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Recent Developments

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RECENT DEVELOPMENTS

CONSTITUTIONAL LAW — ELEVENTH AMENDMENT — STATE SOVEREIGN IMMUNITY BARS EMPLOYEE SUIT AGAINST STATE EMPLOYER EVEN THOUGH CONGRESS HAS APPLIED THE FAIR LABOR STANDARDS ACT TO STATES AS EMPLOYERS.

Employees of the Department of Public Health & Welfare v. Department of Public Health & Welfare (8th Cir. 1971)

Plaintiffs, named employees of various Missouri state institutions, brought a class action suit against their employers in the United States District Court for the Western District of Missouri, to recover unpaid overtime compensation allegedly due them under the Fair Labor Standards Act. Defendants successfully moved for dismissal of the complaint under a theory of eleventh amendment-based state sovereign immunity, and plaintiffs appealed. A panel of the Court of Appeals for the Eighth Circuit reversed, but after a rehearing en banc, the court vacated its prior judgment of reversal and affirmed the judgment of dismissal, holding that the suit was barred by the eleventh amendment and that Missouri had not waived sovereign immunity or consented to this suit. Employees of the Department of Public Health & Welfare v. Department of Public Health & Welfare, 452 F.2d 820 (8th Cir. 1971).

2. The defendants were the Department of Public Health & Welfare of the State of Missouri, the State Board of Training Schools, and various State Board members and officials having supervision of the state hospitals and training schools involved. The latter were sued in their official capacity and as individuals. Employees of the Dep't of Pub. Health & Welfare v. Department of Pub. Health & Welfare, 452 F.2d 820 (8th Cir. 1971).
3. The district court's opinion is unreported.
4. The amendment provides:
   The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.
U.S. CONST. amend. XI. Although the eleventh amendment does not mention suits by a citizen against his own state, it has been construed as being a bar to such suits. See notes 9–13 and accompanying text infra.
5. The unreported opinion of the panel was filed on April 2, 1971. One of the panel judges who voted for reversal wrote the dissent to the final decision. The theory of reversal was that although sovereign immunity applied to the case, Missouri had constructively consented to suit, or had waived its immunity, by operating the institutions involved. See notes 14–16 and accompanying text infra.
6. At the rehearing, supplemental briefs were filed by the parties. The Secretary of Labor, at the invitation of the court, filed an amicus curiae brief supporting the arguments of the plaintiff employees. 452 F.2d at 822.
State sovereign immunity from suit by individuals has traditionally been grounded in the eleventh amendment. Although it makes no mention of suits against a state by its own citizens, the amendment has been interpreted by the courts as a bar to such suits, as well as those specifically mentioned. This judicial expansion is credited to the Supreme Court's decision in *Hans v. Louisiana*, where plaintiff individual, suing his own state, argued that the eleventh amendment did not apply to such a suit. The Court held that such suits were not ones to which the judicial power extends. It is unclear whether the decision was based on the eleventh amendment or on common law sovereign immunity, but since the majority opinion discussed at length the background of the eleventh amendment and its implications, it was generally assumed that the holding was based on the eleventh amendment, and that reading has been consistently followed ever since.

The strength of eleventh amendment–based sovereign immunity has recently been weakened by the Supreme Court's use of the concept of implied consent or waiver to avoid the effects of state immunity. In *Blair* v. West Virginia, the defendant was a bi-state agency created by an interstate compact subsequently approved by Congress pursuant to article I, section 10 of the Constitution. Among other things, the compact provided the agency with the power to sue and be sued in its own name. While this would seem to show unquestionably that there was consent to suit, the issue was not that simple. In the first place, under Tennessee and Missouri law, the sue-and-be-sued clause...
Parden v. Terminal Railway of Alabama State Docks Department, the Court held that where Congress was acting in the exercise of its constitutional power to regulate interstate commerce, it could force the states to choose between entering the area of regulated activity and thereby waiving immunity from suit, or retaining immunity only by avoiding activity in the regulated area entirely. The Court made amenability to suit in the federal courts a precondition to state activity in the regulated field.

As was true of the legislation involved in Parden, the Fair Labor Standards Act was enacted by Congress pursuant to its constitutional power to regulate interstate commerce. Aimed at the elimination of "labor conditions detrimental to the maintenance of the minimum standard of living necessary for health, efficiency, and general well-being of workers," the Act's basic provisions set minimum wages, established maximum hours, and discouraged "oppressive" child labor practices. Although it had not originally done so, Congress later expressly applied the Fair Labor Standards Act to states acting as employers in certain categories of activity, and the Supreme Court has upheld Congress' power under the commerce clause to do so.

When faced in the instant case with the question whether the eleventh amendment applied to suits by individuals against states brought under the Fair Labor Standards Act, the Eighth Circuit followed the traditional reading of Hans and held that it did, thereby granting the immunity did not amount to a waiver of immunity. Second, there was a well-established proposition that sue-and-be-sued clauses gave consent, if at all, to suit in state, not federal, courts. See, e.g., Murray v. Wilson Distilling Co., 213 U.S. 151, 172 (1909). The Petty Court ignored the latter problem, decided that waiver in this case was a problem of federal rather than state law, and found that immunity was waived under federal law. 359 U.S. at 280. For other examples of waiver, see Comment, States — Waiver of State Immunity to Suit with Special Reference to Suits in Federal Courts, 45 Mich. L. Rev. 348 (1947).

16. Id. The dissent in Parden agreed with the majority that Congress had the power to put the states to this choice, but felt that Congress had not done so here and must not be taken to have done so unless there is express language upon which to rely. Id. at 198-200 (White, J., dissenting). See generally Note, Parden v. Terminal Ry. of Ala. State Docks Dep't: The Passing of Sovereign Immunity, 69 Dick. L. Rev. 270 (1965).
19. Id. § 202.
20. Id. §§ 202.
21. Id. § 207.
22. Id. § 212.
23. Id. § 203(d). As originally enacted in 1938, the Act defined employer so as to exclude states and political subdivisions of states, and did not cover employees in institutions such as those involved in the instant case, even if privately operated. Subsequent amendments in 1961 and 1966 added institutions, hospitals and schools to the regulated categories, and withdrew the exemption of states and their political subdivisions with respect to their employees in the new categories. See Maryland v. Wirtz, 392 U.S. 183, 185-87 (1968). In contrast, the Federal Employers' Liability Act — the legislation involved in Parden — gives no such indication that Congress intended it to apply to the states. Much of the discussion in Parden was directed to establishing that Congress had so intended. 377 U.S. at 185-90.
24. Maryland v. Wirtz, 392 U.S. 183 (1968). The Court expressly refused to decide, however, the sovereign immunity problems raised by its decision. Id. at 200.
25. 452 F.2d at 823-24.
asserted by the defendant the status of a constitutional guarantee.\textsuperscript{28} Faced with the argument that Missouri had waived its immunity, the court decided that Congress had not fairly informed Missouri that it would lose its immunity by continuing to operate its mental hospitals and training schools.\textsuperscript{27} Relying on a presumption against a waiver of what it considered to be a constitutional right, the court determined that the presumption was not overcome, and distinguished \textit{Parden} factually on several points.\textsuperscript{28} In analyzing the Eighth Circuit's refusal to adopt the \textit{Parden} waiver theory, it is essential to consider the original basis for judicial expansion of the eleventh amendment to suits against states by their own citizens.\textsuperscript{29} If the expansion is deemed to have been \textit{constitutionally} required, then there is difficulty in deciding that the sovereignty is impliedly waived. If however, it is simply the reassertion of a common law concept of sovereign immunity,\textsuperscript{30} then the question is less difficult.\textsuperscript{31}

The better reasoned view would seem to be that the extension of immunity is based on the common law rather than the Constitution, in spite of the fact that many of the cases which have subsequently relied on \textit{Hans v. Louisiana} consider it to be part of the eleventh amendment and thus constitutional in nature.\textsuperscript{32} Prior to the eleventh amendment, and even before ratification of the Constitution itself, it was assumed that the new system of government framed in the Constitution would not alter the fundamental common law concept that a sovereign state could not be sued without its consent.\textsuperscript{33} When this assumption was undermined by the Supreme Court

\textsuperscript{26} Id. at 825-26.
\textsuperscript{27} Id. at 826. The court was not even willing to concede that Congress had the constitutional power to do this, at least so far as previously undertaken governmental functions are concerned. \textit{Id.} at 825.
\textsuperscript{28} Id. at 826-27. For the factual distinctions between \textit{Parden} and the instant case, see text accompanying notes 41-56 infra. In adopting the presumption against waiver, the court took the Supreme Court's waiver theory literally, and applied rigid constitutional standards — that waiver of a constitutional right must be knowing, voluntary and intelligent. 452 F.2d at 826. In so doing, the court implicitly agreed with the \textit{Parden} dissent that:

A decent respect for the normally preferred position of constitutional rights dictates that if Congress decides to exercise its power to condition privileges within its control on the forfeiture of constitutional rights its intention to do so should appear with unmistakable clarity.

377 U.S. at 199 (White, J., dissenting). For the position that a constitutional right was not really involved, see text accompanying notes 29-37 infra.

\textsuperscript{29} See notes 9-13 and accompanying text supra.

\textsuperscript{30} See, e.g., The Siren, 74 U.S. (7 Wall.) 152, 154 (1868).

\textsuperscript{31} It should be noted, however, that these considerations would have no relevance if the suit in \textit{Parden} or the noted case had been against a state by citizens of a different state, because such a suit is irrefutably within the purview of the eleventh amendment. Nevertheless, the implication of \textit{Parden} was that the result would have been the same had the plaintiff been a citizen of a different state. See Note, \textit{Private Suits Against States in the Federal Courts}, 33 U. CHI. L. REV. 331, 342-43 (1966).

\textsuperscript{32} See note 13 supra.

\textsuperscript{33} This was true even though article III, on its face, seems to threaten state sovereign immunity. See note 7 supra. One writer has detailed this assumption. See 1 C. \textit{Warren, The Supreme Court in United States History} 91 (rev. ed. 1947). The author states:

The right of the Federal Judiciary to summon a State as defendant and to adjudicate its rights and liabilities had been the subject of deep apprehension.
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in a fact situation different from Hans and the instant case, the eleventh amendment restored the assumption, but only as to that factual situation in which it had been successfully challenged. Since immunity for a state when sued by its own citizens had never been attacked, there was nothing for the eleventh amendment to restore in the type of immunity. Thus, Hans by implication reaffirmed a pre-Constitution common law immunity with respect to suits by citizens against their own states, and did not, as is often assumed, make the eleventh amendment say something it clearly does not. Indeed, one court specifically stated that immunity of a state from suit by its own citizens does not arise from the eleventh amendment, and found it "unmistakable" that Hans had based such immunity on the inherent nature of sovereignty rather than the eleventh amendment. It is submitted that the court in the instant case need not have been so concerned that a "constitutionally granted sovereign immunity" was being waived — because it was not.

It is clear that the court was correct in determining that the sovereign immunity problems created by the 1966 amendment to the Fair Labor Standards Act were open and undecided. This is true even though the Parden Court would seem to have answered sovereign immunity problems in cases involving congressionally created causes of action. Much of the

and of active debate at the time of the adoption of the Constitution; but the existence of any such right had been disclaimed by many of the most eminent advocates of the new Federal Government, and it was largely owing to their successful dissipation of the fear of the existence of such Federal power that the Constitution was finally adopted.

Id. See also Hans v. Louisiana, 134 U.S. 1, 12-15 (1890); 3 J. Elliott, Debates on the Federal Constitution 527, 533, 555-56 (2d ed. 1901). Indeed, it seems that the Constitution may not have been passed with article III in its present form had not its proponents been successful in convincing the skeptics that it would allow states to be plaintiffs, yet not force them to be defendants.

34. See note 7 supra.

35. As a result, it is merely a quirk of history that the Constitution specifically protects the sovereign immunity of a state when sued by citizens of another state, but fails to protect the immunity of a state when sued by its own citizens. There is no apparent logic in this, and likewise no logical reason why there should be fewer impediments to the waiver of one type of immunity than the other.

36. See note 13 supra.

37. McCartney v. West Virginia, 156 F.2d 739, 740 (4th Cir. 1946). One commentator has carefully examined the history of the eleventh amendment and the decision in Hans, and reached the same conclusion. See Note, supra note 31, at 334-36.

38. Had the plaintiffs been citizens of a state other than Missouri, the court's concern would have been understandable, for Missouri's claim of sovereign immunity would then have been clearly grounded in the eleventh amendment. However, the discussion of the distinction between a constitutional as opposed to common law immunity is not meant to obscure what might be just as important — that the Parden waiver theory was meant to and can encompass suits against a state by citizens of a different state. See note 31 supra.

39. 452 F.2d at 825. The Supreme Court had emphatically stated in Wirtz that "[q]uestions of state immunity are therefore reserved for appropriate future cases." 392 U.S. at 200. The implication was that although the Fair Labor Standards Act was a generally valid exercise of the commerce clause power, sovereign immunity might be of overriding importance in at least some of the cases where the two would conflict. Id.

40. See text accompanying notes 14-16 supra.
Eighth Circuit's reasoning in the noted case was dependent upon distinguishing *Parden* from the instant case, leading eventually to the conclusion that sovereign immunity must be given greater weight than the congressional legislation. The court found it significant that if the Supreme Court had refused to adopt a constructive consent theory in *Parden*, employees of state owned railroads would have a right without a remedy, whereas in the instant case, denial of a direct personal right of an employee against his state still left two indirect avenues of legal recourse.42 The existence of these alternative remedies was central to the court's conclusion that sovereign immunity should override congressional regulation of commerce.43 However, it is submitted that the court's assertion that its denial of a direct right will have but a minimal effect is illusory. It is more likely that Congress' purpose in bringing state employees within the coverage of the Fair Labor Standards Act will be thwarted should employees such as the Missouri plaintiffs be forced to forego personal rights of action.44 Just as there is judicial reluctance to allow a non-litigant's constitutional rights to be vindicated by another person,45 so should there be reluctance to force third party assertion where rights expressly created by Congress are involved, especially since the rights may never be asserted at all.46

41. Under the Federal Employers' Liability Act, enforcement is only through a direct personal right of action by the injured employee, or his survivor in case of death. 45 U.S.C. § 51 (1970).

42. 452 F.2d at 827 n.1. The Secretary of Labor is permitted to sue on behalf of an employee for the amount of his claim, or for injunctive relief. 29 U.S.C. §§ 211(a), 216(c), 217 (1970). The court also noted that employees themselves might be able to assert a claim for injunctive relief under the doctrine that an illegal act by a state official strips him of his official character and makes injunctive relief possible. 452 F.2d at 826. See *Ex parte Young*, 209 U.S. 123 (1908). In relation to this doctrine, see generally *Block, Suits Against Government Officers and the Sovereign Immunity Doctrine*, 59 Harv. L. Rev. 1060 (1946); *Davis, Suing the Government by Falsely Pretending to Sue an Officer*, 29 U. Chi. L. Rev. 435 (1962); *Jaffe, Suits Against Governments and Officers: Sovereign Immunity*, 77 Harv. L. Rev. 1 (1963).

43. 452 F.2d at 826.

44. In the first place, sheer numbers would make it impossible to channel all personal claims through the secretary. 452 F.2d at 833. Secretary suits on behalf of employees are accomplished only after the employee files a written request with the secretary and waives his right of action. 29 U.S.C. § 216(c) (1970). There seems to be, as the dissent in the instant case indicated, "[a] strong inference that Congress intended to afford state employees the same direct right of suit against their employers as is possessed by covered employees of nongovernmental employers." 452 F.2d at 831 (Bright, J., dissenting). See *Barrows v. Jackson*, 346 U.S. 249 (1953); *Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 123, 149-54 (1951) (Frankfurter, J., concurring). The rationale is that unless there are unusual circumstances, assertion by the interested party himself will be the best assurance that the rights will be fully enforced. While the rationale was developed in cases that did not involve a statute, it should equally apply where the only person left to assert the right is one whose interests may be different than the real party in interest, should the latter be denied a direct right. See note 46 infra.

