only in Mongolia, Bulgaria, Eastern Germany and Red China have the original constitutions been changed only by amendment.216 It should not be forgotten that the legal procedure for the adoption of a new constitution in a socialist state is relatively simple in view of the fact that the total power is vested in a single political party. Hence, a new constitution is always enacted when the Party decides that it is needed for the furtherance of the country's socialist aims.

Yugoslavia, so far, has replaced its constitution more often than any other socialist state in the same period of time. In less than seventeen years the rulers of Yugoslavia have found it necessary to adopt three different types of constitutions, each of which changed basically the country's political and economic structure, preserving, however, its socialist character and socialist constitutional foundations. "It is normal and progressive," says Kardelj, "that a socialist society, which is developing very rapidly, changes also very quickly its political and socio-economic forms."

At the same time, the Yugoslav leaders claim that the frequent and total changes of their supreme laws have but illustrated the desire to assure a direct influence of the working man on the government by offering him a better prospective for social progress and personal advancement. This, however, cannot be attained, they say, without the use of adequate means of revolutionary violence which, therefore, is also incorporated in the new Constitution.218

216 A new constitution for Bulgaria had already been announced. The Decree on the Nomination of the Constitutional Commission of March 16, 1959, Izvestia March 22, 1959.
217 Kardelj 70.
218 Kardelj 70-71.
When the Soviet Constitution was enacted in 1936, it was called "the Stalin Constitution," in honor of the Soviet leader who was its initiator and who participated actively in its drafting. At that time he was called "the immortal leader and the great father of the Soviet peoples." The Constitution was hailed, at the same time, as "a historical document and perennial achievement of the Soviet constitutional law." In the last few years Stalin's name has been omitted when the Constitution is mentioned or discussed, and a new Constitution, better fitted for the present era, is quietly being prepared.

The new Yugoslav Constitution is greeted in the same way and is called the legalized and vivid realization of the Yugoslav socialist society, and at the same time, the convincing confirmation of the correctness of the path of socialist construction chosen by the Communist Party of Yugoslavia under the leadership of comrade Tito.

It remains to be seen whether the next generation of Yugoslav communists will believe that the present Constitution expresses the correct path for Yugoslavia's socialist development, in view of the fact that Marxian dialectic does not recognize absolute truth or lasting values but only imminent interests and expedient solutions. It will be of interest, therefore, to observe the practical implementation of the complex provisions of the new Constitution in the years to come. Undoubtedly, a considerable lapse of time will be required before any appraisal can be made as to whether the objectives set forth by the present communist leadership of Yugoslavia have been attained by the operation of constitutional mechanism. In the meantime, however, the unsolved national, economic and ideological problems of today's Yugoslavia may exercise a decisive influence, not only on the future course and policy of its communist regime, but in given conditions, on its very existence as well.

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219 Vyshinsky 113-28.
220 Kardelj 129.
THE PRIMACY OF COMPETITION AND THE
BROWN SHOE DECISION

IRSTON R. BARNES*

In his analysis of the Supreme Court's decision in Brown Shoe Co. v. United States, the author discusses the proper use of economic evidence in anti-merger proceedings under the amended section 7 of the Clayton Act. Professor Barnes notes that the Supreme Court's use of economic evidence in Brown Shoe reflected both the practicalities of the problem with which it was faced and the economic realities of the situation before it. He concludes, however, that by suggesting that there are certain ancillary tests by which the legality of a merger might be judged, the Supreme Court may have created difficulties which will arise to plague it in future litigation of this type.

Brown Shoe Co. v. United States† provided the Supreme Court with its

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† 370 U.S. 294 (1962). Mr. Chief Justice Warren delivered the Court's opinion for a majority composed of Justices Black, Douglas, Brennan and Stewart. Mr. Justice Clark concurred in a separate opinion. Mr. Justice Harlan concurred in part and dissented in part—dissenting on the ground that the Supreme Court did not have jurisdiction under § 2 of the Expediting Act of 1903 because the district court had retained jurisdiction for the purpose of formulating a divestiture order, and hence its judgment was not final.

A few other cases based in part on amended § 7 had previously reached the Supreme Court. Maryland, Va. Milk Producers Ass'n v. United States, 362 U.S. 458 (1960), had turned very largely on the question whether an agricultural cooperative was exempt from § 7 of the Clayton Act by reason of § 6 of the Clayton Act and § 2 of the Capper-Volstead Act. The Court concluded that the acquisition of a competing dairy violated § 7 of the Clayton Act and that the cooperative, in making the acquisition, had gone outside the "legitimate objects" of a cooperative. In the language of Mr. Justice Black, "We hold that the privilege Capper-Volstead grants producers to conduct their affairs collectively does not include a privilege to combine with competitors so as to use a monopoly position as a lever further to suppress competition by and among independent producers and the processors." The district court's opinion appears in 168 F. Supp. 880 (D.D.C. 1959).

Jerrold Electronics Corp. v. United States, 365 U.S. 567 (1961), was a per curiam decision, affirming 187 F. Supp. 545 (1960), in which the issues were largely concerned with tying arrangements and exclusive dealing contracts, with certain acquisitions found to justify an injunction against further acquisitions but not a divestiture of acquisitions already made.

In Crown Zellerbach Corp. v. FTC, 296 F.2d 800, 807 (9th Cir. 1961), the Supreme Court refused certiorari, 370 U.S. 937.

In United States v. E.I. du Pont de Nemours & Co., 353 U.S. 586 (1957), which was decided under § 7 of the Clayton Act as adopted in 1914, the Court discusses many of the issues which are relevant to amended § 7. See Barnes, Competitive Mores and Legal Tests in Merger Cases: the du Pont-General Motors Decision, 46 Georgetown L.J. 564 (1958).
first opportunity to give full consideration to the application of section 7 of the Clayton Act since its amendment in 1950. This first full pronouncement of the Supreme Court on amended section 7 will be thoroughly studied for guidelines to the future administration of the act. Such a search for guidelines presents a strong temptation to reconcile all divergent statements, to read into the findings answers to troublesome questions raised in earlier cases which have not yet reached the Supreme Court, and to discover simple tests by which to distinguish between lawful and unlawful acquisitions and mergers. But this procedure, applied to the Brown Shoe decision, is doomed to disappointment.

There has been much dissatisfaction with the application of the anti-merger law. This dissatisfaction has centered in a conviction that not enough cases are being brought to halt mergers which are harmful to the economy and that delays in the prosecution of cases defeat the fundamental objectives of the act. It has also been said that the generalized standards of section 7 lack legal predictability. Further, it has been argued that effective enforcement requires the adoption of more explicit tests to permit a prompt determination of the legality of mergers challenged by the government. Like most new legislation dealing with complicated situations, section 7 of the Clayton Act has generated much comment and discussion, which in this instance has been complicated by legal analysts who have sought to discover a litmus-paper test in order to avoid becoming involved in the unfamiliar discipline of economics, and by economists, some of whom have unhelpfully sought to apply price and market theories to the task of identifying a potential lessening of competition or tendency toward monopoly. Thus, with relatively little adjudication, the law has accumulated an unofficial gloss which it now becomes the task of the courts to clear away.

The few cases which have been decided in lower courts deal with only a small array of the situations which will ultimately be presented for decision. Many of these cases have been presented on a less than satisfactory basis; economic analysis, where it has not been lacking, has been relatively unsophisticated. A preponderance of the cases have dealt with directly competitive mergers, and there have been few cases dealing with vertical integration or with extensions into unrelated product areas (the so-called conglomerate merger).

2 64 Stat. 1125 (1950), 15 U.S.C. § 18 (1958). Amended § 7 provides that stock acquisitions and asset acquisitions shall be unlawful "where in any line of commerce in any section of the country, the effect of any acquisition may be substantially to lessen competition, or to tend to create a monopoly."
Adjudication has thus not yet had an opportunity to contribute significantly more orderly procedures, a sharpening of the tools of economic and legal analysis, or a clarification of guidelines for resolving difficult questions and distinguishing between legal and illegal mergers. The relatively slow progress in amplifying the law with decisions stems from an understandable reluctance on the part of the Federal Trade Commission and the courts to generalize broadly beyond the necessities of the issues immediately before them. Yet, in the absence of such generalizations, the formulation of policy proceeds hesitantly as trial attorneys seek to win the case at hand by bringing it within the scope of the limited precedents available rather than by risking remand or reversal by experimenting with untried arguments and untested analyses. The absence of such experimental thinking at the trial level is understandable where the case is being tried before a judge who is perhaps experiencing his first anti-merger litigation or before a hearing examiner who may sometimes be far more concerned with the niceties of procedure and evidence than with becoming acquainted with the complexities of economic analysis; nevertheless, it is unfortunate for the development of the law.

The decision in Brown Shoe came eleven and a half years after the amendment to section 7. The Supreme Court's participation in section 7 litigation prior to the Brown Shoe decision was limited to a per curiam decision, a refusal of certiorari, and a collateral consideration of section 7 to the extent of holding that agricultural cooperatives are not exempt from its provisions.3

The Structure of Judicial Thought

The Supreme Court's opinion in Brown Shoe follows pretty much the opinion of Judge Weber in the district court,4 who quite methodically

3 See note 1 supra. As of January, 1962, 96 proceedings had been started by the Department of Justice and the Federal Trade Commission. Twenty-one had been settled by consent orders (11 by Justice and 10 by the Federal Trade Commission); sixteen had been litigated to the point where a final order had been issued (8 by Justice and 8 by the Federal Trade Commission), although some of these matters were still pending on appeal; and 59 cases were still pending. See, B. Bock, Mergers and Markets, Tables 1 & 2 (1962).

4 179 F. Supp. 721 (1959). The merger of Brown Shoe Company, Inc., and the G.R. Kinney Company, Inc., was effected on May 1, 1956, under a court order which, while refusing a government request for a temporary injunction, required that the businesses be operated separately until a decision could be reached on the merits of the merger. The Government had filed a complaint on November 28, 1955, and obtained a temporary restraining order. After hearing, the preliminary injunction was refused, and as noted, the merger was permitted subject to the requirement that the companies continue with independent managements, each under its own board of directors, and that the assets and operations of
examined the history of the two merging companies, with attention to sales volume, assets and market positions, reviewed the history of the Clayton Act, and successively considered "lines of commerce," "sections of the country," the leading precedents, and the characteristics of the shoe industry, both manufacturing and retailing, before addressing himself to the competitive impact of the acquisition.

Both opinions lean heavily on the legislative history of amended section 7, and both seek diligently to learn what objectives Congress had in mind. This was not difficult, for there was substantial unanimity among members of Congress speaking on the bill and in the reports of the Senate and House Committees. Both Mr. Chief Justice Warren and Judge Weber were more concerned with evaluating the facts in relation to competition than they were with the development of legal or economic theories with respect to merger problems. However, the jurists received little help in weighing the economic dimensions of the case. Both opinions necessarily relied largely upon structural facts, and chiefly structural facts as they related to the acquiring and acquired companies, with only a modicum of data with respect to the structure of the industry and even less with respect to patterns of competition within the industry and its markets. Nevertheless, both judges were reasonably specific in identifying the non-competitive aspects of shoe manufacturing, distribution and retailing. As the jurists were afforded little opportunity for analyzing and evaluating economic data, the anti-competitive factors were dealt with largely on the basis of presumptions respecting competitive behavior.

Chief Justice Warren's opinion rightly recognized that under section 7 of the Clayton Act the only tests for determining the legality of a merger are a tendency toward monopoly and a substantial lessening of competition. A merger can be evaluated only in the context of patterns of competition in relevant markets and industries. Consequently, economic evidence must always be of primary importance in merger cases under the Clayton Act—which will make it necessary to analyze in some detail such topics as "the economic characteristics of the shoe industry" in this paper, since this and related considerations were strongly emphasized by the Supreme Court.

However, this is not to say that a merger case cannot become over-
burdened with an overabundance of economic data of limited relevance. The need to consider "all relevant factors" does not mean that every fact which relates to the structure and operation of an industry should become part of the record in a merger case. This is precisely the vice of the "dragnet" approach, which undertakes to consider all information which either party views as having any significant bearing on competition in the industry. An alternative "predetermined market" approach avoids this defect; but it is unreliable when it attempts to select a relevant market without sufficient inquiry into the competition that prevails in the industry. The Supreme Court avoided both errors by, in effect, adopting the competitive analysis procedure, which permits a prompt selection of those facts which are relevant and a confident rejection of those facts which are not.

Chief Justice Warren's principal contribution to the development of standards for the sound enforcement of the antimerger law lies in his insistence that Congress specified no particular tests, quantitative or qualitative, for measuring relevant markets or for determining competitive effects. Indeed, considered in broad outline, the Chief Justice's opinion is more important for its rejection of a number of faulty and much emphasized "tests" than for establishing new principles. Nonetheless, his opinion is strong in its insistence on the primacy of competition, in its rejection of statistical tests, and in its emphasis on the reasonable inferences to be drawn from industry structure and patterns of competitive behavior.

Finally, it is suggested that the Chief Justice's opinion missed some opportunities and contributed at least one erroneous "consideration" to antimerger law. This latter defect stems from the Court's unguarded language in referring to "mitigating factors" which seemingly might justify a merger even in the face of lessening competition and a tendency toward monopoly. Such expressions detract from the Chief Justice's insistence, elsewhere in his opinion, upon adhering strictly to the statutory tests, and hence they tend to subvert these statutory tests and to create a loophole which, if not repudiated, may arise to plague future litigation.

A Search for Congressional Intent

Mr. Chief Justice Warren gave considerable attention to a careful review of the legislative history of the amendment to section 7, for the

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7 370 U.S. at 321.
8 Id. at 334, 346.
purpose of determining whether the lower court’s judgment was consistent with Congressional intent. Although he found that the legislative history “provides no unmistakably clear indication of the precise standards...to be applied in judging the legality of particular mergers,” the Chief Justice concluded that there were sufficient “expressions of a consistent point of view” to provide a “useable frame of reference within which to evaluate any given merger”; for the “dominant theme” in all discussions of the need for amendment to section 7 was “a rising tide of economic concentration” and “the danger to the American economy...in unchecked corporate expansions through merger.” It was also noted that this trend toward concentration was thought to pose threats to other values, notably “the desirability of maintaining ‘local control’ over industry and the protection of small businesses.”

Congressional concern for the primacy of competition was affirmed by a view of the legislative history in its entirety. The Court found that the history “illuminates congressional concern with the protection of competition, not competitors.” This policy of competition was reflected in the determination to “plug the loop-hole” by extending the application of the law to the acquisition of assets as well as securities, by broadening the coverage of the law to reach all forms of mergers, not simply between actual competitors, but also vertical and conglomerate mergers, where the

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9 Id. at 312.
10 Id. at 315. The Court did not consider the controversy which has developed with respect to the facts regarding economic concentration. In support of the Congressional attitude, the Court’s opinion cited S. Rep. No. 1775, 81st Cong., 2d Sess. 3 (1950), and quoted from H.R. No. 1191, 81st Cong., 1st Sess. 3 (1950), while noting also the reliance of the Congress upon two reports by the Federal Trade Commission, The Present Trend of Corporate Mergers and Acquisitions (1947), and The Merger Movement: A Summary Report (1948). Those who wish to pursue the concentration controversy may consult Lintner & Butters, Effect of Mergers on Industrial Concentration, 1940-47, 32 Rev. of Economics and Statistics 30 (1950), and Blair & Houghton, The Lintner-Butters Analysis of the Effects of Mergers on Industrial Concentration, 1940-47, 33 Rev. of Economics and Statistics 63 (1951). See also Mason, Economic Concentration and the Monopoly Problem, 16-43 (1957).
11 370 U.S. at 315-16. With respect to the protection of small businesses, attention was called to Judge Learned Hand’s opinion in United States v. Aluminum Co. of America, 148 F.2d 416, 429 (1945): “Throughout the history of these [antitrust] statutes it has been constantly assumed that one of their purposes was to perpetuate and preserve...an organization of industry in small units which can effectively compete with each other.” There are few antitrust cases that have required a choice between efficiency and competition—perhaps none at all, when efficiency is viewed as an attribute of the industry and the economy as well as in the more limited sense of achieving low costs by the individual firm.
12 370 U.S. at 320.
effect might be to lessen competition in any line of commerce in any section of the country.\textsuperscript{13} Congress was particularly concerned with checking what was believed to be the rising tide of economic concentration through effective action against mergers "when the trend to a lessening of competition in a line of commerce was still in its incipiency."\textsuperscript{14} Further, Congress specifically rejected the "Sherman Act standards" for judging the legality of acquisitions subject to section 7.\textsuperscript{15} Congress' concern with those mergers having demonstrable anti-competitive effects was also said to be revealed in its willingness to accept mergers which might stimulate or be neutral with respect to competition, such as mergers between two small companies or the acquisition of a failing company "which can no longer be a vital competitive factor in the market."\textsuperscript{16}

The Competitive Analysis Procedure

Chief Justice Warren insisted that Congress had specified no particular tests for measuring relevant markets or for determining competitive effects.\textsuperscript{17} In the language of the Court:

Congress indicated plainly that a merger had to be functionally viewed, in the context of its particular industry. That is, whether the consolidation was to take

\textsuperscript{13} The original § 7, as enacted in 1914, provided that no corporation might acquire the stock of another corporation where the effect may be a substantial lessening of competition between the acquiring and the acquired corporation; it also provided two other standards of illegality—"to restrain such commerce in any section or community, or tend to create a monopoly of any line of commerce." The 1914 act did not prevent the accomplishment of mergers between competitors through an acquisition of assets, not even when the asset acquisition was preceded by an illegal stock transaction. Arrow-Hart & Hegeman Elec. Co. v. FTC, 291 U.S. 587 (1934); FTC v. Western Meat Co., 272 U.S. 554 (1926). Little effective use was made of the second and third tests for condemning an acquisition of securities, apparently on the mistaken view that acquisitions of stock in any corporation other than a direct competitor were not forbidden. But in the du Pont-General Motors case, the Supreme Court found du Pont's stockholdings in the General Motors Corporation to be illegal under the original § 7. United States v. E.I. du Pont de Nemours & Co., 353 U.S. 586, 607 (1957).

\textsuperscript{14} 370 U.S. at 317.

\textsuperscript{15} Id. at 318. In a lengthy footnote the Court noted that following its decision in United States v. Columbia Steel Co., 334 U.S. 495 (1948), various proponents of the bill took positions in favor of adopting tests more stringent than those applicable under the Sherman Act. The Court quotes from S. Rep. No. 1775, supra note 10, at 4-5, wherein the Senate Judiciary Committee stated:

The committee wishes to make it clear that the bill is not intended to revert to the Sherman Act test. The intent here . . . is to cope with monopolistic tendencies in their incipiency and well before they have attained such effects as would justify a Sherman Act proceeding.

\textsuperscript{16} 370 U.S. at 319.

\textsuperscript{17} Id. at 321.
place in an industry that was fragmented rather than concentrated, that had seen a recent trend toward domination by a few leaders or had remained fairly consistent in its distribution of market shares among the participating companies, that had experienced easy access to markets by suppliers and easy access to suppliers by buyers or had witnessed foreclosure of business, that had witnessed the ready entry of new competition or the erection of barriers to prospective entrants, all were aspects, varying in importance with the merger under consideration, which would properly be taken into account.18

It would be difficult to frame a more accurate statement of the necessity of evaluating the competitive significance of a merger in the context of the patterns of competition prevailing in the relevant industries and markets. However, this statement is given further emphasis in an attached footnote, in which the Court observed:

Subsequent to the adoption of the 1950 amendments, both the Federal Trade Commission and the courts have, in the light of Congress' expressed intent, recognized the relevance and importance of economic data that places any given merger under consideration within an industry framework almost inevitably unique in every case. Statistics reflecting the shares of the market controlled by the industry leaders and the parties to the merger are, of course, the primary index of market power; but only a further examination of the particular market—its structure, history, and probable future—can provide the appropriate setting for judging the probable anticompetitive effect of the merger.19

In turning to the analysis of the probable competitive consequences of Brown Shoe Company's acquisition of the G. R. Kinney Company, the Court followed its own prescription. To the extent that economic data were available, the Court examined not only the structural facts relating to the size and market shares of the companies and the degree of concentration in the industry, but it also undertook to inquire as specifically as the record permitted into the competitive behavior, past and prospective, of the parties to the merger and also into the general competitive mores of the shoe industry in manufacturing, in manufacturer-distributor relations, and in retailing. Indeed, one might almost say that this competitive-analysis approach was forced on the district court by the low concentration ratios of the industry and by the low market shares of the parties to the merger, both in manufacturing and in retailing.

This competitive-analysis procedure provides the simplest and most direct means of determining what specific questions must be answered in order to arrive at a sound judgment with respect to the competitive ef-

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18 Id. at 321-22.
19 Id. at 322 n. 38.
fects of an acquisition or merger. This approach is consistent with the over-all objectives of the Congress in amending section 7 of the Clayton Act, and it is in harmony with the very basic tests by which Congress directed that mergers should be judged.

A quite uncomplicated survey of where the acquiring and acquired corporations are engaged in commerce, either as buyers or as sellers, will serve to identify the areas in which they are significant competitors. An analysis of the patterns of competition in the markets wherein either firm is a significant competitor will generally suffice to identify any changes in the opportunities or incentives to compete, either for the respondent corporations for their competitors, or for their suppliers or customers. The areas of competition within which significant changes in the opportunities and incentives to compete can be identified then become the relevant markets for judging the legality of the acquisition. The determination of whether these markets are substantial and important in preserving a competitive industry and a competitive economy will normally present few difficulties. The critical competitive factors are usually few in number and readily identified, particularly by businessmen and economists who are familiar with the industry.

The competitive-analysis approach does not set the stage for either complicated or protracted litigation; all that is required to keep the record within bounds is an insistence by the judge or the hearing examiner on understanding the significance of each line of evidence introduced. Indeed, since the statute refers to competitive effects "in any line of commerce in any section of the country," the proof of anticompetitive effects may be developed with respect to any substantial market, without the necessity of exploring other markets even though such markets are believed also to show adverse effects attributable to the merger. As Chief

20 Section 7, as amended, provides that both stock acquisitions and asset acquisitions shall be unlawful where "in any line of commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly." 64 Stat. 1125 (1950), 15 U.S.C. § 18 (1958).

21 In developing the thought that no one pattern of proof can meet the requirements of all cases, the Report of the Attorney General's National Committee to Study the Antitrust Laws (1955) summarized its judgment on the necessary scope of inquiry at page 123 as follows:

The determination of the legality of a merger will in every case require some study of the markets affected, the companies involved in an acquisition in relation to those markets, and the merger's immediate and longer range consequences for competition. Section 7 is concerned with the proved reasonable probability of substantial competitive effect. Thus, it will always be necessary to analyze the effect of the merger on relevant markets in sufficient detail, given the circumstances of each case, to permit a reasonable conclusion as to its probable economic effect.
Justice Warren quite succinctly noted, competitive consequences cannot be analysed or evaluated apart from "the context of its particular industry," but in that context their meaning is usually unambiguous.

There are only two alternatives to the competitive-analysis procedure: the dragnet approach and the predetermined market approach. The dragnet approach undertakes to assemble all information having any significant bearing on competition as it is viewed by one or another of the parties to the case. The dragnet approach produces extended records, protracted hearings, a multitude of exhibits, and inevitably much conflict of evidence. It is the use of the dragnet approach that has brought economic evidence and economists into disrepute among those who are concerned with the effective enforcement of the antimerger law. It is a possible trial tactic only if the hearing examiner or judge is willing to accept evidence without demanding that its relevance be clearly established. It relies on the premise that any and all facts relating to the way in which competition operates in an industry or market are relevant to showing that competition is, or is not, satisfactory, or that it may, or may not, be lessened as a consequence of the merger.

The predetermined market approach is based upon the assumption that it is possible, without any significant inquiry into the competition that prevails in the industry, to select a particular "relevant market" and confine the examination of the probable consequences of the merger to that relevant market. In cases involving mergers between companies producing or distributing comparable products, the relevant market is presumed to be defined in terms of those products which are common to both corporations. In cases involving supplier-customer relations, the relevant market is presumed to involve those products which are supplied by one corporation to the other. The basic weakness of the predetermined market approach is that significant competitive effects may be overlooked while the trial proceeds to test the merger by less reliable standards. It is not surprising that those who accept the predetermined market approach predicted, in the early years of the antimerger law, that there never would be a merger case involving a conglomerate acquisition, because in a conglomerate acquisition there was no "relevant market."

22 370 U.S. at 321-22.
23 A variant of the predetermined market approach is the selection of the relevant market for testing the merger in terms of the availability of evidence, particularly statistical evidence purporting to show the market shares of the companies with respect to the "relevant products."
A recognition of the public office which competition is called upon to perform for the economy is the starting point for any analysis of the economic consequences of mergers and acquisitions. In this regard, it may be useful to distinguish between price competition and non-price competition. Price competition may be defined to include all those forms of competition which benefit the consumer; competition to achieve greater efficiency of outputs in terms of inputs, competition to reduce costs, price competition which keeps prices in adjustment with competitive costs, improvements in the quality of the product, including the development of new products, increased durability of goods, superior performances, and greater convenience for the consumer. Non-price competition relates to those forms of competition which are concerned largely with switching sales from one supplier to another without giving the consumer any greater advantage in price, quality or service. Non-price competition includes much of advertising and promotion, contrived or artificial product differentiations, all forms of misrepresentation, packaging designed to preempt the attention of the buyer, and similar tactics. Obviously, not all forms of business rivalry constitute competition of the character which serves the public interest.

Price competition, other than anti-competitive uses of price discrimination and similar tactics, presumably serves to maintain a healthy, efficient economy. But not all non-price competition is to be automatically condemned, for the persistence of non-price competition as a defensive tactic may provide convincing evidence that what appears to be an oligopolistic industry is indeed intensively competitive, and the preservation of an intense competitive spirit, even though temporarily manifested in forms of non-price competition, maintains conditions favorable to the development of new products, the achievement of greater efficiency, and perhaps ultimately reductions in price.

The maintenance of sound competition depends upon the competence of buyers to select intelligently among competing offers; therefore, any competition which tends to impair the competence of consumers must be regarded as contrary to the public interest. One of the public offices of competition is the achievement of an allocation of resources, man power, and capital among firms and between industries in such a way as to maintain an effective balance in meeting the diversified needs of consumers. Any development in industry which tends to impair the efficiency with which competition allocates resources among competing uses, such as barriers against the entry of new competitors, is inconsistent with an efficiently functioning economy. In summary, the inquiry into the state of com-
petition, as into the prospective changes in the character of competition, must proceed with an awareness that while the maintenance of price competition is normally in the public interest, an increase in the reliance upon non-price forms of competition may lead in the direction of a lessening of effective competition and a tendency toward monopoly.

The competitive-analysis approach, by focusing on a limited number of critical questions, thus provides a streamlined procedure for identifying the major competitive consequences of a merger and delineating the areas of competition, or relevant markets, in which the substantial character of those competitive effects may be measured. Five basic questions will guide the analysis:

1. How is competition carried on in the industry or industries concerned?
2. What different strategies and tactics of competition are employed by different firms in the industry—by the large, the typical, and the small firms?
3. What are the determinants influencing the selection of different competitive strategies and tactics by different firms?
4. What are the determinants of success (or failure) for firms in the industry?
5. What economic functions must competition perform in this industry, if the industry is to operate efficiently and serve the public interest?

These questions must necessarily be considered in historical perspective if the answers are to be helpful in indicating the prospective effect of the acquisition which is under examination.

Both the Supreme Court and the district court followed the competitive-analysis approach in arriving at their respective decisions in the Brown Shoe case, but in neither court's opinion were this procedure and its rationale specifically articulated. Both courts began with a consideration of the characteristics of the shoe industry, both in manufacturing and in retailing, and with an analysis, quite limited in scope, of the positions of Brown Shoe Company and G. R. Kinney Company in their respective industries. A substantial understanding of the characteristics of the industry was attained before either court turned to the question of the relevant markets and the findings with respect to the prospective competitive impact of the acquisition. Thus, Mr. Chief Justice Warren emphasized "that a merger had to be functionally viewed, in the context of its particular industry," and emphasized "the relevance and importance
of economic data that places any given merger under consideration within an industry framework almost inevitably unique in every case.24

THE ECONOMIC CHARACTERISTICS OF THE SHOE INDUSTRY

The Economic Evidence Before the Courts

The economic evidence before the courts was limited, with an emphasis upon structural facts and only an incidental development of information with respect to competitive behavior. Because of the large number of competitors, both in shoe manufacturing and in retailing, and the relatively low concentration in both aspects of the industry, the structural facts might appear to indicate that the acquisition was of limited competitive significance. Perhaps because the structural facts were not strongly persuasive, the district court and the Supreme Court were compelled to look beyond the presumptions that might have been indulged in if the industry had shown greater concentration or if the parties to the merger had held larger market shares. Consequently, it is the use that is made of economic evidence, rather than the character of the economic evidence, which is of importance in the Brown Shoe decision.

The majority of the Supreme Court found substantiality in a complex of facts: the acquisition by a leading manufacturer of the largest independent chain of family shoe stores; the trend toward vertical integration in the industry, with acquiring manufacturers becoming increasingly important sources of supply for their controlled outlets; and the many markets in which both Brown and Kinney stores were located and were presumably competitive.25

For all the Justices, the emphasis in judging substantiality was in terms of the effect of the acquisition upon competition. It may be noted that the judgment respecting competition rested in substantial part upon industry developments for which other shoe manufacturers were in part responsible.26 As the Supreme Court stated, "The shoe industry is being subjected to just such a cumulative series of vertical mergers which, if

24 370 U.S. at 321-22, & n. 38.
25 Id. at 331, 332, 338, 345. Mr. Justice Clark, concurring, found substantiality in the size of the Brown and Kinney operations and in the direct effect of the acquisition on small manufacturers who had previously supplied Kinney's requirements. Id. at 355-56. Mr. Justice Harlan found Kinney's share of the market substantial "in terms of available markets for independent shoe manufacturers." Id. at 371.
26 The district court found "that as the Brown-Kinney experience is weighed in the same scale with what is happening in the industry in the large manufacturer retail outlet acquisitions, the trend is toward the eventual elimination of small manufacturers and independent retailers." 179 F. Supp. at 740.
left unchecked, will be likely 'substantially to lessen competition.'

The Supreme Court treated the question of relative size as a consideration which must be evaluated in terms of the competition prevailing in the industry. A company of moderate size may pose a threat to competition if that company competes with substantially smaller firms, if it enjoys the advantages of supporting its operations in one area with earnings from other areas, if it is integrated with sources of supply which give it an advantage in purchasing. These are significant points in any appraisal of competitive expectations where the existence of strategic advantages is supported by the evidence.

What competition is important—the competition which is lost, or the competition which remains? Much of the economic evidence introduced in merger cases is concerned with proving the vitality of the competition which remains. However, with any strict application of the statutory standards, the remaining competition is not the controlling fact. What counts against a merger is the competition which is lost, and this position was strongly affirmed by the Supreme Court, which disregarded the large number of manufacturers and retailers still competing in the shoe industry to assert that "remaining vigor cannot immunize a merger if the trend in that industry is toward oligopoly." This ruling might be more precisely stated to be that remaining vigor cannot immunize the merger if a tendency toward monopoly or if a substantial lessening of competition can be identified with the acquisition.

 Competition in the Manufacturing Industry

There was a decline in the number of plants manufacturing shoes in the period under consideration, but whether this decline reflected technological or organizational factors was not disclosed. The shoe manufacturing industry was composed of 1077 independent manufacturers in 1947 and 970 in 1954, a reduction of ten per cent. By 1958 the number of independent manufacturers had decreased another ten per cent to 872. No data were presented with respect to the size distribution or other

27 370 U.S. at 334.
28 Id. at 343-44.
29 Id. at 333.
30 "Of the companies representing 95% of the entire industry, the number of plants operated decreased from 1207 in 1950 to 1048 in 1956. Of the 1048 shoe manufacturing plants in 1956, about 20%, or 212 are owned and operated by 10 companies." 179 F. Supp. at 738.
31 370 U.S. at 301.
characteristics of the firms which disappeared in the twelve-year period. Nor was there any explanation for the reduction in numbers, whether it related to the technology of the industry, to changes in consumer demand, to acquisitions and consolidations, or to financial failures. There were a number of multi-plant firms in the shoe industry, but no information was given concerning the economic advantages associated with multi-plant, as compared with single-plant, manufacturers.

There was no information noted with respect to size distribution among manufacturing plants. In 1955, the domestic production of non-rubber shoes was 509.2 million pairs; there were, in 1954, 970 independent manufacturers. This would result in an average production per firm of approximately 526,000 pairs of shoes. In 1955, Brown was the fourth largest shoe manufacturer, with a production of 25,648,000 pairs of shoes produced in approximately 42 plants; this would have resulted in a production per plant by Brown of 610,000 pairs of shoes. Thus it would appear that each of Brown's plants produced on the average more shoes than were produced by the average manufacturer. Also it would appear that there were either substantial disparities in size among shoe factories or significant disparities in the percentage of capacity at which different plants operated. These may be important facts in judging the working of competition, but their absence was no impediment to a decision. It did appear that factories normally specialize in producing either men's shoes, women's shoes, or children's shoes.

The shoe manufacturing industry was not a highly concentrated industry. In 1957 the top four manufacturers—International, Endicott-Johnson, Brown (including Kinney) and General Shoe—produced twenty-three per cent of the total shoe production; the twenty-four largest manufacturers produced about thirty-five per cent of the nation's production. Brown, as the fourth largest manufacturer, accounted for only five per cent of the national production. Kinney was the twelfth largest manufacturer, operating four factories producing men's, women's and children's shoes and accounting for five per cent of the national production in 1955.

Brown's position as a leading manufacturer was attained in part through a series of acquisitions. Brown's total sales increased between

32 Id. at 300-01.
33 Id. at 303; 179 F. Supp. at 727.
34 370 U.S. at 300.
35 Id. at 300; 179 F. Supp. at 727.
36 179 F. Supp. at 737.
37 From 1945 to 1956, Brown increased the number of its manufacturing plants from 20
1955 and 1959 from $89,313,000 to $159,481,000, and during the same period its assets increased from $36,490,000 to $72,396,000. No asset or sales figures were reported for other companies in the industry and it is not clear what, if any, competitive significance attached to these figures, except that Brown's growth had been very substantial.\textsuperscript{38}

**Forward Integration by Shoe Manufacturers**

Forward integration by shoe manufacturers into the operation of retail stores appeared to be producing a radical change in competition, both in shoe manufacturing and in retailing. The district court found a two-fold trend: First, extensive acquisitions of retail outlets by manufacturers, and secondly, a tendency for the manufacturers to supply an increasing proportion of the shoes sold by their controlled retailers.\textsuperscript{39} The trend to acquire new outlets accelerated in the early 1950's; by 1956 the six largest firms owned and operated 3,997 shoe stores, or eighteen per cent of the nation's 22,000 shoe stores; and the thirteen largest firms operated 4,736, or twenty-one per cent of such stores.\textsuperscript{40} The trend toward integration into retailing was further evidenced by the increase in the number of retail outlets controlled by leading shoe manufacturers between 1945 and 1956.\textsuperscript{41} Between 1950 and 1956, nine independent retail shoe chains, operating 1,114 shoe stores, became subsidiaries of larger firms.\textsuperscript{42} The Brown acquisition of Kinney would have raised its percentage of retail store operations to 5.7 per cent.\textsuperscript{43}

No data were presented for changes in the percentages of shoe sales which were handled through the manufacturers' controlled retail stores.

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\textsuperscript{38} 179 F. Supp. at 727.

\textsuperscript{39} Id. at 737-38. This development was already under way in 1945 with respect to a few of the large shoe manufacturers: Melville Shoe Company had 536 retail outlets in that year; Endicott-Johnson, 488; Shoe Corporation of America, 301; and General Shoe Company, 80.

\textsuperscript{40} Id. at 737, 738.

\textsuperscript{41} Melville Shoe Company controlled 4.3% of the retail shoe operations in 1956, having expanded from 536 to 947 outlets; Shoe Corporation of America controlled 3.8%, from 301 to 842; Endicott-Johnson controlled 2.4%, from 488 to 540; General Shoe Company controlled 2.3%, from 80 to 526; Edison (not a shoe manufacturer) controlled 1.3% (not including its franchise stores) and had grown from zero to 845 stores. 370 U.S. at 300-01; 179 F. Supp. at 738.

\textsuperscript{42} 370 U.S. at 301; 179 F. Supp. at 737.

\textsuperscript{43} 179 F. Supp. at 738. Mr. Justice Harlan specifically rejected the findings with respect
Nor was any information presented to indicate the extent to which these controlled retail outlets occupied various metropolitan or local markets. Consequently, only limited conclusions could be drawn with respect to the impact of this structural change on the operation of competition.

Brown was a late starter in acquiring retail outlets. In earlier years it had experimented with the operation of retail outlets, but had disposed of all of them by 1945. In 1951, however, Brown began a new program of acquiring retail outlets, both by the ownership and operation of retail establishments and by contractual or franchise arrangements. In 1954, Brown acquired Regal Shoe Corporation, which operated a manufacturing plant producing men's shoes and 110 retail outlets. And in 1951, Brown had acquired Wohl Shoe Company, which operated shoe departments in various stores.

The tendency of manufacturers to preempt the supplying of shoes to their controlled retail outlets received much attention in the opinions of both the district court and the Supreme Court. Indeed, the conclusions with respect to competitive effects of the acquisition rested very largely upon the foreclosure of the markets represented by these retail outlets to independent manufacturers. While this conclusion was stated in general terms with respect to all manufacturers with controlled retail outlets, the only evidence reported by the district court related to the experience with the retail outlets acquired by Brown to the trend toward oligopoly and vertical integration in the shoe industry, stating that while "in terms of bare numbers, the quantity of retail outlets owned or controlled by the major manufacturers has undoubtedly been increasing since 1947," these data did not establish the competitive effects of such vertical expansion because it was incomplete and based on "varying standards." 370 U.S. at 374.

44 370 U.S. at 302. The franchise stores were operated by independent retailers under an agreement not to carry competing lines of shoes. The franchise stores were assisted by Brown with advertising, insurance, credit, reports on market and management research, centralized purchase of rubber footwear, and advice with respect to inventory. In judging the competitive effects of the acquisition of Kinney, the franchise stores were treated as part of the Brown organization. 370 U.S. at 337-38; 179 F. Supp. at 725.

Brown Shoe Company's franchise plan has been under attack in a proceeding before the Federal Trade Commission (Docket 7606); the examiner has found the exclusive dealing provisions of the plan to be an illegal restraint of competition in violation of § 5 of the Federal Trade Commission Act. Trade Reg. Rep. ¶ 15705 (Feb. 13, 1962).

45 370 U.S. at 302; 179 F. Supp. at 725. The acquisition of Regal was not challenged by the Department of Justice, although the Regal acquisition was as much a part of the trend toward integration of manufacturing and retailing as the acquisition of Kinney.

46 Ibid.

47 370 U.S. at 332; 179 F. Supp. at 738.

48 Wohl had purchased approximately $3,000,000 worth of shoes from Brown in 1950.
It is significant that the Supreme Court regarded these developments—the acquisition of retail outlets by shoe manufacturers and the increasing proportion of shoes supplied by the parent manufacturer to the controlled retail outlets—very largely as a part of the industry background before coming to a consideration of the merger itself. In thus examining the manner in which competition was conducted in the manufacturers’ sales of shoes to retailers, the Supreme Court was conforming to what is herein described as the competitive-analysis approach to the merger problem.

**Competition in Shoe Retailing**

The economic evidence with respect to competition in the retailing of shoes was quite limited, and what was presented appeared as part of the discussion of competitive effects of the acquisition rather than in the more general analysis of how competition operated in the shoe industry. Basically, there were only two findings: 1. All shoes for men may be considered a “single line of commerce,” with sufficient competition between price-lines and different styles to make unnecessary any further refinement in the product dimensions of the market. Similar findings were made with respect to women’s shoes and children’s shoes. 2. All shoe stores located in cities of 10,000 or more, or in the environs of such cities, were found to be competitive with one another. Other findings with respect to competition in shoe retailing were quite fragmentary, relating to the advantages which chains and manufacturer-affiliated retail stores possessed in competition with independent retailers and to possible advantages of size.

The extent to which shoes in different price-lines and styles for different occasions are, or are not, competitive was discussed by the district court in considering the views of the opposing parties as to the appropriate
product dimensions of the relevant markets. The district court found that men’s shoes, women’s shoes, and children’s shoes are sold in distinct markets and are not competitive, but it disagreed with the respondent’s argument that it was necessary to distinguish between the different style, quality and price lines within these three broad categories.\(^{49}\)

The evidence with respect to competition among shoe stores located in cities of 10,000 and their environs offered a somewhat less satisfactory basis for appraising the operation of competition in shoe retailing.\(^{60}\) The findings by the district court with respect to competition between Brown and Kinney in retailing shoes were summarized in three tabulations, showing separately for women’s shoes, children’s shoes, and men’s shoes, all cities in which the combined sales of Brown and Kinney stores accounted for five per cent of the total sales.\(^{51}\)

The tables showed, for each of 118 cities in which the combined market shares of Brown and Kinney in a relevant line of commerce equalled five

\(^{49}\) 179 F. Supp. at 731-32.

\(^{50}\) Brown had contended that the geographic dimensions of competition should be defined in terms of the central business districts of the larger cities and in terms of standard metropolitan areas for the smaller communities. 370 U.S. at 338; 179 F. Supp. at 732.

\(^{51}\) 370 U.S. at 342. The sales were estimated in pairs rather than in dollars, although the statistics of shoe sales were available only in terms of dollar volume. The government, over Brown’s objections, converted the dollar figures into sales in terms of pairs.

