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BOOKS RECEIVED
Thanks to our forefathers we do have in our organic law a court system with power of judicial review. It has given us a national judicial pattern of differing threads but woven into a single fabric of equal justice under law. This is the more remarkable when we consider that systems of law usually follow the requirements of topography, climate, ethnology and commercial enterprise that exist in a given jurisdiction. The variety of such conditions existing among our several States would ordinarily lead to a variety of judicial systems; still we have only one civil law system (Louisiana) with the remainder all following the common law. In short, we speak one common language of jurisprudence, which is sui generis.

Our judicial system has been the most effective instrument in the maintenance of our freedoms. We have witnessed in our generation personal liberties disappear elsewhere in the world, usually in proportion to the decline of the independence of the courts in such countries. To maintain a strong, independent judicial system, it is necessary to have learned, efficient, experienced and practical judges, for justice cannot be produced through any system of procedures alone. For the most part, it is the product of long, diligent and painstaking labor by the lawyer and the judge; it is, as my Brother Mr. Justice Whittaker once noted, a deliberate science and must be recognized as such. Its product will not be any better, regardless of the system used, than the judges and lawyers who do its work.

Judge E. Barrett Prettyman was such a lawyer for thirty years and has been such a judge for almost a score of years in addition. It is, therefore, most fitting that The Georgetown Law Journal dedicate this volume to him, one of its most distinguished graduates of half a century's standing.

* Associate Justice, Supreme Court of the United States.
1 Time, March 11, 1957, p. 17.
For half this period I have known him well. Indeed, it fell my distinct privilege in 1945, as Attorney General of the United States, to suggest his name to President Truman for appointment to the United States Court of Appeals for the District of Columbia Circuit. I shall always remember the occasion when I asked him to come in for a conference. After some chit-chat I brought up my decision to suggest him for the Court of Appeals. He quickly acknowledged this high recognition with due appreciation and humility. I then told him of my practice always to suggest three names to the President on a vacancy. His jaw dropped somewhat in disappointment. However, he quickly regained his composure when I added that my three names would be (1) E. Barrett Prettyman; (2) Barrett Prettyman; and (3) Brother Prettyman. I later called him and said the third man I suggested, Brother Prettyman, would be nominated. Having a good sense of humor, he quickly retorted, "Well, whatever the brotherhood is, thank goodness for it." His appointment followed and his distinguished service as associate judge, chief judge and senior judge is known to every lawyer.

The United States Court of Appeals for the District of Columbia Circuit is considered by the Supreme Court to be analogous to a supreme court of a State. It is the highest court of the District. In addition, its case load is weighted with appeals from federal administrative agencies. In my view, Judge Prettyman is the most knowledgeable judge in the federal system on the administrative process. His experience prior to going on the bench as Corporation Counsel of the District of Columbia and as General Counsel of the Bureau of Internal Revenue afforded him wide experience in the field. While on the Court of Appeals he has written some of the most important administrative law decisions in the books.2 His philosophy on the administrative process is well expressed in his Henry L. Doherty Lecture, "Trial by Agency," given at the University of Virginia Law School in 1958:

The agencies did not spring from a philosophical premise; they grew from factual happenings. If they now have a philosophical justification it lies in the principle that vast and complex enterprises, involving much of public domain, public needs,

and public ambitions, require public overseers. They find justification in the facts of government and the facts of commerce and industry.  

As to the work of a judge, the philosophy of Judge Prettyman is clearly set out in *Mitchell v. United States*:  

Courts ought not—must not—forget that our vaunted rule of law is a structure of rules; it is not an amorphous jelly of judicial pleasure.  

In Judge Prettyman's view, cases are factual happenings, not springboards for legal essays on diverse subjects. The consequences of these happenings are governed by rules. Where appropriate these rules must be thoughtfully and wisely developed by judges; where the rules are laid down by a higher court or by the legislative branch they must be administered as intended, not as the judge would like them to be. In all events they must be administered with impartiality, with objectivity, and with restraint.  

Judge Prettyman is not a judge who abandoned his duties as a citizen when he donned the judicial robes. He has carried on all during his service on the bench a full measure of extra-curricular activities, foremost among which are the chairmanships of the two Temporary Administrative Conferences, the Board of Inquiry on the Francis Gary Powers Matter, the President's Advisory Commission on Narcotic and Drug Abuse, and the Advisory Committee on Appellate Rules of the Judicial Conference of the United States. He was a moving force in the establishment of the Legal Aid Agency of the District of Columbia; the Prettyman Scholars at Georgetown University Law Center bear his name and are devoted to a legal aid project which is a model for the country.  

E. Barrett Prettyman is a whole man—an interested citizen and a disinterested jurist—with the parts in perfect balance. His impact upon the law, particularly in the administrative area, has been mighty. Some of his decisions are controversial; some, like mine, have been denounced; but no judge worthy of his robes escapes such criticism. In the criminal field his philosophy, like mine, has received the disapproval of some pundits as being out of what they call "the main stream of judicial thinking." But even they who so disagree, I am sure, agree with me that Judge Prettyman admirably meets the qualities of a great judge as laid down by my Brother Frankfurter:  

[W]hat is essential is . . . first and foremost, humility and an understanding of

5 *Id.* at 61, 259 F.2d at 791.
the range of the problems . . . disinterestedness, allegiance to nothing except the search, amid tangled words, amid limited insights . . . to find [that] path through precedent, through policy, through history, through [his] own gifts of insight to the best judgment that [he] can arrive at in that most difficult of all tasks, the adjudication between man and man, between man and state, through reason called law.6

THE CONCEPT OF RESPONSIBILITY*

DAVID L. BAZELON**

A man was going from Jerusalem to Jericho and he fell among robbers who stripped him and beat him and departed leaving him half-dead.

This passage describes a celebrated case of assault and robbery. Its melancholy echo rings through today's newspapers:

A 42-year-old watchmaker was found brutally beaten Wednesday in his shop, police reported.

Literary style changes but not the substance of tragedy:

I weep to think of what a deed I have to do
Next after that; for I shall kill my own children,
My children, there is none who can give them safety.
And when I have ruined the whole of Jason's house,
I shall leave the land and flee from the murder of my
Dear children, and I shall have done a dreadful deed.

The Medean drama recurs in our time:

A Montgomery County mother shot and killed her three teen-age children yesterday, then ended her own life with a single shot from the death weapon she had bought only Wednesday, apparently with murder in mind.

The twentieth century increase in crime has not brought great changes in the nature of the crimes. The future lies not in preparing to meet new and ingenious crimes but in fresh approaches to old problems.

The crimes which most concern us are those which threaten us in our streets and homes. We do not feel so threatened by the organized crime associated with political and economic corruption. We feel that the war against organized crime can be handled by the generals, and indeed the Department of Justice is now giving it effective attention. Sanctions are ineffective not because they are inappropriate but because the professional gangster gives himself long odds against being convicted.

The public is also relatively unconcerned about white collar crimes, such as income tax evasion and stock frauds. We feel that the criminal law can curb such crime. Exposure is often punishment enough. No doubt the Benthamite notion that the criminal calculates pain against pleasure

* The substance of this article was presented as an address in the Edward Douglass White Lecture Series commemorating the 175th anniversary of Georgetown University and published in 35 F.R.D. 100 (1964).

** Chief Judge, United States Court of Appeals for the District of Columbia Circuit.
has some validity in this area. Bentham’s system was a middle-class device more or less applicable to many middle-class crimes. But the law’s deterrent effect is far removed from the juvenile delinquent who risks years in jail by grabbing a woman’s purse. Calculation of potential pleasure and pain is not for him.

So our current concern is with crimes of violence. There is a feeling that we are losing control in this area. The Chief of Police in Washington, D.C., Robert V. Murray, recently despaired that 1964 had started with another phenomenal rise in crime “despite the fact we have 400 more men on the streets than we had when the upsurge began in 1957.” Despite, also, the addition of the K-9 Corps, and walkie-talkie radios.

We are beginning to realize that the rising crime rate is not caused merely by weak law enforcement. Poverty in all its manifestations—lack of basic necessities, family breakdowns, mental disorders, unsupervised youths, school dropouts, alcoholism, drug addiction, and so on—is the chief factor producing antisocial behavior. From my own experience, I know that most defendants convicted of crimes of violence in the District of Columbia are indigent. A successful war on poverty would come close to solving the crime problem. However, eradication of poverty seems only slightly more likely than abolition of crime.

With respect to procedural matters, the criminal law is today facing the effect of poverty. The recent study of Poverty and the Administration of Federal Criminal Justice is significant in its recommendations. It follows two decades in which the bench and bar have reformed first one and then another area where the law delivered less than it promised to the indigent defendant.

Procedural reforms are essential for initiating substantive reforms. Under our adversary system, no reforms—procedural or substantive—are likely without the effective assistance of counsel. The Attorney General’s Committee pointed out:

The essence of the adversary system is challenge. The survival of our system of criminal justice and the values which it advances depends upon a constant, searching, and creative questioning of official decisions and assertions of authority at all stages of the process. . . . [I]nsofar as the financial status of the accused impedes vigorous and proper challenges, it constitutes a threat to the viability of the adversary system.

We have a long way to go before the wealth or poverty of a defendant

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2 Id. at 10.
makes no difference to his chance of a fair trial. Yet if we enforce all procedural safeguards and all constitutional rights, we shall not have gained humane and rational criminal law. We mock justice by assuming that procedural safeguards are equally available to all people accused of crime, but we mock it more cruelly by assuming that all are equally free to choose or refrain from illegal behavior.

Equality of rights before the law does not have as a correlate equality of responsibility before the law. People are not equally endowed, either personally or socially. In the past the criminal law has dealt chiefly with our disappointed expectations. In the future it must deal with the inequalities in natural endowment and opportunity of the people who stand charged before it. This goes to the core of the criminal law—the concept of responsibility.

We have begun to realize that society must recognize its responsibility for individual inequality. Pope Pius XII forcefully asserted the relationship between slum housing and delinquency. He said:

Enough cannot be said about the harm that these dwellings do to the families condemned to live in them. Deprived of air and light, living in filth and in un-speakable commingling, adults and, above all, children quickly become the prey of contagious diseases which find a favorable soil in their weakened bodies. But the moral injuries are still more serious: immorality, juvenile delinquency, the loss of taste for living and working, interior rebellion against a society that tolerates such abuses, ignores human beings and allows them to stagnate in this way, transformed gradually into wrecks . . . .

"Society itself," the Pope said, "must bear the consequences of this lack of foresight."

Strange though it may seem, the notion that the law must recognize the facts of social life is sometimes regarded as immoral. It is argued that if we recognize reasons for a failure to meet our expectations this destroys the expectations and lowers the moral standards of society. I suggest that the opposite is true. We re-enforce the validity of the expectations when we strip away the pretense that all can meet them. We have a moral duty to avoid the trap of Sunday morality—of ignoring the realities in order to maintain the facade.

There is also a more sophisticated objection to the law's recognition of the gulf between expectations and reality. Many people assume that

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5 Ibid.
morality is served by condemning and punishing those who disobey legal fiats. I suppose we punish others partly to overcome our own fear of losing self-control—to shore up our own defense mechanisms—and partly because of misguided religious notions. Religion emphasizes the accountability of the individual to God. In secularizing this concept, we have too often retained strict accountability while we have overlooked its divine corollary of forgiveness and compassion.

I am certainly no theologian, but I recently discussed this idea with a friend, Father O’Doherty, who is head of the Department of Psychology and Logic at University College, Dublin, Ireland. The priest in the confessional, he pointed out, is a judge (he is called “judex”) and the confessional is called the sacred “tribunal.” He is acting for God in a very literal sense. He is concerned with accountability but accompanies it with divine forgiveness. In the secular world, we borrow the idea of holding people accountable. But we forget that in the religious view of accountability the individual being held accountable is rehabilitated—he is forgiven and absolved. In the secular world we use accountability to justify retribution. We seem to be unconcerned with forgiveness and mercy—we even verbalize our lack of concern by instructing the jury not to be swayed by sympathy for the defendant.

I suggest that this is “doing God’s work” in a totally misguided, if not presumptuous, fashion. Father O’Doherty gave an historical explanation for “the erroneous notion that the judge should ‘do God’s work’ in the sense that as judge he should be concerned with ‘sin’, or the ‘internal state of the individual’s conscience.’ ” He said it is a survival of the confusion in medieval society where the responsibilities of church and state were closely intertwined. Yet in a real sense, he argued, our notion of justice should be a reflection of Divine justice—but it should not attempt to reflect the Divine concern for the internal state of the accused’s soul.

I would not abolish the concept of moral responsibility, or necessarily abandon punishment. But we must fashion these concepts to our needs as a human society. Society cannot dispense with its expectations of its citizens. To recognize the difference between our expectations of other human beings and the realities of their behavior does not deny the fact that expectations do affect behavior.

The criminal law cannot fulfill its function as a social tool if it continues to ignore the complexity of causation. Courts should not assume responsibility where there is reason to believe that the defendant’s actions were inspired by something other than abstract evil in the Miltonian arena where God and Lucifer eternally contend. Though there are great gaps in
our knowledge about the causation of behavior, this does not mean that we have no such knowledge from psychiatry, sociology, anthropology, physiology and other disciplines. We are not morally justified in ignoring what we know. We often seem so intent on punishing that we don't want to be confronted with information which might make punishment seem inappropriate. We ignore scientific and common sense data as to causation in order to catch and punish the rat—always assuming there is a rat. We are content with a vast superstructure of codes, trials, prisons and so on, and do not look to see how it fits its base.

Yet we have not been able to bury all our doubts. We are worried for instance about the recidivism rate—about the fact that harsh punishment seems to be an ineffective deterrent. But we look to simple remedies within the system: probation and parole, sentencing institutes, more and more policemen. There is much to be said for each of these palliatives—but not for our timid approach to them. Let me give you an example.

If there is one kind of information we would expect a probation report to contain, it is a psychiatric or psychological evaluation—some insight into the motivation of these people whose motives we condemn and attempt to change. While a 1957 study by the Federal Probation Training Center states that most probation offices "have used Veterans' Administration hospitals and clinics, publicly employed psychiatric facilities, or the United States Public Health Service" for this purpose, there is no indication of the extent of their use. In 1964, the Federal Probation Service made 33,667 investigations of offenders. Yet, as late as 1962, the Chief of the Probation Division of the Administrative Office of the United States Courts said that approximately 5,000 dollars was spent per year for psychiatric help in the entire Federal Probation Service. No federal probation office has a full-time psychologist or psychiatrist to assist in the supervision process. Yet the Chief of the Probation Division in his last annual report did not request appropriations for psychiatric assistance. That our wealthy society approaches its responsibilities in forma pauperis, as it were, is a national scandal.

Even where psychological evaluation could readily be obtained, many

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8 Pye, Shadoan & Snee, op. cit. supra note 6, at 24.
9 Id. at 44.
of our local courts have exhibited a singular reluctance to consider its use. In the year 1962, during which our district court imposed 1,041 sentences, the Legal Psychiatric Services was called upon to make only three presentence examinations.

Our approach to sentencing itself reflects the same imbalance. We spend hundreds of thousands of dollars conducting sentencing institutes for judges in an effort toward obtaining uniform sentences. Of course it is wrong for one person to spend twenty-five years in jail and a similar offender who committed a similar crime to spend five. But it would seem more valuable to inquire into how much good the prison can do in either case. And while these sentencing institutes ponder the factors which make probation or parole more appropriate than prison, should they not examine the quality of the probation service itself?

To my mind the Federal Probation System ought to be a model for the country. But not only is there a serious shortage of help from psychologists and psychiatrists: competent, devoted probation officers are often the result of chance rather than the product of a rational selection system. The power to appoint and promote probation officers is vested in each district court. A probation officer can be removed by the court "in its discretion." There is no standard procedure for "in-service" transfer. Perhaps as many as ten per cent of our probation officers do not meet even the minimum qualifications recommended by the Judicial Conference of the United States twenty-two years ago, in 1942.

It has been asserted that the power to appoint probation officers must be vested in the district judge so that he will have confidence in them and their recommendations. However, it is difficult to conceive how we can insure that the probation officer retains his independence of thought while he is dependent upon the judge for his appointment, tenure and promotion. If we are to have a national probation service of trained professionals, a probation officer must be selected by and responsible to a unified central authority rather than each responsible to a different district judge with his own attitudes and practices. Establishment of a centrally supervised probation organization would also encourage standardization of sentencing procedures—in addition to improving probation procedures.

It is another depressing reflection that the experienced head of the

11 Pye, Shadoan & Snee, op. cit. supra note 6, at 5.
12 Id. at 7.
13 Id. at 5.
14 Id. at 9; cf. 1964 Administrative Office Ann. Rep. 73.
Federal Bureau of Prisons has to plead with Congress not to fix minimum mandatory penalties of five years for second-degree burglary and twenty years for first-degree burglary in the District of Columbia.\textsuperscript{15} James Bennett pointed out that "these Draconian penalties almost without parallel elsewhere in the United States are self-defeating. . . . They will not have the intended effect of deterring this type of offense."\textsuperscript{16}

Somewhat to my amazement, a few theorists of the criminal law have now come out into the open and argued that besides its two generally accepted purposes (reformation and deterrence) a third rationale of the criminal law—retribution—is also valid.\textsuperscript{17} Most of us still prefer to clothe our retributive instincts in the garb of deterrence. But we are being told that, since retribution is a "natural" human instinct, it is right and necessary for society to vent its feelings on the defendant. There is general agreement that the individual must not give way to these retributive feelings. He may not personally avenge a murder or even take his own life. A life for a life is acceptable, it seems, only if we all join in the taking. I hope that the law has a less emotional, more rational and more moral base than the attainment of revenge. True, we all have aggressive, punitive urges. But should the criminal law carry them out? Many people believe that international conflict begins with and feeds upon our aggressive impulses but few would advocate war on this ground. Awareness of our aggressive instincts should help us to refrain from aggression, not to commit it collectively.

Useless punishment would more likely be avoided if we considered why we punish and what we expect to achieve by punishment. We shall not know whether punishment is useless unless we inquire why the wrongdoer

\textsuperscript{16} Id. at 486.
\textsuperscript{17} See, \textit{e.g.,} Address by Jerome Hall, \textit{The Purposes of a System for the Administration of Criminal Justice}, Edward Douglass White Lecture Series, Georgetown University Law Center, Oct. 9, 1963 (maintains that since men can and do abuse their freedom punishment becomes necessary, and that retributive punishment is the only "just" punishment); Hand, \textit{Insanity and the Criminal Law—A Critique of Durham v. United States}, 22 U. CHI. L. REV. 317 (1955) (believes most people consider vengeance a constituent and an important purpose of criminal punishment); Lewis, \textit{The Humanitarian Theory of Punishment}, 6 RES JUDICATA 224 (1953) (calls for return to the retributive theory to preserve to the criminal his right to be treated as a human person made in God's image). Compare Hill, \textit{The Psychological Realism of Thurman Arnold}, 22 U. CHI. L. REV. 377 (1955); Mead, \textit{The Psychology of Punitive Justice}, 23 AM. J. SOCIOLOGY 577 (1918) (both see a shift away from the still strong retributive instincts of society).
acted as he did. Once we know why—or even begin to ask why—we shall better understand how to treat him and how to deter others.

The common law purports to inquire into the causation of conduct when the insanity defense is raised. It has not ploughed deep. You are familiar with the *M'Naghten* rules and with the controversy which has surrounded them for more than a hundred years. I sometimes think we approach that controversy in too academic a fashion. We rarely get to what actually happens—which actual verdicts are based on which actual testimony. It is often shocking to read the records in cases where convictions under the *M'Naghten* rule have been sustained.

For example, in a recent murder case one Don White was sentenced to death. On appeal, the Washington State Supreme Court affirmed the conviction and the United States Supreme Court declined to review it. Five years ago at the age of twenty-two Don White beat an old woman to death in a laundry room. He raped her, took her ring and watch, which were of little value, then spent more than an hour in the room, folding laundry, placing some of it under the head of the dying woman, and chatting with the unsuspecting people who came into the laundry. Later that day, he killed a longshoreman, whom, like the old woman, he had never seen before. He stabbed him with a knife, then wandered a little distance away to drink wine and watch the police come and go. At trial, expert witnesses on both sides testified to the accused’s serious mental disorder. Consider his background. He had never lived with his mother—who was only thirteen at his birth. When he was four months old, a red cap at a railway depot hailed the woman who became his adoptive mother to ask if she wanted a baby. Despite his superior intelligence—his IQ was about 130—he was expelled from every school he attended. Nine times he was in state institutions, with a growing record of violence and delinquency.

In 1951, a child psychiatrist said he was suffering from “a very malignant mental illness,” that “institutionalization is absolutely necessary,” and that “he will almost certainly wind up in prison or in a state mental hospital.” It is apparent that, whatever the cause, the defendant was terribly sick, that his sickness was of long duration, and that it had been brought to the attention of the authorities time and time again.

The Washington Supreme Court squarely faced the issue:

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18 M'Naghten's Case, 10 Cl. & Fin. 200, 8 Eng. Rep. 718 (H.L. 1843).
20 *Id.* at 558-59, 374 P.2d at 946-47; Seattle Post Intelligencer, May 14, 1961, p. 12, col. 1, 5-7.
The question before us is whether we, as the majority of jurisdictions, should refuse to extend absolute immunity from criminal responsibility to persons who, although capable of understanding the nature and quality of the acts (the ability to distinguish between right and wrong), are unable to control their own behavior as a result of mental disease or defect.\textsuperscript{22}

The court noted that "one argument for such change is that we must take advantage of new developments in psychiatry. [But] there is nothing new about the idea that some people who know what they are doing still cannot control their actions."\textsuperscript{23} In other words, the court recognized that no new knowledge was necessary to see that White was grossly disordered. But the court held that the insanity defense "is available only to those persons who have lost contact with reality so completely that they are beyond any of the influences of the criminal law."\textsuperscript{24} The court concluded that "the M'Naghten rule better serves the basic purpose of the criminal law—to minimize crime in society . . . . [W]hen M'Naghten is used, all who might possibly be deterred from the commission of criminal acts are included within the sanctions of the criminal law."\textsuperscript{25}

I am reminded of the 19th century English Judge, Lord Bramwell, who quaintly expressed his approval of M'Naghten in these terms: "I think that, although the present law lays down such a definition of madness, that nobody is hardly ever really mad enough to be within it, yet it is a logical and good definition."\textsuperscript{26} William H. Seward, as defense counsel urging the insanity plea to a jury in 1846, said that we seem to demand entire obliteration of all conception, attention, imagination, association, memory, understanding and reason, and everything else. There never was an idiot so low, never a diseased man so demented. You might as well expect to find a man born without eyes, ears, nose, mouth, hands and feet, or deprived of them all by disease, and yet surviving, as to find such an idiot or lunatic, as the counsel for the people would hold irresponsible.\textsuperscript{27}

It seems to me now, as it seemed to me in 1954 when we abandoned M'Naghten in the District of Columbia,\textsuperscript{28} that a test of responsibility which allows Don White to be sentenced to death is no test at all. I think that when we broaden the test and allow the jury to consider whether the accused's mental disorder was such that he should not be thought re-

\footnotesize{\textsuperscript{22} State v. White, 60 Wash. 2d 551, 585, 374 P.2d 942, 963 (1962).}
\footnotesize{\textsuperscript{23} \textit{Id.} at 588-89, 374 P.2d at 964.}
\footnotesize{\textsuperscript{24} \textit{Id.} at 590, 374 P.2d at 965.}
\footnotesize{\textsuperscript{25} \textit{Id.} at 592, 374 P.2d at 966.}
\footnotesize{\textsuperscript{26} \textit{Report of the Royal Commission on Capital Punishment} 103 (1953).}
\footnotesize{\textsuperscript{27} \textit{Conrad, Mr. Seward for the Defense} 263 (1956).}
\footnotesize{\textsuperscript{28} Durham v. United States, 94 U.S. App. D.C. 228, 214 F.2d 862 (1954).}
sponsible—as a criminal to be punished—we go a long way toward developing a useful courtroom inquiry into causation. I had hoped that Durham would result in treatment rather than punishment for the mentally disordered. In this it has been only partially successful. The last decade in the District of Columbia has seen an increase in acquittals by reason of insanity but this has been largely offset by a decrease in the number of defendants found incompetent to stand trial. The effect has been that the total number of persons charged with crime who are eventually hospitalized instead of imprisoned has not changed very much. The combined total of those found not guilty by reason of insanity and those found incompetent to stand trial in our district court was 61 in 1953—the year before the Durham rule was adopted; this total was not reached again until 1959. Acquittals by reason of insanity are still only a small proportion of our criminal verdicts. In 1963 there were 1439 defendants in criminal cases filed in our District Court. Of these, 983 were convicted and only 50 were acquitted by reason of insanity. In most cases, of course, the insanity issue is not raised. But when it is raised, expert testimony is usually given in conclusory diagnostic terms so that the jury is not really informed as to why the accused behaved as he did. We do not yet know what the results would be if the accused’s mental and emotional condition and the dynamics of his behavior were explained to the jury in detailed, understandable language.

In other jurisdictions, the mentally disordered are acquitted even more rarely than they are in the District of Columbia. The test of criminal responsibility is an area for experimentation; there is probably no single correct solution, whether it be the Durham rule, which other jurisdictions have not adopted, or any other. Nevertheless, it is deeply distressing that ten years after Durham and a hundred years after M’Naghten, we in the United States still punish by imprisonment and death many offenders who are seriously disordered. In this sense Durham and all our thinking on responsibility has failed.

It is fallacious to argue that it would be “unsafe” to liberalize the insanity defense. Some argue that it would leave too much discretion in the hands of psychiatrists, particularly with respect to release. “I am not willing,” said one judge, “to let the security of society depend upon a science

30 Ibid.
which can produce such conflicting estimates of probable human behavior." But as Havelock Ellis said at the end of the last century:

To seek for light in the fields of biology and psychology, of anthropology and sociology, has seemed to many a discouraging task. The results are sometimes so obscure; sometimes, it even seems, contradictory. But if the path lies through a jungle, what is the use of the best and straightest of roads that leads astray? If a critic were to point out to a biologist... the limitations of the microscope, he would be entitled to reply—but excuse me, however imperfect the microscope may be, would it be better to dispense with the microscope? Much less when we are dealing with criminals, whether in the court of justice or in the prison, or in society generally, can we afford to dispense with such science of human nature as we may succeed in attaining.

I submit that nothing could be less safe than isolating a disturbed offender in prison, without treatment, for a fixed time and then releasing him without inquiring into his mental condition. Our experience in the District of Columbia shows that relaxation of M'Naghten does not produce chaos—it does not release dangerous, disordered people into the community. Nearly all states have some provision, comparable to that in the District of Columbia, for detaining and treating a mentally ill offender who has been acquitted by reason of insanity. Of course, compulsory hospitalization also has its dangers, but these dangers are to individual liberty, not to public safety.

We delude ourselves if we pretend that there is nothing "punitive" about compulsory institutional "treatment." However, the solution is not to send sick people to prison. We should at least have an informed awareness of the ground upon which we are treading. I think the Supreme Court in Lynch v. Overholser showed such an awareness. Lynch was charged with a misdemeanor for passing bad checks. He pled not guilty and was committed to a hospital for mental examination to determine his competence to stand trial. When he was found competent and brought to trial, he sought to change his plea to guilty. The court refused to let him,

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32 ELLIS, THE CRIMINAL 232 (1890).
33 "If any person... is acquitted solely on the ground that he was insane at the time of commission [of the offense], the court shall order such person to be confined in a hospital for the mentally ill." D.C. Code Ann. § 24-301(d) (1961). State statutes are discussed in Lynch v. Overholser, 369 U.S. 705, 725-27 (1962) (dissenting opinion).
34 369 U.S. 705 (1962).
apparently because the hospital said his offenses were the product of a mental illness. Although he never claimed he was not responsible and presented no evidence to support an acquittal by reason of insanity, the trial judge acquitted him on this ground. Under the statute requiring hospitalization of those found not guilty by reason of insanity, he was sent to St. Elizabeth's hospital. In a habeas corpus proceeding, the Supreme Court held that the statute should not be applied to one who did not raise the insanity defense.

The compulsory hospitalization of acquitted offenders raises difficult problems of civil liberties which will continue to tax the conscience and judgment of judges, prosecutors, defense counsel and hospital officials. At best, compulsory hospitalization is no more than a partial solution. Though some mentally disordered offenders are so dangerous that they must be confined in institutions, others are not. The treatment of those who require help but are not dangerous challenges our resourcefulness. We should not think in terms of either/or—prison or hospital—but should tailor the disposition to fit the individual. Above all, we must avoid becoming so overwrought by the complexities of the caretaking process that we do nothing at all.

I respect the arguments which my distinguished friend, Chief Justice Weintraub of the New Jersey Supreme Court, recently advanced in the American Bar Association Journal. They reveal the real reasons for the resistance to Durham.

He argues that if we go beyond M'Naghten, if we allow a jury to weigh the responsibility of one who, though sick, has some sense of wrongdoing, and invite psychiatrists to explain how mental illness affected his behavior, we might as well let a witness tell us how factors other than illness produced antisocial conduct in other cases. Why not let experts tell us whether physiological, economic, social or other factors contributed to deviancy? The distinguished British sociologist Barbara Wootton sees the same implications and asks: if we excuse the "mad" why not also the "bad"?

Once the grossly and persistently anti-social can claim to be treated as medical, and not as moral, cases, it is surely only a question of time before the mildly anti-social claim the same privilege. . . . To say that A must be judged guilty and punished because the doctors do not yet know what to do with him, while B must

35 Id. at 706-08.
36 Id. at 719-20.
37 Weintraub, supra note 31.
38 Id. at 1076-77.
not be held responsible for his actions because he can be reformed by medical attention, is really to dig the grave of the whole concept of responsibility: for A, poor soul, is being punished not for his offence but for the limitations of medical knowledge. In a year or two’s time, when medical science has advanced a little more, people like him also will rank as psychopaths and be treated as sick, not as wicked.40

Lady Wootton concludes that, once we go beyond the limitations imposed by M’Naghten, there will be no logical stopping place short of abandoning the concept of criminal responsibility. This does not disturb her, and she is content to allow the concept to “wither away.” Because he fears and foresees the same outcome, Justice Weintraub would cling to M’Naghten.

Nevertheless, Justice Weintraub is sympathetic to the needs of mentally ill offenders. He and others urge psychiatric treatment after conviction.41 They suggest that the proper place for the consideration of complete psychiatric evidence is in and after sentencing, not in the determination of guilt. Hold the man responsible on the basis of M’Naghten; then remove the gag from medical testimony to decide what treatment he needs. There is sweet reasonableness in this view and it has the added attraction of being easy. It withdraws from the community a difficult and troubling issue. But that issue, in my judgment, is one which the community has not only a right but a duty to consider. If our first step is to find guilt and then to provide treatment for the person in spite of his guilt, we have turned away from the very question which should concern us most—the causes of criminal behavior. That is the question toward which Durham is directed. Even if our prison system were transformed, I should still be opposed to finding guilt regardless of moral responsibility on the theory that the accused would be “treated” in prison. I think the success of efforts to treat the individual offender depends on the community’s awareness of his needs—of how he came to act as he did. The best available means for generating such awareness is to provide as much information regarding the defendant as possible to the community-in-camera—to the jury. If the jury is required to assess the defendant’s responsibility, it will be forced to consider the causes of the offender’s conduct. It is essential that the public and not just the professionals know what caused the accused’s behavior, so that it can have some idea of what is required for both treatment and the prevention of like cases.

40 Ibid.
Durham deals with defendants suffering from mental disease or defect. Whether we choose to stop there or go further, we should at least abandon the alleged "safety" of M'Naghten. It is a know-nothing—and learn-nothing—safety. We need not, however, go to the other extreme. Even though M'Naghten is unacceptable, it is not necessary to abandon the concept of responsibility, and largely abolish the criminal law. While no purpose is served by holding individuals to standards they cannot attain, the existence of standards and their enforcement in appropriate cases has clear social utility.

In moving away from the classical legal concept of criminal responsibility, Durham does not embrace the mechanistic interpretation of human behavior which seems to be generally accepted by modern biologists. I think Durham revealed—but did not create—complex and hidden philosophical issues as well as administrative problems. I think the criminal law cannot avoid the riddle of responsibility. The future is in confronting this responsibility with whatever resources the law may have or may acquire.

The genius of the common law is its capacity to assimilate new knowledge and adapt to new needs. It has not used this capacity in the area of criminal responsibility. Recent decades have witnessed tremendous advances in relevant knowledge about human behavior, but legal thinking about "criminal insanity" has scarcely changed in over a century.

In our thinking about criminal responsibility, I would adopt Senator Fulbright's remarks delivered recently in an important foreign policy address.

As long as our perceptions are reasonably close to objective reality, it is possible for us to act upon our problems in a rational and appropriate manner. But when our perceptions fail to keep pace with events, when we refuse to believe something because it displeases or frightens us, or because it is simply startlingly unfamiliar, then the gap between fact and perception becomes a chasm, and action becomes irrelevant and irrational.\textsuperscript{42}

I would urge that the criminal law abandon the myth of total individual responsibility and adapt to the realities of scientific and psychiatric knowledge. This cannot be accomplished by a single decision of any court or within any single jurisdiction. The process will be slow and continuous. New and unsuspected difficulties will appear as we move forward. But the flexibility of the common law provides the tool for meeting them as they arise. What the common law cannot do, if it is to remain true to its tradition, is stand still while the world is in flux.

THE EFFECT OF RECENT CHANGES IN THE LAW
OF "NONSTATUTORY" JUDICIAL REVIEW

SIDNEY B. JACOBY*

The author examines recent modifications in the law of judicial review of federal administrative actions, including the recent grant to all district courts of jurisdiction over mandamus actions and the new venue rule in certain civil actions against government employees and agencies. He notes that the grant of mandamus power to all district courts will increase the instances of local review of the actions of government employees and will obviate recourse to the device of mandatory injunction. The new venue rule, the author continues, may have far-reaching and unexpected consequences, especially in tax refund suits against collection officers, damage suits against federal officers and in certain suits against federal agencies. Professor Jacoby concludes that the modifications are an important step in abolishing some of the artificial and unnecessary peculiarities of government litigation.

This article focuses on a limited aspect of the broad field of judicial review of federal administrative actions, namely the so-called "nonstatutory" judicial review. "Nonstatutory," as the term is used here, refers to proceedings which, without the assistance of a specific or general statutory review provision, are brought against government officers to review their action or inaction on the ground that the legal rights of the plaintiff have allegedly been violated. This area of "nonstatutory" judicial review has undergone substantial modification within the last few years. The most publicized of these modifications was Pub. L. 87-748, enacted on October 5, 1962. The principal purpose of Pub. L. 87-748 was to confer jurisdiction of mandamus actions against federal officers upon all United States district courts, thereby abolishing the exclusive jurisdiction of the United States District Court for the District of Columbia. Another important modification was the July 1961 amendment of the substitution provision of the Federal Rules of Civil Procedure. This article will consider these modifications as well as the possible effects of the new legislation on cer-

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1 See Byse, Proposed Reforms in Federal "Nonstatutory" Judicial Review: Sovereign Immunity, Indispensable Parties, Mandamus, 75 HARV. L. REV. 1479 (1962); Fuchs, Judicial Control of Administrative Agencies in Indiana, 28 IND. L.J. 1, 11 (1952).


tain “statutory” judicial review proceedings involving administrative action.

THE NEW MANDAMUS STATUTE

The new statute, Pub. L. 87-748, consists of two additions to Title 28 of the United States Code. It added a completely new section, section 1361, which granted mandamus jurisdiction to all district courts, and inserted a new venue provision.4 Though hailed by the President upon its enactment as a bill which “corrects an historic anomaly in the jurisdiction of the United States courts,”5 the bill, in the course of its legislative history, did not receive equally enthusiastic support from the Justice Department.6 For instance, while commenting extensively on H.R. 19607 (which ultimately became Pub. L. 87-748), the Department stated that it “questions the wisdom of authorizing district courts generally to mandamus Cabinet officers and other Government officials who are presently suable, if at all, only in the District of Columbia.”8 The Department proposed a revised version, in case the bill were given further consideration by the Congress. The recommendations in the proposed version were adopted by Congress, but as will be seen later, not entirely.9

The new section 1361 provides:

6 See H.R. Rep. No. 1936, 86th Cong., 2d Sess. (1960) [hereinafter cited as H.R. Rep. No. 1936]; S. Rep. No. 1992, 87th Cong., 2d Sess. (1962) [hereinafter cited as S. Rep. No. 1992]. The first of the critical comments was directed at a predecessor bill, H.R. 10089, 86th Cong., 2d Sess. (1960), which would have failed to accomplish the purpose of expanding jurisdiction to all district courts. It was this defect which the Department of Justice emphasized in opposing the bill. Letter From Deputy Attorney General Walsh to Representative Celler, in H.R. Rep. No. 1936, at 5-6. Significantly, the Department did not express any enthusiasm for the purposes of the bill. Cf. H.R. Rep. No. 1936, at 4, where it was stated that as a result of the Department's comments a new bill was drawn, but that “the Department has not taken an official position on the new bill although requested to do so at the hearings.”
9 See also Hearings on H.R. 10089 Before Subcommittee No. 4 of the House Judiciary Committee, 86th Cong., 2d Sess. 54-55 (1960) (unpublished hearings on file with the Committee) (testimony of Mr. MacGuineas of the Department of Justice); Letter From Deputy Attorney General Katzenbach to Senator Carroll, Sept. 18, 1962, in 108 Cong. Rec. 20079 (1962) (statement that the Department would support enactment of the bill if certain changes were adopted).
Action to compel an officer of the United States to perform his duty.

The district courts shall have original jurisdiction of any action in the nature of mandamus to compel an officer or employee of the United States or any agency thereof to perform a duty owed to the plaintiff.

The legislative history of section 1361 discloses that the Department of Justice was most eager to assure that in extending jurisdiction the scope of mandamus would not be enlarged. H.R. 12622,¹⁰ as passed by the House, would not have mentioned the term "mandamus" but rather would have granted the district courts broad jurisdiction to compel an officer "to perform his duty."¹¹ Identical provisions were contained in H.R. 1960, which was reported by the Judiciary Committee without amendments,¹² and passed by the House on July 10, 1961.¹³ It was during the consideration of H.R. 1960 by the Senate Judiciary Committee that the above-quoted critical statement of the Department of Justice was made. In addition to questioning generally the wisdom of granting mandamus jurisdiction to all United States district courts, the Department suggested that if the bill were given further consideration by Congress its provisions should be clarified because the proposed language was dangerously broad. The Department noted that the phrase requiring an officer "to do his duty" might be interpreted much more broadly than the existing mandamus power of the United States District Court for the District of Columbia, and that therefore it was essential that the new section explicitly refer to "mandamus" power. The Department suggested further that if the new power were applied to discretionary acts of executive officials, the judiciary would violate the doctrine of separation of powers.¹⁴ The Senate Committee Report gave some heed to the Justice

¹⁴ S. Rep. No. 1992, at 6. The Department recommended a complete rewording of § 1361, including its catchline, to read as follows:

§ 1361. Action in the nature of mandamus.

The district courts shall have jurisdiction of any action in the nature of mandamus to compel an officer or employee of the United States or of any agency thereof to perform a ministerial duty owed to the plaintiff under a law of the United States.

Id. at 7.
Department comments. It emphasized that where a matter involves the exercise of discretion the court may order only that a decision be made, without control over the substance of the decision, and it modified the wording of the section, but not of its catchline, accordingly. The Senate adopted section 1361 as reported by the Committee, and the bill, thereafter amended by the House of Representatives, finally assumed the version in which it became law, as part of Pub. L. 87-748.

Undoubtedly, the final change in the bill, the insertion of the phrase "in the nature of mandamus," was due to the recommendation of the Department contained in a letter of the Deputy Attorney General, in which he proposed a reworded version "to remove all doubt that the legislative intent of the bill is to do nothing more than extend to all United States district courts jurisdiction in mandamus actions against Federal officials and employees." Actually Congress failed to adopt the recommendations of the Department of Justice in only two respects: (a) it did not adopt the Department's proposal to qualify the new jurisdiction by the phrase "concurrent with that of the District Court for the District of Columbia," and (b) the catchline of the section, which the Department at one time wished to have changed to "Action in the nature of mandamus," remained: "Action to compel an officer of the United States to perform his duty." Congress' failure to adopt these two proposals, however, would not seem to be significant. The retention of the broader catchline appears irrelevant in view of the more restrictive language of the section itself, specifying that the new jurisdiction is of actions "in the nature of mandamus," and whether or not the use of the above-quoted

15 Section 1361, as reported by the Committee, would have read as follows:
§ 1361. Action to compel an officer of the United States to perform his duty.
The district courts shall have original jurisdiction of any action to compel an officer or employee of the United States or any agency thereof to perform a duty owed to the plaintiff or to make a decision in any matter involving the exercise of discretion.
Id. at 8. (All italicized in original.)
18 Letter From Deputy Attorney General Katzenbach, supra note 9.
19 The phrase was eliminated in the final vote "as unnecessary and cumbersome." 108 Cong. Rec. 20094 (1962).
20 See note 14 supra.
qualifying phrase which would have inserted "concurrent with that of the District Court for the District of Columbia" was felicitous, the value of such a phrase is doubtful. Perhaps the intention of the Department in suggesting the phrase was to assure uniformity in future interpretations of the scope of mandamus; perhaps it was intended to afford more prominence to the decisions of the District Court for the District of Columbia. Whatever the intention, it should be noted that the expertise of the local judiciary, distant from the District of Columbia, in public land matters, mining claims and timber rights was the principal concern of the legislators in proposing a localization of mandamus proceedings.

THE SCOPE OF THE NEW JURISDICTION

The few judicial interpretations which the new statute has received until now confirm the view that no change was brought about in the scope of the remedy. For instance, in McEachern v. United States, an action by a social security hearing examiner seeking reinstatement, the court stated that the "purpose of the Act is not to direct or influence the exercise of discretion of the officer or agency in the making of the decision, or to order the Government official to act contrary to his discretion." The court stated further that the "Act does not create new liabilities or new causes of action against the United States Government or its officials." In Dover Sand & Gravel, Inc. v. Jones, an injunction sought

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22 The term "concurrent" jurisdiction now appears in 28 U.S.C. § 1346(a) (1958) giving the district courts certain jurisdiction "concurrent" with the Court of Claims, i.e., with that of a different court system. "Concurrent" would here have referred to a "concurrency" between various tribunals of the same system.

25 Id. at 712.
26 Ibid. The court supported its position by paraphrasing a proposed version of the bill, which was not recommended by the Department of Justice, in which express jurisdiction would have been granted to compel a government official to make a decision in a matter involving the exercise of discretion. See note 15 supra. The court stated that it could "order that a decision be made with no control over the substance of the decision" when the official "has failed to make any decision." 212 F. Supp. at 712. The appellate court vacated the lower court's decision, on the ground that the United States was not the suable party, but an amendment was permitted naming the members of the Civil Service Commission and the Commissioner of Social Security as proper parties defendant. McEachern v. United States, 321 F.2d 31 (4th Cir. 1963); see p. 44 infra. See also Cerrano v. Fleishman, 225 F. Supp. 761 (E.D.N.Y. 1964); Seebach v. Cullen, 224 F. Supp. 15 (N.D. Cal. 1963) (reinstatement suit by a civil service employee). In Seebach the court stated that the new statute "neither creates new liabilities nor new causes of action against the United States Government," and held that the judicial review in reinstatement cases remains limited in the same way as it was prior to the enactment of § 1361. Id. at 17.
against the Regional Administrator of the General Services Administration was refused on the grounds that the determination as to the disposal of surplus property was wholly within the Administrator's discretion; that the new statute was not intended to create any new substantive rights; and that if plaintiff could not have obtained relief before the new statute, he was in no better position now. In Rose v. McNamara\textsuperscript{28} an unsuccessful attempt was made under section 1361 to mandamus a government officer engaged in the execution of a contract. The plaintiff, a government contractor, sought to compel the Secretary of Defense to apply a certain amount due under a contract to the contractor's tax liability, rather than paying it to an assignee. The court held that the relief sought was in reality against the United States, the Secretary being merely the representative of the Government and not personally liable, and that the new statute did not authorize actions previously prohibited. Similarly, an attempt under section 1361 to interfere with a pending administrative proceeding failed when the court dismissed an action for a court order requiring the Federal Power Commission to issue subpoenas in a proceeding before it. The court held that plaintiff's only remedy was by way of review of the final order.\textsuperscript{29} In another case the new statute was the basis of jurisdiction over a suit against the Secretary of Defense by a discharged government employee seeking reinstatement and a declaratory judgment. The United States District Court for the Eastern District of Pennsylvania, in denying relief, applied the inherent limitations of mandamus and noted that relief should not be granted by the court "if in its sound discretion it would be improper to do so," and "unless the case is clear and the reasons are compelling."\textsuperscript{30} In Parker v. Kennedy,\textsuperscript{31} a mandamus action to compel the Attorney General to institute antitrust proceedings, the court, alluding to the doctrine of separation of powers, made the broad statement that the new statute had not altered the fact that it was within the ambit of the Attorney General's executive discretionary power to determine whether the Government should institute such proceedings.

A few cases have specifically interpreted the language of the new statute by which the court may "compel an officer or employee of the United States or any agency thereof to perform a duty owed to the plain-

\textsuperscript{29} Indiana & Michigan Elec. Co. v. FPC, 224 F. Supp. 166 (N.D. Ind. 1963).
tiff.” In a habeas corpus proceeding it was held that the officer in charge of a Marine air station may not refuse permission to have service effected on a Marine held at the air station on a charge of first degree murder. The mother of the Marine had instituted incompetency proceedings against the son, and in granting the order allowing the service the court, mentioning the new statute, noted in passing that the case did not involve “a duty owed to the plaintiff.” In another decision the court held the new statute, which is limited to federal officials, to be inapplicable to a petition filed in the United States District Court for the Middle District of Pennsylvania, requesting that the Orphans’ Court of Delaware County, Pennsylvania, be ordered to issue a decree providing for removal of the guardian of petitioner’s estate.

Consequently, it seems that the traditional limitations of the mandamus remedy, as they have developed ever since Marbury v. Madison, remain unchanged: (a) mandamus issues only in case of a failure, in violation of law, to perform a “ministerial duty”; it does not issue to control the judgment of the officer or to direct the performance of a “discretionary duty”; (b) mandamus will lie to compel obedience by an officer when the desired action of the officer involves a duty plainly prescribed, but mandamus will not lie when the desired action of the officer requires acts of examination or consideration; (c) mandamus will lie only if the court finds, with respect to the interpretation of statutory provisions, that there is no room for doubt as to what the statute means; (d) even though

33 Id. at 959 n.5.
34 In re Wolenski, 324 F.2d 309 (3d Cir. 1963).
35 5 U.S. (1 Cranch) 137, 166, 170-71 (1803).
37 Compare Kendall v. United States, 37 U.S. (12 Pet.) 524 (1838), with Decatur v. Paulding, 39 U.S. (14 Pet.) 497 (1840). This principle was also applied under new § 1361 when a district court dismissed a suit which sought affirmative action by the National Parks Service, on the ground that the administrative determination depended upon difficult interpretations of a deed, other documents and prior court proceedings. Switzerland Co. v. Udall, 225 F. Supp. 812 (W.D.N.C. 1964).
38 Wilbur v. Kadrie, 281 U.S. 206, 218-19 (1930); see Work v. Rives, 267 U.S. 175, 177 (1925). However, mandamus will not be avoided by an allegation of the officer that the statute creating the duty is ambiguous when, in the opinion of the court, there is only one proper interpretation. Roberts v. United States, 176 U.S. 221, 230 (1900). And such a con-
mandamus is at law, not equity, the courts have no jurisdiction if there exists another adequate remedy at law, such as a suit for a monetary judgment; and (e) mandamus actions are subject to other limitations flowing from the general restrictions upon judicial relief against administrative actions, such as the necessity to show that the plaintiff involved has a legal interest, and that he has exhausted his administrative remedies.

SITUATIONS IN WHICH SUITS IN LOCAL COURTS CAN NOW BE EXPECTED

The types of factual situations in which suits under section 1361 can now be brought before the local district courts are varied. As noted, the legislative purpose of the bill was primarily concerned with matters involving public lands, mineral rights and timber, viz, matters within the jurisdiction of the Interior Department where historically the writ of mandamus has been most widely used. But the effect of section 1361 will also be felt in other fields of government litigation. Of course, the broad fields of damages for torts and claims under the Tucker Act involve suits against the United States rather than mandamus suits against officers and therefore will not be affected. Similarly, statutory judicial review of modern administrative agencies is not affected.

The list in Clackamas County v. McKay of illustrative cases in which mandamus was granted demonstrates the types of situations where under the new statute litigation in the local areas can now be expected: (a) suits to compel approval, issuance or delivery of land patents, and varied
other matters involving public lands, such as actions concerning right-of-
way over public lands; 47 (b) mining claims; 48 (c) certain matters involving Indians; 49 (d) in some situations suits to compel the issuance of a patent on an invention; 50 and (e) varied types of situations where a ministerial duty of an officer requires him to make specified payments.

Examples of this last situation have occurred: when the Postmaster General was compelled to pay extra compensation for carriage of mails, which claim, in accordance with a specific statute, had been settled by the Solicitor of the Treasury; 61 when the Treasurer was ordered to pay interest on certain certificates redeemed by him; 52 when the Secretary of the Treasury was required to make a payment of attorney's fees out of a congressionally appropriated fund for satisfaction of a judgment; 53 and when the Secretary of Interior was ordered to distribute money in the Treasury as the proceeds of public lands. 54 Such examples of mandamus requiring the officer to perform the ministerial duty of making a specified payment out of a fund, of course, differ from the numerous instances where certain statutes were interpreted to give rise to money claims under the Tucker Act as claims "upon an Act of Congress"—not out of a specific fund, but against the United States generally. The frequent civil service salary suits 55 or military pay claims 56 before the Court of Claims 57

47 Noble v. Union River Logging R.R., 147 U.S. 165 (1893); cf. Switzerland Co. v. Udall, 225 F. Supp. 812 (W.D.N.C. 1964); Smith v. United States, 224 F. Supp. 402 (D. Wyo. 1963). The Smith case held that there was no cause of action created by § 1361 to compel the Department of Interior to take necessary steps to provide adequate compensation to entrymen on an irrigation project for losses sustained by them because of the alleged failure of the Bureau of Reclamation to comply with the Reclamation Act.


52 Roberts v. United States, 176 U.S. 221 (1900). See also Board of Liquidation v. McBee, 92 U.S. 531 (1876).


and suits for civil service retirement annuities\(^5^8\) exemplify the latter claims.

**THE EFFECT OF THE NEW STATUTE UPON THE DOCTRINE OF SUPERIOR OFFICER AND THE DEVICE OF MANDATORY INJUNCTIONS**

The rule that the superior officer is an indispensable party is not particularly restricted to the issuance of mandamus, but rather is of general application, arising principally in injunction suits.\(^5^9\) Apparently the doctrine was not abrogated by the enactment of Pub. L. 87-748.\(^6^0\) The doctrine flows principally from the nature of the relief sought, in that the superior officer is indispensable when the relief sought will require the superior officer "to take action, either by exercising directly a power lodged in him or by having a subordinate exercise it for him."\(^6^1\) This doctrine, therefore, is unaffected by a provision on *jurisdiction* to grant mandamus, which differs from the issue as to what the substance of the relief shall be. It should be noted that the *Advisory Committee's Note* concerning a proposed amendment of Rule 19, Federal Rules of Civil Procedure, on Necessary Joinder of Parties—upon which the doctrine of requiring joinder of the superior officer is based—clearly expresses the view that Pub. L. 87-748 has not abolished the doctrine, but has merely simplified the possibility of joining the superior officer.\(^6^2\)

The device of issuing mandatory injunctions, on the other hand, would seem to have lost any value or significance. Prior to the new statute, courts outside of the District of Columbia occasionally granted relief similar to mandamus by utilizing the device of issuing mandatory injunc-


\(^{59}\) See p. 41 infra.

\(^{60}\) See S. Rep. No. 1992, at 3; H.R. Rep. No. 536, at 3. See also Prairie Band of Potawatomi Tribe of Indians v. Pukke, 321 F.2d 767, 770 (10th Cir. 1963). In that case a district court's dismissal, for lack of jurisdiction, of a suit between members of an Indian band was affirmed on appeal because the Secretary of Interior and the Commissioner of Indian Affairs had been named as parties, but had not been served. The Court of Appeals noted that new § 1361 was invoked as the basis of jurisdiction for the first time on appeal, but stated that, although undoubtedly indispensable parties, neither the Secretary nor the Commissioner were joined as parties to the suit.


tions. In the past, mandatory injunctions have been issued to compel: (a) the granting of permits or licenses; (b) the admission of imports; (c) the payment of salary to a clerk of a federal court after a United States Marshal attempted to withhold part of the salary pursuant to an order of the Comptroller of the Treasury; and (d) acts which the court believed necessary to make another injunction effective. However, even before the new statute the number of such occasions apparently

63 However, in such cases, though coming close to compelling the issuance of permits, the courts merely ruled that the reason given for the denial of a permit was invalid and should not stand in the way of its issuance "if the applicants otherwise meet the requirements of the law." Baucom v. Jackson, 35 F.2d 248, 251 (W.D. La. 1929) (mandatory injunction enjoining the refusal of the Prohibition Department to grant a permit to prescribe intoxicating liquors for medicinal purposes). Wilson v. Bowers, 14 F.2d 976 (S.D.N.Y. 1924), emphasized that the injunction issued "neither does, nor is intended to, in any way act as a mandamus, nor directly or indirectly to require the collector [of internal revenue] to issue [alcohol] withdrawal permits if, as has been charged, the amount to be furnished under the basic permit has already been exhausted." Id. at 978; see Note, Mandatory Injunctions as Substitutes for Writs of Mandamus: A Study in Procedural Manipulation, 38 Colum. L. Rev. 903, 910 nn.43-49 (1938); cf. National Radio School v. Marlin, 83 F. Supp. 169 (N.D. Ohio 1949) (mandatory injunction against local finance officer of Veterans Administration to issue vouchers to a training school for tuition of veterans).

64 Knapp v. Hyde, 50 F.2d 272 (S.D.N.Y. 1931) (jurisdiction to restrain the Secretary of Agriculture and the Collector of Customs from holding certain shipments in Custom's custody).

65 Loisel v. Mortimer, 277 Fed. 882 (5th Cir. 1922). The court explained that it was restraining the marshal "from refusing to perform a plain ministerial duty." Id. at 885. But see Emerson v. Baker, 3 F.2d 830 (N.D. Ga. 1925). The court in Loisel overcame the absence of mandamus power by stating: "Where the remedy by mandamus is not as available as relief in equity, a mandatory injunction will be granted." 277 Fed. at 886. In support of that statement the court, quite unconvincingly, cited Bourke v. Alcott Water Co., 84 Vt. 121, 78 Atl. 715 (1911). In Bourke, plaintiffs, urgently in need of water, sought to force the water company to resume supply. Actually the case did not involve any statutory lack of mandamus power, but simply held that an injunction would be granted where the remedy by mandamus was not adequate. The mandamus remedy was found inadequate there because the Vermont Supreme Court was not able to hear a petition at law for mandamus until a later term, which would have been much too late under the circumstances.

66 Thus in Lester v. Parker, 235 F.2d 787 (9th Cir. 1956), the court affirmed a district court order which compelled Coast Guard officers to issue documents showing that certain seamen could be employed, so that a local court injunction, which prevented Coast Guard officers from enforcing regulations excluding plaintiff-seamen from employment on merchant vessels, could be effective.

Sometimes injunctions against postal fraud orders granted by the courts outside the District of Columbia are considered mandatory injunctions because they compel the local postmaster to perform his statutory duties of paying money orders and delivering mail. See Williams v. Fanning, 332 U.S. 490 (1947); Byse, Proposed Reforms in Federal "Nonstatutory" Judicial Review: Sovereign Immunity, Indispensable Parties, Mandamus, 75 Harv. L.
decreased after the Supreme Court's pronouncement in *Miquel v. McCari* that "the mandatory injunction . . . prayed for is in effect equivalent to a writ of mandamus, and governed by like considerations."  

Occasionally courts have granted relief similar to mandamus by predicking jurisdiction upon section 10 of the Administrative Procedure Act. Thus in *Atlantic & Gulf Stevedores, Inc. v. Donovan* the local Deputy Commissioner of the Bureau of Employee's Compensation of the Labor Department was compelled to proceed to a decision in a matter properly before him. His duty was described, in typical mandamus language, as "a command to hear and adjudicate. Not a command to tell him how it is to be decided." And in the isolated case of *Adams v. Witmer* the clause of section 10(b) of the Administrative Procedure Act dealing with mandatory injunctions was cited in justification of a decision of the local court ordering the district manager of the Bureau of Land Management to vacate an administrative decision declaring applicant's mining claim invalid.

The courts outside the District of Columbia, however, have not granted mandatory injunctions in the fields of public lands, mineral rights and timber, viz, the matters within the jurisdiction of the Interior Department in which the mandamus remedy historically found its widest acceptance and which, as stated, were the principal reason for the enactment of new section 1361. When a plaintiff in the District Court for the District of Colorado attempted to compel the Government to restore his former grazing privileges, the suit was dismissed for the reason that "no federal district court, other than for the District of Columbia, has jurisdiction to issue a mandatory writ of the character sought by the complainant herein." Similarly, an action in the District Court for the District of Montana to compel the district manager of the Bureau of

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Rev. 1479, 1500 (1962). It should not be overlooked that in such cases jurisdiction is based upon the special jurisdictional grant of 28 U.S.C. § 1339 (1958) concerning postal matters.  
67 291 U.S. 442 (1934).
70 274 F.2d 794 (5th Cir. 1960).
71 *Id.* at 798.
72 271 F.2d 29 (9th Cir. 1959). It should be noted that in *Adams* there was no prayer for the issuance of a patent. See Estrada v. Ahrens, 296 F.2d 690 (5th Cir. 1961) (suit to require admission of aliens into port of entry). But see text accompanying note 80 *infra.*  
73 See p. 23 *supra.*  
Land Management to grant a grazing permit under the Taylor Grazing Act was dismissed. A decision by the District Court for the District of Utah enjoining the State Supervisor for Utah of the Bureau of Land Management and the Range Manager of the Grazing District from withholding a grazing permit was reversed because "while the decree below is negative in form, in that it enjoins the withholding of permits, its effect is to affirmatively require the issuance of permits." Similarly, mandatory injunctions have not been granted in reinstatement suits by public officials. One court, in an action against the district engineer of the War Department, stated expressly that "the prayer for mandatory injunction . . . is in effect a prayer for a writ of mandamus"; other suits have been dismissed for lack of mandamus power without mention of the device of mandatory injunctions. The courts have left little doubt that section 10 of the Administrative Procedure Act did not create any new power, whether suit was brought against a local official to vacate a demotion of an employee, or the prayer was for reinstatement of a discharged employee.

Clearly, the scope of review in the newly acquired mandamus power of the local district courts is neither broader nor more restrictive than the power previously exercised by the device of mandatory injunctions. True, mandamus is a remedy at law, whereas mandatory injunctions are a form of equitable relief; nevertheless, the newly acquired mandamus power would not seem to be broader because, even though at law, mandamus will be denied when there exists another adequate remedy at law, such as a

79 Marshall v. Crotty, 185 F.2d 622 (1st Cir. 1950); McKenzie v. Kirkpatrick, 141 F. Supp. 49 (N.D. Cal. 1956); Fredericks v. Rossell, 95 F. Supp. 754 (S.D.N.Y. 1950). Jurisdiction to grant declaratory relief was also denied in these cases.
80 Cf. Fagan v. Schroeder, 284 F.2d 666 (7th Cir. 1960).
suit for a monetary judgment.\textsuperscript{82} Conversely, the scope of review assumed by the courts in issuing mandatory injunctions apparently is no broader than the mandamus power. Like mandamus, mandatory injunctions have been granted only when the court has found that a ministerial duty exists, and when a matter is left to the discretion of an administrative official the courts have not told him how to decide, but have merely commanded him to hear and adjudicate the matter.

Therefore it appears that the possible scope of review is neither enlarged nor diminished by the new enactment, and that any occasion for utilizing mandatory injunctions against federal officials should now have disappeared.

**The New Venue Provision**

Pub. L. 87-748 also added the following subsection (e) to section 1391 of Title 28, the general venue provision of the United States Code:

\begin{quote}
(e) A civil action in which each defendant is an officer or employee of the United States or any agency thereof acting in his official capacity or under color of legal authority, or an agency of the United States, may, except as otherwise provided by law, be brought in any judicial district in which: (1) a defendant in the action resides, or (2) the cause of action arose, or (3) any real property involved in the action is situated, or (4) the plaintiff resides if no real property is involved in the action.

The summons and complaint in such an action shall be served as provided by the Federal Rules of Civil Procedure except that the delivery of the summons and complaint to the officer or agency as required by the rules may be made by certified mail beyond the territorial limits of the district in which the action is brought.\textsuperscript{83}
\end{quote}

This portion of Pub. L. 87-748 has a much wider application than section 1361 in that it is not limited to mandamus actions. Rather, it potentially covers all the different types of suits against federal officers and agencies, though, of course, it is not concerned with suits against the United States, since detailed venue provisions now exist for such suits\textsuperscript{84} and those provisions remain unchanged.

The legislative history of section 1391(e), like that of section 1361, evidences a desire on the part of the Justice Department to delimit the scope of the new provision. Its efforts in that respect apparently were

\textsuperscript{82} See pp. 25-26 supra.


\textsuperscript{84} \textit{E.g.}, 28 U.S.C. § 1402(a) (1958) (tax refund suits against the United States; venue in the judicial district where plaintiff resides, with special provision for corporations); 28 U.S.C. § 1402(b) (1958) (tort claims against the United States; venue in the judicial district wherein the plaintiff resides or where the act or omission complained of occurred).
only partially successful, and the new provision may present certain additional problems.

"UNDER COLOR OF LEGAL AUTHORITY"

In the predecessor bill, H.R. 10089, the venue provision covered only suits against "an officer of the United States in his official capacity." Clearly as the result of the testimony of a representative of the Department of Justice, the venue provision was broadened to cover suits against an officer acting "under color of legal authority," and thus broadened, H.R. 1960 was finally enacted. The insertion of the phrase "acting under color of legal authority" was described by the House Committee as follows:

By including the officer or employee, both in his official capacity and acting under color of legal authority, the committee intends to make the proposed section 1391(e) applicable not only to those cases where an action may be brought against an officer or an employee in his official capacity. It intends to include also those where the action is nominally brought against the officer in his individual capacity even though he was acting within the apparent scope of his authority and not as a private citizen. Such actions are also in essence against the United States but are brought against the officer or employee as individual only to circumvent what remains of the doctrine of sovereign immunity. The considerations of policy which demand that an action against an official may be brought locally rather than in the District of Columbia require similar venue provisions where the action is based upon the fiction that the officer is acting as an individual. There is no intention, however, to alter the venue requirements of Federal law insofar as suits resulting from the official's private actions are concerned.

Clearly the new venue provision will not apply to private actions of the officials arising out of private torts or contracts made by them as private citizens with no relationship whatever to their governmental activities. However, the exact scope of new section 1391(e) appears doubtful when the particular act bears some relationship to the official's governmental activities.

According to the committee report, the addition of the clause describing

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the officer as one acting "under color of legal authority" was intended to cover situations where the actions "are brought against the officer or employee as individual only to circumvent what remains of the doctrine of sovereign immunity." If that is the criterion, it would seem that situations along the line of Land v. Dollar

are covered by the new statute. In that case an action in tort, arising out of a disagreement as to whether certain stock had been given to the Government outright or simply as a pledge, was sustained against the members of the United States Maritime Commission as individuals, on the ground that the Commissioners were unlawfully withholding plaintiff's property under the claim that it belonged to the United States. Of course, since the new provision is a venue provision, it does not come into play in situations like those where, under the rule of Larson v. Domestic & Foreign Commerce Corp.,
courts have denied jurisdiction over a suit against a public official. In Larson, plaintiff contended that title to certain surplus coal which he had purchased from the War Assets Administration had passed to him and that the Administrator had not only refused to deliver the coal but, indeed, had entered into negotiations for the sale of the coal to another party. The Supreme Court, in a frequently criticized opinion, held that there was no jurisdiction over a suit for an injunction and a declaratory judgment against the Administrator, reasoning that although the actions of the official may have been tortious under general law, they were nonetheless acts of the sovereign and therefore, absent a specific consent-to-suit, not enjoinable by the court, so long as the acts did not conflict with the terms of the official's valid statutory authority. In Malone v. Bowdoin the Larson principle was extended to apply to a suit in ejectment, and later Supreme Court decisions have applied the principle to a variety of situations. Whatever may be the present status of the Larson prin-

90 Id. at 4.
92 Id. at 734.
93 337 U.S. 682 (1949).
95 337 U.S. at 695.
96 369 U.S. 643 (1962) (no jurisdiction over suit against a Forest Service Officer of the Department of Agriculture by plaintiffs claiming to be the rightful owners of land occupied by the officer); see Jaffe, Suits against Governments and Officers: Sovereign Immunity, 77 Harv. L. Rev. 1, 37 (1963).
97 Dugan v. Rank, 372 U.S. 609 (1963) (suit against Bureau of Reclamation officials
principle and the scope of its application, it is clear that the new venue provision of section 1391(e) has no relevance to a solution of that problem, since the provision is neutral in this regard. By using the clause "under color of legal authority" Congress has sought to apply the new venue provision to all suits against individual officers, whenever such suits are permitted within the limits established by the Larson principle.