45. *See* note 46 infra.

46. The secretary has *discretion* to sue under the alternative provisions, and may have interests that are not identical to the personal interests of an individual employee. Indeed.

A suit by a state employee under § 216(b) represents the only remedial provisions of the Act which assures a state employee of the opportunity of having his claim presented to a court.

452 F.2d at 833 (Bright, J., dissenting). Unless he is permitted to assert his right himself, the state employee may have no redress at all.
The Eighth Circuit noted, in addition, that since Congress permitted double damages and attorney's fees in remedies under the Fair Labor Standards Act (which it had not done under the Federal Employers' Liability Act in *Parden*) it could not have intended to include states as defendants, thereby subjecting them to such penalties. What the court failed to notice (or at least mention) was that double damages and fees are within the discretion of the district court and could simply be made non-applicable when a state is the defendant.

The court also drew a distinction between proprietary and governmental functions. It stated that because Missouri had no alternative but to continue to operate the institutions involved, the state could not have been held to have voluntarily waived its immunity. In *Parden*, on the other hand, it was not particularly imperative that Alabama operate a railroad, and its choice to do so, the court decided, could be more easily construed as a voluntary and intelligent waiver of immunity. Such a conclusion, however, fails to recognize that Congress had the power to apply regulations to even those employers that had no realistic option to forego the activity entirely. It seems likely that Congress included states as employers with full knowledge that they must carry on functions such as those involved in the case at bar.

To further buttress its conclusion that *Parden* did not control the present case, the court noted that Missouri did not enter any new form

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47. 452 F.2d at 826.
48. 29 U.S.C. § 260 (1970). Although the court's discretion is limited to cases where the employer has made a showing of "good faith" or "reasonable grounds" for thinking that he was not violating the Act, still, as the dissent points out, it is unlikely that a state would not be able to make such a showing. 452 F.2d at 832 (Bright, J., dissenting). It seems illogical to conclude that penalty provisions show congressional intent that states should not be sued by individuals, since they are not mandatory anyway.
49. 452 F.2d at 826. The reasoning was that *someone* had to operate training schools and mental hospitals — to protect the public and the patients — and there was little likelihood that private enterprise would do so should the state cease to perform this service. *Id.*
50. *Id.* at 827.
51. If the immunity asserted by Missouri is not constitutional in its origin, it need not be "voluntarily" waived. See text accompanying notes 29-37 *supra*. It is only when a fundamental constitutional right is involved that courts impose strict conditions for waiver, including the requirement of an "intentional relinquishment or abandonment of a known right or privilege." *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938). Thus the constitutional difficulties involved in any concept of implied (as opposed to express) waiver of a right are dissipated when the right involved is not a constitutional one. Moreover, the Supreme Court in *Wirtz* had already expressed its opinion, as the dissent noted, on the proprietary-governmental distinction:
[I]t is clear that the Federal Government, when acting within a delegated power, may override countervailing state interests whether these be described as "governmental" or "proprietary" in character.
392 U.S. at 195, quoted at 452 F.2d at 832.
52. In a case substantively similar to the instant one, the Tenth Circuit concluded that "Congress contemplated the financial burden that the Amendments could cause". *Bryce v. Stagers*, 424 F.2d 130, 134 (10th Cir. 1970). The Tenth Circuit permitted the employees of a Utah-owned institution for the custody and treatment of mentally deficient children and adults to sue their employer, upon a finding that *Parden* was dispositive of the sovereign immunity issue. *Id.* at 131–32.
of activity after the Fair Labor Standards Act amendment, whereas Alabama began operating a railroad some twenty years after the Federal Employers' Liability Act was passed. While the distinction is appealing, it should not be of great weight. Where Congress has determined that regulation is essential to general welfare, the overriding federal concern must extend to activities already in operation as well as those not yet undertaken. Additionally, the distinction is not entirely relevant to the court's major concern — the intelligence of a waiver of immunity. The court inferred that because of the twenty year time lapse, Alabama's waiver, if any, was somehow more conscious and therefore more intelligent than could possibly have occurred in the instant case. However, Alabama accompanied its defense of sovereign immunity in *Parden* with the assertion that it in fact had no idea that it was waiving sovereign immunity by operating a railroad. Moreover, the decision to continue activity in an area after Congress has regulated it could well be as intentional and knowing as entry into the regulated area in the first place. Thus it cannot be concluded from either the logical inference or the facts of the comparison that Alabama acted more knowingly and intelligently than did Missouri.

If, as submitted, the factual distinctions between *Parden* and the noted case are not important, then the instant case is even more compelling than *Parden* in asserting that Congress' power to regulate commerce should override sovereign immunity. Since the Supreme Court was willing to find constructive waiver of immunity in order to give protection to a relatively small number of people — employees of state owned railways — even where Congress had not made clear its desire that such protection be given, then a fortiori constructive waiver is applicable were Congress has specifically applied legislation to states as employers, where the class of

53. The state hospitals and schools had been in existence for some twenty years prior to the 1966 amendment.

54. 452 F.2d at 827.

55. United States v. California, 297 U.S. 175, 184–85 (1936). In this case the Federal Safety Appliance Act was applied to a California state-operated railroad. The Court decided it was unimportant whether the state operated the railroad in its "sovereign" or "private" capacity. *Id.* at 183–84. See also Briggs v. Sagers, 424 F.2d 130, 133 (1970).

56. 377 U.S. at 194. Since the *Parden* theory is predicated upon an implied or "constructive" waiver basis, the Eighth Circuit's preoccupation with "conscious" waiver or "waiver in fact" was somewhat inappropriate.

57. See note 23 supra. Without specific congressional action to point to, such as existed in the instant case in the form of the 1966 amendment, the *Parden* Court's assurance that Congress meant to override sovereign immunity sounds somewhat strained:

If Congress made the judgment that, in view of the dangers of railroad work and the difficulty of recovering for personal injuries under existing rules, railroad workers in interstate commerce should be provided with the right of action created by the FELA, we should not presume to say, in the absence of express provision to the contrary, that it intended to exclude a particular group of such workers from the benefits conferred by the Act.

377 U.S. at 189–90.

58. See note 23 supra.
persons meant to be protected is much greater, and where the purpose and need of regulation is a more fundamental and pressing expression of congressional regulation of commerce.

In essence, the Eighth Circuit was dealing with the classic problem of balancing states' rights and federal power, requiring the application of what the *Parden* Court called “the common sense of this Nation's federalism.” When the problem is seen in this light, the Eighth Circuit's factual distinctions seem contrived and of no help. In *Parden*, the Court's “common sense” led to this conclusion:

While a State's immunity from suit by a citizen without its consent has been said to be rooted in “the inherent nature of sovereignty,” the States surrendered a portion of their sovereignty when they granted Congress the power to regulate commerce.

By empowering Congress to regulate commerce, then, the States necessarily surrendered any portion of their sovereignty that would stand in the way of such regulation.

The Eighth Circuit's decision suggests that perhaps sovereign immunity and the eleventh amendment are not so much in disfavor as trends have indicated. Nevertheless, the Supreme Court has shown its disfavor through the fictional doctrine of implied waiver or implied consent to suit. This fiction no doubt resulted from the increasingly vital need that

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59. There can be no question that employers of state and local schools and hospitals number far greater than employees of state-owned railroads, the latter being relatively few in number. For an indication of the number of persons brought within the coverage of the Fair Labor Standards Act by the 1966 amendment, see *Brief for the Secretary of Labor as Amicus Curiae, Employees of the Dep’t of Pub. Health & Welfare v. Department of Pub. Health & Welfare*, 452 F.2d 820, 833 (8th Cir. 1971).

60. The stated congressional purpose behind the 1966 amendment was to attain a minimum standard of living necessary for health, efficiency, and general well being of workers with all deliberate speed consistent with the policy of the Act and the welfare of the American people.

2 U.S. Code Cong. & Ad. News 3004 (1966). In contrast, the Federal Employers' Liability Act was drawn to a much narrower purpose — protecting not all interstate railroad employees, but only those few that are injured.

61. *377 U.S. at 192.*

62. The real issue was whether or not the surrender of state sovereignty in the form of the commerce clause should override common law state immunity from suit in federal courts. The inconclusive factual distinctions raised by the Eighth Circuit seem more calculated to avoid rather than answer this question; for if Congress has the power to condition state activity on amenability to suit in federal court, it has more clearly exercised that power in the noted case than in *Parden*. On the issue of the legislature's power to condition the grant of a privilege upon waiver of constitutional rights, see *American Communications Ass'n v. Douds*, 339 U.S. 382 (1950); *United States v. Appalachian Elec. Power Co.*, 311 U.S. 377 (1940); *Stephenson v. Binford*, 287 U.S. 251 (1932); *Fox River Paper Co. v. Railroad Comm'n*, 274 U.S. 651 (1927); *Note, Judicial Acquiescence in the Forfeiture of Constitutional Rights Through Expansion of the Conditioned Privilege Doctrine*, 28 Ind. L.J. 520 (1953).

63. *377 U.S. at 191* (footnote omitted).

64. *Id.* at 192.

65. See generally *Note, supra* note 31.

private federal remedies be available without entanglement in eleventh amendment technicalities; but it seems to lead to the anomalous result that federal courts are open to a suit by a citizen against a state based on a congressionally created cause of action, yet closed when the suit involves other types of federal questions such as a violation of a constitutional right which Congress has not guaranteed by appropriate legislation. State sovereign immunity flowing from the traditional interpretation of the eleventh amendment and Hans has precluded a wide range of suits involving federal questions, most of them constitutional. To allow sovereign immunity to bar those suits and yet not impede others based on congressionally created causes of action seems to place federal legislation above the Constitution in importance.

Perhaps the Eighth Circuit's decision merely reflects a distaste for the fictional quality of the implied waiver theory and its anomalous result, rather than a respect for sovereign immunity itself. If this is true there is a need for a less fictional method of releasing federal courts from the block of state immunity in the area of federally-created rights. Whatever method is eventually used by the Supreme Court to shed the traditional sovereign immunity doctrine, developed in earlier days when state sovereign immunity was not a tremendous inconvenience, it appears that the needs of our times require that it be done. However valid sovereign immunity once was, and however disciplined the Eighth Circuit's refusal to accept a fictional waiver theory may be, the instant case is but a temporary halt to the continued erosion of state sovereign immunity.

Stephen Cushmore

Cir. 1970). The theory has so far been limited to situations in which Congress has created a federal cause of action in a regulated area of activity and a state has carried on that activity.

67. As the majority noted in Parden:
States have entered and are entering numerous forms of activity which, if carried on by a private person or corporation, would be subject to federal regulation. . . . In a significant and increasing number of instances, such regulation takes the form of authorization of lawsuits by private parties. To preclude this form of regulation in all cases of state activity would remove an important weapon from the congressional arsenal with respect to a substantial volume of regulable conduct. 377 U.S. at 197-98.

68. The paradox seems to result from a distaste for the results of sovereign immunity and a hesitancy to disregard traditional eleventh amendment doctrine. See, e.g., Duhne v. New Jersey, 251 U.S. 311 (1920) (action to enjoin the enforcement of the eighteenth amendment); Fitts v. McGhee, 172 U.S. 516 (1899) (suit alleging deprivation of property without due process); Skokomish Indian Tribe v. France, 269 F.2d 555 (9th Cir. 1959) (suit alleging deprivation of property in violation of treaty).

69. See Cullison, supra at 16-24. The rule is based upon an analogy to the Erie doctrine. See Cullison, supra at 41-56. It is submitted, however, that the Eighth Circuit's factual distinctions were even more contrived than the waiver theory itself. See text accompanying notes supra. 35. For the full development of this suggested postulation see Cullison, supra at 16-24. The rule is based upon an analogy to the Erie doctrine.
DAMAGES — MEASURE OF DAMAGES IN SURVIVAL ACTIONS CONSISTS OF DECEDEENT'S PROJECTED NET EARNINGS REGARDLESS OF WHETHER SUIT WAS INSTITUTED BEFORE OR AFTER DEATH.

Incollingo v. Ewing (Pa. 1971)

The plaintiffs, a child and her parents, instituted an action for injuries allegedly caused to the minor child by the wrongful administration of an antibiotic drug. One month after the action was brought, the child died and her parents were appointed administrators of her estate and were substituted for her as plaintiffs in the action. A verdict was returned against the defendants and judgment was entered on the verdict. The trial court awarded damages for the decedent's pain and suffering and her loss of gross earnings reduced to present worth — with no deduction for the cost of personal maintenance expenses. On appeal to the Supreme Court of Pennsylvania, the judgment was affirmed and the measure of damages was upheld. On reargument, however, the court held that in all future survival actions — whether begun before or after the decedent's death — in addition to allowances for pain and suffering, the proper measure of damages should include compensation for the decedent's loss of gross earning power, less personal maintenance expenses from the time of death through the decedent's estimated lifespan, reduced to present worth. Incollingo v. Ewing, 444 Pa. 299, 282 A.2d 206 (1971).

In Pennsylvania, relatives and heirs of a decedent can recover damages by two separate actions — a wrongful death action and a survival action. The first of these is pursuant to the "Death by Wrongful Act Statute," enacted in Pennsylvania in 1851 and extended in 1855. This

1. This substitution was made pursuant to Pa. Stat. tit. 20, § 320.602 (1950).
2. The action was originally brought against the plaintiffs' druggist. Joined as defendants were an osteopath, the drug manufacturer and the minor's pediatrician. A jury verdict was returned in favor of the druggist, but against the other defendants in the sum of $215,000. Incollingo v. Ewing, 444 Pa. 263, 269-70, 282 A.2d 206, 210-11 (1971).
3. See note 30 infra.
5. The "Death by Wrongful Act Statute" [hereinafter referred to as the Death Act] provides:
Whenever death shall be occasioned by unlawful violence or negligence, and no suit for damages be brought by the party injured during his or her life, the widow of any such deceased, or if there be no widow, the personal representatives may maintain an action for and recover damages for the death thus occasioned. Pa. Stat. tit. 12, § 1601 (1953). The wrongful death statutes as a group can be found in Pa. Stat. tit. 12, §§ 1601 to 1604 (1953).
6. The Death Act was extended by the Act of 1855, which created a new cause of action for certain persons named therein. The Act provides that only the husband, widow, children or parents of the deceased are entitled to recover damages for his death and the sum recovered shall be distributed in proportion to the intestate share each would have in the decedent's personal estate. If none of the enumerated relatives survive the decedent, then the personal representative is entitled to recover the expenses incurred by the estate as a result of the injury and death. Pa. Stat. tit. 12, § 1602 (1953).
Act created a right of action\(^7\) unknown to the common law,\(^8\) applicable in situations where death has resulted from a violent or negligent act and where no suit, pursuant to that violent or negligent act, has been brought by the injured party during his lifetime. It is intended to secure compensation for certain statutorily-designated dependents.\(^9\) The amount of recovery consists of damages for the decedent’s death, expenses incurred for medical, surgical and nursing care, funeral expenses, and such other expenses as could have been recovered by the decedent had he instituted an action in his lifetime.\(^10\) The statutes are vague as to what constitutes damages for the decedent’s death, but the courts have interpreted these damages to include the loss of pecuniary benefits which persons entitled to recover under the statute would have received from the deceased had he not died.\(^11\) They do not, however, include damages sustained by the

7. The action for wrongful death must be brought within one year after death. Pa. Stat. tit. 12, § 1603 (1953). This action can be brought during the period of one year subsequent to death, even though at the time of the death the decedent’s personal right of action was barred by the statute. Western Union Tel. Co. v. Preston, 254 F. 229 (3d Cir. 1918).