Such manipulation of statistics is suggestive of a “numbers game,” where the players are convinced that there is a magic number which will bring a challenged merger within the scope of the law or exclude it. It is difficult to believe that any court or the Federal Trade Commission would find competition different according to whether market shares are measured in physical units or in dollars. That such statistical manipulations have dubious value is suggested by the comment, in footnote, by the Supreme Court:

> The Government’s conversion was, with some exceptions, based on national median income and national averages of shoe prices and the ratio of men, women and children in the population. The District Court accepted expert testimony offered by the Government to the effect that shoe price and population age, sex and income variations in the relevant cities produced, at most, a 6% error in the converted statistics, and that this error was as likely to favor Brown (by increasing the universe of sales against which Brown’s shares were to be measured) as it was to disfavor it. We find no error in the District Court’s acceptance of the Government’s evidence as to the propriety of the accounting methods its experts employed. Lastly, Brown objects that the statistics concerning its own pairwise sales were improperly derived since they included sales by its wholesale distributors to the retail outlets on its franchise plans in the same category as sales to ultimate consumers by its owned retail stores. Again, while recognizing a possible margin of error in statistics combining sales at two levels of distribution, we believe they provide an adequate basis upon which to gauge Brown sales through outlets it controlled. Particularly as the franchise stores were required to finance their own inventory, does it seem reasonable to conclude that most of their purchases from Brown’s distributors were eventually resold? In summary, although appellant might point to technical flaws in the compilation of these statistics, we recognize that in cases of this type precision in detail is less important than the accuracy of the broad picture presented.

370 U.S. at 342 n. 69.
percent, the total number of pairs sold, and the percentage of pairs sold by Kinney stores, by Brown outlets, and by Brown and Kinney combined. The tabulations thus included 114 cities in which both Brown and Kinney sold women's shoes, 88 cities for children's shoes, and 48 cities for men's shoes. These tables provided only a very rough basis on which to reach conclusions with respect to competition, for there was no finding whether small cities in more populous sections of the country were part of larger metropolitan areas, and hence of the extent to which competition from adjacent cities might influence competitive practices in the smaller communities. With respect to the smaller towns, the high percentages shown for a combination of Brown and Kinney stores, or for Kinney and Brown stores considered separately, would suggest that some of these communities might not be large enough to support any considerable number of shoe stores. Without data as to the sales required to sustain a retail shoe store operation in cities of various sizes, there was no basis for determining whether high market shares reflected the small size of the market or a limitation on the prevailing competition. And in pondering these statistics, it should be remembered that the Supreme Court, elsewhere in its opinion, was duly skeptical as to the importance that may be attached to market share figures.\(^5\)

Other aspects of competition in the retailing of shoes, though of a fragmentary nature, contributed to an understanding of the significance of a change in industry structure which joined chains of retail stores to large shoe manufacturers. Thus, it was established that Brown engaged in extensive advertising to develop acceptance for its brands.\(^6\) Independent retailers demonstrated a disadvantage in competing with national shoe chains, whose larger volumes enabled them to carry larger inventories and to alter styles to an extent that was burdensome to the independents. Furthermore, it was noted that national shoe chains were able to support their operations in competitive locations with resources built up from sales in less competitive markets.\(^7\) Also, the retail outlets of integrated companies were found to be capable, by reason of direct supply from manufacturers and volume operations, of offering their brands at prices below those of competing independent shoe stores.\(^8\)

The handling of the economic evidence lacked precision and left many questions unasked and unanswered. An unreasonable burden of inference

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\(^5\) Id. at 322.
\(^6\) 179 F. Supp. at 725.
\(^7\) 370 U.S. at 344.
\(^8\) Ibid.
was imposed on the courts. Neither the district court nor the Supreme Court was able to distinguish between the seemingly inconsequential and the apparently substantial changes in competition in the 118 cities in which Brown and Kinney stores were both located; neither indicated whether all, or only some, of the cities constituted evidence adverse to the merger. In explanation of why a combined market share of five per cent was considered significant, the Supreme Court observed: "If a merger achieving 5% control were now approved, we might be required to approve future merger efforts by Brown's competitors seeking similar market shares."

Such an impliedly general application of a specific percentage to all cities would seem inconsistent with the Court's earlier insistence on considering economic realities. While a five per cent share of the market might not support a viable shoe store in a city of 10,000, that same share might be unnecessarily large in a city of 100,000. What is most significant in the Brown Shoe decision is the willingness of both the district court and the Supreme Court, on the basis of their acceptance of the evidence indicating trends toward concentration and vertical integration and despite the relatively unconcentrated state of the industry, to resolve uncertainties in favor of preserving competition.

THE RELEVANCE OF RELEVANT MARKETS

The Role of Relevant Markets

The role of the "relevant market" in a merger case is not so much to determine where competitive effects shall be evaluated as it is to determine whether the identifiable competitive effects have substantiality in terms of significant markets. The role of relevant markets has frequently been misunderstood. It has sometimes been argued that "the" relevant market must be determined before there can be any analysis of competition in relation to a merger. This misuse of the relevant market concept stems from the oft-quoted and oft-misrepresented statement of the Supreme Court in the du Pont—General Motors case that:

Determination of the relevant market is a necessary predicate to a finding of a violation of the Clayton Act because the threatened monopoly must be one which will substantially lessen competition "within the area of effective competition." Substantiality can be determined only in terms of the market affected.

But the determination of the relevant market is not a necessary predicate

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56 Id. at 343-44.
57 See id. at 322.
to a finding with respect to competition, for the relevant market is defined as "the area of effective competition." The determination of the relevant market is necessary in order to judge whether the competitive effects have the substantiality to produce a significant lessening of competition. As Mr. Justice Brennan later remarked, "The market affected must be substantial."59

A relevant market is any market in which the competitive effects of an acquisition or merger can be identified. It is not necessarily a market defined by products which the acquiring and acquired companies produce and sell in competition with one another; nor is it necessarily defined by the products which one party to the merger supplies to the other. The relevant markets can be determined only by an analysis which identifies the changes in competition which may be expected to flow from the consummation of the acquisition. Relevance relates primarily to the functioning of the economy, and only secondarily to the objectives and purposes of the parties to the merger.

The Unitary Nature and Essential Dimensions of Relevant Markets

The courts and the Federal Trade Commission have quite generally become entangled in needless complexity in dealing with the statutory language "in any line of commerce in any section of the country." These difficulties arise from attempts to fragment the concept of the market, which is both conceptually and practically a unity that defies fragmentation. The Congress used the language "in any line of commerce in any section of the country" in lieu of simply stating "in any market," which seemed capable of being used in an unduly restrictive sense.60

A market cannot be described simply in terms of a product, nor in terms of a geographic area, nor in terms of a combination of product and geographic area; still less is it possible to talk realistically about a "product market" and a "geographic market." To attempt to do so is to obscure the essential unitary nature of a market which combines products

59 Id. at 595.
60 The Senate Committee on the Judiciary undertook to explain the meaning of "in any section of the country" on a piecemeal basis:

What constitutes a section will vary with the nature of the product. Owing to the differences in the size and character of markets, it would be meaningless, from an economic point of view, to attempt to apply for all products a uniform definition of section, whether such a definition were based upon miles, population, income, or any other unit of measurement. A section which would be economically significant for a heavy, durable product, such as large machine tools, might well be meaningless for a light product, such as milk.

handled over time by a group of buyers and sellers operating in a geographic area. In short, markets have many dimensions of which product and geographic extent are only two, and not necessarily the two most important in understanding the operation of competition. No one of these dimensions can be considered meaningfully apart from the others. Thus, it may be said that "in any line of commerce in any section of the country" refers to a relevant market and area of competition, and the problem is how one may most simply and most meaningfully approach the problem of describing the market or area of competition.

A market has at least five essential dimensions, no one of which can be considered apart from the others. These essential dimensions include a product or array of products, a geographic dimension, a time dimension, and the buyers and sellers who, respectively, make up the demand and supply dimensions of the market. The definition of each of these dimensions requires the exercise of informed judgment, based upon an understanding of how competition operates with respect to the market in question.

The problem of market dimensions has received much attention in the litigated cases, and elaborate efforts have been made to develop a variety of specific tests for determining the product dimensions of the market. These elaborate efforts to multiply and specify tests have tended to obscure the constant benchmark of competition in delineating the dimensions of the relevant market. When properly understood, "peculiar characteristics and uses,"61 "distinguishing characteristics,"62 "interchangeability in use,"63 "distinct price lines,"64 and "distinct customers" are not distinct tests for determining the product dimension of a market; they are individually, or collectively, simply a reflection of the basic reality that products do, or do not, meet competitively.

Any delineation of the product dimension of the market must recognize that competition may bring products together, or it may keep them apart; the particular facts on which competition makes its distinctions are derived facts of secondary importance, varying from time to time and from market to market with changes in the prevailing patterns of com-

petition. Thus, products which are alike in physical attributes and in potential use may become separated competitively by such devices as brand differentiation and consumer-conditioning advertising, with the result that, due to the behavior of consumers, these differentiated products no longer meet competitively. The other dimensions of the relevant market are subject to the same pragmatic tests of competition; "the area of effective competition" identifies and defines the relevant dimensions with respect to geographic extent, time, and most significantly, the buyers and the sellers who constitute the effective demand and supply in the market.

Wherever the issue has become critical, the courts and the Commission have been driven beyond the symptoms or superficial manifestations of competition to examine the realities of competition itself. Thus, the United States Court of Appeals for the Ninth Circuit, in Crown Zellerbach v. FTC, declared: "What is important as an aid to the determination as to what is the relevant market is a consideration of what are the facts concerning competition in the market place."65 The importance of both the demand and supply dimensions in determining the relevant market was most explicitly recognized in United States v. Bethlehem Steel Corp.66

The definition of line of commerce in a section 7 case is formulated for the purpose of determining the impact of a merger on competition. Competition is not just rivalry among sellers. It is rivalry for the custom of buyers. Also in many instances, and particularly in the steel industry, it is during periods of shortage, strongly present as rivalry among buyers for sources of supply. Thus competitive forces may move in a number of directions—buyer against buyer; seller against seller; buyer against seller. But however competition is defined and whatever its form or intensity, it always involves interplay among and between both buyers and sellers. Any definition of line of commerce which ignores the buyers and focuses on what the sellers do, or theoretically can do, is not meaningful.67

The actions of the courts in the Brown Shoe case are at variance with their words with respect to the uses made of the relevant market concept. Both courts are on solid ground in examining the characteristics of competition before making any determination of the relevant market, but both courts speak as though the identification of the market came first. Speaking of the vertical aspects of the acquisition, the Supreme Court implied that the effects of the acquisition (rather than its substantiality)

65 296 F.2d 800, 807 (1961).
67 Id. at 592.
are determined after the area of effective competition is defined: "Once
the area of effective competition affected by a vertical arrangement has
been defined, an analysis must be made to determine if the effect of the
arrangement 'may be substantially to lessen competition, or to tend to
create a monopoly' in this market." And also, with respect to the
horizontal aspects, the Supreme Court's opinion states: "Thus, again, the
proper definition of market is a 'necessary predicate' to an examination
of the competition that may be affected by the horizontal aspects of the
merger."

The confusion of statement, in the presence of straightforward, incisive
performance, bespeaks an undue deference to the literal precedent of
earlier opinions. Moreover, it is not necessary to examine all relevant
markets when a substantial lessening of competition or a tendency toward
monopoly has been identified in any significant market.

**The Relevant Markets in the Brown Shoe Case**

The district court made an initial attempt to use the "conventional
approach" to the question of the relevant market, approaching an analysis
of competitive effects in merger cases by identifying one or more lines of
commerce and one or more sections of the country. The government
argued that the line of commerce was "shoes" as a class, or alternatively,
"men's," "women's," and "children's" shoes, separately considered. Brown argued that differences in grades, qualities, prices and uses of shoes
should be considered in determining separate lines of commerce based
on these classifications. After wrestling with "peculiar characteristics and

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68 370 U.S. at 328. It may be that in examining some vertical arrangements, for example
a tying contract, one proceeds from the arrangement to the area of effective competition, and
hence to considering the competitive effects; but in evaluating the economic consequences of a
merger, this sequence is inappropriate. A merger affects the entire behavior of the going
concern, and the fact of merger does not automatically designate the areas wherein competi-
tion may be affected; hence, it is the task of analysis to discover where competition may be
lessened or where a tendency toward monopoly may appear, and then, in terms of that
relevant market to determine whether these adverse competitive effects will substantially
affect a substantial market.

69 Id. at 335.

70 But if no anticompetitive effects are probable in one market, other relevant markets
must also be examined.

Because § 7 of the Clayton Act prohibits any merger which may substantially lessen com-
petition "in any line of commerce" it is necessary to examine the effects of a merger in
each such economically significant submarket to determine if there is a reasonable proba-
bility that the merger will substantially lessen competition. Id. at 325. (Emphasis added.)
uses," "distinguishing physical characteristics," "interchangeability in use," and "distinct price lines," the district court not unsurprisingly concluded that a "'line of commerce' cannot be determined by any process of logic and should be determined by the processes of observation." The court, therefore, decided to "make a determination of the 'line of commerce' from the practices in the industry, the characteristics and uses of the products, their interchangeability, price, quality and style. In other words, determine how the industry itself and how the users, the public, treat the shoe product." Turning to the practical problem of determining the relevant product line in the shoe industry, Judge Weber leaned heavily upon the notion of "reasonable interchangeability" among the various categories and classes of shoes. The reasonable interchangeability standard was introduced in the majority opinion in the du Pont-Cellophane case, wherein the Court stated:

The "market" which one must study to determine when a producer has monopoly power will vary with the part of commerce under consideration. The tests are constant. That market is composed of products that have reasonable interchangeability for the purposes for which they are produced—price, use and qualities considered.

The loose application of the principle of reasonable interchangeability by the majority of the Court, which completely ignored the evidence of the independent price behavior by du Pont in marketing cellophane, gave rise to misgivings, but subsequent references to this precedent have more generally followed the dissenting opinion of Mr. Chief Justice Warren in calling for a more rigid and critical application of this yardstick.

Judge Weber found a reasonable degree of interchangeability in the manufacturing process, but he also found that manufacturers customarily produce their men's, women's, and children's shoes in separate plants. He found a high degree of interchangeability in price, style, and quality,

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71 179 F. Supp. at 730.
72 Ibid.
74 Though conceding that "cellophane combines the desirable elements of transparency, strength, and cheapness more definitely than any of the others," the majority in du Pont-Cellophane nonetheless decided that it had sufficient interchangeability with other flexible packaging materials to make them all part of the same relevant market. Id. at 397-98, 399-400. Chief Justice Warren, dissenting, found significant differences between cellophane and other flexible packaging materials—differences in price and physical properties which were reflected in the market behavior of producers and users—and concluded that cellophane rather than flexible packaging material was the relevant market. See Id. at 414-15.
in the uses to which shoes are put by customers, and in the trade classifications employed to describe the different styles of shoes.75 The court concluded that "all 'men's shoes', regardless of quality, style, price and intended use, have sufficient peculiar characteristics and uses to make them distinguishable and a 'line of commerce.' 76 Similar conclusions were reached with respect to women's shoes and with respect to children's shoes.

Continuing his examination of the market, Judge Weber observed that "section of the country" meant "the geographic market."77 There was no disagreement between the government and the respondent that the nation was the proper geographic dimension of the market for manufacturing; but there was disagreement as to the appropriate geographic dimension of the market for retailing. Again, as with the product dimension, the district court accepted the government's contention and concluded that the appropriate geographic dimension was a "city of 10,000 or more population and its immediate and contiguous surrounding area, . . . and in which a Kinney store and a Brown (operated, franchise, or plan) store are located."78

The Supreme Court accepted the findings of the district court with respect to the "product market." The Court did not comment on Judge Weber's conclusion that a "line of commerce" could not be determined by any process of logic, but offered its own "considerations":

The outer boundaries of a product market are determined by the reasonable interchangeability of use or the cross-elasticity of demand between the product itself and substitutes for it. However, within this broad market, well-defined submarkets may exist which, in themselves, constitute product markets for antitrust purposes. . . . The boundaries of such a submarket may be determined by examining such practical indicia as industry or public recognition of the submarket as a

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75 179 F. Supp. at 731.
76 Id. at 732.
77 Ibid.
78 Id. at 735. In concluding his review of the authorities with respect to the geographic dimensions of the market, Judge Weber came back again to the practical realities of competition as a guide in determining the geographic areas of significance:

Thus a review of the cases leads this Court to the conclusion that each case must stand upon its own facts as to the determination of the area or areas of existing competition. This area must be determined by economic reality and not necessarily by political boundaries or with mathematical precision. Neither can it be determined solely from the testimony of economists.

The economist may give his review of trends and his prognosis of the future, yet, it also remains for the people in the business to tell us the actual effects, the practical results and where and whose competition they meet.

Id. at 733.
separate economic entity, the product's peculiar characteristics and uses, unique production facilities, distinct customers, distinct prices, sensitivity to price changes, and specialized vendors.\textsuperscript{79}

While the Court observed that "the outer boundaries of a product market are determined by the reasonable interchangeability of use or the cross-elasticity of demand between the product itself and substitutes for it,"\textsuperscript{80} there were no findings by either court with respect to cross-elasticity of demand or with respect to what proportion of Brown's output was in price lines that could reasonably be considered competitive with the price lines which were offered by Kinney. However, the increase in Brown's sales to Kinney, previously noted, would appear to be indicative of substantial competition, or substitutability, between shoes in the Brown line and those being retailed by Kinney. The record would appear to support quite fully the findings of Judge Weber that differences in style do not place shoes in different competitive markets.\textsuperscript{81}

Finally, in accepting these conclusions of the district court, the Supreme Court offered a practical guideline—that while "price-quality" differences may be important in determining the likely effect of a merger, where such differences exist, "the boundaries of the relevant market must be drawn with sufficient breadth to include the competing products of each of the merging companies and to recognize competition where, in fact, competition exists."\textsuperscript{82} This result is achieved with certainty only when competition draws the lines for the relevant market.

**Tests of Competitive Effects**

The application of the statutory tests of competitive effects raised no serious difficulties in Brown Shoe. The handling of economic evidence showed a sound sense of the practical, a capacity to work with available data, while still recognizing their limitations. Perhaps the most significant example afforded by the Brown Shoe case was readiness on the part of both courts to draw inferences from limited facts and to resolve doubts in favor of competition. But there are also some grounds for misgivings—in the questions raised about "purpose," in the discussion of "small business" and "local control" among the tests of competitive effects, and in the observations about "mitigating circumstances."

\textsuperscript{79} 370 U.S. at 325.
\textsuperscript{80} Ibid.
\textsuperscript{81} 179 F. Supp. at 731-32.
\textsuperscript{82} 370 U.S. at 326.
The Competitive Effects of Mergers

The Clayton Act, in amended section 7, prohibits acquisitions or mergers where the effect "may be substantially to lessen competition, or tend to create a monopoly." The prospective orientation of the statutory standards, signified by the words "may be," indicates that the enforcement agency must be largely concerned with long-term consequences in judging the legality of an acquisition or merger. The purpose of the antimerger law is to preserve an effectively competitive economy, and the two statutory tests are intended to catch in its incipiency any merger development which threatens that competitive economy.

The effective enforcement of the antimerger law requires that a distinction be made between those forms of business rivalry which are inconsistent with or irrelevant to, and those essential to the maintenance of a sound competitive economy. Virtually every acquisition or merger presumably results in a greater competitive potential for the acquiring company and very often in greater competitive pressures on other firms in the industry; an acquisition or merger may thus be expected to increase the intensity of competition. But what is required, if competition is to be maintained, is that competitive discipline shall continue to be exerted on all members of an industry or market in such a way as to encourage genuine efficiency and progress, the maintenance or improvement in the quality of products and services, and an adjustment of prices to reflect efficient competitive costs. Competition which does not work to produce these consequences is not the kind of competition which the antimerger law seeks to preserve.

There are no simple litmus-paper tests which will serve to identify those acquisitions or mergers which may be expected to have anticompetitive results. There can be no substitute for a market analysis which develops an understanding of the patterns of competition in the relevant industries and markets and of how competition may be altered by the structural changes produced by the acquisition or merger. The market analysis may proceed on three levels: structure, competitive behavior, and company or industry performance. The first two are essential to a determination of the prospective competitive effects. The performance features of the company or industry, though often stressed in merger cases, can normally provide little assistance in evaluating the competitive consequences of an acquisition.

Market analysis commonly gives much emphasis to structural facts, both because it is to be expected that business firms will generally be responsive to the logic of their market positions, pursuing practices which
1963] THE PRIMACY OF COMPETITION 735

are calculated to be profitable in the market circumstances in which the business operates, and also because market structure can normally be examined more readily and more objectively than other types of economic evidence. Market structure data usually involve the consideration of concentration ratios, market-share figures, size-ranking data, the ease or difficulty of entry by new competitors, the productive technologies employed, and similar factors. Market structure evidence must always be interpreted in the light of the competitive practices of the industry or market; there are no linear relations between changes in market structure and changing patterns of competition.

In examining patterns of competition, attention focuses on the different competitive strategies and tactics which are employed by companies differently situated in the industry and on the conditions which make for success or failure for firms of different size. The issue respecting competitive behavior is whether conditions in the industry provide encouragement for the pursuit of those competitive strategies and the use of those competitive tactics which are consistent with the maintenance of a sound competitive economy.

A substantial lessening of competition may arise either from a reduction in competitive opportunities or a reduction in the incentives to compete. A change in the opportunities or incentives to compete may be found with respect to the parties to the acquisition or with respect to their competitors, their suppliers, or their customers. A satisfactory market analysis must show which firms in an industry may be expected to suffer a loss in competitive opportunities or incentives and quite specifically why competitive opportunities or incentives will be impaired with respect to these competitors. Such a finding requires an understanding of the organization and operation of the relevant industries and markets and of how established patterns of competition may change in response to the instant acquisition or merger.83

The competition which the antitrust laws seek to preserve is that competition which creates incentives and opportunities for buyers and sellers to deal freely with one another, which achieves an allocation of resources among competing uses so as to maximize the outputs of goods and services in relation to inputs of materials and labor, which compels businessmen to seek constantly for improvements in products, reductions in costs, and the development of improved technologies, and which requires sellers to

keep their prices in reasonable adjustment to efficient, competitive costs, and which permits buyers to choose competently among rival sellers.84

The secondary statutory test, a tendency toward monopoly, requires a reconciliation between the formal concept of monopoly, as a market state wherein a single seller controls the entire offering of a good or service, and the legal concept of monopoly, as the power to exclude competition or to exercise a substantial degree of control over price. Mr. Chief Justice Warren, speaking in dissent in the Cellophane case, identified monopoly with power over price:

A monopoly seeking to maximize profits cannot raise prices "arbitrarily." Higher prices of course mean smaller sales, but they also mean higher per-unit profit. Lower prices will increase sales but reduce per-unit profit. Within these limits a monopolist has a considerable degree of latitude in determining which course to pursue in attempting to maximize profits. . . . It is this latitude with respect to price, this broad power of choice, that the antitrust laws forbid.85

A tendency toward monopoly exists whenever one competitor, or a few competitors, are able, by reason of size or other advantage, to adopt competitive tactics which cannot be matched by their rivals and thus to attain that competitive immunity which foreshadows the early demise of effective competition. Thus, it is possible to have a tendency toward monopoly or monopolistic behavior set in quite early in the concentration history of an industry, while scores of small competitors are still engaged in lively competition.86

Anticompetitive Effects in Shoe Manufacturing

In finding the Brown-Kinney acquisition a violation of section 7 of the Clayton Act, no sharp distinction between a substantial lessening of competition and a tendency toward monopoly was made, by either the district court or the Supreme Court. The primary anticompetitive effects on the relations between manufacturers and retailers and in the elimination of competition between the Brown retail outlets and the Kinney chain were found to have secondary adverse effects upon competition in manufacturing and in retailing. The further integration of a leading manufacturer with retail outlets and the elimination of competition between two

large systems of retail stores were the bases for holding the acquisition illegal. The district court's holding emphasized the vertical effects of the Kinney acquisition:

[While the acquisition of the manufacturing facilities of Kinney by Brown, would but slightly lessen competition or tend to create a monopoly when considered alone, the combination of the manufacturing-retailing facilities of Brown and Kinney would substantially lessen competition and tend to create a monopoly in the manufacturing of "men's", "women's" and "children's" shoes, considered separately, throughout the United States as a whole.\(^{87}\)

The principal adverse effects in manufacturing were associated with the integration of Brown as a large shoe manufacturer with Kinney, the largest retail family shoe chain. This adverse effect was evaluated against a trend in the industry for large shoe manufacturers to acquire retail outlets and to preempt the supplying of shoes to their controlled outlets.\(^{88}\)

The evidence with respect to Brown's relations to its controlled retail outlets established not only that acquisitions of control were followed by substantial increases in the sales of Brown shoes to these outlets but also by a sharp decrease in sales to these controlled outlets by independent manufacturers.\(^{89}\)

\(^{87}\) 179 F. Supp. at 741. There appears to be some imperfection in the reasoning with respect to the effect of joining Kinney's four shoe factories to Brown's manufacturing facilities. The lower court first observed that this "might only slightly affect commerce on a nationwide scale (5% to 5.5%)." Id. at 739. But then in its summation the court stated:

It is this Court's conclusion that the merger of Brown and Kinney would increase concentration in the shoe industry, both in manufacturing and retailing. The fourth manufacturer would become the third; the top four companies would control 23% of the production market and Kinney and Brown would have one-fifth of that . . . .

Id. at 741. It may be noted that the court referred to the effect of the acquisition on competition in shoe retailing in cities wherein a Brown and a Kinney store are operated. Id. at 739. However, the competitive effects arising from the advantages of the integrated operations might be expected in any community wherein either a Brown or a Kinney store was operated.

It may also be noted that in discussing the effects of combining the market shares of Brown stores with Kinney stores there were two instances in which the smaller market share was 0.5% or less and eight instances in which the smaller market share was less than 1.0%. 370 U.S. at 347-53. Considering the greater ease of entry in retailing as compared with manufacturing, a smaller market share would appear to have greater significance in manufacturing than in retailing.

\(^{88}\) 179 F. Supp. at 737-38. Judge Weber followed this emphasis on the dual trend associated with forward integration by shoe manufacturers with statistics on the decrease in the number of plants manufacturing shoes. It is difficult to judge what, if any, weight should be accorded these developments since there is no indication whether the decrease in the number of shoe factories was a result of changes in technology, changes in the organization of production operations by existing firms, or the elimination of independent firms as a result of inability to meet the competition of larger rivals.

\(^{89}\) Id. at 738-39.
The competitive advantages of the combined manufacturer-retailer shoe operations, by securing a larger share of the retail market for the integrated firms, were also noted as a development that could be expected to create a tendency towards monopoly and a lessening of competition as independent shoe manufacturers found their opportunities to sell curtailed, not only with respect to the integrated outlets, but also with respect to independent retailers suffering a loss in their market positions. Thus, the district court found adverse effects on manufacturing arising both from the foreclosure of the controlled retail outlets to sales by independent manufacturers, and also in the shrinking opportunities of independent retailers which would also adversely affect sales of independent manufacturers.

The Supreme Court's opinion attached much importance to the exclusion of independent manufacturers from retail markets which they would otherwise have found open to their competition. The Court held that the trend toward vertical integration was well substantiated and the tendency for manufacturers to become increasingly important sources of supply to their controlled outlets was well established. The opinion noted that these trends were "the result of deliberate policies of Brown and other leading shoe manufacturers," and rejected the Brown argument that a large number of manufacturers and retailers provided a dynamically competitive industry.

However, the Supreme Court's discussion of the impact of the acquisition upon manufacturing introduced additional considerations which are bound to interject uncertainty and confusion into the consideration of merger cases. The Court thought it necessary to examine "various

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90 Id. at 739.
91 Mr. Justice Harlan, concurring on the merits, would have rested the decision wholly on the prospective foreclosure of a significant market to independent shoe manufacturers. With respect to the argument that, since Kinney was making only 1.2% of the total retail sales, the foreclosure could not be considered substantial, Mr. Justice Harlan made the important observation that if substantiality is measured in terms of the importance of the Kinney market to independent shoe manufacturers, the foreclosure must be judged to be substantially larger. 370 U.S. at 371-72, 373.
92 Id. at 332-33. The Court remarked further "remaining vigor cannot immunize a merger if the trend in that industry is toward oligopoly. . . . It is the probable effect of the merger upon the future as well as the present which the Clayton Act commands the courts and the commission to examine." Id. at 333. Thus, it was "the trend toward vertical integration in the shoe industry, when combined with Brown's avowed policy of forcing its own shoes upon its retail subsidiaries" that caused the Court to reach the conclusion that the acquisition tended to foreclose competition from a substantial share of the relevant markets. Id. at 334.
economic and historical factors” 83 in determining whether the acquisition in question came within section 7 of the Clayton Act:

A most important such factor to examine is the very nature and purpose of the arrangement. Congress not only indicated that “the tests of illegality ... are intended to be similar ... but also chose for § 7 language virtually identical to that of § 3 of the Clayton Act ... which had been interpreted by this Court to require an examination of the interdependence of the market shares foreclosed by, and the economic purpose of, the vertical arrangement.94

The Court thereupon noted that vertical arrangements may take the form of limited term exclusive-dealing contracts or of tying contracts. It noted that tying contracts are inherently anticompetitive and can rarely be harmonized with the antitrust laws. On the other hand it observed that requirements contracts may be used by customers to assure supplies or by small suppliers to assure a market. In this instance, however, the vertical arrangement was thought to produce a foreclosure “quite analogous to one involving a tying contract.”95

While an acquisition has greater permanence than either a requirements contract or a tying contract, it is not clear how this analogy helps to support the determination in this case. Furthermore, section 7 has not normally been viewed as intending to proscribe a “type” of acquisition, but rather to proscribe quite comprehensively all acquisitions having substantially adverse competitive effects. And while “avowed purpose” may help by identifying the competitive effects intended by the proponents of the acquisition, intentions and purposes, even when anticompetitive, are not enough to condemn an acquisition under a statute which makes prospective effects the test of illegality.

The courts have previously been fairly explicit in rejecting good intentions as a justification for a merger having adverse competitive effects. Thus, in the du Pont-General Motors decision, the Court stated:

Similarly, the fact that all concerned in high executive posts in both companies acted honorably and fairly, each in the honest conviction that his actions were in the best interests of his own company and without any design to overreach anyone, including du Pont’s competitors, does not defeat the Government’s right to relief. It is not requisite to the proof of a violation of § 7 to show that restraint or monopoly was intended.96

83 Id. at 329.
84 Ibid.
85 Id. at 332.
Another consideration introduced in the Court's opinion seems to represent a departure from the direct, objective tests of section 7. In concluding its discussion of the impact of the acquisition upon manufacturing, the Court observed "but also we must consider its probable effects upon the economic way of life sought to be preserved by Congress. Congress was desirous of preventing the formation of further oligopolies with their attendant adverse effects upon local control of industry and upon small business."

However, is the economic way of life which the Congress sought to preserve anything other than a healthy, competitive economy? What objective criteria are available to apply standards such as "local control of industry," and "small business"? In a dynamic and progressive economy oriented to growth, forms of business organization and scales of productive operation may become obsolete just as products, machines, and manufacturing technologies become obsolete. In an economy the size of the American economy there is little prospect that technological considerations and efficiency in the use of resources will require such large scale operations as to preclude the maintenance of healthy competition. There is little likelihood that the United States will have to choose between the economic values and the political and social values served by a competitive economy. Since this appears to be so, it is both needless and unfortunate to introduce noneconomic and nonobjective criteria for determining whether the competitive economy is, or is not, being preserved. One may thus agree with Judge Weber's rejection of rationalizations offered in defense of acquisitions—that acquisitions are necessary to preserve incentives, to enable small firms to compete with larger firms and to achieve growth (the growth that is important is the growth of the economy rather than the growth of each individual firm)—since all appropriate objectives can be attained while adhering to the statutory tests.

1958: "If the merger offends the statute in any relevant market then good motives and even demonstrable benefits are irrelevant and afford no defense."

97 370 U.S. at 333. See also id. at 316 & n. 28.

98 Mr. Justice Clark, concurring, would have rested the decision simply on the effect of the acquisition in excluding small shoe manufacturers from access to the Kinney market. Id. at 355-56.

99 Regardless of our economic or other philosophy; regardless of our ideas or thoughts about how good or how bad "bigness" or "control" may be; regardless of how necessary it may be for the smaller to grow bigger and the bigger to better compete with the biggest; regardless of all of these—the Congress has, down through the years, definitely tightened the screws upon acquisitions . . . where, as now ultimately defined, competition is substantially lessened, tendency toward monopoly is created, either or both.

179 F. Supp. at 740-41.
of "a substantial lessening of competition" or "a tendency toward monopoly."

Adverse Competitive Effects in Retailing

The district court found that the acquisition "would substantially lessen competition and tend to create a monopoly in manufacturing-retailing and in retailing alone . . . in every city of 10,000 . . . in which a Kinney store and a Brown (operated, franchise, or plan) store are located."\(^{100}\) This tendency was ascribed (1) to the elimination of competition between Brown stores and Kinney stores and (2) to the fact that the integrated operations would possess important competitive advantages (a) in buying and credit, (b) in advertising, insurance, inventory control, and price control, (c) in larger sales and in price and profit advantages, (d) in meeting style trends, and (e) in forcing independent retailers, no longer able to compete in the low price fields, to concentrate on the higher quality shoes with consequent smaller sales volumes.\(^{101}\)

There is a basic difficulty in dealing with economic evidence of the type adverted to by the district court. The whole thrust of effective competition is to seek advantages over competitors. These advantages may be either efficiency or strategic advantages, the latter being advantages such as are associated with size rather than with superior efficiency. The ultimate objective of a competitive economy is to assure that efficiency shall be encouraged, even though this may mean the elimination of particular competitors; but it is equally essential to the public interest that efficient firms not be eliminated simply by their inability to match strategic advantages associated with greater size and greater financial resources. The distinction is a difficult one, even more difficult in the practical decisions of law enforcement than in the conceptual exercises of economics. But the distinction is important, and until economists are able accurately to distinguish between strategic advantages and efficiency advantages, and the law is able to favor the one and suppress the other, the antitrust laws will not be administered so as to make a maximum contribution to the maintenance of an effectively competitive economy.

The anticompetitive effects in retailing were limited, so far as the findings of the two courts are concerned, to the elimination of competition between Kinney and Brown stores. The record here leaves the economist with some uncertainties. The finding that any Brown store was competitive with any Kinney store rested legally upon the definition of the

\(^{100}\) Id. at 741.

\(^{101}\) Id. at 738-40.
"line of commerce" as including men's shoes generally, women's shoes generally, and children's shoes generally. But while closely related price lines were, quite reasonably, declared to be competitive, widely separated price lines might not be competitive; hence there arises the question whether, in fact, every Brown store was competitive with every Kinney store. Similarly, the real significance of competition between Brown and Kinney stores could be more doubtful when one or the other accounted for a very insignificant percentage of the local market.

The 118 separate cities for which market shares were listed, because the cities had both Brown and Kinney stores, included cities where the combined market shares were five percent or more.\(^\text{102}\) The Supreme Court accepted the significance of the five percent control on the ground that in an industry which is not concentrated, a small market share has greater significance than in a concentrated industry, and that this may be particularly true where the share in question is controlled by a large national chain, having advantages associated with geographical dispersion and vertical integration with a large manufacturer.\(^\text{103}\) But in noting that the acquisition would place independent retailers at a competitive disadvantage, the Court added:

Their expansion is not rendered unlawful by the mere fact that small independent stores may be adversely affected. It is competition, not competitors, which the Act protects. But we cannot fail to recognize Congress' desire to promote competition through the protection of viable, small, locally owned businesses. Congress appreciated that occasional higher costs and prices might result from the maintenance of fragmented industries and markets. It resolved these competing considerations in favor of decentralization. We must give effect to that decision.\(^\text{104}\)

Again, the question must be raised whether Congress established the standard of a competitive economy or whether it made "small, locally owned businesses" and "decentralization" independent tests. It is clear that the primary standard must be the maintenance of a competitive economy, and that one advantage ascribed to a competitive economy is the preservation of opportunities for small, locally owned businesses to survive. This is quite different from making "locally owned business" a

\(^\text{102}\) 370 U.S. at 341-43.

\(^\text{103}\) Moreover, the Court noted that to approve a merger achieving 5% control might establish a precedent requiring the approval of future mergers by Brown's competitors seeking similar market shares. Id. at 343-44. The Court was also influenced by the tendency toward concentration which it found in the industry and by the necessity of dealing with such concentration in its incipiency. Id. at 345-346.

\(^\text{104}\) Id. at 344.
co-equal standard with "a substantial lessening of competition" and "a tendency toward monopoly" in the enforcement of the act.106

The Manufacturer-Retailer Integration

The manufacturer-retailer relation growing out of the forward vertical integration of shoe manufacturers into retailing received much emphasis in the opinions of both the district court and the Supreme Court. This relationship was the principal basis for finding adverse effects in manufacturing and also in retailing. It is surprising, therefore, that there was no recognition of the manufacturer-retailer relationship as a direct impairment of competition; for in any vertical integration, the disappearance of arm’s length bargaining between the supplier and its customer may represent a loss of competition. It is in the bargaining of buyer and seller, in the effort of sellers to get the best possible price and the largest achievable volume, and in the effort of buyers to purchase their requirements at the best (lowest) possible price, that all of the forces of competition are brought into focus. In a very vital sense, the transaction between buyer and seller is the nexus of competition; all the alternative bargains open to the buyer or the seller are simply potential competition in comparison with the reality of the direct buyer-seller relationship.

In any acquisition or merger between suppliers and customers there is, therefore, always a cancelling out of competition, and this cancelling out of competition may, or may not, represent a substantial loss of competition; perhaps a more important loss of competition than the foreclosure of other sellers and other buyers from access to the business previously represented by the parties to the merger.106 Competition may suffer substantially when the unintegrated segment of the industry contracts to a

106 Mr. Justice Harlan, concurring on the merits, also found that the acquisition would have adverse effects upon competition in retailing, arising from the competitive advantages which the Kinney chain would enjoy over independent retailers, by reason of its ability to operate on lower profit margins and possibly by excluding such retailers from dealing in Brown shoes, “since these might be offered at lower prices in Kinney stores than elsewhere.” Id. at 372-73.

106 Barnes, Competitive Mores and Legal Tests in Merger Cases: the du Pont-General Motors Decision, 46 Georgetown L. J. 564, 584 (1958). The Supreme Court did not comment on the competitive significance of the supplier-customer relation in the du Pont-General Motors case. See United States v. E.I. du Pont de Nemours & Co., 353 U.S. 586, 590-91 (1957). However, in United States v. Bethlehem Steel Corp., 168 F. Supp. 576, 592 (S.D.N.Y. 1958), Judge Weinfeld emphasized that “competitive forces may move in a number of directions—buyer against buyer; seller against seller; buyer against seller. But however competition is defined and whatever its form or intensity, it always involves interplay among and between both buyers and sellers.”
degree where it is no longer possible for the unintegrated firms to impose the discipline of effective competition on the vertically integrated firms—unless at that stage in the industry's development there is fully effective competition between the integrated firms.

CONCLUSION

The Quantum of Economic Evidence

The courts demonstrated a sense of the practical in their handling of economic evidence in the Brown Shoe case. The evidence considered was divided almost equally between evidence with respect to the structure of the shoe industry and the patterns of competitive behavior. Quite appropriately, little attention was paid to the performances of the firms or of the industry.\(^{107}\)

In most merger cases it will be true, as Mr. Chief Justice Warren observed in Brown Shoe, that "precision in detail is much less important than the accuracy of the broad picture presented."\(^{108}\) And the trial of merger cases may be expedited if the primary tribunals accept the Court's advice that "there is no reason to protract already complex antitrust litigation by detailed analyses of peripheral economic facts, if the basic issues of the case may be determined through study of a fair sample."\(^{109}\) The fair sample here referred to was the testimony of witnesses from a limited number of cities as to the patterns of competition which might be expected to prevail in cities where Brown and Kinney were competitive.

The Brown Shoe decisions provide some helpful guidelines with respect to the evaluation of economic evidence. Thus, significant insights may be derived from considering the uses made of economic evidence in relation to market-share measures of substantiality, the significance of relative size, the relation of size to market position, the interpretation of trends, and the quantum of competition remaining in a market. The district court and the Supreme Court were in agreement in holding that little significance can be attached to market share figures as such. This position was

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\(^{107}\) Where competition is the test, and where competition has been impaired, there is nothing in the history of the company or the industry which will show what might reasonably have been achieved had both company and industry been under the full discipline of competition.

\(^{108}\) 370 U.S. at 342, n. 68.

\(^{109}\) Id. at 341. The sense of the practical with respect to economic evidence was also shown in the Court's willingness to use men's, women's, and children's shoes as the product dimensions of the relevant market, and in the willingness to accept available statistics with respect to shoe sales on the basis of cities in lieu of data for cities and their environs, which were not available. Id. at 341-42.
virtually forced upon the courts by the very low market shares held by Brown and Kinney.110

The Supreme Court was explicit, both as a matter of principle and in considering the facts of the case, in according limited significance to market share figures. On the basis of an examination of the legislative history, the Court declared that Congress had provided no definite, quantitative test. It did, however, note that:

Statistics reflecting the shares of the market controlled by the industry leaders and the parties to the merger are, of course, the primary index of market power; but only a further examination of the particular market—its structure, history and probable future—can provide the appropriate setting for judging the probable anticompetitive effect of the merger.111

In commenting on the foreclosure of the Kinney market as a result of the acquisition, the Court said that in judging the competitive effect "the size of the share of the market foreclosed" is important, but immediately added, "this factor will seldom be determinative."112 Again, when examining the effects of the merger on shoe retailing, the Court, after noting the market shares, went on to judge the significance of those market shares where the industry was "fragmented," where independent retailers had testified to their disadvantage in competing with national chains, and where the respondent's national chain was integrated with a shoe manu-

110 These figures were so unimpressive that resort was had to quantities rather than percentages, 179 F. Supp. at 727. Judge Weber, confronted with seemingly insignificant market share figures, sought to set these figures in a proper perspective:

[W]e are not so much concerned with percentages, as such, but with what these percentages mean in examination under the light of the facts of the case and the economic realities involved. What difference can it make that Brown has only 5% of the shoe production and Kinney 0.5%, when Brown is the fourth largest firm in the United States and Kinney with only 1.2% of all retail shoe sales is the largest family shoe chain retailer. Their combination moves Brown to third place in the industry. Does it then make sense to say that this is imperceptible because the percentages are small? Or rather, doesn't it make sense to say, that regardless of percentages or size, the test is, what do the facts show as to the trends in the industry and the true economic impact of this particular merger, which takes place among an industry having a few large firms that control a sizeable segment of the total with the balance among hundreds of others having only minute segments?