Interestingly, when confronted with the identical problem in drafting new Rule 25(d) of the Federal Rules of Civil Procedure, the rulemakers used a different device. Prior to July 19, 1961, Rule 25(d) provided that an action against a government officer abated in case of his death or resignation, unless pursuant to court order the action was continued against the successor within a period of six months. To remedy this unfortunate situation, Rule 25(d) was amended to provide for automatic substitution so that the suit no longer abates. In describing the suits against officers to which the rule of automatic substitution applies, new Rule 25(d) uses the simple term "in his official capacity" and no phrase similar to "under color of legal authority" was added. Nevertheless, it is

seeking an injunction against the storing and diversion of water at a dam); Hawaii v. Gordon, 373 U.S. 57 (1963) (action by the State of Hawaii against the Director of the Bureau of the Budget requiring him to withdraw certain advice given some federal agencies, and to determine whether certain land in Hawaii was needed by the United States, and, if not, to convey the land to Hawaii). Recently, in Reisman v. Caplin, 115 U.S. App. D.C. 59, 317 F.2d 123 (1963), the United States Court of Appeals for the District of Columbia Circuit sought to extend the Larson doctrine to suits for anticipatory relief against administrative action by applying the doctrine to a proceeding to quash an administrative subpoena of the Commissioner of Internal Revenue directing the production of audit reports before a hearing official. It made a similar attempt in Kennedy v. Rabinowitz, 115 U.S. App. D.C. 210, 318 F.2d 181 (1963), where a plaintiff sought a declaratory judgment that he not be required to register under the Foreign Agents Registration Act of 1938. These extensions by the Court of Appeals were probably ill-considered, see Note, Banishing the Premature Suitor—A Surprising Use for the Doctrine of Sovereign Immunity, 73 Yale L.J. 493 (1964), and were refuted by the Supreme Court when it affirmed both decisions on different grounds. Reisman v. Caplin, 375 U.S. 440 (1964); Rabinowitz v. Kennedy, 376 U.S. 605 (1964). In Reisman, the Court's affirmation was on the narrow ground that plaintiff had an adequate remedy at law and therefore had not shown any need for equitable relief, while in Rabinowitz the Court held that the Registration Act required plaintiff to register, with the result that the Court saw no "occasion to consider ... the sovereign immunity doctrine." Id. at 607. Whatever the exact meaning of this statement, it seems clear that the Court believes that, at least in matters not involving property rights, the doctrine of sovereign immunity does not stand in the way of a declaratory holding under which no relief is granted against the Government. The two recent cases of the Supreme Court are insufficient, however, to cast doubts on the continued validity of the Larson principle when applied to property rights.

clear from the Advisory Committee’s Notes99 that the coverage of the new substitution rule was intended to be identical. The Advisory Committee specified that the new rule was to be interpreted “as part of a simple procedural rule for substitution,” and that it should not be distorted “by mistaken analogies to the doctrine of sovereign immunity from suit or the Eleventh Amendment.” The Advisory Committee specified that the new rule applies to “actions to prevent officers from acting in excess of their authority or under authority not validly conferred.” This is precisely the type of suit against an officer which caused the drafters of section 1391(e) to include the clause “under color of legal authority.”100

**MONEY JUDGMENTS AGAINST OFFICERS**

With respect to actions seeking money judgments against officers, the difference in language between section 1391(e) and Rule 25(d) may produce opposite results. The Notes of the Advisory Committee specify that the amended Rule would not apply to the “relatively infrequent actions which are directed to securing money judgments against the named officers enforceable against their personal assets.”101 The Notes cite as examples of such actions *Barr v. Matteo*102 and *Howard v. Lyons*,103 where damages were sought out of the pockets of the officials for defamatory utterances in some way related to their office. The inapplicability of the automatic substitution rule to that situation is obvious because the suit seeks satisfaction out of the officer’s personal assets, and not from the Government. On the other hand, it seems that the broadened venue provision of section 1391(e) applies to such suits, on the ground that the officer is being sued as “acting under color of legal authority.”

While it is true that the provision for removal of state court actions against federal officials sued for acts “under color of office”104 has sometimes been interpreted not to include negligence suits against government employees for acts done in the exercise of their duties,105 the phrase

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105 *E.g.*, Ebersole v. Helm, 185 F. Supp. 277 (E.D. Pa. 1960); Goldfarb v. Muller, 181 F. Supp. 41 (D.N.J. 1959) (both involving motor vehicle accidents). The removal problem of the *Ebersole* and *Goldfarb* cases has been nullified with respect to motor vehicle accidents.
“color of legal authority” in section 1391(e) may be interpreted differently. The congressional committees, in describing the purposes of the bill, stated: "The venue problem also arises in an action against a Government official seeking damages from him for actions which are claimed to be without legal authority but which were taken by the official in the course of performing his duty." This language may influence the courts to hold section 1391(e) applicable to cases of the kind of Barr v. Matteo. Thus, though the defendant-official may be residing in another district, it appears that now venue may be laid in the district of plaintiff’s residence, and this despite the fact that any damages recovered would be payable out of the official’s personal assets. This result, though somewhat strange, seems justifiable because suits of the Barr v. Matteo type are generally defended by the Attorney General, and, of course, counsel of the Attorney General is available in every judicial district.

TAX REFUND SUITS

Another situation where it appears that section 1391(e) would govern and where Rule 25(d) would be inapplicable is an action for a tax refund against a collector of internal revenue. The Notes of the Advisory Committee make it clear that new Rule 25(d) does not apply to that situation, but it seems that section 1391(e) may be held applicable. In its letter of February 28, 1962, to the Senate Judiciary Committee, the Department of Justice proposed that the new venue provision be tied into the Administrative Procedure Act and that, to clarify the situation, a

by a new statutory provision. 28 U.S.C. §§ 2679(b)-(e) (Supp. V, 1964). Under this statute, the sole remedy for a plaintiff injured in an automobile accident by a federal employee acting within the scope of his employment is a suit under the Federal Tort Claims Act. The Attorney General is authorized to remove a case brought in a state court against the employee to the federal court where it shall be deemed an action against the United States under the Federal Tort Claims Act.


107 360 U.S. 564 (1959) (libel suit against the head of the Rent Stabilization Agency by former employees of that agency in connection with a press release which he issued as head of the agency).

108 In Barr v. Matteo the defendant was represented by the Attorney General. See 28 C.F.R. §§ 0.45(g), 0.65(a)(c) (1964) (regulations directing the Attorney General to defend certain suits).


special section be inserted providing that the provision "shall not apply to proceedings brought with respect to Federal taxes."\textsuperscript{111} Neither proposal was adopted by the Senate Committee, but instead the general clause "except as otherwise provided by law" was inserted to except from the bill "proceedings brought with respect to Federal taxes."\textsuperscript{112} It is doubtful whether the statutory limitation "except as otherwise provided by law" has succeeded in excepting suits for refund against collectors from section 1391(e). Whatever the exact nature of refund suits against the collection officers may be, it seems clear that such a suit is one against an officer "acting in his official capacity or under color of legal authority."\textsuperscript{113} The phrase "except as otherwise provided by law" is found in subsections (a) and (b) of section 1391, and section 1391 has generally been interpreted to require a specific statutory provision\textsuperscript{114} on venue to exempt an action from its terms. In the same manner, "except as otherwise provided by law" in section 1391(e) would seem to refer to a specific statutory provision, and not merely to the general clause of section 1391(b) under which a suit may be brought only in the district of defendant's residence when jurisdiction is not founded solely on diversity of citizenship. Any other interpretation would render section 1391(e) illusory and would frustrate its legislative purpose.

Clearly, no specific statutory venue provisions exist for tax refund suits against collection officers. Rather, venue in such suits has heretofore been predicated solely upon the general rule of section 1391(b).\textsuperscript{115} Special statutory venue provisions do exist for certain tax proceedings.\textsuperscript{116} These proceedings, however, involve suits against the United States, whereas section 1391(e) is concerned only with suits against officers or agencies. Accordingly, tax refund suits against collection officers may unexpectedly share with mandamus actions the broad venue provisions of section 1391(e).\textsuperscript{117}

\textsuperscript{112} Id. at 4. See also 108 Cong. Rec. 20094 (1962) (remarks of Representative Forrester).
\textsuperscript{113} See Smetanka v. Indiana Steel Co., 257 U.S. 1 (1921).
\textsuperscript{117} Section 1391(e) may also apply to the very exceptional case of a suit for an injunction against the collection officer. Miller v. Standard Nut Margarine Co., 284 U.S. 498 (1932) (injunction against enforcement of a tax which, by prior judicial ruling, had been
Due to its broad language, section 1391(e) may have resulted in a modification of the venue in other proceedings. Section 1391(e) applies to every proceeding in which each defendant is a federal official or a United States agency, "except as otherwise provided by law." The legislative history contains only a few suggestions of the kinds of proceedings which are excepted from the new statute. The Senate Committee\(^{118}\) listed as examples proceedings with respect to federal taxes\(^{119}\) and those under section 5 of the Act of September 26, 1961,\(^{120}\) relating to immigration. In his statement to the House of Representatives, September 20, 1962, Representative Forrester added section 8(a) of the Tennessee Valley Authority Act\(^{121}\) as another example of a venue provision which will remain unaffected.\(^{122}\) Actually, many statutory provisions on judicial review of administrative actions do contain specific venue rules and those proceedings are not affected by section 1391(e). For example, the venue in the review of orders of the Federal Trade Commission,\(^{123}\) the Civil Aeronautics Board,\(^{124}\) the Federal Communications Commission,\(^{125}\) the Federal Power Commission,\(^{126}\) and in suits against the Home Loan Bank Board\(^{127}\) will remain unchanged.\(^{128}\) Likewise special venue provisions are found in the majority of statutes dealing with suits against officers of the United States. For example, statutes governing certain suits against

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\(^{118}\) See pp. 37-38 supra as to the questionable validity of this example.


\(^{120}\) 75 Stat. 651 (1961), 8 U.S.C. § 1105a (a)(2) (Supp. V, 1964) (dealing with judicial review of deportation orders). In this and in all other proceedings to which the new venue provision of the first paragraph of § 1391(e) is inapplicable, the broadened service provision of the second paragraph of § 1391(e) extending the territorial limitation of service under Rule 4(f) of the Federal Rules of Civil Procedure will likewise be inapplicable, since the second paragraph by its terms expressly restricts its application to suits proceeding under the new venue provision.


\(^{122}\) 108 Cong. Rec. 20094 (1962).


\(^{128}\) See Developments in the Law—Remedies Against the United States and Its Officials, 70 Harv. L. Rev. 827, 904 n.524 (1957) (list of statutory review provisions).
the Secretary of Agriculture, the Secretary of Health, Education, and Welfare, the deputy commissioners under the Longshoremen’s and Harbor Workers’ Compensation Act, and the Alien Property Custodian have their own venue provision. On the other hand, new section 1391(e) would seem to apply in suits against the Secretary of the Treasury under the Federal Alcohol Administration Act, since that act does not contain a specific venue provision.

GOVERNMENT CORPORATIONS

With reference to government corporations section 1391(e) may present problems. It is clear from the legislative history of section 1391(e) that the term “agency” includes government corporations. Accordingly, venue in nontort suits against government corporations may now be laid in accordance with section 1391(e) provided the statute governing the corporation contains no venue provision. Heretofore, absent a specific provision, the rule of venue in suits in federal courts against government corporations apparently was in accordance with section 1391(c) which specifically deals with venue in suits against corporations.

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133 49 Stat. 981 (1935), as amended, 27 U.S.C. § 205 (1958); see Davis v. Trigo Bros. Packing Corp., 266 F.2d 174 (1st Cir. 1959). Pursuant to its express language, new § 1391(e) applies only when “each” defendant is an officer or agency of the United States. The legislative purpose of simplifying the venue requirement for plaintiffs, however, would seem to prevail even though one of the defendants joined is a private party, as might occur in fields such as governmental supervision over banking organizations. In such cases the defense of lack of venue, if raised, would seem to be valid; but as a matter of policy it may be wise for the Government to waive the defense in such a case.
135 Generally, suits for torts, within the meaning of the Federal Tort Claims Act, cannot be brought against government corporations because the exclusive remedy for such suits is under the Federal Tort Claims Act which requires a suit against the United States. 28 U.S.C. § 2679(a) (Supp. V, 1964).
Since, for example, in the case of actions involving real property, new section 1391(e)(3) furnishes a broader base of venue, application of subsection (e) in suits against government corporations may become important. It should be mentioned that to implement the broadened venue clause Congress has provided in section 1391(e) for service by certified mail outside the territorial limits of the forum state. Prior to new section 1391(e) it had been held that delivery of a copy of the summons and complaint into the hands of the Assistant Secretary of the Reconstruction Finance Corporation in Washington, D.C., was insufficient to effect service in an action brought in the United States District Court for the District of New Jersey.\(^{137}\) Under new section 1391(e), service by certified mail to the RFC in Washington, apparently, would now be effectual in such a situation:

**INDISPENSABLE PARTIES**

The doctrine requiring the joinder of a superior officer as an indispensable party appears to have been virtually done away with by section 1391(e).\(^{138}\) That doctrine was held to apply when the relief sought required the superior officer to take action either by exercising directly a power lodged in him or by having a subordinate exercise it for him.\(^{139}\) Though not abolished as such,\(^{140}\) the inconvenience of the doctrine can now be avoided by the broad venue and service provisions of section 1391(e). The superior officer can now be joined as a defendant in any local district court and as a matter of precaution it will be desirable to join him whenever there is even a remote chance that a court may hold him to be indispensable. The question arises whether if he was not originally joined there may be an amendment under Rule 15 of the Federal Rules of Civil Procedure permitting his joinder at a later date. The general rule is that if a statute of limitations has run in the interim a party may not, by invoking the "relation back" concept of Rule 15(c), bring in a new party;\(^{141}\) on the other hand, although the statute of limita-

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\(^{138}\) In mentioning the doctrine, the committee reports stated euphemistically that "the question of when a superior officer is an indispensable party is not altogether clear from the cases." S. Rep. No. 1992, at 3; H.R. Rep. No. 536, at 3. The Deputy Attorney General when commenting on the proposed venue rule stated that it would in effect "do away with the defense" of nonjoinder of the superior officer. S. Rep. No. 1992, at 6.


\(^{140}\) See p. 28 \textit{supra}.

tions has run, amendment is permitted when it simply corrects the name of a party already in court. The addition of the superior officer as a party is more than simply correcting the name of a party already in court. However, there seems to be no applicable statute of limitations in cases of the type where joinder of the superior officer has been generally required in nonstatutory review proceedings; and, it is submitted, in view of the liberal purpose of section 1391(e) the defense of laches should not be regarded favorably by the courts. It should be noted that when proposing a redrafting of Rule 15(c) in March 1964, the Advisory Committee considerably liberalized the "relation back" rule as regards the statute of limitations by providing that it shall be sufficient if the proper party has some notice of the institution of the earlier action and "should have known that, but for a mistake concerning the identity of the proper party, the action would have been brought against him." Specifically with respect to government litigation, the new proposal would provide that "delivery or mailing of process to the United States Attorney, or his designee, or the Attorney General of the United States, or an agency or officer who would have been a proper defendant if named" shall be sufficient to permit relation back of the amendment even though the statute of limitations has run against the suit naming the proper defendant. This proposal was the result of certain unsatisfactory decisions in which, instead of naming the Secretary of Health, Education, and Welfare as the proper party defendant in suits for social security benefits, claimants had instituted timely actions but had mistakenly named as defendant either the United States, the Department of HEW, the "Federal Security Administration" (a nonexistent agency) or a Secretary who had retired from the office nineteen days before. In all these cases amendment to name the proper defendant after expiration of the statute of limitations had been denied. As stated

143 See Johnson v. Kirkland, 290 F.2d 440 (5th Cir.), cert. denied, 368 U.S. 889 (1961); Fagan v. Schroeder, 284 F.2d 666 (7th Cir. 1960); Stroud v. Benson, 254 F.2d 448 (4th Cir. 1958).
144 Cf. Florentine v. Landon, 231 F.2d 452 (9th Cir. 1955).
146 Ibid.
by the Advisory Committee, the revision of Rule 15(c) would further advance the objectives of the 1961 amendment of Rule 25(d).\textsuperscript{149}

The proposed revision of Rule 15(c) would seem to be eminently proper and would adequately cover the situations to which it was particularly addressed. In nonstatutory review proceedings the revision appears unnecessary, however, since there does not seem to be an applicable statute of limitations.

**JUDICIAL INTERPRETATIONS OF THE NEW VENUE PROVISION**


The Social Security Administration of HEW, apparently in an attempt to prevent similar situations in the future and probably as the result of Professor Byse's criticism, Byse, *supra*, recently amended § 404.954 of its regulations by adding a new subsection (b), which seeks to cover situations where an otherwise proper civil action for social security benefits is commenced against the "wrong defendant." The new regulation provides that when suit is brought against "the United States or any agency, officer, or employee thereof," instead of against the Secretary of HEW,

the Social Security Administration shall mail to such party notice that he has named the incorrect defendant in such action; and the time within which such party may commence the civil action pursuant to section 205(g) [42 U.S.C. § 405(g)] against the Secretary shall be deemed to be extended to and including the 60th day following the date of mailing of such notice.

29 Fed. Reg. 8209 (June 30, 1964). It should be noted that 74 Stat. 933 (1961), 42 U.S.C. § 405(g) (Supp. V, 1964), states that court review must be obtained within sixty days or "within such further time as the Secretary may allow" and this provision was the authority for the regulation.

The new regulation seems highly commendable, but should in no way lessen the desirability of broadly amending Rule 15(c) of the Federal Rules of Civil Procedure as proposed in March 1964, *supra* note 145, since: (a) suits for social security benefits constitute only one example of the larger problem; (b) the statutory phrase permitting court review "within such further time as the Secretary may allow" is rather unusual; and (c) it may even be doubted whether an instance of having sued the wrong defendant was within the contemplation of the statute. It is hoped that the notice provided for in the regulation will be explicit enough to cause a plaintiff to commence a proper action against the Secretary, and that the Social Security Administration will not take the text of the new regulation too literally, but will issue a notice even in cases where the wrong defendant amounts to a non-existent agency. In any event, entrusting the question here involved to the decision of the district judge, as proposed Rule 15(c) would provide, seems preferable to leaving it to the discretion of the administrator.

\textsuperscript{149} Under amended Rule 25(d) there is an automatic substitution of the successor officer, and when sued in his official capacity the public officer may be described as a party by his official title rather than by name.
States discussed new section 1391(e). In McEachern a suit naming the United States as a party defendant had been instituted in the District Court for the Western District of South Carolina, but was dismissed for lack of jurisdiction. In reversing, the Court of Appeals held that the United States was an improper party defendant, but directed the district court to grant leave to name the members of the Civil Service Commission and the Commissioner of Social Security as defendants.\(^{151}\) In so doing the court stated that under new section 1391(e), proper venue may be laid in the Western District of South Carolina, plaintiff's residence.\(^{152}\) Of course, new section 1391(e) had not been applicable to the suit against the United States, but it became applicable to the suit after amendment of the complaint.

In Doyle v. Fleming\(^ {153}\) an injunction was sought against Fleming, Governor of the Canal Zone Government, and Secretary of the Army Vance against flying the flag of the Republic of Panama in the Canal Zone at the same height as the flag of the United States. Service upon defendant Vance was attempted by sending him a copy of the summons and complaint by registered mail in compliance with the second paragraph of new section 1391(e). The service was quashed on the ground that the Canal Zone was not a "judicial district" wherein an action under section 1391(e) could be brought, since the term "district" as used in Title 28\(^ {154}\) does not include the Canal Zone.\(^ {155}\)

Another case, Camero v. McNamara\(^ {156}\) involved a question of the effect that the broadened venue provision of section 1391(e) may have on a prior stipulation. Plaintiff sued for reinstatement in the Eastern District of Pennsylvania. Prior thereto he had filed a suit for back pay in the Court of Claims, and there a stipulation had been entered into that he would be reinstated if the claim for back pay were sustained. In his present reinstatement suit he contended that it was only since the enactment of new section 1391(e) that he could bring such suit in the district of his residence and that therefore, in weighing the equities, the prior institution of the Court of Claims action should not be held against him.

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\(^{150}\) 321 F.2d 31 (4th Cir. 1963).

\(^{151}\) 321 F.2d at 33.

\(^{152}\) Ibid.


\(^{155}\) 219 F. Supp. at 280.

\(^{156}\) 222 F. Supp. 742 (E.D. Pa. 1963); see p. 24 supra.
In granting defendant a general continuance on the basis of laches, the court rejected plaintiff’s contention on the ground that this is not a case where a litigant justifiably seeks a more convenient forum. If the Government had known that it would have had to eventually defend the claim in two courts, it would have had no motive for stipulating to reinstatement. Moreover, the plaintiff received the benefit of a narrowing of the issue to the question of back pay and now has taken back the consideration the Government received for the stipulation by filing the second suit.\textsuperscript{157}

\textbf{Conclusion}

The recent changes in the law of nonstatutory judicial review have been significant and rather far-reaching.\textsuperscript{158} Any definitive evaluation of Pub. L. 87-748 at this time would of course be premature. The principal purposes of the bill were (a) to make available to the prospective claimant a less expensive and more convenient remedy in the local courts rather than requiring him to sue in the District of Columbia; (b) to reduce the workload of the United States District Court for the District of Columbia; and (c) to provide more efficient judicial administration of the local courts with respect to those administrative acts which are peculiar to certain areas, such as water rights, grazing land permits and mineral rights.\textsuperscript{159} The meager statistics so far available suggest both that an increase in injunction and mandamus cases has occurred in the local courts and that the workload of the District Court for the District of Columbia has decreased. The records of the Clerk of the District Court for the District of Columbia, though not providing a breakdown as to the particular type of review proceeding here involved, do disclose that after the enactment of Pub. L. 87-748 on October 5, 1962, the total number of actions filed for review of administrative proceedings has decreased in proportion to the total number of civil cases filed. While review proceedings constituted nineteen per cent of the total civil cases filed in the fiscal year ending June 30, 1961, and twenty-one per cent of the total civil cases filed in the fiscal year ending June 30, 1962, they

\begin{footnotesize}
\begin{enumerate}
\item \textsuperscript{157} 222 F. Supp. at 745.
\item \textsuperscript{158} They have not been as far-reaching as a proposal by Professor Byse, which provided that an action against an officer based on a claim that he acted unlawfully or under color of authority “shall not be dismissed . . . solely on the ground that the action is in substance against the United States or that the United States is an indispensable party.” Byse, \textit{Proposed Reforms in Federal "Nonstatutory" Judicial Review: Sovereign Immunity, Indispensable Parties, Mandamus}, 75 \textit{Harv. L. Rev.} 1479, 1524 (1962). That proposal would have abolished the Larson principle. See also Davis, \textit{Suing the Government by Falsely Pretending to Sue an Officer}, 29 U. Chi. L. Rev. 435, 457 (1962).
\item \textsuperscript{159} S. Rep. No. 1992, at 2-3.
\end{enumerate}
\end{footnotesize}
dropped to fifteen per cent of the total civil actions filed between July 1, 1962, and May 1, 1963.\footnote{William B. Jones, \textit{Judicial Review of Administrative Determinations by United States District Courts}, 30 J.B.A.D.C. 387, 393 (1963) (The author is District Judge, United States District Court for the District of Columbia).} More specific statistics recently were supplied by the Justice Department in a statement by the Civil Division submitted on January 27, 1964, to a Subcommittee of the Committee on Appropriations of the House of Representatives. The statement considered the effect of Pub. L. 87-748 and listed the number of injunction and mandamus suits handled by the General Litigation Section of the Civil Division.\footnote{The Lands Division, not the Civil Division, handles litigation involving water rights, grazing land permits and mineral rights, viz, the matters with which Pub. L. 87-748 is particularly concerned. 28 C.F.R. § 0.65 (1964). Accordingly, the figures supplied by the Civil Division constitute merely partial statistics. No similar statistics were supplied by the Lands Division.} The statement explained that while in 1962 the General Litigation Section had handled 135 injunction and mandamus suits, seventy-one of which were brought in jurisdictions other than the District of Columbia, in 1963 there were a total of 211 such suits, of which 130 were brought outside the District of Columbia.\footnote{\textit{Hearings on the Departments of State, Justice, and Commerce, the Judiciary, and Related Agencies Appropriations for 1965 Before a Subcommittee of the House Committee on Appropriations}, 88th Cong., 2d Sess. 111 (1964).} Accordingly, it appears that the greater convenience granted to local claimants by Pub. L. 87-748 has produced the result that persons who heretofore might not have instituted actions in the District of Columbia because of expense and inconvenience, now become litigants in the district courts located in their states.\footnote{There seems to be no inconsistency between the above-mentioned two sets of statistics. True, the more general District of Columbia statistics show a decrease in the District of Columbia, while the statistics of the General Litigation Section of the Civil Division show that the number of injunction and mandamus suits increased slightly even in the District of Columbia between 1962 and 1963. However, numerically the principal effect of Pub. L. 87-748 was probably on cases handled by the Lands Division; there the proportional dispersion to the local courts was undoubtedly greater than in the Civil Division.} The Justice Department statement to the Appropriations Committee throws some light on the attitude of the Department toward the bill. As stated,\footnote{See p. 20 supra.} originally the Department questioned the wisdom of the bill in general terms without, however, expressing any specific arguments. Its approval remained somewhat grudging throughout the bill's legislative history. Now in its statement to the Subcommittee the Department gave
the enactment of the bill as a reason for seeking additional appropriations. In addition to anticipating that more mandamus and injunction suits can now be expected, the Department mentioned expressly that because of the local district attorneys' lack of familiarity with the actions, more supervision will be required; that frequently, in view of the judges' lack of familiarity with the actions, more extensive briefs will be necessary; and, specifically, that additional travel by the attorneys of the General Litigation Section will be required because these suits "are usually very important and frequently quite difficult cases." Clearly, the statement of the Civil Division evidences the known hesitancy of the Department to entrust difficult civil litigation to the local United States Attorneys.

Throughout the legislative history the Department sought assurances that the scope of mandamus would not be extended, and that the system of tax litigation would be preserved unchanged; the Department seems to have been successful only with respect to the former. Also, unexpected modifications of the venue rules may have been brought about in damage suits against officers, in suits against government corporations and possibly in other areas. Still, the matters here discussed—the broadening of the mandamus jurisdiction, the broader venue rules and the new rule of substitution—all seem to be salutary developments. They are an important step in abolishing some of the artificial and unnecessary peculiarities of government litigation.

165 Hearings on the Departments of State, Justice, and Commerce, the Judiciary, and Related Agencies Appropriations for 1965 Before a Subcommittee of the House Committee on Appropriations, supra note 162, at 111. See also the statement by Assistant Attorney General Douglas. Id. at 118.

166 As noted p. 37 supra, the Department had proposed that the venue provision be tied into the Administrative Procedure Act. Whatever results the acceptance of that proposal would have accomplished, it clearly would have left unchanged the venue rules in tax refund suits, damage suits against officers and suits against government corporations.

167 Both new Rule 25(d) of the Federal Rules of Civil Procedure and Pub. L. 87-748 contain some anomalies. The heading of Rule 25, after the amendment of July 1961, continues to be "Substitution of Parties," and subsection (d) is still entitled "Public Officers; Death or Separation from Office." Neither of these headings even remotely suggests that Rule 25(d)(2) provides that a suit against a public officer may describe him by his official title rather than by name. Similarly, since the catchline of § 1391 is "Venue generally," it is surprising to find in it a paragraph dealing with the manner of service. On the other hand Rule 4(d)(5) which concerns service on public officers and agencies makes no mention of delivery of the summons and complaint by certified mail, as now is permitted under the second paragraph of § 1391(e).
MISCEGENATION STATUTES: A CONSTITUTIONAL AND SOCIAL PROBLEM

Harvey M. Applebaum*

Beginning with an objective survey of the background of miscegenation statutes, including their history and adoption, the races included under them, consequences of violation, judicial interpretation and their sociological context, the author then analyzes the three leading grounds upon which miscegenation statutes have been attacked—freedom of religion, the due process clause and the equal protection clause. The three arguments offered to support the statutes—scientific, sociological and alleviation of racial tension—are each treated. After examining the applicability to miscegenation statutes of the normal presumption in favor of legislation based upon the police power, Mr. Applebaum concludes that this presumption should be shifted in cases involving classification by race.

Miscegenation statutes prohibit marriage between persons of different races.1 Although many states have now repealed such statutes, there are still a large number of them in operation which impose criminal and other penalties upon parties to such a marriage. These statutes pose a particularly complex constitutional question; they are also the product of a profound social problem which complicates any constitutional analysis. The issue of interracial marriage is an extremely controversial and emotional one in all parts of the country. Considerable national attention was recently focused upon the mere noting of probable jurisdiction by the Supreme Court in McLaughlin v. Florida2 which has been argued before the Court and will be decided this term. Although the Court in McLaughlin may not reach the issue of the constitutionality of miscegenation statutes, it will apparently be confronted with the only precedent that has been consistently cited by courts in upholding these statutes—its 1883 decision of Pace v. Alabama.3

BACKGROUND OF THE STATUTES

HISTORY AND ADOPTION

The tradition of miscegenation statutes in the United States goes back some three hundred years. The idea of a prohibition of interracial

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1 The term miscegenation refers in this article only to interracial marriage; it is frequently used to denote any form of sexual contact between members of different races.


3 106 U.S. 583 (1883).
marriage originated in this country; there was no ban on miscegenation at common law or by statute in England at the time of the establishment of the American Colonies. Marriages between African slaves and white women, particularly indentured servants, caused great moral and economic concern among the colonists. The first miscegenation statute was passed by the Maryland General Assembly in 1661, and was followed by similar statutes in Virginia in 1691, Massachusetts in 1705, North Carolina in 1715, and Pennsylvania in 1725. Pioneers from the Atlantic seaboard venturing westward enacted similar statutes where they settled. The popularity of the statutes continued so that during the nineteenth century thirty-eight states had miscegenation statutes at one time or another. The period surrounding the Civil War found nine of these states repealing their statutes. There appear to have been no further repeals until 1951, at which time twenty-nine statutes were still standing. Ten states have repealed their statutes since 1951 as a result of the publicity and attention occasioned by the 1948 decision of the California Supreme Court which struck down the California miscegenation statute, coupled with the momentum of the legal and political battle for Negro equality in the past decade.


5 If a slave married a white person, the children were thereby freed. Thus an interracial marriage could deprive a master of potential slaves. Cummins & Kane 27.

6 Proceedings of the General Assembly of Maryland 1637-1664, pp. 533-34.

7 Reuter, RACE MIXTURE 81 (1931).

8 Nebraska is illustrative of how these statutes were carried to frontier states. Although the Iowa statute had been repealed, Iowans who had migrated to Nebraska controlled the Nebraska legislature in 1855 and passed a miscegenation statute. See Note, 28 Neb. L. Rev. 475, 477 (1949). The statute was repealed in 1963. Neb. Laws 1963, ch. 243, § 1.

9 It appears that forty-one states have at one time or another enacted miscegenation statutes. In addition to the thirty-eight statutes existing during the nineteenth century, Pennsylvania appears to have repealed its statute before the nineteenth century, and Arizona and Wyoming did not pass their statutes until the twentieth century. Cummins & Kane 28.

10 The states which repealed their statutes during this period were Iowa (1851), Kansas (1857), Maine (1883), Massachusetts (1840), Michigan (1883), New Mexico (1886), Ohio (1887), Rhode Island (1881) and Washington (1867). Note, 10 Wyo. L.J. 131 n.2 (1956).

11 Vernier, AMERICAN FAMILY LAWS § 44 (1931).


13 Perez v. Sharp, 32 Cal. 2d 711, 198 P.2d 17 (1948). [Due to a change in the County
Nineteen states currently have miscegenation statutes in force. Except for Indiana and Wyoming, all of these states are either southern or "border" states, where the historical background of race relations is unique. Six of these southern states ban miscegenation in their state constitutions. All repeals since 1951 have been in western states, where the statutes had been enacted primarily in reaction to the immigration of considerable numbers of Chinese and Japanese.

RACES INCLUDED

The miscegenation statutes vary widely both in the "races" that are included and in the definitions of what constitutes being a member of a particular race. All nineteen statutes prohibit a marriage between members of the white race (sometimes termed Caucasians) and members of the Negro race (sometimes termed persons of African descent). The agreement as to which races are affected terminates at that point and other "races" covered include Mongolians, Chinese, Japanese, Malayans, American Indians, Asiatic Indians, mulattoes, Ethiopians, and others.

Clerk of Los Angeles, defendant in this mandamus action, while this litigation was pending, the case is reported as Perez v. Sharp at 32 Cal. 2d 711, but as Perez v. Lippold at 198 P.2d 17. In subsequent full citation, this article will cite the official name of Perez v. Sharp, indicating Perez v. Lippold parenthetically.]
ans, Hindus, Koreans, Mestizoes and half-breeds. There often appears to be little rhyme or reason for inclusion or exclusion of any or all of these races in the various statutes. The statutes do, however, concur on one point. All are phrased so that an intermarriage between a white person and a member of the other designated groups is prohibited; the statutes generally do not restrict intermarriage between members of races other than the white nor between persons of mixed blood. Thus, the white person is able to marry only another member of his own race, whereas a Negro or a member of any other group may intermarry with any group except whites.

Although all of the states bar a Negro from marriage with a white person, there is diversity in the statutory definitions of what constitutes a "Negro." The most popular type of definition employs a "percentage-of-blood" test. A number of states classify a Negro as "any person of one-eighth or more Negro blood." Other definitions of Negro include persons of Negro descent to the third generation, and persons with any ascertainable trace of Negro blood. These varying definitions mean that a person can find himself a white person in one state and a Negro under the statute of another state. This is due to the fact that a white person is defined in the statutes by the negative implication that he does not possess any of the Negro characteristics described in the statutes. A number of the statutes do not offer any definitions whatsoever as to what blood mixture defines a particular race; they merely prohibit marriage between whites and Negroes or members of the other races.

24 Nevada, before its statute was repealed in 1959.
25 Arizona, before its statute was repealed in 1962.
26 South Dakota, before its statute was repealed in 1957.
27 South Carolina.
28 South Carolina.
29 Louisiana, North Carolina and Oklahoma do exclude marriage between Negroes and American Indians.
30 E.g., Indiana and Florida. This definition is being attacked in McLaughlin for unconstitutional vagueness. See pp. 60-61 infra.
31 E.g., Maryland.
32 Georgia and Virginia.
33 It has been suggested that a uniform definition of "Negro" is needed to eliminate the problem. See Note, Who is a Negro?, 11 Fla. L. Rev. 235 (1958).

Prior to its repeal in 1957, the Colorado statute created the anomaly that citizens of that state could be subject to the statute only if they resided in certain parts of the state. The statute by its terms applied only to those portions of the state which had not been acquired from Mexico. Colo. Laws 1883, ch. 107, § 2. It was held that this distinction was reasonable. Jackson v. City & County of Denver, 109 Colo. 196, 124 P.2d 240 (1942).
34 E.g., Arkansas and Kentucky. The Arizona Supreme Court noted the lack of definitions
The above standards have rendered the task of proving that a person is of a certain racial classification a difficult one, which is frequently to the advantage of those accused of violation of the statutes.\textsuperscript{35} Missouri’s statute provides a test which places the defendant on the witness stand in order to permit the jury to observe his personal appearance and thereby reach a decision as to his race. Where the statute requires a showing of one-eighth proportion of blood or an ancestor at the third generation, there must be proof of a great grandparent of the proscribed race. But statutes specifying any trace of Negro blood (or any Negro ancestry) and those offering no definitions will often have to proceed on more general evidence such as that used in the Missouri test. Thus, appearance is often admitted as some evidence of race,\textsuperscript{36} although it is usually not considered sufficient without other evidence.\textsuperscript{37} The fact that one associates with members of a certain race has been deemed significant,\textsuperscript{38} and courts have also admitted the racial reputation of the person in the community.\textsuperscript{39} These difficulties are compounded in criminal prosecutions, since the racial evidence must comply with the strict criminal standard of proof beyond a reasonable doubt.\textsuperscript{40} As a result, most criminal convictions occur where there is no question of the parties’ racial status.

\textbf{CONSEQUENCES OF VIOLATION}

The miscegenation laws impose criminal sanctions upon both parties to the forbidden marriage; the violation is expressly made a felony in a number of states\textsuperscript{41} and a misdemeanor in others.\textsuperscript{42} Maximum terms of imprisonment under the statutes range from thirty days\textsuperscript{43} to five,\textsuperscript{44} seven\textsuperscript{45} or ten years.\textsuperscript{46} Most of the statutes do not differentiate marriage in the Arizona statute and suggested correction by the legislature. State v. Pass, 59 Ariz. 16, 121 P.2d 882 (1942). The Arizona Legislature responded by amending the statute in 1942 to cure this defect.

\textsuperscript{35} Knight v. State, 207 Miss. 564, 42 So. 2d 747 (1949); Marre v. Marre, 184 Mo. App. 198, 168 S.W. 636 (1914); see Comment, 1 MERCER L. REV. 83, 84-85 (1930).

\textsuperscript{36} Jones v. State, 156 Ala. 175, 47 So. 100 (1908).

\textsuperscript{37} Moore v. State, 7 Tex. App. 608 (1880).

\textsuperscript{38} Hopkins v. Bowers, 111 N.C. 175, 16 S.E. 1 (1892); Bennett v. Bennett, 195 S.C. 1, 10 S.E.2d 23 (1940).

\textsuperscript{39} State v. Miller, 224 N.C. 228, 29 S.E.2d 751 (1944).

\textsuperscript{40} Comment, 1 MERCER L. REV. 83, 85 (1950).

\textsuperscript{41} Alabama, Georgia, Oklahoma, Tennessee and Virginia.

\textsuperscript{42} Arkansas, Delaware, South Carolina, West Virginia and Wyoming.

\textsuperscript{43} Delaware.

\textsuperscript{44} Louisiana, Oklahoma, Tennessee, Texas, Virginia and Wyoming.

\textsuperscript{45} Alabama.

\textsuperscript{46} Florida, Mississippi and North Carolina.
from cohabitation between persons of different races; 47 this is consistent since the marriage is illegal and the parties are therefore automatically violating the state's fornication and cohabitation statutes. Conversely, prosecution for violations of interracial cohabitation statutes cannot be avoided by subsequent marriage, although subsequent marriage is generally recognized as a defense under state cohabitation statutes. 48 Mississippis's statute goes to the extent of punishing any person or corporation that urges or supports any form of miscegenation, and many states impose criminal penalties upon anyone issuing a license to a miscegenous couple or performing a marriage ceremony for them. 49 The statutes usually require criminal intent for a violation 50 and are phrased so that one must "knowingly" enter into the marriage. 51 Thus, parties unaware of their status may be able to avoid the criminal punishment. Ignorant parties, however, may suddenly discover that they are not legally married and have none of the rights flowing from the marital bond, since all of the statutes except that of West Virginia, which requires a decree of nullity, render the marriage void  ab initio , not just voidable. 52 As a result, the participants can lose their marital rights under intestacy statutes 53 and often rights to property under the will of a deceased spouse. 54 Since the marriage is void, the heirs, by establishing a forbidden interracial marriage, may prevent the spouse from inheriting property he or she would otherwise have received. Spouses have also lost the right to workmen's compensation benefits 55 and the privilege against

47 A good example is the Louisiana statute which provides: "Miscegenation is the marriage or habitual cohabitation with knowledge of their difference in race between a person of Caucasian or white race and a person of the colored or negro race." LA. REV. STAT. 14:79 (1950). See State v. Brown, 236 La. 562, 108 So. 2d 233 (1959) (construing the meaning of "cohabit" under this statute), 19 LA. L. REV. 700 (1959).
49 E.g., Georgia, Kentucky, South Carolina and Wyoming.
52 Vernier, op. cit. supra note 11, § 44. Thus, it is arguable that either party to a forbidden marriage could enter into another marriage without any necessity of divorce. See Comment, 1 Mercer L. Rev. 83, 85 (1950).
53 Stevens v. United States, 146 F.2d 120 (10th Cir. 1944); Eggers v. Olson, 104 Okla. 297, 231 Pac. 483 (1924).
54 In re Shun Takahashi's Estate, 113 Mont. 400, 129 P.2d 217 (1942). But see Miller v. Lucks, 203 Miss. 824, 36 So. 2d 140 (1948).
a spouse’s testimony in a criminal trial\textsuperscript{56} as a result of the nullity of the marriage. The common law rule that children of a void marriage are illegitimate is still operative in some states, and would include the offspring of miscegenous couples.\textsuperscript{57} Some states have legitimatized the issue of void marriages by statute; but a few such statutes have been interpreted not to apply to progeny of an interracial marriage.\textsuperscript{58}

The rule that miscegenous marriages are void also creates the problem that the couple may marry in a state where the marriage is not prohibited and later enter a state where it is, creating difficulty in application of conflict of laws principles.\textsuperscript{59} Traditionally, a domicile state may refuse to recognize a marriage that is offensive to its policy.\textsuperscript{60} Where domiciliaries have left the domicile with the intention of evading local law and later return to reside in the domicile state, the courts, utilizing this traditional doctrine, have generally refused to recognize its validity,\textsuperscript{61} even though the marriage was valid when consummated. The same result is frequently achieved by express provision in the statutes.\textsuperscript{62} Otherwise, a couple desiring to marry could avoid the local statute simply by "carfare" to another state.\textsuperscript{63} The issue is more complex when parties domiciled and married elsewhere later move to a state which condemns the marriage. The statutes which refer to this problem have come out both ways.\textsuperscript{64} Parties assuming themselves to be validly married may thus find themselves subject to criminal prosecution—for miscegenation,

\textsuperscript{56} State v. Pass, 59 Ariz. 16, 121 P.2d 882 (1942).
\textsuperscript{57} See Note, 1 Duke B.J. 26, 31 (1951); Comment, 1 Mercer L. Rev. 83, 87 (1950).
\textsuperscript{58} Ibid.
\textsuperscript{59} See Ehrenzweig, Miscegenation in the Conflict of Laws, 45 Cornell L.Q. 659 (1960).
\textsuperscript{60} Restatement, Conflict of Laws §§ 133-34 (1934).
\textsuperscript{61} E.g., Baker v. Carter, 180 Okla. 71, 56 P.2d 85 (1937).
\textsuperscript{62} E.g., Va. Code Ann. § 20-58 (1960). In Naim v. Naim, 197 Va. 80, 87 S.E.2d 749 (1955), it was conceded that the Virginia couple had gone to North Carolina (which permits intermarriage between whites and Mongolians) to evade the Virginia law. This is condemned expressly by the Virginia statute, and the Virginia Supreme Court of Appeals held the marriage void.
\textsuperscript{63} It appears that the Kentucky and Wyoming statutes permit such an evasion. California and Utah also permitted such evasions. Note, 1 Duke B.J. 26, 35 (1951).
\textsuperscript{64} States with statutes holding marriages between parties domiciled and married in a foreign jurisdiction valid are Arkansas (if valid in foreign jurisdiction); Indiana (if persons become or are citizens of a foreign jurisdiction); Kentucky (if valid in foreign jurisdiction); Wyoming (if valid in foreign jurisdiction). States with statutes expressly declaring such marriages invalid are Delaware, Louisiana, Mississippi, Tennessee and Texas. The statutes of Alabama, Florida, Georgia, Maryland, Missouri, North Carolina, Oklahoma, South Carolina, Virginia and West Virginia make no direct statutory reference to the problem.
fornication or cohabitation—when they enter a state which does not legally recognize their marriage. A few courts have recognized property rights of nondomiciliary miscegenous couples in the forum state, even though they would not have recognized such rights if the couple had moved to the forum.\textsuperscript{66}

\textbf{JUDICIAL DECISIONS}

Miscegenation statutes have continually been attacked on constitutional grounds. The courts of last resort of fifteen states have reached the question of their constitutionality and all but one have upheld them.\textsuperscript{68} In addition, the federal circuit courts\textsuperscript{67} and the one federal court of appeals\textsuperscript{68} that have been confronted with the statutes have sustained their constitutional validity. The Alabama Supreme Court invalidated its statute in 1872,\textsuperscript{69} but this decision was promptly overruled.\textsuperscript{70} There is only one state supreme court decision standing which has struck down a miscegenation statute; that is the 1948 California decision of \textit{Perez v. Sharp}.\textsuperscript{71}

The statutes have been sustained in the face of arguments that they violated the impairments of contracts clause,\textsuperscript{72} the Civil Rights Act of

\textsuperscript{66} \textit{E.g.}, Whittington v. McCaskill, 65 Fla. 162, 61 So. 236 (1913); Miller v. Lucks, 203 Miss. 824, 36 So. 2d 140 (1948).


\textsuperscript{72} U.S. Const. art. I, § 10, State v. Tutty, 41 Fed. 753 (C.C.S.D. Ga. 1890); \textit{Ex parte} Kinney, 14 Fed. Cas. 602 (No. 7825) (C.C.E.D. Va. 1879); \textit{In re} Hobbs, 12 Fed. Cas. 262 (No. 6550) (C.C.N.D. Ga. 1871); Green v. State, 58 Ala. 190 (1877); Dodson v. State, 61
1866, the privileges and immunities clause, the equal protection clause and the due process clause. In *Perez*, the California statute was attacked on the novel ground that it violated the constitutional guarantee of freedom of religion. Commentators have also argued that the statutes are bills of attainder and violate the full faith and credit clause. One brief has argued that the statutes interfered with equitable administration of the immigration laws, and another that the statute was unconstitutionally vague in its definition of "Negro."

The Supreme Court of the United States has never ruled on the constitutionality of miscegenation legislation. *Pace v. Alabama* is often cited by courts and proponents of the statutes as support. In *Pace*, a Negro man and white woman had been convicted of fornication. The Alabama statute punished interracial adultery or fornication much more severely than when these offenses occurred between members of the same race. The Court upheld the statute against a claim that it discriminated on the basis of race, answering that there was no discrimination because both races were punished equally. In *McLaughlin v. State*, the Florida Supreme Court relied exclusively on *Pace* in upholding the
challenged statute, so the Supreme Court of the United States is apparently confronted with its precedent in the present term.\textsuperscript{83} \textit{Pace} is not strong precedent for the constitutionality of miscegenation statutes since it concerned only the state’s power to prevent illicit intercourse and did not involve any restriction on the right to marry. Also, as will be developed later, recent Supreme Court decisions indicate that the Court will no longer accept the “equal application” theory utilized in \textit{Pace}.

State decisions have generally upheld the statutes along three lines of reasoning, sometimes drawing upon all three for support. First, marriage is said to be subject to absolute regulation by the state in its police power, since marriage is a social right and not within the purview of fourteenth amendment liberties.\textsuperscript{84} These cases analogize miscegenation to incestuous marriage or marriages between feeble-minded persons which are barred by state laws.\textsuperscript{85} Second, it is said that there is no discrimination or denial of equality in the statutes since they apply equally to both races involved in the marriage.\textsuperscript{86} Under this “equal application” approach, taken by the Supreme Court in \textit{Pace}, neither party can complain since both are treated in an identical manner. Third, it is frequently argued that preservation of racial purity is a legitimate object for exercise of the legislative power to protect the health and welfare of its citizens.\textsuperscript{87} This view implies that even if marriage is a fourteenth amendment right, the legislature nevertheless may restrict this right to prevent the purportedly detrimental biological and social effects of miscegenation.

That these arguments are still very much alive is clear from the recent cases involving the constitutionality of miscegenation statutes. In \textit{Naim...}

\textsuperscript{83} Appellants, however, distinguish \textit{Pace} on the ground that the statute there provided a different punishment for interracial cohabitation than for cohabitation between members of the same race, whereas there is no comparable Florida statute which punishes couples of the same race for cohabitation. Brief for Appellants, pp. 9-14, McLaughlin v. Florida, \textit{prob. juris. noted}, 377 U.S. 914 (1964); 33 U.S.L. \textit{Week} 3137 (U.S. Oct. 20, 1964). If it desires to avoid overruling \textit{Pace}, the Supreme Court might seize upon this somewhat tenuous distinction.

\textsuperscript{84} \textit{E.g.}, Green v. State, 58 Ala. 190 (1877); State v. Gibson, 36 Ind. 389 (1871).

\textsuperscript{85} \textit{E.g.}, Scott v. State, 39 Ga. 321 (1869).

\textsuperscript{86} \textit{E.g.}, McLaughlin v. State, 153 So. 2d 1 (Fla. 1963), \textit{prob. juris. noted}, 377 U.S. 914 (1964); Jackson v. City & County of Denver, 109 Colo. 196, 124 P.2d 240 (1942); State v. Jackson, 80 Mo. 175 (1883).

\textsuperscript{87} \textit{E.g.}, Dodson v. State, 61 Ark. 57, 31 S.W. 977 (1895); State v. Brown, 236 La. 562, 108 So. 2d 233 (1959).
v. Naim. the Supreme Court of Appeals of Virginia upheld the statute challenged there on the basis that the legislature had complete power to control the vital institution of marriage. The parties, a white woman and a Chinese man, had been married in North Carolina, which permits such a marriage. The record was clear that prior to the marriage the woman was a resident of Virginia, and the man was not. It was also clear that both returned to Virginia shortly after the marriage and were residing there. Virginia does not recognize such a marriage if between Virginia residents or if Virginia residents go elsewhere to evade the statute. In addition to citing the long line of cases upholding similar statutes, the court relied on recent United States Supreme Court decisions for support. Shelley v. Kraemer was cited for language distinguishing social legislation from other legislation affecting fourteenth amendment rights; the court found that marriage was in the former category. The court also sought support in the language of Brown v. Board of Educ., where the Supreme Court referred to education as a "foundation of good citizenship;" the Virginia court stressed that interracial marriage could hardly be considered necessary for good citizenship.

Upon appeal, Naim afforded the United States Supreme Court an opportunity to rule on the constitutionality of miscegenation laws. After hearing oral argument, the Court found the record incomplete with respect to the domicile of the parties and remanded to the Virginia Court of Appeals so that the case could be remanded to the trial court. The Court of Appeals refused to comply with the mandate, stating there was no Virginia procedure available to reopen a cause of action. On application to recall the remand the Court dismissed the appeal on the ground that the second Virginia decision left the case devoid of a substantial federal question.

In McLaughlin v. State, the Florida Supreme Court unanimously upheld that state's interracial cohabitation statute in a summary opinion.

89 334 U.S. 1 (1948).
92 197 Va. 734, 90 S.E.2d 849 (1956).
94 153 So. 2d 1 (Fla. 1963), prob. juris. noted, 377 U.S. 914 (1964).
The defendants, a Negro man and a white woman, were each sentenced to thirty days in jail and fined $150 upon a jury finding that they had lived together illicitly in violation of the Florida Code. Unlike the situation in *Pace*, Florida does not prohibit cohabitation between members of the same race; there is, however, a fornication statute of general applicability. The defendants contended that they had been denied equal protection of the laws on the grounds that:

Firstly, the law provides a special criminal prohibition on cohabitation solely for persons who are of different races; or, secondly, if this special statute is equated with the general fornication statute, the higher penalties are imposed on the person [*sic*] whose races differ than would be applicable to persons of the same race who commit the same acts.

Relying on "stare decisis and the precedent of the well written decision in *Pace*," the court held that the cohabitation statute did not deny equal protection since both races were equally punished under its provisions. Noting that the defendants' appeal was but a "mere way station on the route to the United States Supreme Court," the court stated that:

The Federal Constitution, as it was when construed by the United States Supreme Court in that case [*Pace*], is quite adequate but if the new-found concept of "social justice" has out-dated "the law of the land" as therein announced and, by way of consequence, some new law is necessary, it must be enacted by legislative process or some other court must write it.

It would appear that *McLaughlin*, now pending before the Supreme Court, at least confronts the Court with its *Pace* precedent; other issues have also been raised. The constitutionality of the Florida miscegenation statute is challenged on the ground that the defendants were denied due process and equal protection of the laws, in that they were deprived of the defense of common-law marriage which would otherwise have been available to them. The trial judge instructed the jury that there could be no valid common-law marriage between the defendants

95 Fla. Stat. Ann. § 798.05 (1961). The statute provides: "[A]ny negro man and white woman, or any white man and negro woman, who are not married to each other, who shall habitually live in and occupy in the night-time the same room shall each be punished by imprisonment not exceeding twelve months, or by fine not exceeding five hundred dollars."

96 See note 83, supra.

97 153 So. 2d at 2.

98 Id. at 3.

99 Ibid.

under the law of Florida. In addition, the Florida statute is attacked on the grounds that the definition of Negro is unconstitutionally vague, or in the alternative, that the state did not satisfy the statutory requirements of proof.\textsuperscript{101} The Florida provision which defines Negro as “every person having one-eighth or more of African or Negro blood”\textsuperscript{102} applies to both the illicit cohabitation and the miscegenation statutes. The Florida Supreme Court dealt with neither the common-law marriage nor vagueness contentions. A reversal on the ground of vagueness or failure of proof would afford a narrow basis of decision. On the other hand, a decision by the Court striking down the Florida miscegenation statute, as counsel for appellants urged on oral argument,\textsuperscript{103} would be much broader than warranted by the facts. In any event, a decision overruling \textit{Pace}, which is quite probable, would cast considerable doubt on the validity of miscegenation statutes because of the reliance placed upon that case by courts in upholding their constitutionality.

In \textit{Perez v. Sharp},\textsuperscript{104} the California Supreme Court struck down that state's miscegenation statute by a 4-3 decision. The case arose when a white woman and a Negro man sued for a writ of mandamus compelling the Los Angeles County Clerk to issue them a marriage license after he had refused, relying on the miscegenation statute. Justice Traynor, announcing the decision of the court, found that the statute violated the equal protection clause of the United States Constitution. Under the equal protection clause, he said, the legislation could be sustained only if there was a clear and present danger established, or alternatively, if there was a reasonable classification by the legislature. The burden was placed upon the legislature to overcome a presumption that the statute was invalid since a racial classification was involved. It was held that the statute survived neither test and was, in addition, unconstitutionally vague. Justice Carter concurred\textsuperscript{105} on the ground that there was a denial of due process, reasoning that marriage was a fourteenth amendment liberty, and that the policy evinced in the statute was clearly weak, since California recognized “carfare” marriage whereby local residents went to another state to avoid the California statute. The California statute also imposed no criminal sanctions. Also concurring, Justice Ed-

\begin{itemize}
  \item \textsuperscript{101} \textit{Id.} at pp. 27-30.
  \item \textsuperscript{102} \textit{Fla. Stat. Ann.} § 1.01(6) (1961).
  \item \textsuperscript{103} 33 U.S.L. Week 3137-38 (U.S. Oct. 20, 1964).
  \item \textsuperscript{104} 32 Cal. 2d 711, 198 P.2d 17 (Perez v. Lippold) (1948).
  \item \textsuperscript{105} \textit{Id.} at 732, 198 P.2d at 29.
\end{itemize}
monds found that the statute was an infringement of religious freedom, since the parties, Roman Catholics, were denied reception of a Church sacrament, Matrimony. In his dissent, Justice Shenk, relying upon a presumption that the legislation was constitutional, argued that the statute should be sustained since it had a rational basis and a legitimate legislative purpose. He also concluded that since all races were treated equally, it was not proper for the court to go behind the legislative findings of fact.

Perez was the first case to inquire into the evidence and support for the statute; previous decisions had all rested on "well authenticated facts" with very little reference to authority. The cases since Perez, have again returned to the older pattern of upholding the statute without any real inquiry into the facts supporting the statute. Nevertheless, the variance of reasoning in the four opinions in Perez suggests that it could be distinguished by other courts.

SOCILOGICAL CONTEXT

Experts in the field have concluded that fear of miscegenation and interracial intercourse is at the heart of the white man's desire to keep the Negro permanently segregated. Myrdal lists six items in the "white man's rank order of discriminations" and "highest in this order stands the bar against intermarriage and sexual intercourse involving white women." Miscegenation is followed on this list respectively by social conventions, public facilities, political franchise, legal equality and employment. Greenberg has said that "much of the last-ditch opposition to school desegregation, and other desegregation, is based on the idea it

106 Id. at 740-42, 198 P.2d at 34-35.
107 Id. at 742, 198 P.2d at 35.
108 Note, 58 Yale L.J. 472 (1949); Note, 41 Va. L. Rev. 860 (1955). In State v. Jackson, 80 Mo. 175, 179 (1883) the court said:
It is stated as a well authenticated fact that if the issue of a black man and a white woman and a white man and a black woman, intermarry, they cannot possibly have any progeny, and such a fact sufficiently justifies those laws which forbid the intermarriage of blacks and whites.
In Scott v. State, 39 Ga. 321, 323 (1869), the court said:
Our daily observation shows us, that the offspring of these unnatural connections are generally sickly and effeminate, and that they are inferior in physical development and strength to the full blood of either race.
111 1 Myrdal, An American Dilemma 60 (1944).
will eventually lead to intermarriage."112 With miscegenation at the crux of racial prejudice in the United States, it is then not surprising that state legislatures have expressed social policy by legally condemning miscegenous marriages and making them subject to criminal sanctions. The geographical distribution of the statutes has followed the lines of racial feeling against Negroes in the South and Orientals in the western states. The inclusion or exclusion of other so-called racial groups in different statutes appears due to fortuitous historical circumstances and local prejudices within particular states.118

The Negro does not concur in the white man’s emphasis of miscegenation as the crucial problem; Myrdal found that the rank of grievances for the Negro is exactly reversed, with miscegenation being the least significant among the barriers of segregation.114 Negro writers have often claimed that there is no desire among their people to intermarry with whites,118 and this claim was borne out by a recent Ford Foundation survey of 721 Chicago Negro families which concluded: “there is no evidence of a desire for miscegenation, or even interest in promoting it, except among a very tiny minority.”116 Reflecting both this minimal significance of miscegenation for the Negro and a recognition of the highly inflammatory nature of the issue, the NAACP and other civil rights groups have until very recently refrained from attempting to have miscegenation statutes struck down.117 But Negroes do object to the statutes in theory if not in practice. There is a general contention that freedom of the individual is curtailed, but it is also argued that the statutes encourage illicit intercourse and exploitation of Negro women since there is no imposition of the normal marital consequences of such intercourse upon the white male.118 There also exists a feeling that such statutes are a stigma upon the Negro race to the extent that they imply Negroes are not fit to marry white people;

114 1 Myrdal, op. cit. supra note 111, at 61.
115 E.g., Logan, A Negro’s Faith in America 27 (1946).
117 Weinberger, A Reappraisal of the Constitutionality of Miscegenation Statutes, 42 Cornell L.Q. 208, 210-11 (1957); Greenberg, op. cit. supra note 112, at 344. But the appellants in McLaughlin are represented by attorneys of the NAACP Legal Defense and Education Fund.
118 1 Myrdal, op. cit. supra note 111, at 63.
one writer has said the proposition "that all colored folk shall write
themselves down as limited by a general assertion of their unfitness to
marry other decent folk is a nightmare."119 Some commentators argue
that miscegenation statutes serve only to offer legal support for the
popular concept that one race is inferior.120

The possibility that the statutes may do no more than create a stamp
of inferiority upon certain races is borne out by the fact that they do
not accomplish their ultimate purpose of preventing mixed breed off-
spring. From one-third to three-fourths of all Negroes have some mixed
blood in them, and it has been primarily illicit intercourse rather than
actual intermarriage that has produced this high ratio.121 The ban
on marriage has thus not had much of an effect in preventing mixed
breeds. Indeed, as noted above, the statutes may actually have promoted
illicit relations since the white male will bear no marital consequences.
It is true that the number of mulattoes born each year has decreased
significantly in the twentieth century, but Myrdal concluded that
this has been due more to factors such as increased knowledge of
birth control than the statutes.122 Even where there are no miscegena-
tion statutes, interracial marriage is minimal due to social pressures,123
and offspring are infrequent due to birth control. Where two individuals
do wish to marry, it is not likely that a miscegenation statute will prevent
them from doing so; sexual and emotional desires are not easily curbed
by mere legislation. The couple may go to a state which permits the mar-
riage, either remaining there or returning to their native state, or they may
find someone within the state to marry them and take their chances with
the law. If the couple is deterred at all, it is more likely to be because of
social pressures and the difficulties their children will face in adjusting to
a society which condemns such marriages.

Fourteenth Amendment Attacks

It was noted above that miscegenation statutes have been attacked
on a number of constitutional grounds. This article will be limited to a

119 DuBois, The Crisis 106 (1920) as quoted in 1 Myrdal, op. cit. supra note 11, at 64.
120 See Weinberger, supra note 117, at 222. See generally Riley, Miscegenation Statutes—
A Re-Evaluation of Their Constitutionality in Light of Changing Social and Political Con-
121 Herskovitz, Anthropometry of the American Negro 177 (1930); Comment, 21
Rocky Mt. L. Rev. 425, 428 (1949).
122 1 Myrdal, op. cit. supra note 111, at 133.
123 Id. at 606-07.
discussion of fourteenth amendment attacks; certainly the most significant and promising in modern constitutional law. Attention will be principally directed to due process and equal protection, after a brief survey of the ground of freedom of religion.

**FREEDOM OF RELIGION**

*Perez* was the first case in which miscegenation statutes were assailed as a denial of freedom of religion. The parties were both Catholic, and claimed that since the Catholic Church does not condemn interracial marriage, their freedom to receive the Church sacrament of Matrimony had been restricted. Justice Edmonds, in his concurring opinion, said that marriage is "grounded in the fundamental principles of Christianity" and that the right to marry is therefore "protected by the constitutional guarantee of religious freedom . . . ." He further insisted that legislation must pass a much stricter test when it is alleged to infringe one of the specific guarantees of the first amendment rather than some vague notion of due process.

If miscegenation statutes do restrict religious freedom, then the state must bear the burden of proving a "clear and present danger" or exceptional circumstances to validate the restriction. It is apparent that a legislature would find it nearly impossible to prove that miscegenation presents a "clear and present danger." But it is not so clear that miscegenation involves religious freedom. It must be conceded that all Christian sects and most other religions in the United States do presuppose marriage and a family as important to a good life. It would appear that marriage is more important for a good religious life than other matters, such as refusal to salute the flag, refusal to serve on a jury, and distribution of religious literature, which have been held

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125 32 Cal. 2d at 740, 198 P.2d at 34 (1948).


128 See pp. 85-86 *infra*.


to be within the first amendment protection of religious freedom. But those matters are distinguishable from miscegenation. For example, in the flag-salute case, it was a religious tenet of the complaining children that they not salute the flag; the children were required not to do so by their religion. Neither the Catholic Church nor any of the other major religions require that their members marry as a matter of religious faith, and certainly there is no requirement or even encouragement,\textsuperscript{132} of interracial marriage.

The Supreme Court has often distinguished religious beliefs from religious acts; freedom of the former is considered absolute but the state may reasonably restrict the latter.\textsuperscript{133} The Court upheld prohibitions on polygamous marriage despite the fact it was a principle of the Mormon faith.\textsuperscript{134} In these cases the Court said that marriage was within the control of state legislatures and the state's finding that a marriage of one man and one woman was best for the public welfare was an adequate basis upon which to restrict religious freedom. Miscegenous marriages offer an even weaker case since they are not a practice required by religions. A state's finding that interracial marriages are inimical to public welfare would seem to stand up as well as the basis of anti-polygamy statutes when judged solely from the criterion of freedom of religion—the discriminatory aspects of the statute do not enter this judgment. Also when religious acts, as opposed to beliefs, are harmful to other members of society, they can be curtailed. For example, if the children who refused to salute the flag in West Virginia State Bd. of Educ. v. Barnette\textsuperscript{135} had also demanded that the flag ceremony be abolished completely, it is clear they would not have prevailed. In such a case, the Court initially determines whether a religious belief or a religious practice is involved. If it is determined that it is a religious practice, then, within very broad limits, the Court will permit restrictions to be imposed upon religious minority sects if their practices are deemed to be harmful to other members of society or to the members of the sect. This approach to religious practices would be the modern

\textsuperscript{132} One prominent Catholic writer has indicated that although the Church does not forbid interracial marriage, it does attempt to dissuade persons from entering into such unions. \textit{La Farge, The Race Question and the Negro} 196-97 (1943).

\textsuperscript{133} Cantwell v. Connecticut, 310 U.S. 296, 303-04 (1940).

\textsuperscript{134} Cleveland v. United States, 329 U.S. 14, 18 (1946); Davis v. Beason, 133 U.S. 333 (1890); Reynolds v. United States, 98 U.S. 145 (1878). In \textit{Cleveland}, the Supreme Court reaffirmed the earlier decisions in a case involving a Mann Act prosecution of polygamists.

\textsuperscript{135} 319 U.S. 624 (1942).
rationale of the polygamy cases. It seems clear that marriage would fall into the category of religious practices.

Freedom of religion does not appear to be a very promising avenue for an attack upon miscegenation statutes. Miscegenation does not fall into the category of religious beliefs where the strict clear and present danger test would be applicable. It is questionable whether the statutes can be properly categorized as any infringement on freedom of religion. Added to this is the consideration that a freedom of religion argument does not include the racial aspect of the statutes which is covered by the due process and equal protection arguments. It accordingly seems that on balance, due process and equal protection offer the more promising grounds for an attack on miscegenation statutes.