9. See note 6 supra. Pennsylvania procedural rules govern the time when plaintiffs may bring an action for wrongful death. Rule 2202 provides that during the first six months after death the personal representative is the only one entitled to sue under the Death Act. However, during the next six months either the personal representative or any person entitled to recovery may bring suit, but the institution of one action bars any later action. Pa. R. Civ. P. 2202. See Stafford v. Roadway Transit Co., 70 F. Supp. 555, 563 (W.D. Pa. 1947), modified, 165 F.2d 920 (3d Cir. 1948).


11. Kaczorowski v. Kalkosinski, 321 Pa. 438, 441, 184 A. 663, 665 (1936). It has been held that children suing for their father’s death were entitled only to the present worth of such sums as they might reasonably have expected from their father for support and maintenance. Allo v. Pennsylvania R.R., 312 Pa. 453, 459, 167 A. 326, 328 (1933). In making the determination as to what the father would provide the children as support and maintenance, consideration may be given to the father’s “age, ability and disposition to labor, and his habits of living and expenditure.” Pennsylvania R. R. v. Butler, 57 Pa. 335, 338 (1868). See also Glasco v. Green, 273 Pa. 353, 358, 117 A. 79, 80 (1922). The fact that adult sons may inherit a large estate as a result of their father’s death does not affect their ability to recover for their father’s death, nor may such fact be admissible on the question of damages. Stahler v. Philadelphia & R. Ry., 199 Pa. 383, 49 A. 273 (1901). Further, a widow has been denied recovery in a wrongful death action where her negligence contributed to her husband’s fatal injuries. See Minkin v. Minkin, 336 Pa. 49, 54-55, 7 A.2d 461, 464 (1939).

In the case of the death of a wife and mother, in addition to medical and funeral expenses, recovery includes the loss of her services, less the probable cost of her maintenance during her life expectancy. Gaydos v. Domabyl, 301 Pa. 523, 533-34
decedent. Furthermore, neither exemplary damages nor damages for pain and suffering are recoverable, since the aim is to compensate for the loss sustained.

The second available cause of action is a survival action. What is commonly referred to as a survival action can be one of two distinct actions, each being a derivative of the common law action which accrued to the injured party as a result of an alleged tortious act. Both receive authorization through the survival statutes, the most current of which is found in the Fiduciaries Act of 1949.

Damages for the death of a nine-year-old son were held to be the potential return that the father might have received from his son's earnings between the ages of sixteen and twenty-one, less maintenance expenses for the son from the time of death until majority. Chambers v. Ellis, Inc., 104 Pa. Super. 41, 47, 158 A. 583, 585 (1932). But should the child not have received proper care and treatment following the injury which results in death, this might reduce damages. City of Bradford v. Downs, 126 Pa. 622, 630, 17 A. 884, 885 (1889). Other cases make no mention that contributed earnings begin at sixteen, but indicate that any of the child's earnings received by his parents, prior to his reaching majority, should be considered. See, e.g., Liguori v. Philadelphia, 351 Pa. 494, 41 A.2d 320 (1945).

The first survival statute in Pennsylvania dealt only with actions commenced before the decedent died and provided that such action shall not abate with the death of the injured party, but shall pass on to the personal representative. Act of April 15, 1851, Pub. L. No. 669, § 18. This statute was re-enacted in the Fiduciaries Act of 1917, section 35(a). At the same time, in section 35(b) of the Fiduciaries Act of 1917, a new survival statute was introduced, providing that where no action had been started by the decedent during his lifetime, his personal representative could initiate such action on behalf of the estate. This latter provision was soon declared unconstitutional because of a defect in its title, but was later corrected and re-enacted in what is known as the Survival Act of 1937. Both sections 35(a) and 35(b) of the Fiduciaries Act of 1917 have been incorporated in the Fiduciaries Act of 1949, PA. STAT. tit. 20, §§ 320.601 to 320.603 (1950). See also Montgomery & Marshall, A Survey of the Pennsylvania "Wrongful Death" and "Survival" Statutes, 25 PA. B. Ass'n Q. 284 (1954).

The relevant provisions of the Fiduciaries Act of 1949 are sections 320.601 to 320.603.

Section 320.601 provides:

All causes of action or proceedings, real or personal, except actions for slander or libel, shall survive the death of the plaintiff or of the defendant, or the death of one or more joint plaintiffs or defendants.

Section 320.602 provides in pertinent part:

(a) The personal representative of a deceased party to a pending action or proceeding may become a party thereto.

(d) [H]e shall have all the rights and liabilities of a party to the action or proceeding.

Section 320.603 provides:

An action or proceeding to enforce any right or liability which survives a decedent may be brought by or against his personal representative alone or with other parties as though the decedent were alive.

The first of these is a surviving action. This action is begun by an injured party prior to his death and is continued by his personal representative subsequent to his death. Thus, this continuation may be characterized as "survival of suit." Recovery under the survival statutes is for loss due to injury and not to death, and the institution of an action by the decedent prior to his death acts as a bar to a later action brought under the Death Act. The institution of such an action also acts as a bar to a separate and distinct action being brought by the decedent's personal representative; that is, the personal representative can continue the action already brought, but cannot institute a different action for the same injury.

A true survival action is one begun by the decedent's personal representative after the decedent's death to recover damages for the injuries and loss sustained by the decedent. This survival action may be characterized as "survival of cause of action," since it is the cause of action, and not the suit, which survives the decedent. The damages recovered under either situation, "survival of suit" or "survival of cause of action," go to the decedent's estate. It is important to note that while both a wrongful death action and a survival action grow out of the same injury, the cause of action will survive.

19. The Incollingo court suggests that the phrases "survival of suit" and "survival of cause of action" to distinguish the two types of survival situations. 444 Pa. at 304, 282 A.2d at 227. In this Note, the term "survival of suit" will be used synonymously and interchangeably with surviving action; and "survival of cause of action" will be used interchangeably with survival action.
25. Fantazis v. Fidelity & Deposit Co., 369 Pa. 221, 224-25, 85 A.2d 421, 423 (1952); Funk v. Buckley & Co., 138 Pa. Super. 586, 591, 45 A.2d 918, 921 (1946). This should be contrasted to recovery made in a wrongful death action, in which case the money would not become part of the decedent's estate but would be compensation to the statutorily designated persons. Frazier v. Oil Chem. Co., 407 Pa. 78, 81-82, 179 A.2d 202, 205 (1962). Since the sum recovered in a wrongful death action is not an asset of the estate, the Orphans' court has no jurisdiction to act over the distribution of money recovered. See Chapman Estate, 40 Pa. D. & C. 2d 601 (1966). Exclusive jurisdiction is in the court of Common Pleas. Usner v. Duesmith, 346 Pa. 494, 495, 31 A.2d 149, 150 (1943). In a survival action, however, the sum recovered does become part of the decedent's estate, and the Orphans' Court does have exclusive jurisdiction over the amount recovered. Fisher v. Dye, 386 Pa. 141, 145, 125 A.2d 472, 476 (1956); See Burns v. Goldberg, 210 F.2d 646, 650 (3d Cir. 1954); Pozzuolo Estate, 433 Pa. 185, 192-93, 249 A.2d 540, 544-45 (1969) (orphans' court lacked jurisdiction where administrator of decedent's estate averred that the only assets to be distributed were proceeds from a wrongful death action).
26. The Pennsylvania Constitution prohibits any statutory limitation on the amount which can be recovered in a death or survival action. Pa. Const. art. 3, § 18. In this sense, the phrase "survival action" should be limited to the concept of "survival of cause of action," for if a surviving action is brought this precludes a wrongful death action or a new and distinct survival action by the personal representative.

Though the causes of action created by the wrongful death and survival statutes are dissimilar in nature, they must nevertheless be tried together. The Pennsylvania rules of civil procedure, adopted in conformity with the court's
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decedent, they are separate, and may be brought simultaneously.

Prior to 1948, the Supreme Court of Pennsylvania maintained that the same amount of damages are recoverable in a "survival of suit" situation as would have been recoverable by the decedent had he lived through the time of judgment. Thus, in a "survival of suit" action, recovery could be had for the pain and suffering of the decedent from the time of injury to the time of death, as well as the present worth.


29. Of course, where death is instantaneous, there are no damages for pain and suffering. See Fisher v. Dye, 386 Pa. 141, 146 n.2, 125 A.2d 472, 475 n.2 (1956).

30. Present worth is the amount which, invested at the legal rate of interest, would be sufficient to equal the decedent's periodic earnings during his life expectancy. Damages awarded at trial should be reduced to present worth since a lump sum initially invested would be worth more than a number of later received lump sums of equal total amount. For a detailed discussion of the concept of present worth and its mathematical application, see McSparran v. Pennsylvania R.R., 238 F. Supp. 130 (E.D. Pa. 1966). A more general analysis of the concept can be found in Bernstein, Damages in Personal Injury and Death Cases in Pennsylvania, 23 Pa. Ann.Q. 9, 13-15 (1951), and Montgomery & Marshall, supra note 16, at 290-92. Despite the difficulties involved in the application of the present worth concept, the courts have warned against excessive overlapping of damages in such situations. See, e.g., Haddigan v. Harkins, 304 F. Supp. 173, 178 (E.D. Pa. 1969), vacated, 441 F.2d 844 (3d Cir. 1970).


33. Of course, where death is instantaneous, there are no damages for pain and suffering. See Fisher v. Dye, 386 Pa. 141, 146 n.2, 125 A.2d 472, 475 n.2 (1956).

34. The legal rate of interest, which is 6 per cent in Pennsylvania, should be used in reducing the damages awarded to present worth. Murray v. Philadelphia
of likely future earnings through the period of the decedent's life expectancy, undiminished by the deceased's projected maintenance costs.

In *Pezzulli v. D'Ambrosia*, the court maintained that this same measure of damages should also be applied in "survival of cause of action" situations. In *Pezzulli*, a twelve year old boy was fatally injured by the defendant's truck. Subsequent to his death, his father brought a wrongful death action and a survival action, the latter under the Survival Act of 1937. Thus confronted with a "survival of cause of action" case, the court said that the damages should be the same as in "survival of suit" situations, with no deduction for projected maintenance costs.

In 1948, the court was again confronted with a "survival of cause of action" situation in *Murray v. Philadelphia Transportation Co.* In *Murray*, an infant was hit by the defendant's streetcar and died immediately. On the issue of damages in the survival action, brought by the decedent's administrator, the court rejected what it had said several years earlier in *Pezzulli*, and held that in a "survival of cause of action" suit, the damages should be reduced by the amount the decedent would probably have expended on his personal maintenance had he lived. The court did not specify, however, what constituted maintenance expenses, nor was it clear as to whether the damages in "survival of suit" situations should also be reduced by the decedent's personal maintenance costs.


31. The fact that death has occurred in the surviving action, as opposed to an action in which the plaintiff is still alive, means that the diminution in earning power is total. See Pezzulli v. D'Ambrosia, 344 Pa. 643, 647, 26 A.2d 659, 661 (1942).
34. Id. at 649, 26 A.2d at 662.
36. 344 Pa. at 649, 26 A.2d at 662.
38. 359 Pa. at 74, 58 A.2d at 325.
39. In the majority opinion, Justice Linn used the words "cost of maintenance" interchangeably with "living expenses," but did not state that they were synonymous, nor did he define either term. 359 Pa. at 74, 58 A.2d at 325. The court in *Pezzulli* rejected the theory that recovery should be limited to "probable accumulations" of the decedent's estate, i.e., the present worth of what would be left to creditors, legatees and heirs. The court reasoned that the cost of maintenance does not include all of
Three years later, in *Radobersky v. Imperial Volunteer Fire Department*[^40], the court temporarily cleared up the water *Murray* had muddied by distinguishing "survival of suit" and "survival of cause of action" situations with regard to the measure of damages. In *Radobersky*, a husband and wife sued for injuries suffered in a collision between their car and the defendant's fire truck. Subsequent to the institution of the suit but prior to trial the husband died and his executrix was substituted for him to continue the suit. Faced with the question of the proper measure of damages in the "survival of suit" action before it, the court held that damages should include the prospective loss of gross earnings undiminished by the amount the decedent would have expended on his own personal maintenance.[^41] The *Murray* rule, which allowed for the deduction of personal maintenance expenses, was held to apply only to "survival of cause of action" cases, where suits are instituted after the decedent's death by his personal representative or executor.[^42]

However, twenty years after *Radobersky*, the *Incollingo* court recognized the inherent inconsistency in the coexistence of the net earnings rule of *Murray* (i.e., projected future earnings diminished by maintenance costs) and the gross earnings rule of *Radobersky* (i.e., projected future earnings undiminished by maintenance costs), and expressly overruled *Radobersky*, adopting *Murray* as the rule in both "survival of suit" and "survival of cause of action" situations.[^43] In the majority opinion, Justice Pomeroy stated:

> [W]e hold that in all survival actions, damages are properly to be measured by decedent's pain and suffering and loss of gross earning power from the date of injury until death, and loss of earning power less personal maintenance expenses from the time of death through decedent's estimated working lifespan.[^44]

[^40]: 368 Pa. 235, 81 A.2d 865 (1951).

[^41]: *Id.* at 242, 81 A.2d at 868-69.

[^42]: 444 Pa. at 309, 282 A.2d at 229. Six years earlier the court had been asked to consider whether *Radobersky* and *Murray* were inconsistent, but it declined to do so because the question was not raised in the lower court. See *Evans v. Philadelphia Transp. Co.*, 418 Pa. 567, 579-80, 212 A.2d 440, 446 (1965).

[^43]: 444 Pa. at 309, 282 A.2d at 229. In *Skoda v. West Penn Power Co.*, 411 Pa. 323, 191 A.2d 822 (1963), an action was brought under a survival statute. The court held that in computing damages, the amount of the decedent's earnings from the time of injury until trial should be reduced by the amount he would have contributed to his family. *Id.* at 335, 191 A.2d at 829. It is submitted that there was never any foundation for such a holding and that the language of *Incollingo* properly overrules it.

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The court indicated that the primary issue before it was whether the two disparate rules of damages should continue side by side or whether one of them should properly be discarded. It did not question the propriety of the lower court’s application of the *Radobersky* rule to the facts of the case, since from the time *Radobersky* had been decided, the court had uniformly applied its rule to all “survival of suit” situations.

The appellants in *Incollingo* argued that the distinction between the two separate measures of damages was unjustifiable and that there should be one uniform rule for both “survival of suit” and “survival of cause of action” situations — the net earnings rule of *Murray*. They argued that damages under the gross earnings rule of *Radobersky* were excessive and in effect punitive. On the other hand, the appellees urged the court to apply the gross earnings rule of *Radobersky* to the present case, since, like *Radobersky*, it involved a “survival of suit” action. The appellees further urged that, should the court adopt a single measure of damages for both “survival of suit” and “survival of cause of action” cases, it should be the gross earnings rule. Finally, it was the appellees’ contention that in the event the court should adopt the *Murray* rule, it should not be applied in the present case but given only prospective application.