Id. at 737.

111 370 U.S. at 322 n.38.

112 [I]n cases such as the one before us, in which the foreclosure is neither of monopoly nor de minimus proportions, the percentage of the market foreclosed by the vertical arrangement cannot itself be decisive. In such cases, it becomes necessary to undertake an examination of various economic and historical factors in order to determine whether the arrangement under review is the type Congress sought to proscribe.

Id. at 328-329.
facturer. In these circumstances, the Court accepted a five-per cent market share of retail trade in a number of cities as representing a significant proportion of the market.\footnote{113}

The Court's handling of quantitative material relating to market structure, including market share figures, is helpful in that it recognizes that market structure, and changes in market structure, can be understood only in the light of the patterns of competition prevailing in an industry or market. No conclusions can be drawn directly from market share data, however satisfactory and reliable such data may appear to be. But market structure data, in association with an understanding of the patterns of competition prevailing in an industry, do provide a sound basis for determining the prospective economic consequences of a merger.\footnote{114}

The issue of substantiality, its measurement and evaluation, is closely related to the question of market shares. While Mr. Justice Harlan, concurring on the merits, expressed a reservation as to whether the so-called doctrine of "quantitative substantiality" applies under section 7 of the Clayton Act,\footnote{115} the majority opinion was quite explicit in stating that Congress, in discussing the kinds of evidence that might show a lessening of competition or a tendency toward monopoly, had quite consciously avoided exclusive mathematical tests.\footnote{116}

\textit{Ancillary Tests}

The administration of the antimerger law cannot be made more effective by developing ancillary tests or by elaborating symptoms, without recognizing that it is the underlying condition—a substantial lessening of competition or a tendency toward monopoly—which is the constant benchmark of illegality. The particular manifestations in terms of which these adverse competitive effects are shown are important, but they cannot be converted into per se equivalents of the statutory standards. Examples offered in committee reports\footnote{117} should be recognized for what they are—illustrative examples and not independent tests.

\footnotesize\begin{itemize}
\item \footnote{113} See Id. at 343-44.
\item \footnote{114} Barnes, Legal Issues and Economic Evidence in Cartel Law, supra note 82, at 846, 848-52.
\item \footnote{115} See 370 U.S. at 471-72.
\item \footnote{116} Id. at 321, citing H.R. Rep. No. 1191, 81st Cong., 1st Sess. 8 (1950), and S. Rep. No. 1775, 81st Cong., 2d Sess. 21 (1951).
\item \footnote{117} [E]limination in whole or material part of the competitive activity of an enterprise which has been a substantial factor in competition, increase in the relative size of the enterprise making the acquisition to such a point that its advantage over its competitors threatens to be decisive, undue reduction in the number of competing enterprises, or es-
Discussions of "power," or "market power," which have become commonplace in the literature of big business and concentration, have the potentiality of adding confusion to the administration of section 7. There are many kinds of economic power which may be relevant to the enforcement of the antimerger act, but in each instance it is necessary to specify precisely the nature of the power and how it may work to produce anticompetitive effects. For example, power may refer to the immunity of a company from competitive pressure; or it may signify the capacity of a firm to adopt competitive strategies which cannot be met by its rivals; or it may mean a capacity to engage in discriminatory competition to the fatal disadvantage of firms with lesser resources or without the insurance provided by income from alternative markets. All of these are highly significant factors to be considered in evaluating the future of competition, but no useful purpose is served by correlating "power" generally and amorphously with size or market position.118

Are the benefits accruing from a merger to be weighed against a substantial lessening of competition or a tendency toward monopoly? Can a finding of public benefits associated with a merger suffice to justify that merger even though it may result in a substantial lessening of competition or a tendency toward monopoly? The answer to both these questions has been presumed to be in the negative, but in the Brown Shoe decision, the Supreme Court casts doubt on this negative answer.

Thus, in concluding the discussion of the vertical aspects of Brown's acquisition of Kinney, the Court's opinion notes that this may foreclose competition "without producing any countervailing competitive, economic, or social advantages."119 And in concluding the discussion of the adverse establishment of relationships between buyers and sellers which deprive their rivals of a fair opportunity to compete.

H.R. Rep. No. 1191, supra note 115, at 8. These are not useable and dependable standards for enforcing the antimerger law. There are no simple, invariable relations between these factors and prospective competitive developments; as with other evidence, they must be evaluated in relation to the competitive realities of the market.

118 It is self-evident, however, that Congress has recognized that the final result of increased power can and will result to the detriment of the public....

If the manufacturers such as Brown, sell at wholesale prices in the area of effective competition, their product (through all types of outlets) must of necessity reach the retail market of that area. Their company-owned and controlled retail stores have a percentage of that market and a combination of their business increases that percentage. Such increase, regardless of percentage amount, gives them power. Such power not only tends to create a monopoly, but substantially lessens competition by eliminating the effectiveness of the independent retailer and the smaller manufacturer.

179 F. Supp. at 740.

119 370 U.S. at 334.
effects associated with the elimination of competition between Brown outlets and the Kinney outlets, the Court’s opinion observed that,

appellant has presented no mitigating factors, such as a business failure or the inadequate resources of one of the parties that may have prevented it from maintaining its competitive position, nor demonstrated need for combination to enable small companies to enter into a more meaningful competition with those dominating the relevant markets.\textsuperscript{120}

Here is certainly a most generous invitation to respondents in merger cases to expand the economic analysis of the market to show a variety of “mitigating circumstances.” This invitation seems to be potential with large mischief for the effective enforcement of amended section 7. If section 7 cases are not to be turned into “economic extravaganzas,” it is imperative that the Supreme Court affirm at an early date the sufficiency of the statutory tests to establish the legality or the illegality of a merger.

\textsuperscript{120} Id. at 346.
UNIONIZATION AND PROFESSIONAL SPORTS

ERWIN G. KRASNOW* AND HERMAN M. LEVY**

Examining the current problems which the professional athlete faces in bargaining with his employers, the authors emphasize the inherent weakness of the players’ bargaining position as contrasted with the power given their employers by owner-control devices such as the reserve clause and the player draft. Messrs. Krasnow and Levy analyze the defects in the present independent player associations and conclude by pointing out the benefits which could be gained by affiliation with large labor unions, as well as the problems which large scale unionization would present.

INTRODUCTION

Professional sports have grown to be an integral part of the history, folklore, and habits of the American people. The “star” athletes are publicized, glamorized, and eulogized. In spite of the fact that the professional athlete earns his livelihood by participating in sports, the public tends to disassociate him from the economic and business aspects of the sports industry. The world of sports is looked upon in a romantic manner as a world of entertainment, separate and unique in itself. No other business enterprise receives so much attention from radio, television, newspapers, and magazines. However, the economic aspects of sports as a commercial unit in the entertainment industry seem to be studiously neglected by the sports commentators. In the process of building images of “folk heroes,” the sportswriters have failed to give proper coverage to the professional athlete’s status and working conditions as an “employee.”

A flurry of interest in the conditions of employment of the professional athlete arose in 1946 when the American Baseball Guild attempted to unionize the Pittsburgh Pirates. The press began to examine the labor problems of the athlete as related to the need for a union. Since then, the only attention paid to the problems of the athlete as a wage earner has been offered as sidelines in commentaries on the question of professional sports and the antitrust laws.1

In spite of the skepticism of the commentators, a great deal of “un-

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1 E.g., Topkis, Monopoly in Professional Sports, 58 Yale L.J. 691 (1948); Note, 32 Va. L Rev. 1164 (1946).
publicized” unionization has taken place in professional sports in the past ten years. In hockey, basketball, football, and a portion of minor league baseball, athletes have formed players’ associations. These labor organizations do not represent aberrational movements. Spokesmen for such a powerful union as the International Brotherhood of Teamsters have recently expressed a serious interest in conducting a major organizational drive in the professional sports industry.

This article will attempt to answer the following questions: What are the economic features of the sports industry which make it sui generis? How does the unique organization and rules of the industry affect the professional athlete? Compared to other workers, is the professional athlete exploited by management? Does the present employment situation of the professional athlete demonstrate a need for collective bargaining? What are the possible solutions to the labor problems of the individual and the team athlete? What is the type of organization or system best suited to meet the needs of the professional athlete as an employee? If unionization is feasible, are the legal problems insurmountable?

**Sports as an Industry**

To the average fan, professional sports are “sports” first, businesses later, if indeed he thinks of the business aspect at all. Owners and executives in professional sports do not want to convey the image of sports as a business enterprise and every effort is made to add to the public impression of sports as the great American pastime, the exemplar of fair play, and the builder of character. Nevertheless, although investors and

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2 The difficulty of the public in depicting sports as a business reflects one of the unique features of the sports industry—investment and participation in professional sports are not governed solely by the profit motive.

3 Many owners and executives in both individual and team sports look upon their efforts and investments as a diverting, and sometimes costly, hobby. The reward they seek is a type of “psychic income”—“pennants, pleasures, and prestige.” Comment, Monopsony in Manpower: Organized Baseball Meets the Antitrust Laws, 62 Yale L.J. 576, 580 (1953).

4 The remarks of George Trautman, president of the National Association of Professional Baseball Leagues, are typical of this conscious effort to promote sports in this light:

Baseball is a game which is a precious possession of the American people. One which belonged no more to those of us in the professional field than to the millions of loyal fans, old and young. We in [organized] baseball must and do accept the obligation to jealously guard the game, its spirit, its mighty contribution to succeeding generations of our youth, as clean recreation, as a teacher of fair play, and as an example of fair, yet earnest competition.

executives in professional sports may not regard the profit motive as paramount, professional sports are still businesses.5

Strictly defined, sport means participation in some kind of physical activity for its own sake—for the sheer pleasure and recreation one gets from it.6 Amateur and college sports may fit this definition but professional sports do not. Professional sports represent a confederation of businesses dependent upon one another for existence but militantly independent in their operations.7 The difference between professional sports and other industries in the entertainment business, such as motion pictures, lies in the fact that the former needs a competitor to even put on its show, whereas the latter can perform on its own with no cooperation from its competitors. As a rule, other industries do not face the problem of this dual relationship.8

Due to the need for evenly matched competition among contestants and cooperation among competitors, professional sports have evolved a complex set of rules and standards that are the means by which the owners

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5 Professor Simon Rottenberg, Professor of Economics at the University of Chicago, contends that even as to the owners who claim a “sporting” interest as their dominant motivation, their concern with profitability is much stronger than most of them would be willing to admit. These owners may be prepared to take a smaller return from their sports’ operations than their capital might earn in some other use but they are really not prepared to take a loss. Professor Rottenberg believes that with the average baseball property worth five million dollars and some as much as fifteen million, “it seems unlikely that people will subject capital of this magnitude to large risk of loss for the pure joy of association with the game.” Seymour, Baseball, The Early Years 104 (1960).

7 Unlike employers in other enterprises, a professional sports enterprise must cooperate with chosen competitors to create a marketable product. The product is an exhibition between two clubs or individuals, preferably evenly matched, with the outcome in doubt. The independently owned clubs in the team sports and the managers in the individual sports compete to better one another on the “playing field,” and compete for the vital factor in the production of athletic contests: the professional athlete. Yet they must cooperate in setting up schedules and in regulating competition.

8 The nature of the sports industry is such that equality among contestants provides the drama and uncertainty which determines the attractiveness of the exhibition or product to the fans, and thus ultimately the income of the teams and/or the individuals. The court in United States v. National Football League, 116 F. Supp. 319, 323 (E.D. Pa. 1953), compared this aspect of sports with other businesses:

The ordinary business makes every effort to sell as much of its product or services as it can. . . . The ordinary businessman is not troubled by the knowledge that he is doing so well that his competitors are being driven out of business. . . . [I]t is unwise for all the teams to compete as hard as they can against each other in a business way. . . . If this should happen not only would the weaker teams fail, but eventually the whole league, both the weaker and the stronger teams, would fail, because without a league no team can operate profitably.
maintain control over their problems within the structural framework of the sport.\textsuperscript{9} The complexity of the rules and documents of sports is most evident in regard to the market for athletes and their services. This is very obvious in baseball where the structure and rules of the "market" for baseball players and their services are defined in seven lengthy documents which comprise the constitutional papers of the baseball industry.\textsuperscript{10} The other professional team sports are primarily patterned after baseball, their largest peer.

Through this system of agreements, investors in professional sports have provided the machinery for the self-regulation of their business. It has been used to protect the market (the area from which spectators are drawn) by preventing other clubs or individuals from exhibiting contests in the territory assigned to a member club or to an individual contest. What is more important, the investors in team sports have used this machinery to promulgate rules which eliminate almost all competition for player services. The peculiar nature of some of these private laws and the effectiveness of the enforcement machinery—which may deprive an individual of his right to seek employment in his profession or to engage in a business of his choice—set organized sports apart from other forms of professional or business activity.

The tightly knit organization established by the owners in professional team sports has made possible the enforcement of reserve and draft rules. These rules provide that no club may hire a player unless he signs a uniform contract. The contract contains a renewal clause, popularly known as the reserve clause, which empowers the club unilaterally to renew the contract for the following year if the club and the player fail to come to terms. Since the renewed contract contains all the provisions of the original, including the renewal clause, once a player has signed with a club, the club has a perpetual option on his services. The reserve clause is used in baseball, basketball, and hockey. The National Football League abolished its reserve clause in 1948 and substituted one-year contracts with a one-year option for renewal at the same salary, leaving the player

\textsuperscript{9} Only the skeleton of the market rules of the sports industry will be described in this article. Their full texts and exceptions can be found in the constitutional documents themselves.

\textsuperscript{10} These documents are the Constitution of the National League of Professional Baseball Clubs, the Major League Agreement, the Major League Rules, the Major-Minor League Agreement, the Constitution of the American League of Professional Baseball Clubs, the Major-Minor League Rules and the Agreement of the National Association of Professional Baseball Leagues.
Unionization and Professional Sports

1963] 753

technically free to sign with any club at the end of two years. Due to the short playing life of the football player, very few players have taken advantage of this clause. In all team sports, the contract signed by each athlete contains a clause under which he agrees to accept and abide by the rules of the organized sport.

In professional basketball, football, and hockey, the reserve and option systems are buttressed by another practice, namely, the player draft under which the teams annually meet and arbitrarily divide up the graduating classes of college players. The athlete has no voice in his disposition and must either play for the team that has drafted him or not at all. In professional hockey there is an additional restraint. Any player retiring from professional hockey, may not manage or coach for any other team, amateur or professional, without the consent of his former employer.

11 The freedom to play out an option and sign on with a new team has been made more difficult by virtue of a recent amendment to article XII, section 3 of the National Football League Constitution and By-Laws passed at the January 29, 1963 session of the annual meeting of the League. Paragraph (b) of section 3 now reads:

Any player, whose contract with a League club has expired, shall thereupon become a free agent and shall no longer be considered a member of the team of that club following the expiration date of such contract. Whenever a player, becoming a free agent in such manner, thereafter signs a contract with a different club in the League, then, unless mutually satisfactory arrangements have been concluded between the two League clubs, the Commissioner may name and then award to the former club one or more players from the Active, Reserve, or Selection List (including future selection choices) of the acquiring club as the Commissioner, in his sole discretion, deems fair and equitable; any such decision by the Commissioner shall be final and conclusive. (Emphasis added.)

The American Football League also has a one-year contract with an option. The option provides that the team may, on or before a certain date, exercise its option to continue the services of the players for one year more at 90% of the original salary. Normally, however, a new contract is negotiated each year prior to this date, which contains another option in it. However, any player who determines he does not wish to sign a second contract is merely obligated to play out the one year option and then he is a free agent to contract with whomever he desires. Letter from Warren E. Baker, counsel for the American Football League, to Erwin G. Krasnow, April 11, 1961.

12 The average football player’s career extends from four to five years.

13 In hockey and basketball there is only one “major” professional league. In football, however, the American Football League and the Canadian Football League are open to players who do not wish to play for a team in the National Football League. Thus, the organizational rules of professional football, hockey, and basketball eliminate competition for players between teams in a manner exceeding baseball’s control, for under the baseball system, the teams are free to bid for players before they become attached to a team in organized baseball. Accordingly, potential baseball players are free to choose which team they will play for and, in many instances, have been able to command large sums of money for agreeing to play for a particular team. Hearings Before the Antitrust Subcommittee of the House Committee on the Judiciary, 85th Cong., 1st Sess., ser. 8, pt. 1, at 38 (1957).

14 The monopoly on player services is even more pronounced as each professional hockey
Although the legality of these reserve and draft provisions is highly questionable, the fact that clubs will not deal with a player who violates them effectuates their purpose.\textsuperscript{15} The clubs have been able to do this only because of their tight-knit, monopolistic structure which makes exclusion of dissenters the means of enforcement of their decisions and edicts.\textsuperscript{16} Thus, in all team sports, the member clubs enjoy a monopsony control, a buyers' monopoly, over their employees.\textsuperscript{17}

\textbf{The Need for Collective Bargaining}

It is recognized that a compelling factor for unionization, \textit{i.e.}, for collective bargaining, is the element of oppression by the employer. Obviously, employer oppression is a greater threat and more likely to be present in an industry where the employees have a dearth of bargaining tools. The reserve clause and draft provisions, restrictions which are uncommon to other industries, greatly restrict the bargaining power of professional team athletes. The athlete is thus deprived of a power of bargaining which almost every other individual in the country enjoys, namely, the right to choose his employer in a particular field. Since the uniform contract specifies the details of the conditions of employment, the only subject of negotiation between a club and player is salary.\textsuperscript{18}

Club sponsors and controls several teams in grade school and high school leagues, thereby acquiring sole proprietary rights to the career of every player on those clubs. Hearings Before the Subcommittee on Antitrust and Monopoly of the Senate Committee on the Judiciary, 86th Cong., 2d Sess. 216 (1959).

\textsuperscript{15} Note, Baseball Players and the Antitrust Laws, 53 Colum. L. Rev. 242, 244 (1953).

\textsuperscript{16} Note, supra note 1. None of the teams or leagues in professional sports have sought court enforcement of the reserve clause since 1902 and of the uniform players' contract since 1915. The owners in each of the professional team sports have employed a number of extra-legal methods to enforce their rules. To prevent clubs from tampering with players under contract or reservation with other teams, such threats as fines or forfeiture of games are used. To keep players from yielding to tempting offers from clubs outside the sport's structure, the blacklist is used. Where blacklisting and boycotts prove ineffective, the owners supplement these methods with spirited salary wars.

\textsuperscript{17} The owners and executives in organized sports insist on having all matters settled within the structure of the particular sport and by arbitrators of their own choosing. That their view toward these matters is shared by the members of the public is evidenced by the following statement signed by a group of Congressmen in a report to Congress on the applicability of antitrust laws to organized professional team sports:

Constant intervention in their affairs by paternalistic do-gooders will lead to nothing but trouble for all concerned. In our view the policy of decisions of sports should be made by people in sports—the owners and players alike. They should not be made by men in black robes who may never have been to a ball park.


\textsuperscript{18} There have been exceptions in a few cases. Forty minor league baseball players at-
addition to the reserve and draft provisions, the team athlete signs an assignability clause which means he may be traded or assigned to another club at will. His choice once again is limited to either accepting the new assignment or not playing the sport on a professional level in basketball, hockey, and baseball (in football there are two other leagues to choose from). An athlete may be traded in a straight cash transaction but he does not get a percentage of the sales price. In an industry where athletes represent capital assets and are subject to the trading whims of club owners, players are often abused in the process.

In the team sports, the commissioners in baseball, football, and basketball, and the league president in hockey, are given extraordinary powers. The owners have delegated to the office of commissioner or league president the authority to ascertain, and prevent by fine, suspension, or expulsion from the sport, activities which are "detrimental to the interests" of the sport. It is here that agreements made by the owners of the member clubs receive their first implementation. But this person who polices and enforces the terms of the industry against violations is merely the spokesman of the collective voices of the owners, since the owners control his appointment, salary, and tenure.

tempted to obtain contracts with the reserve clause stricken out in 1951, but the president of the National Association refused to approve thirty-two of them. No player in the major leagues has attempted to obtain a contract waiving the reserve clause since 1921. H.R. Rep. No. 2002, 82d Cong., 2d Sess. 170 (1952).

The mass media which regularly feature most aspects of sports "color" rarely attempt to report the working conditions and problems of the athlete as an employee. The fans have come to accept the many restrictive practices by the owners over the employees as a necessary evil.

19 "Trading" means the exchange of a player for any consideration and for any motives—for cash and/or players usually, but not always. In 1915 manager Joe Cantillon of Minneapolis traded outfielder Bruce Hooper to the Chicago Cubs for a hunting dog; in 1931 owner Joe Engel of Chattanooga swapped Johnny Jones for a 25-pound turkey and then invited 25 sportswriters to a turkey dinner; and Clark Griffith sold his brother-in-law, Joe Cronin, to pay a bank debt.

20 Athletes have been referred to as quasi-peons by the courts. American League Club of Chicago v. Chase, 86 Misc. 441, 465, 149 N.Y. Supp. 6, 19 (Sup. Ct. 1914). One court went so far as to say that the reserve clause and the standardized uniform contract violated not only the prohibition against involuntary servitude in the Constitution of Missouri, but also the guarantees against deprivation of personal and property rights without due process of law contained in the Constitutions of the United States and Missouri. American Baseball & Athletic Exhibition Co. v. Harper, noted Cent. L.J. 449, 450 (1902) (unreported).

21 Athletes have been subjected to abuse by the elements of corruption and monopoly in professional sports. Monopolistic combinations in sports seem to be almost a built-in characteristic of the system. Frequently, either a single person or group retains a lion's share of
Another aspect of the exploitation of professional athletes relates to their financial remuneration. It is difficult to assess this area with exactitude as very little information is made public, and the reports of player salaries which do appear in the public press are said to be unreliable.\textsuperscript{22} High salaries in sports should be tempered by the short period of earning power of the professional athlete and the even shorter period of high earning power. For the athlete fortunate enough to earn a large amount of money during the peak of his career, the progressive income tax system takes a sizable share of his "profits." Many athletes, especially those who have not gained fame and fortune on the playing field, are often unprepared for other work and may have to make their sports earnings last until they can establish themselves in other fields.

The fans' image of the professional athlete derives from the minority, this monopoly. For example, James Norris' interests control three hockey teams of the six teams in the National Hockey League, and with three of the six votes on the League's Board of Governors, the Norris family "runs things in the league." Parker, The Hockey Rebellion, Sports Illustrated, Oct. 28, 1957, p. 67. At the House Antitrust Subcommittee Hearing, it was claimed that the National Football League was controlled by a minority of owners. 1957 Hearings, supra note 13, ser. 8, pt. 3, at 2634.

A casual look at the pages of the Senate Hearings on Boxing reveals that boxers have been subjected to the corrupt practices of dishonest managers, professional gamblers and dope peddlers. The New York Managers Guild, a group which announced its dedication to helping the professional boxer, was used as a means of extracting "voluntary contributions" from out-of-state managers and for promoting a monopoly of a few chosen promoters. In December of 1955, the Commissioner of Boxing in New York, Julius Helfand, declared the Guild "a continuing menace to the integrity of boxing" and any manager who remained in the organization would lose his license. The Boxing Record of Julius Helfand, Sports Illustrated, Jan. 14, 1957, p. 39.

\textsuperscript{22} Rottenberg, The Baseball Players' Labor Market, 64 J. Pol. Econ. 242, 250 (1956). One sportswriter commented: "While big league players are remarkably well paid, it is equally remarkable that they aren't paid more." Coughlan, Baseball's Happy Sero: The Player, Sports Illustrated, March 5, 1958, p. 30. Creighton Miller, counsel for the National Football League Players' Association, claims that salaries paid in professional football are not proportionate to the profits reaped by the owners. 1957 Hearings, supra note 13, ser. 8, pt. 3, at 2630. The salaries of baseball players are far smaller in relation to total baseball income and expense than they used to be, and the decline has been consistent through the years. This decline is at least partly explainable by the fact that other expenses have been taken on, such as scouts, farm management, training camps, trainers and additional coaches. Due to the many variables involved in an appraisal of profitability and the inadequate amount of published financial information, it would be extremely difficult to state whether players should be getting a higher percentage of the profits. To many observers, additional salary does not really alleviate the athlete's dilemma. Judge Frank, in Gardella v. Chandler, 172 F.2d 402, 410 (2d Cir. 1949), said that "if the players be regarded as quasi-peons, it is of no moment that they are well paid; only the totalitarian-minded will believe that high pay excuses virtual slavery."
the players on the top teams and the outstanding athletes in the individual sports, who are relatively well paid compared to personnel in other industries of comparable age and skills. But the greatest amount of exploitation occurs in the minor league team sports and to the "lesser lights" in the individual sports. This is an important point because the "majors" and the top individual athletes represent the chosen few when counted numerically.23

The major leagues in baseball have a minimum player salary of $7,000 and there is no limit as to what a club may pay a player. On the other hand there is no minimum in the minor leagues; rather, the minor league baseball player is subject to a maximum salary limit.24

A major leaguer cannot have his salary cut by more than twenty-five percent from one season to the next without his consent. A minor leaguer has no such protection. A player signed to a major league contract is not subject to a salary cut, even if traded to a team in a lower classification subject to a salary limit. In such an instance the major league team is responsible for the difference in salary. In the case of a player signing a minor league contract, sale to a lower classification invariably means a salary reduction, often in midseason.25

If a club for some reason decides to terminate a player's contract, clause seven of the major league contract gives the player thirty days' notice with pay on his release. In the minor leagues, players are not even en-

23 Larry MacPhail, at the time President of the New York Yankees, frankly stated that Robert Murphy's attempt to organize the American Baseball Guild in the major leagues in 1946 "would have been successful . . . if he had started with minor league players. In that event we would probably have awakened to what is known as a 'fait accompli.'" Gregory, The Baseball Player, An Economic Study 193 (1959).

24 This is true in every minor league except the Pacific Coast League. Each AAA and AA league may set its own team maximum. The other leagues are subject to maximum limits as stated in the Major-Minor League Agreement. Earnings in the lower minor leagues are so low that, at the end of each season, it is common practice for Class D teams to have a "players' night" to raise money that can be given to the players to pay the expenses of transportation to their homes. Rottenberg, supra note 22, at 250.

25 Minor league players are especially abused by the trading practices of the various club owners since the trading is often done without regard for the feelings or desires of the player involved. See, e.g., testimony of Cy Block, 1951 Hearings, supra note 4, at 587-89; testimony of Ross Horning, id. at 348-61; testimony of Bonneau Peters, id. at 755-65. Further, if the parent club is strong at a player's position, he may be held back indefinitely. In the short career of the athlete every season counts. There are restrictions on how long a player may be kept in the various league classifications, but these restrictions are often totally ineffective. Far too often, the league in which a man plays and the salary he gets are based on the needs of the owner, not the player's abilities. Topkis, supra note 1, at 700.
titled to notice. President Trautman testified that the practice is not to give the player any notice. He commented that this practice "inspires the player to hustle a little all the time." Further, if a major leaguer is injured, he receives full pay for the entire season in which he is injured. A minor leaguer has no such protection.

A major leaguer receives an allowance during spring training. Minor league players receive no expense money during this time. Major league players receive the benefit of a very liberal pension plan after five years of service. A minor leaguer receives no such benefit regardless of his length of service. Finally, a major leaguer receives moving expenses of up to five hundred dollars for himself and his family when he is traded. A minor leaguer, regularly a subject of trades, does not.

Clause nine of the minor league contract makes provision for arbitration by the executive committee of the national association or by the commissioner of any dispute between a player and a club arising under the contract. Congressman A. S. Herlong of Florida, a former minor league president, suggested that there had been no arbitration of salary disputes "because everybody has been satisfied." However, Cy Block suggested that a player would not appeal because he felt that "they probably would label him a troublemaker or a clubhouse lawyer and his chances of going to the major league would be pretty rough . . . a ball-player cannot afford to put himself in the limelight . . . ."

Two players in the International League put themselves in the limelight when they brought a suit on behalf of themselves and of all members of the International League Baseball Players' Association to declare the uniform player's contract void and unlawful. Paragraph 32 of the complaint reads as follows:

That the plaintiffs and other players of the International League are unable to bargain with the defendants for matters such as pension plans, welfare benefits and

26 1951 Hearings, supra note 4, at 205.
27 "[I]t is merely stipulated that—disability directly resulting from injuries, sustained while rendering services under this contract shall not impair the right of the player to receive his full salary for a period not exceeding two weeks from the date of his injury . . . ."

Also a player in the major leagues receives traveling expenses home upon his release, whereas the minor leaguer receives no travel money. This point would not be as important if there were not such a wide difference between the salary level in the majors and in the minors. The median salary in the majors is $11,000 per year, whereas median salaries in Class D leagues are not greatly in excess of $165 per month. Id. at 121.
28 1951 Hearings, supra note 4, at 457.
29 Id. at 588.
improved conditions, by reason of the fact that the defendants have refused to
so bargain, and, in fact, have stated that they will "trade" the players out of the
International League to lower classifications or will eliminate them from organized
baseball if the players persist in such requests.  

On the basis of the jurisdictional grounds and defective pleadings, the
court did not decide any of the questions on the merits. Justice Loreto noted:

The court's attention has been called to the fact that since the submission of this
motion and because of the prosecution of this suit, disciplinary action has been
taken against one of the plaintiffs by his baseball club. The court expresses its
regret that this has happened and unfortunately can do nothing about it.

It is therefore obvious that a minor league player without the benefit of a
strong organization behind him "cannot afford to put himself in the
limelight."

Since the professional athlete has been able to do little when faced with
the monopolistic activities of the owners which have resulted in harsh
contract provisions and sub-standard working conditions, it would ap-
pear that the logical course of action is to experiment with collective
action as the possible answer to the professional athlete's problems.

DIFFICULTIES IN UNIONIZING PROFESSIONAL ATHLETES

In view of the extent to which the professional athlete has been ex-
plotted, one might conclude that professional athletes, like other em-
ployees in the entertainment field, would have formed a strong union
structure. Yet, although labor organizations do exist on a limited basis in
basketball, football, and hockey, there has heretofore been no extensive
degree of unionization in professional sports. While all the commentaries
in the legal journals have heretofore concluded that unionization in pro-
fessional sports is neither feasible nor practical, the various factors
claimed to militate against labor organization by athletes merit further
analysis to determine whether they represent real or imaginary obstacles
to unionization.

Professional sports represent an industry of "stars," of employees
whose jobs depend entirely on their individual abilities. Partly due to the
emphasis on star performers and partly due to the varied economic and

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31 Id. at 524, 191 N.Y.S.2d at 182.
32 Comment, supra note 3, at 635; Keith, Developments in the Application of Anti-trust
Laws to Professional Team Sports, 10 Hastings L.J. 119, 136 (1958); Topkis, supra note 1,
at 711; Note, supra note 16, at 1176.
educational backgrounds of athletes, professional players tend to be very individualistic. It has been contended that this individualism results in athletes' displeasure with standardized contracts.\textsuperscript{33} It is probably true that athletes prefer to keep the present system of salary negotiations which is based on such intangibles as gate appeal, scarcity of talent, and possible future performances. But this does not mean that athletes do not want to have minimum terms and conditions of employment. A union in professional sports, similar to unions in the theatre and music industry, would be primarily concerned with minimum conditions and probably would not enter into collective bargaining for individual salaries.\textsuperscript{34} The individualistic nature of the athlete should not stand as a bar to collective action if he shares a community of interest with other participants in the sport.

The fact that many athletes are not solely motivated by the profit motive is used by skeptics in support of the thesis that the athletes themselves do not feel a need for a union. However, even the highest paid athletes are concerned with industry practices which necessarily shorten the span of their playing careers.\textsuperscript{35} Moreover, for every athlete who is well paid during the season and has post-season income, there are many more athletes who are poorly paid and find it difficult to locate an employer who will hire on a seasonal basis. Perhaps the pure enjoyment of playing sports and the glamour of being a professional athlete compensate for some of the sub-standard conditions, but it does not completely ameliorate the toll on an athlete's playing life caused by burdensome playing schedules and working conditions. The professional athlete should begin to wonder about the strength of his bargaining power when he notes that many employees on the periphery of sports, such as the ticket takers, receive greater compensation than he does, as a result of being organized.

An article in the \textit{Yale Law Journal} has also claimed that the nature of the athlete's occupation is such that organization for the purpose of collective bargaining is not feasible as "ball playing is a calling brief in

\textsuperscript{33} Comment, supra note 3, at 635.

\textsuperscript{34} The authors conceive of a union in professional sports as setting minimum wages and working conditions, like the Actors' Equity and the American Federation of Musicians. Although a union might venture into the area of individual salaries, the experience with unions in the theater, the movie and music industries has shown that such bargaining would be neither feasible nor desirable in the "star" negotiations.

\textsuperscript{35} For example, the seventy-odd games scheduled in hockey and basketball; frequent and long travel; poor living and working conditions.
duration, migratory in nature and seasonal in character." Yet, the brief
duration of an athlete's career may militate in two directions—although it
takes away the desire for unionization which exists in the ordinary
industrial setting where an employee looks forward to a greater number
of years of employment, the short duration emphasizes both the need for
less burdensome conditions which affect the length of an athlete's
active playing life, and the need for pension and retirement plans. The
migratory and seasonal nature of team sports make it virtually impossible
for athletes to form a labor organization on a league or nation-wide basis
which would meet frequently. However, if each team had a representa-
tive, communication with this delegate would allow a league or nation-
wide organization to plan activities which might occur within a matter
of hours. Communication and quick action would be more difficult for
the individual athlete who is not part of a team or larger group.

It has been contended that public opinion would be opposed to union-
ization of athletes. Although public opinion would represent a significant
factor in an attempt to unionize professional sports, the American sports
fan might become an active supporter of a players' union if the oppres-
sive conditions were made known and the "star" athletes appealed to
the public for support. In the last analysis, it is the players themselves,
not a public opinion poll, who will decide whether or not to organize.

Prophets of doom also contend that if an athletes' union used its pre-
rogative to strike, it would result in financial disaster to the particular
sport. A strike, if sufficiently long, might ruin the schedule of an entire
league. Unlike strikes in motion pictures and other entertainment busi-
esses, a strike in sports, especially team sports, might hold up the whole
industry. The owners would not have the alternative of using strike
breakers since the talent shortage rules this out. However, in answer to
these contentions, it must be pointed out that a strike in sports would not
lead to a chain of events, unprecedented in American industry. The threat
of a strike in any seasonal industry presents serious problems for manage-
ment. But there are means of settling these questions, such as agreement
to "no strike" clauses in the collective bargaining contract.37

36 Comment, supra note 3, at 635.
37 Even if a strike did occur, it would not necessarily mean disaster to the industry. If
there were a short strike, double-headers and other make-up exhibitions would allow a
league to retain substantially the same schedule of competition. If a prolonged strike oc-
curred, the league might reschedule its games based on a league schedule without the striking
team or teams, as has been planned by league officials in the event of a major airline crash
or airline strike.
Another factor militating against unionization is the special situation of minor league athletes, a group comprising the majority of athletes in organized professional sports. Although the minimum working conditions for players in the minor leagues are low and there is the resultant need for collective action, minor league players often lack a sense of cohesiveness due to the tendency to depict their stay in the minors as a temporary situation.38 However, in view of the unhappy lot of the minor league player, there should be a countervailing factor in the form of a greater desire for collective action to eliminate such poor conditions as overnight bus trips, excessive trading, and low salaries. The fact that unionization is possible is illustrated by the formation of the International Baseball League Players’ Association in 1959.

Although there have been labor organizations formed in basketball, hockey, and football, which have had a significant degree of bargaining success, none of the commentators in the scholarly journals has noted these examples of successful labor organization. Instead, the commentators have referred solely to the more publicized “failure” of the American Baseball Guild in 1946. It is unfortunate that this particular union attempt should be singled out as determinative since it was in many respects a case history of poor union strategy.

The experience of the American Baseball Guild merits fuller discussion as an illustration of the pitfalls of union organization which has provided guidance for the later organization of players’ associations. Early in 1946, a former examiner for the National Labor Relations Board, Robert Murphy, registered the American Baseball Guild as a labor union at the Boston City Clerk’s Office.39 With the help of unnamed “star” players, Murphy gradually gained converts to the Guild during spring training. By mid-May the Guild claimed a majority in six major league clubs and over ninety percent of the Pittsburgh Pirates.

On May 15, 1946, Murphy, the sole officer of the Guild, informed the Pittsburgh management that an overwhelming majority of its players were Guild members and wished to discuss collective bargaining.40 Wil-

38 “Hundreds of players labor for years for the Leah of the minors, all the while yearning for the Rachel of the majors.” Gregory, op. cit. supra note 23, at 206.

39 The papers of registration for the Guild cited as objectives: (1) freedom to contract for players; (2) a minimum wage of $7,500; (3) a percentage of the receipts for the players sold or traded; (4) security, insurance, bonus and other welfare payments; and (5) a requirement that disputes between players and management regarding salary and other conditions of employment be subjected to collective bargaining.

40 N.Y. Times, May 16, 1946, p. 25, col. 5.
liam Benswanger, Pirates president, implied that the management was willing to discuss the question of unionization.41 At a conference held on June 5, Murphy threatened to strike if the Pirates refused a representation election. When President Benswanger asked the players to defer the issue until the end of the season, the players voted to strike the following night unless he agreed to an election.42 On June 7, the players held a closed meeting and decided against striking, even though Benswanger had not yet submitted to the Guild’s request for a representation election.43

The Guild was dealt a second blow when the National Labor Relations Board, after studying a petition for certification and unfair labor practice charges, refused to order an election or hold hearings on the ground that baseball was not “commerce.” On August 7, the Pennsylvania Labor Relations Board announced that it would hold an election by secret ballot on August 20.44 Only nineteen of the thirty-one eligible players on the Pirates voted on the question: “Do you desire the American Baseball Guild to represent you exclusively for the purpose of collective bargaining with your employer, the Pittsburgh Athletic Company, Inc.?” One of these votes was contested. The others showed that the Guild was rejected by a vote of 15 to 3.45

The Commissioner of Baseball’s Office worked quickly to nip the union movement in the bud. Commissioner A. B. Chandler said: “We used one man from my office, who was a former pitcher for the American Association, and Rip Sewell and Jimmy Brown, and they beat the union . . . .”46 A special steering committee of owners was set up to map out a program of action during this union attempt. The work of this committee resulted in the “MacPhail Report.” The first draft of this report read, in part:

If we were to frustrate Murphy and protect ourselves against raids on players from the outside, we deemed it necessary that the uniform player’s contract be revised and our players satisfied, at least to such extent as is feasible and practical. A healthier relationship between club and players will be effective in resisting attempts at unionization.47

The American Baseball Guild’s failure was due only in part to retalia-

41 N.Y. Times, June 5, 1946, p. 27, col. 8.
44 N.Y. Times, Aug. 8, 1946, p. 25, col. 3.
45 N.Y. Times, Aug. 21, 1946, p. 20, col. 3.
46 1951 Hearings, supra note 4, at 258.
47 Id. at 480.
tory tactics by the owners. Murphy, an "outsider" in baseball, was the sole officer and director of an organization which had no by-laws or constitution. He did not effectively use publicity releases and public relations as a means of getting an informed and sympathetic fan reaction. Further, Murphy was handicapped by a lack of funds to carry on his organizational drive.

The history of the American Baseball Guild shows that unionization of major league baseball players might have been accomplished but for some serious tactical blunders and the lack of an integrated, thoughtful organizational drive. Although there are some special problems in organizing professional athletes, the formation of labor organizations in football, hockey, and basketball demonstrates that these difficulties are far from being insurmountable.

Each of the players' associations that were formed in football, hockey, and basketball grew out of the players' desire to break through the joint opposition of the owners and the commissioners who were opposed to player participation in the formulation of league standards and conditions. The National Football League Players' Association threatened an antitrust suit against all the owners and executives in the league unless they would agree to negotiate within a two-week period.48 The hockey players did file a three million dollar antitrust suit in a New York federal court against the owners and officers of the National Hockey League, charging both the owners and officers with dictatorial and monopolistic practices.49 The basketball players also threatened coercive action after their organization was ignored for several months by Maurice Podoloff, President of the National Basketball Association. There were rumors of a strike if recognition was not forthcoming, so Podoloff immediately invited the players to a joint meeting with the owners after learning of the intention of the organization to meet with a representative of the American Guild of Federated Artists. It was at this meeting that recognition was granted to the Association.