**DUE PROCESS**

It has sometimes been suggested that to raise the fourteenth amendment due process clause one must have a right that has been abused or infringed.\(^{136}\) Under this view, if marriage is to receive the protection of the due process guarantees, it must be found to be a fundamental right or "liberty" protected by the fourteenth amendment. Many state courts have taken this approach and have found no such right with respect to marriage.\(^{137}\) Most of the commentators,\(^{138}\) and Justice Traynor in *Perez*, have thus started their analysis of miscegenation statutes by asserting that the right to marry is protected by the fourteenth amendment. The Supreme Court has, in dicta over the years, reached the same conclusion. In *Meyer v. Nebraska*,\(^{139}\) the Court said, in speaking of liberty under the fourteenth amendment, that "without doubt it denotes not merely freedom from bodily restraint but also the right of the individual to . . . marry, establish a home and bring up children . . . ."\(^{140}\) In *Skinner v. Oklahoma*,\(^{141}\) the Court noted that "we are dealing here with legislation which involves one of the basic civil rights of man. Marriage and procreation are fundamental to the very existence and survival of the

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136 See Note, 1 Stan. L. Rev. 289, 292 (1949).
137 See cases cited note 76 supra. The cases that have found that marriage is not a fourth amendment right have often supported that decision by citing Supreme Court decisions (such as the polygamy cases) stating that marriage is within the control of the states. This is circular reasoning since a right or liberty can be subject to the control of the states so long as the controls satisfy due process requirements.
138 E.g., Weinberger, supra note 117, at 212; Riley, supra note 120, at 33.
139 262 U.S. 390 (1923).
140 Id. at 399.
141 316 U.S. 535 (1942).
race."\(^{142}\) It would thus appear that the Court has concluded that marriage, being a fundamental institution of our society, is within the scope of the fourteenth amendment, and thus that the right to marry is protected by due process.

Even if it is thought that marriage itself is not a fourteenth amendment "liberty" as conceived by the framers, the due process clause as expanded in the twentieth century should still be available for its protection. Whenever a legislature acts in an area of public concern, its actions must comply with the fundamental fairness demanded by due process.\(^{143}\) In *Bolling v. Sharpe*,\(^{144}\) the Court was limited to use of the fifth amendment due process clause in passing upon the constitutionality of school segregation in the District of Columbia. The discrimination inherent in segregation was held a deprivation substantial enough to violate due process, and there was no discussion of whether public education involves a right or a liberty:

Although the Court has not defined "liberty" with any great precision, that term is not confined to mere freedom from bodily restraint. Liberty under law extends to the full range of conduct which the individual is free to pursue, and it cannot be restricted except for a proper governmental objective. Segregation in public education is not reasonably related to any proper governmental objective, and thus it imposes on Negro children of the District of Columbia a burden that constitutes an arbitrary deprivation of their liberty in violation of the due process clause.\(^{145}\)

Miscegenation statutes not only have classification by race, but they also severely restrict individual action in choice of marital mates. There should be little doubt but that this legislation should be subjected to the due process requirements. These requirements—that legislation restricting individual action have a reasonable basis and be reasonably related to a legitimate legislative purpose—will be discussed below.

**EQUAL PROTECTION**

Just as in the case of the due process clause, it has sometimes been thought imperative to establish a "right" in order to raise the equal pro-

\(^{142}\) *Id.* at 541.

\(^{143}\) See Cafeteria Workers v. McElroy, 367 U.S. 886 (1961). The Court, upholding the dismissal of a government employee, inquired into whether the dismissal was consonant with due process despite the fact there is no right to government employment. The Court said that the question of due process "cannot be answered by easy assertion that, because she had no constitutional right to be there in the first place, she was not deprived of liberty or property by the Superintendent's action." *Id.* at 894.

\(^{144}\) 347 U.S. 497 (1954).

\(^{145}\) *Id.* at 499-500.
tection clause.\textsuperscript{146} This would seem unnecessary. There is already an inherent right involved—the right of the individual not to be discriminated against. The assertion of equal protection claims may on occasion involve specific rights, such as property rights, but this is not essential. In \textit{Brown v. Board of Educ.},\textsuperscript{147} the Court struck down segregation in public schools as a violation of equal protection without any consideration of whether a right was involved; the very fact that children were discriminated against was a denial of equal protection. Thus, even if the extreme view of due process mentioned previously is accepted, \textit{i.e.}, that marriage is not a fourteenth amendment liberty and due process is therefore not applicable, nonetheless, the miscegenation statutes would still be open to attack on the basis of the equal protection clause.

The decisions sustaining miscegenation statutes have usually found no discrimination in the statutes and hence no violation of equal protection, because the statutes apply equally to both races involved in a particular prohibited marriage.\textsuperscript{148} This "equal application" theory has lost its validity as a proper constitutional approach to equal protection in recent Supreme Court cases.

It was argued in \textit{Shelley v. Kraemer}\textsuperscript{149} that there was no discrimination in restrictive covenants based upon race since the state courts were as willing to enforce restrictive covenants against whites as against Negroes. The Court's reply was that "equal protection of the laws is not achieved through indiscriminate impositions of inequalities."\textsuperscript{150} The Court in \textit{Brown} established that "separate but equal" facilities do not satisfy the demands of the equal protection clause since separate facilities are "inherently unequal."\textsuperscript{151} In recent cases where the argument was made that segregation statutes are valid on the ground that they apply equally to both races, the Court has held that such equality is "superficial."\textsuperscript{152} Thus, it would seem that the fact that both whites and Negroes are prevented from intermarriage does not remove inequality by equal discrimination.

\textsuperscript{146} E.g., Weinberger, \textit{supra} note 117, at 212. Justice Traynor, in \textit{Perez}, also asserted that freedom of marriage is a right and hence within the equal protection clause. 32 Cal. 2d at 714-15, 198 P.2d at 18-19.

\textsuperscript{147} 347 U.S. 483 (1954).

\textsuperscript{148} See cases cited note 86 \textit{supra}.

\textsuperscript{149} 334 U.S. 1 (1948).

\textsuperscript{150} \textit{Id}. at 22.

\textsuperscript{151} 347 U.S. at 495.

Shelley appropriately pointed out that the fourteenth amendment protects "personal rights"; the fact that a statute does not discriminate between races is of no avail as long as individuals are denied equal protection. When a Negro is denied the right to marry a white person solely because he is a Negro, the statute discriminates against him as an individual. Any particular application of the statute will of necessity discriminate against individuals. The theory that all races are treated equally in miscegenation statutes can be further attacked on grounds that the statutes clearly favor the white race.

Miscegenation statutes thus do discriminate on the basis of race, and the discrimination is even more serious than segregation of public facilities since individuals are restricted in their choice of a mate solely on the basis of race and there is no equal alternative. Statutes which discriminate against certain persons must comply with requirements of the equal protection clause; the legislation can be upheld only if the discrimination is based upon a reasonable classification with a legitimate legislative object in view—requirements substantially the same as those of the due process clause.

**Reasonable Basis and Reasonable Classification**

A state's police power is limited by the due process and equal protection clauses of the fourteenth amendment. Since miscegenation legislation restricts the rights of individuals to marry and also classifies them according to race, the requirements of both clauses must be satisfied if the police power is to prevail. The test applied to state regulations under both clauses is one of reasonableness. In order to restrict activities protected by the due process clause the statute must have a reasonable basis and be reasonably related to a legitimate legislative purpose. It

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154 Professor Wechsler comments that the nub of miscegenation and other segregation cases is freedom of association; conceding equal facilities, the right of the white majority not to associate must be weighed against the right of the Negro minority to associate freely. Wechsler, Toward Neutral Principles of Constitutional Law, 73 Harv. L. Rev. 1, 34 (1959); see Note, 20 La. L. Rev. 278, 282-84 (1960). Although miscegenation statutes implicitly deny freedom of association to individuals, such an analysis seems inappropriate. Whereas Brown compelled whites to associate with Negroes in public schools, where attendance is mandatory, individuals intermarry voluntarily when they desire to associate with one another; there is no compulsive association on either side.

155 See pp. 80-82, infra.

will be struck down only if it is unreasonable and arbitrary. Likewise, the legislature may classify and distinguish among individuals if the classification is a reasonable one and the statute is reasonably related to a proper legislative object.\footnote{157} A reasonable discrimination then does not violate equal protection. Under both clauses, the Supreme Court has generally held that any rational basis will sustain state legislation.\footnote{158} Three grounds have been advanced as providing a legitimate purpose for miscegenation statutes: scientific, sociological, and alleviation of racial tension.

**SCIENTIFIC BASIS**

Courts upholding miscegenation prohibitions have referred to the "deplorable results" that would occur in the "mongrel breeds" produced by intermarriage.\footnote{159} Reference to scientific and sociological evidence of the undesirability of amalgamation is frequently made, but the courts have rarely examined any of this evidence.\footnote{160} The California Supreme Court in *Perez* made the first real inquiry into the evidence and found that the weight of the evidence refuted the view that the Negro race or the progeny of interracial marriage is inferior. It is not the purpose of this article to reach any conclusion regarding the available scientific data on the results of miscegenation; it will suffice to indicate by a brief survey of the materials that there may arguably be sufficient evidence on both sides of the controversy to afford some basis for a legislature to take either side. It is clear that if a danger of harmful consequences affecting the public health is shown, there is a legitimate legislative object.\footnote{161}

A large number of studies and research projects have concluded that the Negro race is scientifically inferior to the Caucasian race and that miscegenation is undesirable.\footnote{162} Justice Shenk in his dissent in *Perez*

\footnote{157} Borden's Farm Prods. Co. v. Baldwin, 293 U.S. 194 (1934); American Sugar Ref. Co. v. Louisiana, 179 U.S. 89 (1900).
\footnote{158} See cases cited note 203 infra.
\footnote{159} E.g., Scott v. State, 39 Ga. 321, 323 (1869); Lonas v. State, 50 Tenn. 310, 311 (1871); Naim v. Naim, 197 Va. 80, 90, 87 S.E.2d 749, 756 (1955).
\footnote{160} Recent school segregation decisions have examined such evidence. One court refused to order desegregation, concluding that the evidence and studies revealed that the intelligence and aptitude of Negro children is considerably inferior to that of white children, due to "physiological and psychological characteristics of the two races." Stell v. Savannah Bd. of Educ., 220 F. Supp. 667, 682-83 (S.D. Ga. 1963), rev'd, 318 F.2d 425 (5th Cir. 1963); cf. Evers v. Jackson Municipal Separate School Dist., 232 F. Supp. 241 (S.D. Miss. 1964).
\footnote{161} West Coast Hotel Co. v. Parrish, 300 U.S. 379 (1937).
\footnote{162} Davenport & Steggerda, Race Crossing in Jamaica (1929); Embree, Brown
cited ten authorities, one of which itself cited ten additional authorities, which would support a legislative finding that amalgamation of races is inimical to the public welfare.\textsuperscript{163} These studies, frequently by notable scientists, have found, \textit{inter alia}, that Negroes are mentally inferior to whites,\textsuperscript{164} that Negroes are physically inferior to whites (usually based on greater susceptibility to certain diseases),\textsuperscript{165} and that racial mixing leads to retrogression and inferior progeny.\textsuperscript{166} The considerable number of scientists who have concluded that interracial marriage is harmful are often ignored by those who cite contrary evidence. Most of this research occurred in the 1920's and early 1930's; more recent works have tended to reach opposite conclusions.\textsuperscript{167} There has not been a great deal of published research supporting either position since World War II.

The authorities finding that racial intermixture has no harmful results are quite numerous. Some have even concluded that due to a certain "hybrid vigor," interracial marriage is desirable and the offspring are superior; the Hawaiian population, among others, is often cited as an example.\textsuperscript{168} Earlier works that concluded Negroes were inferior have been criticized for ignoring environmental factors in assessing Negro intelligence tests or disease rates.\textsuperscript{169} Justice Traynor's opinion in \textit{Perez Americans 40 (1943); Gates, \textit{Heredity in Man} 329 (1929); George, \textit{The Biology of the Race Problem} (1962); Gregory, \textit{The Menace of Color} 229 (1925); Holmes, \textit{The Negro's Struggle for Survival} 47 (1937); Lasker, \textit{Filipino Immigration} 35 n.3 (1931); Peterson, \textit{5 Mental Measurement Monographs} 151 (1929); Putnam, \textit{Race and Reason} (1961); Reuter, \textit{Race Mixture} 107, 108 (1931); Woodruff, \textit{The Expansion of Races} 251 (1909); Castle, \textit{Biological and Sociological Consequences of Race Crossing}, 9 \textit{Am. J. Physical Anthropology} 152-53 (1926); Davenport, \textit{State Laws Limiting Marriage Selection Examined in the Light of Eugenics}, 9 \textit{Eugenics Record Office Bull.} (1913); Dixon, \textit{Morbid Proclivities and Retrogressive Tendencies in the Offspring of Mulattoes}, 20 \textit{A.M.A.J.} 1 (1893); Hoffman, \textit{Race Traits and Tendencies of the American Negro}, XI \textit{Publications Am. Economic Ass'n} 146-48 (1896); Matas, \textit{Surgical Peculiarities of the Negro}, 4 \textit{Transactions Am. Surgical Ass'n} (1896); Mjoen, \textit{Harmonic and Disharmonic Race Crossings}, 2 \textit{Eugenics in Race and State} 41-61 (1923).

\textsuperscript{163} 32 Cal. 2d at 756-59, 198 P.2d at 44-48.

\textsuperscript{164} \textit{E.g.}, Reuter, \textit{op. cit. supra} note 162, at 107-08.

\textsuperscript{165} \textit{E.g.}, Holmes, \textit{op. cit. supra} note 162, at 47.

\textsuperscript{166} \textit{E.g.}, Davenport \& Steggerda, \textit{op. cit. supra} note 162; Gates, \textit{op. cit. supra} note 162, at 329.


\textsuperscript{168} See authorities discussed in Cummins \& Kane 47-49; Note, 11 \textit{Mont. L. Rev.} 52, 55-57 (1950).

\textsuperscript{169} \textit{E.g.}, Klineberg, \textit{Negro Intelligence and Selective Migration} 59 (1935); 2 Myrdal, \textit{An American Dilemma} 147-49 (1944).
dismissed all of the authority opposed to racial mixture because of the absence of proper environmental considerations.170 The famous Alpha Test of World War I, where statistics revealed that the average northern Negro had a higher aptitude than the average southern white,171 is frequently utilized by proponents of this position. Some projects that earlier found race crossing to be undesirable have since been reinterpreted as having actually supported a contrary result.172 In 1951, UNESCO formed a special committee of eminent scientists to study interracial marriage. The committee concluded that there was no reliable evidence of any ill effects from racial mixture and there was therefore no biological justification for a restriction on marriage between racial groups.178

The more recent studies have also concluded that there is really no evidence of any "pure" races in existence.174 Justice Traynor in Perez emphasized that racial hybridization has long been occurring in the United States.175 The evidence is clear that the vast majority of the Negro population has some Caucasian blood.176 The modern anthropological view is that it can no longer be assumed there are any pure races which have not been influenced by mixed blood.177 In view of this evidence, it would seem that any legislative attempt to preserve racial purity and integrity for biological reasons is rather limited in its potential for accomplishment.

Nonetheless, there is still considerable debate in comparatively recent studies as to the desirability of racial intermixture and the inferiority

171 Yerkes, Psychological Examining in the U.S. Army, 15 Memoires Nat'l Academy of Science 705 (1921); Klineberg, Race Differences 182 (1935); see Montague, op. cit. supra note 167.
172 The report of Davenport & Steggerda, op. cit. supra note 162, which concluded against mixed breeding, was subsequently criticized as not having actually proven the conclusions that were reached. Klineberg, Characteristics of the American Negro 328 (1944); Krober, Anthropology 200-01 (1948); see Cummins & Kane 47-48, where the Davenport Study and subsequent comment are described.
175 32 Cal. 2d at 727, 198 P.2d at 26 (1948).
176 Herskovitz, op. cit. supra note 121, at 177; see notes 121-22 supra and accompanying text.
177 E.g., Dunn & Dobzhansky, Heredity, Race and Society (1952), summarized in Cummins & Kane 49.
of the Negro race. For example, a report prepared in 1962\textsuperscript{178} was recently criticized by a committee of the American Association of the Advancement of Science. After reviewing this report, the committee disapprovingly concluded:

We believe that the public should be informed that any effort to use purported "scientific evidence" regarding biological distinctions between racial groups to screen an attack on the principle of equal civil rights for all citizens finds no support in either the available evidence or in the principles of science.\textsuperscript{179}

The committee's criticism, in turn, was described by one observer as "a tissue of fallacies and confusion."\textsuperscript{180} Even in the arena of school segregation, the desirability of racial mixture is still questioned by some courts, which follow \textit{Brown v. Board of Educ.}\textsuperscript{181} only with reluctance. After introduction of considerable scientific evidence, one such court recently concluded:

[W]hite and Negro pupils of public school age have substantially different educational aptitudes and learning patterns which are innate in character and do not arise out of economic or social circumstance and which cannot therefore be changed or overcome by intermixed schooling or other change of condition or environment within the powers of this Court to decree.\textsuperscript{182}

Thus, even today, a legislature can find some scientific support for the position that miscegenation should be banned. There was, of course, an even stronger basis when the statutes were enacted, due to the predominance at that time of the "inferiority" view. Whether the legislative basis is "rational" may turn on the presumption that is applied to the legislation,\textsuperscript{183} or upon whether modern scientists can reach agreement with recent studies finding no detrimental effects from miscegenation. There are claims to that effect which appear to be valid.\textsuperscript{184}

\section*{Sociological Basis}

The courts upholding miscegenation statutes have not used the sociological arguments to their best advantage. With the scientific evidence

\begin{thebibliography}{9}
\bibitem{178} \textit{George}, \textit{op. cit. supra} note 162.
\bibitem{180} \textit{Letter From Doctor Putnam to Editor}, 142 \textit{Science} 1419 (1963).
\bibitem{181} 347 U.S. 483 (1954).
\bibitem{183} \textit{ supra} note 174, at 217-22. The majority of recent studies do appear to refute the contention that there are harmful biological consequences of miscegenation.
\bibitem{184} \textit{ supra} note 174, at 217-22. The majority of recent studies do appear to refute the contention that there are harmful biological consequences of miscegenation.
\end{thebibliography}
weakening, reliance upon the contention that there are harmful social consequences of miscegenation becomes necessary. The state has a natural interest in maximizing the number of happy marriages and healthy homes in the community; this is well recognized in state regulations of marriage through age limitations, blood test requirements, incest and affinity statutes, and sterilization of mentally incompetent persons. The interest of the state in successful marriages is as vital and as closely related to public health and welfare as are any possible biological effects of miscegenation.

The argument can be advanced that miscegenous marriages have minimal potential for success due to the fact that society at large frowns upon such marriages and the couple is accordingly subjected to great burdens and difficulties. This is usually intensified by family objections and problems in raising the children. It is debatable, however, whether the state has a sufficiently strong interest to warrant barring couples from a marriage of their choice on this ground. In fact, to a lesser extent, the same argument could be made against religious intermarriages; different objections would be raised, however, due to the first amendment.

While mentally incompetent persons are not permitted to marry, in part because they or their offspring will probably become a financial burden to the state, this reasoning cannot be applied to miscegenation. Thus, the decision whether they are willing to undertake the social burdens of intermarriage is perhaps best left to the couple, and a reasonable standard might be that other members of society must be adversely affected before it is proper for the state to make this decision.

The social argument becomes more persuasive, however, when the children of such a marriage are considered. They will undoubtedly have difficulty adjusting to their environment; they cannot escape being singled out for "classification and categorical treatment." The problem of identification may be insuperable; both races may shun the child. The Louisiana Supreme Court in 1959 based its decision partially on this ground in upholding a miscegenation statute. It was the first state court to do so. In considering the effect of miscegenation on the children, the court said:

185 Note, 11 W. Res. L. Rev. 93, 100 (1959); 1 MYRDAL, AN AMERICAN DILEMMA 606-07 (1944).
186 See Note, 11 Mont. L. Rev. 53, 59 (1950). It is often argued that there will be adverse effects on other members of society due to increased racial tension. See pp. 76-78 infra.
187 REUTER, op. cit. supra note 162, at 30.
Such children have difficulty in being accepted by society, and there is no doubt that children in such a situation are burdened, as has been said in another connection, with "a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely to ever be undone."189

Ironically, the quotation used by the court is from the 1954 decision of Brown v. Board of Educ.190 Mulatto children do have a stigma imposed upon them which, unlike the stigma of segregation in the schools, can not be entirely eliminated. The one flaw in this argument is that mulattoes have often been accepted and respected in Negro society.191 In the same vein, white persons who argue that Negroes are inferior beings invariably explain that the successful and acceptable Negroes have white blood and are light-skinned.192

Here again it can be questioned whether the state, rather than the would-be parents, should have the right to make the choice. But that argument, if pressed to the extreme, would uphold polygamy and possibly incestuous marriage (although there may be biological consequences there). It would certainly invalidate the state's power to enact affinity statutes, which prohibit marriage between persons related as in-laws by a previous marriage;193 they are supported on a theory of social harmony closely akin to the social justifications herein enumerated for miscegenation statutes. The state would seem to have an interest in fostering harmonious marriages where it has the ability to do so. The resolution of this issue, like the scientific issue, may turn upon what kind of presumption is applied to the legislation. An analysis of whether the statutes actually precipitate social problems by stamping the Negro race as inferior and unequal to the white race might also be persuasive. The pattern in the statutes of marked protection of the white race indicates the answer to this latter question may be in the affirmative.194 This would distinguish the polygamy and affinity statutes, where race is not involved.

ALLEVIATION OF RACIAL TENSION

A third basis advanced to support the statutes is the great probability that intermarriage will promote racial violence and tension.195 It is

191 Reuter, op. cit. supra note 162, at 183-201.
192 Cummins & Kane 51.
193 See generally Vernier, American Family Laws § 39 (1931).
194 See pp. 80-82 infra.
195 See Note, 58 Yale L.J. 472, 478 (1949). This argument was advanced in Perez and was rejected by Justice Traynor. 32 Cal. 2d at 724-25, 198 P.2d at 25 (1948).
questionable whether such disturbances are inevitable. Miscegenation is not widely practiced even where permitted, due to social pressures. Even where it is, outbreaks of violence have not resulted.\textsuperscript{196} It is nonetheless reasonable to speculate that since miscegenation is at the heart of racial prejudice, its practice may well lead to a heightening of racial tension in the southern states. Normally, prevention of violence supports legislation and serves as a legitimate basis for exercise of legislative power. Assuming that racial violence would result from miscegenation, the Supreme Court decisions indicate that this result alone will not offer an adequate basis to sustain a statute. In \textit{Buchanan v. Warley},\textsuperscript{197} the Court refused to accept a goal of racial tranquility as a sufficient ground upon which to uphold racial zoning ordinances. The Court stated that "this aim cannot be accomplished by laws or ordinances which deny rights created or protected by the Federal Constitution."\textsuperscript{198} However, the Court also noted that amalgamation of the races was not involved. Similarly, in dealing with the position that Little Rock school desegregation should be delayed to prevent potential racial violence, the Court stated "law and order are not to be preserved by depriving the Negro children of their Constitutional rights."\textsuperscript{199} More recently, in \textit{Wright v. Georgia},\textsuperscript{200} the Court again rejected an argument which would uphold breach of the peace convictions in order to prevent racial conflict that might otherwise occur, in stating "the possibility of disorder by others cannot justify exclusion of persons from a place if they otherwise have a constitutional right (founded upon the Equal Protection Clause) to be present."\textsuperscript{201}

Alleviation of racial tension thus appears to be the weakest of the three possible supports for the statutes. It would permit the majority race to maintain a racial restriction simply by threatening violence if the restriction were removed. It also intimates that local law enforcement officials are either unable or unwilling to keep the peace—hardly an adequate basis to support a statute which deprives persons of constitutional rights. Finally, fear of the results and undesirability of miscegenation are the basis of the racial prejudice that currently exists; to uphold a statute that serves to perpetuate this racial prejudice on

\textsuperscript{196} Note, 1 \textit{Stan. L. Rev.} 289, 295 n.51 (1949).
\textsuperscript{197} 245 U.S. 60 (1917).
\textsuperscript{198} \textit{Id.} at 81.
\textsuperscript{199} Cooper v. Aaron, 358 U.S. 1, 16 (1958).
\textsuperscript{200} 373 U.S. 284 (1963).
\textsuperscript{201} \textit{Id.} at 293.
the ground that it will prevent increased prejudice is circular reasoning.  Though the same may likewise be said of any public policy argument in support of the statutes, including those made earlier with respect to the children of miscegenous marriages, it seems that in that case the statute is not helping to perpetuate the problem—a mulatto child will have difficulty regardless of whether or not the statute exists. Evidence of the problems that mulatto children must endure comes from states that do not have statutes, but if the problems endured by such a child stem partially from the existence of miscegenation statutes, then that argument also becomes circular.

**Presumption For the Legislature**

It has been stated that the legislature's exercise of the police power to restrict marriage must be reasonable in order to comply with due process and equal protection requirements. The three bases of support for the statutes enumerated above all involve a factual finding by the legislature that miscegenation would be detrimental to the public health, welfare or morals. It is essentially the same kind of fact-finding involved in the passage of antipolygamy and anti-incest statutes. A presumption in favor of state legislation when it involves such fact-finding has evolved in the Supreme Court. Under this presumption, the fourteenth amendment will be satisfied if there is any rational basis for the legislature's decision and the regulation or classification is not arbitrary; where there are controverted facts and debatable findings, it is not the function of the Court to substitute its choice for that of the legislature. It is arguable that this should be particularly true when something of such vital local concern as marriage is involved, since the Court has always recognized the state's unique power over marriage as a fundamental institution. In his dissenting opinion in *Perez*, Justice Shenk emphasized that this presumption in favor of the legislation is strongest when the police power is being used. The state court in *Naim* held that legislation respecting marriage is fully entitled to this presumption. A finding that legislation has a rational basis does not mean

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202 See Note, 58 Yale L.J. 472, 478 (1949); Note, 1 Stan. L. Rev. 289, 295 (1949).
204 E.g., Maynard v. Hill, 125 U.S. 190, 205 (1888).
205 32 Cal. 2d at 753, 198 P.2d at 42 (1948).
206 197 Va. at 89, 87 S.E.2d at 755-56 (1955). This argument was also urged on appeal to the Supreme Court in Brief for Appellee, Statement Opposing Jurisdiction and Motion to Dismiss or Affirm, p. 5, Naim v. Naim, 350 U.S. 891 (1955).
that the Supreme Court concurs in the wisdom or propriety of the legislation. The Court is merely stating that the legislature had some basis in fact and a legitimate objective.

This presumption should be applicable only if the state's policy is to enforce firmly the regulation in question. It is arguable that some of the state miscegenation laws do not evidence such a policy sufficiently to warrant the presumption being extended to them. For example, where the state recognizes so-called "carfare" marriages of domiciliaries who go to another state to avoid the local statute, the presumption seems inappropriate. California recognized this easy means of evading its statute, and in his concurring opinion in *Perez*, Justice Carter stated that this was an indication that "the marriage cannot be considered vitally detrimental to the public health, welfare, and morals." California's statutory pattern further revealed there was virtually no substantial state policy to back the statute—the children of such marriages were legitimized and the statute was merely declaratory as it carried no penal or criminal sanctions. *Perez* has often been distinguished by commentators on this ground of insubstantial legislative policy. States that do permit avoidance of the statute by a trip to a neighboring state or those states which recognize miscegenous marriages where non-domiciliaries move to the state are hard put to argue that miscegenation is a dire threat to public welfare. A few states such as Wyoming that do not enforce their statute are also susceptible to the argument that there is no justification for a presumption to be given to the state's policy. There are thus some states whose statutory pattern does not warrant the normal presumption. Most of the statutes, however, do not offer such possibilities to a court; they clearly indicate that miscegenation is considered detrimental to the public welfare.

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207 *But cf.* Bickel, *Foreword: The Passive Virtues*, 75 HARY. L. REV. 40 (1961), which suggests that the Supreme Court's prestige necessarily lends support to the wisdom of a legislative decision.

208 Pearson v. Pearson, 51 Cal. 120 (1875).

209 32 Cal. 2d at 735, 198 P.2d at 31 (1948).

210 See Note, 17 GEO. WASH. L. REV. 262, 268 (1949). Justice Carter also mentioned these factors in his concurring opinion in *Perez* as an indication of an insubstantial state policy behind the statute. 32 Cal. 2d at 738, 198 P.2d at 33 (1948).


212 See Note, 10 WYO. L.J. 131, 138 (1956). The Supreme Court might refuse to adjudicate if some form of declaratory judgment is sought on the ground that the statute has become obsolete and has been nullified by lack of enforcement. Poe v. Ullman, 367 U.S. 497 (1961).
If the normal presumption is applied to the miscegenation statutes, they might be upheld on the scientific and sociological bases. Although there is considerable evidence that Negroes are biologically equal to whites and that mixed-blood progeny are not inferior, there is nevertheless sufficient scientific support to afford some basis for the statutes. A court need not agree with that evidence to uphold the statute, because under the normal presumption, it is improper for the court to weigh conflicting scientific evidence; it must accept the choice of the legislature. Racial purity as a social value in and of itself might not be considered a proper basis, but the scientific evidence goes further than that. It provides a "rational" basis in the protection of public welfare. The presumption in favor of the legislation should also be sufficient to validate the statutes on the basis of the social consequences of miscegenation. Few would contend that mixed marriages will not create onerous burdens for both the couple and their children. The legislative fact-finding has substantial support where the social adjustment of its citizens is involved. These same considerations motivated other regulations of marriage such as age, polygamy and affinity restrictions. Although these situations are distinguishable from miscegenation to the extent that race is not involved, they similarly make decisions for the couples. There is a legitimate legislative interest in preventing social disharmony in the home when possible, and the presumption in favor of the legislation could sustain statutes based on that valid interest.

The Skinner Doctrine

Assuming it is found that miscegenation statutes have some factual basis and a strong statutory policy behind them so that the normal presumption would uphold them, the statutes may still be struck down if they do not reasonably accomplish the goals at which they are aimed or if they attempt to do so in an arbitrary manner. The legislature is required to employ means reasonably related to the objective involved. A leading case on this point is Skinner v. Oklahoma ex rel. Williamson,213 where an Oklahoma statute provided that a person twice convicted of a felony would be sterilized; the statute excepted embezzlement from the felonies included in the sterilization requirement. The Supreme Court struck the statute down as violative of the equal protection clause. The Court found the exception for embezzlers to be arbitrary; there was no reason to infer that the legal distinction between larceny and embezzle-

ment had any eugenic significance. The state, although pursuing a proper legislative object,\textsuperscript{214} was found to be arbitrary in its classification. The \textit{Skinner} decision does not mean that a legislature must necessarily eliminate all evils of the same class that can conceivably be thwarted, or none at all. A statute is proper if it attempts to eradicate the most significant evil of the particular class of evils.\textsuperscript{215} Thus in \textit{Buck v. Bell},\textsuperscript{216} the Court found it reasonable that state-imposed sterilization would affect only feeble-minded persons who were in public institutions and not those in private institutions or under private care. The Court was satisfied that the law had done all it could reasonably do and had covered the most potentially harmful group in the general classification of feeble-minded persons. There is, then, an exception to the general requirement of reasonable classification—the statute need encompass only a significant portion of the particular evil it is aimed at and need not attempt to eliminate the evil entirely.

It can be argued that when applied to the miscegenation statutes, the \textit{Skinner} doctrine renders them unconstitutional.\textsuperscript{217} If miscegenation statutes are an attempt on the part of the legislature to prevent the harmful effects of racial mixture, they seem arbitrarily incomplete; the statutes bar only marriages between Caucasians and other designated races. Whites may not intermarry with any other race, but all of the other races are permitted to intermarry and mulattoes are permitted to intermarry with all races but the Caucasian. If the legislation is based on evidence of harm from racial intermarriage, then it may be arbitrary that the statutes only protect the white race from the ill effects. No statute even approaches a complete ban on interracial marriage. By analogy to \textit{Skinner}, it would seem that if white-Negro marriages are eugenically unsound, there is no eugenic reason to except Negro-Mongolian marriages and other intermixtures.

The answer that has been presented is that the legislatures have reasonably sought to strike at the greatest "evil" (in quantitative terms if not qualitative) by concentrating on marriages between whites and members of other races. This contention is weakened, however, when the

\textsuperscript{214} The Court seemed to assume that the sterilization of felons was a proper legislative object; it did not consider the possibility that there may be no correlation between genes and potential felons.

\textsuperscript{215} See Goesaert v. Cleary, 335 U.S. 464 (1948); Miller v. Wilson, 236 U.S. 373 (1915).

\textsuperscript{216} 274 U.S. 200 (1927).

\textsuperscript{217} See Cummins & Kane 35-38.
scientific grounds are used as a basis for the statute, since health and welfare will be substantially affected by all intermarriages; the statutes could easily be extended to condemn interracial marriages of any sort. It is not a question of the legislature having done all that it reasonably could as in Buck v. Bell. Where the social consequences are considered as the statutory purpose, however, the contention is stronger. In the South, for example, where the white-Negro marriage is practically the only problem, it ought to be adequate that the legislature has struck at the most significant "evil" that might cause social disharmony among individuals. Coverage of other races in the South is hardly necessary since they scarcely exist; the statutes in the western states covered the other large "evil" of white-Mongolian marriages which exists in those areas. A legislature might also reasonably take notice of the fact it is too late to do anything about those who are already mulattoes; to cover them would be to deny them the right of marriage altogether since they could not possibly enter into any form of "pure" marriage. The Skinner doctrine does pose a difficult problem for the miscegenation statutory pattern, but the fact that the statutes cover the kinds of interracial marriage which are potentially most "harmful" should exonerate them from an attack based on arbitrary classification.

**Presumption Against the Legislature**

It has frequently been contended that miscegenation laws are within the category of statutes which have a presumption cast against their validity and the burden of sustaining them shifted to the state. Two lines of decisions might substantiate this contention: laws forbidding miscegenation affect the fundamental right of marriage; and they also involve classification by race—either or both of which factors may shift the presumption to one against the legislation.

Where fundamental human liberties under the due process clause are concerned, the Supreme Court has often shifted the presumption. Such cases have primarily involved freedom of religion and freedom of speech, the Court has required that there be proof of a clear and pres-

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ent danger warranting a restriction of those freedoms. It seems clear that marriage does not stand in the preferred position of the first amendment freedoms of religion and speech. It is questionable whether it is so basic a right as to shift the presumption against the legislature; unlike speech and religion, it has always been subject to strict control by the state. Other marital controls such as the affinity statutes would similarly face difficulty in being upheld if the presumption were against them. Marriage is within the peculiar province of the police power of the states and the normal requirements of reasonableness ought to be adequate to protect it when it is restricted;²²¹ it has not been the practice of the Supreme Court to shift the presumption when considering various state regulations of marriage.²²² It should be noted, however, that the right to marry lends additional force to the alternative argument that the racial classifications in the miscegenation restrictions shift the presumption.

Many commentators assume that whenever a racial classification is utilized in a statute, a strong presumption arises against it.²²³ Justice Traynor reached that conclusion in Perez. The cases that have been decided by the Supreme Court concerning race and the fourteenth amendment have to a great extent justified this viewpoint in their language and dicta, if not in their holdings. The first cases indicating this approach dealt with measures taken against the Japanese during World War II. In Hirabayashi v. United States,²²⁴ a Japanese person convicted of violation of the Government-imposed curfew laws attacked the conviction as a denial of due process insofar as it deprived him of his liberty solely on the basis of race. The Court sustained the curfew due to the national peril, but the language of the decision severely condemned racial discrimination under normal circumstances. The Court said: "[D]istinctions between citizens solely because of their ancestry are by their nature very odious to . . . the doctrine of equality . . . . [R]acial discriminations are in most circumstances irrelevant and therefore prohibited . . . ."²²⁵

In Korematsu v. United States,²²⁶ the Court upheld the exclusion of

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²²¹ See Note, 11 W. Res. L. Rev. 93, 100 (1959).
²²² Davis v. Beason, 133 U.S. 333 (1890); Reynolds v. United States, 98 U.S. 145 (1878).
²²³ See, e.g., authorities cited note 218 supra.
²²⁴ 320 U.S. 81 (1943).
²²⁵ Id. at 100.
²²⁶ 323 U.S. 214 (1944).
Japanese from certain areas. Again, the national emergency was said to be the only possible justification for such a measure. But the Court pointed out that restrictions controlling the rights of a single racial group are "immediately suspect" and are to be subjected to "the most rigid scrutiny."227 The Court also pointed out that racial antagonism could never justify such a statute. The Court had an opportunity to apply this view in *Oyama v. California*,228 a case which did not involve war powers. At issue was a California statutory presumption of violation of the alien land law whenever an alien ineligible for citizenship paid the consideration for property that passed to an eligible alien or citizen. The Court struck down the presumption as violative of the equal protection clause since it was applied against Oyama solely on the basis of race.229 In stating that "only the most exceptional circumstances can excuse discrimination on [a racial] basis in the face of the equal protection clause,"230 the Court did not consider the question of the constitutionality of the statute itself, which prohibited ineligible aliens from owning land. Justice Murphy concurred in the majority opinion and argued that the entire statute, being based on racial antagonism, was unconstitutional.231 Another California regulation was invalidated in *Takahashi v. Fish & Game Comm'n*232 where certain racial groups were barred from fishing in coastal waters. The Court said that the state had no legitimate interest in making such a discrimination. It is important to note that these last two cases involved transfer of property and commercial fishing rights, traditionally local matters whose regulation would normally be entitled to a presumption of validity.

Although *Brown v. Board of Educ.*233 did not discuss the question of a presumption, the Court took judicial notice of the stigma and feeling

227 *Id.* at 216.
228 332 U.S. 633 (1948).
229 The Court also spoke of discrimination based upon "country of origin" as well as racial descent. Although when the alien land law was passed it applied to numerous nationalities ineligible for naturalization, by the time *Oyama* was litigated, only the Japanese were excluded.
230 332 U.S. at 646.
231 332 U.S. at 650.
232 334 U.S. 410 (1948). Here, as in *Oyama*, the discrimination was against ineligible aliens, but this in practical effect applied only to Japanese. The Court again spoke synonymously of restrictions on aliens and restrictions by racial ancestry. Mr. Justice Murphy again concurred on the ground that the statute had been passed solely due to racial antagonism; the Court's opinion had not reached that issue. *Id.* at 422.
of inferiority engendered by segregation in the public schools. But in *Bolling v. Sharpe*, the Court, relying on *Brown* in order to strike down segregation in the District of Columbia schools, said that "classifications based solely upon race must be scrutinized with particular care, since they are contrary to our traditions and hence constitutionally suspect." *Bolling* was based upon the fifth amendment due process clause and thus demonstrates that an argument for reversal of the normal presumption when racial classification is used can be made under either the due process or equal protection clause. With respect to miscegenation statutes, which involve both the fundamental right of marriage and racial distinctions, the argument carries a double-barreled attack.

These opinions of the Supreme Court certainly tend toward creating a presumption against the state whenever there is classification by race. A "rational" basis is not enough to provide "most exceptional circumstances," and something "odious" to fundamental notions of equality can hardly be justified by a state's adoption of one side of a debatable question. If a presumption is raised against the miscegenation statutes, there is not much likelihood that they will be upheld. This is particularly true with respect to the scientific basis for the statutes. A state would be hard put to carry a burden of proof that the end results of miscegenation are vitally dangerous to public welfare. It has already been pointed out that many recent authorities, if not the vast majority of them, conclude that there are no harmful physical effects to the progeny of mixed couples. The Court would be justified in dismissing the contrary evidence submitted by the state because of its failure to apply the modern environmental analysis, as Justice Traynor did in *Perez*. The weight of scientific authority clearly would not support the state.

The social-harm argument would present a closer case, but again it is not likely that the state could prove that the social difficulties of the children of miscegenous couples are exceptional enough to overcome a presumption against racial categorizations. Concrete evidence of the effect upon such children would be difficult to obtain, particularly since miscegenation is not widespread and is virtually nonexistent in the states that would be called upon to supply the evidence. The state, then, could not present any definite estimate of the potential of the evil it is attempting to prevent. A state might produce a strong case by investing in

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235 Id. at 499.
research, but that would involve considerable time and expense.\textsuperscript{236} Even if the state could produce sufficient evidence of disharmony, it would still have to justify making the decision of marriage for the couples. It appears that a state would have great difficulty in rebutting a presumption against miscegenation statutes and the statutes would likely be struck down as unconstitutional by the Supreme Court.

On the other hand, a reversal of the presumption is arguably unnecessary in order to protect racial minorities. Statutes with racial categories, even under the rational-basis test, can still be struck down if they are shown to be either a stamp of inferiority upon a particular race or to be based upon racial hostility. For example, in \textit{Brown v. Board of Educ.},\textsuperscript{237} the states had provided equal school facilities but in light of the evidence that there was nevertheless an inherent psychological inferiority instilled in the Negro child by school segregation, the Court held, impliedly if not expressly, that there was no rational basis for legislation which had such an effect. The equal protection clause after \textit{Brown} can then be interpreted to mean that there is no rational basis for a classification if it stamps one race as inferior.\textsuperscript{238} This is borne out by \textit{Anderson v. Martin};\textsuperscript{239} where the Court, in striking down a Louisiana statute requiring that a candidate's race be designated on the ballot, stated that "the vice lies not in the resulting injury but in the placing of the power of the state behind a racial classification that induces racial prejudice at the polls."\textsuperscript{240} The implication of racial labels on a ballot is that race is significant and indicates the quality of candidates for office.

The plaintiffs in \textit{Brown} brought forth a mass of sociological evidence to establish the stamp of inferiority. Similarly, a statute can be attacked if it were inspired by racial hostility and antagonism, regardless of the

\textsuperscript{236} This tactic was used to a limited extent by the state of Alabama, which commissioned the study by George, \textit{op. cit. supra} note 162.

\textsuperscript{237} 347 U.S. 483 (1954).

\textsuperscript{238} It is doubtful that \textit{Brown} can still be read to require proof of a psychological inferiority; it appears to be enough that the state has segregated the races. In a series of per curiam opinions the Court has struck down segregation in many areas beyond education, always relying on \textit{Brown}. See, e.g., Gayle v. Browder, 352 U.S. 903 (1956), \textit{affirming per curiam} 142 F. Supp. 707 (M.D. Ala. 1956); New Orleans City Park Improvement Ass'n v. Delitte, 358 U.S. 54 (1958), \textit{affirming per curiam} 252 F.2d 122 (5th Cir. 1958). Other per curiam decisions have struck down segregation laws with no citation of \textit{Brown}. E.g., State Athletic Comm'n v. Dorsey, 359 U.S. 533 (1959).

\textsuperscript{239} 375 U.S. 399 (1964).

\textsuperscript{240} \textit{Id.} at 402.
purported justification for the legislation.241 Proof of such hostility may be gathered from the pattern and application of the statute or from evidence of circumstances surrounding its passage. Thus, in Griffin v. School Bd.,242 the Court acknowledged that a state might legitimately decide that a law should be applicable only in certain counties, but held that Virginia could not close Prince Edward County schools in order to avoid desegregation. The Court stated that:

The record in the present case could not be clearer that Prince Edward's public schools . . . were closed . . . for one reason . . . only: to ensure . . . that white and colored children in Prince Edward County would not, under any circumstances, go to the same school. Whatever nonracial grounds might support a State's allowing a county to abandon public schools, the object must be a constitutional one, and grounds of race and opposition to desegregation do not qualify as constitutional.243

The desirability of a presumption against the legislation might also be questioned. If the presumption is the rigid one that seems to emerge from the Supreme Court cases, then it may mean that no racial classification is justifiable under the fourteenth amendment; in Mr. Justice Harlan's words, the Constitution may be "color-blind" and forbid any statutory reference to race whatsoever.244 But there are distinctions between the races and there may be occasions where the legislature will have legitimate reasons to use them. A possible example is the use by New Jersey courts of different mortality tables for whites and Negroes.245 It might be contended that these tables do not adequately consider environmental factors and hence have no rational basis, but assuming there is an actual difference in the life span of the two races, it seems reasonable for a state to take this into account. If one race were more susceptible to a disease it should not be thought a denial of equal protection to require that they take immunization shots during an epidemic; and surely the state can classify people according to race for identification purposes.246

243 Id. at 231.
244 Plessy v. Ferguson, 163 U.S. 537, 552 (1896) (dissenting opinion).
245 See Note, 11 Rutgers L. Rev. 757 (1957).
246 The Supreme Court recently affirmed per curiam a three judge district court opinion upholding a Virginia statute which required that the race of the parties be identified in divorce decrees. Tancil v. Woolls, 33 U.S.L. Week 3151 (U.S. Oct. 26, 1964), affirming per curiam 230 F. Supp. 156 (E.D. Va. 1964). In the same order, the Court affirmed per
Miscegenation statutes may arguably be an instance in which the presumption should not shift. They are not concerned with an area that is crucial for racial minorities. Whereas the educational process affects all Negroes, this is certainly not true of interracial marriage, which is practiced and desired by a minute percentage. *Brown* found that separation in the public schools left a permanent mark on the mind of a child in his crucial, formative years; it is doubtful that the existence of miscegenation laws have such an effect. Education is also fundamental to good citizenship according to *Brown*; interracial marriage is neither essential to, nor advocated by, the American way of life. Moreover, marriage is arguably more of the state’s concern than education, which affects the strength of the nation as a whole. Transportation, education, employment and voting rights deserve the rigid scrutiny and concern that minority rights receive under the equal protection clause; but miscegenation may be an area where the state’s concern for social harmony rises higher on the scales since the impact upon the minority races is less serious.247

This line of argument suggests that the rational-basis requirement is adequate to prevent improper racial classification, since there can still be a successful attack on the statute if the attacking party can establish that the statute stamps one race as inferior or is based on racial antagonism; the corollary is that this will allow the state to make racial classifications when they are legitimate. The difficulty with this approach is that it assumes that in cases where statutes are founded on racial hostility, or are intended to stamp one race as inferior, the attacking party can prove such facts. Mr. Justice Murphy mustered considerable evidence of racial bias surrounding the passage of the California Alien Land Law in his concurring opinion in *Oyama*.248 But the motives of a legislature are not always susceptible to evidentiary proof in court. A curiam the lower court’s decision that Virginia’s requirement that there be separate voting lists and assessment rolls for whites and Negroes violated the equal protection clause. Virginia State Bd. of Elections v. Hamm, 33 U.S.L. Week 3151 (U.S. Oct. 26, 1964), *affirming per curiam* 230 F. Supp. 156 (E.D. Va. 1964). The lower court had distinguished the “mandate of separation of names by race” in the voting list requirement from the legitimate use of racial data for statistical purposes in the divorce decree requirement. 230 F. Supp. at 158.

247 Counsel for appellants in *McLaughlin*, however, urged on oral argument that miscegenation statutes present an “easier case” than school desegregation since the right to marry the person of one’s choice is more fundamental than the right to attend a particular school. 33 U.S.L. Week 3137 (U.S. Oct. 20, 1964).

248 332 U.S. at 650.
legislature which has an objectively rational basis for its statute has usually precluded any judicial inquiry into the motivation behind the statute; that is the essence of the rational-basis presumption. This problem would be posed if a southern state now re-enacted its miscegenation statute with coverage of all the potential kinds of interracial marriage and cited sound sociological authority for doing so. Though it might be clear that the statute was a manifestation of racial prejudice, proof of this prejudice would not be easy to establish. There is really a judgment that must be made: whether the Supreme Court in a racial case should assume, subject to concrete proof to the contrary by an attacking party, that a state legislature has acted in good faith, or whether the concern for racial equality necessitates a presumption that legislatures may be biased and therefore should be required to justify any racial classification. The realistic view has to be the latter since it is a cold fact that racial prejudice does exist in this country and is frequently given the force of law by state legislation; miscegenation statutes at least in some states are undoubtedly a good example. A presumption against the state will eliminate the problem of litigants having to establish bias on the part of the legislature. On the other hand, if the state has a legitimate reason for using a racial classification, such as the identification and mortality-table examples above, it will be able to sustain its case. There are very few areas where the state might have a bona fide reason to make racial distinctions; the risk of any undue restraint on the state police power by placing the presumption on the state is therefore minimal.

On reflection, it appears that the Supreme Court is justified in reversing the normal legislative presumptions where race is involved. This will afford maximum protection for racial minorities. It has already been indicated that it is very unlikely that a state can establish “exceptional circumstances” that would support its miscegenation statute; the burden of proof would be a very difficult one to carry. Although it has been noted that miscegenation may be an area where the legislature does

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249 However, in some instances the racial motive will be apparent. Griffin v. School Bd., 377 U.S. 218 (1964).

250 If proof of an adverse psychological effect were still required by the Court, see note 238, supra, and if the question is one of proof of psychological inferiority as opposed to an intentional stamp of inferiority, then the burden of proof should perhaps remain on the plaintiffs. Normally, a "Brandeis brief" is presented to sustain legislative action. If this device is used to attack a statute, as was done in Brown, the burden accordingly should be on the plaintiffs.
have legitimate reasons to classify by race, there is nevertheless the underlying suspicion that racial prejudice is the motivating force of the statutes. This is borne out by the white-oriented protective pattern of the statutes and by a study of other laws on the books of many of the states which condemn miscegenation. Miscegenation statutes not only treat the races unequally, but they imply that one race is inferior. Although they might survive the rational-basis and Skinner tests, the statutes will probably have a presumption cast against them, and be held unconstitutional when finally ruled upon by the Supreme Court.

**Conclusion**

The nineteen state statutes which prohibit miscegenation present a difficult constitutional problem: they do not lend themselves to hard and fast conclusions. This article has concluded that although legitimate arguments can be advanced in support of miscegenation statutes, it is realistic for the Supreme Court to presume against the validity of the statutes since they classify according to race and they imply that certain races are inferior. It is highly unlikely that the states can carry the burden of proof necessary to overcome this presumption.

Other conclusions can be drawn from a constitutional analysis. The statutes are more easily dealt with on the basis of the equal protection clause than under the due process clause, since under the former, one need not get embroiled in the questions of whether marriage is a specific "liberty" under the fourteenth amendment, and if so, whether it has the preferred status necessary to reverse the normal presumption in favor of police power legislation. Equal protection squarely presents the question of race, with which the statutes are solely concerned. In view of the Court's recent equal protection decisions involving race, it seems clear that the Court will hold that miscegenation statutes are a denial of equal protection of the laws. Moreover, such a decision would be reinforced by the fact that the statutes restrict a person's freedom to choose a spouse.

It has also been observed that, when compounded by their social setting, miscegenation statutes do not present the same problems confronted in other racial cases. Voting rights, education, public accommodations, employment and transportation are different in kind from miscegenation. Interracial marriage is more difficult to deal with than public education or the right to exercise the ballot. This suggests that any decision by the Supreme Court with respect to the constitutionality of miscegenation statutes should not merely rest on previous segregation cases in areas such
as education and voting, but can be expected to include a complete and thorough analysis.

It has been noted that the Supreme Court will rule upon the case of *McLaughlin v. Florida* 251 during the present term. There are several possible bases for a decision reversing the conviction in that case which do not reach the broad question of the constitutionality of the Florida miscegenation statute. Any reversal, however, will cast some doubt on the validity of miscegenation statutes. If the Florida interracial cohabitation statute is struck down, then the Supreme Court precedent of *Pace v. Alabama* 252 will be considerably weakened, if not expressly overruled. That case, as noted, has been the principal judicial support for the numerous state statutes. If the Court reverses the conviction on the ground that the statutory definition of "Negro" is unconstitutionally vague, or vague as applied, this would also weaken miscegenation statutes.

A reversal of *McLaughlin* may well subject the Court to the kind of criticism occasioned by the school prayer and reapportionment cases. Some may urge that the Court avoid the issue of miscegenation as it may have done in its final dismissal of *Naim v. Naim*. 253 It would be argued that striking down what represents the core and crux of racial prejudice at a time when great strides have been made in the field of race relations is a political and strategic error. This argument is based on the fact that interracial marriage is insignificant even where permitted, and the only result would be that a few couples would be free to marry while the civil rights movement suffers a substantial setback. On this basis, one could argue that the miscegenation statutes should be the last to fall, after the white race has become accustomed to equality in areas of far more vital importance such as education, public accommodations, voting and employment. However, it is certainly debatable whether the Supreme Court would be acting properly in taking such social and political factors into consideration. Furthermore, *McLaughlin*, unlike *Naim*, is a criminal case; while the Court might be willing to exercise judicial restraint and reverse on a narrow ground, it cannot be expected to ignore a criminal conviction.

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252 106 U.S. 583 (1883).
**THE NLRB AND JURISDICTIONAL DISPUTES: THE AFTERMATH OF CBS**

**JAMES B. ATLESON***

Against a background of the factors which engender work assignment disputes, Professor Atleson considers the difficulties encountered by the National Labor Relations Board in implementing the Supreme Court's mandate to make affirmative determinations in these controversies. Analyzing the myriad of problems involved in this segment of labor law, including those of statutory interpretation, the author suggests that the present Board approach may be hampering the efficient operation of settlement machinery provided by the Taft-Hartley Act.

**INTRODUCTION**

Jurisdictional disputes are common in everyday life. Controversies between vested interests and interlopers in protected territory, between physicians and chiropractors, between lawyers and accountants or trust companies, between governmental agencies or state and federal courts, arise continually. Jurisdiction has been especially troublesome in labor relations.\(^1\) It has been said that "the principle of union jurisdiction lies at the very foundation of trade union structure in this country and that it is the feature which most clearly distinguishes the American labor movement from its European counterparts."\(^2\)

The failure on the part of labor to establish a completely effective machinery for the settlement of jurisdictional disputes\(^3\) stems in part from the concept of jurisdiction itself. Experience with the Knights of Labor taught American unions that overlapping jurisdiction inevitably meant rival unions,\(^4\) and competition was deemed harmful to the labor movement. The Knights admitted into their ranks individuals and locals which had been expelled from national unions and which, on occasion, undermined the standards of employment

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3 Mann 5-28.

4 *ULMAN*, THE RISE OF THE NATIONAL TRADE UNION 367, 404-05 (1955) [hereinafter cited as ULMAN].
which the national unions were striving to secure. Indeed, ... it was the struggle with the Knights which elevated the principle of exclusive jurisdiction to its position of unchallenged eminence in the American trade union movement.\textsuperscript{5}

As a result, the AFL began as an agency of limited powers based upon doctrines of autonomy and exclusive jurisdiction.\textsuperscript{6} This latter principle meant that each national was to possess the exclusive right to acquire and retain members within the job territory authorized by its AFL charter. This principle was evolved to minimize competition and conflict among national unions and workers.

National unions drew their territorial boundaries along national lines. Each national union was issued a charter defining its jurisdiction along craft lines, but generally issuance of a charter merely involved the acceptance of the national's own definition of the scope of its job territory.\textsuperscript{7} "[T]he combined factors of exclusive jurisdiction and organization by craft both reflected and heightened job consciousness."\textsuperscript{8}

Only one union is to have title to particular work. "Only one national union in the territory covered ... can be a legitimate union. Any rival local, sectional or national union is an outlaw (dual) union."\textsuperscript{9} Every local has a charter setting out its territory or trade boundary, and must belong to the national representing that trade or be labeled an "outlaw" union.\textsuperscript{10}

Jurisdiction of a union is considered a property right, and the charter its certificate of title.\textsuperscript{11} Given the importance of property rights in American life, it is easy to see why jurisdictional disputes generate the ardor usually associated with religious conflicts.

Persistent attempts on the part of the AFL to resolve disputes between national unions proved fruitless.\textsuperscript{12} Ironically, the jealously guarded

\textsuperscript{5} Id. at 404-05. Furthermore, unions which were composed of workers who were not highly skilled or whose trade was not substantially organized feared the numerically larger Knights.


\textsuperscript{7} Ulman 406.


\textsuperscript{11} Dunlop, Jurisdictional Disputes, N.Y.U. Second Annual Conference on Labor 477, 482 (1942) [hereinafter cited as Dunlop].

\textsuperscript{12} Mann 8-28.
principles of autonomy and exclusive jurisdiction which evolved to avoid union competition caused continual jurisdictional warring among AFL affiliates. The AFL was reluctant to apply force to member unions, especially against unions which were unwilling to accept adverse arbitration awards and strong enough to contemplate withdrawal from the federation.

Implicit in the very notion of jurisdiction is a lack of class consciousness or working class solidarity.\(^{13}\) The American labor movement, composed of autonomous groups competing for employment opportunities, has used the concept of jurisdiction as a substitute control mechanism for class consciousness.\(^{14}\)

Jurisdictional disputes generally arise from economic and political factors, including the economic interests of the workers and the institutional interests of the union itself. The economic base of jurisdictional disputes is the competition for the control of jobs. Perlman has described the worker's feeling of living in a world of limited opportunity.\(^{15}\) This "scarcity consciousness" may be the result of the worker's feeling of personal limitations or may result from an institutional order which ration's opportunity. In particular, it is recognized that any contraction of the area in which skills are to be employed curtails opportunity for jobs.\(^{16}\) The union senses the limitation of work in a given trade, and feels that if another union usurps some of its work, the amount left for its members is diminished.\(^{17}\)

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\(^{13}\) This characteristic has been discussed at length by Perlman who attributes this phenomenon partly to the heterogeneity of the work force, the lack of a common language, culture or religion, and the existence of free land and the early ballot. Perlman, A Theory of the Labor Movement 162-69, 254-80 (1928). The phrase "class consciousness" refers to an individual's perception of himself as a member of a particular socio-economic group and his perception of his opportunities for upward mobility. It does not refer to the actual structure of the existing stratification system or to the actual mobility rates of the system.


\(^{15}\) Perlman, op. cit. supra note 13, at 239-40.

\(^{16}\) Hyman & Jaffe, Jurisdictional Disputes, N.Y.U. First Annual Conference on Labor 423, 450-51 (1948) [hereinafter cited as Hyman].

\(^{17}\) Strand 29. Concerted effort to protect or enlarge the employment opportunities of members or to prevent the undermining of the wage scale is not a unique characteristic of the labor movement. Other economic agents seek a greater degree of security in an economy in which economic well-being is subject to unpredictable changes. Farmers call upon government to prevent the undermining of parity prices while businessmen seek tariffs or other...
Union members, having devoted substantial effort and time to acquiring knowledge of a particular trade or skill, feel they have an investment in, if not a right to, that trade. Thus, unions representing these individual interests desire full control of the craft. The essence of a property right is the right to exclude others; no other association can be permitted to enter into the trade. Furthermore, the bargaining strength of a union is in part measured by the degree to which the union is independent of the employer. This independence depends upon the existence of a demand for its services by another employer. Thus, "economic versatility" of a union's members is an important bargaining asset. Crafts normally consist of tasks that can be split off and performed by workers unable to perform other tasks involved in the craft. Such division weakens the economic position of the union and its members. The emotionalism surrounding jurisdictional disputes is therefore partially a result of a feeling on the part of union members that their jobs, wage standards or working conditions are at stake.

The extensive detail and fine distinction of jurisdictional disputes have evoked amazement and ridicule from the onlooker but they do not appear ludicrous or hair splitting to men who depend on jurisdictional lines to guarantee them work where very little or even none at all would otherwise be available and certainly not at such high rates of remuneration.

Jurisdictional disputes are critical, especially in periods of job scarcity, to those whose jobs may depend on the outcome. Since the economic losses to the individual worker from jurisdictional

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import controls on foreign goods. Haber, Labor Relations and Productivity in the Building Trades 156 (1956).

18 "The higher the skill required on a particular job, the greater is likely to be job consciousness and pride . . . ." Slichter 250.


A union's rights become paramount, not only over a rival union, but also over the wishes of the men actually performing the job. Although the AFL never fully exercised its jurisdiction in relation to unskilled workers, the federation vigorously opposed the intervention of the CIO. To the AFL the territory belonged to its affiliates even though the workers were not organized. The work itself, not the workers, was important.

Merger eased jurisdictional strife, and the older AFL concept of jurisdiction was modified. The new standard, set out in article III, § IV of the federation's constitution, uses the concept of "established bargaining relationships." Jurisdiction exercised at the time of merger was to be considered inviolate. Thus, the status quo was maintained. See Slichter 248.

20 Ulman 313-14.


strikes often exceed his rewards from victory, economic self-interest cannot be a complete explanation. It is important to note that unions also pursue institutional objectives, such as survival or growth, in addition to defending the economic self-interest of its members. A union seems basically to be a political institution operating in an economic environment. Its desire to expand its territory, increase its membership and protect its exclusive jurisdiction may be based upon overtones of sovereignty.23

Despite charters and constitutional expressions of jurisdiction, and although there is little difficulty with the core of a union's jurisdiction, the outer boundaries of a union are unclear. In addition, though no craft can be completely substituted for another,24 often, on the fringe of a craft's expertise, the skills of one union can be substituted for the skills of another.25

It is impossible to describe work tasks in exhaustive detail. Furthermore, modifications in material, tools and techniques render existing definitions of jurisdiction obsolete and inadequate. Even precise definition, however, would not solve the problem of an aggressive union's attempts to promote the job-oriented interests of its members or to strengthen itself.26

Turning to some of the specific causes of jurisdictional disputes, the introduction of new materials, techniques or machinery often creates problems27 which cannot be resolved by the union's delineation of jurisdiction in the charter.28 Furthermore, the formal organization of separate crafts into unions29 accentuates inter-union friction. In industries such as construction each union has a tradition of autonomy and freedom of

23 Barnett, The Causes of Jurisdictional Disputes in American Trade Unions, 9 Harv. Bus. Rev. 400, 401 (1931). There may also be a psychological base. This "prima donna" factor may consist of vanity, pride or simply lust for power.

24 Strand 34 n.18. One exception may be the laborers, which is largely composed of unskilled workers. The nature of the work and the relatively low pay scale of laborers may deter rival union incursions into the laborers' job territory while encouraging employer resistance to rival union demands.

25 Strand 35.

26 The Carpenters Union considered that everything made of wood or which had ever been made of wood was within its jurisdiction. Christie, Empire in Wood, A History of the Carpenters Union 171, 208 (1956).

27 Strand 41-44.

28 Dunlop states that this factor has been overemphasized as much technical change affects the "interior" of a union's jurisdiction only. An adverse effect on job opportunities within a union may cause greater aggressive behavior at the frontier, however. Dunlop 488-89.

29 Dunlop 484.
action. Moreover, work is mainly casual so union ties are more significant than association with a particular employer. Disputes are often caused by the existence of a large general worker's union such as the hod carriers. Laborers can often perform many of the more unskilled tasks within the jurisdiction of a craft union. Similarly, the growth of multicraft semi-industrial unions, such as the International Association of Machinists or International Brotherhood of Electrical Workers, has stimulated jurisdictional disputes by creating conflicts with craft unions. Although "the proprietary interest in the scope of job duties is likely to be expressed more forcibly when work opportunities are slackening," unions will nevertheless guard against incursions in good times, and may become more aggressive when its membership is declining. Internal political conditions may also be relevant. In the building trades, where business agents are ordinarily elected for short terms, jurisdiction may become a political issue.

Associated with such campaigns, or to fulfill election promises, a business agent of a craft may seek to change jurisdictional lines that have been taken for granted in a locality. A new business agent may seek to take a tough position and extend his jurisdiction. The result may well be retaliation by other crafts and difficulties on existing projects.

Although jurisdiction is drawn on national lines, local variations may blur those lines. Differences in the application of jurisdiction are partly caused by differences in tradition and custom, employer preferences, local leadership and strength, and the degree of the union's specialization. Furthermore, the vigor of a union's assertion of jurisdiction may vary with the size of the job.

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30 Id. at 485.
31 Hyman 424.
32 Dunlop 485.
33 Industrial unions are less susceptible to jurisdictional disputes among themselves. Disputes may arise within an industrial union, however, between the craft and industrial segments. See Slichter 270-76.

Some feel that Taft-Hartley encourages preoccupation with work jurisdiction. By making it possible for a craft to carve out bargaining units from an industrial unit, "the law may have made the proprietary interest in work boundaries a more substantive issue in certain cases." Id. at 256-57. An industrial union, faced with a possible internal revolt, may become especially attentive to work boundaries. If the revolt is successful, the new craft unit may sharpen interest in work jurisdiction.

34 Id. at 251.
35 Id. at 253; Strand 39-41.
36 Slichter 253-54. Jurisdiction will be valuable as a political issue when other factors have made it important to the union's members.
37 Dunlop 487-88.
Employers may cause jurisdictional disputes by making assignments contrary to traditional jurisdictional lines or by following a vacillating work assignment policy. On the other hand, the employer may honestly be in error. In any event, an employer's violation of the traditional lines may seem reasonable to him because of wage rate differentials or because of antagonism to a particular union or its leaders, or may be motivated by union pressure or anti-union bias. Lower echelon supervisors may seek to favor those working with them by giving workers jobs properly within the jurisdiction of another union.