The court, while analyzing the judicial precedent on the issue of damages, noted that *Murray* was in accord with *Pezzulli* only to the extent that both indicated that the measure of damages should be the same in both “survival of suit” and “survival of cause of action” situations. In *Pezzulli*, the court had allowed the cost of maintenance to be deducted from the amount of prospective earnings, but only because the plaintiff in the case did not object to the judge’s instructions to the jury on the amount of damages to be awarded. The court could see no reason why an amount, recoverable by the plaintiff had he lived, should be reduced on account of his death. Indeed, the *Pezzulli* court made it very plain that had the plaintiff objected to the instructions, he would have received gross earnings undiminished by the decedent’s maintenance costs. The *Murray* court, however, relegated this real rule of *Pezzulli* to mere dictum, while emphasizing that the jury verdict based on net earnings had been

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45. 444 Pa. at 301, 282 A.2d at 225-26.
47. 444 Pa. at 302, 282 A.2d at 226.
48. 344 Pa. at 649, 26 A.2d at 662.
49. *Id.* at 648, 26 A.2d at 661-62. Justice Stern reasoned:

> Why should the amount of damages which would have been recoverable by him be reduced by the death occasioned by his injuries, so that his cause of action, when assigned by act of law to his executor or administrator, is for a smaller recovery than it was when the right vested in him during his life?

*Id.* at 648. 26 A.2d at 662.
50. *Id.* at 649, 26 A.2d at 662.
upheld — completely ignoring the true reason for the decision. Murray reasoned that when the plaintiff brings an action, but dies prior to trial, he no longer has a reason to be compensated for future maintenance expenses which will never arise. Therefore, his administrator should not be able to recover anything for his maintenance during his life expectancy. The Murray court believed that such reasoning is equally applicable to an action brought by the administrator, since in this case as well there would never be future maintenance expenditures made by the decedent. However, in his dissent in Murray, Justice Stern expressed the belief that once judicial interpretation has been given to a statute, and the legislature does not act to amend it, it must be assumed that the meaning given by the court expresses the legislative intent. He noted that subsequent to Pezzulli there had been three sessions of the legislature and no action had been taken to amend the survival statute. He also maintained that even if the court should characterize the rule in Pezzulli as dictum, subsequent decisions nevertheless had converted it into established principle.

The Incollingo court, while recognizing the conflict between Pezzulli and Murray, nonetheless believed that the Murray court intended its decision to apply to both “survival of suit” and “survival of cause of action” situations. The general tone of the Murray holding, as well as Justice Stern’s dissent, tend to substantiate this view. Incollingo recognized, however, that Radobersky had distinguished Murray and limited Murray’s applicability to “survival of cause of action” situations. In considering the problems which result from “survival of suit” and “survival of cause of action” cases being governed by two separate measures of damages, the court looked to Justice Stern’s dissent in Murray, which reasoned that the measure of damages awarded in a suit would vary substantially depending on whether or not the plaintiff filed the complaint before the moment of death. The court felt that it could not allow these two rules of damages to continue together any longer, when both “are clearly intended to compensate the decedent’s estate for precisely the same injury.”

51. 359 Pa. at 73, 58 A.2d at 325.
52. Id. at 73-74, 58 A.2d at 325.
53. Id. at 80-81, 58 A.2d at 328 (dissenting opinion).
54. Id. at 77, 58 A.2d at 327 (dissenting opinion).
55. Id. at 80, 58 A.2d at 328 (dissenting opinion).
56. In his dissent, Justice Stern warned that if the present decision were to be interpreted as awarding a smaller measure of damages in a “survival of cause of action” case than in a “survival of suit” case:
[S]uch an escape would be merely from Scylla to Charybdis, for the wholly deplorable consequence would be to restore the practice which prevailed before . . . [the statutory authorization of a “survival of cause of action”] of an unseemly race to the prothonotary’s office to have a writ issued before the victim of the accident passed away so as to reap the fruit of a larger measure of damages.
359 Pa. at 80, 58 A.2d at 328 (dissenting opinion).
57. 444 Pa. at 306, 282 A.2d at 228.
In formulating the appropriate rule of damages, the court determined that the damages should compensate for the full extent of the injury and should be exactly equivalent to the amount of the loss. Since in both “survival of suit” and “survival of cause of action” cases the decedent’s estate and not the decedent himself is the recipient of the amount recovered, the important question is what damages fairly compensate the estate. With this perspective, the estate should not be entitled to greater damages because a complaint was filed five minutes before death as opposed to five minutes after death. The reality of the situation in a “survival of suit” case, as in a “survival of cause of action” case, is that no expenditures will ever have to be made for the decedent’s personal maintenance. To compensate the estate for these non-existent expenses would be to award damages where none existed. Therefore, to be properly compensatory, the court concluded that an award of damages must be reduced by the projected amount of the decedent’s maintenance throughout his life expectancy.

Having determined that net earnings was the proper measure of damages in all survival situations, the court still faced the problem of whether or not it should apply that rule in the instant case. The appellee in *Incollingo* successfully contended that, should the court adopt the Murray net earnings rule, it should do so prospectively. The court, upon

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60. 444 Pa. at 308, 282 A.2d at 229.
61. The constitutionality of this procedure was established by the Supreme Court of the United States in *Great N. Ry. v. Sunburst Oil & Ref. Co.*, 287 U.S. 358 (1932). *Sunburst* involved the interpretation of a Montana statute and the prospective overruling of a prior decision as to the meaning of the statute. The question before the Court was whether it was a denial of due process for a court to adhere to a precedent in the case before it, yet state its intention not to follow this precedent in the future. Justice Cardozo, who delivered the opinion in *Sunburst*, indicated that an individual state would determine what policies it would follow in regard to overruling, and this would largely depend on the juristic philosophy of its judges. *Id.* at 365. He also made it clear that it made no difference whether the case was at common law or involved statutory construction. *Id.*

The Supreme Court has also indicated that any overruling of a case must be done in “a manner that will not prejudice those who might have relied on it.” *James v. United States*, 366 U.S. 213, 221 (1961). The Court has warned that in particular cases there might be “equities that would warrant only prospective application” of the enunciated rule. *Simpson v. Union Oil Co.*, 377 U.S. 13, 24-25 (1964).

Much has been said by the commentators as to the virtues and vices of prospective overruling. In 1924, Robert von Moschzisker, the Chief Justice of the Supreme Court of Pennsylvania, maintained that such a method of overruling was objectionable for three basic reasons. First, it reduced any rule formulated by the court to mere dicta. Second, it discouraged appeals since it provided no benefit to the party challenging an existing rule; and third, it amounted to legislation by the courts. *See von Moschzisker, Stare Decisis in Courts of Last Resort, 37 Harv. L. Rev. 409, 426-27 (1924)*. It has also been argued that such a device makes it easier for a court to overrule a prior decision in any given case. *See Note, The Effect of Overruled and Overruling Decisions on Intervening Transactions, 47 Harv. L. Rev. 1403, 1412 (1934)*. One commentator met von Moschzisker’s arguments, saying that only holding is really no more than a prophecy as to how the court will hold in the future, and that prospective holdings, as prophecies, are entitled to be given greater significance that remarks made in passing. It was submitted that appeals will not be discouraged to any appreciable extent, since businesses would still find it worthwhile to challenge an existing rule even if they would not reap immediate benefits. *See Note, Prospective Operation of Decisions Holding Statutes*
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considering this contention, realized that to remand the case, even for the limited purpose of measuring damages, would necessitate an extensive and expensive duplication of evidence. This could have been avoided had the appellants requested a special finding at an earlier stage in the proceedings to determine the portion of damages that the jury allocated to the decedent's probable future earnings. Had that been done, all that would have been necessary on remand would be to determine the decedent's projected maintenance expenses.62 Weighing the equities involved, the court held that the net earnings measure of damages did not apply in the case at bar, but would apply to cases where the trial is commenced subsequent to the date of its decision.63 Justice Roberts dissented to the majority's prospective overruling of the gross earnings rule of Radobersky, and maintained that the new rule should have been applied in the instant case.64 His reasons were based on two of the common objections to prospective overruling:65 (1) that prospective overruling discourages parties from taking an appeal; and (2) that it reduces the rule of a court to dictum. In response to the former argument, the majority believed that prospective overruling would not have a chilling effect on appellate proceedings so long as the procedure remained the exception and not the rule.66 In answer to the latter argument, they asserted that the Incollingo holding "will be acted upon as any other decision of this Court."67 In this regard, a comparison of Incollingo and Pezzulli raises an interesting issue. Both cases held a single rule of damages as being applicable to all future survival actions. However, while Pezzulli was mistakenly limited, the Incollingo court seemed determined to avoid a similar fate, and made it quite clear that the net earnings rule, despite its prospective effect, is now the law in Pennsylvania.

From a practical standpoint, in computing damages in any survival action, there should be no inclusion of money which would have gone toward the maintenance expenses of the decedent. Such expenses will never be a burden on the estate, since they will never be effectuated. Thus, to include them in the amount of recovery in "survival of suit" actions

Unconstitutional or Overruling Prior Decisions, 60 HARV. L. REV. 437, 439-40 (1947). As to von Moschzisker's third argument, it does not seem that prospective overruling is any more of a usurpation of legislative powers than is overruling where the new rule is applied to the case at bar. See Kocourek & Koven, Renovation of the Common Law Through Stare Decisis, 29 ILL. L. REV. 971, 995-96 (1935). For an excellent discussion of prospective overruling and the arguments for and against it, see Levy, Realist Jurisprudence and Prospective Overruling, 109 U. PA. L. REV. 1 (1960).

63. Id. at 311, 282 A.2d at 230.
64. Id. at 311, 282 A.2d at 231 (dissenting opinion).
66. 444 Pa. at 310-11, 282 A.2d at 230.
67. Id. at 310, 282 A.2d at 230.
would be to award an amount over and above the economic loss incurred by the estate. Professor McCormick has observed:

Since the premature death has not only cut off the prospective earnings of the deceased, but has cut off his living expenses also, it is difficult to justify the award of gross earnings as a measure of the loss caused by the death . . . .\(^{68}\)

The net earnings rule, therefore, as originally suggested by Murray and finally subscribed to by Incollingo, more closely represents the loss suffered by the estate and is more accurately compensatory in both "survival of suit" and "survival of cause of action" cases. In this respect, the Incollingo decision has been long overdue.

Fred B. Fromhold

FEDERAL SECURITIES REGULATION — SECTION 13(d) — SHAREHOLDER GROUP UPON FORMATION MUST IDENTIFY MEMBERSHIP AND PLANS — CORPORATE ISSUER HAS STANDING TO SEEK SHAREHOLDER COMPLIANCE WITH DISCLOSURE REQUIREMENTS.

_GAF Corp. v. Milstein_ (2d Cir. 1971)

GAF Corporation sought to enjoin the Milstein family, which collectively owned 10.25 per cent of the outstanding GAF convertible preferred stock, from using its ownership as a power base to gain control of GAF.\(^1\) The company based its claim for relief upon the Milsteins' alleged violation of sections 13(d) and 10(b) of the Securities Exchange Act of 1934 (the "Act").\(^2\) GAF alleged that under section 13(d)\(^3\) the Milsteins


\(^1\) GAF's specific prayer was for an injunction to prevent the Milsteins from acquiring any shares of any class of GAF stock, from soliciting proxies, from voting any shares acquired during their combination and from otherwise acting to further the alleged conspiracy. _GAF Corp. v. Milstein_, 453 F.2d 709 (2d Cir. 1971), _cert. denied_, 40 U.S.L.W. 3511 (U.S. April 25, 1972).


Any person who, after acquiring directly or indirectly the beneficial ownership of any equity security of a class which is registered pursuant to section 78l [Securities Exchange Act of 1934 § 12] of this title . . . is directly or indirectly the beneficial owner of more than 10 per centum [now five per cent] of such class shall, within ten days after such acquisition, send to the issuer of the security at its principal executive office, by registered or certified mail, send to each exchange where the security is traded, and file with the Commission, a statement containing such of the following information, and such additional information, as the Commission may by rules and regulations prescribe . . . .

\(3\) When two or more persons act as a partnership, limited partnership, syndicate, or other group for the purpose of acquiring, holding, or disposing of
were required to file a schedule 13D, disclosing information relevant for investor decisions,\(^4\) within ten days of the formation of their group, and that the subsequent filing of the Milsteins’ schedule 13D was untimely.\(^8\) In the second count of its complaint, GAF alleged that the Milsteins’ schedule 13D contained deliberately false and misleading statements of fact. GAF maintained that its shareholders had been, and would continue to be, irreparably harmed unless the Milsteins were enjoined from their activities.\(^8\) The Milsteins moved for dismissal of the complaint under rule 12(b)(6)\(^7\) for failure to state a claim upon which relief could be granted.\(^8\)

The district court granted the Milsteins’ rule 12(b)(6) motion on both counts of the complaint. As to the first count, the court held that

\(^4\) Schedule 13D requires: (1) identification of the parties making the purchase and background information on each for the preceding ten years; (2) identification of the source and type of financing used in the purchase; (3) identification of the purposes of the purchase and, if one purpose is to gain control, a statement of plans as to actions after acquiring control; (4) identification of prior holdings of all securities of the same class; and (5) identification of any arrangements with other persons with respect to the issuer’s securities. The schedule must be filed with the Securities and Exchange Commission, sent to each exchange where the security is traded, and sent to the issuer of the security. SEC Schedule 13D, 17 C.F.R. § 240.13d-101 (Supp. 1971).

\(^5\) The Milsteins filed a schedule 13D on September 24, 1970, in which they disclaimed any legal obligation under section 13(d). 453 F.2d at 714. In its complaint, GAF failed to allege the exact time of the formation of the Milstein group, a necessary allegation to determine if the ten day filing period had elapsed and if, in fact, the filing was untimely. However, since the case was before the Second Circuit on appeal from the denial of a rule 12(b)(6) motion, the court was bound to accept as true the allegation that the group’s acquisition, by its formation, of the convertible preferred shares occurred after the effective date of the Williams Bill and more than ten days prior to the actual filing. Id. at 715. However, GAF’s allegation might not have been an accurate statement of the actual situation. The Milsteins received the entire 10.25 per cent of GAF convertible preferred shares when the Rubberoid Company was merged into GAF in May 1967. Id. at 713. As a result, the Milsteins could urge at trial that the group had been formed at or before the merger, a full year prior to the bill’s adoption. Since it was conceded that section 13(d) is not retroactive (id. at 718 n.17), the Milsteins would not have been required to make a section 13(d) filing.\(^7\) Since GAF had prevailed over the Milsteins in a 1971 proxy contest, the latter asserted that the entire controversy was moot, the “injury” from non-disclosure having been cured by the proxy victory. The court, however, was obliged to accept as true the allegation that the Milsteins’ conspiracy continued. Id. at 714 n.11. Although the court indicated that the existence of injury would be weighed at the trial on the merits in determining what, if any, relief should be granted, it probably realized that acceptance of the mootness defense would remove any effective sanction from section 13(d). That is, if a subsequent filing or extraneous circumstances could render moot a section 13(d) claim, there would be little reason to disclose until a complaint were filed. Underlying this realization is the theory that the public interest demands full compliance with securities regulations, notwithstanding that the particular matter in controversy may have long since become public knowledge. A similar intimation was made in Sisak v. Wings & Wheels Express, Inc., [1970-71 Transfer Binder] CCH Fed. Sec. L. Rep. ¶ 92,991, at 90,670 (S.D.N.Y. Sept. 9, 1970). See note 24 infra.\(^7\) Fed. R. Civ. P. 12(b)(6).\(^8\) 453 F.2d at 712. In the alternative, the Milsteins sought summary judgment. Fed. R. Civ. P. 56.
the mere formation of a group of shareholders, with a view to seeking control, was not a reportable event under section 13(d). With respect to its dismissal of the second count, the district court held that GAF, as an issuer, lacked standing under section 10(b) to assert the claim of false and misleading statements. On GAF’s appeal, the United States Court of Appeals for the Second Circuit reversed, holding as to count one that a shareholder group collectively owning ten per cent (now five per cent) of a class of an issuer’s outstanding securities and formed for the purpose of acquiring, holding or disposing of said securities must make a disclosure filing under section 13(d) upon formation. As to count two, the Second Circuit held that the issuer of the securities has standing under section 13(d) to sue for injunctive relief for either an untimely or a false section 13(d) filing. GAF Corp. v. Milstein, 453 F.2d 709 (2d Cir. 1971), cert. denied, 40 U.S.L.W. 3511 (U.S. April 25, 1972).