The three associations also avoided the mistake of Robert Murphy who as the director and sole officer of the American Baseball Guild attempted single-handedly to organize major league baseball. The counsel for the football players was Creighton Miller, a former All-American football player at Notre Dame. Their first representatives were Norm Van Brocklin and Kyle Rote, two of the most respected professional foot-

49 Parker, supra note 21, at 19.
ball players in the league. The hockey players were organized by Ted Lindsay, then a star on the Detroit Red Wings. The basketball players were led by Bob Cousy, regarded by many as "Mr. Basketball," who selected an outstanding player from each team as the original representatives. Thus, it can be seen that an important factor in the success of these organizations was the leadership sparked by players who were respected figures in the sports world. As a practical matter, without the leadership of such star performers, the awakening of public interest and player recruitment would be difficult. Moreover, without such leadership the owners would feel less reluctant to remand the journeymen organizers to lower leagues or even blacklist them. A star performer, however, would be relatively secure from such pressure since the public spotlight shines on his every move. Furthermore, owners are fully aware that their public image, gate receipts, and league position would suffer if they attempted to "deport" or blacklist a star performer.50

Another similarity between the organization of these associations was the recognition by the fans and sportswriters that the players had a bona fide reason to complain as a group. The owners of sports franchises are attuned to public opinion as it directly reflects itself in the gate receipts of their teams and the league as a whole. Thus, a combination of oppressive conditions, unreasonable refusals by the owners to negotiate with the players, leadership by recognized figures in the sport, threat of coercion, good timing, and favorable public reaction resulted in the successful formation of these associations.

A more general factor which aided organization of the players' associations is the flow of the labor movement in the past three decades. There has been a rapid extension in American unionism among the professional white-collar classes. Many highly paid professional groups, as well as many supervisory and white-collar employees, who have traditionally identified their interests with management, have organized themselves into unions. One can see this tendency clearly in the motion picture industry. "Actors, writers and directors—the entire creative talents of the screen, whose fabulous incomes have long distinguished them from all other employees, have established their guilds and insist on bargaining collectively with their employers."51

50 Bob Cousy remarked: "Since I was one of the highest paid men in the league, I felt that it was up to me to form a union. An organization of low-paid players would be useless, and if it didn't have the top men, it couldn't live very long." Cousy, Basketball Is My Life, 159 (1958).

51 Ross, Stars and Strikes, Unionization of Hollywood vii (1941).
Another intangible factor in the organizational movement of players might be termed the "growing up" of the American athlete. Unlike the professional athlete at the turn of the century when a college degree was a rarity, most athletes in the team sports are college graduates.  

**Formation of Actors' Equity and the Players' Associations: A Comparison**

Many of the obstacles to unionization in the sports world are present in the acting profession. Both groups are part of the commercialized entertainment industry. To a large degree success depends on the personal skill and talent of each performer, although in both industries, backstage collaboration and cooperation form a *sine qua non* to individual achievement. The majority of actors, as well as athletes, are destined to a migratory existence, but to the few who capture the public's imagination, careers are long and rewarding. Just as it may be said of athletes, many stage performers are not solely motivated by profit; they are moved by their delight in acting and the sheer glamour of show business.

In view of the similarities of the two industries and in light of the rather brief history of labor organization in sports, a look at a comparable industry might be helpful in analyzing the development of union attempts in sports. Attention in this section will be focused on the origins of the Actors' Equity Association, its early resemblance to the formation of the players' associations, and the contrast between the two organizations.

Although professional athletes do not have a tradition of union affiliation behind them, the recent growth of players' associations bears a striking resemblance to the origins and early development of the Actors' Equity Association. The beginnings of Actors' Equity go as far back as 1912 when the organization was formed by a group of "name" actors protesting the exploitative tactics of the managers. The actors resorted

52 C. Keefe Hurley, counsel for the National Basketball League Players' Association, reported that all but one or two professional basketball players are college graduates. Interview with C. Keefe Hurley, March 15, 1961. J. Norman Lewis, one-time counsel for the baseball player representatives, expressed this idea as applied to baseball:

The major league baseball player of today is as interested in his profession as is any other successful young business executive. He has the same problems of financial advancement, family responsibility and personal satisfaction in the performance of his job as have other young rising businessmen. Perhaps it is this growing up of the American professional athlete which has led them to their consultation with lawyers, the formation of associations, the interest in future security and pensions, and their solicitude for the game... .

1957 Hearings, supra note 13, ser. 8, pt. 1, at 1249.
to group action in order to obtain uniform contracts and decent standards for members of their profession. The initial organizational drive by the actors was not taken seriously by the managers. The Association, nevertheless, received a great deal of publicity because it represented an unusual type of employees' organization. Newspapers and popular magazines as a rule expressed amusement and curiosity rather than serious consideration. There was frequent suggestion that the individualism of the actor would not permit him to subordinate his own interests to those of the group.

Similar to the statements of the players' associations, the organization's leaders tried to emphasize that the Association was not to be regarded as a labor union. In February of 1915, the counsel for the Association appointed a committee to study trade unions and their operations. It was at this point that Actors' Equity began to take on a different development than the present players' associations.

In 1916 a serious campaign was begun for the purpose of educating the membership to the idea of union affiliation. The following passages from an article by Edwin Arden in the March 1916 issue of the Equity Magazine, the monthly journal of the Association, provide illustrations both of the organization's campaign to educate its membership and its conversion to affiliation with organized labor:

Our initial attitude was one of distinct conservatism. Both council and officers were determined not to plunge the Association into disaster by hot-headed, intemperate and ultra-radical methods. . . . In our efforts to gain the universal adoption of an equitable and standard contract, we were either snubbed, ignored, paltered with, or defied. . . . Divergent views of the council members have been slowly crystallized into a unity of decision as to our only trail out of the Wilderness. That trail is affiliation with organized labor.

A short year ago, such a suggestion was met with unconsidered, obstinate opposition by many members of the council. . . . Given a certain time for study of condition and their effects and possible remedies, how could sane men think otherwise? When the records of our office show such overwhelming evidence of daily inequity, oppression, injustice and less than questionable business practices, who could reject an outstretched hand to help them out of literal slavery?

A motion was passed to consider alliance with the American Fed-

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53 In August of 1913, Francis Wilson, president of the Actors' Equity Association, said: "The Actors' Equity Association is not per se a labor union, and it will never become one unless, which is not likely, flagrant injustice on the part of the managers compels it to ally itself with organized labor." Gemmill, Collective Bargaining by Actors, a Study of Trade Unionism among Performers of the English-Speaking Legitimate Stage in America, 1961 (Unpublished Thesis in Univ. of Pa. Library).

54 Harding, The Revolt of the Actors, 28-29 (1929).
eration of Labor at a meeting later that year. The newspapers and magazines gave liberal space for several months to the probable effects of strict unionization. In the meantime, formation of a company union was attempted to thwart the Association. In 1919, however, the Actors' Equity Association joined the American Federation of Labor. Even though some of the commentators stated that "Equity was falling to the grave which it dug for the managers,"55 and that "The actor . . . cannot serve two masters, the Theatre and Unionism,"56 the Actors' Equity Association has attained a position of strength and stability in the organized labor movement.

In addition to having the backing of the AFL-CIO, Actors' Equity now has the advantage of having "tradition" behind them. The public seems to have accepted as a matter of course that actors should and do organize for collective bargaining. The professional actor is proud to become a member of the Association; membership in Actors' Equity has come to be identified with the becoming of a professional in the theatre. The question whether union affiliation or some other form of organization would provide the best solution for the labor problems of the professional athlete should be studied with this background in mind.

PROPOSED SOLUTIONS TO THE PROFESSIONAL ATHLETES' LABOR PROBLEMS

There are a number of possible solutions to the problem of better employer-employee relations in professional sports. Arbitration, regulatory commissions, the representative system and player associations have been used in the past with varying degrees of success. Unionization of the professional athlete may prove to be a feasible solution. The nature of the sport, its organization, and the attitude of the athlete may well determine which of the various solutions would be most beneficial. Furthermore, because of the different framework and modes of competition in the various sports, the solution of labor problems in one of the individual sports, such as boxing, might be quite different from the solution chosen in another team sport, such as baseball.

ARBITRATION OR IMPARTIAL COMMISSION

In professional hockey, salary disputes are referred for arbitration to the President of the National Hockey League. Although this method prima facie provides a means of settling a dispute between an owner and

55 Id. at 207.
56 Id. at 211.
a player, the president-arbitrator is not truly an impartial third party since he is chosen, paid by, and remains at the will of the owners. Significantly, in the four disagreements that have been referred to the president in the National Hockey League the decision has been against the player in each instance.

Since the adoption of the major league agreement in 1921, the baseball commissioner has had authority—

"[T]o hear and to determine finally any dispute to which a player is a party, or any dispute concerning a player which may be certified to him by either or any of the disputants."57

This provision, however, has never been construed to permit arbitration by the commissioner. When A. B. Chandler became commissioner, the major league club owners inserted a rule barring intervention by the commissioner in salary disputes.58 Chandler stated at the congressional hearings that he disagreed with the rule promulgated by the club owners because he believed that players should have the right to secure arbitration of salary disputes.59

Most of the baseball players who appeared during the congressional hearings agreed with Chandler and expressed the view that "a standardized method of salary arbitration was desirable because of the inferior bargaining position of the player who may negotiate with only one employer."60 As early as 1949, players on the St. Louis Cardinals publicly recommended an impartial board of arbitrators for salary disputes. Some players suggested an arbitration system which would utilize arbitrators appointed by both players and owners.61 No such system, however, has been adopted.

The attitude of most club executives and owners has been to reject suggestions of arbitration. The conclusion of the major league steering committee in 1946 that referral of salary disputes to arbitrators or a commissioner would be impracticable is perhaps typical of the prevalent attitude toward arbitration. Thus, Branch Rickey, former general manager of the Pittsburgh Pirates and the Brooklyn Dodgers, believed that arbitration of salaries would be a most difficult task because factors such

61 1951 Hearings, supra note 59, at 1313.
as the following had to be weighed: the club's ability to pay, the athletic ability of the player, and the comparable salaries of other players of similar ability. Rickey predicted "that the ultimate end of such a system would be a department which signed all professional baseball players." Yet, these arguments represented only the standard contentions made by employers in other industries who opposed the imposition of a third person into bargaining negotiations.

The use of an arbitrator or group of arbitrators would not be a helpful instrumentality for the individual athlete, such as the boxer. The boxer initially is the arbitrator of a salary dispute—he has the choice of signing a contract with a number of different managers and/or promoters. It is only the boxer with minimal bargaining power who needs the protection of a larger group for minimum standards and working conditions.

Finally, arbitration in the organized sports world represents only a partial solution to the professional athlete's problems as an "employee," assuming that arbitration would be acceptable to the extent that an athlete would not be ostracized or blacklisted for making use of it. The most powerful "star" athlete would individually be unable to remedy such problems as playing conditions, clubhouse sanitation, and league schedules, by "holding out" on behalf of his colleagues and then referring the issue to an arbitration board.

A solution related to the concept of an arbitration system would be the independent board or commission which settles disputes and creates minimum standards for the entire sport. This is essentially the method used in professional boxing, where regulatory agencies known as state boxing commissions handle such matters as certification of boxers and managers, appointment of referees, ring officials, and doctors, and approval of individual boxing matches. Members of the commission are usually appointed by the governor. However, it is the consensus of sportswriters that the boxing commissions do an ineffective job of policing the sport, and the recent Senate investigations documenting the amount of corruption that has infiltrated the sport seem to justify these observations. Moreover, the strongest of the state boxing commissions have been able to police only a small part of the trouble spots. Furthermore, although these commissions in boxing and the Professional Golfers' Association in golf perform commendable functions in promul-

62 Id. at 730-32.
63 Gregory, supra note 23, at 205.
64 Hearings Before the Subcommittee on Antitrust and Monopoly of the Senate Committee on the Judiciary, 86th Cong., 2d Sess. (1960).
gating uniform playing rules and establishing minimum standards of competition and play an important role in the area of rules and regulations, they are not appropriate groups to represent the individual athlete in the bargaining field. It is difficult to conceive of these rule-making groups unilaterally setting terms and conditions of employment. The athlete needs an organization or system which would perform functions supplementary to that of the independent commission.

THE REPRESENTATIVE SYSTEM

The present system in major league baseball is a type of employee-management committee or representative system. The representation plan began in 1946 in response to the American Baseball Guild's attempt to unionize the Pittsburgh Pirates. A committee of owners suggested that the Commissioner of Baseball call for the election of a player representative from each team. The owners granted three of the requests made by these player representatives in 1946: a minimum salary, a pension plan, and expense allowances during spring training. The owners denied requests for non-revocability of waivers and arbitration of salaries by the commissioner. The player representatives in subsequent years have received other benefits for the two major leagues, namely, an expanded pension plan, financed from the sale of World Series and All-Star Game radio and television rights, gate receipts from the All-Star Game, and contributions by the players themselves.

The Major League Baseball Players' Association, the group which acts as the spokesman for the player representatives, cannot be regarded as a union or a group which bargains collectively. The player representatives have no vote on the outcome of their proposals. "They merely act as conduits to present the players' views to the club owners and then await whatever action the club owners are willing to take."65 Unlike the representative system, a union would imply a more independent and tightly-knit organization capable of affirmative action and economic tests of strength. Nevertheless, from the actual formation of the player representatives into a group called the Major League Players' Association in 1954, spokesmen for the group have denied any intention to establish a union.66 In fact, the players have spurned several union offers.67

66 Seymour, Unions Fall in Organized Baseball, 39 Industrial Bull., No. 4, April 1960, p. 10.
67 Paul Gregory devotes a chapter of his book to defending the present player representative system. Gregory, op. cit. supra note 23, at 196. He claims that the system, for all its
Negotiating with the owners by means of a representation system does not work as well as most of the system's adherents claim. In the few instances where negotiations have been somewhat successful, player representatives have had to resort to threats of litigation or threats not to meet with owners.68

In short, the representative system in baseball is a form of company unionism in which the player representatives are afforded an opportunity to air their grievances on a league-wide basis. This arrangement may be an efficient and peaceful means of settling some labor disputes, and may contribute to the welfare of the players, provided the team owners are benevolent. Unfortunately, reliance on owner benevolence is a rather tenuous solution to the long-range problems in this area. A. B. Chandler, former Commissioner of Baseball, commented recently:

I think it highly important that some more adequate protection be given to the players, at least from the type of ownership which has recently come into the sport. These new owners have handled the situation rather badly, and if they persist in their high-handed method, it is possible that the Government may intervene one of these days.69

PLAYERS' ASSOCIATIONS

The present system of players' associations in professional hockey, football, and basketball might be regarded as labor organizations or bona fide unions.

The term "labor organization" means any organization of any kind, or any agency or employee representation committee or plan, in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment or conditions of work.70

faults, does work and many of the players' requests have been granted. Id. at 205. The Report of the Antitrust Subcommittee comes to a contrary conclusion:

Since the important concessions of 1946, the present system of player representatives in the major leagues has been of little consequence. No amendment to the baseball code has been referred to the players for their opinion, even when such amendments directly affect the players' rights. Likewise, the subcommittee is unaware of any significant amendment to the baseball code which has been adopted at the recommendation of the player representatives. In no instance have the representatives either been present or exercised a vote at the December joint major league meetings, where all "baseball legislation" pertaining to the major league agreement or the major-minor league agreement must be approved by the club owners of the two leagues.


68 1951 Hearings, supra note 59, at 1312.


70 Section 2(5), National Labor Relations Act. The NLRB has been very liberal in interpreting this clause. For example, the Board does not require a "labor organization" to
C. Keefe Hurley, counsel for the National Basketball League Players’ Association, forthrightly states that the Association is a bona fide union both from a popular and a legal point of view.71 Creighton Miller, counsel for the National Football League Players’ Association, is reluctant to call the Association a union and emphasizes the fact that the players do not want to be considered a union.72 This difficulty with nomenclature is the result of its importance to the public and the players themselves. As mentioned previously, the “fan” prefers not to think of athletes as businessmen or labor union members. Also it seems that most players prefer to think of themselves as belonging to a guild or society rather than to a union. Perhaps there is something of a social stigma in the sports world for an athlete to align himself with a labor union.73 Yet, in view of the fact that the Actors’ Equity is a labor union, and an affiliated union at that, it is probable that the players, like actors, would not object to a labor organization if the public image it projected was that of a “guild” or a “society,” even though this same organization would have all the characteristics of the traditional labor union.

The idea of a players’ association is also appealing as a compromise measure to the large group of fans, players, and owners who believe that disputes in professional sports should be resolved within the particular sport’s structure. The many documents and rules of sports have been designed so that all controversies arising in the particular sport would be resolved within the “family.” Although this method is particularly desirable from the viewpoint of the owners and executives, it has resulted in the monopolistic structures which prompted Congress to conduct industry-wide hearings concerning these very practices as possible violations of the antitrust laws. The counsel for the players’ associations, recognizing the fears of the owners and executives of outside intervention, have used the threat of union affiliation and NLRB proceedings as

have a constitution or by-laws, see Stewart Die Casting Div., 123 N.L.R.B. 447 (1959); a collective bargaining agreement or actual bargaining with employer is not required, see Wrought Iron Range Co., 77 N.L.R.B. 487 (1948); James R. Kearney Corp., 81 N.L.R.B. 26 (1949); failure to qualify or register as a labor organization under state law is not a bar, see Alabama Textile Prods. Corp., 73 N.L.R.B. 1192 (1947).

73 According to Henry Kaiser, counsel for the American Federation of Musicians, many of the A.F.M.’s locals deliberately avoid any mention of the word “union” and continue to refer to themselves as “guilds” or “societies.” Interview with Henry Kaiser, Washington, D.C., April 4, 1961.
a bargaining tool.\textsuperscript{74} This bargaining power factor, taken in conjunction with the fact that the players' associations are more tightly-knit organizations, distinguishes the associations from the player representative system in which the representatives merely submit their views without participating in or influencing the decision to any substantial degree.

It can be assumed that the players' association would seek NLRB certification or union affiliation only when and if the owners became very unreasonable. Counsel for the Football Players' Association stated before the Antitrust Subcommittee that he personally believed:

that professional football would be better served if the owners of professional football recognized the players' association and worked out our problems in a family manner, similar to baseball. But I believe further, if they do not, football will be better served by appealing to the NLRB rather than letting it go the way it is now.\textsuperscript{75}

The reluctance to affiliate with a labor federation or request a representation election under the National Labor Relations Act seems to center around the psychological impact that such affirmative moves might engender. It is feared that Board certification or union affiliation might precipitate a great deal of antagonism both from the owners and the general public. Moreover, counsel for the football and basketball players believe that union affiliation or Board certification is not necessary as long as the owners are reasonable in their negotiations with the players. For an "independent" labor organization there is another practical advantage in not seeking a Board representation election at this time in that the time and expense involved in Board and court proceedings might dampen the initial player enthusiasm and irritate many patrons of the game, especially if issues were not settled within a short period of time. Whether these gains outweigh the possible advantages which union affiliation might bring is a speculative question which will be discussed in the next section.

\textbf{UNION AFFILIATION}

Whether affiliation with a larger labor union or federation would be beneficial in the long run to professional athletes is a question of substantial import, especially when viewed in light of the success achieved by Actors' Equity subsequent to its affiliation with the AFL-CIO. The players' associations mark a forward step in the professional athletes' affiliation.

\textsuperscript{74} Interview with C. Keefe Hurley, Boston, Mass., March 15, 1961.

\textsuperscript{75} Hearings on Professional Team Sports Before the Antitrust Subcommittee of the House Committee on the Judiciary, 85th Cong., 1st Sess., ser. 8, pt. 3 at 2632 (1957).
quest for stronger bargaining power. However, these associations represent a very small segment of professional athletes since such organizations exist only in the National Football League, the National Basketball Association, the National Hockey League, and the International Baseball League. There have been several abortive attempts at organization of associations in boxing. The present day effectiveness of even the four players' associations is questionable. There is a genuine fear that these players' associations, due to their limited organization and resources, might become a form of company union over a period of time. The National Basketball Association Players' Association is an example of an organization losing its strength and cohesiveness after its initial recognition by the owners. The Association has a limited amount of working funds, meets infrequently, and has no constitution or by-laws. The International League Players' Association is still in a very formative stage of organization because of the reluctance of the owners to deal with the group as a bargaining unit, and the lack of funds and organization to promote a sustained membership drive. Similarly, the unsuccessful attempts at organization of a boxers' association were due not only to lack of funds but also to the difficulty of organizing athletes who fought in different parts of the country.

Affiliation with a well-organized labor union would considerably improve the chances for success of an organizational membership drive in the particular sport. A union or federation would be able to furnish needed monetary help, the experience of skilled organizers, and the undertaking of simultaneous organizational campaigns in different sections of the country. For example, instead of having separate and distinct players' associations in each of the minor leagues, an organization which had a strong affiliation with a national union would be in a position to conduct a membership drive in all leagues. The same would be true of other leagues and sports. As previously noted, the minor league athlete believes that his tenure in a particular minor league is of a very temporary nature—organization throughout the particular sport would give the player the assurance that as long as he was in any league he would have the support of this organization. The individual sports would be easier to organize if the union had sufficient funds and promoters in different sections of the United States to conduct a major membership drive simultaneously in each state.

The affiliation might provide a strong psychological impetus to the

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professional athletes' decision to join. The actor, the symphony musician, and the television announcer were much more eager to join an organization which had a long history of bargaining success and financial stability. One of the main obstacles in unionizing a hitherto unorganized field such as professional sports is the fear of the employee that his profession is not a proper one for a labor union. It is in this area of employee education, i.e., the teaching of the economic lesson of greater strength through group action, that the national labor union or federation has become effective. These organizations have the personnel, the research facilities, and the communications knowhow to program an effective educational campaign. Affiliation with a national organization would probably provide an image of added power and prestige to a group of professional athletes.

It is not only in the organizational phase that affiliation would be advantageous. An affiliated union would have the benefit of political and legislative lobbies which might form a sufficiently strong pressure group to obtain legislation alleviating the inequalities of the progressive tax system on the high earnings of the outstanding athletes. The statistical and research services of these larger organizations would be very helpful during collective negotiations. Affiliation would also provide a great deal of additional bargaining power, i.e., the potential threat of strikes which would prove very effective in heavily unionized cities.

Affiliation would provide great stability and continuity to professional athletes' unions. The players' associations depend heavily on the support of the "name" athletes and the original organizers. With union affiliation, public acceptance might come earlier than in the case of isolated player association movements that exist at present. Since these associations are for the most part unpublicized, public recognition of the place of labor organizations in sports is retarded considerably. It is only when employees have made their organizations known that there has been any marked recognition of their conditions as a noteworthy part of the employment relations problem.77

LEGAL PROBLEMS PRESENTED BY UNIONIZATION

Although the unionization of professional athletes would raise many

77 Bonnett, Labor-Management Relations 34 (1959). An important result of union affiliation and collective bargaining is the sense of participation that it imparts to union members. Slichter, Healy and Livernash, The Impact of Collective Bargaining on Management 960 (1960). The professional athlete lacks this important feeling of participation in the decisions made in the field in which he earns his livelihood.
problems of an organizational nature, a number of significant legal questions would also be presented by union efforts to organize sports.

First, and of primary importance, would be the question of whether federal or state law would be applicable to the sports-labor-management relationship. Stated otherwise, the question is whether the National Labor Relations Board would assert jurisdiction over sports or whether, when faced by the problem of asserting jurisdiction, the Board would decline jurisdiction, thus permitting state labor laws to regulate the unionization of sports. The applicable law may be of great importance in determining the success or failure of unionization in sports. The National Labor Relations Board has never asserted jurisdiction over all industries and businesses over which it has legal jurisdiction. The Board has instead formulated jurisdictional standards which in effect limit its assertion of jurisdiction to industries falling within certain categories and monetary standards.\(^78\) In the past, the Board has not created any

\(^78\) The following is a compilation of the jurisdictional standards in effect on August 1, 1959, together with the Board decisions in which the particular standard was promulgated:

(a) Non-retail: $50,000 outflow or inflow, direct or indirect. Siemons Mailing Serv., 122 N.L.R.B. 81 (1958). Direct outflow refers to goods shipped or services furnished by the employer outside the state. Indirect outflow includes sales within the state to users meeting any standard except solely an indirect inflow or indirect outflow standard. Direct inflow refers to goods or services furnished directly to the employer from outside the state. Indirect inflow refers to the purchase of goods or services which originated outside the employer's state but which were purchased from a seller within the state. Direct and indirect outflow may be combined as may be direct and indirect inflow to meet the $50,000 requirement. However, outflow and inflow may not be combined.

(b) Office buildings: Gross revenues of $100,000, of which $25,000 or more is derived from organizations which meet any of the standards, except the indirect outflow and indirect inflow standards established in Siemons Mailing Serv., supra. Mistletoe Operating Co., 122 N.L.R.B. 1534, 1536 (1959).

(c) Public utilities: $250,000 gross volume of business, or $50,000 outflow or inflow, direct or indirect. Sioux Valley Empire Elec. Ass'n, 122 N.L.R.B. 92, 94 (1958).


(g) Transportation enterprises, links and channels of interstate commerce: $50,000 gross revenues from furnishing interstate transportation services, or performing services valued at $50,000 or more for enterprises which meet any of the standards except the indirect outflow
special standard for the sports or entertainment industries but has in
effect declined to assert jurisdiction over various segments of these indus-
tries on the grounds that the aspects of the business involved were
local in character or that it would not effectuate the policies of the Na-
tional Labor Relations Act to assert jurisdiction in these cases. Thus,
the Board has in the past declined jurisdiction over cases involving a
symphony orchestra, segments of the horse racing industry, an amuse-
ment park, and an indoor sports arena. On the other hand, it has asserted
dependence over motion picture theatres and producers, television and radio stations, and bowling alleys.

The 1959 amendments to the National Labor Relations Act provide
in section 14(c)(1) that:

The Board, in its discretion, may, by rule of decision or by published rules adopted
pursuant to the Administrative Procedure Act, decline to assert jurisdiction over
any labor dispute involving any class or category of employers, where, in the
opinion of the Board, the effect of such labor dispute on commerce is not suffi-
ciently substantial to warrant the exercise of its jurisdiction: Provided, That the
Board shall not decline to assert jurisdiction over any labor dispute over which it
would assert jurisdiction under the standards prevailing upon August 1, 1959.

Thus, section 14(c)(1) permits the Board to decline to assert jurisdic-
tion over an entire class and by section 14(c)(2) the states may regu-
late those employers over which the Board has declined jurisdiction.

and indirect inflow standards established in Siemons Mailing Serv., supra. H P O Serv., Inc.,

(h) Transit systems: $250,000 gross volume of business. Charleston Transit Co., 123

(i) Taxicabs: $500,000 gross volume of business, retail standard applies. Carolina Supplies

(j) National Defense: Board asserts jurisdiction over all enterprises, as to which it has
statutory jurisdiction, whose operations have substantial impact on national defense. Ready

79 Hialeah Race Course, Inc., 125 N.L.R.B. 388 (1959); Jefferson Downs, Inc., 125
N.L.R.B. 386 (1959); Magic Mountain, Inc., 123 N.L.R.B. 1170 (1959); Pinkerton's Nat'l
Detective Agency, 114 N.L.R.B. 1363 (1955); Philadelphia Orchestra Ass'n, 97 N.L.R.B.
548 (1951); Los Angeles Turf Club, Inc., 90 N.L.R.B. 20 (1950); Olympia Stadium Corp.,
85 N.L.R.B. 389 (1949).

80 Independent Motion Picture Ass'n, 123 N.L.R.B. 1942 (1959); League of New York
Theatres, Inc., 129 N.L.R.B. 1429 (1959); Combined Century Theatres, Inc., 120 N.L.R.B.
1379 (1958); Television Film Producers Ass'n, 93 N.L.R.B. 929 (1951), Trans-Film Inc.,
100 N.L.R.B. 78 (1952).

The first case involving this new section, one which may have some bearing on the Board's possible assertion of jurisdiction over various sports, began with the Board's issuance of two advisory opinions. In *Meadow Stud, Inc.*83 and *William R. Dixon*84 the Board indicated that it would not assert jurisdiction over horse owners and trainers. Thus, when subsequent horse owners and trainers sought to file petitions with the Board, requesting that it conduct representation elections among the employees in their business, the petitions were dismissed on the ground that the Board had already declined jurisdiction over this category of employers in its advisory opinions. In a suit to compel the Board to assert jurisdiction85 the employers argued that the effect of this industry on commerce was such as to require the Board's assertion of jurisdiction, and furthermore that declination by means of an advisory opinion was not authorized by section 14(c) (1) of the act. The Court of Appeals for the District of Columbia Circuit, agreeing with the employers that the Board could not decline jurisdiction by means of an advisory opinion, remanded the case to the Board.88

Following the remand, the Board held the required hearing but again declined to assert jurisdiction over horse owners and trainers.87 In explaining its conclusion, the Board noted that this particular industry is not only one which the states closely regulate but also one from which the states derive important revenues.88 For these reasons, the Board felt it unlikely that the states would allow prolonged labor disputes in this industry; consequently, the Board felt its limited resources might be better devoted to industries where labor disputes would have a more substantial impact on commerce. The Board further indicated, however, that if its expectations were not realized it would reconsider its policy in this area.89

The full significance and impact of this Board decision upon either the horse racing industry or possible NLRB assertion of jurisdiction over other sports cannot yet be determined because of new litigation in this matter. In March 1963, the horse owners and trainers once again filed

86 Ibid.
87 Walter A. Kelley, 139 N.L.R.B. No. 56 (1962).
88 Ibid.
89 Ibid.
suit against the Board in district court\textsuperscript{80} seeking to compel the Board to assert jurisdiction over their business. It may be that a final court decision will be contrary to the Board decision in the prior case. Such a contrary decision would undoubtedly affect any future Board decision with respect to the assertion of jurisdiction over other sports. However, even if a final court decision should agree with the Board’s declination of jurisdiction over horse owners and trainers, it would not necessarily mean that the Board would automatically continue to decline jurisdiction over all other sports. The Board’s rationale for declining jurisdiction over horse racing, which it considers a state monopoly, is not equally applicable to other sports such as baseball and football. Thus, in deciding whether to assert jurisdiction over these other sports in the future, the Board will face considerations different from those in the racing industry, and a decision to assert jurisdiction over these other sports could be reached without inconsistency with the horse racing decision.

If the Board ultimately decides not to assert jurisdiction over these other sports, states would, of course, be free to regulate their labor relations. Although some states have extensive labor legislation and a labor board, others have little or no such legislation and no labor tribunal. Because of the interstate nature of most sports, it would seem more desirable to have the labor relations of this industry regulated by one federal law rather than a multitude of state laws and to have the disputes and problems settled by one administrative agency regardless of where these disputes arise.\textsuperscript{91} From the union’s view, one law would permit them to conduct their organizational campaign on a nationwide basis more easily and with more ultimate chance of success. Then, too, the federal law would probably provide the athlete interested in joining the union with the maximum protection both during the organizational period and afterwards. Employers in this industry would also be benefited by having federal law apply since this law would afford them many protections not afforded by state law. Although these factors are significant to the sports industry in terms of why it is more desirable to have federal law applicable in labor management relations, these factors constitute only a part of the Board’s consideration in determining whether the labor disputes of a particular class of employers in the sports industry are “sufficiently substantial to warrant the exercise of its jurisdiction.” If the NLRB should eventually decline jurisdiction over all aspects of the sports industry, and this declination is upheld by the courts, then,


\textsuperscript{91} The Board seems to reject this view at least insofar as the racing industry is concerned.
only new legislation could make the federal labor law applicable to
sports enterprises.

Assuming, however, that the Board might assert jurisdiction over
certain sports, there would be additional interpretative questions pre-
presented by the act. For example, section 2(3) of the National Labor
Relations Act defines the term "employee" and in so doing specifically
excludes "independent contractor" from this definition. A determina-
tion by the Board of whether a particular relationship constituted a
person an independent contractor for the purposes of the act has turned
upon the facts of each case. In general, however, the control exercised
by an employer over the individual is a vital factor in determining whether
the individual is an employee or independent contractor. Athletes in
team sports would probably have no difficulties in meeting the Board's
interpretation of the term "employee." Individual athletes, such as
boxers, might, however, seem more closely related to independent con-
tractors because of their individual contracting arrangements. On the
other hand, the Board has held free lance artists, screen writers, and
announcers, all of whom do considerable individual contracting of their
services, to be employees within the meaning of the act.

If active unionization begins in the sports industry, it will surely give
rise to some of these questions of jurisdiction and statutory interpreta-
tion. How these questions will be resolved and what will be the effect of
their resolution on the unionization of sports remains to be seen.

CONCLUSION

Although there has been a noticeable lack of public notoriety concern-
ing the extent of labor organization in the sports industry, unionization
in professional sports is no longer a matter of speculation. It is instead
a definite reality. The professional athlete has begun to take advantage
of his greater economic effectiveness as a member of a bargaining group.
During the last ten years, professional athletes in hockey, basketball, and
football have organized league-wide labor unions, organizations known
to the public as players' associations.

The professional athlete when bargaining with management as an
"individual" has been the victim of great exploitation. The Congres-

sional Antitrust Hearings on Organized Sports have documented this history of owner exploitation with a systematic and detailed exposé of the many ramifications of monopoly and corruption in the sports world.\footnote{Hearings Before the Subcommittee on Antitrust and Monopoly of the Senate Committee on the Judiciary, 86th Cong., 2d Sess. (1960); Hearings on Organized Professional Team Sports Before the Antitrust Subcommittee of the House Committee on the Judiciary, 85th Cong., 1st Sess., ser. 8, pt. 3 (1957); Hearings on Organized Baseball Before the Subcommittee on the Study of Monopoly Power of the House Committee on the Judiciary, 82d Cong., 1st Sess., ser. 1, pt. 6 at 299 (1951).} Although there are other possible solutions to the professional athletes' labor problems, unionization may present the most effective means of gaining greater economic strength and stability for the employee in the sports industry.

Arbitration of individual salary disputes or grievances would provide a fractional solution to the over-all labor problems of the professional athlete. The representative systems—and to a lesser degree, the players' associations—are susceptible to becoming disguised forms of company unions. The players' associations are handicapped by a lack of funds and continuing leadership. A national union or federation, equipped with greater financial, political, and research resources, would be a more effective body for developing greater bargaining strength and a strong tradition of union membership. Only such a group would be able to develop the coordinated drive of organization and education needed to form a series of unions in each sport throughout the country.

The problems of unionization in professional sports are really not too different from the problems faced in organizing groups of employees in other industries. There seems to be no major legal obstacles which would thwart union organization in sports. The major difficulties center around questions of strategy, proper timing, gaining public acceptance, and educating the employees to the merits of unionization. Up until the past decade, professional sports represented one of the few units of the commercialized entertainment industry which was left untouched by organized labor. The actor and the symphony musician, entertainers who share much in common with the professional athlete, had formed unions earlier in the century and now have a tradition of union affiliation behind them. The entire creative and artistic talent of Hollywood carry union membership cards. Unionization is now common in many occupations once thought to be without the province of labor organizations: teaching, engineering, and writing. There has been increasing interest shown on the part of organized labor to close the ranks of the "un-organized." Professional athletes are no exception to this trend.
QUALITY STABILIZATION AND THE CRISIS IN FAIR TRADE

GEORGE J. ALEXANDER*

Historically examining Fair Trade laws and their treatment by the state and federal courts, the author notes that Fair Trade has fallen into increasing constitutional disfavor. Professor Alexander then examines in detail one of the several quality stabilization bills which have been introduced for congressional consideration. Noting that in part quality stabilization with its provisions for price-fixing parallels Fair Trade, he points out that significant differences exist between the two concepts, both in purpose and effect. He concludes that, if adopted, quality stabilization, with its pervasive price protection, will impose even greater restrictions on competition at the retail distributive level than those imposed by state Fair Trade laws.

INTRODUCTION

Rejected, abandoned, and wounded, Fair Trade is but a pitiful skeleton. Clearly incapable of rejuvenation sufficient to bring it to its youthful vigor of the "thirties," its prognosis is grim indeed. Spirit gone, it will likely be left to die. A successor has already been conceived. Quality stabilization is heralded as the new medium of legalized resale price maintenance.

The economic demerits and merits of Fair Trade have been fully and often heatedly discussed in the past.¹ Little mention of them will be made herein. Instead, this article will concern itself with a postmortem examination of Fair Trade and the extent of congenital effect to be expected by quality stabilization.

REJECTED

At the time of this writing, the highest courts of twenty-three states have, in one manner or another, declared their own nonsigner Fair Trade provisions unconstitutional.² One territory (Puerto Rico) in which Fair

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Trade was constitutional, repealed its Fair Trade law. For proponents of Fair Trade, even this rather depressing statistic is an understatement of the degree to which Fair Trade is currently rejected.

It is, for example, significant that the states which have declared Fair Trade unconstitutional have based their decisions primarily on bedrock constitutional principles, a factor which makes it unlikely that minor rewording would suffice to placate the courts. Indeed, in three instances, the courts have vitiated a Fair Trade bill which was passed after an initial bill was declared unconstitutional. A number of states have denied the right of the legislature to legislate in the area of general pricing either because of specific constitutional provisions relating to economic policy, for example, a provision preventing monopoly or combinations in restraint of trade, or because, more generally, pricing of consumer goods is held not to be within the affected-with-a-public-interest concept. Moreover, Fair Trade has been found to be outside the usual

police power concepts of health, morals, and general welfare. Consequently, in many states this was sufficient to place it without the legislature’s prerogative. Still other courts found that Fair Trade was unlawful as a delegation of legislative power in allowing price fixing by private individuals for partisan interests. One court which might have allowed legislation in this area and perhaps even the delegation of authority to fix prices to persons outside the legislature, has condemned fair trading for failure to provide a standard governing the price to be set, thereby allowing the price to be set “arbitrarily.” Still other courts have thrown out state Fair Trade on the ground that it violates due process in depriving the holder of the trade-marked article of a property right by fixing his prices. Indeed, a few courts have gone so far as to suggest that, despite the apparent constitutionality of the McGuire Act, state Fair Trade violates federal constitutional guarantees against deprivation of property rights without due process.

A regrettable feature of these rejections, from the standpoint of an advocate of Fair Trade, is not only the already disheartening majority declaration of unconstitutionality but its influence in the remaining states. It would indeed be an extreme overstatement to say that the eighteen states in which Fair Trade has some constitutional sanction are bastions of Fair Trade. In the first place, the recentness of the number of decisions declaring Fair Trade unconstitutional gives some measure of support to the suggestion that a “trend” is forming toward a

8 Ibid.
10 Miles Labs., Inc. v. Eckerd, 73 So. 2d 680 (Fla. 1954).
14 In addition to the twenty-three states which have invalidated fair trade in decisions by the highest court, supra note 2, one state has challenged fair trade in a lower court decision, supra note 3. Alaska, Missouri, Texas and Vermont have no fair trade acts and fair trade has not faced a court test in Maine, Nevada or North Dakota, judging from the reported cases.
15 See note 2, supra.
declaration of unconstitutionality. Secondly, Fair Trade has always depended significantly on the universality of its support. Consequently, each state which rejects Fair Trade, even if it does not thereby persuade other states to take similar action, makes it just that much more expensive and difficult to maintain Fair Trade in the remaining states.

The number, twenty-three, in any event, is a very misleading number. In a number of states that have considered the question recently, the courts have, despite earlier decisions upholding Fair Trade, issued what appear to be judicial warnings that the end of the constitutional road may soon be reached. A case in point is Glaser Bros. v. Twenty-Fifth Sales Co. In that case, a superior court in California found that the nonsigner principle was inapplicable to purchasers who were not in a chain of title of, or in some kind of privity with the price-setter. To rule otherwise, said the court, might raise substantial constitutional and other problems. In the face of the transparent fact that nonsigner provisions were designed to affect people who are not in privity of contract and who have in no way shared in the distributive chain which was contractually bound, such a ruling could mean that nonsigner Fair Trade is in trouble in its originating state. In North Carolina, despite a 1939 decision which held nonsigner Fair Trade constitutional, a lower court in a recent case dissolved a restraining order issued under the state Fair Trade law on the ground that the law was unconstitutional. When the Supreme Court of North Carolina reversed, they surprisingly found no occasion to chide that court for its failure to heed precedent. Instead, the lower court decision was reversed solely on the ground that the constitutional question had been prematurely reached in violation of the concept of judicial abstention. The Supreme Court of Pennsylvania, which only last year upheld Fair Trade, found itself hinting this year that the constitutionality of the depression-originated legislation may no longer survive a test.

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16 The existence of a trend was suggested in Bulova Watch Co. v. Zale Jewelry Co., 147 So. 2d 797 (Ala. 1962).
18 California adopted nonsigner fair trade in 1933. It was the first state to do so and became the model for later acts. The act in its present form may be found in Cal. Bus. & Prof. Code § 16900-05.
22 In accordance with the familiar principle that a court will not decide a constitutional question unless it is absolutely required to do so, we refrain from considering the prob-
Decisions in other cases in which Fair Trade has been upheld demonstrate a palpable amount of disaffection for the concept. In upholding the nonsigner clause, the Delaware Supreme Court in General Elec. Co. v. Klein23 sustained the act, primarily on the ground that the underlying economics were fairly debatable and that, within the field of debatable economics, legislative action was not challengeable. In upholding the federal constitutionality of the state's Fair Trade law, a district court in Maryland,24 although it felt itself bound by precedent, indicated its strong disfavor with the law and offered what appears to be considerable encouragement to an appeal and its own reversal.25

ABANDONED

Aside from the outright rejections and hints of rejection mentioned above, Fair Trade has lost substantial support. To some extent, as previously mentioned, this loss of support can be traced to the rejection elsewhere. Not all of the abandonment has a foundation in legal rejection, however. A number of companies have apparently abandoned Fair Trading because the requirement that a uniform price be maintained has cut sales to high-volume discount houses. Still others have abandoned Fair Trade, finding the enforcement program too difficult or too ineffective. Many more have abandoned Fair Trade for reasons that are unknown.26 The legislature of Puerto Rico has, despite a judicial holding of constitutionality,27 legislatively abandoned Fair Trade.28 Among

lem at this time. . . . However, we cannot fail to observe increasing objections to the legality of nonsigner provisions in particular and to the economic soundness of fair trade bills in general. . . . Changing patterns of merchandising and distribution require a reappraisal of the underlying premises of fair trade legislation.