The structure of employer relationships may also lead to jurisdictional disputes. In the construction industry, boundaries between various specialty contractors are frequently vague. To some extent contractors on a single project are in competition with one another, and a union may be working exclusively for a particular contractor. Thus, competition among subcontractors, specialty contractors and general contractors may be converted into a jurisdictional dispute between unions.38

Although jurisdictional strikes have aroused public concern and antagonism, they have not been numerous. During the period 1935-1947 jurisdictional strikes never "involved more than 1.6 percent of all workers on strike . . . and never resulted in a greater loss than 2.7 percent of the total number of man-days lost by strike activity."39 Jurisdictional strikes, however, tend to be concentrated in particular areas or industries, and although they begin as internal affairs, the disputes break out into the open, adversely affecting employers and the public. The economic losses to the workers and to the employer often seem indefensible.40 The failure of organized labor successfully to avoid or settle these disputes prompted the passage in 1947 of a federal statutory scheme of dispute settlement.41

38 Id. at 486-87.
39 Fisher, The Settlement of Work Jurisdictional Disputes by Governmental Agencies, 2 Ind. & Lab. Rel. Rev. 335, 337 (1949). In 1946, jurisdictional disputes "accounted for only 3.5 per cent of the total number of work stoppages and only .5 per cent of the man-days of idleness." Hyman 423.
40 "In such strikes the public and the employer are innocent bystanders who are injured by a collision between rival unions. This type of dispute hurts production, industry, and the public—and labor itself. I consider jurisdictional strikes indefensible." Address by President Truman on the State of the Union, Jan. 6, 1947, in 93 Cong. Rec. 136 (1947). Jurisdictional strikes are like secondary boycotts in some ways. Unions "strike at their opponents over the shoulder of some third party, usually an employer." Aaron, Union Procedures for Settling Jurisdictional Disputes, 5 Lab. L.J. 258. Employers are seldom neutral, however. Slichter 245. Indeed, most employers consider the determination of work assignments to be one of their basic rights.
41 For a summary of the legislative history of these sections see Mann 40-48.
Steps to Invoke Section 10(k)

Concerted action in support of a work assignment dispute was made an unfair labor practice in 1947. The filing of a charge, however, does not lead to the usual invocation of the Board’s authority under section 10(c) because Congress interposed a special procedure to be followed when such charges are filed. Thus section 10(k) requires the NLRB to “hear and determine” an unfair labor practice covered by section 8(b)(4)(D) “whenever it is charged that any person has engaged in an unfair labor practice” within that section.

In order for the Board to proceed with the determination under Section 10(k), the record . . . must show that a work assignment dispute . . . exists; that there is reasonable cause to believe that the respondent union has resorted to conduct which is prohibited by Section 8(b)(4) in furtherance of the dispute; and that the parties have not adjusted their dispute or agreed upon methods for its voluntary adjustment.

After an employer files a charge, the Board makes three preliminary determinations. First it must discern whether there is “reasonable cause” to believe that the respondent union has engaged in prohibited activity. Although section 10(k) when read literally requires only a “charge” of proscribed activity, it seems logical to require the employer to present a prima facie case.

The Board has held that evidence must relate to “conduct or speech” of the union’s representatives. In Local 106, Int’l Union of Operating Eng’rs (E. C. Ernst, Inc.) the Board found no evidence of a demand by the operating engineers upon Ernst that he assign certain work away from IBEW electricians. It was not sufficient that two competing groups claimed the same work or even that there had been a concerted work stoppage. All parties, however, had assumed that there was a dispute, and the dispute had been determined by the Joint Board in favor of the engineers. In light of the facts of this case the Board’s standard seems too high. Although the “reasonable cause” standard is used by district courts when a request is made for a 10(l) injunction, the absence of

45 27 NLRB ANN. REP. 176 (1962).
46 General Teamsters, 144 N.L.R.B. No. 60 (1963) (B.P. John Furniture Corp.).
47 Ibid.
49 See note 198 infra.
such a standard in the language of section 8(b)(4)(D) or section 10(k), along with the arguable need for a higher standard in injunctions, raises doubts about the Board's approach. Apparently, the Board will require more than work stoppages, and illegal actions will have to be clear.51

Furthermore, veiled threats are also insufficient, and language is said to be "too vague and insubstantial" if it is "subject to interpretations other than as a threat to engage in illegal conduct."52 In a section 10(l) injunction proceeding brought by the General Counsel, the court must also find reasonable cause to believe that the union engaged in prohibited activity. For example, in Penello v. IBEW53 the court found "reasonable cause" even though the alleged threat was ambiguous and the union representative denied a threat was even made. Although resolving conflicts of evidence would infringe the Board's authority, there seems to be no reason for the court's standard in an injunction proceeding to be lower than the Board's standard in a preliminary determination.

While an unambiguous threat standing alone would seem to imply a work stoppage, the Board in Ernst held that such an isolated threat was not sufficient. The Board's position seems to permit unions to apply considerable pressure and yet remain immune from Board scrutiny. Such Board restraint will not encourage resort to private settlement machinery—one of the statutory goals—especially when certain unions, such as the IBEW, refuse to be bound by Joint Board determinations in certain areas.54 On the other hand, unions seeking Board review will be encouraged to make certain that their conduct violates the act. Such a dubious policy was questioned by President Truman in his veto message: "The bill would force unions to strike or to boycott if they wish to have a jurisdictional dispute settled by the National Labor Relations Board."55 Although the veto was overridden,56 the Board nevertheless should not re-

51 The "reasonable cause" standard has been extended into a full hearing on the merits of whether an 8(b)(4)(D) unfair labor practice has been committed. See International Ass'n of Machinists, 136 N.L.R.B. 1216 (1962) (Carling Brewing Co.).

52 General Teamsters, 144 N.L.R.B. No. 60 (1963) (B. P. John Furniture Corp.).


54 Local 12, Int'l Union of Operating Eng'ts, 144 N.L.R.B. No. 2 (1963) (Geo. E. Miller Elec. Co.).

55 93 Cong. Rec. 7486 (1947), 1 Legislative History of the Labor Management Relations Act 916 (1948) [hereinafter cited as Legislative History].

56 The Taft-Hartley Act was passed over the President's veto by a vote of 68 to 25 in the Senate and 331 to 83 in the House. 93 Cong. Rec. 7692 (1947), 2 Legislative History 1656 (passage by the Senate); 93 Cong. Rec. 7504 (1947), 1 Legislative History 922-23 (passage by the House).
quire a union to do more than "threaten, coerce, or restrain," as provided in section 8(b)(4)(D);\(^{57}\) indeed more recent Board decisions seem to indicate a less severe approach.\(^{58}\)

It should be noted that the act is not sympathetic to the equities of a union's case. A union cannot invoke the jurisdiction of the Board, and furthermore must commit an unfair labor practice to satisfy one of the conditions of the statutory settlement machinery. An employer, however, may refrain from filing a charge, thus leaving the union no recourse. Such a course of action may be followed by an employer faced with a weak or nonstrategically situated union and willing to ignore that weaker union's strike.\(^{59}\)

Second, the Board's "reasonable cause" standard has been extended to require an additional determination that a work assignment dispute within the scope of section 8(b)(4)(D) exists. Thus, the union must not only resort to prohibited activity to invoke the Board's authority, but it must be correct in its assumption that a work assignment dispute exists. Although this requirement would not seem to present an insuperable barrier to review, the Board has defined "work assignment dispute" narrowly. Beginning with Local 107, Highway Truckdrivers (Safeway Stores, Inc.)\(^{60}\) the Board has held that a work dispute under section 8(b)(4)(D) must involve a situation in which two or more employee groups are actively seeking certain work. When no jurisdictional dispute is found to exist, the Board will quash the notice of hearing under section 10(k). In Safeway, the employer unilaterally transferred work away from three teamsters who constituted the entire bargaining unit of Local 107, International Brotherhood of Teamsters, and arranged for members of a different IBT local, operating out of other plants of the employer, to do the work. The termination of the one trucking operation covered by Local 107's contract resulted in the teamsters' discharge. The local's picketing was held not to be a violation of section 8(b)(4)(D) although its conduct admittedly fell within the literal terms of that section.\(^{61}\)

The Board in Safeway interpreted NLRB v. Radio & Television


\(^{58}\) See, e.g., Electrical Workers, 147 N.L.R.B. No. 159 (1964) (McCloskey & Co.); Local 1, Int'l Bhd. of Elec. Workers, 147 N.L.R.B. No. 73 (1964) (McDonnell Aircraft Corp.); Detroit Mailers Union, 146 N.L.R.B. No. 23 (1964) (Detroit Gravure Corp.).

\(^{59}\) Hyman 454.

\(^{60}\) 134 N.L.R.B. 1320 (1961).

\(^{61}\) Ibid.
Broadcast Eng'rs (CBS)\textsuperscript{62} to require "two or more employee groups claiming the right to perform certain work tasks." The dispute in Safe-way, the Board argued, was basically a dispute between Local 107 and the employer, and concerned only one union's attempt to retrieve jobs. The Board required that real competition between two unions be shown. Other IBT locals had not pressed the employer for the work. Indeed, the employer had caused the dispute. Section 10(k), reasoned the Board, should not arbitrate disputes between one union and an employer where no competing claims are involved. Whenever the employer "reallocates work among his employees or supplants one group of employees with another, there is not a jurisdictional dispute."\textsuperscript{63} Thus, while requiring two competing unions, the Board's narrow holding is that "reallocation" and allocation of work cannot be similarly treated under sections 8(b)(4)(D) and 10(k) even though both situations seem to fall within the statutory language.

The dissenters, Members Rodgers and Leedom, argued that nothing in CBS suggested that the 8(b)(4)(D) language should not be read literally. Indeed, the Court in CBS stated that the sections extend to a dispute between a union and an unorganized group of employees as well as between two unions,\textsuperscript{64} and pre-CBS Board decisions support this view.\textsuperscript{65} Furthermore, the dissenters reasoned, the addition of the words "trade, craft, or class" has broadened the coverage of section 8(b)(4)(D) to include disputes involving nonunion groups.\textsuperscript{66} However, it is doubtful that unorganized employees would actively contest the picketing union's claim. When work is assigned to nonunion employees, therefore, the dispute is actually between the employer and the challenging union.

There is evidence that the section was passed to protect employers from being caught in the middle of two rival employee groups.\textsuperscript{67} Although section 8(b)(4)(D) was primarily intended to cover a situation where two employee groups claimed certain work, neither the legislative

\begin{itemize}
  \item \textsuperscript{62} 364 U.S. 573 (1961).
  \item \textsuperscript{63} Local 107, Highway Truckdrivers, 134 N.L.R.B. 1320, 1322 (1961) (Safeway Stores, Inc.).
  \item \textsuperscript{64} 364 U.S. at 584.
  \item \textsuperscript{66} See NLRB v. Radio & Television Broadcast Eng'rs, 364 U.S. 573, 584 (1961); Vincent v. Steamfitters Local 395, 288 F.2d 276 (2d Cir. 1961).
  \item \textsuperscript{67} H.R. Rep. No. 245, 80th Cong., 1st Sess. 23-24 (1947), 1 \textit{Legislative History} 314-15.
\end{itemize}
history nor the statutory language expressly limits its coverage to disputes in which a union attempts to force a work assignment away from an employee group which is also actively claiming the work. The Supreme Court has indicated that a strike in protest of a work assignment violates section 8(b)(4)(D) regardless of how passive the other group of employees may be.

It would seem reasonable to permit an employer to test a union's jurisdictional claim even though those to whom the work was assigned do not actively claim the work. It is difficult to tell whether a group of employees will strike to secure or retain work until the work has actually been denied them, and a union could strike although it disclaimed interest in the work while its members were performing it. The danger of work stoppages and harm to the employer is the same whether the group to which the work was assigned claims it or not. Indeed, the employees can now successfully bar a 10(k) determination by disclaiming interest in the work. The employer is in a dilemma because that group might strike if he submits to the striking union. Moreover, the Board has converted the Supreme Court's accurate description of the dispute in CBS into a definition of a jurisdictional dispute. Although the Court did say that jurisdictional disputes are between "two or more groups of employees," the Court was not called upon to determine what disputes come under section 8(b)(4)(D).

Interestingly, a respondent union, according to the Board's decision in UMW (Turman Constr. Co.), cannot avoid a 10(k) determination by a disclaimer of interest in presently representing the employees in question. The Board stated that a 10(k) determination was necessary in such a situation because there was no assurance that further work interruptions would not occur. Surely this fear also exists when the union to which the work is assigned disclaims any jurisdictional rights to it.

Nevertheless, Safeway has been followed in subsequent cases. In Local


70 Farmer 667.

71 364 U.S. at 579.

72 See Note, 73 Harv. L. Rev. 1150, 1157 (1960).


272, *Sheet Metal Workers (Valley Sheet Metal Co.)* the alleged dispute was between two unions affiliated with the same international. The international’s constitution limited to two the number of employees belonging to an outside union who could work within the territory of another local. A local with jurisdiction forced the employer who had transferred three members of an outside union into its territory to replace one of the employees with one of its own members. Stressing that the outside local did not claim the work, the Board quashed a notice of a 10(k) hearing. It is not clear why the Board did not dispose of the case by holding that no “dispute” existed because both sister locals apparently agreed with the territorial limitation.

Member Leedom, the only dissenter, argued that it was immaterial that one union was not claiming the work so long as that group was performing it. As he correctly pointed out, there are factual differences between *Safeway* and *Valley Sheet*. In *Safeway* the employer precipitated the dispute by transferring work away from one local, and that local attempted to preserve its historical bargaining status. Member Leedom argued that the question of whether a jurisdictional dispute exists is now in the hands of the employee groups involved and, if they can agree, they can “divide up an employer’s operations as they wish.”

The Board's narrow reading of section 8(b)(4)(D) will not be limited to the facts of *Safeway*, however. In a later case, the employer assigned work to carpenters rather than lathers because the latter had requested travel pay. Picketing by the lathers was held not to be a violation of section 8(b)(4)(D), because the carpenters did not claim that the work was within their jurisdiction and did not request that such work be assigned to them. A similar result was reached in *Local 1905, Carpet Layers (Southwestern Floor Co.)*, where the disputed work had been assigned to the carpenters despite contrary Joint Board decisions and a 1961 agreement between the painters and the carpenters in which the latter disclaimed jurisdiction over the disputed work. The painters, as well as the carpenters, argued that no jurisdictional dispute existed. Thus, the carpenters performed work in violation of precedent and both

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75 136 N.L.R.B. 1402 (1962).
76 See also *Local 1102, United Bhd. of Carpenters, 140 N.L.R.B. 79 (1962)* (Port Huron Sulphite & Paper Co.).
77 136 N.L.R.B. at 1406.
78 *Local 328, Wood, Wire & Metal Lathers Union, 139 N.L.R.B. 598 (1962)* (Acoustics & Specialties, Inc.).
80 Respondent, as predecessor of *Local 1095, Carpet Layers*. 
unions, possibly fearing an adverse result, were able to avoid a Board determination.

The Safeway rule will also be applied when the employer's change of operation causes the discharge of employees of a different employer. In Local 331, Teamsters Union (Bulletin Co.)81 a newspaper publishing company's decision to cease contracting out its home delivery distribution work resulted in the discharge of an employee of its contract-distributor. This employee's representatives then picketed the replacement. The Board held that the union's sole object in such activity was to regain lost employment, as in Safeway. The work was assigned to one of the company's own drivers whose employee group wisely did not claim the work.

It is interesting that the Board preferred to base its decision on pre-CBS cases,82 determining that no jurisdictional dispute existed where a union struck to defend its past jurisdiction, rather than on Safeway, thereby limiting the latter decision to cases involving a lack of competing claims. In Local 292, Int'l Bhd. of Elec. Workers (Franklin Broadcasting Co.)83 a strike to secure renewed contractual recognition of work jurisdiction was held not to be a jurisdictional strike.84 In Franklin, however, the Board held that the dispute did not concern work assignments but involved the discharge of several union members and the employer's refusal to sign a new union contract, despite the fact that the employer's action resulted from his assignment of work formerly done by the union members to another group of employees. The dissenters in Bulletin, Members Rodgers and Leedom, while repeating their dissenting views in Safeway, also challenged the applicability of Franklin. The striking union in Bulletin represented none of the employer's employees and was not concerned with the abolition of any jobs or the discharge of Bulletin's employees. These distinctions were recognized by the majority, but the policy of Franklin was held to extend to the indirect loss of employment.

As the dissenters in Bulletin point out, however, the Board has decided on the merits cases very similar to Bulletin. In Longshoremen's Ass'n

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81 139 N.L.R.B. 1391 (1962).


83 126 N.L.R.B. 1212 (1960).

84 Cf. Local 110, Sheet Metal Workers Ass'n, 143 N.L.R.B. 974 (1963) (Brown & Williamson Tobacco Corp.).
(Union Carbide Chem. Co.) for instance, the International Longshoremen's Association protested a loss of work resulting from the employer's decision to change its mode of operation and to have loading work performed by its own employees. The dispute was determined on the merits even though the object of ILA's conduct could be said to be the retrieval of work previously done by its members. Member Fanning, in a footnote to the majority's opinion in Bulletin, thought it crucial that the ILA sought to have its members perform the work under the changed method operation, while the union in Bulletin sought to compel the employer to return to his old mode of operation. In either case, however, the object of the strike was to regain the same or similar work once performed by the striking union. Furthermore, work had been lost in both cases by an employee of an independent contractor because of a changed method of operation, and the striking union sought to return to the old mode of operation, i.e., to do the work it previously performed. It is difficult to disagree with the dissent's contention that such factual differences are immaterial.

Moreover, the Board has apparently extended the coverage of the act. In Longshoremen's Union (Northern Metal Co.) the ILA objected to the employer's use of a fifteen-man gang of its members, instead of one composed of twenty-two men, for the work of loading vehicles onto vessels. Prior to 1960 the employer had used fifteen-man gangs for loading of federal cargo under a contract with the United States. When the employer received a contract to load privately-owned vehicles, ILA claimed that it was the practice in Philadelphia to use a twenty-two-man gang. Under an arbitration clause in the ILA-employer association contract, the twenty-two-man crew was found to be the practice in the area, although the grievance committee could not settle the jurisdictional dispute. The employer took twenty-two men under protest, arguing that the additional seven men performed no work, and that if it had to assign work to these extra seven men, it would have to be work now performed by yardmen, represented by the Marine and Shipbuilding Workers Union. The ILA said its demand was not an attempt to displace the yardmen.

With little difficulty, the Board found reasonable cause to believe that the ILA had violated section 8(b)(4)(D), and held that the union

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85 137 N.L.R.B. 750 (1962).
86 139 N.L.R.B. at 1396 n.2 (1962).
87 For a striking example of the result of the Board's approach see Administrative Ruling of NLRB Gen. Counsel, Case No. SR-2177 (1962), 52 L.R.R.M. 1020 (1963).
had presented the employer with the alternative of either hiring seven extra men who could not be used or displacing yardmen and giving their work to the ILA. The Board found it significant that the yardmen had "actively" intervened on the employer's side, apparently only trying to defend area practice. The employer would not necessarily have to discharge the yardmen, and any wasted manpower would have been attributable to the operation of the work rule and does not seem relevant to a determination that a jurisdictional dispute exists.

Admittedly, the determination of reasonable cause involves close factual issues. All jurisdictional strikes and threats are not covered by section 8(b)(4)(D), but only those where an object is to force an assignment of work to one group of employees rather than to another. However, where one object is to force a work assignment, it matters not that the union has a dual purpose. Thus jurisdictional disputes have been held to be properly before the Board despite such additional union aims as the pursuit of better safety practices, adherence to union wage scales or to local standards of competency. In *International Bhd. of Elec. Workers (Bendix Corp.)* the IBEW claimed there was no jurisdictional dispute because the object of its picketing was to increase wage rates at the employer's construction site, not to compel a reallocation of work. The IBEW argued that Bendix was not complying with wage scales set by the Davis-Bacon Act. Most of its appeals to the public dealt with the wage-scale dispute. Indeed, the IBEW went so far as to stipulate with Bendix that any positive award made by the Board should be in favor of the engineers and technicians now performing the work. Nevertheless, the Board found that there was reasonable cause to find that an object "equal in importance" was to force assignment of work away from the Bendix employees and to union members and local electricians. IBEW was apparently concerned that lower wages to out-of-towners would undercut local wage scales and had suggested that the work be subcontracted to local electricians. Whether the employer would have hired IBEW men instead of Bendix's employees to do the work.

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89 *International Longshoremen's Ass'n, 108 N.L.R.B. 313 (1954) (Cargill, Inc.).*
90 *Local 365, Bhd. of Painters, 126 N.L.R.B. 683 (1960) (Southern Fla. Hotel Ass'n).*
92 *138 N.L.R.B. 689 (1962).*
93 *49 Stat. 1011 (1935), as amended, 40 U.S.C. § 276(a) (Supp. V, 1964).* This section provides for payment of prevailing wage rates to laborers and mechanics employed under U.S. government contracts exceeding $2,000, for construction, alteration or repair of public property.
under Davis-Bacon Act standards, however, would be a matter of speculation.\textsuperscript{94}

More recently, in \textit{Local 3, Metal Polishers Union (Cleveland Pneumatic Tool Co.)},\textsuperscript{95} the Board held that a case was properly before it even though the dispute concerned which of two existing bargaining units appropriately included employees who performed the disputed work. Although an election in the appropriate unit would have resolved the issue, the Board was precluded from holding one due to the absence of an election petition therefor and the unwillingness of parties to agree to such a procedure. Both the Metal Polishers Union and the Aircraft Employees Association had been certified and had worked in the same department doing almost the same work under the same supervision. The work in dispute covered a job classification called "snaggers," now included in the Aircraft Employees Association's contract. The employer, however, felt the work now belonged in the Metal Polishers' unit. The work dispute arose when a number of employees in both groups were laid off due to lack of work and the metal polishers threatened to strike unless they received all of the work of the department. The Board held that only one unit, consisting of the job classifications within the metal polishers unit and the snaggers, was appropriate and that an election would resolve the dispute. The Board also stated that it would entertain a petition for the above appropriate unit whenever one was filed.\textsuperscript{96} The Board, determining that the snaggers were in reality metal polishers, assigned the work to the metal polisher bargaining unit. Its approach in \textit{Cleveland} was similar to its approach in pre-CBS cases\textsuperscript{97} in which it refused to resolve disputes in proceedings to clarify certified units. The Board had decided that jurisdictional strikes, in support of contract rights, do not fall within the 8(b)(4)(D) prohibition, despite the fact that the section's language does not make this exception. In these cases the Board viewed the dispute as primarily a question of which of two certified bargaining units more appropriately included the work. The Board seems to have reversed that position in this case, finding a probable violation of 8(b)(4)(D) in order to settle the matter. The Board's analysis of the

\textsuperscript{94} International Bhd. of Elec. Workers, 138 N.L.R.B. 689, 697 (1962) (Bendix Corp.) (dissenting opinion).

\textsuperscript{95} 142 N.L.R.B. 374 (1963).

\textsuperscript{96} For a discussion of the Board's treatment of rights based on certification, see Farmer 700-06.

\textsuperscript{97} See, \textit{e.g.}, Local 173, Wood, Wire & Metal Lathers Union, 121 N.L.R.B. 1094 (1958) (Newark & Essex Plastering Co.).
dispute in this case, however, employs the pre-CBS "unit determination" approach rather than post-CBS criteria.

The third preliminary step to a 10(k) determination involves the existence of private settlement machinery. The Board is directed to hear and determine the dispute "unless, within ten days after notice that such charge has been filed, the parties to such dispute submit to the Board satisfactory evidence that they have adjusted or agreed upon methods for the voluntary adjustment of the dispute." 98

The Board, having defined "parties to the dispute" to include the employer as well as the two employee groups, 99 will not quash notice of a 10(k) hearing when agreement to private arbitration procedures is alleged if one party has not stipulated to such procedures. 100 Furthermore, the Board has held that subcontractors and general contractors must also agree to the settlement or the method of settlement. 101 Thus, it is not sufficient that both employee groups are bound by an agreement, or that each employee group has an arbitration clause in its collective bargaining contract with the employer. Arbitration would not bind one of the employee groups, and arbitration awards could be conflicting. 102 Similarly, an agreement between the employer and the striking union concerning work assignments is not sufficient. 103

It is doubtful that the Board's strict policy follows from the purpose of section 10(k), namely, the settlement of jurisdictional disputes. 104 The section was intended to encourage private settlements and, if the employer is truly but a helpless victim, it is unclear why he should be concerned which agency settles the dispute. Indeed, the "settlement" exception to section 10(k) seems to have been designed to stimulate unions to resolve their own disputes. In Senator Murray's words: "We are confident

100 Local 9, Wood, Wire & Metal Lathers Union, 113 N.L.R.B. 947 (1955) (A. W. Lee, Inc.). Affiliates of the Building Trades Department, AFL, are bound by Joint Board determinations through the Department's constitution. Thus, locals of national unions which are members of the Department are bound despite their failure to agree to Joint Board procedures.
103 Retail Clerks Ass'n, 125 N.L.R.B. 984 (1959) (Food Employers Council).
that the mere threat of governmental action will have a beneficial effect in stimulating labor organizations to set up appropriate machinery for the settlement of such controversies within their own ranks, where they properly should be settled."¹⁰⁸ Neither a literal reading of section 10(k) nor an examination of the legislative history of the act appears to require the employer's participation in private settlement proceedings.¹⁰⁶ On the other hand, it is arguable that private settlement machinery is more effective when employers do participate in the proceedings. Defining "parties" to include only the competing employee groups would, after all, force an employer to seek intervention or be bound by a determination to which he was not a party. Assuming that intervention were granted, however, private settlement devices would arguably be strengthened.¹⁰⁷ Furthermore, it is consistent with legislative policy to permit the employer to test the respondent union's claim before the Board when he has not agreed to be bound by private arbitration.¹⁰⁸ Since the employer initiates the Board's activities, it seems reasonable to consider the employer a party; the fact that he may be neutral with respect to the result of the settlement does not detract from the fact that his actions precipitated the dispute and that he is directly affected by it.

One practical advantage of the Board's approach is that the employer could introduce relevant evidence such as past practice, efficiency and economy—factors peculiarly within his knowledge—at the private proceeding. Moreover, he may be deterred from ignoring the award by virtue of his participation. It should be noted though, that before the Joint Board the employer's assignment is not as significant a factor as it is before the NLRB, assignments often being made by the former on the basis of property rights between two or more unions.¹⁰⁹ Finally, since no procedures exist under section 10(k) to bind the employer,¹¹⁰ the

¹⁰⁵ 93 Cong. Rec. 4155 (1947), 2 Legislative History 1046 (Emphasis added.); see 93 Cong. Rec. 6610 (1947), 2 Legislative History 1554-55 (remarks of Senator Morse); NLRB v. Radio & Television Broadcast Eng'rs, 364 U.S. 573, 577: "Section 10(k) offers strong inducement to quarrelling unions to settle their differences by directing dismissal of unfair labor practice charges upon voluntary adjustment of the jurisdictional dispute." (Emphasis added.)
¹⁰⁶ See O'Donoghue, Jurisdictional Disputes in the Construction Industry Since CBS, 52 Geo. L.J. 314, 332 (1964) [hereinafter cited as O'Donoghue].
¹⁰⁷ Id. at 334.
¹⁰⁸ See Farmer 673.
¹⁰⁹ See Dunlop 482; Strand 61.
¹¹⁰ Mann 5; McGuinn, Jurisdictional Disputes and the NLRB, N.Y.U. Fifteenth Annual Conference on Labor 103, 122 (1962) [hereinafter cited as McGuinn].
private arbitrator's ability to enforce the settlement is perhaps the main reason for the Board's strict policy of requiring the employer's presence.\footnote{Ironworkers Ass'n, 137 N.L.R.B. 1753 (1962) (Armco Drainage & Metal Prods. Co.).}

If a party refuses to comply with a settlement which it had previously agreed to accept, the Board will not make its own determination under 10(k);\footnote{Millwrights, 121 N.L.R.B. 101 (1958) (Don Cartage Co., Inc.).} nor will the Board act under 10(k) when a party has announced it will not honor a future decision made under an agreed upon method, or that it has rejected a decision after it has been made.\footnote{Ironworkers Ass'n, 137 N.L.R.B. 1753 (1962) (Armco Drainage & Metal Prods. Co.).} However, in one case\footnote{Local 825, Int'l Union of Operating Eng'rs, 137 N.L.R.B. 1425 (1962) (Nichols Elec. Co.).} repeated statements by the IBEW that it would not be bound by Joint Board determinations involving line work were considered relevant by the Board in rejecting a Joint Board determination and proceeding under section 10(k). Apparently, the employer's association was not bound by Joint Board procedures and did not participate in the proceeding. In a later decision,\footnote{International Union of Operating Eng'rs, 144 N.L.R.B. No. 2 (1963) (George E. Miller Elec. Co.); cf. Local 181, Int'l Union of Operating Eng'rs, 146 N.L.R.B. No. 64 (1964) (Service Elec. Co.).} however, the Board based a similar determination solely upon the continued refusal of the IBEW and the employer association to be bound by certain Joint Board decisions. This decision seems inconsistent with the policy of encouraging private settlements.\footnote{6 See Farmer 670-71.} Although the Board's approach may be the only practical way to settle these disputes, it leaves no incentive for the union and employer association involved to submit to the Joint Board. The Board has permitted the union to withdraw one area from the jurisdiction of the Joint Board, while ostensibly remaining a party to Joint Board procedures.\footnote{Thus the IBEW submits disputes to the Joint Board dealing with "inside work" but refuses to submit disputes dealing with "outside work." Local 181, Int'l Union of Operating Eng'rs, 146 N.L.R.B. No. 64 (1964) (Service Elec. Co.).}

Although the Board refuses to render a decision under section 10(k), it will proceed with an unfair labor practice complaint against a union which will not comply with a private settlement. In \textit{Wood, Wire & Metal Lathers Union (Acoustical Contractors Ass'n)}, the Board held that

an 8(b)(4)(D) charge would be dismissed only upon compliance with the Board’s decision "or upon such voluntary adjustment of the dispute," and not merely if a method of settlement existed. Thus, the existence of a method of adjustment precludes a 10(k) hearing, but not the issuance of an 8(b)(4)(D) complaint if the method is not successful. The "statute keeps the charge alive pending a final settlement . . . so that an 8(b)(4)(D) complaint action may be taken against a party that resorts to a jurisdictional strike despite the existence of an agreed method of adjustment."119

The Board's position makes it an enforcement arm of a private agency. Since many private settlements do not provide effective enforcement devices, this approach seems to comport with the congressional policy of settling jurisdictional disputes and encouraging private settlements. Furthermore, an opposite approach would permit a party to secure redetermination by the Board by refusing to abide by an unfavorable Joint Board determination.120 Although the Board is merely proscribing conduct covered by 8(b)(4)(D), it is in effect enforcing the private settlement. The Board, however, has no means of enforcing the private settlement against a recalcitrant employer. The successful union which continues to strike is engaged in conduct literally encompassed by section 8(b)(4)(D) and yet there is no lack of compliance on its part. When the employer is obstructing the private settlement, however, and the respondent union has "complied" with Board procedures, the Board will probably dismiss the charge.121

STANDARDS

Despite the apparent command in section 10(k) to "hear and determine" the dispute, the Board until 1961 had limited its inquiry under section 10(k) to whether the striking union had representational rights with respect to the employees performing the work under a prior Board order or certificate or under a collective bargaining contract. If not, the union would be prohibited from attempting to override the employer's assignment.122 In 1961 the Supreme Court decided that the

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119 Wood, Wire & Metal Lathers Union, 119 N.L.R.B. 1345, 1352 (1958) (Acoustical Contractors Ass'n). It is arguable that "such voluntary adjustment" refers to the "agreed upon methods" mentioned in the first sentence of § 10(k). Congress may have wanted the Board to stay out of any dispute where there was an agreed upon method of settlement.
120 International Bhd. of Teamsters, 97 N.L.R.B. 1003 (1952) (William F. Traylor); see Note, 73 HARV. L. REV. 1150, 1162-63 (1960).
121 Note, 73 HARV. L. REV. 1150, 1163 n.68 (1960).
122 See, e.g., International Bhd. of Elec. Workers, 124 N.L.R.B. 323 (1959) (Peacock
NLRB's construction of section 10(k) was too narrow, and refused to enforce a Board order finding a violation of section 8(b)(4)(D) because the Board had not made an affirmative award of the work in the prior 10(k) proceeding, but had merely decided that respondent union was not entitled to the work under an outstanding certificate or contract.

The Board's brief set forth several arguments to justify its narrow construction of section 10(k). These arguments are set forth briefly here, since they are relevant to an understanding of the Board's subsequent decisions. It is worthy of note, however, that the problems expressed by the Board have generally not been solved.

(1) Section 10(k) sets forth no standards by which the Board is to determine jurisdictional disputes. The Court, however, speaking of the NLRB, felt confident that the Board could design standards for the resolution of jurisdictional disputes.

It has had long experience in hearing and disposing of similar labor problems. With this experience and a knowledge of the standards generally used by arbitrators, unions, employers, joint boards and others in wrestling with this problem, we are confident that the Board need not disclaim the power given it for lack of standards. Experience and common sense will supply the grounds for the performance of this job which Congress has assigned the Board.

(2) The broader interpretation of section 10(k) would conflict with other sections of the Labor Management Relations Act in three ways. First, the interpretation may cause unions to compel employers to discriminate with regard to employment. The prevailing organization may acquire a greater form of union security than is allowed by sections 8(a)(3) and 8(b)(2). If the winning union displaced an incumbent union, the displaced employees would be affected because of their union membership. The Court stated that this was not relevant in this case since both groups of employees were organized. Moreover, the Board "will devise means of discharging its duties under section 10(k) in a manner entirely harmonious with those sections." The Board's objection, however, is a broader one. Even though both groups of employees

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124 364 U.S. at 583.
126 364 U.S. at 584.
were organized and employed by CBS, an award in favor of the striking union might cause the employer to reassign or displace employees presently doing the work.\footnote{127}

Second, section 303\footnote{128} permits suits for damages because of jurisdictional disputes. Section 10(k), however, is not applicable even though the same conduct is covered under sections 303 and 8(b)(4)(D). Thus, if the Board were to give effect to factors other than those in sections 8(b)(4)(D) and 10(k), the "substantial symmetry" of sections 303 and 8(b)(4)(D) would be lost. Since section 303 does not permit the union to establish as a defense in a suit for damages the fact that it is entitled to the work on the basis of factors such as custom or tradition, the Board could sanction what has been declared unlawful under section 303. The Court, holding that substantive symmetry between sections 303 and 8(b)(4)(D) was not required, did not decide what effect a Board decision under section 10(k) might have on actions under section 303.\footnote{129} Symmetry, of course, would also be in danger in a section 303 action held before a 10(k) hearing when the union attempts to claim that it is entitled to the work.

Third, section 10(k) could sanction what section 8(b)(4)(D) forbids. An outside union could win on custom or tradition, for example, but the narrow exception to section 8(b)(4)(D)\footnote{130} does not include a 10(k) award, and the union would still be guilty of an unfair labor practice. The 10(k) award would then become meaningless to the union.\footnote{131} Alternatively, a 10(k) award, if included in "order" in section 8(b)(4)(D), could not retroactively validate a jurisdictional strike, the legality of which depends on the circumstances existing at the time it arose. This problem is bound up with the fact that no procedures exist to compel compliance with a 10(k) award by an unwilling employer.\footnote{132} Thus a narrow reading of section 8(b)(4)(D) could lead to a situation where the respondent union receives a work assignment, but the employer refuses to assign the work and the initial strike still violates the act.

Neither of these two problems was faced by the Court. The initial

\footnote{127} See Farmer 685-90; McGuinn 107-08.
\footnote{129} 364 U.S. at 584-85.
\footnote{130} By its terms § 8(b)(4)(D) governs "unless such employer is failing to conform to an order or certification of the Board determining the bargaining representative for employees performing such work."
\footnote{131} Mann 54 n.317.
\footnote{132} Id. at 53-54.
problem set forth in the Board's brief may not arise, because section 10(k) states that a charge will be dismissed "upon compliance by the parties to the dispute with the decision of the Board."\textsuperscript{133} If a striking union is awarded the work it will certainly comply, and noncompliance by the other parties will not cause a cease and desist order to be issued against it. On the other hand, the charge remains to induce compliance when the striking union is not awarded the work.

(3) The Board further contended in CBS that a broader reading of section 10(k) would discourage private settlements. The Court held that this was a "policy determination" that was implicitly settled by the Congress' enactment of section 10(k).\textsuperscript{134}

The Board's general position had been challenged by the National Joint Board.\textsuperscript{135} The Board's stand, argued the Joint Board, induced contractors to disassociate from the Joint Board since a decision under section 10(k) was more likely to be favorable to the employer. The Joint Board felt that only if the two hearings were parallel, thus eliminating the tactical advantage of a 10(k) hearing, would private agreements be strengthened. The NLRB's position, it contended, had permitted contractors to disturb customs and established practices of industry, which in turn increased, rather than reduced, jurisdictional warfare.

**Board Criteria**

In *International Ass'n of Machinists (J. A. Jones Constr. Co.)*,\textsuperscript{136} the first case following CBS in which an affirmative award was made, the Board set forth the guidelines that it would follow.

At this beginning stage in making jurisdictional awards as required by the Court, the Board cannot and will not formulate general rules for making them. . . . The Board will consider all relevant factors in determining who is entitled to the work in dispute, e.g., the skills and work involved, certifications by the Board, company and industry practice, agreements between the unions and between employers and unions, awards of arbitrators, joint boards and AFL-CIO in the same related cases, the assignment made by the employer and the efficient operation of the employer's business. This list of factors is not meant to be exclusive, but is by way of illustration. The Board cannot, at this time, establish the weight to be given the various factors. Every decision will have to be an act of judgment based on common sense and experience rather than on precedent. It may be that later,

\textsuperscript{134} 364 U.S. at 383.
\textsuperscript{136} 135 N.L.R.B. 1402 (1962).
with more experience in concrete cases, a measure of weight can be accorded the earlier decisions.¹³⁷

The relative weight given to various criteria set out in Jones has varied considerably from case to case.¹³⁸ The results have generally favored the employer's assignee; the vast majority of the awards have been made in favor of the union to whom the work was originally assigned. One author suggests that this is not coincidental.¹³⁹ On the other hand, the opposite result has generally been reached by the Joint Board.¹⁴⁰ Such evidence raises doubts as to whether the Board is adequately carrying out the Court's mandate. Furthermore, such a policy, if being purposely followed by the Board, would hardly encourage employers to participate in private proceedings.

The post-CBS cases present a tremendous variety of factual situations which, when combined with the list of criteria set out by the Board, makes analysis and identification of coherent doctrine difficult. For this reason the cases will be discussed in categories determined by significant factors or important problems.

THE EMPLOYER'S ASSIGNMENT

Some cases may properly turn on the employer's choice. The striking union, for instance, may present no evidence supporting its claim.¹⁴¹ However, the use of the employer's assignment as an independent factor in a doubtful case raises some problems, and the required burden of proof could prejudicially favor the employer. It is arguable, however, that it is completely proper for the Board to require the striking union to present some justification for its claim. Although it might be maintained that any burden of proof is inconsistent with the Board's duty to "determine the dispute," perhaps it is justifiable at this point to stress the interest in protecting the employer. Furthermore, this approach may discourage groundless disputes. There is even a third position which would place the burden of justification upon the employer who initiated the dispute, as well as the NLRB intervention. Such an approach is not unreason-

¹³⁷ Id. at 1410-11.
¹³⁸ O'Donoghue 321-23.
¹³⁹ Id. at 322. See also Cohen, NLRB and Section 10(k): A Study of the Reluctant Dragon, 14 Lab. L.J. 905, 918 (1963). In Detroit Mailers Union, 146 N.L.R.B. No. 23 (1964) (Detroit Gravure Corp.), in which the employer's assignment was not upheld, the Board felt it relevant to mention that the employer did not care which employee group received the work.
¹⁴⁰ O'Donoghue 322.
¹⁴¹ Local 862, Treasurers Alliance, 137 N.L.R.B. 738 (1962) (Allied Maintenance Co.).
able, and analogies may be found in concepts, such as "discharge for cause," which are employed in arbitration cases.

The employer's assignment is often considered as a factor separate and distinct from his past practice.\textsuperscript{142} Moreover, the employer's assignment has often been buttressed by other factors which are not really independent.\textsuperscript{143} Thus, the assignment may be upheld partly because the employees are sufficiently skilled to perform the disputed work and have done it to the employer's satisfaction.\textsuperscript{144} Even the fact that the assignment conforms to past practice may mean only that the employer wished the groups to do the work, that the particular division of work is efficient and economical, or that the respondent union has acquiesced in this division in the past. In one case,\textsuperscript{146} the Board emphasized that electrical work had been given to the employer's mechanics on three occasions in the past. IBEW pointed out, however, that each of these assignments drew a protest from other IBEW locals. In this case IBEW offered as evidence the custom in the area, the international's constitution which allegedly covered the work, and a collective bargaining contract with the local Electrical Contractors Association recognizing IBEW as the representative of all employees "within its jurisdiction" and covering all "electrical construction." Nevertheless, the employer's assignment to its own mechanics was upheld, even though the assignment was the only substantial evidence favoring that group.

The Board's consideration of the employer's assignment, which is accorded little weight before the Joint Board, would seem to weaken the use of private settlement machinery to the extent that parties can get better treatment before the NLRB.

\textbf{T\textsc{raditional J\textsc{urisdictional L\textsc{i}nes}}}

The National Joint Board for the Settlement of Jurisdictional Disputes, created by the Building Trades Department, AFL-CIO, and general and specialty contractors associations, attempts to afford protection to traditional jurisdictional lines.\textsuperscript{146} Such recognition of the concept of

\begin{footnotesize}
\begin{enumerate}
\item See, \textit{e.g.}, Carpenters Council, 146 N.L.R.B. No. 133 (1964) (J. O. Veveto & Son); New York Mailers' Union, 137 N.L.R.B. 665 (1962) (New York Times Co.).
\item See Carpenters Council, 146 N.L.R.B. No. 114 (1964) (Stephen Gorman Bricklaying Co.).
\item See, \textit{e.g.}, New Orleans Typographical Union, 147 N.L.R.B. No. 21 (1964) (E. P. Rivas, Inc.); Local 964, United Blvd. of Carpenters, 141 N.L.R.B. 1138 (1963) (Carleton Bros. Co.).
\item Local 38, Int'l Bhd. of Elec. Workers, 137 N.L.R.B. 1719 (1962) (Cleveland Elec. Illuminating Co.).
\item Dunlop 496-98; see Strand 94-104.
\end{enumerate}
\end{footnotesize}
job ownership would seem to be a requirement of any plan evolved by the industry itself.\textsuperscript{147} The NLRB, however, has rejected this concept, even though craft lines are often maintained in nonunion firms in the construction industry.\textsuperscript{148} Although the Board’s “failure to utilize this property concept” may be a failure to appreciate fully the “unique characteristics of the construction industry,”\textsuperscript{149} the Board’s reluctance may be a recognition of problems arising from sections 8(a)(3) and 8(b)(2) of the LMRA.\textsuperscript{150}

The Board’s reluctance was illustrated by a dispute between operating engineers and the plumbers over certain pipe connections of refrigeration equipment.\textsuperscript{151} The employer had assigned the work to the operating engineers, although the work was included among the skills and duties traditionally performed by plumbers. The Board stated that it had to decide between two groups of employees, and that thus the name of the union was of little significance. This approach, although consistent with the language of section 10(k), weakens reliance upon traditional work divisions. The plumbers showed “clear and uncontradicted evidence” that they had for some time represented journeymen in this area. Indeed, the employer had used plumbers for this work for three years. The engineers conceded that this was traditionally plumbers’ work and their regional director admitted that the disputed work was regular pipefitting work which the plumbers were entitled to perform. Despite this evidence, the employer’s assignment to the engineers was upheld. The Board stated that the work required less skill than is involved in normal plumbers’ work, that the employees were sufficiently skilled to perform the work, and that the employer had assigned them the work. Ironically, the Board admitted that this work was an “elementary part of the plumbing and pipefitting craft.” Thus, it appears that although nearly all of the substantive evidence favored the plumbers, nonetheless the employer’s assignment apparently was the determining factor. The Board ignored the regional director’s view, arguing that it was based only on traditional positions. His opinion “was not directed to the

\textsuperscript{147} STRAND 103; see DAWSON, \textit{Hollywood’s Labor Troubles}, 1 IND. \& LAB. REL. REV. 643 (1958).


\textsuperscript{149} O’Donoghue 324.


\textsuperscript{151} Enterprise Ass’n of Steam Pipefitters, 136 N.L.R.B. 1641 (1962) (All-Boro Air Conditioning Corp.).
merits of competing claims for pipefitting work where lesser and higher skilled workmen quarrel over the right to do the simpler forms of the work of their trade."

Shortly thereafter, the Board made another award in opposition to traditional work jurisdiction in Local 991, Int'l Longshoremen's Ass'n (Union Carbide Chem. Co.). The company, Union Carbide, had changed its method of operation so that its own employees, represented by the Texas City Metal Trades Council, performed ship-loading work previously done by a contractor using longshoremen. The employer built its own container dock when it began using aluminum containers rather than paper bags. The ILA had always loaded cargo in the area, including that of Carbide. The Board, in upholding the employer's assignment, found the work to be only an extension of shipping functions currently carried on and an integral part of the plant's operations. It found that the present employees were capable of performing the work and stated that no general cargo was loaded at the container dock. Furthermore, the work was not steady, and Carbide's employees worked throughout the plant wherever they were needed. The work was similar to some work performed in the plant and, as the employees worked part time in the plant, the longshoremen would not have been full time employees.

Member Brown, dissenting, argued that ILA's traditional work jurisdiction should control. The Jones factors could not be "accorded meaningful implementation," he argued, unless the work was awarded to the ILA. The loading was virtually identical to work done by ILA in the past, albeit through a common carrier. Furthermore, there was no evidence that the Trades Council had ever made any jurisdictional claim to the work or that the employees had ever worked as longshoremen. The change in operation, he argued, was in reality a switch of assignment of the work to a new group of employees.

Failure by the Board to follow traditional lines may lead to continued jurisdictional strife. Traditional "rights" or jurisdictional boundaries

152 Id. at 1647.
155 137 N.L.R.B. at 760.
156 The United States Court of Appeals for the Fifth Circuit, in enforcing the Board's order, fully agreed that the factor of trade jurisdiction should not be disregarded, but found substantial evidence to support the Board's award. NLRB v. Local 991, Int'l Longshoremen's Ass'n, 332 F.2d 66, 71 (5th Cir. 1964).
157 After the decision in Union Carbide, the ILA notified the Board that it did not intend
have been accorded deference for many years in most industries,\footnote{158} and unions will continue to dispute assignments which they consider to be in opposition to their traditional jurisdiction.\footnote{159} Furthermore encouraging employers to follow such lines would decrease the number of jurisdictional disputes,\footnote{160} and use of this criteria by the Board would make that body’s awards more predictable.\footnote{161}

A meaningful jurisdictional standard should consider the nature of the functions performed and the equipment used, and at least one NLRB case has followed this rationale.\footnote{162} Utilization of this approach would cause Board awards more closely to parallel those of arbitrators and the Joint Board. Even though application of this standard may weaken the employer’s interest in a 10(k) proceeding, attention should be focused on the competing claims of the two unions involved, rather than on the interests of the employer. Statutory compulsion has been brought to bear on the problem for the purpose of eliminating the social waste and the loss to innocent parties resulting from stoppages caused by work assignment disputes—not for the purpose of forcing a more rational and efficient distribution of labor in areas in which craft work predominates.\footnote{163}

**EFFICIENCY AND ECONOMY**

Employers will consider the efficiency and wage scale of the particular workers as significant factors in making jurisdictional awards. The former criterion would seem more proper for use by the Board than the latter. Although the Board has stated that labor costs cannot be determinative in deciding jurisdictional disputes, they are one of the relevant factors to be considered.\footnote{164} Use of comparative wage rates by the Board would not discourage disputes, however. Indeed, unions to comply with the award. Since an 8(b)(4)(D) charge is only dismissed upon compliance, the Board held an unfair labor practice hearing. A cease and desist order was issued since the union’s only defense was that the 10(k) award was erroneous. See Local 991, Int’l Longshoremen’s Ass’n, 139 N.L.R.B. 1152 (1962) (Union Carbide Corp.).

\footnote{158} Some agreements and decisions of record based upon traditional jurisdiction antedate the existence of the NLRB by thirty years. O’Donoghue 325.

\footnote{159} This factor is arguably irrelevant. Congress made jurisdictional strikes illegal despite the fact that the assignment may have violated even clear traditional jurisdictional lines.

\footnote{160} Note, 73 Harv. L. Rev. 1150, 1164 (1960).

\footnote{161} See Cohen, supra note 139, at 918.

\footnote{162} Local 825, Int’l Union Operating Eng’rs, 139 N.L.R.B. 1426 (1962) (Schwerman Co.).

\footnote{163} Hyman 456.

with lower wage scales would be encouraged to extend their jurisdictional claims. As one author points out, jurisdictional disputes are often caused at the border line of craft jurisdiction because of the wage rate differential.\textsuperscript{165} Thus, use of this factor would add fuel to existing problems and "breed bitter resistance and antagonism."\textsuperscript{166}

Efficiency, on the other hand, is a more appealing criterion. It may refer either to the nature of the operation, or the competence of the workers involved. The nature of the work itself may aid in determining the work assignment. In one case\textsuperscript{167} for instance, the Board upheld an assignment to the lathers of certain work involving the installation of nailing bars on a suspended ceiling. The Board found it significant that the use of carpenters would involve installing temporary ceiling bars, necessitating duplication of effort.\textsuperscript{168} Admittedly, time and costs are components of efficiency. This factor, however, does not present the difficulties mentioned above in reference to comparative wage scales.\textsuperscript{169}

Since the competence of the workers involved to perform the disputed work must, of course, be considered, the respondent must be able to demonstrate that its members can perform the task "at least in a way which will meet the standards of performance normally applicable in the trade or industry."\textsuperscript{170} The Board usually mentions competence but has apparently accorded this factor little weight. It is clear, however, that the more difficult question involves the relative skill of the competing employee groups.

\textsuperscript{165} Dunlop 485.

\textsuperscript{166} Hyman 454. If a task has "traditionally been performed by a craft, and calls for the tools and skills normally exercised by the members of that craft, the task should not be taken from that craft merely because a more economical flow of work could be secured by shifting it to a different craft and because a union can be found to assert a claim to it." \textit{Id.} at 455. The author acknowledges, however, that there are limits to the worker's interest in security. \textit{Ibid.} Economical conduct of the work should be recognized only where the disputed work involves a new task created by changes in materials or techniques. Compare Address by Member Brown, Convention of Alaska State Federation of Labor, Sept. 17, 1962, in 51 L.R.R.M. 103, 105 (1963); pp. 124-28 \textit{infra}.

\textsuperscript{167} United Bhd. of Carpenters, 139 N.L.R.B. 591 (1962) (O. R. Karst); see New Orleans Typographical Union, 147 N.L.R.B. No. 21 (1964) (E. P. Rivas, Inc.).

\textsuperscript{168} \textit{Cf.} Local 964, United Bhd. of Carpenters, 141 N.L.R.B. 1067 (1963) (Carleton Bros. Co.). See also Local 1, Int'l Bhd. of Elec. Workers, 147 N.L.R.B. No. 73 (1964) (McDonnell Aircraft Corp.).

\textsuperscript{169} Hyman 454.

\textsuperscript{170} \textit{Id.} at 452.
SKILL

Where a high degree of skill is required, it seems justifiable to give weight to this factor.\textsuperscript{171} The opposite approach, however, may be inappropriate. Work has been assigned to less skilled laborers when no need was found for the abilities of the higher skilled union.\textsuperscript{172} Similarly, work has been assigned to less skilled production workers where the use of skilled machinists was not necessary to the performance of the work.\textsuperscript{173} However,

most skilled work involves some operations that can be isolated and performed relatively easily. There appears to be no good reason why the settlement of work assignment disputes should become a factor in determining the extent to which jobs are to be thus broken down.\textsuperscript{174}

Furthermore, it is critical to a craft union’s economic position to have versatile members able to perform a number of tasks. Public policy would not be furthered by the use of factors which in themselves often cause jurisdictional disputes.\textsuperscript{175}

\textbf{SIMILARITY TO PAST PROCESSES AND SUBSTITUTION OF FUNCTIONS}

The above sections demonstrate the need to recognize to some extent the traditional jurisdiction of the unions and the worker’s interest in job security. This latter interest is often affected when new material or technological changes are introduced. Such changes are a common cause of jurisdictional disputes, often resulting in a decrease of work opportunities for a particular union.\textsuperscript{176} When tasks are replaced by the introduction of new materials or equipment, the Board has recognized the claim of workers who had performed the similar work in the past. In \textit{Local 681, Int'l Ass'n of Machinists (American Radiator & Standard Sanitary Corp.)},\textsuperscript{177} the machinists had been operating planers, one of which was replaced by a timesaving machine. The assignment to the machinists was upheld, based in a large part on the historical operation of the predecessor machine by that group. Similarly, when an employer, a television and...


\textsuperscript{172} International Union of Operating Eng'rs, 135 N.L.R.B. 1392 (1962) (Frank P. Badolato \& Son).

\textsuperscript{173} Lodge 681, Int'l Ass'n of Machinists, 135 N.L.R.B. 1382 (1962) (P. Lorillard Co.).

\textsuperscript{174} \textit{Hyman} 454.

\textsuperscript{175} See \textit{Dunlop} 485.

\textsuperscript{176} \textit{Id.} at 488-89; \textit{Strand} 41-44.

\textsuperscript{177} 137 N.L.R.B. 1524 (1962).
radio station, replaced his records with magnetic tape equipment, the indexing and filing of tapes were assigned to workers who had filed records in the past.\textsuperscript{178}

In the cases referred to above the new work did not require new skills, nor did it fall directly within the jurisdiction of another union. When these facts do exist, the Board must choose between employees who possess the necessary skills and have traditionally performed the work in question, and employees who have performed functionally similar work in the past but whose function has now been replaced. Job security at this point meets its severest test, as it may run counter to traditional work boundaries. Although the Board has not met the problem in these terms, it is clear that the problem of job security and employment has influenced some awards.\textsuperscript{179} An example may be found in \textit{Philadelphia Typographical Union (Philadelphia Inquirer)},\textsuperscript{180} one of the most significant post-CBS cases to date. In 1959 the employer-newspaper introduced a new process, called photocomposition, and a new piece of equipment called a linofilm machine. Photocomposition, a substitute for the older "hot metal" process which used molten metal for the creation of type, employs a photographic principle. The work in dispute—darkroom tasks of developing the film and sensitized paper and printing of "velox" prints—was assigned by the employer to the typographers. The Newspaper Guild argued that its photographers in the editorial department should do the darkroom tasks.\textsuperscript{181} A third group, the Photo-Engravers Union, claimed the making of the velox prints. The employer argued that photocomposition was an integrated process, all parts of which should be performed by members of the same union, and that typographers should get the work because they did the hot metal work for which the new process was a substitute. The ITU added that it had instituted schools to train its members in the photocomposition process. The Guild replied that its members already possessed the necessary skills, and that similar darkroom photography had been done by them for years. Thus, the

\textsuperscript{178} Local 4, Int'l Bhd. of Elec. Workers, 138 N.L.R.B. 335 (1962) (Pulitzer Publishing Co.).
\textsuperscript{181} The Guild invoked its grievance procedure; the arbitrator decided in favor of the Guild but expressly stated that he would not and could not pass on the rights of the typographers.
problem was posed: to what extent shall interest in job security outweigh traditional jurisdictional lines?

The Board split four ways, three members upholding the assignment to the typographers. The majority opinion of Chairman McCulloch and Member Fanning\(^{182}\) based the determination on two "novel" grounds: (1) that photocomposition is a substitute for hot metal processes done previously by the typographers and (2) that a contrary assignment could result in a loss of employment for typographers. They found that the Board's usual criteria were of no help, and that the collective bargaining contract and the union constitution of each of the three unions could be construed to cover the work. The skills were similar, ITU members having been specially trained to handle this new process, and there was no past practice or clear industry custom. Under these circumstances, they felt, the Board should call upon what the Court in CBS termed "experience and common sense." It was noted that photocomposition and other photographic processes were gradually replacing hot metal methods of composition, and that both processes fulfill the same function in the production of newspapers. Photocomposition, however, requires new skills. The introduction of these new processes, it was therefore found, threatened the jobs of typographers who have always performed composing room work but have only recently acquired photographic skills.

In response to these changes the ITU had established schools to retrain its members in order to retain their jobs as new methods were introduced. The Board (Chairman McCulloch and Member Fanning) assumed that the particular typographers assigned to the work had the necessary training and skills, and implied that the typographers may even possess greater skills because the Guild and photo engravers had not performed darkroom work in connection with composing a newspaper. Significantly, the Board mentioned that the Guild and photo engravers would not "lose even one hour of work they had previously done," whereas a contrary assignment could cause the discharge of typographers. Thus, to overturn the assignment would take away employment of typographers and open up new opportunities for the other two unions. The Board was careful to point out that it relied "particularly on the fact that photocomposition is a substitute for the earlier 'hot metal' process" previously done by typographers.\(^{183}\) Thus, "loss of jobs," though discussed at

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\(^{182}\) Member Rodgers concurred.

\(^{183}\) 142 N.L.R.B. at 43.
length, was de-emphasized. This factor, however, is doubtless a component of the "substituted functions" factor.

Member Rodgers, justifiably intimating that Member Fanning and Chairman McCulloch had introduced "new criteria," concurred on a ground which seemed more consistent with the prior Board policy of giving "substantial, if not decisive, weight" to the employer's assignment in cases where all claims have some validity. He would "upset such assignment only in the face of circumstances which virtually compelled a contrary result," thus following prior decisions which seem to have turned, either expressly or impliedly, on the employer's assignment when factors were in balance, or when the respondent union introduced no significant evidence. 184

In his dissent Member Leedom found no need to discuss "socio-economic" factors since the work should have been assigned to the Guild based on past criteria. 185 The Guild, he noted, had done similar darkroom work and possessed the necessary skills. He found the ITU's training courses irrelevant because, since any employee could attend school and learn the skills necessary for a job, the "skills" criterion could become meaningless. The fact that new skills were required, he argued, made irrelevant the rationale that the new process was a substitute for an older process. The reasoning of the dissent, however, evades the fact that both groups possess the necessary skills. Surely a "skill" criterion is meaningless where both employee groups possess adequate skills; and no showing was made that Guild members possessed higher skills.

The majority's willingness to broaden the 10(k) inquiry beyond the criteria used in past cases is explained by its realization that there are no fixed factors in jurisdictional dispute cases, and that such cases must be decided on their own facts rather than on rigid precedent. The list of factors in Jones was not meant to be exclusive; the relevance of various factors depends upon their applicability to particular factual situations, with the ultimate view toward resolving the dispute in accord with congressional policy.

Although Member Leedom deprecates the introduction of "socio-economic" factors in 10(k) proceedings, 186 it seems that at least three

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184 New York Printing Pressmen's Union, 143 N.L.R.B. 167 (1963) (Stuyvesant Press Corp.).

185 142 N.L.R.B. at 44. Member Brown, dissenting, would have assigned the work to the Guild but did not endorse Leedom's dissent in its entirety. Id. at 47.

186 Unimpressed with the "loss of jobs" factor, Member Leedom pointed out that there was no evidence as to the kind of reorganization which would take place due to the intro-
members of the Board are concerned with the impact of automation.\textsuperscript{187} In \textit{Machinists Union (P. Lorillard Co.)}\textsuperscript{188} the employer installed cigarette packaging machines which eliminated hand packing of cartons. The company assigned the work of adjusting the machines to the Tobacco Workers Union rather than to machine shop workers represented by IAM who had done the repair work on the old machines. The IAM’s certificate excluded fixers (machine adjusters) although a few machinists had been retained as fixers under an agreement to permit them to retain their jobs. The Board held that fixers were needed continuously, that skills of machinists were not needed, and that the work was closely related to the production process. In a later speech Member Brown pointed out that the new machines would cost the jobs of seventy production workers, a fact not mentioned in the \textit{Lorillard} opinion. He also felt that the decision “weighs to the extent possible the impact of automation on the production workers.”\textsuperscript{189} Since the employer’s past practice, Board certificates and industry practice favored the tobacco workers, it is significant that Member Brown referred to the “socio-economic” factors inherent in the case.

Furthermore, the Board has explicitly recognized the “loss of jobs” factor. In \textit{Denver Photo-Engravers Union (Denver Publishing Co.)},\textsuperscript{190} the Board mentioned that its award would not cause respondent’s members to lose jobs, but that a contrary award would adversely affect the jobs of the union members originally assigned the work. Such recognition of the interest in job security seems justified, although awards employing this factor may not always be consistent with traditional jurisdictional lines. Although what one group loses as the result of a 10(k) determination becomes another’s gain, this fact does not “justify disregarding the relative importance of the task in question to both groups in the light of industrial and technological developments.”\textsuperscript{191} While the

\textsuperscript{187} See International Longshoremen’s Union, 147 N.L.R.B. No. 42 (1964) (Howard Terminal), where the Board (Members Fanning, Brown and Jenkins) discusses the impact of automation.

\textsuperscript{188} 135 N.L.R.B. 1382 (1962).


\textsuperscript{190} 144 N.L.R.B. No. 137 (1963). See also International Printing Pressmen’s Union, 146 N.L.R.B. No. 186 (1964) (Kelley & Jamison, Inc.).

\textsuperscript{191} Hyman 451; see International Printing Pressmen’s Union, 146 N.L.R.B. No. 186 (1964). \textit{But see} New Orleans Typographical Union, 147 N.L.R.B. No. 21 (1964) (E. P. Rivas, Inc.).
"loss of jobs" factor may not be legitimately determinative, it has the value of easing, to some extent, the impact of technological change on workers and may reduce union opposition to new techniques or machinery.192

ACQUIESCENCE

The Board has occasionally used union acquiescence in past practices or work assignments as a factor in 10(k) cases. In General Teamsters Union (Snow White Baking Co.)193 the work in dispute was delivery of bread directly to retail stores. The employer had in the past employed driver-salesmen represented by the Teamsters Union, and had, when necessary, used as drivers certain plant employees on a part-time basis. In 1960 the company decided to eliminate most of its routes and the driver-salesmen left its employ. Regular employees, however, continued to supply two retail stores. The union first objected five months later when discussion of the renewal of the contract with the teamsters began. The Board held that the teamsters had acquiesced in the employer's action because they had not complained about the occasional deliveries in the past.

Members Fanning and Brown, in a vigorous dissent, would not impute to the teamsters a "past intent" to relinquish their claim. Indeed, they noted that the use of plant employees was instituted only to supplement the carrying capacity of the driver-salesmen.194 The failure to object to the occasional deliveries should not, they felt, change the fact that the driving in question was normally within the teamsters' jurisdiction. Though the inside employees had performed the specific work in dispute for some time, this was subsidiary to the main portion of delivery work; furthermore, the dissenters pointed out, the system was instituted for the driver-salesmen's convenience. Logic as well as traditional work lines supports the position of the dissenters, who aptly characterized the majority's position as requiring the respondent union to have objected, and perhaps struck, when the supplemental system was instituted. This would encourage workers to refuse to assist a "new helper" on the job in order to avoid a Board ruling that by failing to object at the proper moment they surrendered a part of their traditional work claim. Such action would surely disrupt the employer's operation and would not serve the long-run interest of either party.195

192 Hyman 456.
194 Id. at 1483.
195 See Local 1291, Int'l Longshoremen's Ass'n, 137 N.L.R.B. 1451 (1962) (Northern
The "acquiescence" factor has not only been dubiously applied, but has been over-extended. In Local 28, Int'l Stereotypers Union (Capital Electrotype Co.)\(^{196}\) the work of affixing electrotypers to Tympan sheets had been done by pressmen for many years. When magnesium carriers were substituted for Tympan sheets, electrotypers requested the work. The Board held that the electrotypers' acquiescence in the work assignment for ten years was decisive even though the process had now been changed. The disputed work, however, was "substantially similar" to the old work which was found to be within the jurisdiction of the pressmen. Why the decision was not based solely on this latter point, or on the similarity of processes, is not clear. The opinion appears inappropriately to extend the doctrine of "acquiescence." Carried to an extreme, it could be reasoned that whenever a new process is instituted the workers who had performed the replaced work or process are entitled to operate the new process since no other group had objected before.

An easy case is presented where one union has not objected to assignments of similar work over a long period of time, as in Pipefitters Union (Brown & Williamson Tobacco Corp.)\(^ {197}\) where an employer's assignment to machinists of the job of installing guard rails was supportable because machinists had for twenty years performed the same work. There was no new process; the work in question was exactly that which machinists had done in the past. Even though the work was covered by the Pipefitters' constitution, that union had never claimed the work or attempted to bargain for it. Acquiescence in such a case is no different from the employer's past practice, a factor often considered by the Board.

PRIVATE SETTLEMENTS: A PROBLEM OF FULL FAITH AND CREDIT

Since one of the aims of the 1947 legislation was to encourage private settlements, it would seem that the Board should consider relevant, in a 10(k) proceeding, evidence of decisions of private bodies or agreements of the parties. Although private settlements or arbitration procedures may not satisfy the exclusionary clause of section 10(k), decisions and precedent of private arbitration machinery should have some impact upon the merits of the 10(k) proceeding.

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Metal Co.), where the ILA's acquiescence in the use of fifteen-man crews prohibited their bringing pressure to compel twenty-two man crews despite the area practice requiring the larger number.

\(^{196}\) 137 N.L.R.B. 1467 (1962).

\(^{197}\) 139 N.L.R.B. 1140 (1962).
Decisions of the Joint Board were mentioned by the NLRB in *Jones* as one of the factors to be used in determining 10(k) awards. However, this factor has been accorded only minimal weight. For example, in *Local 1622, United Bhd. of Carpenters (O. R. Karst)* the carpenters submitted approximately 300 Joint Board decisions showing awards of similar work to carpenters over a twelve to thirteen year period. The Board held that this evidence merely showed that the dispute was a long-standing one and that neither union had conceded to the other the right to perform the work in dispute. The Board's cavalier rejection of Joint Board precedents seriously undermines the statutory purpose of avoiding jurisdictional disputes by refusing to aid in clarifying and enforcing established jurisdictional lines. The fact that the dispute is a long-standing one should not affect the value of the evidence. Further, the Board's assignment to the lathers may well encourage further jurisdictional strife, since each union now has some precedent as authority for its position. The Board's approach in *Karst* hampers the establishment of national jurisdictional rules, and hardly encourages resort to Joint Board procedures. Unions which have lost past decisions before the Joint Board will be encouraged to avoid that body and take their case to the Board.