In analyzing a judicial opinion involving statutory interpretation, a knowledge of the statute’s historical context is necessary. The main legislative purpose in enacting the Securities Exchange Act of 1934 was “to insure the maintenance of fair and honest markets . . . in . . . [securities] transactions.” However, the wave of cash tender offers in the mid-
sixties had demonstrated that the then existing market regulations did not provide investors with sufficient or timely information upon which to intelligently base their investment decisions. This inadequacy of information was especially experienced when substantial holders of securities decided to acquire additional shares in a target company or when a tender offer was made. As a result, Congress added the Williams Bill to the Act in 1968. Basically, the Bill required disclosure of certain information by any person who, through acquisition, became an owner of ten per cent of a class of security, or through a tender offer would become such an owner upon the offer’s consummation. The Bill was intended to supplement the disclosure provisions of the Act’s section 16, as that section did not require groups owning ten per cent or more to file, nor did it require filing on the part of a future owner, as a tender offeror might be.

Prior to the instant case, section 13(d) had been the subject of only occasional litigation. The question of when a filing was required under the section was first raised in Bath Industries, Inc. v. Blot.


The cash tender offer or tender offer consists of a bid to buy the shares of a company, at generally higher-than-market prices. If certain conditions are met, the person making the offer obligates himself to purchase, at the bid price, all or a specified portion of the shares tendered by those wishing to sell. Id.

15. Id.

16. Securities Exchange Act of 1934 §§ 12(i), 13(d), 13(e), 14(d) to 14(f), 15 U.S.C. §§ 78(i), 78m(d), 78m(e), 78n(d) to 78n(f) (Supp. V, 1969), as amended, 15 U.S.C. §§ 78(i), 78m(d), 78m(e), 78n(d) to 78n(f) (1970). See note 3 supra.


(a) Every person who is directly or indirectly the beneficial owner of more than 10 per cent of any class of any equity security . . . or who is a director or an officer of the issuer of such security, shall file . . . within ten days after he becomes such beneficial owner, director, or officer, a statement with the Commission . . . of the amount of all equity securities of such issuer of which he is the beneficial owner . . .

20. 113 CONG. REC. 24664 (1967) (remarks of Senator Williams).

21. 427 F.2d 97 (7th Cir. 1970). Aside from the question of timing, the adequacy of the disclosure made in a schedule 13D had been considered in cases involving tender offers. Due to the tender offer context, the issuer was granted standing to assert the inadequacy. Susquehanna Corp. v. Pan American Sulphur Co., 423 F.2d 1075 (5th Cir. 1970); Electronic Specialty Co. v. International Controls Corp., 409 F.2d 937 (2d Cir. 1969).

The information disclosed by the Milsteins in the instant case apparently fulfilled the schedule 13D requirements; GAF had asserted, rather, that it was false and misleading. GAF Corp. v. Milstein, 453 F.2d 709, 712 (2d Cir. 1971). Indeed, it is arguable that the Milsteins disclosed more information than is required. Schedule 13D does not expressly require the filing parties to state any “present intention as to whether or not any additional securities of [the issuer] (might) be acquired by them in the future . . . ” Id. at 714. Any control aspirations must be disclosed (see note 4 supra), but, by making the above statement, the Milsteins may have exceeded this requirement. In this respect, the group’s alleged purchase of 1.6 per cent of the outstanding GAF common shares could indicate an intention contrary to that expressed in the gratuitous statement. In fact, this was a basis for GAF’s claim of false filing. Id. at 721 n.23.
United States Court of Appeals for the Seventh Circuit interpreted section 13(d) as requiring a group to file within ten days of an agreement among its members "to act in concert to acquire additional shares," reasoning that this interpretation was consonant with the legislative intent as expressed in the Williams Bill. Soon after Bath, conflicting holdings as to the meaning of section 13(d) were enunciated in two cases involving testamentary bequests of sizeable blocks of securities. In Sisak v. Wings & Wheels Express, Inc., the District Court for the Southern District of New York ruled that an estate's "receipt" of securities was an "acquisition" within the meaning of the section, triggering the filing requirement. However, in Ozark Air Lines, Inc. v. Cox, the District Court for the Eastern District of Missouri held that a trust's "receipt" of shares was not an "acquisition" for which the section demanded a filing. The only other judicial interpretation of section 13(d), apart from a tender offer context, was made in

22. 427 F.2d at 109 (emphasis supplied by the court). In Bath, the members of a group individually owned less than ten per cent of the outstanding shares, but collectively owned substantially more than ten per cent. Since no schedule 13D was filed until after litigation had begun, the court held that the filing was untimely, ostensibly because a filing had been due within ten days of the group's formation in pursuit of acquiring additional shares. However, the court actually based its finding of untimeliness upon the fact that a member of the group had purchased additional shares subsequent to the group's formation, and that a filing was required within ten days of that purchase. The Bath court recognized the difficulty in enforcing the interpretation that a filing was needed upon formation. Thus, it was further held that upon the purchase of additional shares by a member of a group, there arose a "rebuttable presumption" of the formation of that group, and that the purchase was made pursuant to an agreement by the group to acquire additional shares. From this it is evident that the theory of the holding was altered by the facts supporting it; i.e., the court desired to require filing upon formation, but recognized that the formation of the group could only be pinpointed by a subsequent purchase by the group. Therefore, disclosure was only required within ten days of the purchase. Id. at 110.

23. Id. at 109. See text accompanying note 52 infra.

24. [1970-71 Transfer Binder] CCH Fed. Sec. L. Rep. ¶ 92,991, at 90,666 (S.D.N.Y. Sept. 9, 1970). The suit in Sisak had been brought by shareholders of an air freight company against an estate into which had passed the decedent's holdings of 31 per cent of the company's outstanding shares. The estate did not file a schedule 13D until some 18 months after receipt of the securities, when it petitioned the Civil Aeronautics Board for permission to sell the securities to another air freight company. Id. The shareholders alleged that the filing was untimely and inadequate, and on that ground, the court issued a preliminary injunction pending a CAB resolution of the merger aspects of the transfer. Id. at 90,670.

25. Id. at 90,668.

26. 326 F. Supp. 1113 (E.D. Mo. 1971). In Ozark, a non-profit hospital was the beneficiary of a trust containing over 16 per cent of the issuer's outstanding common stock. The hospital did not file a schedule 13D until several months after the Civil Aeronautics Board granted it permission to vote the shares. This filing was held not to have been untimely, on the ground that the section's purpose was to regulate acquisitions which had the "effect of changing or influencing the control of the issuer or affecting the market." Id. at 1117. Since a bequest only changes the name of the owner of the shares and does not involve any market activity, the hospital's acquisition did not require a section 13(d) filing.

27. Id. The Ozark court was obviously influenced by the lower court decision in GAF and, in fact, expressly adopted the analysis formulated by Judge Pollack. Id. at 1118.

28. Also enacted in the Williams Bill were provisions regulating tender offers. Section 14(d) requires a disclosure filing (a schedule 13D) and section 14(e)
Grow Chemical Corp. v. Uran, wherein the court held that a purchaser of securities could maintain an action under section 13(d) for the failure of a more-than-ten per cent beneficial owner to file a schedule 13D.

To support its holding that the formation of a group owning more than ten per cent of a class of securities triggers the filing requirements of section 13(d), the GAF court first examined the language of the statute itself. Recognizing that section 13(d) and its definition of "person" were crucial to the GAF complaint, the court concluded that the Milsteins "constituted a 'group' and thus, as a 'person,' were subject to the provisions of section 13(d)." Then, confronted with the absence of a statutory definition of "acquire," the court resorted to a dictionary definition — "to come into possession (or) control." With this definition as its basis, the court concluded that:

[T]he group . . . could have gained "beneficial control" of the voting rights of the preferred stock only after its formation . . . . Manifestly . . . the group when formed [acquired] a beneficial interest in the individual holdings of its members . . . [for] "voting control of stock is the only relevant element of beneficial ownership."

In other words, the court equated acquisition with "gaining control." Since a group, upon formation, obtains control of the votes of its members, and since the court considered voting control as the only element of beneficial ownership, a group acquires beneficial ownership when formed.


30. Id. at 892. The Grow case was decided on a rule 12(b) (6) motion and, as a result, few facts were contained in the report of the case, making an assessment of its impact difficult. However, the opinion does show that the corporate plaintiff's alleged injury was that its 13 per cent purchase of securities could have been made at a lower price had the defendant filed a schedule 13D. Id. at 891.
32. The Milstein defendants consisted of a father, his married daughter, and his two sons. 453 F.2d at 714. Although there was no indication as to the individual ownership of the family's convertible preferred shares, it appeared that the two sons were the only Milsteins to purchase the common stock. Id. at 714. At a trial on the merits, such factors would be significant in establishing whether a group had actually been formed. However, since the instant proceeding was on a rule 12(b) (6) motion, the court was obliged to assume the truth of GAF's allegations, including the averment that the Milsteins had acted in concert. Thus, the assertion of section 13(d) claims may in the future effectively eliminate the use of a rule 12(b) (6) motion and automatically require a trial on the merits. Such a result would make the section a convenient tool for incumbent management to use to harass shareholders whom it sees as threats to its continued control. The GAF court recognized the danger of spurious allegations, but its suggested panacea of shareholder remedies for waste (id. at 719-20), may not provide adequate compensation for the innocent shareholders who are unable to avoid a trial on the merits.
33. Id. at 715.
34. Id. at 716 n.14. Although using "acquisition," or a form thereof, several times, section 13(d) does not define the term nor does the context reveal a particular meaning to be attributed to it. See note 3 supra.
35. Id. at 715, quoting WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 18 (1971). Although the court attempted to avoid making "'a fortress out of the dictionary,'" its success is uncertain.
36. Id. at 715-16 (citations omitted and emphasis added).
Therefore, the group is required to file under section 13(d) when formed.

This approach avoids many of the limitations of prior judicial interpretations of section 13(d)(1) and its interaction with section 13(d)(3). Moreover, the court's approach implicitly recognizes the concept of "constructive acquisition," a result which has brought the statute closer to its purported legislative purpose.

Nevertheless, the court's construction of the two sections does not cure all of the statute's imperfections. Indeed, the court's very logic could be viewed as simply an excursion in semantics, and aside from the single use of the dictionary, the Second Circuit failed to produce additional support for the definitions it attributed to key statutory words. Moreover, the court's treatment of "acquisition" appears to have glossed over the considerable difficulty that the term had given other courts. The GAF court's interpretation, while it has some justification in the statute and legislative history, cannot be considered the only one possible, for the prior contrary decisions had taken refuge in the same supporting sources.

37. The district court's interpretation had been criticized for its limiting effect. GAF had contended that requiring a filing only after an actual acquisition would make the "holding and disposing" language of section 13(d)(3) superfluous and urged that this language required a group, once formed, to file even if its purpose were merely to hold or to sell securities, 324 F. Supp. at 1069. Also, the Bath and Ozark decisions appear susceptible to similar criticism. See notes 22 & 26 supra. Although the Second Circuit's holding may have vitiated this particular objection, the court did suggest that some purposes for formation will exempt a group from a section 13(d) disclosure filing. 453 F.2d at 719. See note 94 infra.

38. In the instant case, GAF argued that when a group is formed there is a constructive conveyance of the members' shares to the group, resulting in a constructive acquisition of the stock by the group. 324 F. Supp. at 1066. Acceptance of such a concept is implicit in the reasoning of the Second Circuit in GAF. See text accompanying note 52 infra.

39. See text accompanying note 44 infra.

40. The court recognized that questions as to the extent of section 13(d)'s operation continued to exist. 453 F.2d at 719 & n.20.

41. The only other support utilized by the GAF court was the Bath definition of "beneficial ownership." Id. at 716, citing Bath Indus., Inc. v. Blot, 427 F.2d 97, 112 (7th Cir. 1970). However, the supportive value of this opinion is diminished by GAF's rejection of the Bath court's determination of the legislative purpose of section 13(d). 453 F.2d at 718.

42. Bath Indus., Inc. v. Blot, 427 F.2d 97 (7th Cir. 1970); Ozark Air Lines, Inc. v. Cox, 326 F. Supp. 111 (E.D. Mo. 1971); GAF Corp. v. Milstein, 324 F. Supp. 1062 (S.D.N.Y. 1971). See notes 22, 26 & 9 supra. It is arguable that these courts were overly concerned with the practical application of a holding which would require a filing upon formation. In this regard, the determination of the time of a group's formation would be a difficult task and conceivably an unwise use of judicial resources, particularly as in the instant case where the "group" was a family. In such a situation, the alleged conspiratorial contacts might be inseparable from normal familial relations. GAF Corp. v. Milstein, 324 F. Supp. 1062, 1069 (S.D.N.Y. 1971). These practical problems are relevant because the exact date of formation is crucial; it necessarily determines the ten day filing period, the passage of which, without a filing, gives rise to a statutory violation.

Notwithstanding the practical difficulties in applying its holding, the Second Circuit perceived that the suggested alternatives failed to focus on the real problem — "whether the individuals indeed constituted a 'group.'" 453 F.2d at 718. Moreover, the GAF court had great confidence in the ability of the district courts to fashion appropriate equitable relief should the practical difficulty actually arise in a trial on the merits. Id. at 718-19.

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Recognizing that the statute might be considered less than a "model of clarity," 43 the court demonstrated that its reading of the statutory language was justified by the "purpose" for the enactment of section 13(d). The GAF court concluded that the "purpose" was "to alert the marketplace to every large, rapid aggregation or accumulation of securities, regardless of technique employed, which might represent a potential shift in corporate control . . . ." 44 To support this conclusion, the Second Circuit cited the statute itself — section 13(d)(1)(C) 45 and section 13(d)(6)(D) 46 — and reasoned that the person filing disclose his intention with respect to the acquisition of control (section 13(d)(1)(C)) juxtaposed with the opportunity for exemption from disclosure of certain acquisitions (section 13(d)(6)(D)) indicated that Congress intended that all potential changes in control should be revealed. It is questionable whether the sections cited actually support the court's conclusion, for it is arguable that section 13(d)(1)(C) was only intended to express one of the five informational responses required in a filing 47 and was not a provision which determined the time of filing. Additionally, section 13(d)(6)(D) may have been directed toward the internal functioning of the SEC rather than being a directive as to the quantum of disclosure intended. 48

43. Id. at 716. The lower court's reasoning was somewhat tenuous in its assertion that the statute was clear. 324 F. Supp. at 1066-67. Apparently, the lower court believed that the legislative history was unreliable and chose instead to adopt a rule that could be justified by the section itself, even though the rule would not have as broad an effect as the committee reports justified. Id. at 1067. The different constructions offered by the district and circuit courts serve as a poignant example of Justice Frankfurter's discussion of the different approaches to statutory interpretation. See Frankfurter, supra note 12.

44. 453 F.2d at 717.


[1][1] If the purpose of the purchases or prospective purchases is to acquire control of the business of the issuer of the securities, any plans or proposals which such persons may have to liquidate such issuer, to sell its assets to or merge it with any other persons, or to make any other major change in its business or corporate structure.