25 In view of the decisions . . . this court, while completely unpersuaded, does not feel that it, as a trial court, should set itself up as above its numerous superiors and equals in authority . . . As, however, the point has not been decided by the Fourth Circuit, and this court feels so strongly upon it, the court . . . if requested . . . and if an application for appeal be made . . . will stay proceedings in this court.

Id. at 213.

26 Some of the difficulties of enforcement of a fair trade program are chronicled in Brecher, Buying at Discount, 14 Consumers Union Reports 420 (1949).
28 Laws of P.R. Act No. 3 of July 29, 1958, 2d Spec. Sess. The preamble to the repealing law states: "It was in the decade beginning in 1930 that the type of legislation known as 'fair trade laws' came into being. . . . The present price situation calls for a public policy of low prices in order to combat the threat of inflation that would reduce the purchasing power of money."
manufacturers who favor Fair Trade, whether they have maintained a program of fair trading or not, there appears to be despondency at the current course. Certainly the representative proponents of retail price maintenance claimed, in the hearing on a bill which would strengthen Fair Trade, that the present program had been substantially undermined.29

WOUNDED

Perhaps more significant than either the outright rejection or the abandonment of Fair Trade, are a number of decisions which seemed, nominally at least, to have favored Fair Trade, but which have resulted in fashioning or re-emphasizing substantial impediments to its effective enforcement. It is well accepted, for example, that in order to maintain a Fair Trade price in a state, it is necessary that the fair trader enforce his price maintenance against all retailers and that failure to do so affords an adequate defense to a violating retailer. The enforcement of this duty has led a number of courts in Fair Trade states to interdict fair trading because the manufacturer was unable to plug all the leaks in the dike at the same time.30 In this vein, a New York court, while granting a preliminary injunction against Fair Trade violations after initially refusing to do so, pointed out that the plaintiff in such a case has the burden of showing that "it is presently vigorously and without discrimination enforcing its fair trade rights."31

In another case, a New Jersey court invoked a common provision in corporate statutes, namely, that a corporation may not bring suit in the state unless licensed to do business in it, in order to bar a Fair Trade suit by a manufacturer without such license.32 On the one hand, such a manufacturer, if he is truly not doing business in the state is faced with the onerous burden of obtaining a license which in turn may subject him

29 Take for example this colorful passage: "The afflictions of Job and agonies of Samson were as nothing compared to the travails of this trade [the appliance-radio-TV trade] over the past decade. One of the more lamentable aspects of this saga of sorrows has been a very considerable problem relating to the maintenance of product quality standards in the face of general price demoralization. A degeneration of the marketing atmosphere into something like a state of anarchy has been the inevitable result." Statement by Richard E. Snyder, Consulting Economist. Hearings on S.J. Res. 159 before a Subcommittee of the Senate Committee on Commerce, 87th Cong., 2d Sess. 92 (1962).
to the personal jurisdiction of the local courts and may bring about tax consequences not to mention the annoyance of certification itself.\textsuperscript{33} On the other hand, if he chooses not to maintain suits in the state by reason of the aforementioned rule, he may be effectively prevented from maintaining his state Fair Trade price by being unable to enforce it. At the time of this writing, however, no other state appears to require this choice on the part of a would-be fair trader.

In part, of course, this problem is a function of the person entitled to bring suit. Some states have allowed persons lower in the distributive chain than the manufacturer to be plaintiffs in Fair Trade actions. The lower one may go in this chain without removing himself from the class of permissible plaintiffs, the less onerous the burden of the certificate. In both New Jersey\textsuperscript{34} and California\textsuperscript{35} there is precedent allowing a wholesaler or other temporary owner of the goods to set the resale price although the California holding would seem questionable in light of a recent California case.\textsuperscript{36} Furthermore, at least in New Jersey, even a retailer may enforce a resale price once it has been set.\textsuperscript{37}

A further source of difficulty for the fair trader has been the provision in the McGuire Act\textsuperscript{38} which specifically excludes horizontal price fixing from the act’s protection.\textsuperscript{39} Under this provision it has been held that a vertically integrated producer may not set the price of a seller with which it competes for sales;\textsuperscript{40} a similar result has followed where there have been isolated retail sales by a manufacturer without integration.\textsuperscript{41} The same provision bears the responsibility for a recent case decided by the Supreme Court of Pennsylvania.\textsuperscript{42} In that case, despite

\textsuperscript{33} See Henn, Corporations § 101 (1961).
\textsuperscript{34} Schenley Prods. Co. v. Franklin Stores Co., 124 N.J. Eq. 100, 199 Atl. 402 (Ct. Err. & App. 1938).
\textsuperscript{39} “Nothing [herein] . . . shall make lawful contracts or agreements . . . between producers, or between wholesalers, or between brokers, or between factors, or between retailers, or between persons, firms, or corporations in competition with each other.” 66 Stat. 632, 15 U.S.C. § 45(a) (5) (1958).
\textsuperscript{40} United States v. McKesson & Robbins, Inc., 351 U.S. 305 (1956).
\textsuperscript{41} Esso Standard Oil Co. v. Secatore’s, Inc., 246 F.2d 17 (1st Cir. 1957).
\textsuperscript{42} Gulf Oil Corp. v. Mays, 401 Pa. 413, 164 A.2d 656 (1960).
a statutory provision which appears to validate retailer enforcement of Fair Trade, retailers were denied a remedy on the ground that their combination for purposes of enforcing Fair Trade was found to be in violation of the federal antitrust laws. So holding, the court avoided a question of interpretation of the Pennsylvania act as to a retailer's initiation rights and also bypassed the question of the act's constitutionality. In a similar situation, the United States recently filed a complaint charging violations of sections 1 and 3 of the Sherman Act against retail druggists who had been engaged in establishing a Fair Trade system for products which they sold.43

There have been other comparatively minor annoyances to fair traders. One court reasoning from the sometimes requirement that the price-fixer uniformly fix his retail price44 held that a price cut in a single area of the state vitiated the Fair Trade agreement; this was true, despite the fact that the price cut was a means of conducting a market test on the acceptability of the product at a lower price.45 Another court held that a refusal to deal with a retailer who was a price cutter justified the retailer's sale of goods below the Fair Trade price.46 The latter court found an inequity in requiring price maintenance when the retailer could not obtain renewal of the goods he was selling.47 Finally, courts have refused to enjoin retailers from distributing the now ubiquitous trading stamps with the sale of fair traded goods, despite the fact that the courts recognize that the practice in question would have the indirect effect of lowering prices below the established level.48

Among the major blows to Fair Trade, one of the most significant was the determination that sales could be made from a non-Fair Trade state to consumers in a Fair Trade state without adherence to the Fair Trade

46 Lentheric, Inc. v. Weissbard, 122 N.J. Eq. 573, 195 Atl. 818 (Ch. 1937).
1963] QUALITY STABILIZATION 791

prices.49 This decision increased in importance as a greater number of
states dropped Fair Trade. While its import is not necessarily uniform
on the fair trading of all products, there are a substantial number of
products brought under new competitive pressure because of the fact
that they may be secured within a Fair Trade state at discount prices
by the mere expedient of locating a mail order house in a non-Fair Trade
state. Of course, even without the decision, the existence of the product
at non-Fair Trade prices conceivably puts some competitive pressure on
the stores near the boundaries of the state, irrespective of the legality of
shipment into the state.

Another blow was dealt to Fair Trade by a California court. In
Glaser Bros. v. Twenty-Fifth Sales Co.,50 the Superior Court for Alameda
County refused to allow a wholesaler to enforce Fair Trade prices on
cigars against a California retailer who had purchased the cigars from an
out-of-state wholesaler. The court felt that substantial problems would
be raised by allowing someone other than the manufacturer to set Fair
Trade prices for all retailers within the state in that this could lead to the
establishment of two different prices where there are more than one
wholesaler of the product in the state. The court also found constitu-
tional difficulty with a Fair Trade concept not requiring a privity of con-
tract or, at least, a chain of title between the person being asked to
maintain the resale price and a signator to a retail price maintenance
contract.

This decision is interesting from a number of standpoints. In the first
place, the problem of allowing someone other than the manufacturer to
maintain the Fair Trade program has been raised in other states, and the
decisions have, in some cases, demonstrated little difficulty in allowing a
wholesaler, and sometimes other persons, to establish a program.51 One
of the courts which had previously been faced with the problem was the
Superior Court of California for the County of Los Angeles, which in 1937
in the case of Parrott & Co. v. Somerset House, Inc.,52 had reached an
opposite conclusion. The Parrott court had been faced not only with the
problem of the authority of persons other than the manufacturer to set

49 General Elec. Co. v. Masters Mail Order Co., 244 F.2d 681 (2d Cir.), cert. denied,
51 Norman M. Morris Corp. v. Hess Bros., 243 F.2d 274 (3d Cir. 1957); Schenley Prods.
Co. v. Franklin Stores Co., 124 N.J. Eq. 100, 199 Atl. 402 (Ct. Err. & App. 1938); Old Fort
the price, but had even grappled with the problem of the possibility of multiple pricings, finding such pricing unlikely in light of the original owner's right to exercise his initiative in insuring that a single price be maintained in the state. There is, of course, something to be said for the proposition that if the owner of the trademark is not himself involved in Fair Trade pricing, his apathy at what is designed to be the protection of his trademark might lead courts to conclude that it was not a mark which needed the protection of Fair Trade pricing. It is also a seemingly legitimate assumption that the farther down the distributor's chain that resale price maintenance is actually accomplished, the greater the likelihood that fair trading will be used to effect interests of retailers or wholesalers who are, at least in theory, not the intended beneficiaries of Fair Trade pricing. Nevertheless, the fact remains that by deciding as it did, the Glaser Bros. court has lessened the effectiveness of Fair Trade in California.

The suggestion that a type of chain of title or privity of contract be required in fair trading is again an interesting assertion for a court in California since the California nonsigner provision, which introduced the concept of binding dealers who had not contractually bound themselves was the national model for such legislation. It is also interesting to note that the case was decided in the same month that another court on the other coast of the country was holding the contract in Fair Trade pricing to be largely an irrelevancy. While it is by no means clear whether the Glaser Bros. decision will remain the law in California and even less clear whether it will have any effect in the other Fair Trade states, its wide adoption might again hasten the already precipitous course of Fair Trade.

Finally, the Pennsylvania courts have, of late, found new significance in the McGuire Act requirement that goods to be fair traded must be in "free and open competition with similar goods," and by enforcing this provision have contributed another substantial cloud to the future of Fair Trade as presently constituted. Indeed, at this point, it does not

54 In Mead Johnson & Co. v. Westchester Discount, Health & Vitamin Center, Inc., 212 F. Supp. 310 (E.D. Pa. 1962), the court held that the fact that there may be contractual deficiencies in the underlying contract on which the fair trade law is based is not determinative of the validity of the price set in it since it serves a purely documentary function in the program.
55 See, e.g., Gulf Oil Corp. v. Mays, 401 Pa. 413, 164 A.2d 656 (1960).
56 It is surprising that despite the existence of the free and open competition provision in the McGuire Act, little serious effort had been made at its enforcement prior to the recent
seem unlikely that if Fair Trade succumbs completely, the courts of Pennsylvania will have been largely responsible for bringing about its fate. It is hard to imagine that any of the states which have declared Fair Trade unconstitutional, even those which have invoked the most evil-sounding constitutional rationales, will have made the impression of the Pennsylvania courts on the ultimate outcome of Fair Trade. Not even the suggestion of the Supreme Court of Alabama that a "trend" had been established against the constitutionality of Fair Trade seems likely to match the impression made by a comparatively short series of cases in the state of Pennsylvania.

Pennsylvania has what, by national standards, is a comparatively rigorous Fair Trade law. It provides expressly for enforcement of a Fair Trade program by retailers as well as persons higher in the chain of distribution. The act had the affirmative sanction of the highest court of the state. For these reasons, little concern was probably felt by Fair Trade advocates with respect to the continued effectiveness of the state program. Quite unexpectedly, it would appear, the Supreme Court of Pennsylvania decided, on its own motion, that it ought to consider Fair Trade in a broader context. In Gulf Oil Corp. v. Mays, the court, despite the fact that no issue as to free and open competition remained after the pleadings, raised the question whether gasoline could be fair traded in the state because of the apparent lack of competition between the major oil companies. Holding that a plaintiff desiring to enforce Fair Trade had the burden of establishing that his product was in free and open competition, the court reversed the finding that would have allowed the oil company an injunction against a price-cutter.

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Pennsylvania action. Its major prior application was a holding that color film, at that time exclusively sold by the fair trading seller, was not in free and open competition with black and white film which the other sellers retailed. Eastman Kodak Co. v. FTC, 158 F.2d 592 (2d Cir. 1946), cert. denied, 330 U.S. 828 (1947). This lack of vigorous enforcement is especially puzzling in light of the fact that this provision was perhaps the only provision in the act designed to insure that some economic pressure be brought to bear in setting the price of Fair Trade goods. In fact, one scholar in this field has gone so far as to suggest that with proper enforcement of this provision the Fair Trade concept might be shorn of many of the objections which others have levied against it. See Adams, Resale Price Maintenance: Fact and Fancy, 64 Yale L.J. 967 (1954).

As startling as the *Gulf Oil* decision may have been, it was possible after the decision of this case to ascribe it to the peculiarities of the oil industry. The *Gulf Oil* court emphasized that the major oil companies in many instances sold each other’s gas as well as charged identical prices. The former argument, while not addressed precisely to the free and open competition concept, was thought relevant since trademark protection could hardly be accomplished in the context of selling another’s product. The latter had a direct relevancy to the openness of competition. Perhaps, one could speculate, fair trading was not possible for oil, but as to other products remained unchallenged. Admittedly, a common pleas court in Philadelphia, 62 shortly after the *Gulf Oil* case, did rule that retailers, despite their apparent statutory favor, could not enforce Fair Trade; but with the exception of these two blows, Fair Trade seemed for the time immune from further attack. As late as the middle of last year, the Supreme Court of Pennsylvania was expressly upholding the constitutionality of the state Fair Trade program. 63 In September of 1962, however, a common pleas court in Pittsburgh, 64 read the *Gulf Oil* decision as a directive to examine the freeness and openness of competition and, finding that Gillette razor blades were subject to comparatively little competition from other blades, refused an injunction against a price-cutter of that product. For good measure, it also ruled that a Fair Trade program could not be maintained when complying retailers were allowed to give bonus stamps which could amount to as much as thirteen per cent rebate on sales of fair-traded items; this was true despite the fact that the court followed an older Pennsylvania ruling 65 which held it consistent with a Fair Trade program to give trading stamps (these amounting to less than a two per cent rebate). It further ruled that Fair Trade was, of necessity, based on state-wide pricing and that an area price cut, even one designed as a market test for the lower price, vitiated enforcement of Fair Trade pricing.

Those seeking solace were unlikely to find it in the Supreme Court of Pennsylvania which only three months later decided the appeal of *Shuman v. Bernie’s Drug Concessions, Inc.* 66 In that decision, the court

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65 Bristol-Myers Co. v. Lit Bros., 336 Pa. 81, 6 A.2d 843 (1939).
ruled that retailers which had been instrumental in forcing Fair Trade on their suppliers were improper parties to enforce compliance. The court did not go further and rule on either the question of interpretation of the Pennsylvania act, which would appear on its face to provide the right denied in this case, or on the constitutionality of the act. In the latter context, however, the court spoke in menacing terms.  

It may well be that the trend suggested by Alabama may yet find another convert in Pennsylvania. Should that happen, Pennsylvania will not only have added to the already staggering list but also will have contributed gnawing problems for those who remain in the other camp.

Most significant among the problems that have been raised in Pennsylvania, of course, is the problem of free and open competition. So far, its ambit has reached only two classes of goods. In both cases the court seemed convinced that there was little substantial competition. One is left with the question, especially if the original suggestion of the court be taken at face value and each plaintiff be put to the burden of proving that his product is in free and open competition, whether that doctrine will strike down goods sold in markets where there is neither the extreme concentration of the razor blade industry or the suspected cooperation of the oil industry. If free and open competition means, in addition, that the fair traded product must be brought under price competition by another product, one wonders how many items could ultimately remain in the Fair Trade category. It would seem that a manufacturer, forced to maintain uniform prices on his product among all retailers in the face of what could be sporadic price cuts in the “competing” product, would be hard put indeed, if the products were truly interchangeable, to continue his program without some loss. Where such active competition did not result, might not the absence of this conduct itself be persuasive of the fair trader’s failure to establish free and open competition?

**Alternatives to the Present Fair Trade Program**

Two states faced with a declaration of unconstitutionality with respect to their previous nonsigner Fair Trade program have adopted a new order in resale price maintenance. Both Ohio and Virginia have attempted to revamp their trade law so as to give a trademark owner a continuing property right in his mark and through that right a right to

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67 See note 22 supra.
68 See note 2 supra.
prevent price cutting on his product, on the theory that such cuts are trademark defamation. However, it seems unlikely that the new statutes will ultimately solve any major problem under existing law.

The major innovation introduced by the new Ohio and Virginia legislation appears to be primarily a change of focus. Instead of depending on a contract made between the seller and a single retailer to establish the basic pricing structure, the new acts permit the same result to be accomplished either by contract or by notice. The old nonsigner is no longer bound by another’s contract but is bound instead by notice, either affixed to the product or communicated to him in some other manner.

In Ohio, which had declared nonsigner Fair Trade unconstitutional,71 courts are split on the constitutionality of their new act.72 Virginia has upheld their new act,73 but it should be noted that in its approval the court also indicated that it would not have stricken the more normal nonsigner provision as unconstitutional,74 the issue never having been decided by that court.75

While a number of states which have declared nonsigner Fair Trade unconstitutional have preserved resale price maintenance as between contracting parties,76 there seems little reason to suppose that the law of contract can be sufficiently rewritten to afford the broad Fair Trade protection found in the Ohio formulation:

‘Contract’ means any agreement, written or verbal, arising from the acts of the parties. . . . Any distributor [whether he acquires such commodities directly from the proprietor or otherwise] who, with notice that the proprietor has estab-

74 The Standard Drug court rejected contentions which are usually raised with respect to the more usual form of fair trade, namely, that the act violated due process, was an unconstitutional delegation to private parties of legislative power, and was a delegation of price fixing authority to private parties.
75 In Benrus Watch Co. v. Kirsch, 198 Va. 94, 92 S.E.2d 384 (1956), the Virginia Supreme Court had affirmed so much of a lower court opinion as held that the previous nonsigner Fair Trade provision had been repealed by a later anti-monopoly act, finding it unnecessary to consider the other holding below; i.e., that the nonsigner provision violated the Virginia Constitution.
lished a minimum resale price for a commodity, accepts such commodity shall thereby have entered into an agreement with such proprietor. . . .77

Virginia attempts its recodification more succinctly. "'Contract' means any agreement, written or verbal, or actual notice imparted by mail or attached to the commodity or containers thereof."78 Whatever effect this third-party-notice theory may have on internal law, it would seem to change few issues with respect to Fair Trade. If enforcing a price against unwilling third parties is an unconstitutional delegation of legislative power, it remains so with notice. Indeed, nonsigner provisions are also unenforceable absent notice.79 If a manufacturer may not dictate a price to non-agreeing buyers because pricing of general commodities is not affected with a public interest or because this is a taking of property without due process, there would again appear to be little reason for a distinction. Rather clearly, in states in which price fixing without a standard violates the constitution or in which anti-monopoly and restraint-of-trade provisions make price fixing an illegal objective, notice should not affect the result. If, then, notice has any effect, it may be a peculiarly negative one. The McGuire Act exemption, which legalizes Fair Trade, provides for the exemption of "contracts or agreements prescribing minimum or stipulated prices"80 and further exempts from antitrust sanction the civil interdiction of price cuts below the contract level.81 Without questioning the right of the legislatures of Ohio and Virginia to redefine "contract" for internal consumption, it seems questionable that the one-party-plus-notice contract is within the meaning of "contract" in the McGuire Act.

79 The McGuire Act, 66 Stat. 631 (1952), 15 U.S.C. § 45(a) (1958), only exempts statutes which, in substance, prohibit the willful and knowing cutting of price. The issue usually arises with respect to the duty of the nonsigner to maintain the resale price of which he did not have notice at the time that he purchased the goods, although later notice was given. In this context a number of courts have relieved the retailer of fair trading obligations. E.g., James Heddon's Sons v. Callender, 29 F. Supp. 579 (D. Minn. 1939); Lentheric, Inc. v. Weissbard Bros., 122 N.J. Eq. 573, 195 Atl. 818 (Ch. 1937). Some have not. E.g., Barron Motor, Inc. v. May Drug Stores, Inc., 227 Iowa 1344, 291 N.W. 152 (1940). No reported case, however, seems to support an action against a retailer for sales made prior to his receiving notice of the fair trade price.
The Quality Stabilization Concept

The Quality Stabilization Bill, which as a joint resolution last year won the approval of the House Committee on Interstate Commerce and the Senate Commerce Sub-Committee, contains a number of provisions which are not directly related to the problem currently under discussion. For example, under the proposed act an owner of a brand name is given the right to prevent retailers, utilizing his branded goods, from adopting certain deceptive practices as well as to require their adherence to his resale price. It may be, as several witnesses before the Senate sub-committee indicated, that the provisions are designed to divert attention from price-fixing provisions. It may, on the other hand, be true that a reiteration of presently existing rights against retail abuse coupled with a provision for civil relief is thought to be a genuinely desirable aim of federal legislation. However that may be, Quality Stabilization is significantly to be accomplished under this act by price stabilization.

Procedurally, the Quality Stabilization Bill is designed to function in much of the manner of the Ohio and Virginia acts. The manufacturer is to provide notice of the established price and the retailer, whether dealing directly with the manufacturer or not, is to adhere to the price

83 S.J. Res. 159, 87th Cong., 2d Sess. (Comm. Print July 26, 1962). This bill was chosen as the focus for discussion since it was the subject of extensive public hearings in the 87th Congress. See Hearings on S.J. Res. 159 Before a Sub-Committee of the Senate Committee on Commerce, 87th Cong., 2d Sess. (1962). Furthermore, a number of changes were made from the draft as originally submitted, see S.J. Res. 159, 87th Cong., 2d Sess. (Feb. 21, 1962), indicating close study by the committee.
84 S.J. Res. 159, 87th Cong., 2d Sess., § 8(a) (b) (c) (Comm. Print 1962).
85 "I know that the crux and heart of this bill . . . refers to price fixing by dealers. If you take that out, I am sure the proponents haven't the least interest in the bill." Testimony by Hon. Lee Loevinger, Assistant Attorney General of the United States. Hearings on S.J. 159, supra note 83, at 143. Congressman Emanuel Celler, after calling the bill a wolf in sheep's clothing continued: "It is as clear as a pikestaff that this is a resale price maintenance bill. There's an old Turkish adage, 'when a cat would eat her kittens she calls them mice.' Call this bill what you may, it is still a resale price maintenance bill." Id. at 252.
86 See notes 69 and 70 supra, and accompanying text.
87 A condition to the invocation of the protection of the act is that: "said goods or the containers thereof or the display devices to which they are attached for sale are plainly marked with the resale price or prices established therefor . . . ." S.J. Res. 159, 87th Cong., 2d Sess. § 8. (Comm. Print 1962). In addition, a sale below the established price is only significant "after written notice by [the] . . . owner of the institution of the owner's currently established resale price or prices, . . ." Ibid.
of which he is notified.\textsuperscript{88} Failure to adhere by the retailer gives the manufacturer a right to revoke, apparently perpetually, the retailer's right to handle any of the manufacturer's trademarked products.\textsuperscript{89} The bill specifically conditions resale price maintenance on the existence of goods in "free and open competition" with goods identified by a brand name,\textsuperscript{90} although the originally considered draft did not include such a condition.\textsuperscript{91} Price maintenance is also expressly conditioned on diligent policing of the provisions against all retailers.\textsuperscript{92} The federal courts are expressly given jurisdiction to enforce the act without respect to the amount in controversy.\textsuperscript{93}

While omitting an express exemption for activities under the act with respect to the general antitrust laws,\textsuperscript{94} the bill does give a greater range of right to the manufacturer than was available under state fair trading. In the first place, he is expressly allowed to maintain a resale price despite the fact that he is himself competing in the resale of his product.\textsuperscript{95} Further, he is given the astonishing right to set a series of resale prices which differ from each other on any basis which is not "made unlawful

\textsuperscript{88} Ibid.
\textsuperscript{89} Ibid.
\textsuperscript{90} Ibid.
\textsuperscript{91} The condition contained in the original draft was: "When goods usable for the same general purpose are available to the public from sources other than the owner of such brand, name, or trademark, . . ." S.J. Res. 159, 87th Cong., 2d Sess., § 8 (Feb. 21, 1962). That this less restrictive provision may still closely approximate the desires of the quality stabilization advocates seems indicated by the fact that several of the quality stabilization acts introduced in the present Congress revert to this draft. E.g., H.R. 2564, 88th Cong., 1st Sess. § 8 (1963); H.R. 3669, 88th Cong., 1st Sess. § 8 (1963).
\textsuperscript{92} S.J. Res. 159, 87th Cong., 2d Sess. § 12 (Comm. Print 1962).
\textsuperscript{93} S.J. Res. 159, 87th Cong., 2d Sess. § 11 (Comm. Print 1962).
\textsuperscript{94} The original draft provided: "No exercise of any right or remedy provided in [this act] . . . shall be construed to be a violation of any of the Antitrust Acts . . . ." S.J. Res. 159, 87th Cong., 2d Sess. § 14 (Feb. 21, 1962). This provision is again being introduced in new bills. See, e.g., H.R. 457, 88th Cong., 1st Sess. § 14 (1963). In this respect it should be noted that the other provisions of the act may become very significant. For example, the right to revoke a dealer's right to handle trademarked goods because of sales below the established price and the right to do so for vaguely defined acts of deceptive marketing, may well be used by the holder of a trademark to boycott a disfavored retailer which, but for the act, would be a per se violation of the Sherman Act. Klor's, Inc. v. Broadway-Hale Stores, 359 U.S. 207 (1959). The exemption provided might reverse the anti-boycott ruling. There are many other activities which might be sanctioned by the broad language including some unforeseeable ones.
\textsuperscript{95} S.J. Res. 159, 87th Cong., 2d Sess. § 15 (Comm. Print 1962).
by any other statute." The combination of these provisions leads to some rather interesting possibilities should the bill become law.

The provision which expressly gives the right to a trademark owner to set the resale price despite the fact that he also participates in sales at the same distributive level, contains the language: "Provided, That such owner shall sell such identified goods at any level of distribution at the price established for that level of distribution." This is the first direct suggestion in the bill that the manufacturer or other owner is to be given the right not only to set a retail price but to set the price at which his trademark goods may be sold at any level of distribution. While it may well be necessary for a trademark owner to set his retail price at such a level as to allow the retailer to make a profit, there appears to be little suggestion that the power to control wholesale prices is similarly necessary to protect the manufacturer's product. That aside, it is a little difficult to discover in the purported justification of the bill a reason for allowing a control over distributive prices above the retail level. The justification for price stabilization under both Fair Trade and quality stabilization has been hinged to the concept that lowering the product's retail price results in product defamation. However tenuous this reasoning, the extension of the product defamation concept above the retail level seems almost incredible. If a given trademark product were being distributed at a price which allowed merely the normal wholesaler margin of profit, and if the retail price were controlled, the product would apparently be moving in its manufacturer-determined price level, and consequently would be undefamed. The reduction of the wholesale price, which would result in giving the retailer a greater profit, should hardly result in the retailer's rejection of the line in question. Far from being disparaged, such goods would seem to gain a competitive edge by the greater profit margin at the retail level.

Of course, what this provision more patently does is to provide the manufacturer with an opportunity to stabilize a margin of profit at several levels of distribution and, through use of this horizontal stabilization, to dissipate, conceivably, some price-cutting pressure which might

96 S.J. Res. 159, 87th Cong., 2d Sess. § 14 (Comm. Print 1962). This provision was added by the subcommittee; it did not appear in the original draft.
98 This hypothesis is the recurring theme of the testimony of proponents of quality stabilization. See Hearings on S.J. Res. 159, supra note 83. In part, this may be explainable by the encouragement which the United States Supreme Court gave to trademark protection in retail sales in Old Dearborn Distrib. Co. v. Seagram Distillers Corp., 299 U.S. 183 (1936).
otherwise be directed against him. Such a result is not necessarily beyond
the purpose of this act since the act seems founded _inter alia_ on an
economic premise that "it is recognized that unless fair competitive
practices [resale price maintenance] can be maintained in all appro-
priate stages in the distribution of . . . identified products, the market-
ing of . . . identified products is depressed and the quality thereof
tends to deteriorate . . . ." The proposition that a manufacturer must
be guaranteed a substantial profit if he is to produce a quality good
may seem an unusual principle in an economy that is, at least nominally,
dedicated to a philosophy of competition-enforced quality. Granting that
proposition, however, the aforementioned provision seems sensible
enough. If it is designed to do anything, it is designed to make it as
feasible as possible for the owner of a trademark to build in a profit
margin at each level of distribution.

The same provision has another novel application in that, by its express
terms, the bill would allow a trademark owner to fix horizontally a
price with sellers in competition with him, a result specifically pro-
hibited by the McGuire Act. As a result of this provision, it would
seem desirable, indeed, for any retailer who can afford to do so to inte-
grate vertically. With a measure of vertical integration and a product in-
terchangeable at the retail level with that of some of its competitors, each
company would become entitled by reason of its ownership of a trademark
to make a horizontal price-fixing agreement with a competitor respecting
the sale of its product. Moreover, if retailers are judiciously chosen for
this purpose, it may be possible to create at the retailing level, through
contract, a measure of integration and price stability even where actual
integration would quite likely violate either the anti-merger provisions
or perhaps even the monopoly provisions of federal law. Of course, the
advantages aforementioned are not necessarily limited to the retail level
since they can be accomplished at any given level of distribution. Again,
this result seems reasonably consistent, granting only the basic premise
that an increase in profits is necessary to maintain the quality of goods.
The result seems strange, however, in light of the fact that, throughout
the hearings on quality stabilization, the Senate sub-committee expressed
a strong desire to prevent the act from becoming a vehicle for horizontal
price-fixing.

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99 Preamble to the original draft. S.J. Res. 159, 87th Cong., 2d Sess. (Feb. 21, 1962). It
was removed by the subcommittee, but has returned in several of this year's bills. E.g., H.R.

100 See note 39 supra and accompanying text.

101 For example, Senator Monroney repeatedly asked for suggestions from witnesses as to
The power granted by this section need not be exercised in the manner above indicated. It can, instead, be used to determine the profit margin of anyone in the distributive chain. Retailers may be rewarded by requiring the wholesaler to resell at a price considerably lower than the required retail price; they may be punished by greatly closing the gap. Similarly, distributors at each level in the chain of distribution may have their profits significantly determined by one who, for all intents and purposes, may be a stranger to them—the owner of the trademark. It is indeed peculiar that, on the whole, retailers and small businessmen testified in support of this bill which would seem a more likely product of the larger corporations which own the majority of significant trademarks.

One further provision should be noted in the same regard. The bill expressly allows the resale price to be "differentiated with reference to any criteria not made unlawful by any other statute."102 In the event that the trademark owner does not have sufficient power under the aforementioned provisions of the proposed statute, he is hereby given this additional power to force compliance by distributors and retailers. The brand owner by use of this section, has almost perfect control over how his goods shall be distributed. If he wants his goods to move quickly in one area and slowly in another, he has but to set a different price in each. Coupled with the price-fixing provisions allowed among horizontal competitors,103 this power can create, without more, a division of markets as well as a price-fixing arrangement. Two competitive distributors need only price-fix each other (assuming that through vertical integration they become sellers of goods under a trademark owned by the other) and then set their respective prices so as to allow one company a low resale price on both its own and its competitor's commodity in one section of the country in return for reciprocity in another. Whether such an arrangement would be "made unlawful by any other statute" merely because market division is a violation of the Sherman Act,104 is unanswerable. Quite conceivably, since the Sherman Act only prohibits restraints of trade, there is no prohibition sufficiently specific to invoke the "unlawful" clause of the Quality Stabilization Bill.

The price-differentiation section has still other possibilities. A given

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103 Note 95, supra.
person in the chain of distribution can be rewarded or put out of business by adjusting his resale price. Since there is no need to make a similar adjustment on all resale prices, assuming that a lawful criterion can be created which would identify the seller in question, much the same range of possibilities as above suggested for classes of distributors and retailers can be applied to individuals. It is not quite clear how the variable price level provision of the bill is to be squared with the provision which requires that if a manufacturer price-maintains on a level in which he sells, he charge the price "established for that level." In any event, at a minimum, the trademark owner, able to conduct horizontal price stabilization even in its uncomplicated form on the level at which he is also a seller, is clearly enabled to build in a substantial profit margin for himself above the level that he might achieve if other purchasers of his product were allowed to compete with him in price for its sale; he may also trim the retail profit margin sufficiently to drive out competitors in any market he wishes to monopolize.\footnote{106}

To be sure, the trademark holder would under this bill be exercising no greater rights than a totally integrated producer-seller would exercise with respect to goods which were not sold outside the seller's stores. The significant point is that for all intents and purposes this bill gives a person, by virtue of his ownership of a trademark, practically the same control over the sale of his goods as he would have had had he established this integrated plant. This means that trademark owners so large or so powerful that they could not integrate without serious threat of antitrust sanctions may have the benefits of that integration apparently without antitrust reverberations. This also means that, large or small, the manufacturer of goods is given enormous economic power over those lower in the chain. That also seems a rather interesting anomaly.

When the proponents of the bill spoke of its need, almost all ultimately addressed themselves to the plight of the small businessman.\footnote{106} This bill

\footnote{105} The Aluminum Company of America used a "price squeeze" of this sort to control sheet aluminum production. Its effectiveness contributed to the finding of monopolization by the company. United States v. Aluminum Co. of America, 148 F.2d 416 (2d Cir. 1945).

\footnote{106} Some, such as Mr. Richard E. Snyder, a consulting economist, took the statistical approach. His statement, replete with charts, undertook the burden of establishing the deplorable condition in retailing which he colorfully described. See Hearings on S.J. Res. 159, supra note 83, at 84-106. Others, perhaps best represented by Senator Humphrey, approached the problem by extolling the virtues of the small retailer and the vices of fly-by-night discounters. After praising the former, he testified, as to the latter: "That is generally what a discounter does. He comes in, sets up his establishment, contributes nothing to anybody, including the Community Chest, the church, or the town, and even fights over his taxes." Id. at 120.
is touted as a tool to give small retailers a new competitive weapon against the “discount house.” In terms of the provisions of the proposed act, however, it seems curious that small business was the intended beneficiary. Vertical integration, so helpful in utilizing the provisions of this bill for the purpose of increasing profit, is presumably not open to most “small businesses.” If small businesses need greater countervailing power against manufacturers too prone to sell to discount houses, they are hardly given it by a bill that makes those manufacturers virtual dictators of the retailer's profit margin. Moreover, if the bill was designed to prevent sales to discount houses, it seems strange that it incorporated a provision allowing variable resale pricing. If anything, a volume criterion virtually suggested by the act, and rather clearly not unlawful by any antitrust provision, would make it possible to freeze by quality stabilization a difference in retail price between discount houses and regular retail sales without depriving the manufacturer of sales to either. All that would be increased in such a scheme is the manufacturer's profit from both. Why it has been assumed by proponents of small business legislation that their best alternative is to give increasing power to manufacturers is not known. If Fair Trade has helped retailers at all, it seems in recent years at least to have helped primarily because retailers, who arguably are not entitled to do so, have invoked Fair Trade provisions in self-protection. They are clearly given no such right under quality stabilization. They, then, are to receive their benefits from manufacturers who are to be guaranteed a profit margin sufficiently large to insure that they will continue to make quality goods.

To be sure, price stabilization will only result from dictated pricing in industries in which retailers of the same product are otherwise in a position not to compete with each other, or where this is true on another distributive level. Moreover, price setting will only be effective with respect to goods which are not brought under serious competitive pressure by competing goods. In other words, price maintenance is likely to be effective only where, by using Fair Trade devices, sufficient concentration can be achieved and sufficient competition can be prevented so that there results an oligopolistic situation in which price-cutting no longer seems advantageous. Since, however, many trademark owners in our

107 See notes 51 and 52 supra and accompanying text.
108 The Federal Trade Commission noted in its 1945 report on resale price maintenance that the leadership in the movement for fair trading has shifted to organized retailers' groups, especially in the retail drug trade. FTC, Report on Resale Price Maintenance 5 (1945).
present economy seem to be among those who are already operating in heavily concentrated fields, the device seems to exist in a dangerous area.

**THE PROSPECTS FOR QUALITY STABILIZATION**

During the last session of Congress, bills for quality stabilization were extensively discussed and won a considerable amount of support.\(^{109}\) Pundits suggest that it may be in an even stronger position in this session.\(^{110}\)

Should Congress in this session pass the Quality Stabilization Bill, it would, of course, make a major change in the Fair Trade prognosis. To begin with, it would immediately impose on the twenty-four states and territories which have rejected Fair Trade and the four states which have never adopted it a comprehensive system of resale price maintenance. In twenty-three states it would automatically reverse a holding of unconstitutionality under the state constitution.

With respect to the holdings of several states that Fair Trade is unconstitutional within the federal constitution, it seems unlikely that these decisions will prevail. To begin with, the argument, often imposed in state constitutionality cases, that the pricing of general goods is not a matter affected with a public interest, would seem in light of current federal cases to be made too late in the constitutional development of the law.\(^{111}\) The later cases appear to support the proposition that, assuming a lack of arbitrariness and no invidious discrimination, economic regulation on any matter thought proper by the state or Congress is constitutionally immune. The closely allied point that price regulation is an unconstitutional taking of property without due process of law would appear to be equally dubious, as is illustrated by many of the same cases.\(^{112}\) The only constitutional argument that appears sufficient to overcome summary disposition is the argument that this type of law constitutes a delegation of price regulation to private persons. While the delegation argument has met with some success, and is advocated as an appropriate reason for rejecting federal Fair Trade by one commenta-

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\(^{109}\) In the 87th Congress, quality stabilization made considerable progress in the House of Representatives—it was approved by the Committee on Interstate Commerce, H.R. Rep. No. 2352, 87th Cong., 2d Sess. (1962), and “cleared” by the Rules Committee, H.R. Rep. No. 2520, 87th Cong., 2d Sess. (1962). It did not get to the floor, however.


\(^{112}\) Ibid.
tor, no federal legislation has been invalidated on a delegation argument since the great depression. In sum, it is at this point viewed as unlikely that a federal court will declare quality stabilization, if passed, to be an unconstitutional statute, on these most common bases for state invalidation.

One other state argument appears worthy of note. A number of states have pointed out that fair trade delegates not only the price-fixing authority, but delegates that authority without a standard on which to judge an appropriate price level. On this basis, the unconstitutional delegation argument has been sustained. The same argument could be made to support a holding of arbitrariness which might, in state courts, be sufficient to invalidate the legislation. Even conceding this argument, however, the federal courts seem unlikely to find quality stabilization violative of the constitution.

One negative effect which the proposed federal legislation might contribute to the enforcement of Fair Trade is a likely result of freeing federal district courts, which have in the past indicated their reluctance to enforce Fair Trade, from the mandate to follow state law. Left to their own devices in interpreting quality stabilization, it may well be that terms such as “free and open competition” may be given the strict interpretation which the Pennsylvania courts have applied, or perhaps one even stricter which would require that there be active price competition between products, as for example, that all products in a given line cannot be fair traded at essentially identical prices. A commentator has suggested that with such an interpretation of Fair Trade, its influence would be minimal.

Aside from the free and open competition requirement, an apparently reluctant addition to the act in the first place, the phrase “unlawful by any other statute,” which qualifies the option of the fair trader to vary his prices, is another vague term which disillusioned courts might well construe strictly.

More obviously, the effect of the Quality Stabilization Act would be to make price maintenance national in scope since there need be no interstate competition in the price of the product. While the manufacturer must, of course, still reckon with the price of competitive goods, except for the influence of those goods, he is free to dictate the price at which

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113 Ibid.
114 See, e.g., Miles Labs., Inc. v. Eckerd, 73 So. 2d 680 (Fla. 1954).
his product will be sold throughout the nation. Whether the effect of his ability to set a national price will lead to a level of prices that are substantially in excess of prices competitively determined, no one really knows. Many economists guess that it would have that effect,117 but the evidence, other than theory, is rather wanting in respect either to their assertion or its denial.118 Also, by enabling the manufacturer to perform his price planning on a national scale, the act would sweep away whatever economic power was previously held by a localized group of retailers whose influence would then be matched against a national as opposed to a statewide trading policy. Finally, the form of the act itself may lead to granting so much additional power to manufacturers and making it so desirable to integrate vertically that a considerable amount of concentration may develop. Experience indicates that it is unlikely that concentration once developed can be effectively reversed.

CONCLUSION

It seems reasonably probable that McGuire Act-sanctioned Fair Trade is an ailing concept. Of late, courts have bared their teeth at the concept and a bite at a time, as in Pennsylvania, or with a swift lunge at the jugular, have managed to end their state’s experimentation with retail price maintenance. Failing in the states, the proponents now have a substantial representation for their viewpoint in Congress. The proposed federal law, while in the main incorporating national Fair Trade provisions, introduces a small number of innovations some with even more controversial potential than existed under state Fair Trade.