Apparently, the Board's narrow reading of the "agreed upon methods" exclusion of section 10(k) has resulted in considerably less weight being accorded to the determinations of the Joint Board. In *Local 825, Int'l Union of Operating Eng'rs (Nichols Elec. Co.)* the engineers offered in support of their position 130 recent Joint Board decisions. The Board dismissed them, stating that there was no evidence that IBEW joined in submitting any of these disputes to the Joint Board. IBEW is bound by Joint Board determinations, however, even though it has steadfastly refused to comply with its determinations involving line work. IBEW's refusal to comply was emphasized by the Board to demonstrate that

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199 135 N.L.R.B. at 1411.


201 See United Bhd. of Carpenters, 142 N.L.R.B. 163 (1963) (Berti Co.).

there was no agreed upon method of adjustment and to weaken the evidentiary value of the award on the merits. The Board held that the Joint Board awards could not be given sufficient weight to offset the other relevant considerations—a determination which seems to overstate the weight actually given the awards by the Board.

The Board did give substantial weight to a federation ruling, however, in an early post-CBS case, where, incidentally, the ruling was consistent with the employer's assignment. Finding "no outstanding equities in favor of the machinist as against the electrician operation of the crane," the Board gave "substantial weight to the long-standing rulings by the parent federation of both disputing unions that the operation of electric cranes . . . 'shall be Electrical Workers work.'" In 1922 the Building and Construction Trades Department, AFL, decided that this type of work should be performed by electricians.

On the other hand, little deference will be accorded the Joint Board determinations when it does not address itself to the underlying dispute. In Glaziers Union (Pittsburgh Plate Glass Co.), for instance, the employer had assigned work involving the moving of glass crates on a construction project to laborers represented by Local 18, Hod Carriers Union. Local 1778, Glaziers Union, representing outside glaziers and inside handlers, induced a work stoppage. The Joint Board had decided in favor of the glaziers but it is clear that the NLRB regarded that award as at best ambiguous since the successful union was the representative of both groups of "glaziers." The work dispute was in reality between the outside glaziers and "all other nonskilled categories." The Board's award, however, was in favor of the laborers and inside glaziers whether represented by Local 18 or 1778 under their collective bargaining

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203 A Joint Board award to respondent union will not be "controlling" where all parties were not bound by it. Carpenters Council, 146 N.L.R.B. No. 114 (1964) (Stephen Gorman Bricklaying Co.). Apparently, however, the award would not be controlling even if all parties were bound. The real question involves the weight to be given an award.

204 Although the Board found it "highly probable" that operating engineers would bring more skill and experience to the operation, it felt that IBEW members possessed sufficient skills. The assignment to IBEW was upheld although the only substantive evidence favoring that union, besides the employer's choice, was the employer's use of IBEW members since 1955 and some evidence that other employers in the state also used IBEW members.

205 International Ass'n of Machinists, 135 N.L.R.B. 1402 (1962) (J. A. Jones Constr. Co.).

206 Id. at 1411.

207 PLAN FOR SETTLING JURISDICTIONAL DISPUTES NATIONALLY AND Locally 76-77 (1962). This plan is commonly known as the Green Book.

208 137 N.L.R.B. 968 (1962).

209 Glaziers Union, 137 N.L.R.B. 975 (1962) (Binswanger Glass Co.).
contracts covering inside warehouse employees. Thus, the Board awarded the work to two competing unions. The Board refused to assign the work solely to the inside glaziers because laborers had done "a major portion of the work" during the past several years while Local 1778 had been used to a lesser degree. As Chairman McCulloch and Member Brown point out in their dissent, leaving two competing unions entitled to do the work hardly decides the controversy.210

_The Miami Agreement_211

A tribunal faced with the "law" of another jurisdiction must interpret that law. Such a problem faced the Board in _Bricklayers Union (Consolidated Eng'r Co.)_.212 The work in dispute was the installation of "drop lines" from overhead T-valves down to assembly line locations where wiring was to be done. Consolidated had received a general contract for the construction of a large addition to a Chevrolet assembly plant. The work was assigned by Chevrolet to its maintenance employees, represented by the United Auto Workers, rather than to the employees of Consolidated, represented by the Building and Construction Trades Council. Chevrolet argued that it had not given this work to Consolidated under its general contract.

The Council, on the other hand, argued that its pipefitters should receive the work because it was part of "new construction," and was not comparable to electrical or pipefitting work performed by production or maintenance employees. Claiming that it was entitled to the work on the basis of area and past company practice, the Council further argued that under the Miami Agreement of 1958, the UAW had agreed to cede new construction work to craft unions. The mediation team, operating pursuant to the procedures of the Miami Agreement, was unable to get the parties to agree, but did determine that the work fell within the "new construction" provision of the Miami Agreement. The Agreement was not a contract for binding arbitration, as the Board

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210 137 N.L.R.B. at 974.
211 The Miami Agreement was made in 1958 between the presidents of the Building and Construction Trades Department and the Industrial Union Department—subordinate groups of the AFL-CIO. By its terms, "new" construction work was assigned to the building trades unions and production and maintenance work to the industrial unions. Special teams were set up to adjust disputes that arose between the two groups. The agreement admitted the existence of a doubtful area in between, where decisions would have to be based on past practices.
pointed out, and neither party agreed to be bound by the conclusion of either the initial investigatory team or the AFL-CIO Executive Council.

Indicating that the UAW had never conceded its jurisdictional claim in this case, the Board held that the Miami Agreement was not a firm contract for arbitration, nor conclusive evidence that UAW had ceded jurisdiction. The Agreement recognized a "doubtful area" between new building construction and production and maintenance work in which decisions should be based on past practices on an area, industrial or plant basis. The Board held that the disputed work fell within this doubtful area, a fact, the Board reasoned, which "must be conceded from the very fact that the parties . . . were unable to agree upon its proper allocation."213 Finding no difference in the skills of either union, that evidence of past practice revealed a "mixed experience," and apparently no substantial evidence favoring either group, the Board assigned the work to the UAW employees, thus upholding the employer's assignment. Indeed, the employer's assignment was the only significant factor remaining.

**Employer-Union Agreements**

Agreements between the employer and the striking union seem to have been interpreted in such a way as to favor the employer's assignment.214 In Local 10, Int'l Longshoremen's Union (Matson Nav. Co.)215 the work in dispute was the assembly of lumber on the docks used by carpenters in shoring cargo on board ships. Carpenters performed the shoring work, but the longshoremen sought the assembly work. The employer's assignment to the carpenters was upheld. The International Longshoremen's and Warehousemen's Union had always assembled lumber loads in Seattle, Portland and Los Angeles. This was also true in San Francisco before World War II, but carpenters began performing such work during the war due to manpower shortages. A few contractors in San Francisco, however, still used ILWU members. A provision in the contract between the ILWU and the employers' association (PMA) stated that "Longshore work shall include the following dock work . . . (e) the building of all loads on the dock." The Board did not deal with this provision, perhaps deciding that it was offset by Matson's past practice. It also ignored an arbitration award under the contract to the ILWU. Matson's practice, however, as

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213 Id. at 129-30.
pointed out above, was an exception to practice on the West Coast. Thus, the employer's assignment was upheld despite area practice, a contract clause and a contrary arbitration award.

The value of precedent in this area is well demonstrated by the recent case of Longshoremen's Union (American Mail Line, Ltd.) which involved the same parties and the same contract. In this instance the Board awarded certain cargo handling operations to members of the ILWU although the employer had originally assigned the work to the operating engineers. The employer had changed his assignment, however, and had given the work to ILWU members. Although other facts also favored the ILWU, the Board found that the "most persuasive factor" was the interpretation of the ILWU-PMA arbitrator that the work belonged to the longshoremen under the parties' mechanization agreement. The Board accepted the parties' urging to "honor their agreement as interpreted by them." In Matson, however, an arbitration award interpreting the same automation agreement and also awarding the work to the ILWU was brushed aside because the Board usually gives such awards no "significant weight unless all parties to a dispute have participated in the arbitration." Thus in both cases arbitration awards between the same two parties and involving the same agreement favored ILWU's claim. One award was the "most persuasive factor" while the other award received no "significant weight." It seems more than coincidental that the Board's determination in both cases upheld the employer's final award.

There may have been greater significance to the Board's apparent switch of policy, however. The changing nature of the arbitration process is well demonstrated by the recent Supreme Court decision in Carey v. Westinghouse, where the Court held that an employer must arbitrate a work assignment dispute if one of the unions involved so requests. Recognizing the fact that an arbitration award would not bind the second union unless it intervened or were joined, the Court nevertheless stated that

216 The Board conceded that there was no evidence of any superiority in skills, even though carpenters at Matson serve a four year apprenticeship. Efficiency favored carpenters, however, as it was thought efficient to have the selection of proper lumber on the docks performed by the same worker who would use that lumber in the hold of the ship.
218 PMA-ILWU memo of agreement on mechanization and modernization.
219 See Longshoremen's Union, 147 N.L.R.B. No. 147 (1964) (Howard Terminal); Longshoremen's Union, 144 N.L.R.B. No. 140 (1963) (Albin Stevedore Co.).
arbitration may as a practical matter end the controversy or put into movement forces that will resolve it . . . . Since § 10(k) not only tolerates but actively encourages voluntary settlements of work assignment controversies between unions, we conclude that grievance procedures pursued to arbitration further the policies of the Act.221

It is ironic that the court would require bilateral arbitration on an essentially trilateral controversy when the Board has consistently ignored such awards. Since one union has not participated in the arbitration proceedings, the Board's past approach seems justified. Although national labor policy favors private settlements of disputes, as is clearly expressed by the exclusionary clause in section 10(k), surely an equally important policy is the promotion of arbitration which will be "final and binding." However, without intervention an arbitration award cannot finally settle a work assignment dispute.222

Although a general critique of Carey is beyond the scope of this article, it is significant to note this decision in light of American Mail Line.223 Carey will probably have some effect upon the Board's resolution of work assignment disputes. However, the Board's giving the decision weight would conflict with its past, and more sound, approach to arbitration awards. Since the arbitrator bases his decision in large part upon the collective bargaining contract, emphasizing this award would seem to violate the Board's mandate to "hear and determine" the dispute. Furthermore, giving weight to the bilateral arbitration proceeding raises due process problems.224

An employer-respondent union contract was used to reverse the employer's assignment in Printing Pressmen's Union (Stuyvesant Press Corp.),225 one of the few cases in which the Board awarded the disputed work to the respondent union. The employer installed offset printing presses in 1958 but subcontracted all offset preparation until 1962 when part-time duties were assigned to a member of the ITU. However, in 1958, at the company's request, the local employer's association, of which Stuyvesant was a member, had notified the pressmen that it recognized their jurisdiction over the operation of offset presses. This letter was considered to be a contract by the Board and was made the basis of an

221 Id. at 265-66.
award to the pressmen. The company's preference was held "not persuasive" as the assignment was made after the "contract" with the pressmen. Although the decisive factor was the 1958 agreement which the Board, in effect, enforced, the Board noted that the work in question constituted a normal accretion to the offset press work. The Board also noted that in determining bargaining units it customarily includes offset preparation employees in a unit of offset press employees as it is clear that the former have a close community of interest with the latter.\textsuperscript{226} Generally, however, Board standards for the determination of bargaining units do not seem appropriate for deciding jurisdictional disputes.\textsuperscript{227}

\textit{Inter-union Agreements}

A statewide agreement between two disputing unions was given substantial weight in \textit{Local 68, Wood, Wire & Metal Lathers Union (Acoustics & Specialties, Inc.)}.\textsuperscript{228} the first case to depart from the employer's assignment. The employer assigned acoustical ceiling installation work to its own employees, represented by the Carpenter's Union. The lathers objected because of an agreement entered into between the two unions which stipulated that the disputed work was to be within the jurisdiction of the lathers. The company stated that it was not a party to the agreement and was therefore not bound by it. As might be expected, the inter-union agreement was held not to be an agreed upon method of settlement.

The Board found that a balance existed between the equities of both unions and that many criteria determinative in the past were not present. There was no collective bargaining contract with either union; there were no Board certifications; the skills possessed by members of both unions were similar; company and area practice were split almost evenly; and efficiency was apparently not materially affected because the employer had regularly used members of both unions to perform the disputed work. Noteworthy is the fact that the carpenters could have prohibited the Board from proceeding further by arguing that they did not claim that the work was within their jurisdiction. The statement that a balance of factors exists heralds either a new approach or the creation of new factors.\textsuperscript{229} In cases in which both sides had equally impressive claims


\textsuperscript{227} Hyman 450.

\textsuperscript{228} 142 N.L.R.B. 1073 (1963).

\textsuperscript{229} See Philadelphia Typographical Union, 142 N.L.R.B. 36 (1963) (Philadelphia Inquirer).
or neither side had any substantial claim, the Board emphasized the employer's assignment. In Jones the Board gave substantial weight to a federation ruling when "no outstanding equities favored either union." However, this ruling favored the union chosen by the employer.\footnote{International Ass'n of Machinists, 135 N.L.R.B. 1402 (1962) (J. A. Jones Constr. Co.).}

In Acoustics \& Specialties, on the other hand, the Board gave effect to the inter-union agreement even though it was not consistent with the employer's preference. The Board visualized its duty as being much like that of an arbitrator,

balancing all of the interests involved and aiming at a solution which will, in its judgment, finally resolve the dispute. \ldots In attempting to resolve this dispute, individual interests in a particular case may have to be subordinated to a practical and effective solution of the overall problem.

As noted earlier the Carpenters-Lathers Agreement is an attempt by the Unions to eliminate jurisdictional disputes between them. Like all compromises it satisfies neither side completely, but is an attempt to replace the picket line by the bargaining table. That this solution may discommode an individual union member or cause an employer to divide his work between the various crafts differently than before the agreement cannot be gainsaid.\footnote{142 N.L.R.B. at 1078-79. The majority added: "An employer's assignment of the disputed work cannot be in all cases the controlling factor in determining jurisdictional disputes." \textit{Id.} at 1079 n.4.}

Assuming that the factors are in balance, it is difficult to quarrel with the Board's forthright approach. The employer's assignment has been upheld in other cases in which the striking union had more substantial claims than that of the lathers in Acoustics \& Specialties. Indeed, since all traditional factors are neutral, what balances out the employer's choice? Apparently the Board decided that the union agreement outweighed the employer's assignment.

Member Rodgers, dissenting, argued that the Board had improperly applied the Jones criteria. He thought efficiency, as well as economy, favored the carpenters, since carpenters were cheaper to employ and the number of lathers in the area was small.\footnote{Recognition of this factor is important despite the prohibition of the closed shop because craft association and trade skills often create "the practical equivalent of the closed shop." Hyman 453.} Furthermore, he argued, the Board should not "enforce" the private agreement because the parties had not abided by it, and its terms should not be imposed upon the employer since he was not a party to the agreement.\footnote{142 N.L.R.B. at 1082.} The basis of the
dissent, however, can only be that the application of traditional jurisdictional criteria favored the carpenters. The argument that the Board is “enforcing” a private agreement and “imposing” its terms on an employer seems primarily rhetorical. Furthermore, since the agreement was balanced against the employer’s choice, the significance of the fact that the employer was not a party thereto diminishes. 234

The Board’s approach in Acoustics & Specialties would be approved by those writers believing that the Board should focus on the competing claims of the unions rather than on the employer’s interests. 235 Such an approach, however, follows the national policy of promoting private settlement only if the employer is not required to be a party to the private agreement. Carey may not be helpful on this question since one of the two parties involved in that case was the employer. Since the Board has held that the employer is a necessary party to any agreed upon method of adjustment, 236 the weight the Board will give to an inter-union agreement remains unclear. One writer has suggested that such agreements should not be significant since the “two unions may place greater emphasis on the need for agreement than on the effect of the agreement on production and efficiency.” 237 The “need for agreement,” however, may be more important in relation to national policy than “production and efficiency.”

In any event, the Board appears to recognize limits to the application of inter-union agreements. First, the Board will find there is no dispute under section 8(b)(4)(D), and therefore none under section 10(k), when one union does not claim the work, even though that union had previously ceded the work tasks to the respondent union. 238 Second, the inter-union agreement will not be accorded significant weight where the Board finds the division of work to be “arbitrary.” In Bricklayers Union (Engineered Bldg. Specialties, Inc.), 239 where two competing unions had divided caulking work, the Board stated that

234 Member Leedom, dissenting, recognized the majority’s balance but thought that the assignment and the efficiencies outweighed this agreement. The employer’s assignment, he argued, should govern the result in the absence of countervailing factors of greater weight. Id. at 1083.
235 See Hyman 456.
236 Local 825, Int’l Union of Operating Eng’rs, 139 N.L.R.B. 1426 (1962) (Schwerman Co.).
237 Strand 113.
such a division of the work would be arbitrary in nature, rather than based upon legitimate jurisdictional claims. In our view, we would not be meeting our responsibilities under the Act if we were to accept such an arbitrary division of the work as the basis for our award.\footnote{Ibid.}

Although the contract division may not follow normal craft lines, it is not clear why the agreement was "arbitrary." Certainly, as in Acoustics & Specialties, it is justifiable to say that this was an "attempt by the unions to eliminate jurisdictional disputes between them." Indeed, the inter-union agreement in that case was given substantial weight although it was not consistent with the employer's preference. Furthermore, the Board has given effect in several cases to an employer's "arbitrary" but practical division of work based upon the destination of the finished product.\footnote{See, e.g., New York Mailers' Union, 137 N.L.R.B. 665 (1962) (New York Times Co.), where the employer divided work between deliverers and mailers on the basis of the ultimate destination of the product.}

Third, the use of the interim agreement in Acoustics & Specialties was predicated upon the existence of a "state of balance." In a recent case involving the same unions, the agreement was not held determinative because past practice and efficiency favored the lathers.\footnote{Carpenters Council, 146 N.L.R.B. No. 133 (1964) (J. O. Veveto & Son).}

\section*{The 10(k) Award}

\subsection*{Affirmative Awards and Section 8(a)(3)}

Assuming that a decision on the merits is reached, problems remain to be solved. Specifically, the formulation and enforcement of the award must be determined. Soon after CBS the Board in Local 66, Int'l Union of Operating Eng'rs (Frank P. Badolato & Son)\footnote{135 N.L.R.B. 1392 (1962).} upheld the employer's work assignment to respondent union even though the employer did not at that time employ any members of the respondent union. The implication that an award may be in favor of an outside union has been confirmed in later cases.\footnote{See, e.g., Local 862, Treasurers Alliance, 137 N.L.R.B. 738 (1962) (Allied Maintenance Co.); United Ass'n of Journeymen & Apprentices of the Plumbing Indus., 144 N.L.R.B. No. 12 (1963) (Matt J. Zaich Constr. Co.).} Similarly, it appears immaterial that the employer is not a neutral bystander.\footnote{Local 991, Int'l Longshoremen's Ass'n, 137 N.L.R.B. 750 (1962) (Union Carbide Chem. Co.).}

Even if both employee groups have the same employer there is still
the problem of assigning work on the basis of union membership. The major Board objection to the granting of affirmative work assignments before CBS was that the enforcement of 10(k) determinations by an employer might, in the words of the act, encourage or discourage union membership by "discrimination in regard to hire or tenure of employment."246 It seems clear that an award based upon union membership would conflict with sections 8(b)(2) and 8(a)(3).

Jurisdictional disputes can be distinguished from representational disputes because in the former, two or more unions seek the right to do specific work for their members, not to change the union affiliation of the other claimants of the work. The membership and representation rights of the unions are not affected; the conflict is over the right to do certain work and not to represent certain employees. The application of section 8(a)(3), however, is based on whether job rights are affected because of union membership; it does not turn on whether the discrimination is intended to change the union status of the employees discriminated against.247 "[T]here is no substantial evidence that Congress intended to subordinate the prohibition against discrimination to the desire for jurisdictional peace."248 Since CBS expressly requires affirmative awards to be made, it seems obvious that such awards cannot be made to a particular union.249

The Board has attempted to avoid this problem by assigning the work in dispute to certain employees but not to their union. Thus, in Jones the Board assigned the disputed work to "electricians, who are represented by the IBEW, but not to the IBEW or its members."250 Such an approach seems justifiable in light of the "trade, craft, or class" language in section 8(b)(4)(D).251 Thus, the Board made it clear in Enterprise Ass'n of Pipefitters (All-Boro Air Conditioning Co.)252 that it must decide "which of two groups of employees is entitled to the

247 See Radio Officers' Union v. NLRB, 347 U.S. 17 (1954); NLRB v. Oertel Brewing Co., 197 F.2d 59 (6th Cir. 1952).
248 Farmer 687. But see NLRB v. Radio Eng'rs Union, 272 F.2d 713, 716 (2d Cir. 1954).
249 See generally Farmer 685-90.
250 135 N.L.R.B. at 1411.
251 This approach was suggested in the union's brief in CBS. "The Board need not even make its determination in terms of the unions involved. It may resolve the jurisdictional dispute in terms of crafts . . . ." Brief for Respondent, p. 41, NLRB v. Radio & Television Broadcast Eng'rs Union, 364 U.S. 573 (1961).
work,” and, “the name of the incumbent union is of little consequence.”\textsuperscript{253} In \textit{All-Boro} pipe connecting work was assigned to operating engineers even though the Board conceded that plumbers traditionally performed the work. The Board will, therefore, look at the skills of employees involved rather than the traditional jurisdiction of the unions to which they belong.\textsuperscript{254}

Although it has been argued that a 10(k) determination cannot be a defense to an 8(b)(2) charge,\textsuperscript{255} the Board has decided that an award to certain employees represented by a particular union, but not to the union itself, can be a defense. In \textit{Local 502, Int'l Hod Carriers Union (Cement-Work, Inc.)},\textsuperscript{256} the trial examiner, finding all the essentials of an 8(b)(2) charge as well as a jurisdictional dispute under section 8(b)(4)(D), decided that all issues pertaining to the alleged jurisdictional dispute should be considered before the conduct could be treated as a violation of any other section. The examiner, therefore, recommended dismissal of the 8(b)(2) and 8(b)(1)(A) charges because the challenged conduct was “inextricably interwoven” with a jurisdictional dispute.

The Board agreed with the trial examiner’s recommendation and held that if the union’s right to the work could be established it could assert such right as a defense to the 8(b)(2) charge. Therefore, the act would be effectuated by permitting the union to introduce evidence as to whether its members were entitled to perform the work. Members Rodgers and Leedom, dissenting, argued that jurisdictional dispute issues are not properly asserted as defenses to 8(b)(2) and 8(b)(1)(A) charges.\textsuperscript{257}

The Board has apparently assumed either that the strong policy against discriminatory displacement of employees has legislatively been outweighed by the policy of settling jurisdictional disputes or, more likely, that its awards to employees successfully avoid violations of section 8(b)(2). Admittedly, an employer’s compliance with a Board award is different from unilateral discrimination, but the courts and the Board have been reluctant to compromise sections 8(a)(3) and 8(b)(2) in the past.\textsuperscript{258} Furthermore, it would be difficult to hold that section 10(k), a

\textsuperscript{253} Id. at 1645.
\textsuperscript{254} Local 1, Bricklayers Union, 141 N.L.R.B. 119 (1962) (Consolidated Eng’r Co.).
\textsuperscript{256} 140 N.L.R.B. 694 (1962).
\textsuperscript{258} See Note, 50 Geo. L.J. 121, 133 (1961).
procedural provision, conflicts with or modifies sections 8(a)(3) or 8(b)(2), substantive provisions which set absolute standards.

The importance of the discrimination issue, represented by the scope and emotion of the congressional debate on the subject, should be contrasted with the rather haphazard manner in which section 10(k) was incorporated into the act. Although Congress' failure to recognize the inherent conflict involved in these sections cannot be justified, the omission may be explained by the fact that Congress' sole aim in the 1947 jurisdictional dispute deliberations was the protection of employers and not protection of employee rights.\(^\text{259}\)

Even if the Board does feel that its awards avoid the prohibitions of sections 8(b)(2) and 8(a)(3), in making its awards, it nonetheless considers factors which deal directly with the union itself and not the particular employees in question. Thus, the Board looks at Board certificates, collective bargaining contracts, traditional jurisdictional boundaries, union constitutional provisions and area practice. The wording of the award, therefore, cannot alter the fact that the employees' freedom from discrimination on the basis of union membership is compromised by the work assignment.\(^\text{260}\) The verbal distinction, however, is based to some extent on other factors used by the Board in 10(k) proceedings and may be the most satisfactory way to harmonize the sections.

ENFORCEMENT

If the Board upholds the employer's assignment there is little difficulty in enforcing the 10(k) award, since the 8(b)(4)(D) charge will simply be dismissed upon compliance with the Board's award.\(^\text{261}\) Noncompliance, on the other hand, subjects the union to both an unfair labor practice proceeding and, possibly, a damage action under section 303. Little difficulty would seem to be encountered where the respondent union is awarded the work, the employer reassigns the work, and the union originally assigned the work strikes. Although this union is a party to the dispute, the unfair labor practice charge is directed against the other union. The employer may desire Board action even though an action under section 303 may lie. He must file a section 8(b)(4)(D) charge, and a literal

\(^{259}\) Comment, 61 Colum. L. Rev. 1142, 1153-57 (1961).


\(^{261}\) "Upon compliance by the parties to the dispute with the decision of the Board or upon such voluntary adjustment of the dispute, such charge shall be dismissed." LMRA § 10(k), 61 Stat. 149 (1947), 29 U.S.C. § 160(k) (1958).
reading of the act would seem to require another 10(k) proceeding. However, since the Board has already heard and determined the dispute, it would seem reasonable to permit the Board to avoid unnecessary duplication.\footnote{Mann 53 n.315.}

Difficulty arises, however, if the respondent union is awarded the work by the Board and the employer refuses to comply.\footnote{The idea that Board determinations can be directly enforced against employers cannot be upheld on grounds of statutory construction, legislative history, or labor policy.” Farmer 694. See also Mann 53-55.} The act contains no language which would make an award judicially enforceable against a recalcitrant employer. Statutory procedure for enforcement of any Board decision\footnote{LMRA \textsection 10(e), 61 Stat. 147 (1947), 29 U.S.C. \textsection 160(e) (1958).} is limited to “orders” issued after unfair labor practice proceedings, and the 10(k) award is not such an “order.”\footnote{Mann 53-54 nn.316 \& 317. Nor does the word “order” in the exculpatory clause of 8(b)(4)(D) seem to include a 10(k) award.} Failure of the employer to act in accordance with the 10(k) award would also not be an unfair labor practice since it is not a violation of section 8. A cease and desist order may issue after a 10(k) proceeding, not because the union is violating the Board’s award, but because noncompliance removes the bar to the prohibition of section 8(b)(4)(D). Furthermore, the successful employee group has no recourse under section 303 since that section only provides a damage action for employers. Congress apparently assumed that employers were generally neutral and would voluntarily comply with Board awards.\footnote{Farmer 694-95; Comment, 61 \textsc{Columbia L. Rev.} 1142, 1153 (1961).}

President Truman in his veto message noted that Board determinations were ineffective against “parties to the dispute to whom the award might be unacceptable.”\footnote{93 \textsc{Cong. Rec.} 7487 (1947), 1 \textit{Legislative History} 918-19. Numerous writers have agreed. \textit{E.g.}, Mann 51-55; Farmer 693-97; Comment, 61 \textsc{Columbia L. Rev.} 1142, 1153-57 (1961).} The Board seems to have reached the same conclusion.\footnote{See Lodge 68, \textsc{Int'l Ass'n of Machinists}, 81 N.L.R.B. 1108 (1949) (Moore Drydock Co.).} Furthermore, the National Labor Relations Act had not contained any limitation on the employer’s right to assign work.\footnote{Mann 55.}

From the standpoint of labor policy, it has been argued that:

Compelling an employer to accept a Board determination that he assign specific work to one group rather than another would be a totally unwarranted infringe-
ment on the rights of management and would seriously undermine collective bargaining. Such a requirement would go far beyond the negative guarantees against unfair discrimination or a refusal to bargain in good faith in regard to work assignments and would encourage unions to ignore the normal collective bargaining channels and to seek instead the assignments desired directly from the Board. 270

Although enforcement of Board awards would qualify managerial prerogatives, enforcement would be consistent with the interest in protecting the public from inter-union conflict.

The only recourse open to the employee group, then, seems to be concerted activity. Yet, such action would be literally prohibited by section 8(b)(4)(D) since in enumerating the defenses to an 8(b)(4)(D) charge Congress made no reference to employee activity in support of a Board decision. Furthermore, section 303 provides a damage action for employers for the same conduct proscribed by section 8(b)(4)(D), but does not provide a defense based upon a 10(k) award.

Although union activity in support of a Board award is literally proscribed by the statute, there is no failure of compliance on the union’s part. It would not seem to be an abuse of discretion for the Board to refuse to proceed further than a 10(k) proceeding when the charged party is willing to comply. A complaint is usually not issued under section 8(b)(4)(D) unless a determination is not complied with, since a charge is sufficient to invoke the 10(k) procedure. The Board could not proceed under section 10(b) in the absence of a complaint issued by the General Counsel, who may in his discretion refuse to issue complaints where the employer is failing to abide by a voluntary settlement or a Board award. 271 There is no bar, however, to a proceeding under section 10(b) following noncompliance with a 10(k) determination.

That the General Counsel or the Board may refuse to proceed is a devastating commentary on congressional thoroughness. It seems incongruous that the policy of settling jurisdictional disputes based upon the protection of the public and employers from work stoppages can only be enforced in some cases by permitting a strike which is literally prohibited by the act. In fact even this resolution is not satisfactory since the union may be too weak to force compliance. Thus, although it seems clear that no direct enforcement procedure against employers exists, even indirect pressures may be insufficient.

It would seem anomalous for the Board to recognize a union’s right to certain work and then deny economic coercion to obtain such work.

270 Farmer 695.
271 Manhattan Constr. Co. v. NLRB, 198 F.2d 320 (10th Cir. 1952).
Section 10(k) determinations thus would become little more than advisory opinions, seemingly contrary to the Supreme Court's assumptions in *CBS*. Yet it is not clear that the Board will dismiss an 8(b)(4)(D) charge when the employer refuses to comply. As mentioned earlier, the dismissal of a charge under section 10(k) is based upon "compliance" by the parties, and a 10(k) award is not expressly made a defense to an 8(b)(4)(D) unfair labor practice. Indeed, a 10(k) award is preceded by a finding of *reasonable cause* of an 8(b)(4)(D) violation; therefore, a 10(k) award does not necessarily mean that section 8(b)(4)(D) has been violated. Congressional intent and statutory language would then seem to require the Board to proceed with an unfair labor practice proceeding when the successful union in the 10(k) proceeding continues to strike. Such a harsh approach could be modified by refusing to proceed unless the employer demonstrates compliance\(^2\) by giving the Board discretion based upon the grounds used in determining the dispute.\(^3\) Although most employers will probably comply with a Board determination, the lack of adequate enforcement machinery is a deficiency which should be corrected.

**Jurisdictional Disputes in the Courts
Injunction Proceedings**

Whenever a regional representative has reasonable cause to believe that conduct violating section 8(b)(4)(D) has occurred and a complaint should be issued, he may petition a federal district court for injunctive relief under section 10(l).\(^4\) In jurisdictional disputes the regional officer is authorized to seek injunctive relief only when "such relief is appropriate"; his action is not mandatory as in other 10(l) injunction proceedings. The court's function is limited to the question of whether, based upon the evidence, the petitioner has "reasonable cause to believe" that the charges are true;\(^5\) there is no requirement that the court decide whether a violation of the act has in fact been committed.\(^6\) The Board need not "conclusively show the validity of the propositions of law underlying its charge; it is required to demonstrate merely that the propositions of law which it has applied to the charge are substantial and not frivolous."\(^7\)

\(^{272}\) McGuinn 124-25.

\(^{273}\) Farmer 696.


\(^{275}\) Douds v. International Longshoremen's Ass'n, 242 F.2d 808, 810 (2d Cir. 1957).

\(^{276}\) Madden v. International Organization of Masters, 239 F.2d 312 (7th Cir. 1958).

Although there is no statutory authorization for requiring initiation of a 10(k) proceeding before seeking a 10(l) injunction, nonetheless the district court in *Lebus v. Local 60, Plumbers Union* 278 refused to enjoin union conduct because no 10(k) proceeding had been initiated. In that case the regional director had combined an 8(b)(4)(A) "hot cargo" charge with a jurisdictional charge in requesting the injunction. The court found no merit in the first charge and expressed doubt about the second. The court deemed a 10(l) injunction, pending a determination of the unfair labor practice under section 10(c), "at best, premature." 279 Whether the court’s approach will be followed in cases where only a jurisdictional charge is filed is unclear. In any event, the unfair labor practice is not determined under section 10(k). This determination is only reached if the respondent union refuses to comply with an adverse award, long after a 10(l) injunction is needed.

Furthermore, a conflict of decisions has arisen. In *McLeod v. Newspaper Deliverers Union* 280 the court rejected a union defense that the dispute should be resolved internally through the union grievance and arbitration procedures. In *McLeod*, the competing union, the Mailers, had refused to submit the dispute to arbitration, and processing the dispute through the Deliverers' administrative machinery alone would not resolve the dispute. The court, however, stated that even if all the parties had agreed to arbitration, "it would mean only that the Board would be precluded by section 10(k) from making a determination as to which union is entitled to the disputed work." 281 It would not preclude the Board from instituting this injunction proceeding. 282

The conflict between *Lebus* and *McLeod* is apparent. The *McLeod* court would issue an injunction when it finds that the petitioner has reasonable cause to believe that the respondent union is engaged in conduct violating 8(b)(4)(D) irrespective of whether the Board may quash notice of the 10(k) hearing because there was an agreed method of settlement. On the other hand, the court in *Lebus* attempted to tie sections 10(k) and 10(l) together, and, unlike the *McLeod* court, may have attempted to interpret the "appropriate" clause of section 10(l).

Another problem facing the courts is that of defining the scope of

279 *Id.* at 394.
281 *Id.* at 440.
282 "It is well settled that a § 10(k) hearing and determination is not a prerequisite to the institution of § 10(l) proceedings." *Ibid.*
section 8(b)(4)(D). It was noted above that the Board has narrowly defined jurisdictional disputes to exclude disputes between an employer and one group of employees. The same problem has been presented to the courts in 10(k) proceedings, and one court has denied an injunction because of the Board's rationale. In *Penello v. Local 59, Sheet Metal Workers Ass'n* 283 the court decided that section 10(k) was an integral part of the policy expressed in section 8(b)(4)(D) and that both must be read together. Therefore, if there were no "dispute" which could be determined under section 10(k), there could be no violation of section 8(b)(4)(D). Conversely, if conduct were within section 8(b)(4)(D), it would present a dispute "cognizable by the Board in a Section 10(k) hearing." 284

The *Penello* court then interpreted the sections as requiring two rival and competing groups of employees. Like the Board, the court emphasized the language in CBS that "the dispute" under section 10(k) "can have no other meaning except a jurisdictional dispute under section 8(b)(4)(D) which is a dispute between two or more groups of employees over which is entitled to do certain work for an employer." 285 The court reasoned that section 8(b)(4)(D), as well as section 10(k), could not apply to a situation in which there were not two competing groups of employees. Since there is no enforcement procedure against an employer, a 10(k) determination in favor of the respondent union would not resolve the dispute but would merely take respondent's picketing out of the act's proscriptions. 286 It is not inevitable that the respondent would be awarded the work, however, and the lack of enforcement procedures against an employer may only be congressional oversight. The statute's legislative history does not conclusively exclude from coverage a dispute between an employer and a single union, and the statutory language does literally include such disputes. Ironically, the *Penello* court, by denying the injunction because there was no violation of section 8(b)(4)(D) also takes the respondent's picketing out of the act's proscriptions.

The *Penello* holding has not gone unchallenged. The Eighth Circuit has held that the jurisdictional dispute provisions are applicable when

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284 Id. at 464.
285 Id. at 466, quoting 364 U.S. at 579.
286 "Picketing in such a situation [where the picketing union is not a party to the 10(k) proceeding] is not proscribed by § 8(b)(4)(D) because it does not involve a dispute between rival groups of employees over particular work." Id. at 471.
the dispute "might be said to be solely between an employer and a Union." Indeed, the conduct held not to be a jurisdictional dispute by the Board in Safeway was enjoined by a district court after the decision in CBS. The respondent union in Safeway had moved to dissolve an injunction issued prior to CBS. The court rejected the union's claim, a contention later accepted by the Board, that CBS defined "dispute" as a controversy between two competing employee groups. The court correctly pointed out that the question before the Supreme Court in CBS was not whether the controversy was covered by section 8(b)(4)(D), but rather concerned the functioning of the Board in 10(k) hearings. Jurisdictional disputes involving a neutral employer, who probably will be more amenable to any Board award, may offer greater likelihood of final settlement and industrial peace. It is not clear, however, that all other jurisdictional disputes are excluded from section 10(k) and, therefore, from section 8(b)(4)(D).

SECTION 303

Employers may bring suits in federal courts for damages caused by union activity which violates section 8(b)(4)(D). By referring to 8(b)(4)(D), section 303(a) incorporates the standards necessary to a determination that section 8(b)(4)(D) has been violated. A 10(k) award is not expressly made a defense to a 303 action, so the Board could conceivably permit what a court declared unlawful. Even if the award were a defense, however, the incongruity remains because a 10(k) proceeding is not a prerequisite to a damage action. Thus an employer, by bypassing Board procedures, insures that the defense can never be raised. Moreover, parallel actions before the Board and a district court raise the possibility of inconsistent results, though some inconsistency must be expected whenever parallel actions are permitted.

To resolve this apparent inconsistency, courts could defer to the administrative competence of the Board. Since the employer need not initiate an 8(b)(4)(D) charge, however, there may be no proceeding to which to defer decision. Moreover, deferral would have no

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287 Local 978, Carpenters v. Markwell, 305 F.2d 38, 47 (8th Cir. 1962).
291 Ibid.
relevance unless a 10(k) award is to have some effect upon the outcome of the damage suit. As a matter of policy, it may be wise for courts to give substantial weight to a Board decision, but there is no statutory language making this mandatory. Furthermore, as pointed out earlier, a 10(k) award does not decide whether an unfair labor practice was committed, and a union which is successful in a 10(k) proceeding may have violated section 8(b)(4)(D). The only practical solution is to limit section 303(a), as well as section 8(b)(4)(D), to section 10(k).

The Board has held that section 8(b)(4)(D) is not "violated" until there is noncompliance with a 10(k) award. Similarly, there may be no violation of section 303 until a 10(k) proceeding is held. Thus, if respondent union is successful in a 10(k) proceeding, there would be no violation of either section 303(a) or section 8(b)(4)(D). Here again, however, there is no statutory reason why a court cannot proceed with a damage action in the absence of a 10(k) determination.

An assumption implicit in the above discussion is that inconsistent results are to be avoided. However, such inconsistencies as may exist do not stem from different interpretations of the parallel provisions, but only from the fact that section 10(k) is a necessary step in the protection afforded by section 8(b)(4)(D) but not in that afforded by section 303(a). As pointed out, it is not inevitable that a 10(k) award will be considered a defense to an action under section 8(b)(4)(D). Such a determination may be regarded as a mere advisory opinion which may be rejected by the employer, or as no more than a procedural bar to further Board action on behalf of a noncomplying employer. It is evident that Congress desired an independent tribunal to pass on the legality of concerted activity in support of jurisdictional claims, and was not primarily concerned with providing a symmetrical framework.

The Supreme Court has already answered part of this dilemma. In International Longshoremen's Union v. Juneau Spruce Corp., the Court held section 10(k) to be an administrative limitation upon the Board but not upon a court. Although the case stands for the narrow prop-

293 In a complaint proceeding the standard is "preponderance of the evidence." See International Longshoremen's Ass'n, 142 N.L.R.B. 257 (1963) (National Sugar Ref. Co.), where the Board found that the trial examiner erred in a complaint proceeding after a 10(k) award in failing to evaluate the evidence independently and by concluding that he was bound by a prior 10(k) proceeding. The error was harmless, however, as the Board based its findings on a de novo review of the record.

294 Farmer 690-91; McGuinn 124-25.


296 Id. at 243-48.
osition that a cease and desist order is not a prerequisite to the recovery of damages under section 303, it is evident that the Court felt that a 10(k) determination also was not necessary. The practical result of the decision, then, is that conflicting decisions are possible.

Even though conduct may "violate" section 8(b)(4)(D), however, there may be no 10(k) proceeding. The Board, for example, will quash notice of a 10(k) hearing if the parties have voluntarily adjusted the dispute or submitted evidence of agreed-upon methods of settlement. There is no reason to assume that section 303 was not intended to compensate for damages suffered during the strike, even though no 10(k) award is made.

In light of the Board's limited pre-CBS conception of its duty under section 10(k), it is arguable that the CBS decision and its directive to render affirmative awards will require a reconsideration of Juneau Spruce. Although the Court in CBS held that "substantive symmetry" between the sections was not necessary, it did not at that time have to decide the effect of a 10(k) award upon section 303(a). The Court's view of "independence" should be relaxed so that there could be no liability in damages before a 10(k) determination. Damages could lie, however, for actions contrary to a 10(k) award prior to an unfair labor practice adjudication under section 10(c). Thus, the union would be further induced to comply with the award. Similarly, a section 303 action could be denied to an employer who refuses to be bound by the 10(k) determination. An opposite approach would not only dilute the effectiveness of the 10(k) proceeding but would weaken private arbitration as well, because the employer, despite an arbitrator's adverse award, could recover damages for a strike caused by an assignment which violated traditional jurisdictional lines or area practice. Limiting the scope of section 303(a), on the other hand, would continue to give the employer the protection of section 8(b)(4)(D) and, at a later time, section 303 as well.

Conclusion

Certainly problems arise whenever decisions are based upon the existence and the balancing of a list of criteria. Not only must the criteria be found, but they must be accorded values or weights. Accepting these problems as inevitable, nonetheless a review of NLRB decisions suggests that criteria have been shuffled and shifted to justify a preordained re-

298 See id. at 136-39 (1961); Farmer 690-93; McGuinn 126-27.
There can be little quarrel with most of the factors set forth in the Jones opinion. Although the Board's decisions will not parallel those of private arbiters such as the Joint Board, perfect symmetry, even if possible to achieve, is probably unwise. The Board's traditional arbitration standards must be applied with a recognition of the Board's statutory role as administrator of the entire act. Especially important in light of the significance of the antidiscrimination principle of sections 8(a)(3) and 8(b)(2) are the Board's efforts to look to the particular workers affected and not to their unions. Although the Board's attempt to avoid the thrust of the antidiscrimination sections is not entirely satisfactory, the Board seems to be making the best of an extremely difficult situation.

Furthermore, recent cases demonstrate that the Board is willing to look beyond the employer's assignment. In two such cases it has overturned the employer's assignment in the absence of an inter-union agreement, solely on the basis of the Jones criteria. Both awards were based upon the nature of the work, the particular productive process and the skills required.

An area of serious concern is the effect of Board decisions upon private methods of settlement. Surely, the premium given to employers' assignments has not encouraged resort to private arbitration, at least on the part of employers and the employee groups assigned the disputed work. The existence of alternative forums with different standards will inevitably induce a party to choose one forum over another. The Board, however, by its disregard of prior Joint Board awards has not improved the situation.

Statutory conflicts in addition to those discussed in this article plague the Board. For example, the relationship of section 8(b)(4)(D) to section 8(b)(4)(B) has been troublesome. Although the Board's position that the sections are mutually exclusive may be retained, a redefinition of secondary boycott, at least in light of the particular characteristics of the construction industry, is probably required. While this conflict of standards, forums and statutes cannot be justified by referring to the

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301 See O'Donoghue 334-37.
302 See Ibid. See also Local 5, United Ass'n of Journeymen and Apprentices of the Plumbing Indus., 145 N.L.R.B. No. 157 (1964) (Arthur Venneri Co.).
“evils” of jurisdictional disputes, popular support and political considerations in 1947 were not conducive to thorough legislative examination. It seems justifiable to point out, as has Professor Mann, that the legislation has “suffered from too many friends and not enough critics.”303

303 Mann 59.
NOTE
THE UTILITY REQUIREMENT IN THE PATENT LAW

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INTRODUCTION

During the formulation of the Constitution of the United States, extensive study was made to determine how to provide for the stimulation of the economic growth of the new country by rewarding creativeness.\(^1\) Over three months passed before the wording which approached that ultimately used was approved by the Committee of Eleven.\(^2\) The final draft was adopted without debate, and signed by the delegates of the states on September 17, 1787.\(^3\) The resulting enactment provides that:

The Congress shall have Power . . . To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.\(^4\)

Thus, the Constitution expressly requires that a limited monopoly be awarded only where there has been an invention of useful subject matter.\(^5\) This charge, specifying both invention\(^6\) and utility, has formed the basis of the test for granting a patent. The specific elements, as recited

\(^3\) Id. at 706.
\(^4\) U.S. Const. art. I, § 8. (Emphasis added.)
\(^5\) Thompson v. Baisselier, 114 U.S. 1 (1885).
\(^6\) The concept of "invention," long used as a term of art in the patent law, was expressly provided for in the Patent Act of 1952 by the establishment of two requirements: (1) that a device, to be patentable, be novel, 35 U.S.C. § 102 (1958), and (2) that a novel device, to be patentable, be different from prior devices to a degree which would not have been obvious to one having ordinary skill in the art at the time the invention was made, 35 U.S.C. § 103 (1958).
in article I, section 8, have been expressly included in each of the patent statutes throughout the development of the patent laws. The current statute provides that: "Whoever invents or discovers any new and useful process, machine, manufacture, or composition of matter, or any new and useful improvement thereof, may obtain a patent therefor . . . ." Although often described as a well-settled concept, the requirement for, and actual presence of utility has been the source of extensive litigation over the years. Efforts to define the concept, to delineate the degree of disclosure necessary to satisfy the statutory requirement, and to attack the utility of a device after patenting, have complicated what would appear to be an elementary concept. Recent thinking, emphasizing the requirement of separate tests for utility depending upon the particular type of invention, and tending to equate the statutory requirement of utility with the requirement that a method of use be shown for a device, makes timely a review of the subject.

**Historical Setting**

**Utility—the Concept**

Utility is a concept often approached in the negative rather than in the positive. Courts have found it expedient to base decisions upon whether a device does or does not lack utility rather than upon whether there is positive utility present. Tests which are a measure of whether a device is detrimental, not whether it is of some benefit, have become the means of determining usefulness. The unfortunate result of this approach has been confusion as to the meaning and purpose of the constitutional requirement of utility in invention.

That the courts have chosen to make general use of a negative test does not mean that the concept has not been positively defined. In 1870, the Supreme Court in *Seymour v. Osborne* said: "Improvements for which a patent may be granted must be new and useful . . . but the requirement [utility] . . . is satisfied if the combination . . . is capable of being beneficially used for the purpose for which it was designed . . . ."

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11 78 U.S. 516 (1870).
12 Id. at 548.
It would seem that this positive definition establishes three requirements: (1) that an invention be capable of use; (2) that the use be beneficial; and (3) that the beneficial use of which the invention is capable be one intended by the inventor.

The first requirement, that an invention be capable of use, dictates that the invention be able to produce a result. A machine which is unable to produce a result is patently inoperative and lacks utility. Where partial operation has been achieved, the presence of utility depends upon the type of deficiency which limits its effectiveness. If the imperfect operation results only in decreased efficiency, the courts will usually find that the device possesses the requisite utility, reasoning that so long as it is capable of accomplishing the intended result, the value of the result achieved is irrelevant since the use has been established. Where, however, the question is one of sporadic operation or impracticality of use, the courts have found that utility is lacking; here the issue is not whether the device operates well, but whether it operates at all.

A third situation, where an invention incapable of any specific use by itself contributes to the accomplishment of a subsequent result, arises most often in the chemical arts where one compound may have utility only in contributing to the production of another. It does have a mechanical art equivalent, however, in manufacturing, where blanks and similar objects are used to produce end products. In these instances, it has generally been held that if the function of the end product satisfies the statutory requirement of utility, that satisfaction is imputed to the intermediate contributing invention.

The second element of the definition, that the use be beneficial, has generally been construed to mean that the use not be harmful, not that the use be capable of some beneficial result. The inclusion of this element in the definition incorporated what had been, and often still is considered to be, a complete definition of the concept. Justice Story, as early as 1817, said:

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16 E.g., Hartford-Empire Co. v. Obear-Nester Glass Co., 71 F.2d 539, 22 U.S.P.Q. 270 (8th Cir. 1934) (apparatus held inoperative because its parts were too fragile and easily broken).
All that the law requires is, that the invention should not be frivolous or injurious to the well being, good policy, or sound morals of society. The word "useful," therefore, is incorporated into the act in contradistinction to mischievous or immoral. For instance, a new invention to poison people, or to promote debauchery, or to facilitate private assassination, is not a patentable invention. But if the invention steers wide of these objectives, whether it be more or less useful is a circumstance very material to the interests of the patentee, but of no importance to the public. If it be not extensively useful, it will silently sink into contempt and disregard . . . .

Although the definition of utility by exclusion rather than inclusion has remained popular, it is not complete in view of the constitutional charge. It would seem that the better view is that a device must be positively useful, in addition to being nonfrivolous, in order to be worthy of a patent grant.

The requirement that there be a beneficial use, in addition to prohibiting frivolity, serves a second important purpose in the definition. "Beneficial" is an extremely flexible term, depending for its meaning on the moral and social standards of the times and locale. The meaning of the concept, therefore, is readily adaptable to varied sets of facts and allows the courts wide latitude in making their judgments. Thus, in Page v. Ferry, the court, after considering various tests for utility, pointed out that certain inventions, such as those regarding some trifling articles of dress, for example "hoops" and "crinolines," were obviously new inventions designed to "poison the people" and as such, lacked utility. This puritanical spirit seems to have diminished, however, and utility has been recognized in devices where their only functions were the amusement and pleasure of the user.

The final requirement, that the beneficial use of which the invention is capable be a use which was intended by the inventor, specifies that the inventor be aware of his contribution before any protection is granted him. This concept was well stated in Callison v. T. J. Dean Novelty Co., the court saying that:

An invention is useful, as that term is used in the statute, if it is capable of being beneficially used for purposes for which it was designed. . . . Or, as some-
times stated, if it will operate to perform the functions and secure the results inten
tended, and its use is not contrary to law, moral principles, or public policy . . . .24

An inventor, therefore, must know what he has invented and how it is a useful invention. It is not enough that he has invented something for which he knows no use.25 Neither is it adequate if he intends a use, but that use is only speculative.26 If, on the other hand, he has stated a number of uses and all but one fail, the statutory requirement is satisfied since success of only one of the disclosed functions will support patentability.27 The significance of the requirement of a specific intention of use lies in the fact that someone other than an original inventor may, under the law, obtain a patent based on the use of an old invention so long as that use is new and unobvious. The Supreme Court in Expanded Metal Co. v. Bradford,28 stated that:

A process may be altogether new, whether the machinery by which it is carried on be new or old . . . . A new process may be carried on by the use of an old machine in a mode in which it was never used before . . . . In such a case, the patentability of the process in no degree depends upon the characteristic principle of the machine, although machinery is essential to the process, and although a particular machine may be required.29

It is clear, therefore, that if the grant would cover an invention with no limitation as to intended use, further inventive adaptations would not be afforded the statutory protection.

Thus, it can be said that although the tests for utility have been traditionally negative, the more complete concept requires that an invention be capable of a function, which function must be beneficial and not frivolous or contrary to the sound morals of society, and must produce a result which was specifically intended by the inventor.30

DISCLOSURE REQUIRED TO SUPPORT UTILITY

The patent statute makes usefulness necessary to entitle an applicant to a patent for that which is new.31 Each application, therefore, must

24 Id. at 58, 21 U.S.P.Q. at 242.
Soc'y 773 (1948).
1930), rev'd on other grounds, 283 U.S. 664 (1931).
29 Id. at 382.
state some utility which the applicant alleges is the purpose of his invention. There is no specific rule regarding the degree of disclosure required to support an allegation of utility, but there must be at least a bare assertion of utility as an indication of the use or uses intended. Where the utility of a device is obvious, as in the case of most mechanical and electrical inventions, an assertion of its function is adequate. Where, however, there appears to the examiner a possibility that the invention will not be able to accomplish the alleged function, its utility will be challenged since a merely speculative result will not support a patent grant. Once utility is in dispute, the applicant must introduce evidence in support of his allegation, making a sufficient showing to support the granting of a valid patent.

The extent of the evidentiary showing required of the applicant depends to a great extent on the type of challenge which is made and, as the law has developed, the type of invention in question. When the problem involves the fundamental operability of the invention, a reasonable showing of relevant evidence is ordinarily sufficient. When the problem involves a question of utility for a specific purpose, an extensive showing of specific results has sometimes been required.

There are various avenues which may be taken by an applicant to support an allegation of utility which has been challenged. He may introduce evidence of commercial success of his device, general use by the public, operational tests both in service and in the laboratory, affidavits by persons who have witnessed its utility and any other evidence in sup-

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38 This has most often occurred when the consideration has been one of physical safety. See, e.g., Katz v. Horn Signal Mfg. Corp., 52 F. Supp. 453, 59 U.S.P.Q. 196 (S.D.N.Y. 1943), wherein it was held that although the invention, a traffic detector, might operate a few times, unless it operated every time under given conditions it would be a menace to traffic and thus lack utility. Similarly, in Rudd v. Kingsland, 94 F. Supp. 569, 88 U.S.P.Q. 418 (D.D.C. 1951), it was held that therapeutic utility of ointment was not proven by testimonials of two users that they were cured, or by vague statements of doctors. See also pp. 166-74 infra.
port of his position. The evidence presented may serve not only to give proof of the utility of the device, but in cases where patentability is questionable, it has been held that a showing of extensive utility may be a significant factor, as regards the requirement of unobviousness, in deciding whether the device warrants protection.39

Evidence of commercial success in support of utility has generally been accepted as valid and significant in supporting the allegation.40 At one time, early in the development of patent law, commercial success was considered to be conclusive evidence of utility.41 This view has tempered over the years, however, and it can now be more safely said that a favorable commercial result argues heavily in favor of utility.42 This reduction of the evidentiary importance of commercial success can probably be attributed to recognition by the courts that many things other than utility can influence the public to purchase a product, not the least of which is extensive advertising.43

A showing of general public use has substantially the same effect as commercial success in supporting an allegation of utility. It is not considered to be conclusive evidence,44 but does carry substantial weight in any final determination.45

Operational tests and demonstrations are given great evidentiary significance in finding utility. Where the applicant can make a practical demonstration of utility, nothing further is required.46 He need not even know how or why his invention works.47 What is meant by a practical demonstration, however, is not altogether clear. The courts have consistently held that the degree of usefulness or significance of an invention is not described or limited by the patent statute,48 and that therefore an invention need not be a very useful or profitable one so

41 See Robertson v. Blake, 94 U.S. 728 (1877).
44 See McClain v. Ortmayer, 141 U.S. 419 (1891).
47 Ibid.
long as it is capable of some use not mischievous, injurious or immoral. They have also consistently held that mere laboratory successes are not enough to support a finding of utility, even though it is not necessary to show the operation of a commercial embodiment. These holdings seem incompatible. If a device is capable of achieving a beneficial result under laboratory conditions, it has use to some degree. Whether this utility can be exploited for economic gain would seem irrelevant so long as a degree of use has once been established. To require more is to extend the statute beyond its express limitations.

Finally, the submission of affidavits by persons who have witnessed the operation of the invention is of extreme value, and such affidavits are ordinarily considered conclusive evidence of utility insofar as the initial patent grant is concerned. When these showings are reduced in significance, it is usually because of the circumstances under which they were taken, or because the alleged utility borders on what the ordinary person feels is impossible.

Adequate proof of utility, however, does not of itself present a sufficient showing to support the grant of a patent. Patentability requires, in addition to utility, that the invention be both novel and unobvious. Furthermore, in no case is an adequate showing of the elements of patentability legally conclusive. Rather, a patent is still open to the challenge that the statutory requirements have not actually been met.

**POST-PATENTING ATTACK ON UTILITY**

The issuance of a patent is prima facie evidence of the utility of the device protected. Not being conclusive, however, the validity of a patent is always subject to attack by any person whose best interests

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49 E.g., Pitts v. Wemple, 19 Fed. Cas. 762 (No. 11194) (C.C.N.D. Ill. 1850); In re Holmes, 20 C.C.P.A. (Patents) 899, 63 F.2d 642, 47 U.S.P.Q. 455 (1940).


53 See, e.g., In re Oberweger, 28 C.C.P.A. (Patents) 749, 115 F.2d 826, 47 U.S.P.Q. 455 (1940).


55 See Grayson Heat Control, Ltd. v. Los Angeles Gas Appliance Co., 134 F.2d 478, 57 U.S.P.Q. 93 (9th Cir. 1943).

would be served if the patent were not in force. The burden of proof in these cases is on the party attempting to invalidate the patent.\textsuperscript{57}

If that party happens to be the defendant in an infringement suit, the defense of invalidity by reason of lack of utility is lost to him since an infringer cannot deny the utility of an invention infringed.\textsuperscript{58} Other ways by which a party to an action may admit the utility of a patented device, and thereby estop himself from invalidating the patent on the ground of lack of utility, include (1) a stipulation by a defendant that a decree might be entered for a royalty based on the patent in question;\textsuperscript{59} (2) an application by the alleged infringer for a patent on the device in question;\textsuperscript{60} and (3) advertising by a defendant in promotion of an infringing device.\textsuperscript{61} If such admission of utility is made, the defendant is estopped from relying on lack of utility as a defense, even if the lack of utility of the patented device is plainly evident.\textsuperscript{62}

The several arguments advanced to attack utility have been variously successful. It has been contended that when the device consists of a combination of elements, an improvement in one of the elements is not useful as to the combination since the final result has not changed. This argument was rejected since, although the same result was achieved, it was through a varied interrelation of the elements of the combination.\textsuperscript{63}

Utility requires that a device be operable.\textsuperscript{64} Where the operation of a patented device has been found to be extremely impractical, the patent has been adjudged invalid. In \textit{Hartford-Empire Co. v. Obear-Nester Glass Co.},\textsuperscript{65} an apparatus was operable in the sense that it actually functioned, but the specified material from which it was constructed was so brittle that the parts readily broke in use and the device could not remain operational; the patent was held to be invalid. Where the question is one of how well an invention operates, rather than whether it operates at all, the validity of the patent in question has generally been upheld. The Patent Office Board of Appeals in \textit{Ex parte Kerone}\textsuperscript{66} enunciated

\textsuperscript{57} E.g., Parker v. Stiles, 18 Fed. Cas. 1163 (No. 10749) (C.C.D. Ohio 1849).
\textsuperscript{58} See Gandy v. Main Belting Co., 143 U.S. 587 (1892).
\textsuperscript{59} Western Elec. Co. v. La Rue, 139 U.S. 601 (1891).
\textsuperscript{60} DuBois v. Kirk, 158 U.S. 58 (1895).
\textsuperscript{64} See H. Brinton Co. v. Nishcon, 93 F.2d 445, 36 U.S.P.Q. 272 (2d Cir. 1938).
\textsuperscript{65} 71 F.2d 539, 22 U.S.P.Q. 270 (8th Cir. 1934).
what appears to be the current law in this area: "It is not regarded as fatal that the process might not be 100% efficient and there is nothing to indicate that it could not be operated at some fair degree of efficiency."^{67}

The argument that sufficient utility to support a patent is not present unless the mode of operation or result of the invention shows advancement over the prior art was rejected in *United States Hat Mach. Corp. v. Boesch Mfg. Co.*,^{68} where the patentee continued to use the prior art methods in his business as well as his newly patented method. It was contended that the continued use of the old method evidenced that the new method failed to produce significant advancement in the art, and therefore lacked utility. The court, in reversing, held that the relative merits of the prior art, as compared with the patented device, were irrelevant in determining the fulfillment of the statutory requirement of utility.\footnote{69} The court's statement of the law on this point was in harmony with the well-settled rule.\footnote{70}

As mentioned above, an invention is not lacking in utility in the patentable sense if it functions properly for the purposes intended.\footnote{71} What is the situation then if the actual results produced by the device fall short of those disclosed in the specification? If the entire theory of operation of the invention is erroneous as presented in the specification, utility is negated.\footnote{72} If the question arises from the failure of one embodiment of the invention, utility will not be challenged provided at least one embodiment is operable as disclosed.\footnote{73} If the question is one of the degree of success of the result, utility is not negated.\footnote{74} These situations are fundamental and well settled. Where, however, the device as disclosed is inoperable but may be made operable by modifications which are within the capacity of one having ordinary skill in the art, the law is unsettled. In *Cleveland Punch & Shear Works Co. v. E. W.  

\footnote{67} Id. at 503.  
\footnote{68} 108 F.2d 417, 44 U.S.P.Q. 52 (2d Cir. 1940).  
\footnote{69} Id. at 419, 44 U.S.P.Q. at 54.  
\footnote{70} Lowell v. Lewis, 15 Fed. Cas. 1018 (No. 8568) (1st Cir. 1817); Hotchkiss v. Greenwood, 12 Fed. Cas. 551 (No. 6718) (C.C.D. Ohio 1848).  
Bliss Co.,\textsuperscript{75} it was held that claims to a machine which was inoperable as patented were invalid even though the modification required to make it operable was within the capacity of one having ordinary skill in the art. Shimadzu v. Electric Storage Battery Co.,\textsuperscript{76} however, declared a patent to be valid where the process disclosed was capable of being developed, so as to be commercially useful, by one having ordinary skill in the art. The cases are distinguishable by considering the words of the court in \textit{Cleveland Punch}:

\textbf{[A]} patent disclosure may be valid provided the flaw can be corrected by the mere exercise of mechanical skill and not further invention. We have no occasion to challenge or depart from the doctrine so rationalized. It is not, however, applicable to the present case.

Rode was chief engineer \ldots \textbf{[The presses]} were built at his direction \ldots . The presses failed \ldots . He may not, therefore, be heard to say that what the others did to complete the reduction of his concept to practice, which he himself either could not or failed to do, was merely the exercise of mechanical skill.\textsuperscript{77}

By these facts, the court described a situation where an inventor, although comprehending his invention, did not disclose it sufficiently to facilitate its use. The correction for the omission, however, was well within the capacity of one having ordinary skill in the art. They then distinguished it from the Shimadzu situation where the inventor clearly defined his device which, despite the accuracy of definition, was still inoperable in the absence of modification. That the modification might have been made by one having ordinary skill was not considered material since the inventor had not defined an operable device to which a modification might be made. The result of the \textit{Cleveland Punch} case is sound, but it is submitted that the reasoning reaching that result is more properly based on the requirement of disclosing how to use an invention,\textsuperscript{78} rather than the requirement of disclosing its utility.\textsuperscript{79}

The most questionable ground on which to attack the utility of a patent is that of commercial failure. The argument in favor of attack on this ground seems to be that since commercial success evidences utility, then commercial failure evidences a lack of it. Consideration of representative cases in this area indicates that other factors weigh more heavily than commercial failure in influencing the decisions. In \textit{Universal
Oil Prods. Co. v. Globe Oil & Ref. Co.,\textsuperscript{80} the process under attack was being used in an attempt to invalidate a subsequent patent in an infringement suit. The inventor had, in the first instance, developed a process and reduced it to practice in the laboratory. He was not able to make his invention commercially feasible, however, and as a result he abandoned the project after having filed an application for a patent. The flaw carried over, and a patent was not granted, the court stating: "It is true that commercial production is not necessary to constitute reduction to practice but it is also true that a process which cannot be successfully operated commercially does not satisfy the requirement that only useful processes may be patented."\textsuperscript{81} It is submitted that the commercial failure in this case did not conclusively show lack of utility. It did evidence, however, that the device was inoperable as to its designed purpose, a commercial process, and that therefore, its utility was negated by inoperability.

Similarly, in Ellis-Foster Co. v. Reichhold Chems., Inc.,\textsuperscript{82} claims to a process were held void on the ground of lack of utility through commercial failure. The commercial failure, however, appears to have been caused by nonuniformity in one of the reagents. It would therefore seem that, as in Universal Oil, the reason for commercial failure of the process was inoperability and that both its commercial failure and its invalidity resulted therefrom.

Many cases have held that commercial failure is not necessarily evidence of lack of utility.\textsuperscript{83} This is probably the better view, since rapidly developing arts, active commercial promotions and many other variables which have no relevance to the utility of the device may cause it to fail at the market place.

Utility in Pharmaceutical Applications

The problems in the patent law dealing with the degree of proof required to support an allegation of utility for an invention which is closely associated with human safety have been analyzed and delineated in the pharmaceutical field.\textsuperscript{84} Therefore, the pharmaceutical field will be considered in detail.

\textsuperscript{80} 40 F. Supp. 575, 50 U.S.P.Q. 616 (N.D. Ill. 1941).
\textsuperscript{81} Id. at 581, 50 U.S.P.Q. at 621–22.
As has been stated, among the basic requirements for patentability is an allegation of utility in a patent application. Furthermore, where the utility is challenged, the applicant is burdened with introducing reasonable proof of the alleged utility. A basic question in cases where human safety is a consideration, as is particularly the case in the area of pharmaceuticals, has been: what constitutes reasonable proof?

Generally, the Patent Office has demanded proof of a high degree of utility in patent specifications alleging pharmaceutical use, the amount and kind of proof necessary to show such utility being determined by the particular facts of each case. Thus, where the applicant has alleged that his invention will cure a problem previously deemed incurable, the Patent Office has required overwhelming proof.