(6) The provisions of this subsection shall not apply to—

(D) any acquisition or proposed acquisition of a security which the Commission, by rules or regulations or by order, shall exempt . . . as not entered into for the purpose of, and not having the effect of, changing or influencing the control of the issuer or otherwise as not comprehended within the purposes of this subsection.


48. The district court in GAF used a similar approach to determine what it claimed to be the congressionally-intended effect of section 13(d)(3), contrary to that asserted by the circuit court. The lower court stated that a group's intention to acquire, hold or sell securities was not the triggering factor for a section 13(d) filing, but was simply a criterion to be used to determine if a group had been formed. 324 F. Supp. at 1069. Section 13(d)(3) determined only the types of "persons" who would come within section 13(d)(1) and those persons would be required to file only "after acquiring" securities. Id.
However, stronger support for the GAF court's determination of the "purpose" of section 13(d) was found in the congressional committee reports on the Williams Bill.\textsuperscript{49} The reports stated that the Bill's general purpose was:

[To provide for full disclosure in connection with cash tender offers and other techniques for accumulating large blocks of equity securities of publicly held companies.\textsuperscript{50}]

However, they became relatively specific with respect to section 13(d):

The purpose of section 13(d) is to require disclosure of information by persons who have acquired a substantial interest, or increased their interest in the equity securities of a company by a substantial amount, within a relatively short period of time.\textsuperscript{51}

Finally, and most convincingly, the reports stated:

The group would be deemed to have become the beneficial owner, directly or indirectly, of more than 10 percent of a class of securities at the time they agreed to act in concert. Consequently, the group would be required to file the information called for in section 13(d)(1) within 10 days after they agree to act together, whether or not any member of the group had acquired any securities at that time.\textsuperscript{52}

A reading of these three passages alone would indicate that section 13(d) was intended solely "to alert the marketplace to . . . a potential shift in corporate control"\textsuperscript{53} and to require a filing upon the formation of a group.

However, the legislative history also stated, as the court conceded in a footnote, "that the [Bill] was designed for the benefit of investors and not to tip the balance of regulation either in favor of management or in favor of the person seeking corporate control."\textsuperscript{54} This passage, when considered in conjunction with the purpose of the Act as a whole,\textsuperscript{55} justifies a comparative measuring of the various interests involved. Although a purpose of the Williams Bill may be to assure disclosure of potential changes in control,\textsuperscript{56} the Bill's concentration on full disclosure should be considered

\textsuperscript{49} S. REP. No. 550, 90th Cong., 1st Sess. (1967); H.R. REP. No. 1711, 90th Cong., 2d Sess. (1968). The use of the legislative history in interpreting section 13(d) appears justifiable since the statute is unclear. However, the district court found the committee reports conflicting and thus not available to aid in construing the section. 324 F. Supp. at 1067. On the other hand, the Second Circuit found the reports to be consistent and reasoned that a failure to utilize them would shut off the only source of illumination for the statute. 453 F.2d at 716.


\textsuperscript{51} S. REP. No. 550, 90th Cong., 1st Sess. 7 (1967); H.R. REP. No. 1711, 90th Cong., 2d Sess. 8 (1968).

\textsuperscript{52} S. REP. No. 550, 90th Cong., 1st Sess. 8 (1967); H.R. REP. No. 1711, 90th Cong., 2d Sess. 8-9 (1968) (emphasis added).

\textsuperscript{53} 453 F.2d at 717.

\textsuperscript{54} Id. at 717 n.16 (emphasis added).

\textsuperscript{55} See text accompanying note 13 supra.

\textsuperscript{56} A bill's original purpose may be mellowed or lost in the statute as it is enacted. Professor Loss, a leading commentator on securities regulation, concluded that the indicated purpose of section 13(d) had not been incorporated in the statute as enacted. 453 F.2d at 717 & n.15. Moreover, a recitation of purpose which is not
in light of the Act's objective of maintaining "fair markets" without giving an undue advantage to management or insurgents. The Second Circuit resolved these conflicting interests as follows:

[W]e are well aware that it was Congress's intention primarily to protect investors in the security. [T]he statute cannot be faulted if it achieves this goal without a question, and as a by-product management also becomes aware of those seeking to seize control of the corporation.57

The lower court in GAF made an equally-valid but different resolution of the balance,58 limiting disclosure to situations in which there is substantial market activity (where a group makes purchases beyond the two per cent exemption), a circumstance in which the investor has a great interest. Requiring disclosure for his protection in such circumstances would exceed any advantage incumbent management might receive there-from in resisting a control fight. On the other hand, if the market activity is slight or non-existent (where a group makes small purchases or holds for investment), a circumstance in which the investor has little interest, requiring disclosure would only serve to aid incumbent management and might deter legitimate attempts to influence company policy. In the former situation, the interest in protecting investors and maintaining market integrity would outweigh any advantage to management, which, accordingly, would not be excessive. In the latter situation, there would be an advantage only to management since the investor would receive minimal additional protection and market integrity would be jeopardized. Thus, the alternative resolution would effectuate the purpose of the Williams Bill only in conjunction with the purpose of the Act as a whole. However, the more important issue is not which of the proffered resolutions is correct, but whether the court is the proper body to make the resolution. There would be no abuse of judicial restraint in awaiting a legislative declaration of the priorities.59

If the GAF court's determination of the purpose of section 13(d) is valid, it serves as a legitimate basis for the holding that section 13(d) requires a filing upon the formation of a group. Indeed, the final argument advanced by the court was based upon this determination of purpose. The court urged that a different definition of the purpose would nullify the section's effectiveness. If the statute does not require disclosure upon formation so as to afford investors the opportunity for timely assessment apparent on the face of the statute may, if controlling, deprive the public of adequate notice of what is required to comply with the statute. 324 F. Supp. at 1067-68. Finally, as Judge Pollack admonished, "we do not legislate by committee report, we legislate by statute." Id. at 1068. See generally Frankfurter, supra note 12.

57. 453 F.2d at 718 n.19.
58. 324 F. Supp. at 1070.
59. A counterargument might be that a wrong should not go unremedied. However, since a trial on the merits would be needed to prove the existence of the wrong, a wise course might be to avoid formulating a broad and sweeping rule until a more definite record is presented.
of "the potential for changes in corporate control and [adequate valuation of] the company's worth," the raison d'être of the section would go unfulfilled. Thus, the court utilized its version of the legislative purpose for section 13(d) to justify its version of the meaning of the statute. Although there is a basis for this maneuver, the entire argument appears cyclical. The court's conclusions are dependent upon each other and thus, the argument loses its effectiveness if either is incorrect. Moreover, it is questionable that even the immediate holding will give full effect to the alleged statutory purpose.

In this regard, some illustrations may indicate the necessity for continued concern over the effectiveness of the section's disclosure requirement. First, the Second Circuit's interpretation still leaves a considerable amount of non-market activity exempt from the filing requirements of section 13(d). For example, shareholders owning less than five percent of a corporation's outstanding shares could form a group without having to file a schedule 13D until their collective ownership exceeded the threshold level. As a result, a well-organized group with ample resources could substantially increase its holdings by market purchases or by privately-negotiated sales within the ten day grace period established by section 13(d)(1). Therefore, a potential or, perhaps, an actual change in control could arise without a violation of the disclosure requirements. Clearly, the present holding would not aid the investor in evaluating his position in this situation, for the "potential" for change would be realized before any disclosure would have to be made. A second illustration would be the formation of a group of non-shareholders having similar plans for the acquisition of control. The potential for a control change in this situation would seem as real as in the case of a group owning 5.1 per

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60. 453 F.2d at 717.
61. The approach is suggested in a very perceptive analysis of section 13(d), one to which the GAF court made repeated references. See Comment, Section 13(d) and Disclosure of Corporate Equity Ownership, 119 U. PA. L. Rev. 853, 876 (1971).
62. Privately-negotiated sales appear to be a relatively unfettered method of acquiring control. The presence of numerous holders of large blocks of securities, such as pension funds, foundations and insurance companies, affords the wealthy control-minded investor an opportunity to acquire control without having to make prior disclosure. For example, should he negotiate with several such holders on an individual basis for private sale of their holdings, all transactions to be consummated within a ten day period, he would be required to disclose his ownership only within ten days after it exceeded the five per cent level. Of course, he would also be required to comply with other sections, if applicable, such as sections 16(a) and 13(d)(2). See notes 19 supra & 78 infra. Since large block holders were among the defendants in Bath, this method of acquisition appears to be far from theoretical. Bath Indus., Inc. v. Blot, 427 F.2d 97, 103-04 (7th Cir. 1970). However, such holders generally maintain a neutral policy in control contests. See Note, 71 COLUM. L. Rev. 466, 475-76 (1971).
63. If the plan to acquire control necessitates market purchases, the demand would be ostensibly reflected in an increase in the market price of the securities. Although such an effect would increase the expense of obtaining control, it would also give the investor the impression that his shares were more valuable. However, since he would be without knowledge of the group's plans, the increased value might be illusory for the group, upon acquiring control, could foreseeably act in a manner inimical to the investor's interests.
cent of the outstanding securities, yet the sub-threshold group (owning less than five per cent or none at all) could conspire in anonymity without fear of liability until it owned five per cent. Third, the GAF court’s holding would not require disclosure of the existence of a bad faith group which had deliberately concealed its formation. Admittedly, no interpretation of section 13(d) would assure disclosure of such a group, but the present holding may encourage such surreptitious behavior. Since legitimate consultations and voting agreements may make the participating shareholders a group for the purposes of section 13(d), the resulting disclosure requirement may prompt these shareholders to avoid such situations or simply to conceal the informal combinations.64 Finally, it appears evident that almost any variation65 of these situations could occur and remain outside the statutory requirements.66

Once the Second Circuit determined that the complaint alleged a section 13(d) violation, it considered whether GAF, as a corporate issuer, had standing to assert the violation. Two conclusions were made: (1) GAF had standing to assert an untimely filing claim,67 and (2) GAF also had standing to assert a claim of false and misleading statements in the Milsteins’ schedule 13D.68

The Second Circuit offered substantial support for its conclusion that GAF had standing to maintain a claim for untimely filing.69 The court relied upon cases which had held that a private right of action was available.

64. See notes 32 supra & 94 infra.

65. A group owning less than five per cent might be able to avoid filing when its ownership exceeded the five per cent level, for if its total acquisitions within a twelve month period were less than two per cent, they would arguably be exempt under section 13(d)(6)(B). See note 9 supra. On the other hand, section 13(d)(1) may require a filing whenever ownership exceeds five per cent. The statute is unclear as to which section would control. The district court alluded to the problem: Conceivably, Congress may have felt that a first filing — when the group is formed — is more important to the public than later filings when a small amount of stock is purchased, but nowhere is it indicated that the legislators felt one filing is more significant than another. There is simply no statutory authority for saying that a . . . purchase of not more than 2% is exempt, but a group must report when it makes no purchases at all.

324 F. Supp. at 1068 (emphasis added).

66. One must remember that the prior interpretations of section 13(d) contain similar, if not aggravated, defects. This indicates that the statute itself may be defective. Nevertheless, if the purpose of the statute is to maintain fair and free markets without undue aid to incumbent management, the statute may be less deficient, simply because it was not intended to provide for full and complete disclosure but only increased disclosure. See text accompanying notes 88-92 infra.

67. The court did not expressly state that untimely filing was a violation which GAF had standing to assert. However, since the court in its initial remarks divided the complaint into two violations, “failing to file the required statements and . . . filing false ones” (453 F.2d at 712), but expressly dealt with only the latter in considering standing, its initial discussion of standing, by implication, must be considered as a discussion of standing to assert a claim of untimely filing. Id. at 719.

68. Id. at 720.

able under the federal securities laws,\textsuperscript{70} that an issuer, as a private party, had standing,\textsuperscript{71} and that an issuer had standing under sections 14(d) and 14(e).\textsuperscript{72} Further, since sections 14(d) and 14(e) were enacted at the same time as section 13(d), the GAF court reasoned that symmetry demanded the extension of standing to an issuer under section 13(d).\textsuperscript{73} Finally, the court concluded that the issuer's ideal position, both as a recipient of a schedule 13D\textsuperscript{74} and as a sentinel over transactions in its own securities, made GAF an appropriate party to enforce section 13(d).\textsuperscript{75}

In regard to its holding that section 13(d) afforded GAF standing to assert claims of false and misleading filings, the Second Circuit was without any express precedent, but relied on more esoteric arguments. The court concluded that:

[T]he securities acts should not be construed technically and restrictively, but "flexibly to effectuate (their) remedial purposes." With this teaching in mind, we conclude that the obligation to file \textit{truthful} statements is implicit in the obligation to file with the issuer, and \textit{a fortiori}, the issuer has standing under section 13(d) to seek relief in the event of a false filing.\textsuperscript{76}

To support this conclusion the court stated that false disclosures would undermine the purpose of the Williams Bill, as well as the Act as a whole,

\textsuperscript{70} J. I. Case Co. v. Borak, 377 U.S. 426 (1964). Here the Supreme Court stated:

It appears clear that private parties have a right under § 27 to bring suit for violation of § 14(a) of the Act. Indeed, this section specifically grants ... jurisdiction over "all suits in equity and actions at law brought to enforce any liability or duty created" under the Act.

\textit{Id.} at 430-31. Although section 14(a) did not expressly grant a private right of action, the Court further stated that "among its chief purposes [was] 'the protection of investors,' which certainly imply[d] the availability of judicial relief ..." \textit{Id.} at 432. Thus, it was held that a private party has standing to claim a violation of section 14(a).

\textsuperscript{71} Studebaker Corp. v. Gittlin, 360 F.2d 692 (2d Cir. 1966). In \textit{Gittlin}, a corporate issuer, threatened with a proxy fight, obtained injunctive relief against a shareholder who had made untimely filing of proxy materials.


The court cited \textit{Electronic Specialty Co. v. International Controls Corp.}, 409 F.2d 937 (2d Cir. 1969), wherein a corporate issuer was held to have standing to assert a claim of inadequate disclosure by one making a tender offer for its shares.

\textsuperscript{73} 453 F.2d at 719.

\textsuperscript{74} \textit{Id.} \textit{See} note 4 \textit{supra}. The court suggested that the simple fact that the issuer received a schedule 13D could alone be sufficient reason to grant standing to the issuer. \textit{Id.}

\textsuperscript{75} \textit{Id.} Recognizing a possible objection to its conclusion, the court discounted any suggestion that the holding would tip the balance in favor of incumbent management as against insurgents. It argued that careful scrutiny of management allegations by the district courts, along with the traditional shareholder remedy for waste, would obviate any difficulties in this regard. \textit{Id.} at 719-20. \textit{But see} note 32 \textit{supra}.

\textsuperscript{76} 453 F.2d at 720 (citation omitted and emphasis supplied by the court). In so stating, the court summarily dismissed the Milsteins' claim "that false filing does not violate the section that requires the filing ... but rather the penal provisions on false filings ... [or] the anti-fraud provisions ... ." \textit{Id.} False filing claims had been asserted previously through a provision (section 14(a)) other than the penal or anti-fraud provisions. \textit{See} note 70 \textit{supra}. Thus, the court apparently reasoned that section 13(d) also implicitly permitted a false filing claim.
and would often be more harmful than no filing at all.\(^7\) Moreover, the presence of the requirement in section 13(d)(2) and in rule 13d-2 to amend a schedule 13D upon the occurrence of a material change in the facts stated in the schedule suggested to the court that there was an obligation under section 13(d) to make truthful filings.\(^8\) Finally, the argument that the issuer was an ideal plaintiff was repeated. The court opined that the SEC, in the event of an alleged section 13(d) violation, was already too overburdened and lacked the issuer’s particular expertise to assert all the proper claims.\(^9\) In the court’s view, shareholders were also less than suitable claimants, for they do not have “the necessary background information,” the issuer’s “immediate access” nor, too frequently, the necessary incentive to sue.\(^8\)

The rationale used by the Second Circuit to afford GAF standing under section 13(d) is not completely convincing. Although symmetry may demand the extension of standing to an issuer, such an argument appears to encroach upon the legislative function. Had Congress so desired, it could have expressly authorized standing for the issuer under section 13(d) as it did under the companion sections regulating tender offers.\(^8\) The fact that Congress chose not to act makes any interpretation of its inaction

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\(^7\) Id. at 720.