It is unquestionable that quality stabilization—Fair Trade—retail price maintenance, whatever it be called, deviates from the main stream of our statutorily announced economic policy. In a country that has long taught, as a matter of horn-book economics, that price and quality of goods are determined and controlled by competitive forces, the new suggestion that price be controlled by trademark holders and quality protected by ample profit margins strikes a dissenting note. To be sure, state Fair Trade has never approached the predictions of economic doom


118 Dr. Lee, despite having more adequate statistical support than most of the other witnesses before the subcommittee, stated, “Let me be the first to admit that these figures are nothing but educated estimates . . . .” Id. at 294.
that have been uttered of it. Moreover, it may well be that quality stabilization, if passed, will fail because of some of the same vices which are rapidly carrying away its predecessor. However, it may also be that for better or for worse quality stabilization will achieve the result that has long been attempted of Fair Trade.
CONDITIONS OF PROBATION: AN ANALYSIS

Judah Best* and Paul I. Birzon**

In their criticism of the apparent tendency of the courts to overlook the true purpose of conditions of probation, rehabilitation of the offender, the authors discuss and evaluate some of the more commonly imposed conditions in relation to the ends to be achieved. Messrs. Best and Birzon suggest that the wide latitude of discretion vested in the trial courts in their choice of conditions, together with the reluctance of the reviewing courts to overturn a condition once imposed, have placed the probationer at an unfair advantage. They urge that this discretion be limited, within reasonable bounds, by statute, and that the appellate courts adopt certain principles of fairness in determining the limits of the trial court's discretion in any given case.

INTRODUCTION

Basic to modern penology are the premises that society as a whole profits most from a rehabilitation and reformation of the criminal offender, that correction is most effective when attention is paid to the particular difficulties of the individual offender (an "individualized justice," so to speak), and that rehabilitation should and must be accomplished, whenever feasible, without resort to the corrupting influence of institutional life. These premises, hardly novel, find their greatest realization today in the procedure known as probation.  

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The opinions and conclusions expressed in this article are those of the author and do not necessarily represent the views of the Department of Justice, the United States Attorney's Office, or any other governmental department or agency thereof.

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2 The theory of probation evolved from antecedent practices, all intended to lessen or otherwise mitigate the severities of the penal code. In English common law the courts were presumed to have power to suspend sentence for specified purposes and periods. On this basic authority rest the devices which preceded probation. Dressler, Practice and Theory of Probation and Parole 6-7 (1959).

3 Probation may be defined as a procedure of social investigation and supervisory treatment used by the courts for selected individuals convicted of law violations. During the period of probation the offender lives a comparatively normal life in the community and regulates his conduct under the conditions imposed by the court and subject to the supervision and guidance of a probation officer. The National Probation and Parole Ass'n, Probation Handbook 5. The suspended sentence should not be confused with probation. "The latter involves supervision of the convicted offender; the former does not." National Probation and Parole Ass'n, Advisory Council of Judges, op. cit. supra note 1 at 23.

In many jurisdictions the courts have the power, either inherently or by statute, to suspend
Probation enables the offender to reshape his life in the framework of normal living conditions; it preserves family life and other normal social relationships; it enables the offender to carry out his responsibilities by supporting himself and his family.

Probation avoids the shattering impact of imprisonment on personality; it avoids imprisonment's stimulation of hatred of law-abiding society; it avoids confining the reformable offender with hardened criminals who might have a contaminating effect on him; [and] it avoids the stigma attached to imprisonment . . . 4

One of the most important aspects of probation is the matter of conditions accompanying the grant. Ideally, they should be imposed with a view toward assisting the offender in his rehabilitation. Practically, they may be used to assist the court in its supervision of the probationer. Too often, however, they are used to accomplish results which, while socially desirable in the eyes of some, serve neither of these ends. Take, as an illustration, the following situation. A twenty-three year old male defendant pleads guilty to having had sexual relations with a female minor and makes application for probation. Both he and the girl are suffering from syphilis, but there is no positive evidence to demonstrate that the defendant communicated the disease to the girl. All of this information is before the court at the time of sentencing. The trial court sentences the defendant to a term of imprisonment for five years with execution of the sentence suspended upon the fulfillment of certain conditions, among which is the requirement that the defendant be sterilized.

An unreal situation? This occurred in California in 1936. In affirming the trial court's refusal to modify the condition, the California District Court of Appeals stated that:

As the trial court very properly observed, it was not so much concerned with curing the disease with which appellant was afflicted as it was with preventing appellant from transmitting the disease to his possible posterity. If reproduction is desirable

sentence and to release the offender without placing him under the supervision of a probation counselor. "This is sometimes more suitable than probation which it is sometimes incorrectly called." National Probation and Parole Ass'n, Standards for the Practice of Adult Probation 14 (Tent. Draft 1958). Finally, parole may be distinguished from probation in that:

Parole is a form of release granted after a prisoner has served a portion of his sentence in a penal institution; probation, properly applied, is granted an offender without requiring incarceration. Parole is an administrative act of the executive or an executive agency. Probation is a judicial act of the court . . .


In 1961, in the State of California, 12,566 adult offenders were granted probation. This number comprised 48.3% of those seeking probation. California Bureau of Criminal Statistics, Delinquency and Probation in California (1961).

to the end that the race shall continue, it is equally desirable that the race shall be a healthy race and not one whose members are afflicted by a loathsome and debilitating disease.  

The defendant (quite properly, we submit) refused probation on the terms offered and went to jail. Yet, since the trial court had initially determined that he was a fit candidate for rehabilitation, it would seem that society as well as the defendant profited little from the five years incarceration.

While this case may present an extreme factual situation which is not likely to be repeated, it is nevertheless representative of the many uses to which probation has been put and of the attitudes which have made them possible. Because the trial courts are under very little restraint as to the conditions which they may impose as concomitants of the probation grant, because all too few procedural safeguards are provided the offender, and because there is a general reluctance on the part of the reviewing courts to inquire into the purpose of conditions already imposed, probation may be used as a vehicle for ends wholly unrelated to the reformation of the offender. Of even greater concern, moreover, is the danger that in permitting such a latitude in imposing conditions, the purpose and effect of probation may be negated.

The function of this article is to examine the proper purpose of the conditions imposed within the probation process. In so doing, we have attempted to categorize and evaluate those types of conditions most commonly imposed upon the would-be probationer. This evaluation of necessity requires an appraisal of the safeguards provided by the legislature and the reviewing courts against the imposition of unreasonable, illegal, or in some instances, unconstitutional conditions. With this end in mind, it is hoped that the weaknesses which presently exist in the probation system will be pointed out and some constructive suggestions for their improvement offered. Prior to embarking upon this evaluation, however, some consideration should be given to certain general concepts of probation along with a brief outline of the probation process itself.

**The Probation Process**

While certain procedural rights may attach once probation has been granted, 6 it is generally conceded that its initial grant is a matter of

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6 The requirements of notice and hearing in a proceeding to revoke probation have been incorporated into the statutes of many jurisdictions. See, e.g., N.Y. Code Crim. Proc. § 935 (right to hearing); Ore. Rev. Stat. § 137.550 (Supp. 1961) (summary hearing); cf. State v.
privilege to be granted or refused at the discretion of the state. In determining whether probation shall be made available to certain classes of offenders, controlling emphasis has been variously placed by the legislatures upon the nature of the offense, the type of punishment called for by the offense, and the character of the offender. However, in a minority of jurisdictions probation may be extended to all classes of offenders without regard to such qualifications, and the drafters of the Model Penal Code have taken the position that since no legislative classification of offenses can take account of all contingencies, discretion to authorize probation should be vested in the trial court in all cases save where sentence of death or life imprisonment is ultimately prescribed.

While these restrictions on the courts' power exist largely because of


Certain crimes which are viewed with especial disfavor by a particular jurisdiction have been deemed non-probationable. E.g., Mass. Gen. Laws Ann. ch. 279, § 1 (1959) (influencing voter in connection with employment).


9 See, e.g., Okla. Stat. tit. 22, § 991 (Supp. 1957), which authorizes the court to suspend sentence, provided, inter alia, the defendant has "prior thereto previously borne a good reputation." The offender's record of previous convictions is often a specific consideration. E.g., Ill. Ann. Stat. ch. 38, § 785 (Smith-Hurd 1961).


a subordination of the community’s desire for rehabilitation to its desire for retribution and deterrence,\textsuperscript{12} further limitations have been imposed where it is deemed that a special expertise may be required. In Utah, for example, there can be no probation for a defendant with a “mental abnormality” until the Superintendent of Hospitals certifies that a release is in the best interests of the public, at which point the probation authority may impose conditions to safeguard the public and the defendant.\textsuperscript{13} Similarly, in New Mexico, a defendant who has been convicted of alcoholism may, notwithstanding the court’s order, be permitted to go on probation “for such time and under such conditions” as a majority of the Commission on Alcoholism shall judge best.\textsuperscript{14} The statutes of such jurisdictions, a brave minority, demonstrate an awareness that in certain zones of human behavior, even the most well equipped judge would be at a loss to adequately handle the problems of correction.

The probation process itself may be divided into three consecutive elements: (1) The preparation and presentation of the pre-sentence report which serves to guide the court in its decision, (2) suspension of the offender’s sentence for a period under such conditions as the court may determine,\textsuperscript{15} together with the retention of the offender within the

\textsuperscript{12} See Model Penal Code § 1.02 (2), comment (Tent. Draft No. 2, 1954) wherein it is stated: The section is drafted in the view that sentencing and treatment policy should serve the end of criminal prevention. It does not undertake, however, to state a fixed priority among the means to such prevention, i.e., the deterrence of potential criminals and the incapacitation and correction of the individual offender. These are all proper goals to be pursued in social action with respect to the offender, one or another of which may call for the larger emphasis in a particular context or situation.

\textsuperscript{13} Utah Code Ann. § 77-49-7 (Supp. 1961).


\textsuperscript{15} The power to suspend sentence may be vested in the trial court distinct from the power to impose probation, e.g., Nev. Rev. Stat. § 176.300 (1959), or as an incident thereof, e.g., Cal. Pen. Code § 1203.1, People v. Sidwell, 27 Cal. 2d 121, 129, 162 P.2d 913, 917 (1945).

In the absence of statutory authorization, the courts may have inherent power to suspend sentence. E.g., State v. Mungioli, 131 N.J.L. 52, 34 A.2d 752 (Sup. Ct. 1943); People ex rel Forsyth v. Court of Sessions, 141 N.Y. 288, 36 N.E. 385 (1894); State v. Pelley, 221 N.C. 487, 20 S.E.2d 850 (1942). Contra, State v. Bigelow, 76 Ariz. 13, 258 P.2d 409 (1953); Pagano v. Beachly, 211 Iowa 1294, 232 N.W. 798 (1930); State v. Blanchard, 156 Me. 30, 159 A.2d 304 (1960); Ex parte Boyd, 73 Okla. Crim. 441, 122 P.2d 162 (1942).

community rather than in prison, and finally (3) the supervision of the probationer by a carefully trained probation officer. While this article is primarily concerned with the second element, each of the three plays an important part in determining the success or failure of the probation program.

In determining whether a defendant shall be admitted to probation, the sentencing court is often instructed by the legislature to take inventory of the history and character of the offender, the nature of the offense and any other circumstances under which the offense was committed. With the recognition that such an accounting calls for facts which a judge, unaided, would be inadequately equipped to gather, a decision as to sentencing is commonly delayed until a sizeable body of information concerning the offender has been collected and organized by the probation service of the court.

to the applicability of the Federal Probation Act in the District of Columbia see note 155, infra. There appears to be some confusion as to whether the District of Columbia courts have inherent power to suspend sentence. Compare Miller v. United States, 41 App. D.C. 52, cert. denied. 231 U.S. 755 (1913) (inherent authority to suspend imposition of sentence at common law) with Ziegler v. District of Columbia, 71 A.2d 618 (D.C. Muníc. App. 1950) (no inherent authority to suspend execution of sentence).

It would seem that where the legislature has provided a procedure for probation, that procedure should be the exclusive method for suspending punishment as a corrective device. See Ex parte Slattery, 163 Cal. 176, 124 Pac. 856 (1912); In the Matter of Grove, 43 Idaho 775, 254 Pac. 519 (1927); People ex rel Boehert v. Barrett, 202 Ill. 287, 67 N.E. 23 (1903). But see Pinkney v. State, 160 Fla. 884, 37 So.2d 157 (1948); People v. Cordell, 309 Mich. 585, 16 N.W.2d 78 (1944); People v. Kaiser, 95 Misc. 681, 159 N.Y. Supp. 322 (Sup Ct. 1916).


While other jurisdictions also have statutory authority for the imposition of this condition, California is notable for the frequency of its imposition. In 1961, of 12,566 adult offenders placed upon probation in California, 1766 received straight probation, 2750 received jail alone as a condition of probation, 2676 received jail plus fine or restitution as a condition. In all, 43% of those placed upon probation were required to serve some jail term as a condition of probation. California Bureau of Criminal Statistics, Delinquency and Probation in California (1961).

Probation and Criminal Justice 3 (Glueck ed. 1933); Standard Probation and Parole Act § 2 (a) (1955).

The results of such an investigation, which may include observation and interviews, as well as physical and mental examinations, are then incorporated into a pre-sentence report which is placed at the disposal of the sentencing judge. In many states, such a pre-sentence report has been made a statutory prerequisite to probation generally, or with respect to certain classes of crimes or offenders. The report's content may be limited to certain specific information, such as the age of the defendant, his occupation and background, or may include recommendations as to probation or both as to probation and the imposition of specific conditions.

The next step in the process is the actual grant of probation. The trial court may suspend the imposition, or pronounce sentence and then suspend execution thereof. Thereupon, the offender is released, with the express understanding that he comply with one or a series of conditions enumerated by the sentencing court. The period during which the conditions are to run will often be left to the discretion of the court, but statutory minima and maxima are frequently provided.

19 See, e.g., Del. Code Ann. tit. 11, § 4343 (1953); N.Y. Pen. Law § 2188.


The report may be mandatory unless the court orders otherwise in some jurisdictions. See e.g., Fed. R. Crim. P. 32(c) (1); Ore. Rev. Stat. § 137.530 (Supp. 1961); S.C. Code § 55-592 (1962).


26 Virtually every jurisdiction authorizes both procedures by statute. E.g., Federal Probation Act, 18 U.S.C. § 3651 (1958); Cal. Pen. Code § 1203.1; Colo. Rev. Stat. Ann. § 39-16-6 (1953). The Model Penal Code contemplates only suspension of sentence and not the imposition of a sentence and suspension of its execution. The rationale for this approach is "that if a suspension works out badly and sentence is to be imposed, we do not think the nature of the sentence should be pre-determined at the moment of conviction; the causes of the failure of suspension ought to be before the Court before the sentence is determined." Model Penal Code § 6.02.3(b), comment (Tent. Draft No. 2, 1954).


Upon the grant, the probationer is placed in the care of the probation officer. Many jurisdictions charge this officer with the duty to keep informed of the probationer’s conduct and conditions, and also authorize him to “use all suitable methods to aid and encourage him [the probationer] and to bring about improvement in his conduct and condition.” However, such authority is informal at best, and in one jurisdiction the officer has been limited merely to ordering the probationer to report—and even in this instance, the court must first impose such a condition to report.

In addition to the authority given to the probation officer in his capacity as the immediate supervisor of the probationer, the probation department of the state is itself frequently authorized to exercise power concurrent with the court to adopt rules or regulations concerning the probationer’s conduct. At least one jurisdiction requires compliance with such rules as a mandatory condition of probation, while another has included such compliance in its enumeration of permissible and suggested conditions. Once again these administrative rules remain subordinate to the authority of the sentencing court, and may exist only insofar as they are “not inconsistent with the conditions imposed by the court.”

During the probation period, the conditions imposed may be modified or the offender may be discharged completely. Upon violation of any of

Ann. § 13-1657 (1956) (maximum term called for by the offense); Fla. Stat. Ann. § 948.04 (Supp. 1962) (two years beyond the maximum term for which defendant might have been sentenced).

For the argument that utilizing criterion established to determine maximum terms of imprisonment in order to gauge the duration of probation is logically defective, see Model Penal Code § 301.2, comment (Tent. Draft No. 2, 1954).

the conditions, the court may revoke its order of probation and impose sentence if the imposition thereof has been suspended, or remove the suspension of execution of the sentence previously imposed.\textsuperscript{37} Technically, the probationer need not be credited with the period of time spent on probation.\textsuperscript{38} If, however, probation has not been revoked and the offender has fulfilled the commitments imposed upon him by the court and society, he is no longer liable to imprisonment for the crime of which he was convicted.\textsuperscript{39}

**Conditions of Probation**

As has been indicated earlier, the trial court must initially determine the nature of the condition to be imposed upon the would-be probationer. In some jurisdictions, statutes require the imposition of certain conditions in all cases where probation is to be granted. These may require that the probationer shall not violate the criminal laws of any state or the federal government,\textsuperscript{40} shall not leave the state without the court's consent,\textsuperscript{41} shall comply with the rules and regulations prescribed by the court or by the agency designated for his supervision,\textsuperscript{42} shall report periodically with regard to his whereabouts, conduct and employment,\textsuperscript{43} shall post bond with or without sureties for the performance of the conditions imposed,\textsuperscript{44} or shall pay costs to the court.\textsuperscript{45}

With respect to these conditions, no discretion is lodged in the trial court; they must be incorporated within every order of probation. But this does not prevent the court from imposing conditions in addition to those made mandatory by statute. Certain typical conditions found au-

\textsuperscript{37} See generally, Note, Legal Aspects of Probation Revocation, 59 Colum. L. Rev. 311 (1959). But see the dissenting opinion of Judge Bazelon in Hyser v. Reed, No. 16716, D.C. Cir., April 11, 1963, p.30 where he states: "But no specific violation of a condition need be found in order to revoke probation . . . . Probation may be revoked solely on the basis of predictive judgments about likely future behavior."


\textsuperscript{39} Under the federal rule revocation proceedings may be brought at any time during the five-year period following the grant for breach of a condition during the probation period. Federal Probation Act, 18 U.S.C. 3651 (1958).


\textsuperscript{41} Ibid.


\textsuperscript{45} Mo. Ann. Stat. § 549.150 (1949).
Authorized but not required by statutes in most states, are, _inter alia_, support of dependents (which generally comprises the largest single category of probationers), the making of restitution to the victim of the crime committed, and initiation of a course of vocational training.

This legislative enumeration is by no means exhaustive of the conditions that can or have been imposed as an incident to a conditional release. In the somewhat less conventional cases conditions have been imposed which run the gamut of every conceivable human relationship; _e.g._, take care of mother and father (which do not make remarks against the sheriff), join the Navy, insure a third party's car against accident and casualty loss, disclose names of associates in crime and shore up an adjacent building. These latter conditions result from powers conferred upon the courts through statutes permitting a defendant to be admitted to probation upon such terms and conditions as the court deems best, proper, or the like. In some jurisdictions there is no preliminary

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47 Nonsupport constituted the highest percentage of cases placed on probation in New York State in a recent two-year period, with 16.6% and 16.2% of the respective totals for 1954 and 1955 being found in that category. Filiation proceedings, with 14.5% in 1954 and 14.7% in 1955, constituted the second largest group placed upon probation. Report of the Dep't of Correction of the State of New York 103 (1955-1956).

48 See, _e.g._, N.Y. Code Crim. Proc. § 932(j).


50 _Ex parte Pittman_, 157 Tex. Crim. 203, 248 S.W.2d 159 (1952).


52 _People v. Patrick_, 118 Cal. 332, 50 Pac. 425 (1897).


enumeration, and the sole direction given the court is that it should affix terms and conditions as the court in its discretion shall determine,\textsuperscript{59} fix,\textsuperscript{60} prescribe\textsuperscript{61} or see fit to impose.\textsuperscript{62}

This then is the authority under which the courts operate. Let us now consider those conditions which commonly result from the exercise of that authority and the circumstances and rationale attending their imposition.

**COSTS**

Frequently the payment of costs is imposed as a condition of probation.\textsuperscript{63} Ordinarily the amount of such payment is equivalent to the cost of the judicial proceeding involved, though the measure imposed may be the expenses of the ensuing probation. On occasion the exaction may be gauged by some extrinsic factor, as for instance, the cost of utilizing a private prosecutor.\textsuperscript{64}

Like the other pecuniary conditions involving payment to the state rather than to a private party, the rationale for the condition of costs is supposedly the rehabilitation of the defendant. By making the defendant pay, the argument runs, his sense of obligation to society is awakened. This approach to rehabilitation, namely, that the defendant is returned to complete freedom in society only through undergoing some tangible sacrifice, has its counterpart in psychoanalysis, where the sacrifice undergone through payment of substantial fees plays a significant role in treatment. However, the rationale is rarely articulated in the "costs" cases, and it would seem from the enormous range of offenses in which the condition has been imposed that rehabilitation of the offender is a secondary consideration.

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other condition reasonably related to the rehabilitation of the defendant and not unduly restrictive of his liberty or incompatible with his freedom of conscience." Model Penal Code § 301.1(2) (1) (Proposed Official Draft, 1962).
\textsuperscript{63} See, e.g., People v. Marks, 340 Mich. 495, 65 N.W.2d 698 (1954); Ex parte Sethers, 151 Tex. Crim. 553, 209 S.W.2d 358 (1948).
\textsuperscript{64} State v. Hardin, 183 N.C. 815, 112 S.E. 593 (1922); State v. Weeks, 14 Wis. 2d 186, 109 N.W.2d 889 (1961). See also Comment, Conditions of Probation Imposed upon Wisconsin Felons: Costs of Prosecution and Restitution, 1962 Wis. L. Rev. 672. On rare occasion, the trial court will impose the condition of costs with an eye to the ability of the defendant to discharge the conditions. See State v. Crook, 115 N.C. 529, 20 S.E. 513 (1894).
Costs may be imposed as a condition precedent to probation or they may also be imposed concurrently with probation, or as a condition subsequent to a jail sentence. The condition becomes most inconsistent with the general aims of probation when it is used in the first of these ways, i.e., when its fulfillment is a condition precedent to probation. What generally happens in this circumstance is that the person who has been regarded as otherwise suitable material for probation is denied such opportunity because of a lack of funds. This is a regrettable situation, both because of the likelihood of inequality of opportunity among defendants, and because the factor of economic status seems irrelevant once the initial determination has been made that the defendant can be reformed. It is more humane, as well as more nearly in keeping with the aims of probation, to either impose costs as a condition concurrent with probation, or arrange a system of installment payment of such costs.

Usually the exact amount of costs is not determined by the trial judge at the time of the pronouncement of the condition. However, on occasion a definite figure or some prescribed fraction of total costs is settled upon. As has been stated previously, such figure bears no relation to the economic situation of the individual defendant. There also appears to be a tendency to utilize costs as a form of punishment. This practice is most prevalent in connection with minor offenses, where typically sentence is suspended solely upon fulfillment of this condition. When used in this manner the condition of costs is indistinguishable from the imposition of a fine. Where the condition imposed is in excess of an amount necessary to reimburse the state, the trial court may well be exceeding its statutory authority.

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66 State ex rel. Vanderheis v. Murphy, 246 Wis. 168, 16 N.W.2d 413 (1944).
67a It may very well be that the imposition of costs as a condition of probation upon indigent defendants may constitute a denial of equal protection of the law. See Ex parte Banks, 74 Okla. Crim. 1, 6, 122 P.2d 181, 184 (1942) (dictum).
71 In determining the validity of an order of probation, it must be measured by the ultimate purposes of the probation statute. See People v. Teasdale, 335 Mich. 1, 55 N.W.2d 149 (1952) (commenting upon Mich. Stat. Ann. § 28.1133 (Supp. 1957)).
FINES

The same rationale used to justify the imposition of costs as a condition to probation is applicable to imposition of the condition of fines: it quickens the sense of social responsibility in the offender. A fine, nevertheless, is clearly punitive in character, usually varying in amount with the gravity of the offense for which the defendant has been convicted, and is payment to the state in expiation for the defendant’s offense. Sometimes the sum exacted as a fine is diverted for the “use of the county,”72 or in rare instances, for the use of a private individual.73 In these circumstances, the money exacted cannot properly be termed a fine, for the primary purpose appears to have been some form of restitution rather than punishment of the defendant. What has occurred is that a statutory measure is being utilized as a rough gauge to satisfy other ends of the criminal law.

A distinction must be made between fines which are true conditions, and fines which are in themselves the imposition of a sentence.74 The former category is included within the scope of this survey because of the apparent inability of the courts to distinguish between the two forms.75 The importance of the distinction lies in the fact that where the fine is deemed to be a sentence, a court might not be able to imprison the defendant for its violation,76 whereas it has been held that even the payment of a fine required as a condition of probation does not make the probation order a final sentence which would preclude a subsequent sentence upon violation of other conditions of probation.77 In addition, attempts to impose a fine in the form of a sentence as a condition precedent to the suspension of some remaining portion of the sentence have been held unauthorized by statute.78

It has been held in at least one jurisdiction that probation cannot be

73 See Bohannon v. State, 271 P.2d 739 (Okla. Crim. 1954). However, the fine may not be diverted to the use of the trial judge. Tumey v. Ohio, 273 U.S. 510 (1927).
78 See Scott v. Griffin, 170 Ga. 368, 153 S.E. 25 (1930) (no authority, by statute or at common law, once sentence has been imposed, to suspend a portion thereof). See also Kemp v. Meads, 162 Ga. 55, 132 S.E. 533 (1926).
imposed concurrently with a sentence. The rationale is that the statute contemplates probation in lieu of and not in addition to sentence. However, occasionally fines are imposed simultaneously as a sentence and as a condition precedent to probation in a conviction involving multiple counts in an indictment. This has occurred most frequently in prosecutions for willful evasion of income tax.

As in the case of the condition of costs, the payment of a fine has been imposed as a condition precedent to probation, or as a condition concurrent with probation. When a fine is imposed as a condition concurrent with probation, often probation constitutes nothing more than an organized method for the monthly collection of fines, and other than this rather humane method of allowing installment settlement of the fine, differs in no way from the sentence suspended upon condition of payment.

Generally, there is a limit upon the amount of money to be exacted as a fine, whether in the form of sentence or condition. There has been an attempt in some jurisdictions, notably California, to justify amounts in excess of a statutory maximum for fines by characterizing such excess as, say, reparation. However, in view of the necessity for clarity in sentencing such ambiguous conditions cannot be justified.

There are occasions when the inability to meet the payment of a fine imposed as a condition to suspended sentence results in the imposition of a severe jail term, as for example, one day for every two dollars. What has happened in these circumstances is the imposition of a jail term upon the hapless convict of far greater length than would be otherwise allowable as a maximum statutory term. Such use of the probation system

83 E.g., United States v. Taylor, 305 F.2d 183 (4th Cir. 1962); Springer v. United States, 148 F.2d 411 (9th Cir. 1945); People v. Labanera, 89 Cal. App. 2d 639, 201 P.2d 584 (Dist. Ct. App. 1949).
85 Ex parte McVeity, 98 Cal. App. 723, 277 Pac. 745 (Dist. Ct. App. 1929). See also Lee v. Superior Court, 89 Cal. App. 2d 716, 201 P.2d 882 (Dist. Ct. App. 1949) wherein for a conviction for statutory rape, a sentence of imprisonment for one year would be suspended if defendant accepted the following conditions: (1) Jail for one year, then two years' probation; (2) Fine of $500; (3) No longer see the girl; (4) Steady employment; (5) Report regularly to the Probation Officer. The defendant was placed on probation against his will.
86 Ex parte McVeity, supra note 85.
1963] CONDITIONS OF PROBATION 823

by the trial court is a deliberate misconstruction of the ultimate aims of the probation statute as promulgated by the legislature.

BONDS

The posting of bond either for appearance or for assurance that the probationer will faithfully observe the conditions of probation also seems inconsistent with the premise that the erstwhile probationer is worth salvaging. The rationale of individual treatment of the offender can retain very little vitality in the states where a statute requires the posting of bond as a condition of probation.87 A suggestion has been made that the omnipresent bond is a vestige of an early, unsupervised probation or suspension of sentence.88 In any event, the net result of this requirement is that those capable of obtaining bonds most easily are those professional criminals who have a reputation for not bolting.89

Occasionally, a bond is imposed as a condition in support cases.90 No attempt is made to justify such a condition upon the theory of rehabilitation. In this situation, the bond acts only as a guarantee against any default by the husband which can be looked to for payment before additional measures can be taken against him. Only one jurisdiction allows a civil cause of action for recovery against a bond posted as a condition precedent to suspension of sentence in a criminal prosecution. In such a case the prosecuting witness in the previous criminal action enjoys the position of a third party beneficiary of the bond.91

SUPPORT

The support of dependents remains the one most common condition imposed upon probationers, since even states which had no other adult probation law created a somewhat analogous system with regard to persons convicted of nonsupport.92 Generally the condition is handled by

87 See generally 2 U.S. Dep't of Justice, op. cit. supra note 76, at 224-27.
88 Ibid.
92 2 U.S. Dep't of Justice, op. cit. supra note 76, at 234.
payment to the probation officer of a monthly installment\textsuperscript{93} for remittance to the child, wife or indigent parents.\textsuperscript{94} The support of dependents cannot be predicated upon a rehabilitation of the offender, save as compulsory payment may awaken a sense of responsibility. However, this is never seriously raised as the purpose of the condition of support. In effect, the legislature has taken a position that this is the only way remaining to provide for dependents other than by the state itself assuming the burden.\textsuperscript{95} This is most apparent in cases where the crime for which the defendant has been convicted does not bear a direct relationship to the condition.\textsuperscript{96} If, however, we discard the rehabilitation rationale, and assume that the purpose is nothing more than to provide for dependents, then we remove the conceptual inconsistency. Unfortunately, we are still confronted with a legal inconsistency. In those jurisdictions where fornication or seduction remains a punishable offense, attaching a condition of support to suspension of sentence may well raise a problem of procedural due process, for there has not been a prior adjudication of paternity.\textsuperscript{97} In these situations, the courts almost invariably extricate

\textsuperscript{93} For description of this procedure, see Towns v. State, 25 Ga. App. 419, 103 S.E. 724 (1920).

\textsuperscript{94} Cf. Vt. Stat. 1933, No. 157, § 2876, by which the entire income of probationers convicted of nonsupport went to their dependents under the airy assumption "that the defendant will be sustained and supported by his good conduct alone." 2 U.S. Dep't of Justice, op. cit. supra note 76, at 236. This statute has been modified. Vt. Stat. Ann. tit. 15, § 205 (1958). As to support of indigent parents, see Ind. Ann. Stat. § 10-1411 (1955).

\textsuperscript{95} It becomes apparent that the effect on the probationer is a secondary consideration. The function of the condition is "not to punish the defendant, but to secure support for the neglected wife." City of New York v. Kriegel, 124 Misc. 67, 72, 207 N.Y. Supp. 646, 650 (Sup. Ct. 1924).

\textsuperscript{96} The term relationship is used in the sense of a direct causal relationship between offense and condition. Thus, the imposition of a conditional suspension of sentence for the offense of nonsupport, where the condition is one of support, is an example of a causal relationship, whereas a conviction for failure to support an illegitimate child which contains as a condition of probation that the defendant pay the confinement expenses of the mother, Commonwealth v. Gross, 324 Mass. 123, 85 N.E.2d 249 (1949), lacks such causal relationship. Compare In re McClane, 129 Kan. 739, 284 Pac. 365 (1930) (upon conviction for attempt to commit rape, a condition of parole [sic] is imposed that the defendant support wife and child), and State v. Jackson, 226 N.C. 66, 36 S.E.2d 706 (1946) (upon conviction of assault on person other than wife, execution of sentence suspended upon condition that the offender support his wife), with State v. Summers, 375 P.2d 143 (Wash. 1962) (condition in manslaughter case that defendant support own children held illegal).

\textsuperscript{97} Swanson v. State, 38 Ga. App. 386, 144 S.E. 49 (1928) (sentence of hard labor on chain gang for fornication suspended upon support of child); State v. Teal, 108 S.C. 455, 95 S.E. 69 (1918) (execution of sentence for seduction suspended upon support of child "alleged by her to be the child of the defendant").
themselves from difficulty by finding authority in the portion of the statutory grant relating to the power of the court to impose such conditions as it deems best, and justifying the condition as being for the public good.98 The problem seems to be analyzed upon review not in terms of any rights vested in the defendant, nor in terms of the ultimate aims of probation, but rather in terms of the discretion of the trial judge.

There is also confusion as to the duration of the condition. While the sentence of imprisonment for abandonment is relatively short, it has been held that the condition runs during the minority of the child, thus confronting the offender with the prospect of either receiving a twelve-month sentence, or accepting a twenty-year condition.99 However incongruous this may seem, it can be reconciled since the crime is a constantly recurring one; i.e., were probationer to refuse the condition and accept the sentence, at the end of the year's incarceration, after a reasonable interval during which he refuses to support his offspring, he could be rearrested and charged with a new offense.

There are certain limitations upon judicial imposition of filial or parental obligations. Generally, the condition of support may not be imposed for a longer period of time than that recognized as legal duty. At least one court has held that the probationer is only liable for the bare minimum legal obligation established by statute, and hence any moral responsibility existing beyond this point is legally superfluous, and cannot be imposed by a court of law.100 Nevertheless, there are occasions when the administration of such conditions fails to respond to the practicalities of changing family situations with the result that the condition is stolidly enforced beyond the point where it is either socially necessary or desirable.101

98 Swanson v. State, supra note 97.
100 "[B]ut where the condition has no bearing on either of these two matters, (restraint and reparation) but relates only to a future moral and not legal obligation, we think it is an abuse of the discretion vested in the trial court..." Redewill v. Superior Court, 43 Ariz. 68, 81, 29 P.2d 475, 480 (1934).
101 Most striking as an illustration of this danger is a North Carolina case wherein sentence upon conviction of abandonment of spouse had been suspended upon condition of support. At a later date the wife obtained a divorce. Probationer attempted to cease payments, but his obligation of support continued despite the change in legal status. State v. Henderson, 207 N.C. 258, 176 S.E. 758 (1934).
RESTITUTION

Restitution to aggrieved parties for loss or damage caused by the defendant’s unlawful act is frequently made a condition of probation, and authority to impose such a condition is granted to the courts either express by statute or is sanctioned by practice pursuant to a broad grant of authority relating to the terms and conditions of probation. A distinction will be drawn, for the purposes of the present analysis, between restitution and reparation. Restitution normally consists of reimbursement of that sum of money which the defendant appropriated in the commission of his criminal act. The imposition of such a condition occurs commonly in the area of embezzlement, income tax evasion and larceny. Reparation is generally considered to be synonomous with tort damages; i.e., a sum of money paid to an injured party that is roughly commensurate with special and general damages. The amount of such reparation may be set by the sentencing court, the probation officer or it may be deferred until a subsequent civil hearing is held on the issue. When the last is the case, the sentencing court may require as a condition of probation that the defendant “should have the financial ability to pay any judgment rendered against him in a civil action for damages.”

The rationale articulated for the imposition of the restitution and reparation conditions is the reformatory effect the imposition of such a responsibility will have upon the probationer’s character. To be clearly con-
sonant with such a purpose, it is necessary that the defendant be closely supervised during the period of the condition's existence. Such supervision of course should not entail harassment, but rather an examination into the financial situation of each defendant in order to work out a system of payment which most effectively accomplishes reimbursement, and yet does not interfere with the defendant's family and other responsibilities.\footnote{111} However, it is difficult to tell in some circumstances whether the best interests of the \textit{probationer} are uppermost. Restitution has been utilized so often to achieve its own admittedly desirable goal that the courts fail to articulate any real concern as to reformation and rehabilitation of the probationer.\footnote{112}

Most of the statutes limit restitution to the amount alleged and proven to have been appropriated by the defendant;\footnote{113} the same limitation confines reparation to the persons proven to have been injured by the act of the defendant.\footnote{114} The wisdom of these limitations is best shown by the fact that in those jurisdictions where there is no specific enumeration of permissible conditions, the amount of restitution ordered may well exceed the measure of loss caused.\footnote{115}

Occasionally circumstances will arise not covered by the statute, as in convictions for wilful evasion of income tax,\footnote{116} when the "appropriation" has not been adjudicated. Generally the condition upon which sentence is suspended in such cases is that the defendant will make an honest effort to come to a settlement of his debt with the Internal Revenue Service. However, with the prospect of criminal sanctions hanging over his head, realistically, it is doubtful whether the probationer will contest such a Service determination and utilize normal civil remedies such as a court proceeding in order to protect his property.\footnote{117}

\footnote{111} See Model Penal Code § 301.1, comment (Tent. Draft No. 2, 1954); 2 U.S. Dep't of Justice, op. cit. supra note 76, at 238-39.

\footnote{112} There can be no real reformation of a wrongdoer unless there is at least a willingness on his part to right the wrong committed. The effect of such an act upon the individual is of inestimable value, and to a large extent, determines whether there has been any real reformation.

People v. Lippner, 219 Cal. 395, 399, 26 P.2d 457, 458 (1933).


\footnote{114} See Karrell v. United States, 181 F.2d 981 (9th Cir.), cert. denied, 340 U.S. 891 (1950).


\footnote{116} E.g., Hensley v. United States, 257 F.2d 681 (5th Cir. 1958); United States v. Steiner, 239 F.2d 660 (7th Cir. 1957); United States v. Steehr, 196 F.2d 276 (3d Cir. 1952).

\footnote{117} I have no intention of permitting the probationary power of this court to be used as a club to force the defendant to settle his tax liabilities on terms dictated by the
Reparation is imposed as a condition of probation most frequently where there has been criminal violation relating to the unlawful operation of an automobile.118 Ideally, the determination of a specific sum in reparation for injury should be deferred to a subsequent civil action. Without the opportunity which would be afforded by such a hearing, the defendant would not be allowed affirmative defenses which might bar recovery by the aggrieved party.119 It may be argued that presenting such an opportunity would unduly complicate the probation process, and in fact, be quite irrelevant, since the trial court has already determined that the fulfillment of this condition will have a salutary effect upon the defendant’s character.120 The problem may be reduced to a conflict between aims of the criminal law (probation in particular) and those individual rights the defendant retains in spite of his conviction. Thus, payment and rehabilitation, desirable without relation to a specific context, may yet be in conflict with such safeguards as are contained in the due process and equal protection clauses of the Constitution of the United States.120a Much clearer are the objections raised when reparation bears no relation to the crime.121 In such circumstances the purpose involved is quite plainly to enforce payment through a use of the probation machinery and without regard for the defendant. Such a condition must be presumed invalid not only as having been imposed without statutory authority, and as being against public policy, but also as a violation of substantive due process.

BANISHMENT

Normal probation procedure requires the probationer to remain within the jurisdiction and to keep the probation officer informed at all times

Government. Defendant is entitled to assert any bona fide defenses passed upon by the appropriate civil tribunal.


120 See Gross v. United States, 228 F.2d 612 (8th Cir. 1956).

120a See Hink, The Application of Constitutional Standards to Probation, 29 U. Chi. L. Rev. 483, 490, 491 (1962). Professor Hink’s paper is directed mainly to the problem of probation revocation.

121 “But if we take this definition and apply it to restitution conditions in probation cases it is apparent that the restitution must be for loss sustained as a direct consequence of the commission of the particular crime for which the respondent stands convicted . . . .” State v. Barnet, 110 Vt. 221, 231-32, 3 A.2d 521, 525 (1939). Accord, People v. Becker, 349 Mich. 476, 84 N.W.2d 833 (1957).
of his whereabouts. A condition of probation that the offender leave the state, United States, county, town, village or neighborhood would be inconsistent with such procedure. Nevertheless it has been imposed from time to time by a sentencing court—and quite as readily the condition is struck down as invalid by the reviewing court.

The condition of banishment suffers from the same opprobrium that attaches to the sentence of banishment: It is contrary to public policy to allow one state to foist its undesirables onto sister states. There sometimes appears to be an attempt to justify the imposition of such a condition (especially where the condition consists merely of removal from one nearby village to another) upon the ground that the offender can be rehabilitated only by removing him from an environment which prompted commission of the offense. Granting some merit to this thesis, it seems anachronistic and as a practical matter, unusable today.

IMPRISONMENT

A condition of imprisonment as one of a number of conditions imposed with probation is theoretically inconsistent with the rationale of probation. Probation is based upon the premise that the offender has been found fit to re-enter society, supervised to some degree, but otherwise enjoying the same freedom as anyone else. There is simply no way to reconcile incarceration with this premise. However, there are cases where a condition of imprisonment has been imposed upon the offender as a part of his probation requiring as long or longer a term in prison than the maximum that could be imposed as a sentence. California, in particular, consistently utilizes a period of incarceration as a condition precedent to probation. This is sometimes justified by the interesting

123 People v. Patrick, 118 Cal. 332, 50 Pac. 425 (1897).
125 Ex parte Pittman, 157 Tex. Crim. 203, 248 S.W.2d 159 (1952).
assertion that "a taste of punishment" will not harm the probationer.\textsuperscript{131} Because the condition of imprisonment is not subject to the statutory and customary limitations of a sentence, the danger of unfairness increases. As has been pointed out above, the condition may impose a longer term than a sentence; in addition, the term of imprisonment imposed as a condition precedent to probation may be harsher than the sentence.\textsuperscript{132}

Moreover, since discretion remains vested in the trial judge, he retains the power to modify this condition before it is completely discharged so as to lengthen the period of incarceration.\textsuperscript{133} While California, in particular, consistently upholds such mid-term modification,\textsuperscript{134} it would seem that such maintenance of control over the offender once he has entered prison should be struck down as an unwarranted extension of the trial court's jurisdiction.