Although no one could condemn the Patent Office for the forthright concern for the social welfare which motivated its proof requirements, the legal ground on which it based its demands appears tenuous at best. The practice of requiring detailed proof has not been promulgated by statute. Furthermore, there is little case law to support such a demand. Despite this, the Patent Office has required that results of tests on humans be introduced to support allegations of utility. It has also required detailed proof of every allegation made.

The standard of proof set down by the Patent Office has been upheld

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93 See Ex parte Appeal No. 23127, 34 J. Pat. Off. Soc'y 153 (Pat. Off. Bd. App. 1951). But see In re Gottlieb, 328 F.2d 1016, 140 U.S.P.Q. 665 (C.C.P.A. 1964), wherein the court reversed the Board of Appeals, holding that the applicant had satisfied the utility requirements of § 101 when usefulness for some purpose was shown. The court stated that it was unnecessary to determine utility for other purposes indicated in the specification. Id. at 1019, 140 U.S.P.Q. at 668.
by the United States District Court for the District of Columbia in cases where a pharmaceutical use has been claimed.\textsuperscript{94} In \textit{Rudd v. Kingsland},\textsuperscript{95} for example, the court affirmed the Patent Office finding that there was a failure of adequate proof of \textit{therapeutic utility} for a medicinal preparation for external application. The court rejected the affidavits of two physicians because one was based on hearsay and the other contained a vague statement to the effect that the preparation had some merit. Earlier, in \textit{Canadian-American Pharmaceutical Co. v. Coe},\textsuperscript{96} the court of appeals reversed the Patent Office and found that utility was present in a medicine which was shown to lessen the pains of cancer without curing or healing the disease. Voluminous affidavits were submitted and there was little doubt that the pain was actually lessened. The court found that the medicine had an important function and actually worked, and stated that it was not within its province to discourage or encourage the use of medicines.\textsuperscript{97} The affidavits and the weight accorded them seemed to be the critical point on which these cases were decided. In the \textit{Rudd} case, the applicant failed to sustain the burden of producing reasonable proof, while in \textit{Coe} the applicant sustained this burden.

In \textit{Isenstead v. Watson}\textsuperscript{98} the court affirmed the Patent Office, finding deficient the proof of utility of a compound for testing the function of the human liver. After stating that the technical determinations of the Patent Office should be accorded considerable weight, the court went on to say:

Great care and scrutiny should be particularly taken in connection with applications for medical patents. While the granting of a patent does not legally constitute a certificate that the medicine to which it relates is a good medicine and will cure the disease or successfully make the test which it was intended to do, nevertheless, the granting of such a patent gives a kind of official imprimatur to the medicine in question on which as a moral matter some members of the public are likely to rely.\textsuperscript{99}

The \textit{Isenstead} case was cited with approval in \textit{Commonwealth Engineering Co. v. Ladd},\textsuperscript{100} in which the district court affirmed the Patent

\begin{footnotesize}
\begin{enumerate}
\item \textsuperscript{94} Commonwealth Engl'r Co. v. Ladd, 199 F. Supp. 51, 131 U.S.P.Q. 255 (D.D.C. 1961);
\item \textsuperscript{97} 75 U.S. App. D.C. 313, 126 F.2d 847, 53 U.S.P.Q. 92 (1942).
\item \textsuperscript{98} Id. at 314, 126 F.2d at 848, 53 U.S.P.Q. at 93.
\item \textsuperscript{100} Id. at 9, 115 U.S.P.Q. at 410. This statement was criticized in \textit{In re Hartop},\textsuperscript{50} C.C.P.A. (Patents) 780, 311 F.2d 249, 135 U.S.P.Q. 19 (1962) (concurring opinion).
\end{enumerate}
\end{footnotesize}
Office's refusal to issue a patent based on an application which claimed to disclose a process for thawing and melting frozen blood. The court stated that "in connection with an invention consisting of a process or a method, the term 'utility' must necessarily mean whether the process will operate as claimed and will produce the result intended by the inventor." The court reiterated its statement in *In re Isenstead* that great weight must be accorded the technical objections of the Patent Office and, referring to the above quoted statement in *Isenstead*, concluded that "these remarks are equally applicable to a process intended for medical use."

The United States Court of Customs and Patent Appeals is of the opinion that there is no statutory basis and little case law supporting many of the Patent Office decisions on the issue of the standard of proof of utility in the pharmaceutical field. The court agrees with the Patent Office that an invention, to be patentable, must be useful, not frivolous, and on this ground affirmed the Patent Office in the case of *In re Oberweger*. In that case, the applicant alleged the invention of a composition and a method for using the same in treating the scalp for the purpose of growing hair. The applicant and a doctor filed affidavits attesting to the effectiveness of the composition; however, the Patent Office Board of Appeals deemed the affidavits insufficient to show utility for a composition which belongs to a class which from common knowledge has long been the subject of much humbuggery and fraud. The *Oberweger* court, quoting from *In re Perrigo*, stated that an invention "must appear capable of doing the things claimed in order to be a device of practical utility." The court required that the affidavits present clear and concise proof of utility rather than brief, general and conclusory statements.

Recently the utility standard was affected by *In re Krimmel*, which

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101 Id. at 53, 131 U.S.P.Q. at 257.
102 Id. at 54, 131 U.S.P.Q. at 258.
involved an allegation of general utility in a pharmaceutical application of a medicine for treatment of an eye disease. The examiner required the applicant to submit clear and convincing proof that the composition was safe, effective and reliable when used on humans. The applicant submitted affidavits containing test results when the preparation was used on rabbits and pointed out that he made no claim that his invention was designed for human use. The Board of Appeals affirmed the examiner, holding that the standard experimental tests performed on the rabbits were insufficient to establish utility since the economic value of experimental laboratory animals is insufficient to warrant treatment of them for disease, and that therefore tests on humans would be necessary to establish utility. Due to the lack of experimental tests on humans, the Board held that the requirements of section 101 had not been met. The United States Court of Customs and Patent Appeals reversed the decision, holding that the utility requirement of section 101 had been satisfied by the standard experimental tests performed on the rabbits:

[I]t is our firm conviction that one who has taught the public that a compound exhibits some desirable pharmaceutical property in a standard experimental animal has made a significant and useful contribution to the art, even though it may eventually appear that the compound is without value in the treatment of humans....

Although we have no doubt that the Patent Office has, in the case at bar, acted in good faith and with the proper motives, the fact remains that the Patent Office has not been charged by Congress with the task of protecting the public against possible misuse of chemical patents. There is nothing in the patent statute or any other statutes called to our attention which gives the Patent Office the right or the duty to require an applicant to prove that compounds or other materials which he is claiming, and which he has stated are useful for "pharmaceutical applications," are safe, effective, and reliable for use with humans. It is not for us or the Patent Office to legislate and if the Congress desires to give this responsibility to the Patent Office, it should do so by statute.

We now hold only that appellant has established that his compounds have statutory utility even though he has not proven that they have the ultimate utility—prevention, alleviation, or cure of a disease in the human body. In this instance, appellant has proven sufficient utility to satisfy the requirement of 35 U.S.C. 101.108

In another case decided the same day, the court held that a statement of utility in the "animal body" is sufficiently generic to be satisfied by proof of utility in standard experimental laboratory animals.110


These cases say only that proof of utility in experimental animals is sufficient to satisfy a claim of statutory utility. They do not say that further inquiry and a requirement of further evidence will not be made in cases where there is a legitimate question as to whether there is utility vis-a-vis any animal. Thus in *In re Novak*\(^{111}\) the court recognized that an examiner could require further evidence of utility if one with ordinary skill in the art would not accept allegations of utility in either humans or animals without further proof.

Due partially to the recent decisions by the United States Court of Customs and Patent Appeals on pharmaceutical patent applications in the medical field,\(^{112}\) Congress has passed an act under which the Secretary of Health, Education, and Welfare is authorized to assist the Commissioner of Patents in answering questions relating to drugs.\(^{113}\) The Patent Office presently has a similar arrangement with the Department of Agriculture in determining the patentability of plant patents.\(^{114}\) The new statute provides that:

\[\text{(d) The Secretary is authorized and directed, upon request from the Commissioner of Patents, to furnish full and complete information with respect to such questions relating to drugs as the Commissioner may submit concerning any patent application. The Secretary is further authorized, upon receipt of any such request, to conduct or cause to be conducted, such research as may be required.}\^{115}\]

Thus the Commissioner of Patents may now refer applications or supporting evidence submitted to the Secretary of Health, Education, and Welfare for assistance in determining whether the utility requirement has been met and for a nonbinding, advisory opinion from the Secretary.\(^{116}\) At the same time, responsibility for determining the efficacy and safety of drugs has been given to the Food and Drug Administration, as evidenced by the passage of amendments to the Federal Food, Drug, and Cosmetic Act on October 10, 1962.\(^{117}\) The Report of Senator Eastland, submitted with the proposed Drug Amendments Act of 1962, which was later passed in amended form,\(^{118}\) stated that the bill would require that

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\(^{112}\) *Hearings on S. 1552 Before the Subcommittee on Antitrust and Monopoly of the Senate Committee on the Judiciary*, 87th Cong., 1st Sess., pt. 3, at 1209-10 (1961) [hereinafter cited as *1961 Hearings*].


\(^{114}\) *1961 Hearings* 1210.


\(^{116}\) *1961 Hearings* 1210.


new drugs meet a test of effectiveness in addition to the existing test of safety. A new drug application could be denied by the FDA if there is a lack of substantial evidence that the drug will have the effect claimed for it.

It appears that the two agencies of the federal government will duplicate efforts if the Food and Drug Administration proceeds under the law promulgated by the Congress and the Patent Office continues its demand for substantial proof of utility in pharmaceutical patent applications.

The case of *In re Hartop* was decided by the United States Court of Customs and Patent Appeals after passage of the statutes discussed above. From that case it appears that the problem of determining the standard of proof in showing utility remains unresolved. The divided five-judge court reversed the Patent Office's rejection of an application; two judges joined in a strong dissent and one judge concurred in the majority's result. The applicants were deemed to have alleged utility in humans by the statements set forth in their patent application. The examiner required proof of the safety and effectiveness of the applicants' therapeutic composition in humans. An affidavit was submitted presenting data which supported the allegation that the compositions were safe, effective and reliable for producing the therapeutic effects set forth in the specification. These data were compiled by comparative tests on standard experimental animals with a known pharmaceutical composition. The court reduced the issues to a single question of safety in stating that:

At this point we wish to point out that although the board, in affirming the examiner, referred to the necessity for proof that the "claimed composition is safe, effective and reliable," neither the examiner nor the board has given any reasons for doubting the effectiveness and reliability of appellants' solutions in inducing anesthesia in any animal, including humans, and we will assume that...

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119 S. REP. No. 1744, 87th Cong., 2d Sess. 9–10 (1962); see note 117 supra and accompanying text.

120 Id. at 10.


123 Although the applicants contended that they did not allege utility in humans, the court found that due to statements in the specification, which contrasted the individual doctor with the large institutional users, one skilled in the art would conclude that utility in humans was the use which applicants alleged. *Id.* at 786, 311 F.2d at 253, 135 U.S.P.Q. at 423.
upon a showing of safety in human therapy, the examiner and the board would have been satisfied as to all three qualities and would have conceded the composition to be useful under section 101.\textsuperscript{124}

The court took judicial notice of the fact that many therapeutic substances with desirable physiological properties when administered to lower animals or humans entail certain risks or may have undesirable side effects. The proper criterion was held to be whether the applicants' composition was as safe as a commercially acceptable one. The court held that such safety was properly shown by affidavits setting forth evidence that comparison tests on standard experimental animals disclosed no significant difference between the safety of a commercial solution and the applicants' solution.\textsuperscript{125} The majority concluded that:

[B]earing in mind that inherent in the concept of the "standard experimental animal" is the ability of one skilled in the art to make the appropriate correlations between the results actually observed with the animal experiments and the probable results in human therapy, we hold that appellants' claimed solutions have been shown to be useful within the meaning of 35 U.S.C. 101 . . . . We think that a sufficient probability of safety in human therapy has been demonstrated in the case at bar to satisfy the requirement of 35 U.S.C. 101 that appellants' invention be useful.\textsuperscript{126}

A strong dissent, citing the district court decision of Isenstead v. Watson,\textsuperscript{127} stated that the applicant had failed to rebut the technical objections properly made by the examiner, and continued:

The weakest and the most dangerous element in the majority rationale is its apparent adoption of the theory, which is sheer speculation, nothing more, that if a given drug will have a certain effect on "a standard experimental animal," whatever that animal might be, it will "probably" have the same effect on human beings.\textsuperscript{128}

Thus, the majority of the United States Court of Customs and Patent Appeals holds that each case must be decided on its own facts, and that the weight accorded the technical objections of the examiner will be relatively unpersuasive, unless fully substantiated. The weight given the same objections in the United States District Court for the District

\textsuperscript{124}Id. at 788-89, 311 F.2d at 255, 135 U.S.P.Q. at 424.

\textsuperscript{125}Id. at 791, 311 F.2d at 257, 135 U.S.P.Q. at 426.

\textsuperscript{126}Ibid.


of Columbia has been considerable. An applicant should allege utility in humans not before the Patent Office but rather before the Food and Drug Administration, where his right to market his drugs for use in humans will be determined. Thus, an allegation of a "pharmaceutical use" or of use "in animals" in patent applications in the pharmaceutical field would result in an acceptance of proof of successful tests in standard experimental animals by the Patent Office and would resolve the entire problem of the proof of utility for such patent applications.

UTILITY IN CHEMICAL PROCESS APPLICATIONS

In recent years, one of the more active areas of controversy in the patent field has centered around the utility requirement in patent applications for inventions in the chemical field. As with pharmaceutical applications, the Patent Office has favored a strict requirement of utility, while the United States Court of Customs and Patent Appeals applies a more lenient standard. The dichotomy will be examined in an effort to determine its cause and to recommend a solution.

Throughout the past fourteen turbulent years of debate in the area of chemical patent utility, two statutory provisions have demanded constant interpretation. Congress has set forth the requirement that an invention

129 See text accompanying note 99 supra.
130 An applicant may appeal an adverse decision of the Patent Office Board of Appeals to the Court of Customs and Patent Appeals or may commence a civil action in the United States District Court for the District of Columbia. 35 U.S.C. § 141 (1958) provides that: "An applicant dissatisfied with the decision of the Board of Appeals may appeal to the United States Court of Customs and Patent Appeals, thereby waiving his right to proceed under section 145 of this title." 35 U.S.C. § 145 (1958) provides that:
An applicant dissatisfied with the decision of the Board of Appeals may unless appeal has been taken to the United States Court of Customs and Patent Appeals, have remedy by civil action against the Commissioner in the United States District Court for the District of Columbia if commenced within such time after such decision, not less than sixty days, as the Commissioner appoints.
have utility, in which case, if certain other "conditions and requirements" are met, it may be patented.\(^\text{131}\) One of the more important "conditions" or "requirements" appears at 35 U.S.C. § 112 (1958) as follows:

The specification shall contain a written description of the invention, and of the manner and process of making and using it, in such full, clear, concise, and exact terms as to enable any person skilled in the art to which it pertains, or with which it is most nearly connected, to make and use the same . . . .

**THE LITERALISM OF THE UNITED STATES COURT OF CUSTOMS AND PATENT APPEALS**

A leading treatise in the field of patent law defines the advent of an invention as that point in time when an invention is reduced to practice, that is, when it has been reduced to a fixed, positive and practical form.\(^\text{132}\) Maintaining a clear line of distinction between the several statutory classes of invention as recited in section 101, the treatise further defines reduction to practice as follows: "a process is reduced to practice when it is successfully performed; a machine, when it is assembled, adjusted and used; a manufacture, when it is completely manufactured; a composition of matter, when it is completely composed."\(^\text{133}\)

The requirement that an invention have utility, while consistently applied, has been plagued with difficulties in its practical application. Not only have these difficulties involved the absence of any standard amount or degree of usefulness necessary to obtain a patent, but they have also presented serious confusion with respect to the definition of utility as applied to the several classes of invention. The utility requirement in chemical process applications has been particularly controversial in recent years and has been the subject of considerable attention and thought by the courts, as will be seen.

Returning to sections 101 and 112, it is observed that both sections refer to the concept *useful*. Section 101 requires that an invention be useful to be patentable; section 112 states that "the specification shall contain a written description of the invention and the manner and process of making and using it . . . ."\(^\text{134}\) Initially it may be said simply that an application must describe a "useful" invention and a description of how to use it.

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\(^\text{131}\) A person who invents something new and useful may obtain a patent therefor "subject to the conditions and requirements of this title." 35 U.S.C. § 101 (1958).

\(^\text{132}\) 2 *Walker, Patents* 920–21 (Deller ed. 1937).


\(^\text{134}\) This portion of section 112 is often referred to as the "how to use" requirement.
It would seem apparent that each class of invention, be it a process, machine, manufacture or composition of matter, must have a utility or use distinct from that which is required for an invention falling in another class. Likewise, it would seem apparent that the "how to use" requirement of section 112 would, for each class of invention, be equally distinct from that required for the other classes. However, this has not been the case.

Fearing the possibility of being driven into a logical morass, the courts, prior to 1950, had judiciously avoided maintaining a clear distinction between the utility required for "processes" and that which is required for "products," i.e., compositions of matter. It was perhaps due to this fear that the United States Court of Customs and Patent Appeals reached the conclusion it did in In re Bremner. The Bremner application was concerned with methods of polymerizing dihydrapyran. Six different methods were presented, five of them producing resins and one producing a viscous liquid. The invention was claimed both in terms of the process and the product for producing the product. Since no utility was disclosed for the product, all the claims were rejected on the ground of lack of utility for "failure to comply with the requirements of section 4888, Revised Statutes, or Rule 35, Rules of Practice . . . ." Applicants argued that the resins produced were useful because they were by their very definition and of necessity moldable. The court was obviously not favorably impressed by the applicants' argument, saying:

It is our view that no "hard and fast" ruling properly may be made fixing the extent of the disclosure of utility necessary in an application, but we feel certain that the law requires that there be in the application an assertion of utility and an indication of the use or uses intended.

It was never intended that a patent be granted upon a product, or a process producing a product, unless such product be useful.

The court further stated that there was no assertion of utility nor any use disclosed for the product in the application, citing the predecessors to sections 101 and 112, the United States Constitution, and several cases.

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136 Record, p. 10.
137 The court made no distinction between the product and process claims. Id. at 33.
138 Brief for Applicants, p. 1.
139 37 C.C.P.A. (Patents) at 1034, 182 F.2d at 217, 86 U.S.P.Q. at 75.
140 U.S. Const. art. I, § 8. "The Congress shall have Power . . . To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive right to their respective Writings and Discoveries."
141 All of the cases cited dealt exclusively with product claims. Potter v. Tone, 36 App.
Two of the cases cited, Scovill Mfg. Co. v. Satler and In re Holmes, are of interest in that the question of utility was dealt with clearly in the former but was confused in the latter. In Satler, the court held that an invention can be said to lack utility only if it proved to be totally incapable of doing anything claimed for it. In the Holmes case, the court apparently confused utility with the requirement that there be a patentable distinction between the claimed invention and prior art. The Holmes majority stated:

In other words, insofar as the utility of the product is concerned, nothing can be ascribed to a pipe having the seams of appellant's claimed product which renders such a pipe patentably distinct from a pipe having no such seams.

Appellant's invention lies in the process and not in the product produced by that process.

This statement indicates that the process, if not the pipe itself, should be patentable, although the court did not so hold. Conversely, the Satler language seems to indicate that if the invention, i.e., the process, is capable of doing what is claimed for it, it is patentable. It would seem to follow then, that even a process which produces a useless product, or for that matter, an illegal one, such as a gambling device, should be patentable. This conclusion is borne out by later decisions and the Holmes case supports this position unless the court was totally mistaken in its interpretation of the meaning of "utility." Holmes is valuable in that it confirms the previously unsettled notion that products and processes fall into separate and distinct classes of invention.

The case of Petrocarbon Ltd. v. Watson involved an appeal of a rejection of both product and process claims where no distinction was made between the two. The application claimed an invention consisting of a process for the production of new and useful polymers. The application stated in several places that the polymers would be deposited in the form of a film when cooled. It was also claimed that:

All the polymers obtained in the above examples were useful because they had great thermal stability and did not soften when heated to a temperature of 270°C.


142 Supra note 141.

143 20 C.C.P.A. (Patents) 899, 63 F.2d 642, 16 U.S.P.Q. 399 (1933).

144 Id. at 902, 63 F.2d at 644, 16 U.S.P.Q. at 401.

They were not attached by sulfuric acid at 150°C. They were insoluble in, and also did not swell visibly in, boiling

- ethyl alcohol
- diethylethers
- chloroform
- xylenes
- benzene
- toluene
- glacial acetic acids.146

Applicants argued that the quoted matter amounted to a sufficient disclosure of the utility of the claimed invention. The Court of Appeals disagreed:

Some further indication . . . should have been given to enable readers of the application to understand how the product is to be used. . . . [T]he present specification . . . makes no such statement as to the film, [and does not explain] how the film is to be used. Since the word "film" by itself does not connote a particular use, the specification is defective as a matter of law.147

Judge Burger, in a persuasive dissenting opinion, argued for the admission of expert testimony on the question of obvious uses for the film. "I think it is unsound to say that as a matter of law the word 'film' by itself does not connote a particular use . . . ."148 Judge Burger's remarks were noted with approval by the United States Court of Customs and Patent Appeals in In re Nelson,149 decided in June of 1960, three years after the Petrocarbon decision. The claims in Nelson were directed to new steroid compounds which were said to be valuable intermediates in the preparation of other steroids. The claims were rejected by the examiner as lacking in utility because applicants had not disclosed how the claimed intermediates could be converted into products having known useful properties. The examiner's answer stated that "the mere allegation that they are useful for conversion is not sufficient," and that the disclosure was fatally defective with respect to the utility requirements of section 112.150 On appeal, the court considered this rejection as an indication that confusion existed between sections 101 and 112. Section 112, as the court viewed it, did not deal with "utility" as the term is used to define a prerequisite to patentability, but rather to the disclosure as to the manner of using the invention.151

146 Id. at 215, 247 F.2d at 801, 114 U.S.P.Q. at 95.
147 Ibid.
148 Id. at 216, 247 F.2d at 802, 114 U.S.P.Q. at 95.
150 Id. at 1038, 280 F.2d at 176, 126 U.S.P.Q. at 247.
151 Id. at 1040, 280 F.2d at 178, 126 U.S.P.Q. at 248.
In discussing the Petrocarbon case, the majority in Nelson went further than did Judge Burger and factually distinguished Petrocarbon from In re Bremner in holding that:

The case differs from the Bremner case in the amount of information given about the new polymers which, in the Petrocarbon case, was sufficient to enable those skilled in the art to use the new materials and hence section 112 was complied with.

For the reasons above stated, we must respectfully decline to accept the Petrocarbon case as a precedent.

In re Wilke, decided in February of 1963, involved an appeal from the Board's affirmance of a rejection by the examiner of a number of process and product claims. The rejection as stated in the examiner's answer, said that "all of the claims stand finally rejected as being based on an insufficient disclosure with respect to utility and failing to comply with 35 U.S.C. 112." While the court stated that appellants and the Board agreed that the issue wholly involved the sufficiency of the disclosure of "how to use" required by section 112, the Solicitor for the Patent Office construed the rejection in the conjunctive as based on a lack of utility under section 101 and an insufficiency of disclosure of "how to use" under section 112. In refusing the Solicitor's interpretation, the court criticized the examiner's form of rejection, saying: "A reasonable compliance with 35 U.S.C. 132 and Patent Office Rule 104 should have resulted in such a statement of the ground of rejection that no basis could here exist for such a divergence of views." The court cited In re Nelson as an earlier example of the confusion which results from a failure to separate the utility requirement of section 101 and the "how to use" requirement of section 112. Nevertheless, the court did make an important and far reaching distinction involving the "how to use" requirement of section 112 between products and processes when they said:

[W]here "the invention" claimed is a process, the requirements of 35 U.S.C. 112 may be met by a written description of the manner of using the claimed process. However, such a description of the manner of using the process may not be a sufficient compliance with 35 U.S.C. 112 where "the invention" claimed is a product.

Maintaining this distinction, the court rejected that part of the "rule of Bremner" which required that the specification must teach a use for the

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155 Id. at 967, 314 F.2d at 561, 136 U.S.P.Q. at 438.
156 Id. at 968, 314 F.2d at 561, 136 U.S.P.Q. at 439.
157 Id. at 968, 314 F.2d at 562, 136 U.S.P.Q. at 439.
product of a claimed process. "Had this been the intent of Congress, we are certain that it would have been so stated in 35 U.S.C. 112. Instead, the language of 35 U.S.C. 112 where applied to a process requires no more than has been here disclosed."158 That is to say, the steps must be disclosed in the specification only sufficiently to teach one of ordinary skill in the art how to carry out the claimed process.

The Wilke decision was followed and supported in In re Adams,159 which involved the same confusion of issues under sections 101 and 112 as did Wilke. In Adams both product and process claims had been rejected on the ground that the specification contained an insufficient "disclosure of utility."160 No reference was made below to the process claims per se. Considering the process claims by themselves and citing In re Wilke, the court said: "The method is used for making the compounds. We have no doubt that the disclosure is sufficient, insofar as the method claims are concerned, to satisfy the requirement of 35 U.S.C. 112."161

In re Szwarc162 involved a continuation-in-part of the parent application in the Petrocarbon case and presented the question of whether Szwarc could obtain the benefit of the filing date of his parent application in order to avoid a rejection of his later application because of the fact that he had obtained a British patent on the same invention. Obtaining the benefit of Petrocarbon's filing date in turn depended on whether the invention claimed in the Szwarc continuation-in-part was sufficiently disclosed in the Petrocarbon parent application. The Szwarc application contained both product and process claims. Drawing the Wilke distinction between the disclosure requirements to support product and process claims, the court found sufficient disclosure in the parent case of how to use the claimed processes and accorded the Szwarc process claims the benefit of the parent filing date.163 The product claims were denied the

158 Id. at 973, 314 F.2d at 566, 136 U.S.P.Q. at 442.
160 Record, p. 219.
161 50 C.C.P.A. (Patents) at 1188, 316 F.2d at 478, 137 U.S.P.Q. at 335.
163 The Patent Office Board of Appeals affirmed the examiner's rejection of the Szwarc application on the ground that the decision in Petrocarbon was res judicata on the issue of whether the parent application disclosed the invention as required by § 112. The United States Court of Customs and Patent Appeals avoided the holding of res judicata on the ground that the law, i.e., the court's own interpretation, with respect to the sufficiency of disclosure under § 112 had changed since Bremner. This permitted the court to make an independent determination of the sufficiency of disclosure in the parent application. Id. at 1582–83, 319 F.2d at 286–87, 138 U.S.P.Q. at 215–16.
benefit of the filing date of the parent case solely on the ground of collateral estoppel. Reaffirming the rejection of the "Bremner rule" as to processes, the court said:

As stated in In re Wilke . . . a specification which teaches those skilled in the art how to use the process, i.e., by disclosing the manipulative steps of the process, the required operating conditions and the starting materials so that the process may be used by a person skilled in the art, meets the requirements of 35 U.S.C. 112. It is not necessary to specify the intended uses for the product produced therein.

As shown by this review of the previous cases, the United States Court of Customs and Patent Appeals has in recent years displayed a predisposition to clarify the utility requirement for chemical processes and to do this notwithstanding a contrary holding by the United States Court of Appeals for the District of Columbia Circuit. In accordance with this predisposition, whatever was left of the "rule of Bremner" as regards process claims has been totally eliminated in In re Manson, the most recent case involving the point. To borrow a phrase from the dissent in that case, the court has now adopted "the novel proposition that a process which produces a useless product is patentable." Manson had copied process claims from a patent for the purpose of provoking an interference. Affidavits were filed under Patent Office Rule 204(b) purporting to show that Manson was prima facie entitled to an award of priority relative to the filing date of the patent. The examiner took the position that the affidavits were deficient in that they failed to show a utility for the product produced by the claimed process and therefore that Manson had not shown that he had made a useful invention prior to the filing date of his application. The Patent Office Board of Appeals agreed with the examiner's position that a process is not useful merely because the product produced is known unless the product produced is shown to be useful. The court, however, found such a requirement unjustifiable in view of section 101, stating that "a process which operates as disclosed to produce a known product is 'useful' within the meaning of Section 101." To require that the product have a use in order that the process be patentable was termed "an improper arrogation of the authority delegated to Congress by the Constitution." The court added that had Congress in-

164 Id. at 1580, 319 F.2d at 284, 138 U.S.P.Q. at 214.
165 Id. at 1583, 319 F.2d at 286, 138 U.S.P.Q. at 216.
167 Id. at 239, 142 U.S.P.Q. at 39.
168 Id. at 235–36, 142 U.S.P.Q. at 36.
169 Ibid.
tended such a result it would have expressly so provided in section 101 or 100(b). The Wilke proposition that it is not necessary that a specification show how to use the product of a claimed process furnished the court support for eradicating the remnants of the "rule of Bremner." Then, in an apparent effort to reinforce its position, the court relied upon the same authorities it had used to support its position in Nelson, namely those holding that an invention is "useful" if neither mischievous nor immoral. Summarizing, the Manson court gave a classic shorthand statement of its position—a process is patentable if it works and doesn't hurt anyone.\(^\text{170}\)

It remains to be seen whether the Manson decision is adopted in future cases. In any event, while it seems to be a correct and reasonable interpretation of the statutes and prior decisions, most of them having been decided by the present court,\(^\text{171}\) it appears to lead to an absurd result.

The absurdity lies in the fact that since, under the Manson rule, the utility of the product is not considered in determining whether the invention, \(i.e.,\) the process, is patentable, then in an instance where the product has no practical use, the process which produces that product is nonetheless patentable. One may thereby obtain a patent for an invention which has no practical usefulness. By way of illustration, a process comprising the steps of removing the head skins from a snare drum and heating them to a temperature of 1000 degrees for thirty minutes would result in Glob X, a product which may or may not be known. Since the steps of the process for producing Glob X are expressly set forth and the starting materials are given, compliance with section 112 is satisfied. Similarly, since the process has produced Glob X, it is useful, \(i.e.,\) it has done the very thing claimed for it. Whether Glob X is produced by a process which a layman can appreciate or by a complex series of chemical reactions understood only by those skilled in the chemical art, it would seem that both processes are within the holding of \textit{In re Manson} and would under that holding be patentable.

While the illustration is admittedly absurd, it is valuable if, by giving rise to serious consideration of the utility question, it leads Congress to amend the statutes in this area. Hopefully, Congress will define by statute what is "useful" as regards processes and even more important, set forth in clearer terms the application of section 112 to these inven-

\(^{170}\) \textit{Id.} at 238, 142 U.S.P.Q. at 38.

\(^{171}\) Worley, C. J., Rich, Martin, Smith and Almond, JJ.
tions. The status of the present law on the utility requirement as applied to processes seems to cry out for legislative clarification. At present, the only basis for a holding to the contrary seems to rest upon a judicial interpretation of the intent of Congress as manifested in sections 101 and 112.

THE ARGUMENT FOR Bremner

Utility of the early chemical inventions created no problem. Most inventions were directed toward obtaining an obviously useful result so that no question of patentable utility arose. Later, utility was said to be assumed. Ex parte Watt was perhaps the leading case in this area prior to 1950, when the first real occasion for interpreting the statutory requirement of utility in chemical inventions arose. In Watt, the Patent Office Board of Appeals, in an effort to justify the examiner's restriction requirement, stated that any organic compound could be used in the preparation of other compounds. It is significant that the Board was not considering a rejection for lack of utility.

The courts were first called upon to interpret what Congress had intended by the term "useful" in section 101 in relation to a chemical invention which was neither inoperative nor frivolous in In re Bremner. Apparently no chemical patent application had been rejected on the ground of lack of utility of a product produced by a process prior to Bremner, so that so far as chemical inventions were concerned, the case appears to have been one of first impression. It is important to note that in Bremner the court relied upon sections 31 and 33 of Title 35, U.S.C., the predecessors to sections 101 and 112. The court interpreted the forerunner of section 101 to require that an invention have utility regardless of the statutory class into which it might fall. Be the invention machine, manufacture, product or process, it was required that it possess utility. How utility is attained, however, presents another question.

172 E.g., Patent No. 3,633 was granted to Charles Goodyear for a process of vulcanizing rubber. The pneumatic process of making steel commonly referred to as the "Bessemer Process" was patented by Henry Bessemer in patents No. 16,082 and 16,083. Patent No. 400,665 was granted for the "Hall Process," a process which furnished the solution to the difficult problem of producing aluminum on an industrial scale.


176 Id. at 165.

The utility of a machine such as a gasoline engine, or a manufacture such as a paper clip, or a product such as floor wax, is obvious. These three statutory classes all embody inventions which, when used as intended, can produce a useful result. Of course, if the invention does not produce a useful result, it fails to meet the requirement of section 101 that it have utility and is not patentable.

A somewhat different approach must be taken when determining the utility requirement of a process, however. Initially, to avoid a possible problem area, processes will arbitrarily be considered to be of two types: those producing products, and those producing semi-intangible results. An example of the latter would be a therapeutical process for curing an illness. The intended result of this type of process is obviously useful, and the only question, if any, is the evidentiary one of whether the process actually produces the claimed result.178

Returning to the former type of process, that which produces a product, the question presented involves a determination of the utility requirement. The United States Court of Customs and Patent Appeals in Bremner answered this question by saying that the utility of a process producing a product must be measured by the utility of the product produced.179 That the utility of a process producing a product must be measured in this way is obvious. No invention is useful in a vacuum; it must be put to a use. A gasoline engine produces no useful result while packed in a crate for shipping; but it does produce such a result in supplying power for an automobile. While sitting in the shipping crate, a gasoline engine may be operable, and thus possess utility, or inoperable, and thus lack utility. The same analysis can be applied to a process which produces a product. Such a process may or may not have utility. To determine whether this type of process has utility, it must be put to a use and this use must obviously involve the use of the product produced. If the product can be used to attain a useful result, then the process producing the product is useful; it has utility.

The above discussion considers only a part of the holding in Bremner. The other portion can be advantageously reviewed if considered with Petrocarbon Ltd. v. Watson.180 The court in Petrocarbon stated that there

178 See pp. 166-74 supra.
179 "It was never intended that a patent be granted upon ... a process producing a product, unless such product be useful." 37 C.C.P.A. (Patents) at 1032, 182 F.2d at 216, 86 U.S.P.Q. at 74.
had to be in the application "an indication of the use or uses intended."\footnote{181}{Id. at 215, 247 F.2d at 801, 114 U.S.P.Q. at 95.} It has previously been stated that an invention must be used to show that it possesses utility, that it is not useful only in a vacuum. Return to the hypothetical shipping crate with the gasoline engine inside. Next to it is another crate containing a product-producing process. No one would question the sufficiency of the disclosure of a patent application which set forth the manner of making the engine but omitted a discussion of its use. This is not due to the absence of a statutory provision requiring an indication of its use, but because its use in automobiles, airplanes, lawn mowers, ad infinitum, is obvious. But this is not necessarily the case with the process. If the use of the products produced were obvious, for instance, where a process produced floor wax, the case would be similar to that of the gasoline engine. But where there is no known or obvious use for the products, there must be a disclosure of how to use the product, \textit{i.e.}, a disclosure of how utility is to be obtained. Without this disclosure, the process would merely produce products which could not be used and would therefore be useless. For as concerns the utility of a process which produces a product, it makes little difference whether the product is not used because it lacks utility or because no one knows how. In either case, the process has no utility. Those who would argue that utility can be found in a process which no one knows how to use are, it is submitted, allowing such mental calisthenics to obfuscate reality.\footnote{182}{See p. 182 \textit{supra}.}

Both \textit{Bremner} and \textit{Petrocarbon} were discussed in the later case of \textit{In re Nelson}.\footnote{183}{47 C.C.P.A. (Patents) 1031, 280 F.2d 172, 126 U.S.P.Q. 242 (1960).} The court in \textit{Nelson} found a confusion to exist between sections 101 and 112. It was the court's opinion that these sections were separate and distinct.\footnote{184}{See also note 151 \textit{supra} and accompanying text.} Initially, it is observed that the view of the court as to the distinctness of sections 101 and 112 is only conditionally correct. The view is correct to the extent that section 101 states that if an invention be useful, the inventor may obtain a patent therefor, while section 112 requires a disclosure of how to use the invention. However, we have seen that to be useful an invention must have a use which produces some useful result. Section 112 requires that an inventor disclose this use to show how the utility of section 101 is obtained. Therefore, the rejection\footnote{185}{See note 150 \textit{supra} and accompanying text.} merely meant that the applicant had not complied with section 112 in disclosing how the invention was to be used to obtain a useful

\begin{footnotesize}
\begin{enumerate}
\item[181] \textit{Id.} at 215, 247 F.2d at 801, 114 U.S.P.Q. at 95.
\item[182] See p. 182 \textit{supra}.
\item[184] See also note 151 \textit{supra} and accompanying text.
\item[185] See note 150 \textit{supra} and accompanying text.
\end{enumerate}
\end{footnotesize}
result; how, in fact, utility was to be obtained. The court's statement that a mere allegation that the compounds were useful for conversion did not suffice\(^{188}\) was not directed to section 101. It merely meant that for the purpose of showing how a useful result is to be obtained in compliance with the requirements of section 112 a mere allegation of utility is not sufficient; there must be a disclosure of how the product is to be used. As stated by the Solicitor: "[A] compound which acts as an intermediate for the production of another compound having no utility can hardly be said to be useful in the sense of the law."\(^{187}\) In a footnote, the court added that a mere assertion of utility to satisfy the requirements of section 101 is a meaningless formality.\(^{188}\) This statement is wholly consistent with the position of the Patent Office. Mere assertions of utility are meaningless. The actual possession of utility is required, and to possess utility, an invention must be capable of a use. Where a use is neither known nor obvious, one must be disclosed; otherwise, the invention is useless. When this is the case, i.e., when the invention has no known or obvious use and the specification fails to disclose a use, the claims are subject to a rejection not only on the ground of an insufficient disclosure under section 112, but also on the ground of lack of utility under section 101, because, as previously stated, an invention which no one can use to produce a beneficial result has no utility.

The Nelson court found utility in the steroid intermediates by finding that the disclosure sufficiently described (at least to the court's satisfaction) how to make other steroids "of a class at least some members of which were known to have useful therapeutic properties."\(^{189}\) Upon such a finding of fact by the court, the result was perfectly harmonious with the then existing law. The disclosure was sufficient to teach those skilled in the art how to produce a useful result. That all of the end products could not be so used did not make the invention unpatentable. A device which works only sometimes is patentable.\(^{190}\) It is not the extent of the utility that governs, but the evidence of the existence of at least some utility.\(^{191}\)

Considering Bremner and what it required of a specification concern-

\(^{188}\) Ibid.

\(^{187}\) Brief for Comm'r of Patents, p. 15.

\(^{188}\) 47 C.C.P.A. (Patents) at 1047 n.4, 280 F.2d at 183 n.4, 126 U.S.P.Q. at 252 n.4.

\(^{189}\) Id. at 1043, 280 F.2d at 180, 126 U.S.P.Q. at 250.

\(^{190}\) Freedman v. Overseas Scientific Corp., 248 F.2d 274, 115 U.S.P.Q. 42 (2d Cir. 1957); see note 15 supra and accompanying text.

ing utility and "how to use," the Nelson court felt it clear that these requirements had been fully met by the application before it. Allegedly adhering to the "rule of Bremner," the court pointed out that the "test is what the application as a whole communicates to one skilled in the art." In so doing, the court merely put into words what had previously been implied, stating that the "how to use" requirement of section 112 varied with the obviousness of the use of the invention. It was made clear that not all compounds were useful as intermediates and that patents would not be granted on any new compound alleged to be an intermediate. The "Bremner rule requires . . . that an application shall make known to those skilled in the art (that) something can be done" with the invention; that some useful result can be obtained. The court disagreed with Petrocarbon but not on the legal principles applied. Rather, the disagreement revolved on the facts, the court finding the term "film" to indicate a use to those skilled in the art.

However, Bremner and Petrocarbon did not escape entirely unscathed. The court read its interpretation of sections 101 and 112 into Bremner, finding that case to have held that the requirement that the applicants' specification set forth the intended use was distinct from the mere possession of utility. Not only does this position inevitably lead to a consideration of whether an invention which no one can use is useful, but it is contrary to the implications of the language used in Bremner. In the Bremner opinion, immediately after stating that the law requires an indication of the use intended, the court added that it was never intended that a patent be granted for an invention unless it be useful. The clear implication is that the disclosure of the use of the invention under section 112, and the indication of the usefulness of the invention under section 101, are not only not distinct from each other, but are related.

In dissenting, Judge Kirkpatrick expressed his difficulty with the insistence of the majority upon the complete separation of sections 101 and 112:

The requirements of Section 112 as to showing manner of using are inseparable from those of Section 101 as to usefulness. The provision of Section 112 that the specification shall describe the manner of using a process or composition of matter (unless it is obvious) certainly means, in view of Section 101, that the applicant must show how his invention can be employed usefully.

192 47 C.C.P.A. (Patents) at 1048, 280 F.2d at 184, 126 U.S.P.Q. at 253.
193 Id. at 1050, 280 F.2d at 185, 126 U.S.P.Q. at 254.
194 Petition for Rehearing by the Comm'r of Patents, pp. 7–9.
195 47 C.C.P.A. (Patents) at 1058, 280 F.2d at 191, 126 U.S.P.Q. at 258. (Emphasis added.)
Judge Kirkpatrick found in the application no disclosure of how anything that could be usefully employed could be made from Nelson’s steroids.\(^\text{196}\)

_\textit{In re Wilke}_\(^\text{197}\) presented a situation very similar to that of _Nelson_ with respect to the grounds of rejection. If anything, the language used by the examiner more clearly pointed out than did the examiner’s rejection in _Nelson_ that the rejection was based on both sections 101 and 112.\(^\text{198}\) Unlike _Nelson_, _In re Wilke_ contained both product and process claims. Section 112 was held to require that the specification contain both a written description of the invention and that it set forth the manner of using the product. This is not surprising; through use, a product must be able to produce some beneficial result in order to meet the utility requirement of section 101.

The court in _Wilke_ also reasoned that the specification must disclose the manner of using the process. But the “use” of the process is not the same as that previously discussed with respect to meeting the utility requirement of section 101.\(^\text{199}\) To the court, the “manner of using the process” merely meant defining the steps of the process. This position was directly opposed to the holding in _Bremner_; the court simply refused to apply it. In so ruling, the _Wilke_ court rephrased the _Bremner_ language to avoid any mention of the term “useful,” stating that the “rule of _Bremner_” was “that the specification must teach a use for the product of the claimed process.”\(^\text{200}\) This misinterpretation of _Bremner_ originated in _Nelson_\(^\text{201}\) and was followed and approved in _In re Johnson_.\(^\text{202}\)

\(^\text{196}\) Judge Kirkpatrick was also concerned about the manner in which the majority had defined useful. He pointed out that every definition of utility, including those cited by the majority, required at least some utility as opposed to mere absence of frivolity or danger to society. “I cannot believe that either text writers or courts ever thought that the word ‘useful’ in the statute meant simply ‘harmless.’” _Ibid_. _But see_ note 170 _supra_ and accompanying text.


\(^\text{198}\) See note 155 _supra_ and accompanying text. The two cases point up the court’s inconsistency in dealing with §§ 101 and 112. In _Wilke_ the court stated that it agreed “with the board that the rejection of the appealed claims is based solely on appellants' failure to disclose their invention as required by 35 U.S.C. § 112.” 50 C.C.P.A. (Patents) at 968, 314 F.2d at 562, 136 U.S.P.Q. at 439. However, where virtually the same language was used by the examiner in the _Nelson_ case, it was there found not only to bring in § 101, but also to involve a “scrambling of the separate statutory requirements.” 47 C.C.P.A. (Patents) at 1039, 280 F.2d at 177, 126 U.S.P.Q. at 248.

\(^\text{199}\) See note 181 _supra_ and accompanying text.

\(^\text{200}\) 50 C.C.P.A. (Patents) at 973, 314 F.2d at 566, 136 U.S.P.Q. at 442.

\(^\text{201}\) 47 C.C.P.A. (Patents) at 1047, 280 F.2d at 183, 126 U.S.P.Q. at 252.

Any interpretation of the requirements of section 112 with respect to the disclosure of how to use a process would appear to be open to doubt, since the Nelson court itself found the language not tailored to fit all of the classes of invention which might be patented.\textsuperscript{203} However, it is only through the court’s erroneous interpretation of Bremner in Nelson that it obtained its result in Wilke. Because of its rigid adherence to the proposition that sections 101 and 112 are completely distinct, the Wilke court felt unhampered by the requirements of any of the other sections of the statute when interpreting section 112. Therefore, when the court rationalized its result by reasoning that had it been intended that the law be other than as the court had found it, Congress would have so stated in section 112,\textsuperscript{204} it never considered that Congress might have “so stated” in section 101. Similarly, the statement that the “language of 35 U.S.C. 112 where applied to a process requires no more than has been here disclosed”\textsuperscript{205} demonstrates the court’s absolute refusal to consider that the requirements of section 112 might be intertwined with the requirements of section 101.

The practical effect of the ruling in Wilke seems to have gone unnoticed. This was probably a result of two factors: (1) the court’s refusal to consider the rejection by the Patent Office in Wilke to have been on the ground of lack of utility; and (2) the fact that the court actually found a sufficient disclosure of how to use some of the products produced. At any rate, it was still considered necessary to the allowance of process claims that the specification contain an indication of the use of the products of the process so that the public would have a reason for using the process.\textsuperscript{206} Two subsequent cases passed down the same year seemed to be consistent with this view. The court in In re Adams\textsuperscript{207} considered the rejection to be one under section 112 on the ground of an insufficient disclosure of how to use the compounds and adhered to its ruling in Wilke with respect to the different disclosure requirements of how to use a product and a process.\textsuperscript{208} Again, however, the specification

\textsuperscript{203} 47 C.C.P.A. (Patents) at 1048, 280 F.2d at 184, 126 U.S.P.Q. at 253.
\textsuperscript{204} See note 158 supra and accompanying text.
\textsuperscript{205} 50 C.C.P.A. (Patents) at 973, 314 F.2d at 566, 136 U.S.P.Q. at 442.
\textsuperscript{207} 50 C.C.P.A. (Patents) 1185, 316 F.2d 476, 137 U.S.P.Q. 333 (1963). See also note 159 supra and accompanying text.
\textsuperscript{208} Judge Almond, who wrote the majority opinion, appears to have retreated somewhat from Wilke, when he stated that “the disclosure of how the product is used is not required to be as complete in order to show how to use the method of making the product as it is with product claims.” 50 C.C.P.A. (Patents) at 1188, 316 F.2d at 478, 137 U.S.P.Q. at 335.
was found to contain a sufficient disclosure of how to use the products produced by the claimed process. Similarly, in *In re Szwarc*\textsuperscript{209} the specification was found to contain a sufficient teaching of how to use the products produced by the claimed process.

The most convincing argument in support of the position that the United States Court of Customs and Patent Appeals has deviated from the constitutional and statutory requirements than an invention have utility before it may be patented is found by an analysis of the result in the recent case of *In re Manson*.\textsuperscript{210} The court reached its result in *Manson* through a combination of three misinterpretations of the law. The first involved the strained definition of utility reached in *Nelson* that an invention is patentable if "harmless." The second concerned the court's overly rigid insistence upon the separation of sections 101 and 112 and the concomitant failure to realize that in the practical world governed by the law an invention which no one can use has no utility. Finally, because of its rigid insistence upon the separation of sections 101 and 112, and the wording of the first paragraph in section 112, the court reached the erroneous conclusion that the requirement of section 112 of showing how to use a process is satisfied by merely defining the steps of the process.

The decision in *Manson* will have a severe impact upon the chemical patent bar. It has now been suggested that whenever a patent application is filed on a worthless product, it should be claimed in terms of the process for producing it whenever possible. In this manner, the requirement for utility will be satisfied.

It is submitted that the ludicrous proposition reached in *Manson*, i.e., that a process producing useless products is useful, is founded neither on good law nor sound reasoning. It is required by section 112 that an invention have utility. To possess "utility," it has been shown that an invention must be capable of producing some beneficial result as distinguished from being frivolous.\textsuperscript{211} The clear implication of sections 101 and 112 is that they are to be read together and that complete separation is impossible.\textsuperscript{212} In view of the requirement of a positive showing of

\textsuperscript{209} 50 C.C.P.A. (Patents) 1571, 319 F.2d 277, 138 U.S.P.Q. 208 (1963). See also note 162 *supra* and accompanying text.

\textsuperscript{210} 333 F.2d 234, 142 U.S.P.Q. 35 (C.C.P.A. 1964). See also note 166 *supra* and accompanying text.

\textsuperscript{211} Hall v. Duart Sales Co., 28 F. Supp. 838, 42 U.S.P.Q. 354 (N.D. Ill. 1939); see note 20 *supra* and accompanying text.

utility and the interdependence of sections 101 and 112, it is submitted that the court's opinion of the utility required in a process is erroneous. Contrary to the apparent opinion of the court, the failure of Congress to place an express provision in the path of the court is certainly no invitation to proceed at will, particularly in view of the implications which Congress has made available. The words of the District Court of New Jersey are appropriate:

Congress is aware of the burning controversies that rage over the alleged inadequacies and inefficiencies of our antiquated patent law. It is common knowledge that its committees as well as other governmental agencies have been and are investigating practices in the field of patents with a view to formulating recommendations for substantial revisions and changes to be enacted in the patent system.

It remains for the lawmaking body to courageously and intelligently take up its responsibilities to amend and clarify and synchronize the patent system with the times and the technological age in which we live and not for this court to judicially legislate its individual ideas of the appropriate social and economic practices that should prevail in the light of the modern age as substitutes for stabilized regulations by statute.213

CONCLUSION

In the course of the last fourteen years, the concept of utility, a reasonably approached if not reasonably well settled area of the patent law, has been subjected to the strain of "progressive" thought. The primary purpose of the patent system, as defined by the Constitution, is the promotion of progress through reward to inventors for creativity. It has been suggested that this purpose can be more effectively implemented by utilizing the patent system for "information dissemination."214 Although progress in the arts may well be furthered by disseminating information, grounding patentability upon such a theory disregards the element of utility so fundamental to the patent system and deprecates the catalyst of reward which the framers of the Constitution devised to implement their purpose.

The equivocal language of sections 101 and 112 permits the United States Court of Customs and Patent Appeals to adopt the "information dissemination" theory. Recent cases dealing with chemical processes


indicate that the court is willing to do so. To preclude this, and to reinstate the requirement of utility, Congress should provide:

(1) that each class of invention set forth in section 101 possess some positive utility to be patentable;
(2) that the utility of a process be measured by the utility of its product or result;
(3) that the specification include a disclosure of how to use the invention sufficient to demonstrate that utility.

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On June 1, 1964 the Supreme Court of the United States took up the gauntlet flung down by the Florida Supreme Court. In a per curiam decision, the Court vacated and remanded the case for further consideration. In view of the dissimilarity of the facts here and those of the Schempp and Murray cases and our conviction that the establishment clause of the Constitution was never designed to prohibit the practices complained of, we do not feel that the privilege, or duty, is ours to speculate the extent to which the Supreme Court of the United States intended to expand its philosophy. We have, without avail, endeavored to find, in the diverse views expressed by the several justices of the United States Supreme Court who participated in these decisions, a clear course for us to follow. It seems, therefore, more fitting that the responsibility for any enlargement be left to that Court.
opinion the Court stated: "The judgment of the Florida Supreme Court is reversed with respect to the issues of the constitutionality of prayer and of devotional Bible reading pursuant to a Florida statute . . . ." The Supreme Court thus summarily declared unconstitutional such traditional practices as Bible reading and recitation of the Lord's Prayer in the Florida public schoolrooms. Had such a decision been handed down as recently as three years ago it would have created a furor among the press and public. Yet few voices were raised in protest; the Court's brief holding was felt inevitable. The way had been prepared by the Court's other recent and more controversial school prayer and Bible reading decisions.

In 1962 in *Engel v. Vitale* the Supreme Court held that the New York Board of Regents could not constitutionally compose a prayer and recommend its recitation in public schoolrooms. Public interest was immediately aroused and controversy over the holding was widespread. Joint resolutions were introduced in the House of Representatives and the Senate proposing constitutional amendments generally designed to permit prayer in the public schools. Among these was House Joint Resolution 9 introduced by Representative Frank J. Becker of New York which provided simply: "Prayers may be offered in the course of any program in any public school or other public place in the United States." No action was taken on any of the proposed constitutional amendments. The furor began to abate; Congress and the public withheld final judgment pending the Court's decision in future prayer cases.

Then, on June 17, 1963, the Supreme Court in *Abington School Dist. v. Schempp* held that a state may not constitutionally require Bible reading and recitation of the Lord's Prayer in the public schools. Such a

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requirement was held to be a violation of the establishment clause of the first amendment, as applied to the states through the fourteenth amendment.

Again public reaction to the Court's decision was openly hostile. This public resentment was reflected in the activities of Congress. One hundred and forty-six resolutions were introduced into the House of Representatives, each designed to amend the Constitution to vitiate the Court's holding.

Congressional critics of the Court were quick to accuse it of everything short of outlawing God. Yet a reading of the decisions would not sustain these accusations. By forbidding a state-imposed God the Court, consistent with its previous decisions, was again simply delineating its position on the church-state relationship; it was merely adding another brick to the "wall of separation between church and State."

CHURCH, STATE AND THE SUPREME COURT

The relationship between religion and government is not a novel problem to the Supreme Court. As early as 1844, in Vidal v. Girard's Ex'rs, the Court was faced with a church-state relationship question in an action by heirs to set aside a devise to the City of Philadelphia to establish a college. The devise contained a provision that no ecclesiastic of any sect should hold or exercise any station or duty in the college, a proviso that was alleged to violate the public policy of a Christian society. Mr. Justice Story, writing for the Court, asked:

Why may not the Bible, and especially the New Testament, without note or comment, be read and taught as a divine revelation in the college—its general precepts expounded, its evidences explained, and its glorious principles of morality inculcated? What is there to prevent a work, not sectarian, upon the general evidence of Christianity, from being read and taught in the college by lay teachers? Certainly there is nothing in the will, that proscribes such studies.

In sustaining the devise, the Supreme Court noted "the differences in opinion almost endless in their variety" on matters "connected with religious polity, in a country composed of such a variety of religious sects as our country . . . ."
The Court did not question that the linking of church (the teaching of Christianity) and state (in a college to be operated by the City of Philadelphia) violated the establishment clause of the first amendment. But, as the Court noted the following year, this could be simply explained—the first amendment's prohibition of governmental establishment of religion was held not to apply to state action.12

However, federal action could come in conflict with individual religious beliefs and raise a first amendment question. In 1878, in Reynolds v. United States,13 a Mormon appealed from an indictment against him for bigamy, claiming that polygamy was a part of his religion and that federal strictures denied him free exercise. The Court denied his claim for exemption from the statute, stating that "when the offense consists of a positive act which is knowingly done, it would be dangerous to hold that the offender might escape punishment because he religiously believed the law which he had broken ought never to have been made."14 The right to free exercise was limited, according to the Court, by the state's right to control the conduct of its citizenry.

The passage of the fourteenth amendment affected the right of the states to restrict religious freedoms. In 1923 the Court held in Meyer v. Nebraska15 that freedom of religion was included in the concept of "liberty" protected by the due process clause. This holding was further elucidated two years later when, in Pierce v. Society of Sisters,16 the Court held that an Oregon statute requiring every child between the ages of eight and sixteen to attend public school "unreasonably interferes with the liberty of parents and guardians to direct the upbringing and education of children under their control."17 The Court stated that "rights guaranteed by the Constitution may not be abridged by legislation which has no relation to some purpose within the competency of the State."18

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12 Permoli v. Municipality No. 1 of the City of New Orleans, 44 U.S. (3 How.) 589 (1845).
13 98 U.S. 145 (1878); see Davis v. Beason, 133 U.S. 333 (1890) (Mormons forbidden to vote by state); Cleveland v. United States, 329 U.S. 14 (1946) (fundamentalist Mormons convicted of Mann Act violation).
14 98 U.S. at 167.
15 262 U.S. 390 (1923); see Bartels v. Iowa, 262 U.S. 404 (1923).
16 268 U.S. 510 (1925).
17 Id. at 534-35.
18 Id. at 535. (Emphasis added.); cf. Jacobson v. Massachusetts, 197 U.S. 11 (1905) (compulsory vaccination statute held to be within state police power and not unreasonably violative of individual "liberty").
The constitutionality of a Regents' requirement of compulsory military training at the University of California was upheld nine years later. Complainants, conscientious objectors, alleged that the regulation violated both their first and fourteenth amendment rights. The Court distinguished this case from Pierce on the ground that the essential element of compulsion was absent—complainants were not forced by the State of California to attend the University. "Economic compulsion"—inability to afford schooling at another college—was insufficient to raise the fourteenth amendment question. Concurring, Justices Cardozo, Brandeis and Stone held that no first amendment question was raised. "Instruction in military science, unaccompanied here by any pledge of military service, is not an interference by the state, with the free exercise of religion . . . .")

In 1940, the Court again was faced with the problem of state enactments intended to regulate and protect society which violated the religious tenets of a minority group. Members of the Jehovah's Witnesses sect challenged a number of different state statutes, alleging that they violated the free exercise clause. The issue, briefly stated, was: if the sect was to be exempted from such "nonreligious" legislation, was there not the danger that all citizens could become self-appointed censors, deciding which laws they wished to ignore on the basis of "religious scruples"? On the other hand, the language of the free exercise clause was unequivocal. The Court decided the many-faceted problem by distinguishing the establishment clause from the free exercise clause:

The constitutional inhibition on legislation on the subject has a double aspect. On the one hand, it forestalls compulsion by law of the acceptance of any creed or the practice of any form of worship. Freedom of conscience and freedom to adhere to such religious organization or form of worship as the individual may choose cannot be restricted by law. On the other hand, it safeguards the free exercise of the chosen form of religion. Thus the Amendment embraces two concepts,—freedom to believe and freedom to act. The first is absolute but, in the nature of things, the second cannot be. Conduct remains subject to regulation for the protection of society.

Under this theory Minersville School Dist. v. Gobitis upheld the expulsion from school of children of the Jehovah's Witnesses sect for

19 Hamilton v. Regents of the Univ. of Cal., 293 U.S. 245 (1934).
20 Id. at 266.
21 Cantwell v. Connecticut, 310 U.S. 296, 303-04 (1940); see Prince v. Massachusetts, 321 U.S. 158 (1944) (state statute prohibiting sale of literature on public streets by minors upheld although child understood such distribution to be required by religion).
22 310 U.S. 586 (1940).
refusal to salute the flag. Yet just three years later, in *West Virginia State Bd. of Educ. v. Barnette*, the Court expressly overruled *Gobitis*, holding that to force a child to salute the flag when such an act was against his religion constituted a denial of due process. The Court noted that "the freedom asserted by these appellees does not bring them into collision with rights asserted by any other individual. . . . The sole conflict is between authority and rights of the individual." The Court acknowledged that the Board of Education resolution requiring the daily flag salute contained recitals concerning the flag's patriotic symbolism taken largely from the *Gobitis* opinion. However, it felt that "national unity as an end which officials may foster by persuasion and example is not in question. The problem is whether under our Constitution compulsion as here employed is a permissible means for its achievement." The majority held that it was not.

Mr. Justice Frankfurter, who had written for the majority in *Gobitis*, disagreed. He could not hold that the due process clause authorized the Court to strike down a state statute which had a legitimate legislative end. "The constitutional protection of religious freedom terminated disabilities, it did not create new privileges. It gave religious equality, not civil immunity. Its essence is freedom from conformity to religious dogma, not freedom from conformity to law because of religious dogma."

In 1947 a New Jersey statute authorizing district boards of education to contract for transportation of children to and from all nonprofit schools came under attack in *Everson v. Board of Educ.* A taxpayer challenged the validity of the statute insofar as it authorized reimbursement to parents for the transportation of children attending sectarian schools. For the first time in constitutional history, the suit was based on the establishment clause of the first amendment. The Court held that the statute in question did not constitute an establishment of religion; however, in discussing the ramifications of the establishment clause, the Court emphasized that the first amendment "requires the State to be a neutral in its relations with groups of religious believers and non-

23 319 U.S. 624 (1943).
24 Id. at 630.
25 Id. at 626.
26 Id. at 640.
27 Id. at 647.
28 Id. at 653.
believers; it does not require the State to be their adversary. State power is no more to be used so as to handicap religions than it is to favor them."\(^{30}\) Over Mr. Justice Jackson’s protest that such neutrality was not being maintained,\(^{31}\) the majority held the statute constitutional.

The constitutionality of a “released time” program for religious instruction in public schools was challenged in *McCollum v. Board of Educ.*\(^{32}\) In that case the school board allowed religious teachers, employed by a multidenominational group, to give religious instruction in public school buildings once a week. Pupils whose parents so requested were excused from their regular classes to attend the special religious classes. The other pupils were not released from school. The Court held that the utilization of the state’s tax-supported public school system and its compulsory school attendance laws for the purpose of religious instruction violated the first amendment (as applied to the states through the fourteenth amendment). It was held that by allowing such instruction “the State also affords sectarian groups an invaluable aid in that it helps to provide pupils for their religious classes through use of the State’s compulsory public school machinery. This is not separation of Church and State.”\(^{33}\)

However, four years later in *Zorach v. Clauson*\(^{34}\) the Court held constitutional a New York “released time” plan which allowed public schools to release pupils at their parents’ request for religious instruction. The distinction between this arrangement and that condemned in *McCollum* was that here the students left the grounds and went to religious centers for their religious instruction. Although those children not released stayed in school, the Court found no evidence in the case to support a conclusion that the system involved coercion to get public school children into religious classrooms. The Court continued:

> There cannot be the slightest doubt that the First Amendment reflects the philosophy that Church and State should be separated. And so far as interference with the “free exercise” of religion and an “establishment” of religion are concerned, the separation must be complete and unequivocal. The First Amendment within the scope of its coverage permits no exception; the prohibition is absolute. The First Amendment, however, does not say that in every and all respects there shall

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\(^{30}\) *Id.* at 18.

\(^{31}\) “The case which irresistibly comes to mind as the most fitting precedent is that of Julia who, according to Byron’s reports, ‘whispering “I will ne’er consent,”—con- sented.’” *Id.* at 19.

\(^{32}\) 333 U.S. 203 (1948).

\(^{33}\) *Id.* at 212.

\(^{34}\) 343 U.S. 306 (1952).
be a separation of Church and State. Rather, it studiously defines the matter, the
specific ways, in which there shall be no concert or union or dependency one on
the other. That is the common sense of the matter.35

This “common sense” approach to the first amendment continued. In McGowan v. Maryland36 the Court reiterated its stand: “The First Amendment, in its final form, did not simply bar a congressional enactment establishing a church; it forbade all laws respecting an establishment of religion.”37 McGowan was the first of four cases38 decided by the Court at the same time, all concerning the constitutionality of Sunday closing laws. In McGowan the Court upheld defendants’ convictions, holding that the state could properly regulate weekend sales, analogizing the statute in question to statutes outlawing murder, adultery and polygamy—activities conceivably within the tenets of some religious sects.39 Like McGowan, Two Guys from Harrison-Allentown, Inc. v. McGinley40 did not involve a free exercise question, as there was no allegation of infringement of personal beliefs. In answer to the establishment issue, the Court held that although the original Pennsylvania Sunday closing statutes were obviously founded on religion,41 recent history showed that the purpose of the laws was not intended to be religious, but to promote the public health and welfare,42 and thus did not constitute an establishment.

*Braunfeld v. Brown,*43 challenging the same Pennsylvania statute, presented a free exercise question. Orthodox Jewish merchants claimed a violation of their rights, since the statute would either compel them to give up their Sabbath observance or put them at a serious economic disadvantage. The Court held that economic pressure was only an indirect burden on the exercise of religion; it was not sufficient to strike down the legislation.44

35 Id. at 312.
37 Id. at 441.
39 366 U.S. at 442.
41 Id. at 592.
42 Id. at 598.
44 Id. at 606.
If the purpose or effect of a law is to impede the observance of one or all religions or is to discriminate invidiously between religions, that law is constitutionally invalid even though the burden may be characterized as being only indirect. But if the State regulates conduct by enacting a general law within its power, the purpose and effect of which is to advance the State's secular goals, the statute is valid despite its indirect burden on religious observance unless the State may accomplish its purpose by means which do not impose such a burden.45

These decisions did not, however, signal withdrawal of the Court's insistence on the complete separation of secular and sectarian activities. Also in 1961 the Court struck down a Maryland constitutional provision which required an appointee to the office of notary public to declare his belief in God.46 Mr. Justice Black, writing for the Court, again elucidated the Court's position on denial of free exercise:

We repeat and again reaffirm that neither a State nor the Federal Government can constitutionally force a person "to profess a belief or disbelief in any religion." Neither can constitutionally pass laws or impose requirements which aid all religions as against non-believers, and neither can aid those religions based on a belief in the existence of God as against those religions founded on different beliefs.

In upholding the State's religious test for public office the highest court of Maryland said:

"The petitioner is not compelled to believe or disbelieve, under threat or punishment or other compulsion. True, unless he makes the declaration of belief he cannot hold public office in Maryland, but he is not compelled to hold office."