\(^8\) Id. Section 13(d)(2) states in part:

> If any material change occurs in the facts set forth in the statements . . . , an amendment shall be transmitted to the issuer and the exchange and . . . the Commission . . .


Rule 13d-2 states in part:

> If any material change occurs in the facts set forth in the statement . . . the person who filed such statement shall promptly file with the Commission and send to the issuer and the exchange an amendment disclosing such change . . .


Although the court may be correct in the inference drawn from section 13(d)(2) that section 13(d) obligates one to truthful filing, this inference lends only indirect support for granting the issuer standing to claim a false and misleading filing. Rather, such an inference indicates only a type of section 13(d) violation and not the parties having standing to assert that violation. Moreover, it is uncertain whether a “material change” includes increasing one’s ownership by less than two per cent of the outstanding shares as was allegedly done by the Milsteins here. But cf. 453 F.2d at 721 n.23.

\(^9\) Id. at 721.

\(^8\) In its reference to the unsuitability of shareholders as plaintiffs, the GAF court implied that the standing it afforded the issuer under section 13(d) did not extend to shareholders. However, it is arguable that if the issuer need not demonstrate its reliance on an alleged violation in order to assert a claim, shareholders should not be required to either, for the holding and its apparent rationale — “private enforcement . . . [as] a necessary supplement to Commission action” — indicate that compliance with the traditional elements of shareholder standing should not be required to enforce securities regulations. Id. See Rosenblatt v. Northwest Airlines, Inc., 435 F.2d 1121, 1124 (2d Cir. 1971).

\(^8\) The court, in passing, attempted to refute this argument. 453 F.2d at 720 n.22. It asserted that section 14(e) was the result of “a clear need for an anti-fraud provision,” whereas a section 13(d) false filing, not having so widespread an effect as a section 14(d) violation, did not compel an express standing provision. Id. Notwithstanding the court’s assessment, congressional silence could as easily indicate an intention to prevent the use of section 13(d) in a contest for corporate control, and in any event, silence alone cannot be given conclusive weight.
highly speculative. Additional doubt as to the wisdom of the holding is prompted by the paucity of precedent for upholding an issuer's standing under section 13(d) alone. Even with the noblest judicial "teachings" as guides, it is submitted that courts should not assume a law-making role absent clearly-compelling circumstances.

Furthermore, it is not readily apparent that the issuer's "unquestionably . . . [ideal] position to enforce section 13(d)" mandated the extension of standing to GAF. Simply asserting (convincingly or not) that the SEC and shareholders are not always in a position to enforce the section does not demonstrate that the issuer has been granted standing. This, at most, merely suggests that standing for the issuer might have been intended in order to give the section its full effect. The only implication raised by the court's approach was that Congress may have favored the extension of standing to the issuer under section 13(d).

However, there are substantial indications that Congress, on the contrary, disproved such a result. For example, the legislative history affirmatively demonstrates that Congress intended not to entrench incumbent management by enacting section 13(d). Further, the inference is permissible that the section was only intended to supplement the extensive regulatory scheme of the Securities Exchange Act of 1934 and, accordingly, to be implemented in conjunction with the Act's emphasis on maintaining "free and fairly functioning markets." Thus, the section's objective of providing the investor with increased information would be tempered so as not to upset the market equilibrium established by the Act as a whole. Therefore, it is arguable that the new provision was intended to be enforced with complete objectivity. Certainly, it was not enacted to provide an added weapon for any of the competing interests in a corporate control contest.

Moreover, the reluctance of other courts to grant the issuer standing under section 10(b) raises doubts as to the validity of the Second Cir-

82. See Frankfurter, supra note 12, at 539.
83. The Bath decision is apparently the only other instance in which an issuer had been granted standing, yet in that case the standing question was not raised. Bath Indus., Inc. v. Blot, 427 F.2d 97 (7th Cir. 1970).
84. The instant case may very well lack compelling circumstances. See note 6 supra.
85. 453 F.2d at 719.
86. The shareholder may not be such a disparate plaintiff. See note 80 supra.
87. See Frankfurter, supra note 12, at 539.
89. GAF Corp. v. Milstein, 324 F. Supp. 1062, 1069 (S.D.N.Y. 1971). See text accompanying note 13 supra. Admittedly, this approach is also based upon speculation.
90. The district court apparently applied a similar "balancing of interests" rationale to justify its definition of acquisition. 324 F. Supp. at 1070. See text following note 58 supra. Since the lower court concluded that the Williams Bill was intended only to require disclosure after substantial non-exempt acquisitions achieved through market purchases or tender offers, it differed with the Second Circuit as to the purpose of the Bill and whether that purpose was superior to the purpose of the Act as a whole.
cuit's grant of standing under section 13(d). In this regard, the GAF court's own hesitancy “to open the door to issuers . . . seeking more than 'injunction' relief” in a section 10(b) action, but its willingness to grant the issuer standing under section 13(d) seems somewhat incon-gruous. If the denial of section 10(b) standing has been based upon the fear that issuers, out of self-interest, might abuse such standing, the present holding does not allay these fears and, unfortunately, makes section 13(d) susceptible to the same abuses.

Despite the aforementioned deficiencies, the GAF holding will have a considerable impact in the field of securities regulation. The interpretation of section 13(d) as requiring a group to file upon formation will apply to nearly all combinations collectively owning five per cent or more of a class of an issuer's securities. Thus, there should be few instances in which the investor will have to make his securities decisions in ignorance of such a group's existence or of its plans. Admittedly, the holding will be difficult for the trial courts to implement, for determining the time of a group's formation, in particular, appears much like “an attempt to grasp quicksilver.” Nevertheless, these difficulties seem minor when compared with the holding's effect of increasing public awareness of potential changes in corporate control. Undoubtedly, certain groups, such as foundations and other traditional holders of large blocks of securities, may object to the increased disclosure. Nevertheless, such objections are not sufficient to limit the applicability of the instant holding but, rather, call for SEC action in establishing any necessary exemptions under section 13(d).

However, the greatest impact of the instant case in the securities field should be from the Second Circuit's grant of standing to an issuer to assert a claim of false and misleading section 13(d) filings. This extension of standing has significantly expanded the number of potential plaintiffs under section 13(d) and appears to be a legitimate precedent for like extension of similar provisions of the Securities Exchange Act. In the same vein, the GAF court has expanded the relief available to potential plaintiffs under section 13(d) and, perhaps, under other reporting requirements. SEC has the power to exempt certain acquisitions from the disclosure requirements. Securities Exchange Act of 1934 § 13(d)(6)(D), 15 U.S.C. § 78m(d)(6)(D) (1970). See note 46 supra.
provisions, since false and misleading, as well as untimely, filings were deemed violative of section 13(d). It is apparent that future “fraud” violations, at least under section 13(d), may be asserted without relying on the traditional “fraud” section, section 10(b), and its more restrictive standing requirements. Although the court’s holding is a colorable and logical extension of prior judicial pronouncements, the extension may be unwarranted. Considering the dangers inherent in granting an issuer standing and the difficulties of making the rule workable, the GAF court may well have crossed the fine line between permissible statutory interpretation and the power to legislate.

Overall, GAF has made considerable progress toward realization of the legislative goal of assuring full disclosure of corporate equity ownership. Unfortunately, the deficiencies of the holding and of the opinion, along with those of the statute itself, portend many subsequent judicial encounters with section 13(d) before the goal is achieved.

Stephen D. Ford

LABOR LAW — PUBLIC EMPLOYEES — NON-CIVIL SERVICE EMPLOYEES ARE EMPLOYEES AT WILL AND MAY BE SUMMARILY DISCHARGED ON ACCOUNT OF POLITICAL ASSOCIATION.

American Federation of State, County and Municipal Employees

v. Shapp (Pa. 1971)

Plaintiffs, three employees of the Pennsylvania Department of Transportation1 and an AFL–CIO union claiming to represent 5,000 transportation department workers, brought an action in the commonwealth court2 against both the Governor of Pennsylvania and the Secretary of Trans-

97. See note 10 supra.

1. The Pennsylvania Civil Service Law of 1941, PA. Stat. tit. 71, §§ 741.1 et seq. (1962), gives all employees included therein certain rights and protections, especially in regard to hiring, promotion and discharge. These include: hiring and promotion principally on the basis of test scores, PA. Stat. tit. 71, §§ 741.601 to 741.602 (1962); suspension without pay for disciplinary reasons only, PA. Stat. tit. 71, § 741.803 (1962); discharge only for “just cause,” PA. Stat. tit. 71, § 741.807(a) (1962). Moreover, religion, race or party affiliation are specifically excluded as proper reasons for discharge. Id. The employees here, however, were not covered by the Act since they were classified under the category “unskilled labor,” PA. Stat. tit. 71, § 743.3(w) (Supp. 1971). Therefore, whatever statutory protection plaintiffs enjoyed came from the Pennsylvania Public Employe Relations Act, PA. Stat. tit. 71, §§ 1101.101 et seq. (Supp. 1971). See notes 22 & 87 infra.

2. The Commonwealth Court has original jurisdiction over civil actions brought against the Commonwealth itself or against one of its officers, acting in his official capacity, with two exceptions neither of which applies here. One exception is for a writ of habeas corpus or post-conviction relief; the other is for proceedings under the Eminent Domain Code. PA. Stat. tit. 17, § 211.401(a) (1) (Supp. 1971).
portation, seeking a preliminary injunction to prevent the workers' discharge solely because of their political affiliation with the Republican party. The plaintiffs' theory was that although they were hired on account of their political affiliation, this factor in itself was an unconstitutional basis for discharge, as a violation of the employees' rights of freedom of association, and rights of equal protection and due process.

The commonwealth court heard argument on April 21, 1971, but did not issue an injunction until May 10, during which time plaintiffs and 2,000 other employees were discharged. The injunction provided that the status quo as of May 10 remain; that is, there should be no further termination of employment without notice and a hearing, and employees whose employment had been terminated after April 21 must be given an opportunity for rehiring as vacancies arose.

In a 4 to 3 decision, the Pennsylvania supreme court reversed the commonwealth court, holding that the Governor has the power to hire and fire at will all employees not protected by the Civil Service Act “irrespective of their ability, their politics or their political connections.” Moreover, the court held that the plaintiffs were denied no constitutional rights by such politically motivated firings. American Federation of State, County and Municipal Employees v. Shapp, 443 Pa. 527, 280 A.2d 375 (1971).

The state of the law regarding the rights of public employees has changed substantially since the time of Justice Holmes, when the established view was that the government, if acting in a proprietary capacity, could treat its employees as if it were a private employer. Therefore, government employment was considered a privilege held at the will of the employer, and without the constitutional rights associated with citizenship.
in terms of an employer–employee relationship with the government. While the United States Supreme Court has ruled on other questions related to public employment, neither that Court nor the Pennsylvania supreme court has ever ruled on the constitutionality of the “spoils system” — a government employment system based on political patronage. The United States Supreme Court has rejected the theory that public employment “may be conditioned upon surrender of constitutional rights which could not be abridged by direct government action.”

In the area of first amendment rights, the Court has held that government may regulate in the area only with narrow specificity. For example, the Supreme Court has held that public employees retain their first amendment right to comment upon matters of public concern without fear of job loss. Finally, in dealing with the question of discharge from public employment, the Court has stated that “constitutional protection does extend to the public servant whose exclusion . . . is patently arbitrary or discriminatory.”

In the instant case, the Pennsylvania supreme court first sought to determine whether there were some “apparently reasonable grounds as well as pertinent legal principles to support the preliminary injunction.” However, the court then framed the issue so as to eliminate any reasonable claim by premising the question on the belief that the plaintiffs had no constitutional or statutory protection from discharge. The court wrote:

The basic issue boils down to this: Can the Governor of Pennsylvania discharge at will any and every employee of our State Government who is not protected from discharge (a) by the Constitutional provision of procedural Due Process, with a right to notice and a hearing, or (b) by any other provision of the Constitution, or (c) by any Federal Statute, including the Civil Rights Act and the Voting Rights Act, or (d) by any State Statute, including Civil Service Statutes and the Public Employe Relations Act?

12. 443 Pa. at 533, 280 A.2d at 377 (emphasis added). To phrase an issue in such a way would tend to make a reader suspicious of the reasoning to follow. In framing the question in this way, the court assumed that the plaintiffs had no statutory or constitutional claim, which in fact was the real issue in the case. Therefore, the court in actuality was not framing a question, but stating their conclusion, for if the issue was as the court stated it, even the plaintiffs would agree that the court reached the correct decision under the law.
Without such protection the plaintiffs would have no claim, but of course the existence of such a claim is the essence of the case. It was the court's premise that the settled principle regarding public employment is that absent controlling legislation, a public employer can summarily discharge employees. To support this proposition, the court cited *Cafeteria Workers Local 473 v. McElroy* which, according to the court, upholds the government's freedom to terminate employment at will. In *Scott v. Philadelphia Parking Authority*, the Pennsylvania supreme court held that non-Civil Service employees were employees-at-will and took their jobs subject to summary removal. The court stated that the policy for such a position was set in the *Mitchell v. Chester Housing Authority* case, wherein it held that the proper functioning of government required agencies to be responsive to the elected representatives of the public so that a proper chain of responsibility could be established.

Having established the status of such employees, the court stated that patronage employees have no constitutional or statutory claim when they are fired on political grounds. The court supported its holding with respect to statutory protection by examining the appropriate sections of the Voting Rights Act, the Civil Rights Act of 1871 and the Pennsylvania Public Employe Relations Act of 1970, and concluded that

14. 367 U.S. 886 (1961). Compare *Vitarelli v. Seaton*, 359 U.S. 535 (1959). In *Vitarelli*, the Court prevented the summary discharge of an Interior Department employee, although upholding the principle of summary discharge of non-civil service employees. The discharge was not proper because the department did not conform with procedure it had established for such cases. *Id.* at 539.
16. *Id.* at 154, 166 A.2d at 280.
18. *Id.* at 328, 132 A.2d at 880.
20. Act of May 31, 1870, ch. 114, § 1, 16 Stat. 140, *codified in* 42 U.S.C. § 1971 (1970). It is the court's contention that the Voting Rights Act is not here appropriate because the aim of that legislation was to make sure that no qualified voter would be deprived of that privilege on account of race or color or hindered in its exercise because of any form of intimidation. 443 Pa. at 535, 280 A.2d at 378. If that is the extent of a claim under that statute, then there would seem to be no grounds here for its application. Certainly, the court has correctly stated the statute's original purpose and use until the present time.
Every person who, under color of any statute, ordinance, regulation, custom, or usage, or any State or Territory, subjects, or causes to be subjected, any citizen of the United States or any other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.
Collective bargaining is the performance of the mutual obligation of the public employe and the representative of the public employe to meet at reasonable times and confer in good faith with respect to wages, hours and other terms
"[i]t is clear . . . these plaintiffs do not come within the provisions or protections of any of the aforesaid Acts." It was the court's opinion that, in effect, the question of the limits of political patronage is a legislative question. Therefore, since no reasonable basis in law for the issuance of the injunction was presented, the commonwealth court was reversed.