The federal courts commonly impose a sentence simultaneously with probation in the case of convictions based upon multiple counts. This occurs most frequently in the successful prosecution for wilful evasion of income tax. Consequently, it is not at all strange to find offenders who are to serve consecutive or concurrent prison terms on several counts before they embark on probation. This practice has been extended by statute to include even the sentence under one-count indictments. In 1958, section 3651 of the Federal Probation Act was amended to permit confinement of the offender for a period not exceeding six months as a part of the probation grant in cases involving conviction based upon a one-count indictment.\textsuperscript{135} Essentially, this change had come about in order to bring the practice with regard to single-count convictions in line with the already existing practice as to multiple-count convictions.\textsuperscript{136} With regard to this imprisonment-probation practice, the Administrative Office of the United States Courts has stated that many federal judges "are of the opinion that confinement for a brief period in a suitable jail or treatment institution has a salutary effect upon an offender and is conducive

\textsuperscript{131} Ex parte Glick, 126 Cal. App. 649, 650, 14 P.2d 796, 797 (Dist. Ct. App. 1932).
\textsuperscript{132} See, e.g., In re Acosta, 65 Cal. App. 2d 63, 149 P.2d 757 (Dist. Ct. App. 1944) (as a condition precedent to probation, one year in jail with no time off for good behavior).
\textsuperscript{133} Cf. Wilson v. Carr, 41 F.2d 704 (9th Cir. 1930); In re Hazlett, 137 Cal. App. 734, 31 P.2d 448 (Dist. Ct. App. 1934).
to his rehabilitation on probation to follow."137 No statistics are available, however, to test this proposition.

**Judicial Review of the Imposition of Conditions of Probation**

As we have seen, it is an understatement to say that great power has been lodged in the sentencing court.137a Administrative in nature, affecting vast areas of everyday life, the conditions imposed under probation tend to cut across a whole range of possible legal safeguards in order to get a job done. Moreover, although it has been said that the proper exercise of such authority is guaranteed through strict supervision by the appellate courts,138 unhappily this view has not been borne out in practice. Indeed, it may be said that the reviewing courts are reluctant to overturn any conditions once they have been imposed. Such reluctance is generally based upon one of several grounds: (1) the broad discretion accorded the trial court; (2) the ambiguity in the "reasonable condition" test; and (3) the consent theory.

As to the first of these grounds, a condition of probation generally can be sanctioned by statutory language which authorizes the trial judge to impose as an incident of probation any condition he may deem best.139 Such conditions may be declared invalid only where the trial court has clearly abused its discretion, and in order for an appellate court to arrive at such a conclusion, it must decide whether the condition imposed is consistent with the ultimate aims of probation. The problem, then, should become one of statutory interpretation, both as to the express and implied purposes of the Probation Act. Rarely, however, does such an analysis take place.

As to the second ground for upholding the trial court's imposition of a condition of probation, the statement that the condition is "reasonable" is a rubric which in practice is seldom subjected to careful analysis.140 Normally all a reviewing court signifies by this term is that the imposition of the condition is within the discretion of the trial court, or that the condition does not appear to be immoral, impossible to perform, or

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137 Id. at 3.
137a As one court has recently stated: "In the act of sentencing, the judge approaches the attribute of the Almighty—he sits in judgment of his fellow man." Leach v. United States, D.C. Cir., No. 17,549, April 25, 1963, p. 4.
139 See statutes cited notes 56-62, supra.
the like. On occasion the appellate court will inquire into the relationship between the condition and the crime committed by the offender; such relevance then becomes a factor in assaying the reasonableness of the condition. However, since the discretion of the trial court is broad, and conditions imposed normally are not such as would shock the conscience, invariably all manner of conditions are termed reasonable. The case of State v. Smith presents a striking instance of the tendency. In a conviction for the larcenous taking of grain, the condition imposed was that the defendant shall refrain from driving a car upon the highways. While the condition is reasonable enough in the sense that it is not horrendous, the appellate decision does not satisfactorily spell out the especial relevance between the offense and the condition.

In many cases, however, the reasonableness of the condition upon which sentence is suspended is never even at issue. Particularly in the revocation hearing, where the defendant, accused of failure to live up to the condition, is pleading the unreasonableness or illegality of the condition, courts have found it convenient to avoid the issue by resort to a theory of waiver: the defendant has consented to the condition in the trial court and therefore cannot raise the issue of its illegality. Some courts have gone one step beyond, and have analogized the transaction between the defendant and the trial court to a contract and at least one court has gone so far as to criticize the defendant for "welching."

Difficulty arises with such reasoning, however, because the analogy is not complete. The law of contract is posited upon the notion of an equality of bargaining position between parties which culminates in a voluntary agreement. However, defendants are not in a position to

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142 Relevance may be a significant factor in determining the statutory authorization for the imposition of a condition, see State v. Barnett, 110 Vt. 221, 3 A.2d 521 (1939), or in determining whether such imposition is in violation of a constitutional requirement of procedural due process, see People v. Becker, 349 Mich. 476, 84 N.W.2d 833 (1957).


144 E.g., Ex parte McClane, 129 Kan. 739, 284 Pac. 365 (1930); State v. Collins, 247 N.C. 248, 100 S.E.2d 402 (1957).


bargain with a court because virtually any condition is preferable to jail. The nonfederal narcotics cases are perhaps the best instance of the inequality of positions. In these cases the offender is faced with Hobson's choice, for the alternative to accepting probation and its concomitant conditions is to endure the effects of narcotic withdrawal in a county jail. In apparent recognition of the defects in the consent theory, within recent times at least one jurisdiction has held with consistency that acceptance of an unreasonable or illegal condition is no bar to a later objection. It would seem that this holding may even be explained upon the strict contract theory that a person cannot consent to an illegal contract.

Aside from the "contract analogy" the reviewing courts generally hold that there is no necessity to inquire into the consonance of the condition with the aims of probation on the grounds that the defendant is free not to accept the State's offer, and that the offer is being made by the state as a matter of grace and clemency. It is submitted, however, that this approach taken by the courts to the problem is misleading. The conduct of the defendant is largely irrelevant if the real question is the legality or illegality of a condition.

The duty of the reviewing court is to

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153 See People v. Osso, 50 Cal. 2d 75, 323 P.2d 397 (dissenting opinion), cert. denied, 357 U.S. 907 (1958), observing that the trial court, has deprived these three defendants of their means of earning a livelihood since they may not even work as the most menial laborers in their own union and cannot receive renumeration "from any union." The terms of probation are wholly out of line with the cases holding that probation is an act of grace and clemency for the purpose of permitting rehabilitation . . . .


Courts commonly require as a condition of probation that the defendant refrain from engaging in a particular occupation. E.g., Stone v. United States, 153 F.2d 331 (9th Cir. 1946) (defendant shall not be employed as a steward on any railroad engaged in interstate commerce); United States v. Greenhaus, 85 F.2d 116 (2d Cir. 1936) (defendant shall engage in no stock or bond sale); People v. Stanley, 162 Cal. App. 2d 416, 327 P.2d 973 (Dist. Ct.
interpret the laws and to ensure that the trial court does not exceed its jurisdiction. Indeed, aside from this strictly statutory consideration the public policy of the state should mark such transactions as invalid regardless of any consent of the parties.\textsuperscript{154}

\textbf{Conclusion}

On the basis of the above material, it becomes apparent that one of the principal deficiencies in the present use of conditions of probation is a need for more definite legislative control over the use of probation by the courts. This control should take the form of a specific enumeration of permissible conditions which the sentencing courts may impose as an incident of probation.

The presence of such a legislative enumeration would act as a guide to the sentencing court, and establish a standard for review as well.\textsuperscript{155} At the same time however, it is recognized, albeit reluctantly, that the fullest realization of the objectives of probation requires the sentencing court to be vested with some discretion to impose other conditions when necessary for reformation of the offender. The problem then becomes one of determining the permissible limits of judicial discretion, and, hence, the validity of the conditions imposed. In this regard it is suggested that the following standards be employed by the reviewing courts.

\textit{Is the Condition Validly Authorized by Statute?}

Where a jurisdiction already has a legislative enumeration of permissible conditions, there is a ready-made standard by which to judge


\textsuperscript{155} Unfortunately, the District of Columbia has only partial benefit of such legislative directive. The only criterion established for sentencing in the Court of General Sessions is that the trial court may impose probation "upon such terms as it may deem best." D.C. Code Ann. § 24-102 (1961). This vague standard is in sharp contrast with the enumeration of permissible conditions set forth in the Federal Probation Act which governs the grant of probation, inter alia, in the United States District Court for the District of Columbia. 18 U.S.C. § 3651 (1958). However, it should be noted that the Federal Probation Act also empowers the trial court to impose other conditions "as the court deems best." Ibid.

Prior to 1958, the United States District Court for the District of Columbia was specifically excepted from the operation of the Federal Probation Act. Act of June 25, 1948, ch. 645, § 3651, 62 Stat. 842. This exception has been removed and section 102 of the D.C. Code was repealed insofar as it applied to the District Court. Act of June 20, 1958, 72 Stat. 216.
the validity of the contested condition. In such a jurisdiction, if restitut-
tion, for example, is limited by statute to an amount actually lost by an
grieved party, a condition imposing a greater payment is clearly illegal.

Does the Condition Come Into Conflict With One of the General
Aims of Probation?

A condition that the would-be probationer be sterilized cannot be
reconciled with the avowedly corrective aims of probation. Granting
some leeway to the discretion of the trial judge, there must nevertheless
be some discernible relationship between the condition imposed and the
reformation of the offender. If such relationship does not exist the con-
dition is unnecessary to the probation process and is therefore invalid.
This test is easily enough applied when the conditions imposed are harsh
and punitive; in such circumstances one may readily enough discern no
reasonable relationship between, say, sterilization and reformation.
The difficulty arises where the condition is not itself onerous. Thus, the
condition that a probationer not allow people to congregate in her
home after the hours of darkness is not in itself a difficult condition to
perform—but is it reasonably related to the probationer's reformation?156

Does the Condition Conflict With Some Right of the Defendant?

The defendant, despite his conviction, nevertheless retains certain
basic, personal rights. On occasion, a condition will be imposed which
violates such rights. In one such case, the United States Court of Appeals
for the Ninth Circuit held invalid as an unwarranted intrusion into the
privacy of the person, a condition that the defendant donate a pint of
blood to the Red Cross.157 There is no difficulty in concluding that such
a condition is an unwarranted violation of the personal rights of the
defendant, and is therefore invalid. Much less clear are the conditions
which place limitations upon the offender where the activity limited
may not be legally protected as a right. For example, in those cases where
the sentencing court has imposed as a condition of probation that the
defendant shall not engage in a specific course of employment,157a
what sometimes happens is that a defendant is effectively deprived of the
means of securing a livelihood, particularly when through age or lack of
training he is unable to adapt to his change of circumstances. In such a

157 Springer v. United States, 148 F.2d 411 (9th Cir. 1945).
157a See cases cited note 153, supra.
case, it is suggested that the condition would be invalid as offending against the individual's basic right to work.

*Does the Condition Come into Conflict With a Basic Tenet of Our Society? Is it Fair?*

This standard is the most elusive of all: it is clear that a condition offends against our concept of fair play and is therefore invalid where the condition imposed upon a defendant totals up to a harsher punishment than the maximum sentence available pursuant to statute. Similarly, the courts should find invalid the support condition imposed where no prior adjudication of responsibility has been made, or the situation where the trial court imposes a condition that a probationer enter a sanitarium when the record fails to demonstrate evidence of insanity.

What has happened in these circumstances is that the sentencing court has performed functions which are normally assigned to other mechanisms of our society. In the support case, the criminal court has undertaken to determine paternity, a function assigned to the civil forum; in the other illustration, the court has functioned without regard to the commitment procedures designed for involuntary treatment of the mentally ill. And in both cases the criminal court has by-passed the safeguards that custom, time and practice have incorporated into these other processes of our society. In these circumstances, quite clearly the conditions imposed are unfair, are invalid, and the imposition is an abuse of judicial discretion.

RECENT DECISIONS


After being arrested for possession of narcotics, Hom Way informed federal narcotic agents that he had purchased heroin from Blackie Toy, who operated a laundry on Leavenworth Street in San Francisco. The agents then proceeded to the laundry of the petitioner, James Wah Toy, although the laundry was known to them only as "Oye's Laundry," and the identity of the proprietor was unknown. An agent knocked on the door of the laundry and when Toy answered the door the agent represented that he had come to pick up laundry. When told to return later, the agent showed his badge, whereupon Toy slammed the door and ran to the back of the building to his bedroom. The agents forced open the door and pursued, entering the bedroom and placing Toy under arrest.

Immediately after his arrest, Toy was apprised of Hom Way's accusation. Toy denied ever having sold narcotics, but stated that he knew a man named "Johnny" who did. Toy led the agents to the house of "Johnny." The agents entered the house and found one Johnny Yee there. Yee surrendered several tubes of heroin to the officers and later told them that the heroin had been given to him by Toy and a man named "Sea Dog." Toy later identified "Sea Dog" as the petitioner Wong Sun. Wong Sun was then arrested and Toy, Yee and Wong Sun were all arraigned on a complaint charging violation of the Jones-Miller Act.¹

All three were released on their own recognizances. They were later interrogated and statements were prepared for the signatures of Toy and Wong Sun, but both refused to sign them, although Toy made corrections of the statement and Wong Sun admitted the accuracy of its contents.

At trial, Hom Way did not testify, and Johnny Yee was excused after flatly repudiating his earlier statement and claiming the privilege against self-incrimination. The Government relied primarily on four pieces of evidence, each challenged by the petitioners: (1) Toy's statement made immediately after his arrest;

¹ 70 Stat. 570 (1956), 21 U.S.C. § 174 (1958). Whoever fraudulently or knowingly imports or brings any narcotic drug into the United States or any territory under its control or jurisdiction, contrary to law, or receives, conceals, buys, sells, or in any manner facilitates the transportation, concealment, or sale of any such narcotic drug after being imported or brought in, knowing the same to have been imported or brought into the United States contrary to law, or conspires to commit any of such acts in violation of the laws of the United States, shall be imprisoned not less than five or more than twenty years and, in addition, may be fined not more than $20,000.
arrest; (2) the heroin seized from Johnny Yee; (3) Toy's unsigned statement; and (4) Wong Sun's unsigned statement. The trial court admitted all four items into evidence and found therein sufficient corroboration to sustain the unsigned confessions. On appeal, the United States Circuit Court of Appeals for the Ninth Circuit affirmed, although it held the arrest of Toy to have been without probable cause and therefore illegal. The Supreme Court granted certiorari and heard argument in the 1961 Term, but later gave leave to reargue. The Court reversed, Mr. Justice Brennan writing for the majority of the five to four Court. Held, defendant's statement made immediately after his illegal arrest and narcotics seized from a third party as a result of such a statement are inadmissible, and will not serve to corroborate a confession in a federal criminal proceeding.

In cases of illegal arrest any evidence obtained after such an arrest is inadmissible in evidence if there is a causal nexus between the illegality of the arrest and the obtaining of the evidence. The pivotal point of this rule, the "poisonous tree doctrine," is the causal relationship between the arrest and the evidence. In applying this concept to statements made by a defendant after he has been illegally arrested, the courts have generally held that whether the statement is the "fruit" of the illegal arrest depends upon whether the arrest and the attendant circumstances are such as to render the subsequent confession involuntary. If the statement made was voluntary, the necessary causal nexus is severed and the illegality of the arrest insulated. Thus, the "poisonous tree doctrine" has no applicability to "confessions made while a defendant is under arrest . . . if voluntarily made and if Rule 5, Federal Rules of Criminal Procedure . . . is not violated . . . ." However, in cases where the police have detained the defendant in violation of Rule 5(a) of the Federal Rules of Criminal Procedure, the case is carried out of the exception to the "poisonous tree doctrine" and into the control of the McNabb-Mallory rule, which decrees that any confession made during the course of the illegal detention is inadmissible regardless of its voluntariness. Thus, in Rule 5(a) cases the coin-

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2 Wong Sun v. United States, 288 F.2d 366 (9th Cir. 1961).
7 See Nardone v. United States, 308 U.S. 338 (1939); Silverthorne Lumber Co. v. United States, 251 U.S. 385 (1920).
8 See cases cited note 6 supra. 
cidence alone of illegal detention and a statement renders the statement inadmissible, thereby obviating the search for the causal nexus.

In the instant case the Court first decided that the facts established the illegality of Toy’s arrest, since it was made without a warrant and without probable cause. The Court then decided that Toy’s statement was not voluntary, basing its decision on the fact that six or seven officers chased Toy into his bedroom where his wife and child were sleeping and almost immediately arrested and handcuffed him. In light of these facts the Court believed that it was “unreasonable to infer that Toy’s response [the statement] was sufficiently an act of free will to purge the primary taint of the unlawful invasion.” The Court then went on to hold that since the narcotics seized from Johnny Yee were seized as a result of Toy’s statement, they were similarly tainted with the poison of the original wrong and therefore could not be used in evidence.

The central holding of Wong Sun is thus the finding of a causal relationship between Toy’s illegal arrest and his resulting statement, based on the Court’s belief that it would be “unreasonable to infer” that Toy’s statement was voluntary in light of the circumstances surrounding its extraction. The rapidity of this basis for the finding of causality might pass unnoticed were it not underscored by the Court’s footnote, in which it pointed out that even in the absence of “oppressive circumstances,” such as those forced upon Toy by the invasion of the narcotic agents, “where an exclusionary rule rests principally on non-constitutional grounds, we have sometimes refused to differentiate between voluntary and involuntary declarations.” The coincidence of this statement with the weak basis for the finding of causality seems to indicate that the Court felt that there was no need for such a differentiation in this case. A clear implication arises from this observation: If the Court is to exclude evidence without regard to causality between such evidence and the illegal arrest when there is merely a violation of a federal statute, it is an obvious requirement of logic and policy to make similar exclusions where there is a violation of a constitutional command. This would, in effect, carry the McNabb-Mallory-type exclusion into all areas of illegal arrest, rather than restricting the rule to its present confines of Rule 5(a) violations. Mere coincidence of an illegal arrest with the obtaining of evidence would require that the evidence be excluded without regard to causality.

This implication finds further support in the same footnote wherein the Court cites two cases, Bynum v. United States and United States v. Watson, both cases in which the McNabb-Mallory-type exclusion was extended, in unprecedented fashion, beyond its normal bounds of Rule 5(a) violations. In the Bynum case the defendant was arrested without a warrant and without probable

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11 371 U.S. at 486.
12 371 U.S. at 486-87, n. 12.
cause, and his fingerprints taken. The United States Court of Appeals was faced with the question of the admissibility of the fingerprints thus obtained. The court stated that the fact that the defendant was illegally arrested was "in itself and without more a sufficient ground for excluding them [the fingerprints] from evidence." Thus, the court in that case was willing to exclude the evidence without a finding of a causal relationship between the illegal arrest and the evidence, thereby applying a McNabb-Mallory-type exclusion without the prerequisite violation of Rule 5(a).

In Watson v. United States a United States District Court held that even though the defendant had voluntarily surrendered marijuana which was attempted to be put into evidence, the fact that his apartment had been illegally searched rendered the evidence "tainted to such an extent by the illegality of the entry that it cannot be used in a Federal court." Here again the exclusionary rule was applied without reference to the causal link between the illegal act of the police and the evidence obtained. The appearance of these two cases in the footnote to the Court's conclusion on the issue of causality is further indication that there is strong reason to imply that Wong Sun marks an extension of the McNabb-Mallory-type exclusion.

Mr. Justice Clark, with whom Justices Harlan, Stewart and White joined, dissenting, found cause for alarm in the majority's reading of the facts of the case and were likewise disturbed by the legal theory whereby the statements of Toy and Wong Sun were denied reciprocal corroborative effect. The dissenters, however, did not dwell upon what seems to be the real significance of the case—the question of causality in the application of the exclusionary rule when there has been an illegal arrest.

The Solicitor General of the United States was more alert to the significance of the question of causality in the case, for in his brief he argued that "there should be no general rule barring all statements or admissions made in connection with an illegal arrest." Indeed, a quick reading of Wong Sun would seem to indicate that the Solicitor General's argument prevailed, for the Court adopted no express rule ignoring causality. There was no need for such a rule in Wong Sun, as the Court satisfied itself with the posturing of the facts into alignment with existing law. However, the fact that such posturing was necessary, coupled with the frailty of the causal link which was held to taint the questioned evidence, clearly implies that the question of causality has been reduced in importance in all cases involving the application of the exclusionary rule following an illegal arrest.

Although Wong Sun does not, in haec verba, require such an extension of the McNabb-Mallory-type exclusion, there is sound basis in reason for establishing

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16 189 F. Supp. at 781.
17 371 U.S. at 498.
18 Brief for Respondent, p. 43.
such an extension. Since the McNabb-Mallory rule demands the exclusion of evidence obtained coincidently with a violation of a federal statute, Rule 5(a) of the Federal Rules of Criminal Procedure, it would seem that a constitutional provision which attempts to secure a similar right is entitled to, indeed demands, equally effective enforcement. As Judge, later Chief Justice, Vinson stated in *Nueslein v. District of Columbia*: "[W]e must regard constitutional provisions as more generic and more organic than other law with which we deal."  

It is anomalous that violations of Rule 5(a) are, under the McNabb-Mallory rule, dealt with more severely than other illegal arrest situations, equally violative of more fundamental rights. This anomaly would be removed if the rationale timidly lurking in the *Wong Sun* case were given full expression. As Mr. Justice Clark characterized it in his dissent, *Wong Sun v. United States* is "a Chinese puzzle."  

But puzzling though it may be, *Wong Sun* is a portent of important changes to come in the law of criminal procedure. It would seem, on balance, to be a favorable portent.

FRANK J. MAHADY


On November 16, 1963, pursuant to an invitation for bids issued by the Department of the Army, the plaintiff, G. L. Christian and Associates, submitted a bid on the construction of the Fort Polk, Louisiana, housing project under the Capehart Act. In his capacity as contracting officer, the District Engineer, having determined plaintiff's bid to be the lowest acceptable response, accepted the bid by a "letter of acceptability" in December 1956. In June 1957, after the approval of higher authority in the Department of the Army, plaintiff "subcontracted" the entire project to a joint venture composed of the H. B. Zachry Company and the Centex Construction Company, and included an "irrevocable power of attorney," in effect substituting Centex-Zachry as prime contractor.

Five months after Centex-Zachry had commenced the project in accordance with the contract, work was suspended by the contracting officer, and subsequently, on February 7, 1958, the contractor was notified that the contract was being terminated "for the convenience of the Government" although the contract did not itself contain a termination for convenience provision. One week


20 371 U.S. at 498.
later, the contracting officer contacted Centex-Zachry, requesting amendment of the contract to include the standard termination clause which basically restricts recovery to costs incurred plus a percentage of profit on these costs. The contractor declined to accept the modification. Subsequently, after several of the claims arising out of the termination were settled administratively, Centex-Zachry brought suit in the Court of Claims in the nominal plaintiff’s name, seeking recovery for the remainder of the claims, including anticipated profits, contending that the termination by the Government constituted a breach of contract. The Commissioner sustained the claims, finding the Government’s termination a violation of the terms of the agreement, and awarded the contractor common-law damages.1

The Court of Claims, however, reversed the Commissioner’s opinion as to the award of anticipatory profits. Held, since Armed Services Procurement Regulation section 8.703 requires the insertion of a standard termination clause in certain public contracts, an agreement omitting the provision must be read as if the clause were included in measuring the contractor’s recovery for termination by the Government.2

In its decision, the court reasoned that ASPR section 8.703, requiring insertion of the termination for convenience clause, was issued under statutory authority, and thus “had the force and effect of law.”3 Further, if the regulation applied to the contract involved here, “there was a legal requirement that the plaintiff’s contract contain the standard termination clause and the contract must be read as if it did.”4 In considering the circumstances attendant to the making of the contract, the court noted (1) that there has been a “deeply ingrained strand of public procurement policy” disallowing the recovery of anticipated profits by a contractor,5 (2) “that the Defense Department and the Congress would be loathe to sanction a large contract which did not provide for power to terminate,”6 and (3) that an experienced contractor “could not have been wholly unaware that there might be a termination for the convenience of the Government.”7 As a result, the court concluded that it “should not be slow to find the standard termination article incorporated, as a matter of law, into plaintiff’s contract.”8 This reasoning of the court, constituting as it does a complete departure from prior prevailing law and practices, is deserving of some examination, not only of its conclusions, but its suppositions as well.9

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3 Id. at 424.
4 Ibid.
5 Id. at 426.
6 Ibid.
7 Id. at 427.
8 Id. at 426.
9 It is acknowledged by the authors that a second major difficulty is presented by this
In observing that the Armed Services Procurement Regulation\textsuperscript{10} (ASPR) was issued pursuant to statute, the court resorted to the Armed Services Procurement Act of 1947\textsuperscript{11} as the principal source of legislative authority.\textsuperscript{12} That assumption, however, bears some examination, for while it is true that sections II and III of ASPR clearly coincide with the provisions of the act, the source of authority for section VIII, including the specific regulation relied on here for the authority to read the clause into the contract, is more problematical; for while the Armed Services Procurement Act provides for such matters as the requirement of procurement by formal advertising, restrictions on the use of certain kinds of contracts, and remission of liquidated damages, there are no provisions in the act for termination and, interestingly, there are no specific provisions authorizing the promulgation of regulations to effect the purpose of the statute. The question is thus presented whether ASPR section VIII, can be predicated on the authority of the Armed Services Procurement Act at all. One factor indicating the contrary is that the Department of Defense, shortly after the passage of the Armed Services Procurement Act of 1947, proposed legislation to provide a statutory basis for the Government's termination of contracts.\textsuperscript{13} The bill was not reported out of committee at that time, and similar measures introduced in the interim years have also failed of enactment.\textsuperscript{14} If any inference is to be drawn from the inaction of Congress on the matter, a lack of legislative desire

court's treatment of the subcontractor's right to sue, in view of Severin v. United States, 99 Ct. Cl. 435 (1943), cert. denied, 322 U.S. 733 (1944). However, in the interest of space, this discussion is restricted to what is felt to be the more significant aspect of the decision.


\textsuperscript{12} 312 F.2d at 424, n.8.

\textsuperscript{13} S. 2450, 80th Cong., 2d Sess. (1948); H.R. 6152, 80th Cong., 2d Sess. (1948). See also Comp. Gen. Ms. B-75551 (May 14, 1948) (a report by the Comptroller General to the Committee on the Judiciary of the United States Senate, wherein he noted his disapproval of S. 2450 on the basis of what he felt to have been an unsatisfactory history of termination settlements under the Contract Settlement Act of 1944, 58 Stat. 649 (1944), 41 U.S.C. § 101 (1958)).

\textsuperscript{14} Cf. Hardee, Termination of Military Contracts, 32 Texas L. Rev. 172, 176 (1953). See also the statement by the National Defense Committee of the Chamber of Commerce of the United States, wherein it is stated:

In 1947, Congress approved the Armed Services Procurement Act, which prescribed broad policies to govern the procurement of military items. It also approved the Federal Property and Administrative Services Act, establishing legislative policies for the peacetime disposal of surplus property. Significantly, however, neither of these measures dealt with contract terminations. The subject was considered in conjunction with the Armed Services Procurement Act, but was left out of that measure with a view toward the enactment of separate legislation. Unfortunately, no such legislation was ever enacted.

It is further interesting to note that Section VIII of the ASPR was not issued until January 1952 (to become effective March 1, 1952) after efforts to obtain peacetime termination legislation failed.
1963] RECENT DECISIONS 845

to provide statutory authority for termination of Government contracts would seem to be indicated.

An even stronger indication of the lack of express statutory authority for the termination provision is found in the Department of the Army's Procurement Law, which succinctly states that "no statute makes the termination regulations in ASPR section VIII apply to contracts which do not expressly incorporate them by reference or otherwise" and thus "the basic rights of the Government and the contractor upon the termination must be found in the terms of the contract itself." 15 Similar references to the lack of statutory authority to terminate contracts are found in various manuals of the other branches of the Defense Department,16 and in the Code of Federal Regulations.17

It should be acknowledged that Congress has enacted statutes in the past which provide for termination of particular types of Government contracts,18 and that termination provisions have been read into contracts on the basis of these statutes.19 However, all such statutes have been directed toward contracts made by the Government during wartime, or those made in furtherance of the war effort.20 At present, however, and at the time of the termination of the con-

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16 Air Force: AFM 110-9, Procurement Law (1960) at 11-1:

No statute recognizes the right of the Government to terminate a contract.1 [footnote 1: 10 U.S.C. 2301 et seq., the basic authority for all purchases of supplies and services by the military establishment, makes no mention of the right to terminate contracts.]

and at 11-13 to -14:

From 21 July 1944 to 18 May 1948 Government contracts were terminated and settled under the authority of the Contracts Settlement Act of 1944 and a Joint Termination Regulation issued to implement that Act. . . .

Since 19 May 1948 the procurement of supplies and services by the Department of Defense has been effected under the authority of the Armed Forces Procurement Act of 1947. The Air Force relies upon appropriate contract provisions reserving to the Government the right to terminate for convenience and settle contracts issued pursuant to the Act.


17 41 C.F.R. § 1-8.201(b) (1963) provides in part: "Thus, the contractual right to terminate a contract for the convenience of the Government and to make settlement agreement . . . is based on such a clause."


20 E.g., Act of December 18, 1941, ch. 593, § 201, 55 Stat. 839: "The President may
tract involved here, none of these statutes was in effect with regard to the Government's right to terminate, and the termination regulations of section VIII do not resort to them for their source of authority. 21 Anomalously, however, the cases which the court cites as authority for reading in the clause in this instance, are all cases decided on the basis of these war termination statutes. 22

If, then, ASPR section 8.703 cannot be said to rely on a statutory grant of termination power, what legislative basis can be offered? Enlightening is the comment of a Department of Defense "Fact Sheet":

Section VIII of the Armed Services Procurement Regulation was developed to fill the gap left upon the expiration of the Contract Settlement Act [of 1944] and the Joint Termination Regulation. The Armed Services Procurement Act does not itself specifically mention terminations. Accordingly, the Regulation is issued under the general authority of the Secretaries of the Military Departments, based on the Procurement Act and other statutes, to issue detailed regulations to carry out their authority and responsibilities. 23

Accordingly, in the Code of Federal Regulations, two statutes are cited as authority for the issuance of ASPR section VIII. The first provides that military department heads are authorized to promulgate regulations "for the government of his department, the conduct of its officers and clerks, the distribution and performance of its business, and the custody, use, and reservation of the records, papers, and property appertaining to it." 24 The second statute provides that officers of the Defense Department may obligate funds for procurement and other related supply management functions by regulations prescribed by the Secretary of Defense. This statute further states that "the purpose of this section is to achieve the efficient, economical, and practical operation of an integrated supply system to meet the needs of the military departments without duplicate or overlapping operations or functions." 25

Thus, while it may be true that ASPR section VIII is a necessary method of implementing the procurement powers granted by the Armed Services Procura-


23 Department of Defense, Munitions Board, Office of Committee and Publications, "Fact Sheet" No. 1-53, July 1, 1952, at 1. (Emphasis added.)


ment Act, it seems clear that if section VIII is said to be issued pursuant to statutory authority, in the true sense of the phrase, it must be based only on enactments granting department heads the authority to make regulations for the governing of departmental activities.

Having examined the statutory authority for section VIII, it yet remains to be seen whether the termination provision can be read into a contract omitting any mention of it. Hitherto two rationales have been relied upon to preclude such a result: (1) The inability of the statute or regulations to be automatically incorporated into the contract, and (2) the lack of consent on the part of the contractor. As to the first, the usual view has been that, absent a specific provision making the act applicable directly to contracts, any statute requiring the insertion of provisions in public contracts is mandatory only on the contracting officials, and in no way can be interpreted to bind a private contractor directly. Thus, in a Comptroller General opinion involving the omission from a contract of a provision required by the Eight Hour Laws of 1912 it was held that, notwithstanding the statutory requirement that such contracts “shall contain a provision” regarding hours of employment and rates of pay, and that “every such contract shall stipulate a penalty for each violation of such provisions in a contract,” the contractor was not bound by the penalties prescribed by the Act, since it had not been incorporated into his contract, and since he had not agreed to be bound by the provisions. In his decision, the Comptroller General found the act to be merely “a mandatory direction to the officers and agents of the Government.” Further observing that the prescribed penalty could not be summarily imposed on the contractor when no such provision had been included in the contract or otherwise agreed to by him, the decision concluded that it would be inconceivable “that the act is automatically binding upon a contractor under a contract which does not contain its provisions.”

Arguably, it would seem that statutes requiring the insertion of contract clauses would present the strongest case for binding the contractor to the terms of the statute by reading the clause into the contract. However, since such statutes have been construed as binding only on the contracting official, to find that the regulations issued pursuant to such statutes bind a private contractor would be granting them greater “force and effect” than the enactment itself. This would seem especially anomalous in the instant case where the regulation involved is founded not on statutes requiring termination provisions, but only on

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27 37 Stat. 137.
28 20 Comp. Gen. 890 (1941).
29 Id. at 892.
30 Id. at 893.
31 Cf. 40 Comp. Gen. 565 (1961); 20 Comp. Gen. 931 (1941); 20 Comp. Gen. 890 (1941).
the general power of department heads to issue regulations for the conduct of departmental activities. Against this background it would seem clear that in no way can the statutes on which ASPR section 8.703 relies, be read so as to grant powers sufficient to read into a contract a clause not specifically included by the parties. In other words, if a statute directing the insertion of a provision in a contract cannot be said to bind a private contractor to terms not agreed to by him, it would seem that where a regulation alone, without specific statutory authority to include the provision, requires its insertion, the case for binding the contractor to the omitted clause "by operation of law" is more than suspect.

The second element in the consideration of the binding effect of a regulation requiring the insertion of a contract clause is that of the contractor's consent, or lack of consent, to the provision. The Comptroller General opinion mentioned earlier emphasizes the need for consent on the part of the contractor before he can be bound by the particular provision, even though the instructions of the statute are clear and unambiguous. Underlining the need for agreement on the part of the contractor is the holding of United States v. Smoler Bros., Inc.\(^{32}\) where a clause other than that required by the Walsh-Healy Act\(^{33}\) was inserted in the contractor's agreement. There, the Court held that the contractor would be bound by the clause in the contract to which he had agreed rather than that required by the statute. Indeed, this need for the contractor's consent before he can become bound by termination provisions was implicitly recognized by the Department of the Army itself when it stated: "[T]he basic rights of the Government and the contractor upon termination must be found in the terms of the contract itself. The whole termination system established by ASPR section VIII depends on the use in contracts of termination clauses provided in it or similar clauses.\(^{34}\) It seems apparent, therefore, that prior to the instant decision, except where a wartime termination statute was involved, consent by the contractor was considered a necessary condition to holding him bound by any contract provision. By ignoring this requirement the net effect of the instant case is to make the instruction of the regulation, rather than agreement of the contractor, the controlling factor in determining what the parties to the contract had intended.\(^{35}\)

\(^{32}\) 187 F.2d 29 (7th Cir. 1951).


\(^{34}\) D.A. Pam. 27-153, Procurement Law 407 (1961). Further, in view of the Supreme Court's ruling that an agency's interpretation of its own regulations is controlling, Bowles v. Seminole Rock Co., 325 U.S. 410 (1945), the language of ASPR § 8.000(b) is of importance: "This part [Section VIII] applies to contracts entered into under the [Armed Services Procurement] act which by their terms provide for termination thereof for the convenience of the Government." 32 C.F.R. § 8.000(b) (1961). (Emphasis added.)

\(^{35}\) See Flying Tiger Line, Inc., ASBCA No. 2060, at 7 (1954):

We shall pass over as unnecessary for consideration, the questions, first, whether the contract did deviate from regulations, and second, whether this Board could direct an amendment under any conditions if there were such a variance. The contract in its present form was executed by both parties and was approved by the Secretary of the Air Force through his duly authorized representative. In these circumstances the con-
One final aspect of the instant holding, that of the relation of the regulation to the validity of the contract involved, is deserving of attention. Traditionally, where questions of government contracts involved a contracting official’s failure to follow the prescriptions of a statute or regulation, courts have restricted their discussions to the validity of the contract as it was made. Thus, in *Federal Crop Ins. Co. v. Merill,* where the contracting official had entered into an agreement prohibited by regulation, the contract was found to be invalid, and the insured was denied recovery on that basis. Further, where a statute has directed the inclusion of prescribed provisions or stipulations in certain public contracts, it has been held that all contracts made otherwise are prohibited, and consequently no recovery can be had on a contract prohibited by law. In all such instances, the statute or regulation has been used strictly to determine the extent of the contracting officer’s authority, and thus to determine whether the contract was validly made. The only binding effect of the statute or regulation on private parties has been to charge them with notice of the contracting official’s authority.

In the instant decision, however, the court ignored entirely the effect which the regulation involved may have had on the validity of the contract, notwithstanding the violation of section 8.703 by the contracting officer. Rather, the court presumed the validity of the agreement, and then resorted to the regulation for authority to supplement the contract as it was written. The sharp contrast to prior rulings is apparent. The effect of this novel approach is the equally
unprecedented alteration of the extent of recovery permitted the private party by disallowing any award of anticipatory profits in spite of the absence of a termination clause in the contract.\textsuperscript{41}

Underlying the above instances in which the instant court deviated from prior law is the most significant aspect of its decision, namely, the court’s use of the syllogistic statement, “As the Armed Services Procurement Regulations were issued under statutory authority, those regulations, including 8.703, had the force and effect of law.” By so stating the court has reinforced the concept that any regulations issued pursuant to statute, without more, have a binding effect on private parties as great as if the regulation were a statutory command of Congress. The growing blacklog of such language, although usually in dicta,\textsuperscript{42} has begun to provide a dangerous source of pronouncements which eventually may be called on to substantiate a holding to that effect. Such statements ignore entirely the need at least for an examination of the statutory authority on which such regulations are based, and whether the requirements of the Federal Register Act have been met. In the logical extreme, toward which this decision takes a gigantic step, an internal regulation, circulated only within a particular procurement department, may be found to bind a private contractor to an obligation or liability neither known by the contractor to be involved in the contractual relationship nor included or intended to be included in the contract itself.

At best, a private contractor’s duty has been broadened from one of ascertaining the scope of authority of the agent with whom he deals to one of maintaining an intimate knowledge of all departmental regulations and being bound by them whether he consents or not. What is needed, it is submitted, is an examination into, and a critical evaluation of, such concepts as regulations having the “force and effect of law,” and the binding effect of regulations on the public at large. Perhaps this decision will dramatize the extent to which these concepts, heretofore assumed without comment or explanation, can be carried.

JOHN P. SEARS
EDWARD P. TAPTICH

\textsuperscript{41} See 41 C.F.R § 1-8.201(b) (1963):
[T]he contractual right to terminate a contract for the convenience of the Government and to make a settlement agreement . . . is based on such a clause. However, the power of a contracting activity to issue a termination notice does not depend on the existence of a termination for convenience clause in the contract. In the absence of a termination for convenience clause however, such action normally constitutes a breach of contract. Such a breach of contract may subject the Government to liability for common-law damages, including anticipatory profits, unless the Government arrives at a voluntary settlement with the contractor.


Defendants, residents of Nebraska, claiming title under a Nebraska tax deed, had instituted an action to quiet title in a Nebraska state court to land situated in the Missouri river bottoms where the channel of that river forms the boundary between the states of Missouri and Nebraska. Plaintiff, Julia Duke, a citizen of Missouri, had appeared in the Nebraska proceedings objecting to the jurisdiction of the court over the land and contended that it was in fact located in Missouri and that title thereto was vested in her pursuant to a Missouri land patent. The Nebraska court found the land to be in Nebraska and quieted title in the Durfees, defendants here. On appeal to the supreme court of that state the decision was affirmed.

In 1959, Julia Duke filed the instant suit in a Missouri state court contending that the land was located in Missouri, and that the Nebraska decision operated beyond the jurisdiction of that court. She claimed that the judgment was open to collateral attack despite the fact that she had appeared in the Nebraska proceedings, litigated the jurisdictional issue and had it expressly decided against her. The defendants removed the suit to the United States district court and defended on the grounds that the Nebraska judgment was res judicata. The district court, deciding the merits of the controversy, found that the land was located in Missouri but dismissed the action, holding the jurisdictional question to be res judicata. The Court of Appeals for the Eighth Circuit reversed. Held, the jurisdictional basis of a state court judgment in an action to quiet title to land which may be located in either of two states is subject to collateral inquiry under the doctrine of res judicata in subsequent proceedings in the other state.1

While the applicability of the doctrine of res judicata to problems of jurisdiction over parties is well settled, its applicability to questions of jurisdiction over subject matter previously determined and subsequently contested is fraught with some uncertainty. Much of the difficulty is traceable to the conflict of res judicata with the equally established principle that a state tribunal cannot subject to its process property extending beyond its jurisdiction; any such exertion

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2 American Sur. Co. v. Baldwin, 287 U.S. 156 (1932) (general appearance); Baldwin v. Iowa State Traveling Men's Ass'n, 283 U.S. 522 (1931) (special appearance); see Sunshine Anthracite Coal Co. v. Adkins, 310 U.S. 381, 403 (1940); 1 Freeman, Judgments § 333 (5th ed. 1925).
3 See Restatement (Second), Conflict of Laws § 451 (1934).
is a nullity and open to inquiry as to the basis of that jurisdiction in a collateral proceeding.

Noting that no cases have dealt specifically with geographical jurisdiction over realty in a res judicata context, the Duke court made a comprehensive survey of case law highlighting the policy factors which have influenced the decisions for and against collateral inquiry.\(^5\) In Forsyth v. Hammond, the Supreme Court upheld the conclusiveness of a determination as to subject matter jurisdiction where the question had actually been litigated, emphasizing that when the avenue of direct appeal to cure possible jurisdictional defects is available and exhausted, res judicata should preclude collateral attack upon such jurisdictional basis.\(^6\) Nevertheless, in Vallely v. Northern Fire & Marine Ins. Co.,\(^7\) collateral inquiry was allowed where the jurisdictional issue was not litigated in the first proceeding. The Court there allowed collateral attack because the first court had litigated in an area where defendant was excepted from the provisions of the Federal Bankruptcy Act—a clear absence of jurisdiction as set out by the act and underlying congressional policy.