The fact, however, that a person is not compelled to hold public office cannot possibly be an excuse for barring him from office by state-imposed criteria forbidden by the Constitution.47

Thus the stage was set for the first of the famous and highly controversial decisions concerning prayer in the public schools.

Establishment According to Engel

On June 25, 1962, the Supreme Court held in Engel v. Vitale48 that the New York State Board of Regents could not constitutionally require all public school children to recite a twenty-two word prayer at the opening of school each morning. The prayer was very simple: "Almighty God, we acknowledge our dependence upon Thee, and we beg Thy bless-

45 Id. at 607.
47 367 U.S. at 495-96.
ings upon us, our parents, our teachers, and our country." Yet, since the prayer was composed by the state, the state had "established" a religion within the meaning of the first amendment.

The lower courts had not construed the Regents' action as "establishment." The trial court, in a long and well-reasoned opinion, had analyzed the Supreme Court's holdings on religion in the public schools and determined that this prayer would not fall within the ambit of these rulings. Although the Regents' amicus brief argued that the prayer was a part of our "spiritual heritage" and merely "religious instruction," the trial court held that its purpose was clearly devotional. However, this did not bar the prayer from the public school classroom:

Twenty-two words in length, and thus taking substantially less than one minute to recite and a good deal less time for recitation than does the legislative prayer deemed by Zorach to be within permissible constitutional degree, the instant prayer, at least when its recitation is limited to daily exercises at the opening of school, must be classified as outside McCollum's proscription of religious instruction and within Zorach's sanction as an accommodation.

So long as recitation of the prayer was not mandatory (as it had been in the Board's original resolution), the prayer could be upheld.

The Appellate Division sustained the lower court's decision in a per curiam affirmance. The concurring opinion disagreed with the emphasis of the lower court that it was "accepted practice" that such a prayer be said. Instead, it felt that the sole reason for sustaining the prayer should be that it did not constitute religious teaching within the ban of the first amendment.

The New York Court of Appeals affirmed the decision of the lower courts. Judge Desmond, writing for the majority, held that the prayer did not constitute an establishment of religion.

Saying this prayer may be, according to the broadest possible dictionary definition, an act of "religion," but when the Founding Fathers prohibited an "establishment of religion" they were referring to official adoption of, or favor to, one or more sects.

However, for the first time in the case there was a dissent. Two judges felt that the prayer did violate the prohibitions of the first amendment:

50 Id. at 693, 191 N.Y.S.2d at 490.
51 Id. at 694, 191 N.Y.S.2d at 490-91.
53 Id. at 343, 206 N.Y.S.2d at 186.
55 Id. at 180, 176 N.E.2d at 581, 218 N.Y.S.2d at 661.
In sponsoring a religious program, the State enters a field which it has been thought best to leave to the church alone. However salutary the underlying purpose of the requirement may be, it nonetheless gives to the State a direct supervision and influence that overstep the line marking the division between church and State and cannot help but lead to a gradual erosion of the mighty bulwark erected by the First Amendment. This does not mean that the State is or should be hostile to religion—merely that the State should not invade an area where the constitutionally protected freedom is absolute and not open to the vicissitudes of legislative or judicial balancing.\(^{56}\)

The Supreme Court of the United States, citing no cases as authority for its holding, held the prayer unconstitutional as violative of the establishment clause.\(^{57}\) The basis for the holding was that the prayer had been composed by the Regents, a state body, and was therefore direct state intervention in the business of religion. The Court felt that the constitutional prohibition against laws respecting an establishment of religion must at least mean that in this country it is no part of the business of government to compose official prayers for any group of the American people to recite as a part of a religious program carried on by government.\(^{58}\)

Respondent school board had argued that the prayer could not constitute an establishment since it was "non-denominational." In addition, no coercion was involved; all students who wished to do so could remain silent or leave the room during the recitation of the prayer. To this argument the Court, again delineating the differences between the free exercise and establishment clauses, replied:

Neither the fact that the prayer may be denominationally neutral nor the fact that its observance on the part of the students is voluntary can serve to free it from the limitations of the Establishment Clause, as it might from the Free Exercise Clause, of the First Amendment, both of which are operative against the States by virtue of the Fourteenth Amendment. Although these two clauses may in certain instances overlap, they forbid two quite different kinds of governmental encroachment upon religious freedom. The Establishment Clause, unlike the Free Exercise Clause, does not depend upon any showing of direct governmental compulsion and is violated by the enactment of laws which establish an official religion whether those laws operate directly to coerce nonobserving individuals or not.\(^{59}\)

The Court acknowledged that some might think it foolish to see such an "innocent" exercise as an establishment. However, it had an answer for its critics:

\(^{56}\) Id. at 191-92, 176 N.E.2d at 588, 218 N.Y.S.2d at 670-71.
\(^{57}\) 370 U.S. 421 (1962).
\(^{58}\) Id. at 425.
\(^{59}\) Id. at 430.
To those who may subscribe to the view that because the Regents' official prayer is so brief and general there can be no danger to religious freedom in its governmental establishment, however, it may be appropriate to say in the words of James Madison, the author of the First Amendment:

"[T]he is proper to take alarm at the first experiment on our liberties. . . ."60

Mr. Justice Douglas concurred in the holding. However, his interpretation of the point at issue was strikingly different from that of the majority. As he saw it, "the point for decision is whether the Government can constitutionally finance a religious exercise."61 In a lengthy footnote, he discussed the many "aids" to religion in the country, mentioning such things as chaplains for the Congress and the military, religious proclamations issued by the President, "In God We Trust" on coins and "under God" in the pledge of allegiance, as well as tax benefits and exemptions for religious organizations.62 No matter what the form of aid, Mr. Justice Douglas considered it unconstitutional.63 Although he did not feel that to authorize the prayer was to establish a religion in the strictly historical meaning of the words,64 he nonetheless felt that since "the person praying is a public official on the public payroll, performing a religious exercise in a governmental institution,"65 the exercise was unconstitutional.

Mr. Justice Stewart was the sole dissenter.66 He cited statements of Presidents from George Washington to John F. Kennedy, asking the protection and help of God on assuming office.67 To him, the prayer was not an "official religion" established by the State of New York. Rather, it was a reflection of the "deeply entrenched and highly cherished spiritual traditions of our Nation."68

On the day following the Engel decision, eight members of the House of Representatives introduced resolutions proposing to amend the Constitution to permit the offering of prayer in public schools.69 On July 26 and August 2, hearings were held before the Senate Committee on the Judiciary on three proposals to amend the Constitution to permit prayer

60 Id. at 436.
61 Id. at 437.
62 Id. at 437 n.1.
63 Id. at 437.
64 Id. at 442.
65 Id. at 441.
66 Id. at 444.
67 Id. at 446-49.
68 Id. at 450.
and Bible reading in schools.\textsuperscript{70} By the time the Eighty-seventh Congress
adjourned in October, fifty-nine proposals for constitutional amendment
had been put before Congress.\textsuperscript{71} In addition, numerous statements con-
cerning the decision were made on the floor of Congress, and numerous
opinions of clergy and others were inserted into the \textit{Congressional Re-
cord}.\textsuperscript{72} However, action was postponed; it was expected that the Court
would clarify and delimit its ruling in the several Bible reading cases
pending before it.

\textbf{The Bible in the Public Schools}\textsuperscript{73}

The cases of \textit{Abington School Dist. v. Schempp} and \textit{Murray v. Curlett}
were decided jointly; the decision was handed down on June 17, 1963.\textsuperscript{74}
The Court held that the establishment clause forbids a state or city to
require the Bible to be read without comment and the Lord’s Prayer
to be recited daily at the opening of its public schools. The Court
decided that these were religious and not secular exercises, and the state’s
requirement of such exercises violated the first amendment command
that the Government maintain strict neutrality, neither aiding nor op-
posing religion. The majority stated:

\begin{quote}
The place of religion in our society is an exalted one, achieved through a long
tradition of reliance on the home, the church, and the inviolable citadel of
the individual heart and mind. We have come to recognize through bitter experience
that it is not within the power of government to invade that citadel, whether its
purpose be to aid or oppose, to advance or retard. In the relationship between man
and religion, the State is firmly committed to a position of neutrality.\textsuperscript{75}
\end{quote}

\textsuperscript{70} \textit{Hearings before the Senate Committee on the Judiciary, Prayers in Public Schools and
\textsuperscript{71} H.R.J. Res. 752-60, 762-68, 770-71, 773-75, 777-78, 785, 787-89, 791-93, 795-98, 800-
04, 807, 810-11, 814-15, 820, 822, 825, 842, 844, 848, 888, 896, 87 Cong., 1st Sess. (1961);
\textsuperscript{72} See, e.g., 108 Cong. Rec. 12238 (1962) (remarks of Senator Javits); 108 Cong. Rec.
17354 (1962) (sermon by Howard C. Wilkinson, inserted by Senator Ervin). For the
varied reaction of the legal community see Griswold, \textit{Absolute Is in the Dark—A Discussion
of the Approach of the Supreme Court to Constitutional Questions}, 8 Utah L. Rev. 167
(1963); Pfeffer, \textit{Court, Constitution, and Prayer}, 16 Rutgers L. Rev. (1962); Sutherland,
\textit{Establishment According to Engel}, 76 Harv. L. Rev. 25 (1962); Kauper, \textit{Prayer, Public
Supreme Court and the Freedom of Religion Mélange}, 49 A.B.A.J. 439 (1963), with Butler,
\textit{The Regents’ Prayer Case: In the Establishment Clause “No Means No,” id. at 444.}
\textsuperscript{73} See generally \textit{Boles, The Bible, Religion, and the Public Schools} (1961); \textit{Johnson
& Yost, Separation of Church and State in the United States} (1948).
\textsuperscript{74} 374 U.S. 203 (1963).
\textsuperscript{75} 374 U.S. at 226.
Although the question of the constitutionality of Bible reading in the public schools had been litigated many times in state courts, it had not previously come before the Supreme Court. The holdings of the state courts were inconsistent and irreconcilable. In the main, the diversity of the holdings could be attributed to two factors: the wording of the relevant state constitutional provision and the state court's interpretation of the meaning of the word "sectarian."

STATE COURT DECISIONS ALLOWING BIBLE READING AND PRAYER IN THE PUBLIC SCHOOLS

A Colorado court dismissed a petition for a writ of mandamus to compel the board of education to revoke a rule requiring Bible reading as part of the morning school exercises. It held that such exercises were not "preference given by law," support of a "place of worship," possessed of a "sectarian purpose," or "controlled by a sectarian denomination" as forbidden by the Colorado constitution.

A Georgia court granted a writ of mandamus sought by the city of Rome to compel the members of the board of education to comply with provisions of a city ordinance requiring daily Bible reading and prayers in the schools. The court felt that it would require a strained and unreasonable construction to find anything in the ordinance which interferes with the natural and inalienable right to worship God according to the dictates of one's own conscience. The mere listening to the reading of an extract from the Bible and a brief prayer at the opening of school exercises would seem far remote from such interference.

Iowa law was held to permit Bible reading and singing of religious songs in schools. Although the Iowa constitutional provision on freedom of religion was modeled on the federal constitution, the court held that so long as the children were not compelled to attend the exercises, their objection could not be regarded as weighty. When, however, a local school board leased the second floor of a parochial school and turned the public education over to the Sisters, the court held that Iowa constitutional provisions had been violated, and enjoined

76 People ex rel. Vollmar v. Stanley, 81 Colo. 276, 255 Pac. 610 (1927).
77 Id. at 285-87, 255 Pac. at 615.
79 Id. at 773-74, 110 S.E. at 901.
80 Moore v. Monroe, 64 Iowa 367, 20 N.W. 475 (1884).
81 Id. at 370, 20 N.W. at 476.
the practice. Such interrelationship was found not in accord with the principle of separation of church and state.

A Kansas court refused to order readmission of a student expelled for insisting upon studying during daily recitation of the Lord’s Prayer and Twenty-third Psalm. The court brushed aside the allegations that the exercises violated the state constitutional provision for religious freedom and a statute forbidding sectarian control of common school funds. It saw “nothing in the Constitution or statute which can be construed as an intention to exclude the Bible from the public schools.”

As a matter of fact, the court held that “the exercises of which plaintiff complained were not a form of religious worship, or the teaching of sectarian or religious doctrine. There was not the slightest effort on the part of the teacher to inculcate any religious dogma.”

A Kentucky court refused to enjoin the use of the King James version of the Bible on the ground that it was not a sectarian book.

The book itself, to be sectarian, must show that it teaches the peculiar dogmas of a sect as such, and not alone that it is so comprehensive as to include them by the partial interpretation of its adherents. Nor is a book sectarian merely because it was edited or compiled by those of a particular sect. It is not the authorship nor the mechanical composition of the book, nor the use of it, but its contents, that give it its character.

The court also felt that if the legislators had intended to exclude the Bible, “they would simply have said so.”

The only case from Maine involved the expulsion of a student for refusing to read the Protestant version of the Bible. The court held that in this instance the Bible was used merely as a book in which instruction in reading was given. It felt that the majority should not bow to the conscience of the minority, lest it undermine the power of the state.

A Massachusetts court also upheld the right of school officials to expel a pupil for refusal to participate in compulsory prayer after Bible

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82 Knowlton v. Baumhover, 182 Iowa 691, 166 N.W. 202 (1918).
84 Id. at 57, 76 Pac. at 423.
85 Id. at 58, 76 Pac. at 423.
87 Id. at 617, 87 S.W. at 794.
88 Id. at 618, 87 S.W. at 794.
89 Donahoe v. Richards, 38 Me. 379 (1854).
90 Id. at 399.
91 Id. at 409.
reading. The court held that the school committee could not require that pupils conform to religious rites or observances. However, it found that such was not the case here, since the regulation requiring participation in the prayer did not prescribe an act which was necessarily one of devotion or religious ceremony, but rather only required quiet and decorum. The rule did not compel the pupil to join in the prayer but only to assume an attitude "calculated to prevent interruption by avoiding all communication with others during the service." The constitutionality of this ruling was upheld as recently as 1955, when the court held that the criminal prosecution of parents for failure to send their child to school was valid. "The mere reading of the Bible and the recital of the Lord's Prayer in the public schools do not justify the failure of the defendants to have [their child] attend school."

A Michigan court refused to compel discontinuance of the use of the book "Readings from the Bible" in the Detroit public schools.\(^9\) Over a strong dissent, the court held that the reading of the extracts from the Bible in the manner indicated by the return, without comment, is not in violation of any constitutional provision. I am not able to see why extracts from the Bible should be proscribed, when the youth are taught no better authenticated truths of profane history.\(^9\)

A Minnesota school board provided each schoolroom with a copy of the King James version of the Bible and directed teachers to read suitable selections. The court found no violation of constitutional provisions involving places of worship and prohibitions of appropriations to religious sects.\(^9\)

As to the wisdom of the practice of reading extracts from the Bible, we do not desire to express an opinion, for that is left to the local school board. So long as no pupil is compelled to worship according to the tenets of any creed, or at all, and no sectarian belief is taught, courts should not hold that there is any violation of the constitutional guarantee of religious liberty.\(^9\)

New York litigation concerning religion in the public schools has reached the Supreme Court of the United States twice, in Zorach and

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92 Spiller v. Inhabitants of Woburn, 94 Mass. 127 (1866).
93 Id. at 129.
95 Id. at 495, 126 N.E.2d 111.
97 Id. at 569, 77 N.W. at 253.
99 Id. at 151, 214 N.W. at 21.
Engel. New York state courts had previously denied relief to other complainants who claimed that the erection of a crèche on school grounds during Christmas holidays was violative of their constitutional rights. An action to prevent waste of the city's money in purchase of books entitled "Bible Readings" in accordance with New York City law was dismissed, although the court declined to comment on the constitutionality of the charter section in question. The New York courts have similarly accorded summary treatment to proceedings to prohibit the use of a fire house auditorium by religious sects for religious worship, actions to forbid the use of school buildings by student racial and religious groups, and proceedings to compel the State Commissioner of Education to revoke a requirement that the pledge of allegiance include the words "under God."

A Tennessee court sustained a demurrer to a proceeding to enjoin board of education members from requiring students to attend Sunday school and to invalidate a statute requiring daily Bible reading. The court held that the reading of a verse in the Bible without comment, the singing of some inspiring song, and repeating the Lord's Prayer were not in violation of the [Tennessee] constitutional mandate which guarantees to all men "a natural and indefeasible right to worship Almighty God according to the dictates of their own conscience"; nor is it reasonable to suppose that it is in support of any place or form of worship, or an effort to "control or interfere with the rights of conscience."

A Texas court gave judgment for defendants when mandamus was sought to command the trustees of an independent school district to desist from conducting allegedly sectarian exercises in school—Bible reading without comment, recitation of the Lord's Prayer and singing of appropriate songs. The court held that such activities neither con-

102 Lewis v. Mandeville, 201 Misc. 120, 107 N.Y.S.2d 865 (Sup. Ct. 1951).
106 Id. at 673, 288 S.W.2d at 722.
verted the school into a sect within the meaning of the Texas constitution, nor were the exercises in the interest of or forwarding the view of any one denomination in violation of the constitution.

STATE COURT DECISIONS FORBIDDING PRAYER AND BIBLE READING IN THE PUBLIC SCHOOLS

Although an Illinois court in 1880 refused to allow recovery of damages for wrongful suspension from school on the ground that the rule requiring daily Bible reading was discretionary with the school board and not subject to court inquiry,\textsuperscript{108} thirty years later it held that such exercises were violative of individual rights.\textsuperscript{109} The court held that the wrong arose out of the compulsion to join in the worship. "The free enjoyment of religious worship includes freedom not to worship."\textsuperscript{110} The court rejected the argument that the majority of the people had the right to establish the form of worship.

Whatever may be the view of the majority of the people, the court has no right, and the majority has no right, to force that view upon the minority, however small. It is precisely for the protection of the minorities that constitutional limitations exist. Majorities need no such protection—they can take care of themselves.\textsuperscript{111}

Removal of the compulsion would not make the prayer acceptable, since the court felt that "if the instruction or exercise is such that certain of the pupils must be excused from it because it is hostile to their or their parents' religious belief, then such instruction or exercise is sectarian and forbidden by the Constitution."\textsuperscript{112}

In Louisiana, parents of Catholic and Jewish school children alleged that the parish board of school directors had violated the state constitution in requiring daily Bible readings without comment.\textsuperscript{113} Although the court could not find that the Catholic conscience would be violated by such a practice,\textsuperscript{114} it held that such readings violated the constitutional rights of the Jewish school children.\textsuperscript{115} Allowing such children to be excused from such exercises would not adequately protect their rights, since "the exclusion of a pupil under such circumstances puts him in

\textsuperscript{108} McCormick v. Burt, 95 Ill. 263 (1880).
\textsuperscript{109} People ex rel. Ring v. Board of Educ., 245 Ill. 334, 92 N.E. 251 (1910).
\textsuperscript{110} Id. at 340, 92 N.E. at 252.
\textsuperscript{111} Id. at 346, 92 N.E. at 254.
\textsuperscript{112} Id. at 351, 92 N.E. at 256.
\textsuperscript{113} Herold v. Parish Bd., 136 La. 1034, 68 So. 116 (1915).
\textsuperscript{114} Id. at 1042, 68 So. at 119.
\textsuperscript{115} Id. at 1047, 68 So. at 121.
a class by himself; it subjects him to a religious stigma; and all because of his religious belief."\textsuperscript{116}

In \textit{Nebraska}, a taxpayer succeeded in an action against the school board to prevent certain public school exercises which included Bible reading from the King James version, offering of prayers and singing of hymns, according to the uses of the "Orthodox Evangelical Church."\textsuperscript{117} Unlike the Louisiana court, the Nebraska court acknowledged the divisive differences in the various translations of the Bible. Although the opinion was later modified to acknowledge that the law did not forbid the use of the Bible in either version in the public schools,\textsuperscript{118} the court felt that it was self-evident that the exercises complained of constituted religious worship and were sectarian in their character within the meaning of the constitutional ban.\textsuperscript{119}

A \textit{New Jersey} court was faced with the question of the constitutionality of the distribution of Bibles in public schools by a religious sect.\textsuperscript{120} It held that such action was more than the mere "accommodation" of religion permitted by \textit{Zorach}; instead, the state had tacitly placed its stamp of approval upon the distribution of, and indeed, upon the Gideon Bible itself.\textsuperscript{121} This, the court held, was unconstitutional.

An \textit{Ohio} court refused to enjoin the board of education from forbidding the use of the Bible in the schools, holding that the court had no authority to interfere with the internal affairs of the schools.\textsuperscript{122} The court continued that:

\begin{quote}
\textit{Legal} Christianity is a solecism, a contradiction of terms. When Christianity asks the aid of government beyond mere \textit{impartial protection}, it denies itself. Its laws are divine, and not human. Its essential interests lie beyond the reach and range of human governments. United with government, religion never rises above the merest superstition; united with religion, government never rises above the merest despotism; and all history shows us that the more widely and completely they are separated, the better it is for both.\textsuperscript{123}
\end{quote}

A \textit{Pennsylvania} school director filed a bill against the principal of the public school, alleging that although the school board had unanimously

\textsuperscript{116} \textit{Id.} at 1050, 68 So. at 121.
\textsuperscript{118} 65 Neb. at 883, 93 N.W. at 172.
\textsuperscript{119} \textit{Id.} at 870, 91 N.W. at 847.
\textsuperscript{121} \textit{Id.} at 51, 100 A.2d at 868.
\textsuperscript{122} Board of Educ. \textit{v. Minor}, 23 Ohio St. 211 (1872).
\textsuperscript{123} \textit{Id.} at 248.
excluded the Bible as a text book, the principal had assembled all pupils for Bible reading, responses, prayers and sermons by visiting clergy. The court overruled a demurrer, saying that "it is too plain for argument, that denominational religious exercises and instruction in sectarian doctrine have no place in our system of common school education."125

Similarly, a South Dakota court ordered readmission of Roman Catholic children who had been expelled for refusal to participate in school-opening exercises.126 The court considered that "it is the function of the churches to teach religion."127 Thus no sect could complain of being deprived of religious education because it was not taught in public schools.

A Washington court refused to issue a writ of mandamus to compel the school board to examine students in Bible study and to give them high school credits for such study.128 The court noted that concepts of the Bible differ, and felt that it was impossible to teach the Bible without evincing some partisan opinion.

"[T]he court is known of all men that the rock upon which the religious opinions of men have split is the "Word," and that every sect is able to sustain itself at least to its own satisfaction, by reference to the literal word of the Bible. It is the other sect that is the victim of partial interpretation."129

This position was upheld in 1930, when the court curtly refused to require Bible reading in the schools.130

A Wisconsin court upheld the action of Catholic parents to enjoin reading of the King James version of the Bible in school.131 The court struck down two oft-used arguments—that the Bible was not a sectarian book and that if it had been constitutionally intended that the Bible be excluded, the language would have been explicit.

The argument may be plausible, but it is believed to be unsound. Constitutions deal with general principles and policies, and do not usually descend to a specific-ation of particulars. Such is the character of the provision in question. In general

125 Id. at 396.
127 Id. at 351, 226 N.W. at 357.
128 State ex rel. Dearle v. Frazier, 102 Wash. 369, 173 Pac. 35 (1918).
129 Id. at 382, 173 Pac. at 39.
130 State ex rel. Clithero v. Showalter, 159 Wash. 519, 293 Pac. 1000 (1930), appeal dismissed, 284 U.S. 573 (1931).
131 State ex rel. Weiss v. District Bd., 76 Wis. 177, 44 N.W. 967 (1890).
terms it excludes sectarian instruction, and the exclusion includes all forms of such instruction.\textsuperscript{132}

Several years later, however, the same court refused to enjoin the holding of graduation exercises in a church.\textsuperscript{133} The constitutional prohibition against compelling a person to enter a place of worship was limited to a place where religious instruction was being given at the time he was required to be present. However, the court acknowledged that "a very different question would arise if an attempt were made to introduce the practice of having prayer as part of the daily routine in our public schools."\textsuperscript{134}

The only time the question of Bible reading in the public schools was presented to the Supreme Court of the United States, the appeal was dismissed on procedural grounds.\textsuperscript{135} The New Jersey court had held that a state statute requiring at least five Old Testament verses to be read daily in the classroom and permitting the recitation of the Lord's Prayer did not violate the Constitution. Although possibly contravening the beliefs of numerically small religious sects, Bible reading was upheld. The New Jersey court held that "reading does not, obviously, effect or tend to effect the setting up, or the establishment, of a religion and, just as obviously, it does not prohibit the free exercise of any religion."\textsuperscript{136} Similarly, it held:

\begin{quote}

We find nothing in the Lord's Prayer that is controversial, ritualistic or dogmatic. It is a prayer to "God, our Father." It does not contain Christ's name and makes no reference to Him. It is, in our opinion, in the same position as is the Bible reading.\textsuperscript{137}

\end{quote}

The Supreme Court of the United States dismissed the action without considering its merits. Insofar as appellant sued as a parent, the Court held the action was moot, because the child had graduated from public school since the appeal was taken.\textsuperscript{138} Appellant, as a mere taxpayer, could not allege facts sufficient to bring the action within the Court's jurisdiction, since he could not show such a direct and particular financial interest as is necessary to maintain a taxpayer's case or controversy.\textsuperscript{139}

\textsuperscript{132} Id. at 198-99, 44 N.W. at 975.
\textsuperscript{133} State ex rel. Conway v. District Bd., 162 Wis. 482, 156 N.W. 477 (1916).
\textsuperscript{134} Id. at 495, 156 N.W. at 481.
\textsuperscript{136} Id. at 450, 75 A.2d at 887.
\textsuperscript{137} Id. at 451, 75 A.2d at 888.
\textsuperscript{139} Id. at 433-35.
Schempp and Murray

The two cases decided together by the Supreme Court in 1963 had arrived at opposite conclusions at the trial level on almost identical sets of facts. The district court in Schempp v. School Dist.\(^\text{140}\) had held both the statute and the practices complained of unconstitutional under the establishment and free exercise clauses. The fact that the exercises were not compulsory did not affect the decision:

The daily reading of the Bible buttressed with the authority of the State and, more importantly to children, backed with the authority of their teachers, can hardly do less than inculcate or promote the inculcation of various religious doctrines in childish minds. Thus, the practice required by the statute amounts to religious instruction, or a promotion of religious education.\(^\text{141}\)

The court held that the argument that the lack of comment permits every listener "to interpret what he hears in the fashion he desires, . . . either ignores the essentially religious nature of the Bible, or assumes that its religious quality can be disregarded by the listener. This is too much to ignore and too much to assume."\(^\text{142}\)

On the other hand, the Maryland court in Murray v. Curlett\(^\text{143}\) affirmed the action of the Baltimore Superior Court in sustaining a demurrer to a complaint that a school board regulation requiring the reading, without comment, of a chapter of the Holy Bible and/or the reading of the Lord's Prayer violated petitioners' rights to freedom of religion. A majority of four judges held that the exercise did not violate the first and fourteenth amendments; three judges dissented.\(^\text{144}\)

The Supreme Court of the United States considered the two cases together. Mr. Justice Clark, writing for the majority, acknowledged that religion has been closely identified with American history and government.\(^\text{145}\) He traced the Supreme Court's holdings on the meaning of the establishment clause, reiterating the distinction from the free exercise clause—"a violation of the Free Exercise Clause is predicated on coercion while the Establishment Clause violation need not be so attended."\(^\text{146}\) Although the Court saw no harm in, and indeed advocated, the study of the Bible for its literary and historic qualities,\(^\text{147}\) the exercises in question


\(^{141}\) 177 F. Supp. at 404.

\(^{142}\) Id. at 405.

\(^{143}\) 228 Md. 239, 179 A.2d 698 (1962).

\(^{144}\) Id. at 250, 179 A.2d at 704.


\(^{146}\) Id. at 223.

\(^{147}\) Id. at 225.
were not so presented. "They are religious exercises, required by the States in violation of the command of the First Amendment that the government maintain strict neutrality, neither aiding nor opposing religion."148

Mr. Justice Douglas, as in Engel, again based his concurrence on the concept of state financing of religion, rather than accepting the majority view that state requirement of the prayers and Bible verses constituted an establishment. In his opinion,

the present regimes must fall under that clause for the additional reason that public funds, though small in amount, are being used to promote a religious exercise. Through the mechanism of the State, all of the people are being required to finance a religious exercise that only some of the people want and that violates the sensibilities of others.149

Mr. Justice Brennan, in a lengthy and well-reasoned concurrence, traced the history of the first amendment and the problem of the Bible in the public schools. In his view,

the history, the purpose and the operation of the daily prayer recital and Bible reading leave no doubt that these practices standing by themselves constitute an impermissible breach of the Establishment Clause. Such devotional exercises may well serve legitimate nonreligious purposes. To the extent, however, that such purposes are really without religious significance, it has never been demonstrated that secular means would not suffice.150

In an attempt to mitigate the impact of the Douglas dictum, Mr. Justice Brennan continued:

What the Framers meant to foreclose, and what our decisions under the Establishment Clause have forbidden, are those involvements of religious with secular institutions which (a) serve the essentially religious activities of religious institutions; (b) employ the organs of government for essentially religious purposes; or (c) use essentially religious means to serve governmental ends, where secular means would suffice.151

THE BECKER REACTION

The Schempp decision unleashed accusations that the Court was driving God from the schools152 and making the United States a godless

148 Ibid.
150 374 U.S. at 293-94.
151 Id. at 294-95.
152 E.g., Washington Post, April 24, 1964, p. 15, col. 3 (statement of Representative Cramer).
state.\textsuperscript{153} Protests were heard from all parts of the country, even from some of those states where religious exercises in the schools were prohibited prior to \textit{Schempp}.\textsuperscript{154} For example, some of the most vocal objection to the Court's decisions,\textsuperscript{155} as well as strongest support for the Becker proposal, has come from California,\textsuperscript{156} where public school prayer may well be prohibited by the state constitution.\textsuperscript{157}

This more or less spontaneous reaction to \textit{Engel} and \textit{Schempp} has been fanned and encouraged by organizations which have invested large sums of money in the promotion of letter-writing and petition-signing campaigns designed to put pressure on Congressmen in Washington to support the prayer amendments. To further their goals, these organizations have not hesitated to align supporters of the Supreme Court decision with advocates of communism\textsuperscript{158} or to compare our now prayerless school system with that of the Soviet Union.\textsuperscript{159} What should be considered as a serious question of constitutional law is thus presented as a disagreement between the godly and the godless.

Yet it was not the Court's holdings in \textit{Engel} and \textit{Schempp} that aroused the bulk of the reaction. Rather, the outcry centered on Mr. Justice Douglas' concurrence in \textit{Engel} and the activities delineated therein as potentially unconstitutional "aids" to religion.\textsuperscript{160} In hearings before the House Committee on the Judiciary, one witness testified, "By implication of the Supreme Court action, the United States has no right formally to engage chaplains for the opening of the sessions of the Senate or the House of Representatives."\textsuperscript{161} Another wondered, "Will the baccalaureate service and Christmas carols be the next to go?"\textsuperscript{162} A third predicted that pretty soon the Supreme Court says you have to take down "In God We Trust." You have to take it off your coins. You can’t have any chaplains in the Army and the Navy. You can’t have anything that is supported by the government of the States or the Nation that gives any intimation that this is a nation under God.\textsuperscript{163}

\begin{small}
\textsuperscript{153} \textit{E.g.}, N.Y. Herald Tribune, April 23, 1964, p. 8, col. 5 (Statement of Representative Becker).
\textsuperscript{154} See Appendix, \textit{infra}, p. 224.
\textsuperscript{155} See, \textit{e.g.}, Washington Post, May 14, 1964, p. K-21, col. 5.
\textsuperscript{156} See, \textit{e.g.}, \textit{Hearings before the House Committee on the Judiciary}, 88th Cong., 1st Sess., ser. 9, pt. 2, at 1541 (1963). (testimony of Victor Jory on behalf of Project Prayer) [hereinafter cited as \textit{School Prayer Hearings}].
\textsuperscript{157} \textit{Cal. Const. art. 9, § 8}; \textit{Ops. Att’y Gen. 316}.
\textsuperscript{158} Chicago Sun Times, April 26, 1964, p. 3, col. 2.
\textsuperscript{160} 370 U.S. at 437, n.1.
\textsuperscript{161} \textit{School Prayer Hearings} 314 (testimony of Representative King).
\textsuperscript{162} \textit{School Prayer Hearings} 319 (testimony of Representative Quillen).
\textsuperscript{163} \textit{School Prayer Hearings} 368 (testimony of Representative Howard W. Smith).
\end{small}
One Congressman felt that the Court's decisions were even more far-reaching: "If the Court was right the Declaration of Independence might have to be rewritten to strike out reference to the Supreme Being."\(^{164}\)

Despite this emotionalism, the controversy over the Becker proposal is not a question of religion versus nonreligion. The Court did not hold many of the things it is accused of holding; much of the agitation surrounding *Engel* and *Schempp* is actually concerned with "What will the Court do next?" The Becker amendment attempts to control what the Court might say as well as what it has already said.

The one hundred and forty-six resolutions to amend the Bill of Rights considered by the House Committee on the Judiciary cover a wide range in both form and content. These proposals may be grouped as follows: those which permit prayer or Bible reading or both in public schools;\(^{165}\) those which permit prayer or Bible reading or both in all public places or institutions, including schools;\(^{166}\) those which permit reference to belief in or reliance upon God in government documents and proceedings and upon coinage of the United States;\(^{167}\) and those which combine all of the major elements of the other proposals.\(^{168}\) Typical of this last type of resolution is that proposed by Representative Becker, which was devised in bipartisan conference and which has received the support of sixty other proponents of amendment.\(^{169}\) It states:

**SECTION 1.** Nothing in this Constitution shall be deemed to prohibit the offering, reading from, or listening to prayers or biblical scriptures, if participation therein is on a voluntary basis, in any governmental or public school, institution, or place.

**SECTION 2.** Nothing in this Constitution shall be deemed to prohibit making reference to belief in, reliance upon, or invoking the aid of God or a Supreme Being in any governmental or public document, proceeding, activity, ceremony, school, institution, or place, or upon any coinage, currency, or obligation of the United States.

**SECTION 3.** Nothing in this article shall constitute an establishment of religion.

**SECTION 4.** This article shall be inoperative unless it shall have been ratified as an amendment to the Constitution by the legislatures of three-fourths of the

\(^{164}\) *School Prayer Hearings* 310 (testimony of Representative Roudebush).


\(^{166}\) *H.R.J. Res. 9, 119, 480, 219, 514, 70, 80, 92, 197, 482, 483, 486, 517, 553, 810, 816, 343, 88th Cong., 1st Sess. (1963).*

\(^{167}\) *E.g., H.R.J. Res. 505, 88th Cong., 1st Sess. (1963).*

\(^{168}\) *H.R.J. Res. 515, 603, 767, 771, 781, 869, 913, 914, 924, 942, 88th Cong., 1st & 2d Sess. (1963-64).*

The problems raised by the wording of all the proposed amendments are myriad. Some have specified that recitation and reading of nondenominational prayers be allowed; others have referred to the Holy Scriptures or to the Holy Bible; still others have specified religious worship, prayerful meditation, or any prayer or other recognition of God. Some of the proposals have used positive language, asserting that prayer or worship shall be allowed; others have taken the negative form, stating that they shall not be prohibited. Some have included the requirement that participation be voluntary; others have stated that it must not be compulsory; and still others have provided that those present must be given the opportunity to request to be excused. It is impossible to consider in detail the multitudinous problems of legal interpretation posed by such language. Instead, detailed analysis will be limited to the wording of the Becker amendment.

Obvious questions arise concerning the form of prayer and scriptures which would be used, whether certain particular translations of the Bible should be specified for public use, and whether the sacred writings of all religions should be legalized or only those of the Judaeo-Christian tradition. Although much emphasis is placed on the idea that it is a militant atheistic minority which objects to prayer in public school, past history has shown that numerous disputes have arisen between the adherents of the Jewish, Protestant, and Catholic faiths in regard to state prayer practices. Thus, Roman Catholic parents who objected to the reading of the King James version of the Bible brought many of the early school prayer suits.171 Similarly, members of the Jewish faith have protested that the King James version or Gideon Bible is unacceptable to them and that their children can participate only in readings of the Old Testament.172 Opposition to the establishment of the prayers and scriptures of any one religion is likely to come from all of the other religions in any given community. The scope of this problem is indicated by the fact noted by the Court in Schempp, that there are in the United States today "83 separate religious bodies, each with membership exceeding 50,000, . . . as well as innumerable smaller groups."173

173 374 U.S. at 214.
A further question left unanswered by the wording of the amendments is who would determine what prayers would be read or what religious exercises would be performed. The Becker proposal provides no answer to this problem. Other amendments propose that the decision be left to each state, to each community or in the case of schools, to the authority administering any school or school system. Allowing the question to be thrown into the political arena on any level would unquestionably result in a debasement of religion and in an abuse of political debate. Although leaving the question to the local community would result in a more faithful reflection of the religious composition of the community, nevertheless, because of the heterogeneous nature of almost all of our local units, it could conceivably serve as a divisive wedge, with groups vying for control of the school board, town council, or other body empowered to make the prayer decision. Religion could become a political issue, in direct contravention to the intent of the first amendment.

Although the Becker proposal provides that participation must be on a voluntary basis, the question arises whether religious observances in the public schools, having behind them the full authority of the teacher, can be truly voluntary or noncompulsory. The opinion has been voiced that the pressures involved in leaving a room to avoid participation in religious exercises are no greater than those experienced by an individual in remaining true to any of his beliefs: "[W]e have known many boys to be ridiculed for complying with religious regulations but never one for neglecting them or absenting himself from them." However, the majority of cases which have considered this problem have said that no real choice is offered in the case of young children who have not reached the maturity to practice nonconformity. The onus attached to leaving the room during an exercise which the rest of the class believes is part of a good upbringing, it is argued, is too great for the average child. The choice of risking the censure of classmates by adhering to one's religious beliefs or of compromising by conforming to the practice of the group has been held to be no choice at all.

A further difficulty arises when the "voluntary" nature of classroom prayer is examined. The Becker proposal makes no provision for the teacher of one faith who is required to read the Bible translation or lead the prayer of another faith. Whether the provision that prayer be on a voluntary basis applies to the teacher as well as to the students is not revealed by the proposal.

175 People ex rel. Ring v. Board of Educ., 245 Ill. 334, 351, 92 N.E. 251, 256 (1910); State ex rel. Weiss v. District Bd., 76 Wis. 177, 199-200, 44 N.W. 967, 975 (1890).
The final section of the Becker resolution provides that "Nothing in this article shall constitute an establishment of religion." This qualification of the establishment clause eliminates prayer and Bible reading, as well as invocation of or reference to a Supreme Being, from the meaning of the word "religion." The single word "religion," however, is the object of both the establishment and free exercise clauses. As the Supreme Court has observed, "It is hardly credible that Congress used the term . . . in different senses in the same sentence." Therefore, it is possible that the Becker proposal could have consequences more far-reaching than intended or anticipated. The free exercise clause could inadvertently be modified to mean that while Congress may not generally prohibit free exercise of religion, it may limit such "nonreligious" activities as prayer and Bible reading.

The potential effect of the addition of the Becker amendment to the Constitution is extremely difficult to measure. Representative Becker's aim is a simple one:

Inasmuch as we had no trouble and there was no discord in America concerning this program, why couldn't we revert to the pre-June 25, 1962 formula as practiced throughout the Nation in numerous communities?

Yet the consummation of this desire is infinitely more complex than it appears. The thought was often expressed during the hearings that there had been no problem concerning school prayer at the local level prior to Engel. The litigation in the state courts during the past century belies this assertion; the petitioner in Engel, among others, considered the matter serious enough to take it to the Supreme Court.

But even if the Becker resolution were enacted, the status quo ante could not be returned. The possibility of court action has always served as a deterrent to overzealous religious groups. No sect or faith has been able to obtain control of the local school board and to propose extensive sectarian rites. Such a situation would foreseeably incur the wrath of the religious minority, which would seek the aid of the courts in preventing sectarian practices in public schools. But the Becker proposal removes such a control on local action. By providing that "Nothing in this article shall constitute an establishment of religion," the entire area of prayer and Bible reading in the public schools is removed from the purview of the courts. The proposal does not require that any permitted prayer be nonsectarian or nondenominational. There would be no legal

176 United States v. Cooper Corp., 312 U.S. 600, 606 (1941).
177 School Prayer Hearings 230 (testimony of Representative Becker).
recourse for the minority if the schools initiated daily ceremonies of sectarian character and of several hours' duration, so long as the ceremonies reflected the beliefs of the majority of the community. The only controls would be the tolerance and discretion of the local school board.

It has been suggested that the Becker proposal could be an unconstitutional constitutional amendment.178 This argument contends that the Becker amendment could be attacked on the same grounds as the practices it attempts to reinstate, i.e., that it is an establishment of religion in contravention of the rights of the minority. If the effect of the Becker amendment is as intended, it would nullify the establishment clause of the first amendment. However, it can be argued that the Congress cannot, by adopting an amendment to the Constitution, abrogate a right under another amendment without repealing that amendment first. Without such a repealer, the minority right still exists under the first amendment. How can it be nullified by passing an amendment waiving that right? Although this argument may appear unnecessarily complex and legalistic, it cannot be ignored. The language of such a proposal has not been judicially passed upon. Without an express statement of repeal, the first amendment in time could be held controlling when the language and intent of the first amendment and Becker amendment came into conflict.

Another problem which must be considered is the operation of the proposed amendment on the states. Several state constitutions prohibit prayer in the public schools.179 If the Becker proposal were adopted, there is a question of whether it would become binding on the states through the operation of the fourteenth amendment. If so, would state constitutional prohibitions be vitiated as the field became pre-empted by the Federal Constitution?

If it were held that the potential twenty-fifth amendment took precedence, much more would be wrought by the amendment than a return to pre-Engel days. Prayer and Bible readings would be introduced into schoolrooms in states which had long prohibited such practices by constitutional provision or judicial determination. Accurately speaking, the status quo would not have been regained. In addition, to hold that the provision for school prayer would be permissive rather than mandatory within each state does not solve the problem. If the right to pray is inalienable, and states may not constitutionally prohibit prayer, is it consistent to hold that such a right may be denied by a local school authority who decides not to prescribe prayer?

178 Id. at 240-42.
179 See Appendix infra, p. 224.
From the negative and permissive language of the Becker resolution it is possible to interpret it as merely removing the first amendment roadblock to school prayer. Under such an interpretation, the state constitutional provisions against public prayer could be maintained. This, however, could lead to the novelty of a selectively-applied amendment. No other constitutional amendment is subject to a state's decision of applicability; each one is mandatory rather than permissive. But the Becker proposal raises the possibility that fifty states could enact legislation prohibiting prayer in public places, thus partially nullifying an amendment to the Constitution.

The final irony concerning the Becker proposal is that it fails to meet unequivocally the crisis it is intended to prevent. Representative Becker, in response to the specters raised by Mr. Justice Douglas' concurrence, has attempted to forestall the "fraternity of secularists" who, "if given further leeway, will remove chaplains from our armed services, our legislative assemblies, both State and National, and create in the minds of our children and young people the feeling that a tribute to God in relation to the affairs of our Nation is a misdemeanor, if not a crime."

But by including the all-embracing provision, "Nothing in this article shall constitute an establishment of religion," Becker has answered only the holding of the majority. Mr. Justice Douglas held expressly in Engel that "I cannot say that to authorize this prayer is to establish a religion in the strictly historic meaning of those words." He clarified his view of the establishment clause in his concurrence to Schempp:

[T]he Establishment Clause is not limited to precluding the State itself from conducting religious exercises. It also forbids the State to employ its facilities or funds in a way that gives any church, or all churches, greater strength in our society than it would have by relying on its members alone. Thus, the present regimes must fall under that clause for the additional reason that public funds, though small in amount, are being used to promote a religious exercise.

Such a duality is not reflected in the language of the Becker proposal. The resolution is rather focused on the first aspect of the establishment clause as seen by Mr. Justice Douglas—the state's conduct of religious exercises. The "dangers" raised by the second facet— forbidding financial aid to religion—are not treated at all. "Nothing in this Constitution shall be deemed to prohibit the offering . . .[of] prayers . . . in any governmental or public school, institution, or place," but simultaneously

180 School Prayer Hearings at 212 (testimony of Representative Becker).
nothing authorizes the expenditure of governmental funds to support a chaplain in the Congress or the armed forces. Similarly, nothing may prohibit reference to belief in God. But the questioned exemption from taxation enjoyed by religious organizations is not made any more constitutional by the wording of Becker.

The Becker proposal, therefore, strikes at only part of the problem. It attempts to reverse two specific Supreme Court decisions and to fight off the ghosts of decisions to come. Yet its actual coverage is quite narrow. Even if the Becker amendment became part of the Constitution, the Supreme Court, by adopting the Douglas view, could hold such practices as chaplains and tax exemptions unconstitutional as governmental “aids” to religion. It could be expected that upon such a holding another amendment would be proposed to “return the situation to status quo.” This is not the proper function of a constitutional amendment. It should not be called into play every time the status quo is disturbed. Rather, the Congress should give consideration to the words of the first amendment: “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof...”
APPENDIX—State Rulings on Religious Observances in Public Schools

Bible Reading

Bible reading required by statute:


Bible reading permitted by statute:

OHIO: Nessle v. Hum, 2 Ohio Dec. 60, 1 Ohio N.P. 140 (1894); Compare with Board of Educ. v. Paul, 10 Ohio Dec. 17, 7 Ohio N.P. 58 (1900), and Board of Educ. v. Minor, 23 Ohio St. 211 (1872).

"Exclusion of the Holy Bible" specifically prohibited by the constitution:

MISSISSIPPI: Const. art. III, § 18.

Bible reading found unconstitutional by federal district court:
Bible reading in specific instance found unconstitutional by state court:


WASHINGTON: See State ex rel. Deearle v. Frazier, 102 Wash. 369, 173 Pac. 35 (1918); State ex rel. Clithero v. Showalter, 159 Wash. 519, 293 Pac. 1000 (1930), appeal dismissed, 284 U.S. 573 (1931).

WISCONSIN: State ex rel. Weiss v. District Bd., 76 Wis. 177, 44 N.W. 967 (1890).

In at least six states the language of the law and the opinions of the attorney general suggest that Bible reading might be considered unconstitutional:


Recital of the Lord's Prayer permitted by the courts:


IOWA: Knowlton v. Baumhover, 182 Iowa 691, 166 N.W. 202 (1918); Moore v. Monroe, 64 Iowa 367, 20 N.W. 475 (1884).


TENNESSEE: Carden v. Bland, 199 Tenn. 665, 288 S.W.2d 718 (1956).


Use of prayers permitted but forcing of recital prohibited by the court:


THE TEN COMMANDMENTS

Use permitted by statute:


RECENT DECISIONS

SIT-IN CASES OF 1964—A CONSTITUTIONAL RIGHT TO PUBLIC ACCOMMODATIONS?

On June 22, 1964, the Supreme Court, in five cases known collectively as the “Sit-In Cases of 1964,” reversed decisions of the highest courts of Maryland, South Carolina and Florida which had affirmed the convictions of defendants charged with violating the criminal trespass law of the respective states. The basic facts in each of these cases are similar. The defendants were refused service on the premises in question—two restaurants, two lunch counters, and an amusement park—solely on the basis of race. When the defendants refused to leave the premises at the request of the owner or his agent, they were arrested.

In *Robinson v. Florida* and *Griffin v. Maryland* the Court held that the two states involved had deprived the defendants of the equal protection of the law guaranteed by the fourteenth amendment. In *Robinson*, the Florida health regulations were found to reflect a policy of segregation based on race. In *Griffin*, a deputy sheriff, who was also an employee of the amusement park in question, filed a complaint against the defendants in order to enforce the park's practice of excluding Negroes. In this act of the deputy, the Court found “state action” in violation of the fourteenth amendment. The Court held that the action of one who possesses state authority and purports to act under that authority is state action.

In the two South Carolina cases, *Bouie v. City of Columbia* and *Barr v. City of Columbia*, the Supreme Court struck down the convictions because they were based on a new interpretation of the state's trespass statute, which was then retroactively applied to the defendants. The Court held that the defendants were thereby deprived of their liberty without due process since they were not given fair warning that their contemplated conduct was proscribed.

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3 378 U.S. at 156.

4 378 U.S. at 135.

5 378 U.S. at 362; 378 U.S. at 151. Additional convictions in *Barr* for breach of the peace were overturned by the Court for insufficiency of the supporting evidence. Id. at 151.

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The decision in *Bell v. Maryland* turned on a technical point. Before the Court reviewed the convictions, the City of Baltimore\(^6\) and the Legislature of Maryland\(^7\) had enacted public accommodation laws applicable to the restaurant involved. The common-law effect of supervening legislation abolishing a crime is the dismissal of any criminal proceeding based on the crime and not finally disposed of at the time of enactment of the legislation.\(^8\) However, Maryland has a general saving clause statute\(^9\) which in certain circumstances abrogates the effect of the common law. The Court held that the question of whether the saving clause preserved these convictions was one of interpretation and legislative intent to be determined by the state court. The judgment was therefore reversed and the case remanded.\(^10\)

By its decisions in these cases the Court did not reach the underlying issue of whether or not there is a constitutional right to public accommodations.\(^11\) In *Bell*, the Court had an opportunity to resolve the constitutional question but chose to circumvent it. This is clearly pointed out by Mr. Justice Douglas: "At the argument and at our conferences we were not concerned with that question, [the effect of the saving clause] the issue being deemed frivolous. Now it is resurrected to avoid facing the constitutional question."\(^12\) In the disposition of these cases the Court utilized the well-established judicial doctrine that constitutional questions, even when properly presented by the record, will not be ad-

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\(^6\) *Baltimore, Md., City Code* art. 14A, § 10A (1950).


\(^8\) 378 U.S. at 230.


\(^10\) 378 U.S. at 241-42.

\(^11\) Four justices reached the constitutional question. Mr. Justice Douglas would reverse the judgments in all five cases by finding a constitutional right to public accommodations. Mr. Justice Black, with Justices Harlan and White concurring, would affirm the criminal trespass convictions in all the cases but *Robinson* (in which a unanimous Court found state policy that denied equal protection of the law) by holding that the Constitution itself does not forbid private discrimination in places of public accommodation. To answer the dissent in *Bell*, although not desiring to reach the constitutional question, Mr. Justice Goldberg, with the Chief Justice concurring, would find a constitutional right to public accommodations. The concurring and dissenting opinions in *Bell* treated at length the question of a constitutional right to public accommodations. 378 U.S. at 242, 286, 318 (1964). These opinions were incorporated in the other cases by reference to *Bell*, *Griffin v. Maryland*, 378 U.S. 130, 137-38 (1964); *Barr v. City of Columbia*, 378 U.S. 146, 151 (1964); *Bouie v. City of Columbia*, 378 U.S. 347, 363, 365 (1964); *Robinson v. Florida*, 378 U.S. 153, 157 (1964).

\(^12\) 378 U.S. at 243.
judicated if the case can be disposed of on nonconstitutional grounds.\textsuperscript{13} It is also likely that the Court exercised restraint since the civil rights legislation then pending before the Congress\textsuperscript{14} would make moot, in large part, the public accommodations question. For, pursuant to the powers delegated to it by the Constitution, Congress can enact legislation conferring rights otherwise nonexistent.\textsuperscript{15} The Congress could, therefore, create a right to public accommodations whether or not such a right exists per se in the Constitution.

Although the congressional debate is completed and the legislation enacted, the basic issue remains unresolved, for there are areas of public accommodation not encompassed by title II of the Civil Rights Act of 1964.\textsuperscript{16} For example, when an establishment which provides lodging to transient guests contains not more than five rooms for rent and is actually occupied by the proprietor,\textsuperscript{17} or when a restaurant does not offer food or other products, a substantial portion of which have moved through interstate commerce,\textsuperscript{18} discrimination based on race alone is not proscribed by the act.

If title II of the Civil Rights Act of 1964 is upheld by the Court\textsuperscript{19} and the term "public accommodations" is to be limited to the definition contained in that act, only those areas defined in the law would be public accommodations and the enjoyment of these accommodations would be a right granted by the law. It may be argued, however, that the term "public accommodations" demands a broader definition. Indeed the words themselves denote any place where a member of the public might expect to be accommodated. One author suggests that accommodations are public where any white person would expect to be served.\textsuperscript{20} Thus, in the public accommodations area, unless the federal and state legislation\textsuperscript{21}...

\textsuperscript{14} H.R. 7152, 88th Cong., 2d Sess. (1964).
\textsuperscript{15} \textit{E.g.}, the right to collective bargaining, upheld in NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937).
\textsuperscript{20} \textit{Lewis, The Sit-In Cases: Great Expectations, The Supreme Court Review} 147 (Kurland ed. 1963).
\textsuperscript{21} In addition to the Civil Rights Act of 1964, 34 states and the District of Columbia have enacted some form of public accommodation legislation.
is regarded as incorporating an all-encompassing definition of the term "public accommodations," the question remains: Is there a right guaranteed by the Constitution to public accommodations?

In considering the question of whether the Constitution guarantees the right to public accommodations, congressional debate concerning the thirteenth, fourteenth and fifteenth amendments presents an incomplete and possibly inaccurate basis of interpretation. Emphasis will be placed instead upon the early decisions of the Court interpreting these amendments since such cases represent "the construction placed upon the amendment[s] by justices whose own experience had given them contemporaneous knowledge of the purpose that led to . . . [their] adoption . . . ."  

The concurring opinions in Bell hold that the right to public accommodations is derived from the thirteenth, fourteenth and fifteenth amendments which were enacted to establish one class of citizenship. It is argued that the denial of access to public accommodations is a relic of slavery and perpetuates a caste system which violates the purpose of these amendments by establishing second-class citizenship. However, since it is only the government which can confer citizenship, it is only the government which can establish degrees of citizenship. Acts of an individual in denying another individual access to public accommodations would not, therefore, constitute the establishment of second-class citizenship. It is only where the acts of individuals create a pattern of community discrimination which is embodied in a state policy that second-class citizenship is created. Further, "it would be running the slavery argument into the ground to make it apply to every act of discrimination which a person may see fit to make . . . ."  

The issue is thus narrowed to the arguments based solely on the fourteenth amendment: is the right to public accommodations a privilege or immunity of a citizen of the United States; does the equal protection clause of its own force guarantee to all a right to public accommodations?

Since the "Fourteenth Amendment makes no attempt to enumerate

24 378 U.S. at 247-50, 288.
25 Id. at 246-50.
26 Id. at 288.
27 Civil Rights Cases, 109 U.S. 3, 24 (1883). Indeed there were thousands of free Negroes in the nation at the time of the adoption of the amendments. Private discrimination in places of public accommodation was not considered tantamount to an invasion of the Negro's status as a freeman. Id. at 25. See also Comment, 17 Rutgers L. Rev. 563, 569 (1963).
the rights [privileges or immunities] it [was] designed to protect28 and since its terms are as "general" and as "comprehensive as possible"29 the meaning of the phrase must be gleaned from judicial interpretation.

It is necessary to point out that the fourteenth amendment provides for dual citizenship; one is a citizen of the United States and also a citizen of the state wherein he resides. In addition, the amendment forbids a state to abridge the privileges or immunities of citizens of the United States. This latter provision gives rise to two incidental questions: (1) what are the privileges and immunities of state citizenship; and (2) are these privileges and immunities which are protected by article IV, section 2 of the Constitution transferred to the security of the federal government by virtue of the privileges or immunities clause of the fourteenth amendment?

In Corfield v. Coryell30 Mr. Justice Washington defined the privileges and immunities of state citizenship:

We feel no hesitation in confining these expressions to those privileges and immunities which are, in their nature, fundamental; which belong, of right, to the citizens of all free governments; and which have, at all times, been enjoyed by the citizens of the several states which compose this Union, from the time of their becoming free, independent, and sovereign. What these fundamental principles are, it would perhaps be more tedious than difficult to enumerate. They may, however, be all comprehended under the following general heads: Protection by the government; the enjoyment of life and liberty, with the right to acquire and possess property of every kind, and to pursue and obtain happiness and safety . . . .31

However, the existence of a right to public accommodations as a privilege or immunity of state citizenship is immaterial32 since the second question—whether protection of the privileges and immunities of state citizenship is transferred to the federal government by the fourteenth amendment—was decided in the negative as early as 187333 and has been reinforced by subsequent decisions.34 In the Slaughter-House Cases, the

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28 Strauder v. West Virginia, 100 U.S. 303, 310 (1880).
29 Ibid.
31 Id. at 551-52.
32 Although the Court in the instant cases did not consider whether a right to public accommodations is a privilege or immunity of state citizenship, it is arguable that if such a right exists as a privilege or immunity of state citizenship, a state's denial of the right based solely on race would be a violation of the equal protection clause of the fourteenth amendment.
33 Slaughter-House Cases, 83 U.S. (16 Wall.) 36 (1873).
34 E.g., Snowden v. Hughes, 321 U.S. 1, 6-7 (1943); Maxwell v. Bugbee, 250 U.S. 525,
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Court explicitly stated that the privileges and immunities of a citizen of a state were "not intended to have any additional protection by this [similar] paragraph of the [fourteenth] amendment." The Court went on to say:

It would be the vainest show of learning to attempt to prove by citations of authority, that up to the adoption of the recent amendments, no claim or pretense was set up that those rights [defined in Corfield] depended on the Federal government for their existence or protection, beyond the very few express limitations which the Federal Constitution imposed upon the States—such, for instance, as the prohibition against ex post facto laws, bills of attainder, and laws impairing the obligation of contracts. But with the exception of these and a few other restrictions, the entire domain of the privileges and immunities of citizens of the States . . . lay within the constitutional and legislative power of the States, and without that of the federal government.

Since the fundamental privileges and immunities inherent in state citizenship, among which may or may not be a right to public accommodations, are not protected by the privileges and immunities clause of the fourteenth amendment, does the right to public accommodations inhere in the privileges or immunities of federal citizenship?

Once again the answer is found in the decisions of the Supreme Court. The Court has repeatedly held that the privileges and immunities referred to in the fourteenth amendment are only those which owe their existence to the federal government, its national character, its Constitution or its laws. In the Slaughter-House Cases the Court specifically enumerated some of these privileges and immunities: the right to travel; the right to the care and protection of the federal government over life, liberty and property when on the high seas or within the jurisdiction of a foreign government; the right to assemble peacefully and to petition for a redress of grievances; the right to the writ of habeus corpus; the right to use navigable waters of the United States; the rights secured to citizens of the United States by treaties with foreign powers; and the constitutional rights secured by the thirteenth

538 (1919); Twining v. New Jersey, 211 U.S. 78 (1908). In the latter case the Court said: "There can be no doubt . . . that the civil rights sometimes described as fundamental and inalienable, which before the war Amendments were enjoyed by state citizenship and protected by state government, were left untouched by this clause of the Fourteenth Amendment." Id. at 96.

35 83 U.S. (16 Wall.) at 74.
36 Id. at 77. (Emphasis added.)
and fifteenth amendments and the due process and equal protection clauses of the fourteenth amendment.  

The logic of the Court in *Maxwell v. Dow* could be applied here to argue that if the right to public accommodations were a privilege or immunity covered by the fourteenth amendment it "would be among the first that would occur to any one enumerating or defining them." Regardless of the merits of this argument, before a citizen can claim that a right he categorizes as a privilege or immunity of federal citizenship has been abridged by the state, he must point to some constitutional provision other than the privileges or immunities clause, or to a federal law, or to a federal privilege which arises by implication therefrom as the source of his asserted right.

Excluding the specific rights secured by the Civil Rights Act of 1964, it is submitted that a constitutional provision or federal law cannot be found which makes the right to areas of public accommodation a privilege or immunity of federal citizenship. By implication, however, the right to certain areas of public accommodation can be derived from the right to travel, a right already recognized as a federal privilege. Where one has been given the right to travel, he is also given the incidents necessary to the enjoyment of that right. The areas of public accommodation concomitant to the right to travel, however, have by and large been included in the Civil Rights Act of 1964. Based on the foregoing rationale, a constitutional right to public accommodations, except as related to the right to travel, could not be created from the privileges or immunities clause of the fourteenth amendment.

Can such a right be derived from the equal protection clause of the fourteenth amendment? It is submitted that no constitutional right to be served in privately owned businesses is contained *per se* in the equal protection clause. The prohibitory provisions of the fourteenth amendment do not operate against "merely private conduct, however discriminatory or wrongful," for it is only *state involvement* denying equal

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38 83 U.S. (16 Wall.) 36 (1873).
39 176 U.S. 581 (1900).
40 Id., at 594.
protection of the laws which is forbidden by the fourteenth amendment.\textsuperscript{44}

Action of the state which is thereby prohibited includes action by a state legislature, state courts, or state executive or administrative officers;\textsuperscript{45} municipal ordinances;\textsuperscript{46} the actions in office of municipal officials;\textsuperscript{47} and the acts of a state's political subdivisions and administrative agencies\textsuperscript{48} which have the effect of denying the equal protection of the law. Even state inaction which results in the denial of equal protection falls within the proscription of the fourteenth amendment.\textsuperscript{49}

The problem in ascertaining whether state action constitutes a denial of equal protection centers on the determination of whether "in the circumstances . . . the character of state involvement or the relation of the state to the private acts in issue"\textsuperscript{50} is such that the state should be held responsible. Since it is impossible to postulate a situation of complete noninvolvement of the state, it is necessary to delineate discriminations of a private property owner which the state merely buttresses by its action from those discriminations which involve the state to such a significant extent that the private discrimination is imputed to the state, thereby resulting in an unconstitutional denial of equal protection.\textsuperscript{51}

This point is significantly demonstrated by the history of the \textit{Girard Trust Cases}.\textsuperscript{52} When the City of Philadelphia, acting as trustee of a fund set up to administer a college for "poor male white orphans," excluded Negroes in accordance with the terms of the will setting up the trust, the Court held that this constituted action by a state agency forbidden by the fourteenth amendment.\textsuperscript{53} When a private individual by court order subsequently replaced the city as trustee to carry out

\begin{footnotesize}
\bibitem{45} Cooper v. Aaron, 358 U.S. 1, 18-19 (1958); Virginia v. Rives, 100 U.S. 313, 318 (1880).
\bibitem{46} Peterson v. City of Greenville, 373 U.S. 244, 248 (1963).
\bibitem{48} Griffin v. County School Bd., 377 U.S. 218, 231 (1964).
\bibitem{51} In his dissent in \textit{Bell}, Justice Black considers and rejects the idea that licensing alone is sufficient to constitute a business an agent of the state. 378 U.S. at 333. \textit{But see}, Lombard v. Louisiana, 373 U.S. 267, 282-83 (1962) (Douglas, J., concurring).
\bibitem{53} Pennsylvania v. Board of Trusts, \textit{supra} at 231.
\end{footnotesize}
the terms of the will, neither the action of the court in appointing the trustee nor the subsequent refusal of the court to admit Negroes was held to constitute state denial of equal protection of the law.\textsuperscript{54} It appears evident from the \textit{Girard} history that not every instance of private discrimination enforced by a state agency is sufficient state action to constitute a denial of equal protection.

At first glance this conclusion seems to conflict with the holding in \textit{Shelley v. Kraemer}.\textsuperscript{55} Here, the prohibited state action involved state enforcement of restrictive covenants which had the effect of denying to the parties their federally guaranteed right to "own, occupy, enjoy, and use their property without regard to race or color."\textsuperscript{56} This case enunciates the principle that where both parties engaged in the purchase and sale of property are parties \textit{willing to transact}, the power of the state cannot be invoked to prohibit that transaction on discriminatory grounds based exclusively on race. Such state action, the Court held, is an infringement of a "federally guaranteed right" which constitutes a denial of the equal protection of the law.

In the instant situation, where a property owner is \textit{unwilling} to admit a person because of racial prejudice, and no legislation compels him to do so, it is submitted that the holding in \textit{Shelley} would not apply. For, where there is no right secured by law, the mere enforcement of individual racial prejudice by a state agency does not amount to a denial of equal protection of the law within the meaning of \textit{Shelley}.

These considerations lead to the conclusion that no constitutional right to public accommodations is found in the fourteenth amendment. This judgment is made with the realization that the art of carving out the rights protected by the fourteenth amendment is not a task easily performed but one which challenges the imagination of man. In the words of the German jurist, Jellinek:

\begin{quote}
[T]o recognize the true boundaries between the individual and the community is the highest problem that thoughtful consideration of human society has to solve.\textsuperscript{57}
\end{quote}


\textsuperscript{56} Bell v. Maryland, 378 U.S. 226, 330 (1964) (Black, J., dissenting).


Respondent, a Kentucky producer of distilled spirits, imported whiskey from Scotland via the ports of Chicago and New Orleans. The whiskey was stored in respondent's bonded warehouses in Kentucky prior to its sale to customers in domestic markets throughout the United States. A Kentucky statute\(^1\) imposed as a condition to the shipment or transportation of distilled spirits into the state the acquisition of a permit and the payment of a tax of ten cents on each proof gallon contained in the shipment. Pursuant to this law, the Kentucky Department of Revenue collected a tax on the imported whiskey while it was in respondent's warehouse in the original packages, prior to its resale. Respondent sued for a refund on the ground that the tax violated the import-export clause\(^2\) of the federal constitution. The Department contended that the twenty-first amendment\(^3\) rendered that clause inapplicable to intoxicating liquor. The Kentucky Court of Appeals granted the refund,\(^4\) and its judgment was affirmed by the Supreme Court of the United States. Held, a tax levied on the importation of foreign intoxicating liquor and collected while it is stored in the original packages prior to sale by the importer violates the import-export clause, notwithstanding the twenty-first amendment.\(^5\)

The issue, as framed by the Court, was whether the twenty-first amendment had completely repealed the import-export clause with respect to intoxicating liquor. In passing directly upon this question for the first time,\(^6\) the Court expressly rejected the contention that the amendment operated to produce such a result.\(^7\)

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\(^1\) KY. REV. STAT. § 243.680(2)(a) (1962).