The leading case for the proposition that the policy factors underlying the doctrine of res judicata apply equally to determinations of jurisdiction over subject matter is Stoll v. Gottlieb\(^8\) where, unlike Vallely, the issue of jurisdiction was actually contested in the first suit. The Court, speaking through Mr. Justice Reed, saw no reason to retry an issue already determined, and stated simply that "there is no reason to expect that the second decision will be more satisfactory than the first."\(^9\) Res judicata was later upheld even where the parties did not contest the jurisdictional issue, but reasonably could have.\(^10\)

The Supreme Court, therefore, had recognized that res judicata applied to determinations of subject matter jurisdiction; and if the parties had appeared to contest the jurisdictional issue, collateral attack was allowed only where the first court in determining jurisdiction had come into conflict with paramount congressional policy\(^11\) or the interests of national sovereignty.\(^12\) The balance of policies approach thus developed by the Court was reflected in the 1948 revision of the Restatement of Conflicts in which sufficient policy exceptions to res judicata included cases where the issue was not litigated, where there was clear lack of jurisdiction, or where the jurisdictional determination conflicted with superseding questions of law.\(^13\)

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\(^5\) 308 F.2d at 213-17.

\(^6\) 166 U.S. 506, 517-18 (1897).

\(^7\) 254 U.S. 348 (1920).

\(^8\) 305 U.S. 165 (1938).

\(^9\) Id. at 172.


\(^13\) Restatement, Conflict of Laws § 451(2) (Supp. 1948); Restatement, Judgments § 10 (1942).
Using the Restatement as a correct assessment of the case law, the Duke court proceeded to find the non-existence of factors heretofore considered as policy exceptions to the doctrine of res judicata. Noting that the first decision involved a question of fact, that there was no clear lack of subject matter jurisdiction, and that the parties had actually contested the jurisdictional issue, thereby satisfying the due process requisites of notice and appearance, the instant court nevertheless allowed collateral attack. The court was able to find that since real estate was involved, the fifth exception set forth in the Restatement was applicable, that is, the strong policy against a court acting beyond its boundaries. It declared, "excessive judicial action by way of claimed jurisdiction over land... is a proper subject of inquiry despite opposing considerations in favor of the termination of litigation."15

While recognizing that the decision rests on the traditional weighing of policy factors, the court placed undue reliance upon the Restatement's fifth exception, perhaps at the expense of misapplying Supreme Court thinking in this area. Deciding the case in this manner leaves unanswered the countervailing consideration that the second inquiry will not be any more satisfactory than the first—a factor to which the other res judicata exceptions have some relation. For example, when there is clear lack of jurisdiction or when the jurisdictional question was not litigated, there is good reason to allow the second court to make a collateral inquiry since it is possible that the first court was wrong and in fact did not have jurisdiction. So, too, when the jurisdictional question is one of law, a supervening law or congressional policy may point to a better subsequent determination of jurisdiction. The fifth exception, however, merely repeats the ultimate question: is there sufficient reason to inquire again into a factual determination of jurisdiction already made by a competent court? Standing alone, it offers no specific reason to allow collateral inquiry. Thus, the recognized exceptions to res judicata as a local doctrine do not manifest themselves in the instant case.

Furthermore, in reconciling its decision with Supreme Court precedent, the court noted that cases involving extraterritorial land form an exception to the Stoll decision enforcing res judicata of prior subject matter jurisdictional determinations. This, however, is not traceable to any sanctity of real property, but rather to a 1909 Supreme Court opinion holding that under full faith and credit a state of situs may rightly refuse to enforce the judgment of a sister state directly affecting its land.17 Even the court's reliance on early Supreme Court cases allowing collateral inquiry where jurisdiction over land in original judgments were void seems unfounded since those decisions rested solely upon the infringement by state courts of jurisdiction exclusively vested elsewhere by statute.18 In view of this absence of the recognized res judicata exceptions, the

14 308 F.2d at 218.
15 Id. at 220.
16 Id. at 219.
18 Williamson v. Berry, 49 U.S. (8 How.) 495, 533 (1850) (sale of realty exceeded
real grounds for the court's decision thus seems to lie in the fact that any resolution of private rights in the instant dispute creates further problems of exclusive state sovereignty over land, validity of state property deeds and subsequent taxing powers. In short, the instant court concluded that these questions were of such import that a court in another state whose sovereignty is adversely affected by a state's previous determination of real estate situs has a right to question the first state's jurisdiction over subject matter.\textsuperscript{19} The \textit{Duke} court, then, purports to create a new policy exception to res judicata.

In this regard, the instant court early in its opinion, found that the full faith and credit clause of the Constitution in no way precludes a court from making collateral inquiry into the jurisdiction of a sister state judgment\textsuperscript{20} as the constitutional dictate does not apply to a judgment without jurisdiction.\textsuperscript{21} However, a second court's inquiry into jurisdiction traditionally has been allowed only to the extent that the policy exceptions surrounding the doctrine of res judicata permit. Thus, if the policy exceptions to res judicata do not apply, the jurisdictional basis of the first court is res judicata and full faith and credit commands that the judgment be given full effect.

In the instant case, the problem of whether the Nebraska court had exceeded its jurisdiction in a geographical sense was a due process question regarding the physical power of a court\textsuperscript{22} which could and should have been finally resolved by direct appeal to the Supreme Court from the Nebraska decision without pursuing a collateral remedy in the Missouri courts.\textsuperscript{23} The reasons in support of the policy of res judicata are founded on the fact that there is adequate remedy for lack of jurisdiction by way of direct appeal.\textsuperscript{24} When a different avenue of jurisdictional inquiry is attempted in a collateral proceeding, the Supreme Court's latest words enforcing res judicata indicate that the doctrine is indeed a strong one. In \textit{Chicot County Drainage Dist. v. Baxter State Bank},\textsuperscript{25} the Court upheld res judicata in the face of an erroneous determination of jurisdiction where the statute under which jurisdiction was found was unconstitutional.\textsuperscript{26} That case

Chancellor's statutory jurisdiction); Hickey's Lessee v. Stewart, 44 U.S. (3 How.) 750, 761-62 (1845) (realty disputes to be litigated by board created by treaty); Elliot v. Piersol's Lessees, 26 U.S. (1 Pet.) 328, 341 (1828) (authority of court over realty derived from statute).

\textsuperscript{19} 308 F.2d at 220.
\textsuperscript{20} Id. at 212; Thompson v. Whitman, 85 U.S. (18 Wall.) 457 (1874).
\textsuperscript{21} Riley v. New York Trust Co., 315 U.S. 343, 349 (1942); Restatement, Judgments § 4, comment b (1942).
\textsuperscript{22} McDonald v. Mabee, 243 U.S. 90, 91 (1917).
\textsuperscript{23} See generally, Gavit, Jurisdiction of the Subject Matter and Res Judicata, 80 U. Pa. L. Rev. 386 (1932) wherein the author deemphasizes the importance of lack of jurisdiction over subject matter in suits between private litigants where res judicata is at issue.
\textsuperscript{24} Stoll v. Gottlieb, 305 U.S. 165, 171, 172 (1938); Croudson v. Leonard, 8 U.S. (4 Cranch) 434, 437 (1808).
\textsuperscript{25} 308 U.S. 371 (1940).
\textsuperscript{26} Id. at 376.
likewise had aspects of conflict with state sovereignty since a federal court had litigated with respect to state bonds—clear infringement of jurisdiction.\textsuperscript{27} Thus, in light of such a strong holding in \textit{Chicot County}, the few Supreme Court decisions allowing collateral attack for policy considerations should be viewed most narrowly.

Moreover, any apparent justice in having the courts of Missouri pass on land which might possibly lie in Missouri for reasons of state sovereignty is answered by the fact that Missouri as a state is not bound by the instant decision and has independent recourse to the Supreme Court for the settlement of its boundary dispute.\textsuperscript{28} Where the factual question of jurisdiction was actually litigated and was not clearly erroneous, refusal to adhere to res judicata would thus engraft a questionable further exception in this area. And the general language of the Restatement's fifth exception and the special policy reasons of state sovereignty and realty status present no cogent reasons to relax the policy demanding the termination of litigation.

As a result of its refusal to give res judicata effect to the Nebraska judgment, the \textit{Duke} court has seemingly denied full faith and credit to that judgment and presented a constitutional vehicle by which the Supreme Court can either reaffirm the rationale of \textit{Chicot County} or recognize a new policy exception which has the overtones of a full faith and credit exception. It is hoped that the forthcoming decision will shut the door to such an exception and uphold the doctrine of res judicata.


Children's Hospital, James Jennings and Ernest Ross offered and sold eight-per cent first mortgage bonds of Children's Hospital to residents of several states without first filing a registration statement with the Securities and Exchange Commission. Advertisements had been placed in newspapers with interstate circulation, the United States mail and other facilities of interstate commerce. The purpose of the bond issue was to finance the promotion, organization, construction and initial operation of Children's, an osteopathic hospital.

Jennings and Ross caused Children's to be incorporated, selected the members of the first board of directors and became the only salaried directors thereof, re-

\textsuperscript{27} Id. at 377.
\textsuperscript{28} See Missouri v. Nebraska, 196 U.S. 23 (1904); Rhode Island v. Massachusetts, 37 U.S. (12 Pet.) 657 (1838).
ceiving $1000 a month. The promoters intended to withhold ten per cent of the proceeds from the bond issue of $1,650,000; a portion of which was to be expended on office overhead, promotion and cost of sale. The balance of approximately $50,000 was to go to the promoters. The construction company which had been chosen without bid to construct the hospital then informed Jennings it would be unable to undertake the project. Jennings and Ross thereupon formed a construction company for the sole purpose of taking over the contract to construct Children's with the resulting profit of $180,000 to pass to themselves in lieu of the $50,000 they were to receive from the bond promotion.

The SEC filed a complaint to enjoin Children's, Jennings and Ross from offering and selling the bonds without first filing a registration statement. A temporary restraining order was entered on November 2, 1962. The defendants failed to file an answer and a default judgment for plaintiff was entered. Held, Exemption from registration as allowed by Securities Act of 1933 for securities issued by a corporation organized and operated exclusively for charitable purposes is not available when there is a single substantial non-charitable purpose being served by the organization or operation of the issuer.¹

Section 3(a)(4) of the Securities Act of 1933 exempts from registration "[A]ny security issued by a person organized and operated exclusively for religious, educational, benevolent fraternal, charitable or for reformatory purposes and not for pecuniary profit, and no part of the net earnings of which inures to the benefit of any person, private stockholder, or individual."² If the above exemption or other exemptions available under sections 3 and 4 are not applicable to the security issue, then unless a registration statement is in effect as to that security, it is "unlawful for any person, directly or indirectly to make use of any means or instrumentalities of transportation or communication in interstate commerce or of the mails to sell such securities ... or to carry or to cause to be carried through the mails or in interstate commerce ... any such security for the purpose of sale ...."³ The instant court, though entering a default judgment, felt that the situation before it warranted setting forth at some length the findings and conclusions underlying its decree. In the absence of an answer, the court assumed that had an answer been filed, the defense raised would have been that the security was within the charitable exemption under section 3(a)(4) of the Securities Act. The case thus manufactured was one of first impression, since no prior decision had defined the exemption in question and only one case had applied it.⁴

The magnitude of the problem involved is best illustrated by showing the im-

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⁴ SEC v. Universal Serv. Ass'n, 106 F.2d 232, 238 (7th Cir. 1939).
mense growth in the volume of charitable securities purportedly within the section 3(a)(4) exemption. The SEC estimates that institutions claiming the charitable exemption sold $117 million of securities in 1962, $66 million in the next preceding year, and only $20 million in 1950. These securities were almost entirely bonds and were principally issued by churches and hospitals. Playing a small but ever increasing role among the issuers of such securities are a rash of "non-profit" hospital ventures, financed with first mortgage bonds promoted as paying investors eight-per cent interest. Though the hospitals are concentrated in the Southwest, some eighty per cent of their bonds are believed to have been marketed elsewhere. Moreover, the problem is not limited to the Southwest, as hospitals claiming to be within the charitable exemption have been promoted in Ohio, Florida, Texas, Hawaii and Washington, and have sold bonds totalling approximately $10 million. The growth of such issues seems to be forthcoming. As one SEC official has said, "there may be a mushrooming of this type development. The combination for whetting investor's appetite is perfect . . . high return, the protection of a bond and the feeling you're contributing to a charitable cause."

These developments undoubtedly motivated Judge Davis' decision to go beyond the exigencies of the situation at hand and lay down a standard to be used in determining whether or not the charitable exemption applied. The approach adopted was a precise and analytical one which defined each of the key words within the exemption clause, relying basically on decisions defining similar exemptions under the Social Security Act and the Internal Revenue Code.

To come within the section 3(a)(4) charitable exemption, the first requirement is that the security be issued by a "person organized and operated exclusively for . . . charitable . . . purposes." In defining "exclusively," the court relied in the main on Better Business Bureau of Washington, D.C. v. United States wherein the Supreme Court defined the word "exclusively" as used in section 811(b)(8) of the Social Security Act in connection with educational institutions, to mean that a single non-educational purpose, if substantial in nature, will destroy the exemption regardless of the presence or importance of other truly educational purposes.

The legislative history of the Securities Act of 1933 is silent as to the intent of Congress concerning what organizations are to be included within the section

6 Ibid.
8 Saturday Evening Post, Sept. 29, 1962, pp. 19, 22.
13 326 U.S. 279 (1943).
14 Id. at 283.
3(a)(4) charitable exemption. However, since the wording of the exemptions under the Social Security Act and the Securities Act are identical, the court in the instant case felt that the definition of "exclusively" in *Better Business Bureau* could be applied to define that term as used in the charitable exemption provision of the Securities Act. The adoption of this definition is further supported by United States *v. La Société Française De Bien-Faisance Mutuelle* which held the reasoning of *Better Business Bureau* applicable to an identical charitable exemption in the Internal Revenue Code.

The court also gave a liberal interpretation to the phrase "charitable purpose," and in doing so followed the better authorities on this point. To adequately define "charitable purpose" you must encompass within such definition the source of the funds and the application of the same. As was stated in *Hamilton v. Corvalis Gen. Hosp. Ass'n*, the distinctive features of a charity are that it derives its funds mainly from public and private charity, and holds them in trust for the object and purpose expressed in its charter. In considering the application of the funds, the instant case carefully points out that an institution can be "charitable" irrespective of the fact that all the patients pay for services rendered as long as it is not conducted for the pecuniary profits of anyone connected therewith, that is, the receipts must be devoted to the necessary maintenance of the institution and the carrying out of the purpose for which it was organized. The essential test, then, is not the amount of charitable work carried out, but whether the institution does all the charitable work allowed by its financial means.

The corollary to this "charitable purpose" requirement for the availability of the charitable exemption is the prerequisite that the corporation must not be organized or operated for pecuniary profit and no part of the net earnings may inure to any person connected therewith. The major thrust of this decision lies in the liberal interpretation given to this specific requirement. This clause, the court states, must be construed "to encompass profit, not only from net earnings, but from any source, arrangement or manipulation, whether such profit inures to anyone directly or indirectly connected with the corporation." From this construction, the court concluded that "the non-charitable element which defeats the exemption is the anticipated profit from the organization and promotion of the institution and from the construction of the hospital facilities."

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15 152 F.2d 243 (9th Cir. 1945).
16 Id. at 245.
18 146 Ore. 168, 30 P.2d 9 (1934).
19 Id. at 13. See also Congregational Sunday School & Publishing Soc'y *v. Board of Review*, 290 Ill. 108, 125 N.E. 7, 10 (1919).
22 214 F. Supp. at 890-91.
23 Id. at 891.
Thus, the court approached the problem by narrowly limiting the exemption and then concluding that the facts before it were not within its scope. By so doing, the court recognized that any attempt to categorically set out the precise metes and bounds of the exemption would invite imaginative promoters to create other schemes which would come within these boundaries. Wisely, then, the opinion establishes an undefined “substantial non-charitable purpose” test and leaves its future application to a case-by-case determination.

A striking example of the value of not setting down a strict definition as to what constitutes a “non-charitable” purpose is illustrated by a case decided shortly after the decision was handed down in *Children's*. In *SEC v. Shreveport Medical Hosp.*24 a prominent member of the community attempted to promote a proprietary hospital. Realizing that it would not be financially successful, he had the hospital taken over by a charitable group. The only financial remuneration received by the original promoter was the fact that the organization formed to promote the hospital as a charitable institution assumed the outstanding debts of the original promoter. Furthermore, the original promoter had no connection whatsoever with the subsequent issue of bonds by the hospital. Nevertheless, applying the “substantial non-charitable purpose” test, the court found the bond issue not to be within the charitable exemption clause because the organization assumed the debt incurred in the original promotion as a proprietary hospital and part of the bond issue would be used to pay off such debts. It is quite clear that the foregoing facts could not have been visualized by Judge Davis in *Children's* in any attempt to encompass all possibilities of profit-taking within any single definition. In *Children's* the profit-taking was obvious; whereas in *Shreveport Medical Hosp.* it was not.

The obvious purpose of the instant decision is to confine the charitable exemption of section 3(a)(4) to enterprises in which non-disclosure can work little or no ill effect. The opinion explicitly equates the nature of the security with that of the institution, and carefully points out that once the character of a corporation and its securities changes from charitable to commercial “the basic motive impelling the purchasers to invest will rest upon entirely different considerations.” The court recognizes that while those who invest primarily from charitable motivations are only incidentally interested in the commercial soundness of their investment, this is not true of those who invest in quasi-charitable organizations with a substantial non-charitable purpose. Accordingly, investors in “institutions not organized for strictly charitable purposes are entitled to the disclosures concerning the enterprise which must be made under the registration process.”25 This is in keeping with the congressional intent in creating the exemption, for the legislative history points out that it “carefully exempts from its application certain types of securities and security transactions where there is no practical need for its application or where public benefits are too remote.”26

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In this way the opinion paves the way for still another test to determine whether a security issue should be given the charitable exemption. The legislative history of the section indicates that it was designed to exempt "securities of a non-commercial character issued by eleemosynary institutions." Thus, while the instant case looks only to the nature of the issuing corporation to determine the character of the security, there appears to be no reason why this determination should be so confined. Indeed, the language quoted above makes it clear that Congress intended to deny the exemption to securities of a commercial nature even though issued by a bona fide charity. Thus, the character of the security itself should be tested, and the nature of the issuing institution should be considered only as one of several factors to be weighed in making this determination.

The application of this test would require an examination of the purpose the issue serves for all those directly or indirectly connected with the organization. In essence, every relevant factor would be considered and a determination made as to whether, in the aggregate, they give the issue a commercial flavor. Among the most important would be the nature of the issuing organization and the motivation of the investor. Obviously, if the corporation is not a bona fide charitable institution, the charitable exemption would not be available. This was the decision in the instant case. However, if the issuer is found to be a bona fide charity, the motivation of the investor becomes crucial. And the most expedient method of making this determination is to examine the issue itself to see what type of investor it is designed to attract. Thus, the interest rate, whether it is secured by a mortgage, and whether it is offered beyond the geographic area served by the charity, should be included among the factors weighed.

The proposal of this test is not a criticism of the instant decision; it is doubtful that such an extension could have been justified. It is submitted, however, that a future adoption of this suggestion would more completely close the door to schemes to avoid the disclosure requirements of the act.

STEPHEN PALEY


Plaintiff, a bartender on duty in the clubhouse of a fraternal benefit association, was injured by flying glass fragments when an unopened bottle of soda water exploded behind the bar. The defendant had bottled, sold and delivered

27 Id. at 15. (Emphasis added.)
the soda water to the purchaser, plaintiff's employer. An action in assumpsit was brought under section 2-318 of the Uniform Commercial Code, differing from the express provisions of section 2-318 of the Uniform Commercial Code, and has insufficient privity with his employer-purchaser to bring an action against the manufacturer of the bottle under the warranty provisions of the Code.

Prior to this decision—the first authoritative interpretation of section 2-318 of the Uniform Commercial Code—at least one lower court in Pennsylvania and several federal courts construing Pennsylvania law, while not ruling on the exact question presented here, had used language sufficiently broad to support a ruling which would have extended the warranty to an employee of the purchaser. Some Pennsylvania decisions had even found sufficient privity between a sub-purchaser and a retailer in food cases. And particularly within the last five years, decisions under the Uniform Sales Act have been gradually eroding not only the strict privity requirement but the rationale supporting it as well. It is therefore surprising to find a court seeking to re-energize privity of warranty, especially where the statute involved is the Uniform Commercial Code, which is considerably more liberal in its warranty provisions than the Uniform Sales Act.

In its opinion, the Pennsylvania court examined section 2-318 and Comments 2 and 3 of the Code, and concluded that "clearly the Code gives no basis for

1 Uniform Commercial Code § 2-318 provides:

A seller's warranty whether express or implied extends to any natural person who is in the family or household of his buyer or who is a guest in his home if it is reasonable to expect that such person may use, consume or be affected by the goods and who is injured in person by breach of the warranty. A seller may not exclude or limit the operation of this section.


8 Uniform Commercial Code § 2-318, Comment 2 states:

The purpose of this section is to give the buyer's family, household and guests the benefit of the same warranty which the buyer received in the contract of sale, thereby freeing any such beneficiaries from any technical rules as to "privity." It seeks to accomplish this purpose without any derogation of any right or remedy resting on negligence. It rests primarily upon the merchant-seller's warranty under this Article that the goods sold are merchantable and fit for the ordinary purposes for which such goods are used rather than the warranty of fitness for a particular purpose. Implicit in this
the extension of the existing warranty to an employee of the purchaser."\textsuperscript{9} But while such an employee may not come within the express beneficiaries set forth in the Code, the Code nowhere excludes the possibility of implied beneficiaries. Moreover, the very fact that the Code uses the word "beneficiaries" may be said to indicate an attempt to evacuate the citadel of privity. Indeed, Comment 2 makes it plain that the enumeration of express beneficiaries is for the purpose of "freeing any such beneficiaries from any technical rules as to 'privity.'" And Comment 3 seems clearly to recognize that there may be implied beneficiaries who might likewise be freed from these "technical rules" of privity. Two states, New York and California, have managed to reach such a conclusion under the more restrictive Uniform Sales Act.

New York and California have adopted the view that under modern merchandising techniques, it can hardly be unreasonable to hold a manufacturer liable for defective goods which he knows will pass through the hands of the purchaser's employees. In Peterson v. Lamb Rubber Co.,\textsuperscript{10} the Supreme Court of California held that an employee of the purchaser, injured when an abrasive wheel flew apart, could recover on an implied warranty because he had a successive right, granted by the employer, to use the wheel. The court reasoned that it was common knowledge that equipment purchased by an employer will be used by employees, "who in this respect may be said to stand in the shoes of the employer."\textsuperscript{11} And this same reasoning has been endorsed by the Supreme Court of New York, which has held that "regardless of contractual privity, the implied warranties of fitness and merchantability run from a retailer to the purchaser's employees for whose use the article of personal property has been purchased."\textsuperscript{12}

A similar result was reached in the recent case of Chapman v. Brown,\textsuperscript{13} decided under Hawaii law. In Chapman, a hula skirt of what later proved to be flammable material was lent to a friend of the purchaser. When the friend suffered burns caused by the skirt's accidently catching fire, a federal district court granted recovery and refused to allow the defense of lack of privity, even

\section{Acknowledgements}

This section is that any beneficiary of a warranty may bring a direct action for breach of warranty against the seller whose warranty extends to him.

Comment 3 provides:

This section expressly includes as beneficiaries within its provisions the family, household, and guests of the purchaser. Beyond this, the section is neutral and is not intended to enlarge or restrict the developing case law on whether the seller's warranties, given to his buyer who resells, extend to other persons in the distributive chain.

\textsuperscript{9} 187 A.2d at 577.

\textsuperscript{10} 54 Cal.2d 339, 5 Cal. Rptr. 863 (1960).


\textsuperscript{13} 198 F. Supp. 78 (D. Hawaii 1961).
though Hawaii warranty law was based on the Uniform Sales Act rather than the more liberal Uniform Commercial Code. The basis for the court's decision was a public policy in favor of protecting even non-buyers from dangerous and defective articles. This public policy argument was raised in Hochgertel, but the Pennsylvania court summarily dismissed it as "unmeritorious."

The Pennsylvania court's cautious policy behind its holding seems to be based primarily upon three points: (1) expansion of warranty protection to include employees of a purchaser would amount to judicial legislation; (2) Pennsylvania law did not seem to offer sufficient supporting precedent for so extending privity; and (3) making the manufacturer the guarantor of his product would cause "harsh and unjust results."

The court's claim that to permit recovery would be judicial legislation appears weak in view of the Code's expressed intention of "neutrality" toward broadening or narrowing the warranty provisions. Further, the statement that any changes in privity requirements should be left solely to the legislature finds little support in the weight of authority. As was said in Chapman, "the truth is that privity was never a static concept, and it should not now be made any more static than the common law is static, unless clearly restrained by express statute." The Code comment makes it plain that the statute is not intended to be restrictive. Since it is known to the manufacturer that bottled beverages will be sold to restaurants and hotels, where the proprietor will not personally open every bottle—in other words, that the product will pass through hands other than those of the purchaser, the situation would seem to be ripe for common law courts to make the law conform to the existing state of merchandising.

Further, the Hochgertel court has not only definitely ignored the trend of the case law from other jurisdictions, but has also paid insufficient attention to the developing case law in Pennsylvania. The court based its rule that privity did not extend beyond a purchaser upon Loch v. Confair, a 1949 Pennsylvania case decided under the Uniform Sales Act, wherein a bottle which a shopper had placed in her shopping basket exploded and injured her before she could complete the purchase. The court held in Loch that there could be no recovery on a warranty basis because there had been no sale. The Hochgertel court argued that "the inescapable conclusion of Loch v. Confair . . . is that no warranty will be implied in favor of one who is not in the category of a purchaser." But the

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14 See note 8 supra.
15 See, e.g., Picker X-Ray Corp. v. General Motors Corp., 185 A.2d 919, 922 (Mun. Ct. App. D.C. 1962) (footnotes omitted), wherein the court stated:
Appellee contends that the Uniform Sales Act codified the doctrine of privity and that any change must come from legislation. This argument has been rejected often by the courts. Moreover, the Uniform Commercial Code . . . expressly leaves questions concerning privity to the judiciary. [citing Comment 3]
16 198 F. Supp. at 105. See also Dole v. Gear, 14 Hawaii 554, 561-62 (1903); Miller v. Monsen, 228 Minn. 400, 406-07, 37 N.W.2d 543, 547 (1949).
17 316 Pa. 158, 63 A.2d 24 (1949).
18 187 A.2d at 578.
more logical interpretation would seem to be that there can be no recovery on a warranty basis unless there has first been a purchase by someone, and a recent federal decision has distinguished *Loch* on this ground.\(^ {19}\)

In contrast to *Loch v. Confair*, there has been a series of cases decided under Pennsylvania law which would have given the court—had it been so inclined—ample precedent to expand the privity doctrine. *Mannsz v. Macwhyte*,\(^ {20}\) a 1946 federal decision, failed to grant recovery on an express warranty when a wire rope, supporting a scaffold, broke. However, the court stated that "whether the approach to the problem be by way of warranty or under the doctrine of negligence, the requirement of privity between the injured party and the manufacturer of the article which has injured him has been obliterated from the Pennsylvania law."\(^ {21}\) The same view with regard to the privity requirement under Pennsylvania law was reiterated in two later federal cases, *Magee v. General Motors Corp.*\(^ {22}\) and *McQuaide v. Bridgeport Brass Co.*\(^ {23}\) And in *Jarnot v. Ford Motor Co.*,\(^ {24}\) decided in 1959, recovery was allowed in a suit brought against a manufacturer by the owners of a truck, purchased from a retailer, which crashed when part of the wheel assembly failed. The Superior Court of Pennsylvania there stated that "proof of a contractual relationship or privity between the manufacturer and the purchaser is not necessary to impose liability for the damage."\(^ {25}\)

*Thompson v. Reedman*,\(^ {26}\) decided under Pennsylvania law by the Federal District Court for the District of Connecticut in 1961, is the most recent applicable case. It concerned a suit by an injured passenger against the manufacturer of an automobile as a guest in the home, thus bringing the plaintiff under the express provisions of section 2-318. Distinguishing *Loch* on the ground that there no title had passed, the court in that case concluded that the language of the applicable cases decided under Pennsylvania law "has been broad enough to cover the present situation."\(^ {27}\) A motion to dismiss for lack of privity was therefore denied. Neither *Magee, Jarnot, McQuaide*, nor *Thompson* was cited by the Hochgertel court in its opinion, although all of these decisions were more recent than *Loch* and although *Thompson* was specifically a section 2-318 case.

Further in its reasoning, the court balanced the pros of granting recovery against the cons of denying it, and decided that the price of "social justice" in this case was too high; it would require making the manufacturer the guarantor


\(^{20}\) 155 F.2d 445 (3d Cir. 1946).

\(^{21}\) Id. at 449-50.


\(^{25}\) Id. at 430, 156 A.2d at 572.


\(^{27}\) Id. at 123.
of his product. This argument was recently discussed in an exhaustive article by Dean Prosser.28 His thesis is that the manufacturer already is a guarantor of his products: but his being made a guarantor is done by a process of fictions instead of an outright statement, and it is now time to brush away the cobwebs of privity and recognize that holdings subjecting a manufacturer to liability on the basis of "privity" are in reality imposing absolute liability upon him. By rejecting these arguments, the Hochgertel court reaches the anomalous result of making some of the decisions in Uniform Sales Act states more liberal than the instant decision under the Uniform Commercial Code. Thus, other Commercial Code states, seeking to give full effect to the Code's warranty provisions, will have to look to non-code states for case law; and to give full effect to these warranty provisions, these states must decline to follow Hochgertel, thereby destroying the uniformity of decision which the Code supposedly should insure.

The court's concluding reason for denying recovery was that the plaintiff had "an adequate remedy in trespass." It is undeniable that the plaintiff has a remedy in trespass, but its adequacy is open to considerable doubt. To recover, the plaintiff would have to prove negligence, and in Pennsylvania he is aided by a shift of the burden of proof only to the extent that the defendant must show that it was not generally negligent.29 A more satisfactory solution would eliminate the hazards of jury determination by making the manufacturer the guarantor of his product;30 he is usually in a much better position to absorb and distribute the costs of these inevitable accidents than the injured person.

In conclusion, the Pennsylvania court's rationale—that the Code affords no basis for relief to a purchaser's employee for a breach of warranty; that any change must come from the legislature; that public policy arguments are "unmeritorious"—has been challenged vigorously by many eminent commentators. The holding is contrary to the recent cases even under the more restrictive Uniform Sales Act, and seems plainly at variance with the express words of section 2-318 and Comments 2 and 3.

It is particularly unfortunate that the first authoritative case decided under section 2-318 should opt for a revitalization of the privity concept, increasingly discredited even under the Uniform Sales Act, and should thus make adoption of

28 Prosser, The Assault Upon the Citadel (Strict Liability to the Consumer), 69 Yale L.J. 1099, 1134 (1960). A similar argument was made by Traynor, J., in Escola v. Coca Cola Bottling Co., 24 Cal. 2d 453, 461-62, 150 P.2d 436, 440 (1944) (concurring opinion), wherein he stated:

[It should now be recognized that a manufacturer incurs an absolute liability when an article he has placed on the market, knowing that it is to be used without inspection, proves to have a defect that causes injury to human beings. . . . Even if there is no negligence, however, public policy demands that responsibility be fixed wherever it will most effectively reduce the hazards to life and health inherent in defective products that reach the market.

To the same effect see 2 Harper & James, Law of Torts § 28.33, at 1606 (1956).


The Commercial Code a step backward, into the realm of the “technical rules of privity.” At the present time, Pennsylvania may be consonant with a majority of jurisdictions in its view of privity, but the developing case law is visibly opposed to the attitudes expressed in the instant decision. The fact of so many liberal decisions in such a short time would indicate that the ultimate majority view under the Uniform Commercial Code—and seemingly the better reasoned one—will be the position presently taken by New York and California.

PHILLIP T. HUTCHISON

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31 A tabulation by the court in Chapman v. Brown, 198 F. Supp. 78, 104 (D. Hawaii 1961), indicated that 15 American jurisdictions require privity in all cases, and only 4 hold that privity is unnecessary in any case. At the time the Chapman opinion was handed down 17 jurisdictions, including Pennsylvania, held privity unnecessary in food cases.
BOOK REVIEWS


Professor Metzger displays an active interest in international law and the legal mechanisms for conducting international relations, an interest developed from his experience as Assistant Legal Advisor for Economic Affairs in the State Department, as a Professor of Law at Georgetown University Law Center and as a consultant on various international problems and programs.

Professor Metzger's approach reflects his background; it combines the pragmatic with the scholarly, the "wouldn't it be wonderful if" with "this is as far as you can get at this time." Thus, throughout his treatment of a broad range of subjects with which the book deals, there is reflected a realistic recognition of the probable combined with a constructive desire to establish better, but always workable, solutions. Admittedly, these solutions are generally of only a limited or partial nature. Long-term solutions designed to achieve the ultimate in goodness and right must be reserved to the theorist, but a theorist will find that Professor Metzger's proposals provide the first practical steps toward an ultimate, but long in the future, panacea.

The book is a collection of sixteen articles previously published in law and professional journals, loosely grouped together under the headings of International Law, International Trade, and International Finance and Investment.

The first article, "The Nature and Extent of Legal Limitations on a Nation's Freedom of Action," characterizes Professor Metzger's approach. In this article he recognizes the dominance of nationalism in today's nation-state relationships; the theory of international law that the only constraint upon a state is that to which it has consented, and the practical fact that although such restraints as are consented to still constitute the principal legal limitations on a state's freedom of action, there nevertheless have developed legal limitations apart from a state's consent. These latter restraints derive from world opinion, external to the state's will, but having an impact on its course of action. Professor Metzger recognizes the amorphous origin of these external restraints and the fact that they cannot be delineated or catalogued in advance. Further, he argues that since most restraints arise out of consent, one must realistically approach the problem of securing such consent. Nations, like people, must
be dealt with in terms of their own stage of development, their mores and their desire to progress along what they conceive to be the path of their national future. This conclusion is one which must constantly be borne in mind by the private United States corporation investing in a developing country which seeks to assure its future by obtaining all types of long-term concessions from the host country.

Along this line, his article on "Exchange Controls and International Law" \(^1\) calls attention to the significant limitations in one area on the freedom of a state to act as a result of various post-war agreements. Often ignored, but of considerable importance, for example, is the existence of the undertaking by each member of the International Monetary Fund to enforce in its territories the exchange controls of another country.

In the section on the "Connally Reservation and the World Court" Professor Metzger admits the impressive support for the repeal of the Connally Amendment, but argues that the outright repeal of the amendment is not likely to be achieved. He therefore proposes substituting the formula of the French government, although it is not a popular one, of reserving disputes arising out of hostilities and "disputes arising out of a crisis affecting the national security or out of any measure of action relating thereto." \(^2\)

The chapter on the settlement of disputes among nations by a weighted voting formula, \(^3\) as provided for in the Bretton Woods Agreement for the International Bank for Reconstruction and Development and the International Monetary Fund, and as has been adopted in various international commodity agreements, calls much needed attention to a practical political, non-judicial procedure for settlement of such disputes in situations where international organizations or agreements are established to deal with a specific area of nation-state relationships.

One always associates Professor Metzger with his views on the act of state doctrine. \(^4\) He argues well for the position that in order for the Court to pass on the validity of acts of another government, performed within their own territory, there must be direct expression in this regard by the Department of State. \(^5\)

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\(^{1}\) Metzger, International Law, Trade and Finance: Realities and Prospects, ch. 11 (1962) [hereinafter cited as Metzger].

\(^{2}\) Metzger, 40.

\(^{3}\) Id. ch. 3.

\(^{4}\) Id. ch. 6.

In the trade section, Professor Metzger’s article on the then-conceived, but unborn Trade Expansion Act of 1962 affords an excellent legal history of the program and analysis of the reasons underlying the changes made. Similarly, his study of the developing world of regional markets provides a realistic basis for considering the problems that will develop from the growing trend to establish such trade unions, both the internal problems facing the members of such groups and the external problems of those trading with the unions.

Although Professor Metzger never actually poses as an advocate for a solution, he does attempt to point the way to the most practical means to the desired end. In his section on International Conventions for Handling Liability of Nuclear Powered Vessels or in his proposal that the Civil Aeronautics Board require air carriers engaged in foreign air transportation involving the United States to secure $150,000 per passenger coverage in flight accident insurance, he is attempting to suggest practical solutions, not theoretical divisions of ultimate liability.

He doubts the practical wisdom of securing multilateral conventions for protecting investors of developed countries in their investments in developing countries. Nor does he place much reliance on bilateral treaties of “friendship, commerce and navigation” for protection of private foreign investments, beyond their function of providing an attitude of hospitality to such investments. Recognizing the significant role played by foreign investment in the economic growth of developing countries, he urges foreign investors to rely on the commitments of their own nation, such as the various guaranty programs of the United States, and to conduct themselves in the host nation in a manner conducive to gaining local support, or at least to prevent the creation of antagonisms.

This book never becomes a simple report of the status, or lack thereof, of an international legal doctrine, but instead consistently attempts to point the way to future development. Many will argue with his proposals, but since Professor Metzger advocates no single theme nor any single

6 Metzger, ch. 7.
7 Although the timely setting of this chapter makes it clear when the article was published, it would have been helpful if the date of original publication had been noted on the other chapters of the book.
8 Metzger, ch. 8.
9 Id. ch. 10.
10 Id. ch. 16.
11 Id. ch. 14.
12 Id. ch. 13.
13 Id. ch. 15.
approach to the whole of today's legal problems in international relations and transactions, the list of adherents and dissenters to his views will vary as each issue is raised.

Professor Metzger has written a stimulating book. It is stimulating because against the total background of his experience and scholarly research he relentlessly seeks out courses of action which are possible of realistic achievement and designed to move international legal concepts and action in a desirable direction at a sane rate of progress.

WALTER S. SURREY*


Professor Carlston of the University of Illinois has long labored in the vineyard of international relations and law. This, his latest book, contains some of the fruits of his work during the past five years or so. It contains eight essays, some of which have appeared in learned journals, six dealing with nationalization of property and concessions agreements (most of which have appeared before), two with the inadequacies of, and his proposed remedies for, the present international political, economic, and legal "system," and a final essay setting forth conclusions.

Professor Carlston is a man of good will and understanding; he is seriously committed to the search for a new and better world, and if his crystal ball is as cloudy as those of others, at any rate it is not much more so.

Regarding the inadequacies of the existing "world order," Professor Carlston, while not attempting to catalog them systematically, mentions the expansionist character of international communism, the disparities in wealth within the underdeveloped countries, the inadequate sharing of wealth amongst countries, the continued willingness of countries to use force, even nuclear force, to defend their interests, and a variety of other ills of which we have been aware for some time.

He recognizes that there are no simple answers to the problem of "creating a viable world organization." The present unsatisfactory world "system" cannot be righted "in terms of creating a 'reign of law'" because existing conditions "are largely supported by the power relations of the principal actors." They will not sacrifice the influence that power

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gives until they achieve a consensus on ends and means and confidence that such a consensus will be valued and supported.

When it comes to prescribing how to get from the present poor state of affairs to the state to which men of good will have aspired for thousands of years—the effective outlawry of force, the effective amelioration of conflicts of interest, the effective achievement of peaceful change—Professor Carlston, in company with so many others, can offer little help. He sets forth a series of propositions, in general language, which describe the way states act; he indicates the way in which states will act once they have decided to forego the use of power, or once they have decided to value the interests of others as much as they do their own. But there is little in his prescription which is on the same wave length with his diagnosis, or which is relevant to the question of how one brings the patient from the sickbed to his feet, except for his general conclusion that "states, as such, are characteristically unsuitable for organization," by which he means that in order for international authority to evolve, there must be a withering away of the nation as we know it.

The difficulty with Professor Carlston's generalizations, as is the difficulty with most of the large generalizations which tend to be offered by so many who are unhappy with the existing state of affairs, is that they are too general to be useful in dealing with the many complex and difficult strands of both national and international life. These difficulties have their roots in the conflict of interest among competing groups. In the international area the conflicts are mostly between countries, but even there they often arise because of the interests of a powerful domestic group within a country. These conflicts vary greatly in nature and intensity; the "solutions" are compromises worked out on a problem-by-problem basis, and the task of appreciating the conflicts, taking into reasonable account the various interests, and engineering temporary adjustments pending the further solvent of time and change is peculiarly troublesome, though possible. Unfortunately, the large generalization doesn't help much.

For example, should consuming countries be prepared to pay a sufficiently high price for a commodity to keep the most marginal producer in business in a producing country? If not, should the consumer pay to keep alive some less economic producers in view of the balance of payments and development problems in the producing country? If so, where should one strike the balance, and what measures can or should be taken to ensure that in the meantime the economy of the producing country is diversified so that the consumer does not suffer a permanent loss in
real income? To say that international commodity stabilization agreements are a good thing and we ought to have more of them, is not to deal meaningfully with these practical and difficult problems. And the sad thing is that practically every major international problem is similarly complex and immune from the simple precept.

Does this mean that we can never get from here to there? Not necessarily. But it does mean that there are no shortcuts from the grimy, detailed case-by-case approach to problems, whether they be cessation of nuclear testing with adequate safeguards, the negotiation of a tin or coffee agreement, disarmament by stages, a Berlin settlement, or any other of the major international problems which have long been with us, and others of similar caliber which will arise tomorrow.

Stanley D. Metzger*

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BOOKS RECEIVED


ERRATA

In the article, "Implied Duties of Cooperation and the Defense of Sovereign Acts in Government Contracts," beginning on page 516, the third sentence on page 557 which, as printed, reads, "This protection clearly is in the public interest, since the desired independence and responsibility of the private contractor would be impaired . . . ." should be changed to read, "This protection clearly is in the public interest, since the desired independence and responsibility of the private contractor would not be impaired . . . ."