\(^2\) "No State shall, without the Consent of the Congress, lay any Imposts or Duties on Imports or Exports, except what may be absolutely necessary for executing it’s inspection Laws . . . ." U.S. CONST. art. I, § 10.

\(^3\) "The transportation or importation into any State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited." U.S. CONSR. amend. XXI, § 2.

\(^4\) James B. Beam Distilling Co. v. Department of Revenue, 367 S.W.2d 267 (Ky. 1963).

\(^5\) Department of Revenue v. James B. Beam Distilling Co., 377 U.S. 341 (1964). The Court agreed with the Kentucky court's determination that the tax in question, although in form an occupational or license tax, was, in fact, a tax on imports. Id. at 343. The Beam Court also reaffirmed the traditional "original-package" doctrine in its application to goods imported for sale. Ibid. That doctrine, originating in Brown v. Maryland, 7 U.S. (12 Wheat.) 419 (1827), has been discarded with respect to goods imported for use by the importer. Youngstown Sheet & Tube Co. v. Bowers, 358 U.S. 534 (1959).

\(^6\) 377 U.S. at 345-46.

\(^7\) Id. at 346.
The history of liquor regulation in the United States manifests the uniquely local problem presented by that commodity, in that it is so inextricably related to the social and religious mores of the community. The states, through the exercise of their police powers, have traditionally enjoyed a large degree of freedom in the control of alcoholic beverages moving in intrastate commerce.\textsuperscript{8} In 1890, however, the Supreme Court held that under the commerce clause a state could not prohibit the sale of liquor manufactured in and brought from another state, where the liquor was sold by the importer in the original packages or kegs.\textsuperscript{9}

Under the influence of the "dry" interests, Congress passed the Wilson Act,\textsuperscript{10} which purported to remove the protection of the commerce clause from liquor upon its "arrival," in the original package or otherwise. Judicial interpretation of the act soon rendered it practically ineffective.\textsuperscript{11} Congress subsequently enacted the Webb-Kenyon Act,\textsuperscript{12} which prohibited the transportation of liquor, in interstate or foreign commerce, into any state for receipt or use therein, in the original package or otherwise, and in violation of any law of such state.\textsuperscript{13} The eighteenth amendment, imposing absolute national prohibition, was passed in 1919\textsuperscript{14} and repealed in 1933 by the twenty-first amendment.

Despite suggestions that the twenty-first amendment was merely a constitutional restatement of the Webb-Kenyon Act and, in any event, intended only to protect those states desiring to remain or to become "dry,"\textsuperscript{15} the Supreme

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\textsuperscript{9} Leisy v. Hardin, 135 U.S. 100 (1890).


\textsuperscript{11} "Arrival" was construed to mean delivery to the consignee. Rhodes v. Iowa, 170 U.S. 412 (1898). Direct shipment by the importer to domestic customers thus became legally permissible. Heyman v. Southern Ry., 203 U.S. 270 (1906).


\textsuperscript{13} Under the Wilson Act, a state law was required to be a valid exercise of the police power and could not discriminate against products of other states which were recognized by the enacting state as subjects of lawful commerce. Scott v. Donald, 165 U.S. 58, 100 (1897). The same requirement was held to exist under the Webb-Kenyon Act. Monumental Brewing Co. v. Whitlock, 111 S.C. 198, 97 S.E. 56 (1918); Brennan v. Southern Express Co., 106 S.C. 102, 90 S.E. 402 (1916); see Dugan v. Bridges, 16 F. Supp. 694, 707 (D.N.H. 1936), \textit{appeal dismissed on motion of appellants}, 300 U.S. 684 (1937).

\textsuperscript{14} The Wilson and Webb-Kenyon Acts were not affected by the eighteenth amendment except insofar as they were made theoretically unnecessary. De Ganahl, \textit{The Scope of Federal Power Over Alcoholic Beverages Since the Twenty-first Amendment}, 8 Geo. Wash. L. Rev. 819, 822 (1940).

\textsuperscript{15} The Webb-Kenyon Act had been initially vetoed by President Taft. 49 Cong. Rec. 4291 (1913). After final passage by Congress, the act was upheld over constitutional objections in a seven-two decision. Clark Distilling Co. v. Western Md. Ry., 242 U.S. 311 (1917). It has been observed that the doubts expressed by the President and a minority of the Court
Court quickly demonstrated that its concept of the amendment was a much broader one. In a series of decisions, all involving interstate commerce, it was held that the amendment had completely removed intoxicating liquor from the protection afforded by the commerce and equal protection clauses of the Constitution. In thus sanctioning discrimination solely on the basis of origin, the Court relied upon a strict reading of the amendment, noting that to hold otherwise "would involve not a construction of the Amendment, but a rewriting of it." These rulings gave rise to a large number of discriminatory and retaliatory statutes which are unparalleled in the modern history of legislation in this country. The Court's interpretation of the amendment has been strongly criticized, both on constitutional grounds and in view of the prior

over the constitutionality of the Webb-Kenyon Act, in addition to the prior judicial treatment of state efforts at liquor control, led to apprehension over the future of the act and ultimately to the passage of the twenty-first amendment, which incorporated nearly identical language. Note, 38 Colum. L. Rev. 644, 645 (1938); 85 U. PA. L. Rev. 322, 323 (1937); see 50 Harv. L. Rev. 353, 354 (1936). Early judicial opinion also considered the amendment to be simply a constitutional elevation of the act. See, e.g., Dugan v. Bridges, 16 F. Supp. 694, 707 (D.N.H. 1936), appeal dismissed on motion of appellants, 300 U.S. 684 (1937). Furthermore, without regard to its relationship to the Webb-Kenyon Act, the conclusion has been reached that the amendment was intended only to protect the "dry" states against any possible influx of intoxicants from nonprohibition areas. Parrott & Co. v. City & County of San Francisco, 131 Cal. App. 2d 332, 338, 280 P.2d 881, 885 (1955) (dictum); 14 Stan. L. Rev. 876, 882 (1962); Note, 55 Yale L.J. 815, 816-17 (1946); see 21 Cornell L.Q. 504, 511-12 (1936). It has been suggested that the congressional debates prior to the adoption of the twenty-first amendment are at best inconclusive with respect to its purpose. Note, 72 Harv. L. Rev. 1145, 1147 (1959). However, a reading of those proceedings would seem to indicate that the principal if not the sole concern was for the protection of the "dry" states. De Ganahl, supra note 14, at 822-23, 833; Comment, 25 Calif. L. Rev. 718, 725 (1937); see 76 Cong. Rec. 4138-79, 4215-32 (1933).


17 Such a result was in marked contrast to the Court's attitude toward state protection of local economic interests in other areas. See, e.g., Baldwin v. G. A. F. Seelig, Inc., 294 U.S. 511, 522 (1935).


19 E.g., Ohio Rev. Code Ann. §§ 4301.54, .55 (Page 1954). The statutes have invariably been upheld in state courts. E.g., State ex rel. Superior Distrib. Co. v. Davis, 132 Ohio St. 308, 7 N.E.2d 652 (1937). For a compilation of these statutes, see Note, 72 Harv. L. Rev. 1145 (1959), which concludes that most laws of this type either have been repealed or are no longer enforced. The important point is, however, that if such a law exists and is applied it will doubtless be held constitutional. See cases cited note 16 supra.

20 E.g., Anteau, Commentaries on the Constitution of the United States 12-13 (1960); Note, 38 Colum. L. Rev. 644, 659, 662-63 (1938); Note, 55 Yale L.J. 815, 816 (1946); see 37 Mich. L. Rev. 957, 960 (1939).
history of liquor regulation. Nonetheless, its rationale has persisted in recent times.

It was in the light of this interpretation of the twenty-first amendment that the Beam Court had to consider the taxability of imported foreign liquor. Prior decisions would seem to dictate that the instant tax be upheld. The Court has, in the past, spoken in general terms of the right of a state to prohibit or regulate the importation of liquor. State Bd. of Equalization v. Young's Mkt. Co. upheld a license fee for the privilege of importing beer into California, as applied to beer brought in from Missouri and Wisconsin for sale in California. Mr. Justice Black, dissenting in Beam, observed that there is nothing in the Young's Mkt. opinion "to suggest that the holding would have been different if the beer had come from, say, Canada." But, as pointed out by the majority, the argument had been made in Young's Mkt. that the Court's holding would imply an invalidation of all restrictions upon police power to be found in the Constitution, including the import-export clause. The Court there had replied that "the question for decision requires no such generalization."

Irrespective of the broad language used in past decisions, the fact that the Court has always been content with a strict, literal reading of the amendment would seem to indicate that a tax on foreign imported liquor would be upheld. It is because the phrase "in violation of the laws thereof" is on its face unqualified that alcoholic beverages have been denied the protection of the commerce

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21 E.g., Note, 7 Geo. Wash. L. Rev. 402, 404, 414 (1939); 50 Harv. L. Rev. 353, 354 (1936); 85 U. Pa. L. Rev. 322, 323 (1937); Note, 55 Yale L.J. 815, 816-17, 820 (1946); see 21 Cornell L.Q. 504, 511-12 (1936); Note, 72 Harv. L. Rev. 1145, 1154 (1959).


24 299 U.S. 59 (1936).

25 377 U.S. at 347.

26 Id. at 344.

27 299 U.S. at 64. The Beam majority relied on this statement to establish that the Court had "never so much as intimated" that the amendment allows a violation of the import-export clause. 377 U.S. at 344. The refusal to go beyond the facts in Young's Mkt. should certainly not, however, be taken as conclusive in connection with the effect of the twenty-first amendment on the import-export clause. The Court in Beam also distinguished Gordon v. State, 166 Tex. Crim. 24, 310 S.W.2d 328 (1956), aff'd per curiam, 355 U.S. 369 (1958), which allowed a permit tax on rum brought from Mexico into Texas. In spite of the similarity between that tax and the levy in Beam, the Texas court had held that Gordon did not involve a tax on imports. Id. at 27, 310 S.W.2d at 330. Mr. Justice Black, dissenting in Beam, expressed the opinion that the tax in Gordon was actually one on importation. 377 U.S. at 349. However persuasive such a characterization of the facts might be, it is nonetheless true that Gordon was based upon the finding that there was no tax on imports, thus rendering that decision inapplicable to the import-export clause problem posed by the instant case.
Recent Decisions

and equal protection clauses. Indeed, since both interstate and foreign commerce are controlled by the same constitutional provision, a state may completely prohibit or regulate the importation of foreign liquor for delivery or use therein, under the twenty-first amendment. Yet, although a state clearly has the right to tax the importation of intoxicants from another state as an incident of its power to regulate, the Beam decision produces the rather strange result that such a duty may not be levied upon liquor imported from abroad.

The obvious explanation for such a distinction is that there is nothing comparable to the import-export clause which governs state taxation of interstate commerce. The Beam Court itself noted this fact.

We have often indicated the difference in this respect between the local taxation of imports in the original package and the like taxation of goods, either before or after their shipment in interstate commerce. In the one case the immunity derives from the prohibition upon taxation of the imported merchandise itself. In the other the immunity is only from such local regulation by taxation, as interferes with the constitutional power of Congress to regulate the commerce, whether the taxed merchandise is in the original package or not.

Mr. Justice Black saw no necessity for any difference in treatment. In the first place, he observed, "the clause against taxing imports is general like the Commerce Clause itself." Furthermore, the Import-Export Clause is no more exalted and no more worthy to be excepted

29 This fact was acknowledged by the Beam Court. 377 U.S. at 346 (dictum). See also Gordon v. State, 166 Tex. Crim. 24, 310 S.W.2d 328 (1956), aff'd per curiam, 355 U.S. 369 (1958). Some doubt has been expressed concerning the validity of this proposition, on the ground that federal power over foreign commerce is inherent in sovereignty and may not be surrendered to the states in the same manner as federal power over interstate commerce. De Ganahl, supra note 14, at 880-82. Seemingly no such difficulty would exist if a state law were to apply equally to sister states and foreign nations, as did the Kentucky statute in Beam. See id. at 881.
31 Mr. Justice Black concluded that the twenty-first amendment was intended to repeal the "original-package" restriction on state taxation of foreign imported liquor, on the ground that the doctrine had been expressly attacked in the Senate debate. 377 U.S. at 350 (dissenting opinion). Reference was made to the remark of Senator Borah that after Leisy v. Hardin, 135 U.S. 100 (1890), the states "were powerless to protect themselves against the importation of liquor . . . ." 76 Cong. Rec. 4171 (1933). This argument appears to be unpersuasive, since Leisy involved the application of the "original-package" doctrine to the sale of liquor shipped in interstate commerce.
32 377 U.S. at 344, quoting from Hooven & Allison Co. v. Evatt, 324 U.S. 652, 665-66 (1945). The Hooven case is only analogous, since the imports there involved were non-alcoholic. The passage cited was in answer to the argument that the import-export clause prohibits only unreasonable taxation.
33 377 U.S. at 347 (dissenting opinion).
from the Twenty-first Amendment than are the Commerce and Equal Protection Clauses. It seems a trifle odd to hold that an Amendment adopted in 1933 in specific terms to meet a specific twentieth-century problem must yield to a provision adopted in 1787 to meet a more general, although no less important, problem.\footnote{Id. at 348 (dissenting opinion).}

There seem to exist additional arguments against the supremacy of the import-export clause. The distinction drawn by the Beam majority between absolute and qualified prohibition would clearly be controlling if the twenty-first amendment were to allow only regulation which does not unduly burden interstate commerce. However, the amendment permits not only regulation, including taxation, which \textit{unreasonably} hinders interstate commerce, but also \textit{complete prohibition thereof}. Surely, this is as absolutely repugnant to the commerce clause as a duty on imports is to the import-export clause.\footnote{See, e.g., Buck \textit{v.} Kuykendall, 267 U.S. 307, 315-16 (1925).} In addition, the latter clause, while containing only one specific exception, \textit{i.e.}, a fee for inspection, provides also that Congress may consent to state taxation of imports. Since the Court may find congressional consent to laws otherwise violative of the commerce clause,\footnote{See Prudential Ins. Co. \textit{v.} Benjamin, 328 U.S. 408 (1946); Clark Distilling Co. \textit{v.} Western Md. Ry., 242 U.S. 311 (1917); \textit{In re} Rahrer, 140 U.S. 545 (1891).} it would not, it seems, require too great an extension of the judicial arm to place that provision on the same plane as the import-export clause, when considering the effect of the twenty-first amendment.\footnote{A similar argument should apply to the observation that the import-export clause is not inconsistent with the amendment. This approach was taken in Parrott \& Co. \textit{v.} City \& County of San Francisco, 131 Cal. App. 2d 332, 280 P.2d 881 (1955), and in State \textit{ex rel.} H. A. Morton Co. \textit{v.} Board of Review, 15 Wis. 2d 330, 112 N.W.2d 914 (1962), the two cases relied upon by the Kentucky Court of Appeals in Beam. Although a constitutional amendment and an act of Congress admittedly differ in legal character it would seem that with respect to congressional consent a strong analogy between them can be drawn, particularly where an amendment is drafted by that body. Thus, it should be less difficult to find that the twenty-first amendment has removed intoxicants from the protection of a clause containing a proviso for congressional consent than from a clause with no such authorization. The equal protection clause imposes an \textit{absolute} prohibition. “No State shall . . . deny to any person within its jurisdiction the equal protection of the laws.” U.S. Const. amend. XIV, § 1. Yet, the Court has denied its applicability to liquor under the twenty-first amendment. Mahoney \textit{v.} Joseph Triner Corp., 304 U.S. 401 (1938).} It is submitted that a more proper basis for marking the distinction, if one is sought, might lie in the difference between the respective purposes of the two provisions.\footnote{The principal purpose of the commerce clause is to prevent economic discrimination and retaliation among the several states. See H. P. Hood \& Sons \textit{v.} Du Mond, 336 U.S. 525, 539 (1949); \textit{Anteau}, \textit{op. cit. supra} note 20, at 38, 51. According to one theory, the import-export clause was designed to prohibit taxation by importing states which would result in discrimination against, and retaliation by, interior states. Youngstown Sheet \& Tube Co.
The one Supreme Court case most nearly in point with Beam arose under the Wilson Act. In De Bary & Co. v. Louisiana, the Court upheld a state license tax on the sale, by an importer, of foreign wine and liquor in the original packages. It would seem to follow that the Beam levy be sanctioned under that act. The Court in Beam instead remarked that "there is nothing in that decision, nor in the language of either the Wilson Act or the Webb-Kenyon Act, to support the view that Congress intended by those laws to consent to state taxation upon importation of liquor." The Court's disposition of De Bary was not consistent with long-established precedent. A better method might have been to overrule the case as not in accordance with the purpose of the Wilson Act.

The Beam Court concluded its opinion with what might be an important caveat. "All we decide today is that, because of the explicit and precise words of the Export-Import Clause of the Constitution, Kentucky may not lay this impost on these imports from abroad." Since the liquor in the instant case was intended for distribution throughout the United States, it is likely that some or even all of it did not fall within the ambit of the twenty-first amendment, since not for "delivery or use" in Kentucky. Although the sweeping language of the

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v. Bowers, 358 U.S. 534, 545 (1959). Under such a view, there probably does not exist sufficient dissimilarity so as to find a more absolute prohibition in the import-export clause than in the commerce clause. A second theory subordinates the above-mentioned purpose of the import-export clause to (1) the execution of an orderly and effective national policy concerning foreign affairs and (2) securing to the federal government an exclusive source of revenue. Id. at 556 (Frankfurter, J., dissenting). If this interpretation is accepted there is, it seems, a strong argument for drawing a distinction between the two clauses. The protection of sovereign power over foreign relations and the necessity for guaranteed sources of operating revenue should, perhaps, take priority over the desire for commercial harmony among the states. Accordingly, under the second theory there should be less freedom in construing the twenty-first amendment as withdrawing intoxicants from the import-export clause than from the commerce clause.

40 377 U.S. at 345-46 n.7.
41 It is evident that the Court distinguished De Bary from Beam on the ground that the tax in the former case was imposed on the sale of the beverages in question. See ibid. This would not seem to be in accord with the determination, pronounced more than a century ago, that "a tax on the sale of an article, imported only for sale, is a tax on the article itself." Brown v. Maryland, 7 U.S. (12 Wheat.) 419, 444 (1827). But see Brown-Forman Co. v. Kentucky, 217 U.S. 563, 571-72 (1910).
42 See note 13 supra.
43 377 U.S. at 346. (Emphasis added.)
44 Compare with this consideration the Beam Court's unequivocal statement that "to sustain the tax which Kentucky has imposed in this case would require nothing short of squarely holding that the Twenty-first Amendment has completely repealed the Export-Import Clause so far as intoxicants are concerned." 377 U.S. at 345. That the Court might not have found the "delivery or use" requirement satisfied in Beam through a liberal interpretation thereof is suggested by Hostetter v. Idlewild Bon Voyage Liquor Corp., 377 U.S. 324
opinion would not then be essential to the decision, it would nonetheless retain its significance, for it represents the current thinking of the Supreme Court in this area.

It has been observed that the instant decision is somewhat inconsistent with the rationale employed by the Court in the past. However, if Beam is an indication that the Court is now willing to look beyond the general language of the twenty-first amendment and interpose other constitutional limitations the result is a welcome one. Such an approach would be consonant with both legislative intent and sound constitutional law.

**CONSTITUTIONAL LAW—UNIONS—COMMUNISM—SECTION 504 OF THE LANDRUM-GRIFFIN ACT, WHICH BANS COMMUNISTS FROM HOLDING UNION OFFICE AND IMPOSES CRIMINAL SANCTIONS FOR VIOLATIONS, IS UNCONSTITUTIONAL AS VIOLATING THE FIRST AND FIFTH AMENDMENTS OF THE UNITED STATES CONSTITUTION. Brown v. United States, 344 F. 2d 488 (9th Cir.), cert. granted, 33 U.S.L. Week 3169 (U.S. Nov. 9, 1964) (No. 399).**

Defendant, while a member of the Communist Party, was elected by union members to the Executive Board of Local 10 of the International Longshoremen’s and Warehousemen’s Union for the years 1959, 1960 and 1961. He was thereupon indicted for violation of section 504 of the Landrum-Griffin Act, which makes it a crime for any member of the Communist Party to hold union office

(1964), a case decided on the same day as Beam and pivoting on a strict reading of that phrase. In Hostetter, delivery to the interstate importer was not sufficient for application of the amendment, the Court noting that ultimate delivery by the importer was not in the state of importation. Id. at 333. Thus, the actual basis of the decision in Beam remains somewhat unclear, i.e., whether the case was necessarily founded on the relationship of the twenty-first amendment to the import-export clause or simply upon the import-export clause alone. The briefs filed by the parties in Beam do not clarify the facts with respect to the method of delivery utilized. Respondent contended that the instant case was “on all fours” with Parrott & Co. v. City & County of San Francisco, 131 Cal. App. 2d 332, 280 F.2d 881 (1955), in which the tax was collected prior to disposal of the liquor by consignment or sale. Brief for Respondent, p. 11. This fact, although not establishing the manner of delivery, does indicate that when the duty was levied it could not be stated with certainty that the intoxicants were destined for delivery in the importing state, in which case the applicability of the amendment is questionable. It is conceivable, however, that the respondent in Beam did not intend the comparison of Parrott to encompass this particular element.

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(a) No person who is or has been a member of the Communist Party . . . shall serve—

(1) as an officer, director, trustee, [or] member of any executive board or similar governing body . . .

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during or for five years after the termination of his membership in the Communist Party . . . .
office. The jury returned a verdict of guilty after having been instructed that, as a matter of law, the Executive Board was a "governing body" within the meaning and scope of the statute and that no proof of specific intent was necessary for conviction under the statute.

On appeal, it was urged that defendant had no intent to bring about the evil the statute was designed to prevent, that the statute placed an invalid restraint on freedom of association and that the criminal sanctions violated due process. The court upheld the instruction that the Board was, as a matter of law, such a "governing body" as to be within section 504's prohibition and agreed with the trial court's finding that no specific intent was required for conviction, but reversed on constitutional grounds. Held, section 504 of the Landrum-Griffin Act, which bans Communists from holding union office and imposes criminal sanctions for violations, is unconstitutional as violating the first and fifth amendments of the United States Constitution.2

Section 9(h) of the Labor Management Relations Act3 had required that, as a condition of a union's utilization of opportunities afforded by the act, each of its officers file an affidavit with the National Labor Relations Board, stating (1) that he was not a member of the Communist Party, (2) that he did not believe in any organization that believed or taught the overthrow of the United States Government, and (3) that he was not a member of such an organization. This section was characterized as the first to be aimed directly at Communist Party members as a separate object of loyalty checks.4 The provision for non-Communist affidavits, when coupled with the criminal sanctions for false affidavits,5 obviously attempted to deter Communist officers from filing at all, and, in the face of a denial of NLRB privileges, to encourage union members to rid themselves of Communist leadership.6 The section had survived the tests of NLRB7 and lower federal court8 interpretation before it reached the Supreme

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2 Brown v. United States, 334 F.2d 488 (9th Cir.), cert. granted, 33 U.S.L. Week 3169 (U.S. Nov. 9, 1964) (No. 399).


4 BROWN, LOYALTY AND SECURITY, EMPLOYMENT TESTS IN THE UNITED STATES 73, 76 (1958).


7 Inland Steel Co., 22 L.R.R.M. 1060 (1958), supplementing 77 N.L.R.B. 1 (1948). The NLRB issued a conditional order requiring an employer to bargain with a union if that union complied with the affidavit and filing requirements of the Labor Management Relations Act, 61 Stat. 136 (1947), as amended, 29 U.S.C. §§ 141-87 (1958), as amended, 29 U.S.C. §§ 141-87(a) (Supp. V, 1964). The union's request that the order be made unconditional, on the ground that the affidavit requirement was unconstitutional, was denied.

Court in *American Communications Ass'n v. Douds*. In that case, a withdrawal of NLRB privileges from the union followed an officer's failure to file the non-Communist affidavit. The Court implemented the "balancing test" between the probable effects which section 9(h) would have on free speech and assembly and the dangers of political strikes, *i.e.*, substantial harm to commerce. Finding an abridgment of first amendment rights, limited in scope to a discouragement from occupying a position of union power, and the great public interest in the efficiency of interstate commerce, the balance was struck in favor of the statute. The Court stated that Congress could rationally conclude that Communist Party members would ferment political strikes. Therefore, in light of the great power which union leaders had over the economy, the restrictions were valid under the commerce clause and not violative of the first amendment.

Section 9(h) was repealed by the Landrum-Griffin Act and seemingly altered into the more stringent form of section 504. Whether the legislative concern was directed at other prime areas of interest, *e.g.*, federal-state jurisdiction and "hot-cargo" contracts, or whether the safe constitutional road which section 9(h) had run instilled confidence, section 504 seemed to escape the often heated disputes over the constitutionality of other sections.

Section 9(h) dealt with the elimination of harmful conduct by union officers; thus it was not a direct interference with free speech. This distinction was made by the *Douds* Court when it refused to apply the "clear and present danger" test. Granting the logical nature of such a distinction, it would still seem that the judicial attitude toward such statutes has had its basis in the evolution of the "clear and present danger" concept. When first enunciated in *Schenck v. United States*, Mr. Justice Holmes' test required a clear and present danger to the security of the nation before an utterance or association could be punished. Confronted with the Smith Act and its attack upon the

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10  Id. at 400.
11  Id. at 405.
12  Id. at 391.
13  Id. at 406.
16  339 U.S. at 396.
17  249 U.S. 47 (1919).
Communist conspiracy, the Court in *Dennis v. United States* altered the test to “the gravity of the evil discounted by its improbabilities.” Then, in *Yates v. United States* the Court laid down the evidentiary requirements for conviction under the act, *i.e.*, advocacy of concrete action for the forcible overthrow of the Government.

The membership clause of the Smith Act was constitutionally questioned in *Scales v. United States*. The Court, in rejecting a constitutional attack based upon first amendment rights, relied on the *Dennis* opinion, where the element of specific intent was read into the advocacy and organizing clause of the act. In the membership clause of the act, the Court stated, Congress could not be assumed to have intended heavy penalties for mere passive membership; thus it read in the requirement of “specific intent” to fulfill illegal goals.

In *Noto v. United States* the “specific intent” requirement was again regarded as essential for conviction, although that point was not reached in the case, for the present advocacy of violent overthrow was not deemed to have been proven. It was with an eye on the language of these two Supreme Court cases that the Ninth Circuit found section 504 invalid.

Before reaching the constitutional issues, the majority of the *Brown* court rather speedily disposed of the trial court’s instruction that the Executive Board, to which Brown was elected, was an “executive board or similar governing body” within the meaning of the statute. Granting that this Board might not be capable of directly causing an interruption of commerce, the court reasoned that section 504 included not only those bodies with authority to cause such interruption, but also governing bodies which had the power to influence such a result. Furthermore, the court stated, in light of the restrictions on ex-convicts, all signs pointed to the fact that the scope was not restricted to upper-echelon positions of real power.

A concurring opinion by Judge Duniway attempted to buttress the majority’s position as to the law-fact question of the lower court’s instruction. Judge

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20 *Id.* at 510. The Court adopted the language of Judge L. Hand from the lower court.
22 *Id.* at 329, 330.
24 *Id.* at 221, 222.
27 *Ibid.*, which, in addition to Communists, bans from union office felons and ex-felons, convicted of crimes specifically mentioned in the section, for a period of five years after release.
28 334 F.2d at 497.
Hamley, in his dissent, maintained that the constitutional question should not have been reached, but rather that the trial court's instruction on the scope of the statute invaded the province of the jury. Thus, he reasoned, a partially directed verdict resulted, depriving defendant of the right to jury trial.

Judge Hamley was indeed on firm ground when he urged that, if it is at all possible, the constitutional issue should not be reached. The Supreme Court has often pronounced such a policy. That it is the role of the jury in a federal criminal case, and not the judge, to decide questions of fact is equally valid. But the trial judge in the Brown case is in the domain of statutory construction and interpretation, an area occupied by the court's powers. The scope of the statutory provision involved would seem to fall into just such an area where the judge may instruct as a matter of law.

The problem of constitutionality was centered upon a search for the element of intent. As the majority viewed it, the issue was "whether criminal punishment of any and all Communist Party members who become union officers, regardless of lack of intent to bring about the evil the statute was designed to prevent or to further other unlawful aims of the Party, infringes the guarantees of the First and Fifth Amendments."

In the face of the lower court's finding that no proof of specific intent was necessary and the government's reliance on Douds and section 9(h), the court answered with Scales and Noto. As it interpreted these cases, the requirements for criminal conviction in Party membership cases were (1) that the organization be engaged in the type of advocacy intended to be controlled and (2) that the defendant be an "active member" with specific intent to further such illegal purpose. Although these cases demonstrated the need for the element of intent for such convictions, the court had to reply to the strong argument that since the Supreme Court had upheld section 9(h) of the 1947 act, why should section 504, which is aimed at the same evil—political strikes—be held unconstitutional?

The Brown court began to dissect and distinguish Douds on the basis of the degree of restraint placed on the first amendment right of association by sections 9(h) and 504. Although the dimension of the restraint may have been the same—loss of right to hold union office—the quality and force of the restraint in section 9(h) had been the discouragement from union office by denial of NLRB privileges to the union, whereas by virtue of section 504, there

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29 Id. at 501.
33 334 F.2d at 492.
was an actual, personal denial of union office and a criminal sanction to make such denial more effective. Considering the degree of restraint and the absence of the element of intent, the court found the provision unreasonably broad.

Although separated in the majority opinion, the due process question was intimately bound with the degree of restraint exerted. Citing once again Scales and Noto, the court dismissed the government's argument that the crime was the individual and knowing act of becoming a union officer and not solely the affiliation with the Party. The gist of the offense, so the court reasoned, was the advocacy in which the organization was engaged.

In Dennis, proof of intent to bring about overthrow was deemed explicit; in Scales, conviction under the membership clause required the joining of such an organization "knowing the purpose thereof"; and in Yates, Scales and Noto, the word "advocate" was construed to mean action "immediately or in the future." Criminal statutes as applied to Communist activity or membership were thus narrowly construed and upheld. The Brown court found no language in section 504 that would require scienter and intent as components of the crime. The trial judge had instructed the jury that no intent was necessary for conviction under this section; it appeared equally unambiguous to the appellate court. This total lack of statutory expression or even ambiguity caused the Brown court to find the section unconstitutional as violative of the first and fifth amendments.

Judge Barnes, dissenting with Chief Judge Chambers but in a separate opinion, found that the "balance struck" between congressional intent and statutory product "comports with the dictates of the Constitution." Both dissenter also raised the right-privilege dichotomy, which provides that the right to be a member of the Communist Party and the privilege to hold union office can properly be separated, with the latter subject to more stringent legislative control and deprivation.

Since the enactment of section 9(h) the imposition of governmental sanction upon the Communist Party and its members has been increasing. The civil disabilities which have been imposed on Party members include prohibition of entry into the United States, denial of Social Security benefits and ineli-
gibility for many forms of employment.\textsuperscript{42} Tightened regulations also arose under the control acts of 1950\textsuperscript{48} and 1954.\textsuperscript{44} Although it was never stated that membership in the Communist Party was a crime per se, the obvious consequence of affiliation with the Party was the opening of a wide area of possible civil and criminal sanctions. Section 504 seemingly follows this line of regulatory measures and makes criminal not Party membership alone but membership plus union officership.

If due deference is given to Congress and to its intent to prevent political strikes and purge unions of corruption, why then the problem with section 504? It was obvious that the \textit{Brown} court felt that no requirement of specific intent could be found in the unambiguous statute, and further that knowing and unknowing members, as well as legal and illegal functions, were lumped in the same basket. The court stated that "grave doubt" was cast upon the contention that union officership plus Party membership is conclusive of guilt.\textsuperscript{45} This doubt found its source in the \textit{Noto} and \textit{Scales} cases. Just three days after the \textit{Brown} court had rendered its decision, the Supreme Court in \textit{Aptheker v. Secretary of State}\textsuperscript{46} found section 6 of the Subversive Activities Control Act of 1950\textsuperscript{47} unconstitutional. Section 6 provided that any member of a Communist organization which had registered or had been ordered to register would commit a crime if he attempted to use or obtain a United States passport. In that case the Court, it is important to note, found (1) sweeping prohibition of passports from Communist members whether knowing or unknowing and (2) the rendering of the degree of activity irrelevant to be so contrary to the fifth amendment as to render the statute unconstitutional on its face.\textsuperscript{48}

The majority in \textit{Brown} would most certainly have added the \textit{Aptheker} case to buttress its evaluation of the trend of Communist-control legislation and judicial construction thereof. The freedom of association which the majority considered unduly restricted in \textit{Brown} remains a right constantly protected by the courts.\textsuperscript{49} The distinction between innocent and knowing membership,

\textsuperscript{42} E.g., N.Y. \textit{Civ. Serv. Law} § 105(1) (public school employment); see Adler v. Board of Educ., 342 U.S. 485 (1952).


\textsuperscript{44} Communist Control Act of 1954, 68 Stat. 775, 50 U.S.C. §§ 790-93 (1958), wherein Communist-infiltrated organizations were added to Communist-front and Communist-action organizations as subject to the Control Board's regulations.

\textsuperscript{45} 334 F.2d at 493.

\textsuperscript{46} 378 U.S. 500 (1964).


\textsuperscript{48} 378 U.S. at 510-11.

\textsuperscript{49} E.g., Gibson v. Florida Legislative Investigation Comm'n, 372 U.S. 539 (1963); NAACP
and legal and illegal activity, would seem to be a necessity before association can be linked with criminal conviction. The older “balancing” test, 50 whereby the determination of the legislature that the need for control of a given element or activity or threat of activity outweighs the loss of some personal rights is given great deference, has not been destroyed. But now, the establishment of an “irrebuttable presumption” or “prima facie” indication that individuals who are members of the Communist Party are threats to national security is adjudged an abridgment of essential rights. 51

It is within the character of the restraint that the due process argument arises, for in Brown, unlike Douds, there is a criminal conviction as well as a withdrawal of a privilege. The right-privilege dichotomy urged by the two dissenters seems of little weight when the accused party faces not only removal from a position but a criminal charge as well. Douds seems, in fact, to speak clearly on this. “Of course we agree that one may not be imprisoned or executed because he holds particular beliefs.”52 The distinction offered by the government that the defendant is not convicted of affiliation but of active entrance into a union position of power may seem feasible, but it still cannot remove the gist of the charge, i.e., affiliation with the Communist Party. And this charge brings sharply into focus the relationship between the classification of guilty parties and the apprehended evil.

If the identification of a person as criminal be through his political affiliation as united with his position in society, without the establishment of some interrelationship, it is unreasonable. If such a practice were upheld, then the fact of association alone would be determinative of disloyalty and disqualification. Section 504 seems to indicate such an arbitrary classification and seems not susceptible of the saving grace of favorable construction that was bestowed upon the Smith Act.


52 339 U.S. at 408.
BOOK REVIEWS


Lon L. Fuller, long-distinguished Carter Professor of General Jurisprudence at Harvard Law School, has for many years inveighed against analytical and positivistic jurisprudence in favor of an "ought" or evaluative theory of law. In 1940 Professor Fuller published his first book, Law In Quest of Itself, in which, with incisive strokes of analysis, he attacked positivism in favor of some normative theory of law. In his assault on positivism he was careful to state that he did not subscribe to particular segments of the natural-law tradition, but he left virtually unexpressed the details of his personal legal philosophy.

Throughout the ensuing years, in articles and addresses, his attack on legal positivism remained undiminished; at the same time, the details of his own philosophy remained largely undisclosed. In his 1958 Harvard Law Review exchange with Professor H. L. A. Hart, some notion of his own legal theory was revealed through isolated references to "certain fundamental accepted rules specifying the essential lawmaking procedures,"1 and to the "internal morality of law"2 and its requirements of clarity3 in law and prospective application of law.4

A general statement of his thesis can be found in the following passages of the article:

In so far as possible, substantive aims should be achieved procedurally, on the principle that if men are compelled to act in the right way, they will generally do the right things.5

I suggest that if German jurisprudence had concerned itself more with the inner morality of law, it would not have been necessary to invoke any notion of this sort ["higher substantive law"] in declaring void the more outrageous Nazi statutes.6

The primary emphasis, however, was still negative; the article, entitled "Positivism and Fidelity to Law," was like an answering brief designed principally to respond to Hart's views as expressed in "Positivism and

1 Fuller, Positivism and Fidelity to Law, 71 HARV. L. REV. 630, 639 (1958).
2 Id. at 645.
3 Ibid.
4 Id. at 650.
5 Id. at 643.
6 Id. at 659-60.
the Separation of Law and Morals" and to demonstrate the fallacy of Hart’s legal positivism—but not to set forth a detailed articulation of his own view. A full affirmative propounding of his own views was needed.

Professor Fuller satisfies this need in *The Morality of Law*, a much-expanded version of his lectures delivered at the Yale Law School in April 1963, as part of the William L. Storrs Lecture Series. Representing the culmination of years of intensive study and reflection, this book sets forth a comprehensive articulation of the author’s own legal philosophy and must be regarded as his finest jurisprudential achievement to date.

Professor Fuller’s literary style is simple and direct and as colorful and engaging as ever; yet the contents of his book cannot be absorbed without sustained reflection. This is as it should be. He has a keen eye for the enlightening metaphor or illustration, although in some instances his allegories and analogies become overlong and overdone. The book was obviously written with great care and pause. There are no glib statements or incautious generalizations. He states his case with modesty and intellectual integrity. The book is filled with stimulating insights and distinctive judgment. In short, the book is well written.

Basic to the thesis set forth by Professor Fuller are two distinctions: the distinction between the “morality of duty” and the “morality of aspiration” and the distinction between the “internal morality of law” and the “external morality of law.” The morality of aspiration “is the morality of the Good Life, of excellence, of the fullest realization of human powers.” The morality of duty, on the other hand,

lays down the basic rules without which an ordered society is impossible . . . . It is the morality of the Old Testament and the Ten Commandments. . . . It does not condemn men for failing to embrace opportunities for the fullest realization of their powers. Instead, it condemns them for failing to respect the basic requirements of social living.

The distinction between the moralities of duty and aspiration has particular relevance to the use of law as a means of governing and directing human behavior. “There is no way by which the law can compel a man to live up to the excellences of which he is capable.” In this area of the morality of aspiration, workable standards cannot be developed. It is only

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7 71 Harv. L. Rev. 593 (1958).
8 Fuller, The Morality of Law (1964) [hereinafter cited as Fuller].
9 Id. at 5.
10 Id. at 5-6.
11 Id. at 9.
in the realm of the morality of duty that we can effectively govern and
direct human conduct.12

The morality of aspiration has, to be sure, pervasive implications:

In one aspect our whole legal system represents a complex of rules designed to rescue man from the blind play of chance and to put him safely on the road to purposeful and creative activity. . . .

But there is no way open to us by which we can compel a man to live the life of reason. We can only seek to exclude from his life the grosser and more obvious manifestations of chance and irrationality. We can create the conditions essential for a rational human existence. These are the necessary, but not the sufficient conditions for the achievement of that end.13

After a lengthy excursion into the relevance of economic theory to the moralities of duty and aspiration, Professor Fuller concludes:

[W]hen it actually comes to cases, our common sense tells us that we can apply more objective standards to departures from satisfactory performance [the morality of duty] than we can to performances reaching toward perfection [the morality of aspiration].14

This postulate is later in the book to have highly significant consequences for the implementation or codification of the "internal morality of law." But first Professor Fuller must posit the eight principles of the internal morality of law.

His second chapter entitled "The Morality That Makes Law Possible" sets out his principles of legality. There are "eight kinds of legal excellence toward which a system of rules may strive,"15 "eight distinct standards by which excellence in legality may be tested,"16 eight "desiderata" of a "system for subjecting human conduct to the governance of rules."17 They are: (1) the generality of law or, stated simply, the requirements that there be general rules; (2) the promulgation of law; (3) the prospective application of law; (4) the clarity of law; (5) the consistency of law, or the avoidance of contradictions in law; (6) the avoidance of rules requiring conduct beyond the powers of the affected persons—commanding only the possible; (7) the constancy of law through time; and (8) the congruence of official action and the declared rule of law.

Having posited these eight principles of the inner morality of law, the principles or "morality that makes law possible," Professor Fuller reaches

12 Ibid.
13 Ibid. (Emphasis added.)
14 Id. at 32.
15 Id. at 41.
16 Id. at 42.
17 Id. at 46.
a conclusion which, apart from the statement of the eight principles of the inner morality of law, is the most significant part of his philosophical thesis. Its significance, however, is not readily apparent; it is obscured upon first perusal because his conclusion is made so quickly and so early in the chapter without the traditionally attendant linguistic earmarks of importance and without the development and the illustrations characteristic of practically all points made by him in the book.

First, he reasons that the inner morality of law is distinctively "affirmative in nature: make the law known, make it coherent and clear, see that your decisions as an official are guided by it, etc. To meet these demands human energies must be directed toward specific kinds of achievement and not merely warned away from harmful acts." 18

He continues:

Because of the affirmative and creative quality of its demands, the inner morality of law lends itself badly to realization through duties, whether they be moral or legal. No matter how desirable a direction of human effort may appear to be, if we assert there is a duty to pursue it, we shall confront the responsibility of defining at what point that duty has been violated. It is easy to assert that the legislator has a moral duty to make his laws clear and understandable. But this remains at best an exhortation unless we are prepared to define the degree of clarity he must attain in order to discharge his duty. The notion of subjecting clarity to quantitative measure presents obvious difficulties. We may content ourselves, of course, by saying that the legislator has at least a moral duty to try to be clear. But this only postpones the difficulty, for in some situations nothing can be more baffling than to attempt to measure how vigorously a man intended to do that which he has failed to do. 19

He concludes that, with the exception of the "desideratum of making the laws known," 20 the eight principles of inner morality cannot be reduced to, and articulated in the form of, workable legal standards:

All of this adds up to the conclusion that the inner morality of law is condemned to remain largely a morality of aspiration and not of duty. Its primary appeal must be to a sense of trusteeship and to the pride of the craftsman.

With respect to the demands of legality other than promulgation, then, the most we can expect of constitutions and courts is that they save us from the abyss; they cannot be expected to lay out very many compulsory steps toward truly significant accomplishment. 21

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18 Id. at 42.
19 Id. at 42-43.
20 Ibid.
21 Id. at 43-44.
I do not wish to quarrel over small differences of degree, but Professor Fuller uses the language "its primary appeal must be to a sense of trusteeship and to the pride of the craftsman" and "the most we can expect of constitutions and courts is that they save us from the abyss." With this, I must take exception.

To be sure, "the notion of subjecting clarity [or any of the other principles of the law's inner morality] to quantitative measure presents obvious difficulties," but I would suggest that much can be done toward reducing these desiderata of law's inner morality to workable and effective constitutional standards. We may not hit upon a formula for articulation in one or two sentences as in the case of standards of prohibition. To state affirmative prescriptions is always more difficult than to state negative proscriptions, as Professor Fuller recognizes. But I would urge that the English language is more useful than we give it credit to be. It may take more words; it may take several paragraphs. In any case, the end is worth the effort, and I for one believe it can be achieved. It may require new techniques of draftsmanship, a change from the customary brief proscriptive form, as illustrated by the Sherman and Federal Trade Commission Acts, that is, short and general. But experience and the wisdom of the past is on our side. As Professor Fuller himself recites, the courts over a period of time have infused substantial content into "due care" and "good faith"; and to these, we may add "due process," "in restraint of trade," and "unfair acts and practices."

Professor Fuller examines in detail the demands of each of the eight desiderata of law's inner morality. Although none of these eight precepts is particularly new and all have through the ages been generally accepted as valid norms for evaluating the administration of law, Professor Fuller in his restatement of them has imparted a new vitality.

None of these principles is held by Fuller to be absolute, and we may take exception to the point at which he draws his line or to his application of the desiderata to particular situations. Professor Fuller is keenly

22 Id. at 43.
23 Id. at 44.
24 Id. at 43.
25 Id. at 42.
26 "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal." 26 Stat. 209 (1890), 15 U.S.C. § 1 (1958).
28 Fuller 64.
aware of the difficult problems of balance involved. He concludes his second chapter with this remark:

It is easy to see that laws should be clearly expressed in general rules that are prospective in effect and made known to the citizen. But to know how, under what circumstances, and in what balance these things should be achieved is no less an undertaking than being a lawgiver.29

I would urge that no argument can be made against the inner morality of law as a statement of eight general principles.

In Chapter III, "The Concept of Law," a title admittedly borrowed from H. L. A. Hart's recent book,30 Professor Fuller relates his thesis to prevailing theories of law. His theory, he claims, is not like traditional natural law; it is "procedural" natural law. It deals "not with the substantive aims of legal rules, but with the ways in which a system of rules for governing human conduct must be constructed and administered if it is to be efficacious and at the same time remain what it purports to be."31

In this chapter, as in much of his past jurisprudential writing, Professor Fuller stresses the importance of the definition of law, the concept of law. He defines law as "the enterprise of subjecting human conduct to the governance of rules."32 He rejects Holmes' predictive theory of law that law is "the prophecies of what the courts will do in fact, and nothing more pretentious"33 and the American legal realists' extension of this definition to "law in action"; he rejects the Austinian definition that law is the "command of the sovereign" and Hans Kelsen's theory of law as an officially formulated hypothetical judgment linking a conditioning circumstance with a conditional consequence. Professor Fuller's emphasis of the appropriate definition or concept of law has its literary antecedents in his article, "Positivism and Fidelity to Law."34 The definition of law is especially important to him because it has a powerful effect on human attitudes, particularly on one's fidelity to law.

Professor Fuller's concern for the appropriate definition of law is, I feel, misplaced, for one's definition of law does not inevitably affect one's fidelity to law and, moreover, one is not limited to a single concept. I would at once embrace all of the definitions alluded to above, including Professor Fuller's, as useful to an understanding of what law is and

29 Id. at 94.
31 Fuller 97.
32 Id. at 106.
33 Holmes, The Path of the Law, 10 Harv. L. Rev. 457, 461 (1897).
34 Fuller, supra note 1.
what it is about. I would then immediately discard each of these definitions in favor of a substantive natural-law theory for the purpose of criticizing, evaluating, guiding, accepting or rejecting the positive law.

In Chapter IV, Professor Fuller analyzes the relationship of his "inner morality of law" to "external morality of law" or "the substantive aims of law." While the law's internal morality is, "over a wide range of issues, indifferent toward the substantive aims of law and is ready to serve a variety of such aims with equal efficacy," not just "any substantive aim may be adopted without compromise of legality [the internal morality of law]."

Professor Fuller reasons that inherent in his eight principles of procedural natural law resides a minimum content of substantive natural law. The internal morality of law is not "something added to, or imposed on, the power of law, but is an essential condition of that power itself." "[S]ome minimum adherence to legal morality is essential for the practical efficacy of law . . . ."

He is, moreover, apparently prepared to rely entirely on this "minimum" to preclude such travesties of justice as the Nazi regime and the South African apartheid, for he directs the following challenge to H. L. A. Hart:

Does Hart mean to assert that history does in fact afford significant examples of regimes that have combined a faithful adherence to the internal morality of law with a brutal indifference to justice and human welfare? If so, one would have been grateful for examples about which some meaningful discussion might turn.

Professor Fuller makes a fully independent and valuable jurisprudential contribution in his incisive analysis of the interaction of the internal and external moralities of law. I believe he has demonstrated as has no one before that a clear and valued minimum of substantive morality flows from procedural precepts of natural law and that therefore an emphasis of procedural guarantees can give us substantial substantive benefits. The implications for this country's notions of procedural and substantive due process, often regarded as distinct and nonintersecting, are clear and need no discussion here.

His total reliance, however, on the internal morality of law to safeguard us from the grossest kinds of disregard of human rights and dignity is

35 Fuller 153.
36 Ibid.
37 Id. at 155.
38 Id. at 156.
39 Id. at 154.
superlatively disturbing. Professor Fuller apparently assumes that any violation of basic and inherent substantive morality will somehow of necessity invariably violate the internal morality of law as well. A fair translation would seem to be that internal morality or, in terms more familiar, procedural due process, alone is enough.

He asks for examples of regimes which have combined a faithful adherence to the internal morality with a brutal indifference to justice and human welfare. The now classic example of the South African apartheid does not satisfy him because the racial laws enacted by the Union of South Africa were not adequately clear, violating one of the eight principles of inner morality. His analysis seems to me to be strained.

While it is true that those regimes which blatantly disregard basic human rights ordinarily will similarly disregard basic procedural rights, this is not inevitable. Even absent historical examples, I am not convinced that a racial discrimination statute or any other basically brutal piece of legislation could not be constructed and administered so as to satisfy every precept of Professor Fuller's inner morality of law. We need something more than a procedural natural law, even granting its minimum substantive content. We need in full measure both substantive and procedural natural law or due process. We cannot content ourselves with focusing upon the procedural or inner morality alone; the substantive morality is equally if not more basic.

I have criticized Professor Fuller for not positing an independent substantive evaluative theory of law. It may be said that this is unfair, for Professor Fuller has not undertaken to propound such a theory. I would urge, however, that his works over the years would clearly reveal that he has considered a substantive theory but has rejected such as epistemologically and generally unworkable; man’s reason is not capable of formulating a viable substantive natural-law theory.

There will be those, I am sure, who will criticize Professor Fuller for an alleged failure to recognize that what is fundamentally monstrous with the Nazi regime and the South African apartheid is a disregard of substantive and not merely procedural notions of morality. I would suggest that it is because he has deeply considered a substantive theory that it would be unfair to make this criticism; Professor Fuller recognizes the fundamental grossness of the Nazi and Union of South African atrocities. He is not ignoring the substantive aspects of these governmental actions; he is saying that a substantive theory cannot be developed to evaluate such activities. He believes that as much can be accomplished by way of

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40 Id. at 159-60.
his procedural theory because it contains a minimum substantive content sufficient to protect us from gross substantive violations. As I have indicated earlier, this notion is his most profound, deserving the careful consideration of all.

Professor Fuller's book, *The Morality of Law*, will bring the realization of the Rule of Law a full step closer. Thus, it is not an adverse reflection on this book, but, on the contrary, it is to its high credit, that I say it goes far toward the development of a viable and workable basis for evaluating and accepting or rejecting governmental actions—but not far enough.

RALPH J. SAVARESE


The general aims of our antitrust laws, so firmly ingrained in the fabric of our free society, seldom engender dispute or criticism. As stated by the Attorney General's National Committee to Study the Antitrust Laws:

The general objective of the antitrust laws is promotion of competition in open markets. This policy is a primary feature of private enterprise. Most Americans have long recognized that opportunity for market access and fostering of market rivalry are basic tenets of our faith in competition as a form of economic organization.\(^1\)

Of course, consensus as to the ends does not necessarily imply agreement as to the means. Assuming the competitive economy to be the ideal,\(^2\) how may it best be implemented? The general wording of the antitrust statutes\(^3\) leaves much room for disparate interpretation by the

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2. The ultimate advantages to be achieved by the competitive economy, *e.g.*, low prices, optimum production, high quality products, as well as their emulation by the antitrust statutes are well described by Mr. Justice Reed in United States v. E. I. du Pont De Nemours & Co., 351 U.S. 377 (1956), and by Mr. Justice Black in Northern Pac. Ry. v. United States, 356 U.S. 1 (1958).
3. Thus, Mr. Chief Justice Hughes described the Sherman Antitrust Act as follows:
   As a charter of freedom, the Act has a generality and adaptability comparable to that found to be desirable in constitutional provisions. It does not go into detailed definitions which might either work injury to legitimate enterprise or through particularization defeat its purposes by providing loopholes for escape. The restrictions the Act imposes are not mechanical or artificial. Appalachian Coals Inc. v. United States, 288 U.S. 344, 359-60 (1933).
courts, the Federal Trade Commission and private litigants. Would, for example, the merger of two of the largest banks in Philadelphia foster or hamper the competitive goal? Competition is diminished in the narrower Philadelphia market; but if a broader view is taken and the relevant geographic market is expanded to encompass the Northeastern Seaboard, competition may actually be augmented by making the merged bank competitive with the larger New York banking interests. Even price-fixing, usually regarded as the most serious of antitrust violations, has sometimes been sanctioned as necessary to the achievement of broader policy goals and objectives.

The generality of the statutes, and the consequent wide range of possible interpretations is, of course, a recognition of the variety and continuous change of economic and business situations. Economic progress is impossible where business is bound in a legal straight-jacket of economic forms and practices. Innovation and experimentation, the handmaidens of such progress, require flexibility within the permissible range of business activity. This flexibility is the keynote of economic regulation under the antitrust laws, as indicated by the guiding principle of interpretation—the "Rule of Reason." Not every anticompetitive practice is condemned; the only acts which suffer from the onus of the law are those which "unreasonably" restrain.

Flexibility, though at times necessary and justifiable, is nonetheless a mixed blessing. Flexibility, especially in the application of a criminal statute, imposes a heavy burden on the businessman. For example, he must fulfill his obligations to his corporation and its stockholders by increasing sales—thus diminishing those of his competitors. He must make countless decisions as to the means of meeting such obligations while staying within the bounds of the law. When presented with a concrete problem, there may be few clear guiding principles in the nebulous area between legality and illegality. And his plight has not been lessened by the great changes in the antitrust field as evidenced

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5 See United States v. Socony-Vacuum Oil Co., 310 U.S. 150 (1940) (violation found even with respect to indirect price-fixing).
6 E.g., Appalachian Coals Inc. v. United States, 288 U.S. 344 (1933); Board of Trade v. United States, 246 U.S. 231 (1918).
7 See Standard Oil Co. v. United States, 221 U.S. 1, 59-62 (1911).
8 See generally Oppenheim, Federal Antitrust Laws 1-16 (2d ed. 1959).
9 Penalties for violation of the Sherman Antitrust Act may amount to fines up to $50,000 and/or imprisonment up to one year. 26 Stat. 209 (1890), as amended, 15 U.S.C. §§ 1-2 (1958).
by the recently developed mammoth body of legislative, administrative
and judicial prohibitions.  

In this setting, the dedication of Earl Kintner's new book, An Antitrust
Primer, seems particularly appropriate: "To the perplexed businessman
—who must always obey the law without always knowing what the law
is." As the dedication suggests, this book is primarily intended for the
decision-making businessman. A singular service has been performed
by its intent as well as its substance; no longer need decisions be made
in ignorance of antitrust consequences. It is, indeed, fortunate that a
man of Mr. Kintner's talents has offered his years of experience, both
in government and in private practice, to fill one of the principal
voids heretofore existing in legal-business writing.

Consistent with the dedication, the design of the book is to acquaint
the businessman with the antitrust dangers inherent in various business
practices. The book is "not a comprehensive treatise of every phase of
the antitrust and trade regulation laws . . . . Neither is [it] designed
to plumb various positions on what the philosophic bases of these laws
are or should be." It is, as its title connotes, a "primer for the aware
business executive." Its purpose is not to make him his own antitrust
lawyer, but rather to heighten his awareness of the laws, and thus
guide his decision as to consultation of specialists "before the conse-
quences of a contemplated course of action descend upon him." This
explains the conspicuous absence of elaborate and disconcerting foot-
notes, so characteristic of other writing in the field. The absence of
the scholar's propensity to annotate and digress endlessly into the
morass of academic refinement, however, does not detract from the
scholarship, quality and usefulness of the work. Mr. Kintner has no
need to document his vast knowledge and expertise in the field; it is
common knowledge. Furthermore, the book speaks for itself.

In his announced effort to "state carefully every major premise of
antitrust and trade regulation and to provide meaningful examples of
the application of the law to business practices," Mr. Kintner has

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10 For a discussion of judicial and legislative activity in the past year, see 25 A.B.A.
Antitrust Section 3-254 (1964).
11 Mr. Kintner was formerly Chief Counsel and later Chairman of the Federal Trade
Commission.
12 KIN TNER, AN ANTITRUST PRIMER xv (1964) [hereinafter cited as KIN TNER].
13 Ibid.
14 Ibid.
15 Ibid.
succeeded admirably. The introductory chapters provide the necessary perspective by highlighting the rise of free competition and government regulation, and by providing a bird’s eye view of the antitrust and trade regulation laws. The book continues by way of description, explanation and example, with a special treatment of each of the substantive violations, starting with “contracts, combinations and conspiracies,” (section 1 of the Sherman Antitrust Act), proceeding through the various per se violations (price-fixing, boycotts, limitations on the resale market and exclusive dealing arrangements), the Robinson-Patman Act, patents, mergers, monopolization, interlocking directorates, and “unfair methods of competition” and “unfair or deceptive acts and practices” proscribed by the Federal Trade Commission Act. There are also chapters on the troublesome exemption problem and on antitrust enforcement. The enforcement chapters are helpful in comparing and contrasting the practices employed by the Justice Department, the Federal Trade Commission, state enforcement agencies and private litigants. Finally, the lengthy section devoted to advertising is particularly significant because of the frequency with which problems in that area arise.

An epilogue describes Mr. Kintner’s own views of the proper role of government in the economy. This is perhaps the most valuable section of the book because it provides a philosophy or perspective with which to approach the myriad of related and unrelated antitrust problems. Thus, though the laws appear to change through application to particular situations, by always viewing a particular problem in the light of a broader perspective an overriding consistency and predictability may be possible.

The ultimate objective, whether in the political or economic arena, is to avoid “the concentration of power, whether in private hands, as in monopoly, or in government hands, as in a statist regime.” Therein is found the “basic premise of antitrust and trade regulation laws: that the nation’s economy is best regulated by the interplay of free market forces.”

Mr. Kintner’s book appears at a very opportune time in the history

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19 KINtNER 224.
20 Id. at 223.
of the antitrust and trade regulation laws. The Sherman Act is now three-quarters of a century old. The Federal Trade Commission Act\textsuperscript{21} and the Clayton Act\textsuperscript{22} have just passed the half-century mark. Many and divergent cases have been decided and much has been written. It is time for an experienced administrator and practitioner to reappraise the policies, practices and decisions underlying and manifested by these laws. Thus, it would seem that what was intended as a "modest effort," \textit{i.e.}, a primer for businessmen (no insignificant feat in itself), may become much more—a perspective for specialists, judges, legislators and teachers. In this respect, regardless of changes in the specifics of the law,\textsuperscript{23} this book will retain its vitality for some time.

\textbf{Bernie R. Burrus*}

\textbf{MISSISSIPPI: THE CLOSED SOCIETY. By JAMES W. SILVER. Harcourt, Brace 

This book starts and finishes (except for the appendices) with the riot which took place at Oxford, Mississippi on September 30 and October 1, 1962, on the occasion of the admission of James H. Meredith, a Negro, as a student to the University of Mississippi. In his prefatory note, Professor Silver, with considerable accuracy, calls the riot by his fellow Mississippians "a mad insurrection against their own government," and says that to him "it was and still is nothing less than incredible."\textsuperscript{1} The events culminating in the riot were very nearly unbelievable, involving as they did not only extreme violence and emotion but also the strange failure of communication between societies which appear to use the same language, yet use identical words to express entirely opposite things. The central part of \textit{Mississippi: The Closed Society} does much, despite its author's own statement, to make the incredible seem not only capable of belief, but inevitable. It is a fascinating story, well told. I recommend it to everyone but particularly to those who need proof of the immense diversity developed under the

\textsuperscript{22} Ch. 323, 38 Stat. 730 (1914) (codified as amended in scattered sections of 15, 18, 29 U.S.C.).
\* Associate Professor of Law, Georgetown University Law Center.

\textsuperscript{1} \textbf{Silver, MISSISSIPPI: THE CLOSED SOCIETY} ix (1964) [hereinafter cited as \textit{Silver}].
federal system in this country, which still permits differences between a state and nation so vast as to lead to the brink of armed federal-state conflict.

The closed society which Dr. Silver describes in detail in the case of Mississippi is the kind of society Judge Learned Hand feared on at least two occasions when he spoke of the limitations on the powers of the judiciary and of the law to channel the deepest currents of our society. In a speech in 1942, on the occasion of the 250th anniversary of the founding of the Supreme Judicial Court of Massachusetts, he called an independent judiciary the "counsels of moderation," and warned, with respect to its power:

but this much I think I do know—that a society so riven that the spirit of moderation is gone, no court can save; that a society where that spirit flourishes, no court need save; that in a society which evades its responsibility by thrusting upon the courts the nurture of that spirit, that spirit in the end will perish.2

And in speaking about the spirit of liberty in 1944, in the midst of war, to an audience which included a large number of newly sworn citizens, Judge Hand spoke of the limits of the power of law to shape society in these terms:

I often wonder whether we do not rest our hopes too much upon constitutions, upon laws and upon courts. These are false hopes; believe me, these are false hopes. Liberty lies in the hearts of men and women, when it dies there, no constitution, no law, no court can save it; no constitution, no law, no court can even do much to help it. While it lies there it needs no constitution, no law, no court to save it.3

For the most part the spirit of moderation and the spirit of liberty died in Mississippi in the period covered by Dr. Silver's book, with the consequences Judge Hand foretold. How did this happen? It was first, as told by Dr. Silver, a matter of history—the driving urge for white supremacy which followed the Civil War, achieved by violence in 1875, secured by fear and ballot box corruption for the next fifteen years, institutionalized by law in the Constitution of 1890, and maintained since as an article of faith in "the establishment of orthodoxy" in Mississippi politics. The history necessarily omits almost completely the breaks in the pattern, from the national statesmanship of Lucius Quintus Cincinnatus Lamar following the Civil War to the attempts at enlightened leadership by Governor J. P. Coleman and Congressman Frank Smith in the 1950's.

3 Id. at 144.
Succeeding chapters, entitled "The Voices of Militancy" and "The Voices of Acquiescence," describe the climate of thought in the state. On the one hand, militancy found expression in the inexorable growth of the Citizens Council and the ceaseless pounding on the race issue and on Mississippi's infallibility by most of the Mississippi press. One result—astonishing to lawyers not acquainted with Mississippi—is the growth of the myth that federal law bows in Mississippi to the doctrines of state law.4 Meanwhile, on the other hand, acquiescence was evidenced by acceptance of the churches, indoctrination in the schools, silence in the face of suppression of protest, and an exodus from the state of many of the best of her young people.5

There is some pressure from the militant right, and some support for it in the press, in all states. There is also inertia, a prevalent desire to conform, and an unwillingness to cause trouble with any group with strong notions about society. The politics of race and the closed society in Mississippi, however, pass beyond usual experience. They led to a system under which the oppression of the Negro, of which Dr. Silver gives only a few examples,6 became completely accepted. The failure of national law and policy to tolerate such oppression finally erupted into violence in "the great confrontation" at Oxford, an event to which Dr. Silver was a personal witness and which he sets forth in some detail.7 One of its most extraordinary aspects, as the book makes clear, was not what happened but the massive self-aimed propaganda in film and pamphlet which followed, designed to prove that Mississippi was right, and the whole world wrong, throughout the entire occurrence.

This book was based mainly on a speech given in Asheville, North Carolina in November 1963 to the Southern Historical Society. Dr. Silver has included the text of a number of letters he wrote between September 28, 1962, and November 16, 1963, mostly to his son and daughter. They contain some of the personal efforts he made to prevent the rewriting of history which started in Mississippi before the shooting at Oxford had stopped.8 More importantly, they consistently reflect the

4 Silver 49-52.
5 Id. at 81-82.
6 Id. at 83-106.
7 Id. at 107-33.
8 Id. at 159-243; see especially Letters From James W. Silver to his daughter Betty Silver, Oct. 2, 1962, id. at 162-67; Oct. 7, 1962, id. at 169-71; Letter From James W. Silver to Arthur Schlesinger, Jr., Oct. 10, 1962, id. at 171-72; Letter From James W. Silver to the Memphis Commercial Appeal, Oct. 31, 1962, id. at 175-76; Letters From James W. Silver
often angry, almost always frustrated attempts to establish the truth by a Mississippian who refuses to give up on his fellow citizens. The last letter is to the editor of the Jackson Clarion-Ledger, which reported the Asheville speech as an attack on Mississippi, but reported it in such a manner as to make it impossible for anyone to tell what was in the speech. Dr. Silver pointed out in his letter to the editor that copies of his speech were available "just in case anyone in Mississippi would like to find out what it is that has been so roundly condemned," and concluded by saying: "And, at the risk of seeming contentious, I meekly suggest that the editor, the congressman, and the governor might profit from a reading of the document, maybe on their way to my funeral."9

During early September of this year, peaceful desegregation came to schools in Biloxi, Jackson and Carthage, Mississippi. I am sure that this was at least in part the consequence of some persons in Mississippi having profited from the reading of Dr. Silver’s book. It is a matter of regret that his book comes a little too late (although his arguments with others in Mississippi did not) to meet the need expressed by his friend, William Faulkner, in 1955:

We speak now against the day when our Southern people who will resist to the last these inevitable changes in social relations, will, when they have been forced to accept what they at one time might have accepted with dignity and goodwill, will say, "Why didn’t someone tell us this before? Tell us this in time?"10

BURKE MARSHALL*

Silver to the Jackson Clarion-Ledger, Nov. 29, 1962, id. at 188, and Dec. 10, 1962, id. at 189.

9 Id. at 243.

10 SMITH, CONGRESSMAN FROM MISSISSIPPI 332 (1964).

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