The applicability of the three cases cited by the majority was questioned, with some merit, by the dissent. The Scott and Mitchell cases both concerned employees in positions of policy implementation, if not actual policy making. Consequently, the principle established in Mitchell and reiterated in Scott seems both proper and necessary since to argue otherwise would mean that men at the very top in the administrative hierarchy who oppose the new board or chief executive would nonetheless be the men who would form and implement much of the policy with which they disagree. As Mitchell stressed, the essence of the day-to-day operations of their jobs involves policy and politics, and, certainly, removal for political reasons is not only proper, but perhaps necessary for a smoothly functioning government. Such men are employees-at-will because of the very nature of their positions. The plaintiffs here, however, are semi-skilled or unskilled workers, whose job is simply to maintain public highways. Thus, the applicability and rationale of the Mitchell and Scott decisions seems to be strained. The Mitchell doctrine is not appropriate here since the plaintiffs are not policy implementors in any sense. Few administrations differ on the basic principle that road maintenance is necessary within the Commonwealth, so that policy would not change with changes in administration. On the level of the employees in question, and conditions of employment, or the negotiation of an agreement or any question arising thereunder. But see Pa. Stat. tit. 43, § 1101.101 (Supp. 1971), where the stated public policy behind the Act was:

[T]o promote orderly and constructive relationships between all public employers and their employes subject, however, to the paramount right of the citizens of this Commonwealth to keep inviolate the guarantees for their health, safety and welfare.

See note 87 infra.

23. 443 Pa. at 536, 280 A.2d at 378. The court makes that statement after the citing of the statutes, without explanation or reasoning or authority as to why these are not appropriate. Moreover, the question of first amendment rights is not discussed at all.

24. Id. at 536, 280 A.2d at 378.

25. Id. at 538-39, 542-43, 280 A.2d at 379-80, 381-82 (Barbieri, J., dissenting).

26. Mitchell and Scott were the heads of the Chester Housing Authority and Philadelphia Parking Authority, respectively. It is a stipulation in the instant case that the employees occupy "non-policy making positions." Id. at 538 n.2, 280 A.2d at 379 n.2.

27. In Mitchell, the court wrote:

[Good administration requires that the personnel in charge of implementing the policies of an agency be responsible to, and responsive to those charged with the policy-making function, who in turn are responsible to a higher governmental authority, or to the public itself, whichever selected them. This chain of responsibility is the basic check on government possessed by the public at large.] 389 Pa. at 328, 132 A.2d at 880. In Scott, the court added to the above statement: "[T]he power to dismiss summarily is the assurance of such responsibility." 402 Pa. at 154, 166 A.2d at 280-81.
only incompetence or inefficiency would change the policy “implementation” and no one contends that such reasons would not be reasonable grounds for removal. It would seem, therefore, that the policy considerations stressed in Mitchell in no way compel the applicability of the same standard of employment for both directors and highway repairmen, and the use of such a standard in the present context is both unwarranted and unsupportable.

The court’s reliance upon Cafeteria Workers is also open to question. The plaintiff in that case was a short order cook who, working on a Naval base for a private employer, was refused a security badge and therefore was not allowed to enter the base. The contract between the Government and the private employer reserved to the security officer the right to determine who met security regulations. Further, the contract provided that the employer could not engage employees at the base if they did not meet the security standards. The United States Supreme Court upheld the Government’s action even though it did not provide a hearing or statement of the reasons for its denial of security clearance.

While the Cafeteria Workers decision gives some support to summary discharge from government employment, it has only limited applicability to the precise question in the instant case. First, the rights of public employees were not in issue in Cafeteria Workers; and second, the only question was the plaintiff’s continued employment at a particular base for security reasons. Moreover, Mr. Justice Stewart, writing for the Court, acknowledged that the Government does not have the freedom of action of private employers in such matters, and concluded:

We may assume [the discharged employee] could not constitutionally have been excluded from the Gun Factory if the announced grounds for her exclusion has been patently arbitrary or discriminatory — that she could not have been kept out because she was a Democrat or a Methodist.

Further, Justice Brennan in his dissent wrote:

In other words, if petitioner’s badge had been lifted avowedly on grounds of her race, religion or political opinions, the Court would concede that some constitutionally protected interest . . . had been injured.

29. The Court, per Mr. Justice Stewart, stated:
   It has become a settled principle that government employment, in the absence of legislation, can be revoked at the will of the appointing officer.
30. Id. at 896-97.
31. Id.
32. Id. at 898. Justice Stewart also stated:
   In United Public Workers the Court observed that: “[N]one would deny” that “Congress may not ‘enact a regulation providing that no Republican, Jew or Negro shall be appointed to federal office, or that no federal employee shall attend Mass or take any active part in missionary work.’”
33. Id. at 897 (citation omitted).
34. Id. at 900 (Brennan, J., dissenting).
Even if the court was correct in its view that *Cafeteria Workers* applies to the instant situation, it does not follow that the court's interpretation of that decision was well founded. A totally plausible interpretation might be that under certain circumstances persons may be denied employment for a rational reason or, perhaps, no reason, but that the government cannot so act for a stated "wrong" reason. The *Cafeteria Workers* Court itself acknowledged that a "wrong" reason for exclusion would encompass political party affiliation and religious preference, and possibly, therefore, any reason which infringed upon a constitutionally protected right or one which was based on essentially discriminatory grounds. In the present case, the stipulated reason for discharge was political affiliation — expressly stated to be an impermissible basis for removal by the *Cafeteria Workers* Court.

Finally, the court, in contending that the plaintiffs were denied neither statutory nor constitutional rights, may have erred in light of recent decisions in this area. Notably, the court never adequately discussed the questions relating to the denial of the plaintiffs' first amendment right of freedom of association, fourteenth amendment rights of due process and equal protection, and civil rights under the Civil Rights Act of 1871.

There is no doubt that actions of the Governor constitute state action so as to make these federal guarantees applicable to the Commonwealth under the fourteenth amendment. Consequently, his actions must be consistent with applicable constitutional guarantees. Thus, the problem is whether these discharges, based on political party membership, violated the petitioners' constitutional rights.

The Supreme Court in *NAACP v. Alabama* discussed the right of freedom of association under the first and fourteenth amendments, stating:

Effective advocacy of both public and private points of view, particularly controversial ones, is undeniably enhanced by group association,
as this Court has more than once recognized by remarking upon the
close nexus between the freedoms of speech and assembly. It is
beyond debate that freedom to engage in association for the advance-
ment of beliefs and ideas is an inseparable aspect of the “liberty”
assured by the Due Process Clause of the Fourteenth Amendment,
which embraces freedom of speech. Of course, it is immaterial whether
the beliefs sought to be advanced by association pertain to political,
economic, religious or cultural matters, and state action which may
have the effect of curtailing the freedom to associate is subject to
the closest scrutiny.40

Moreover, the Court has reinforced this position with regard to the right
of political association by specifically declaring that “the right of individuals
to associate for the advancement of political beliefs . . . rank[s] among
our most precious freedoms.”41 Therefore, it is clear in the context of the
present case that the plaintiffs have the constitutional right of association,
specifically “for the advancement of political beliefs.” Therefore, it must
be determined whether the state, consistent with the first and fourteenth
amendments, may limit this freedom when individuals become public
employees.

The Court in *United States v. Robel*42 had an opportunity to rule on
the question of the Government’s right to discharge a public employee on
account of his political association. In that case, Robel, a Communist
Party member employed by a shipyard which handled government work,
was discharged under section 5(a)(1)(D) of the Subversive Activities
Control Act of 1950.43 The Court declared that section unconstitutional
as a violation of freedom of association, stating:

But the operative fact upon which the job disability depends is the
exercise of an individual’s right of association, which is protected
by the provisions of the First Amendment . . . . Thus, § 5(a)(1)(D)
contains the fatal defect of overbreadth because it seeks to bar employ-
ment both for association which may not be proscribed consistently
with First Amendment rights . . . . This the Constitution will
not tolerate.44

40. Id. at 460-61 (footnotes omitted).
42. 389 U.S. 258 (1967). It is submitted that an argument may be made that
the “national security” cases are not controlling in the instant case on the basis that
the effects of the state actions in each differed. In the national security cases,
the effect of the governmental action was to brand an individual a Communist, while
in the instant case the plaintiffs were fired not so much to label them Republicans,
but to make room for Democrats in patronage jobs.
43. Subversive Activities Control Act of 1950, § 5(a)(1)(D), ch. 1024, tit. I,
§ 5, 64 Stat. 992, as amended, 50 U.S.C. § 784(a)(1)(D) (1970). This statute,
in force at the time of the *Robel* decision, provided:
When a Communist organization . . . is registered or there is in effect a
final order of the Board requiring such organization to register, it shall be
unlawful for any member of such organization, with knowledge or notice that
such organization is so registered or that such order has become final if such
an organization is a Communist-action organization, to engage in any employment
in any defense facility.
44. 389 U.S. at 263, 266. Justice Brennan, concurring in *Robel*, stated:
Since employment opportunities are denied by § 5(a)(1)(D) simply on the
basis of political associations the statute also has the potential of curtailing free
This language indicates that the state may not use political membership as a basis for discharge from public employment in all cases; but, a certain type of associational tie may serve as a proper basis for discharge.

Again, in Bates v. City of Little Rock the Court held that "[w]here there is a significant encroachment upon personal liberty, the State may prevail only upon showing a subordinate interest which is compelling." When the individual's freedom of association has conflicted with the state's right to discharge an employee for his political association, the Court has held that to sustain such a discharge the state must show that the individual's membership was a "clear and present danger to a substantial interest of the State." These guidelines were applied by the Court in Robel so as to reject the Government's claim of a compelling state interest in denying to Communist Party members the right to work in a defense plant, and in Elfbrandt v. Russell, the right to teach in public schools. In the instant case, the legitimate state interest the Commonwealth was seeking to uphold was never stated, but on the facts it is doubtful, in light of the above examples, that any such "compelling" interest could be found. Certainly, in attempting to exclude Robel and Elfbrandt, the state could at least attempt to argue in terms of national security. In the instant case, however, the discharge of employees from their non-policy making positions on the ground that some substantial state interest was served by the exclusion of Republicans from such positions would seem clearly unsupportable.

The next question, also largely ignored by the court, was whether the plaintiffs were denied due process under the fourteenth amendment. Due process is an elusive concept, difficult to define apart from the particular context in which it is to be applied. In the area of public expression by inhibiting persons from establishing or retaining such associations.

46. Id. at 524.
47. Elfbrandt v. Russell, 384 U.S. 11, 18 (1966). Although the standard is not an easy one to sustain, the Supreme Court recently, in Connell v. Higginbotham, 403 U.S. 207 (1971), upheld a state loyalty oath as a condition of public employment. Mr. Justice Marshall wrote in concurrence:

Such a forward-looking promissory oath of constitutional support does not in my view offend the First Amendment's command that the grant or denial of governmental benefits cannot be made to turn on the political viewpoints or affiliations of a would-be beneficiary.

Id. at 209. Similarly, in Law Students Civil Rights Research Council v. Wadmond, 401 U.S. 154 (1971), the Court upheld the right of a state to require an applicant to the bar to affirm that he will support the United States and New York state constitutions.

48. 384 U.S. 11 (1966). The Robel analysis has been upheld as it applied to the states, by not allowing the state to exclude a person from employment only on the basis of association. Baird v. State Bar, 401 U.S. 1 (1971); Keyishian v. Board of Regents, 385 U.S. 589 (1967). Another recent case has held that the overbroad type of inquiries involved therein denied first amendment rights to the petitioners because the result of such actions was to discourage other citizens from the exercise of those same freedoms. In re Stolar, 401 U.S. 23 (1971). See Shelton v. Tucker, 364 U.S. 479, 485 (1960).

49. The notion of due process, as applicable here, is two-fold. First, there is the procedural aspect; that is, the right to receive proper notice and the right to
employment, the Supreme Court has held that substantive due process means that the reason for dismissal must bear a reasonable relation to the employee's "fitness or competence"\(^5\) to perform a specific job. In other words, there must be a rational connection between the reason for dismissal — Republican Party membership — and the "fitness or competence" of the employee for the particular job — here, unskilled work performed under the direction of the transportation department. Similarly, Mr. Justice Black, in reversing the denial of an application to take a bar examination because of Communist Party affiliation, wrote:

\[
\text{Any qualification must have a rational connection with the applicant's fitness or capacity to practice law . . . .} \\
\text{An applicant would not be excluded merely because he was a Republican, or a Negro, or a member of a particular church.}\ \text{\(5^{1}\)}
\]

Likewise, lower federal courts have held that dismissal of homosexuals from government employment violated due process absent a showing that homosexuality related to "occupational competence or fitness."\(^5\) In the

have a hearing. The other is substantive, which focuses on the reasons for the action taken. The important question there is whether the decision was arbitrary. Such is not an easy decision for the courts. As one court wrote:

Discretionary power does not carry with it the right to its arbitrary exercise. Otherwise the existence of the power itself would encounter grave constitutional doubts. . . . What is arbitrary, however, in the sense of constituting a denial of due process, depends upon circumstances.


50. Shelton v. Tucker, 364 U.S. 479, 485 (1960). There, an Arkansas statute allowed the school board to require teachers to state all their associational ties. The board then used this list in deciding whether to retain such teachers, none of whom had tenure. The Court ruled that such interference with freedom of association infringed upon due process since there was no legitimate reason for such an inquiry beyond those factors which related to a teacher's "fitness and competence."

51. Schware v. Board of Bar Examiners, 353 U.S. 232, 239 (1957). In Schware, the New Mexico board refused to allow the petitioner the right to take the bar examination because he had previously been a Communist Party member, had been arrested, and had used aliases. The Supreme Court, in reversing the board's decision, was of the opinion that in the context of violating due process, the traditional dichotomy between a "right" and a "privilege" to practice law was meaningless. Mr. Justice Black wrote: "[I]t is sufficient to say that a person cannot be prevented from practicing except for valid reasons." Id. at 239 n.5.

52. Scott v. Macy, 349 F.2d 182, 185 (D.C. Cir. 1965). In Scott, the Civil Service Commission refused to allow the petitioner to make application for a federal job on the basis of his prior, although unspecified, "immoral" conduct. The action of the Commission was voided by a majority of the court. The minority opinion written by then Circuit Judge (now Chief Justice) Burger was based on the court's prior opinion in Dew v. Halaby, 317 F.2d 582 (D.C. Cir. 1963), cert. denied, 379 U.S. 951 (1964), which dealt with a similar situation. The Government there tried to use the pre-employment homosexual acts of the employee as basis for dismissal from his job as an air traffic controller. The court upheld the dismissal on the grounds that it was not arbitrary since given the nature of the position and the nature of the employee's prior conduct there was sufficient proof that he lacked the needed "skill, alertness and responsibility" necessary. Id. The court concluded that "[i]n considering whether the plaintiff's removal was arbitrary and capricious we cannot ignore the nature of the appellant's duties." Id. at 587. So even though the specific result differed, the difference on the face of the decision would seem to be a factual one rather than a conceptual one in that both courts recognized and utilized the same standard in determining the final result.

Likewise, in Adams v. Laird, 420 F.2d 230 (D.C. Cir. 1969), cert. denied, 397 U.S. 1039 (1970), although the court refused to give the employee—homosexual
instant case, no such showing appears in the record, and it is doubtful that any could be found since political party membership bears no relation at all to the unskilled, non-policy making position in question. Moreover, the Commonwealth seems to have specifically violated the Schware rationale by using a stated prohibited reason for the dismissal. The instant court's reluctance to apply the fourteenth amendment's prohibitions did not end with the due process clause, for it also failed to shed any light on the equal protection issue.

Equal protection is a multi-faceted concept, but its essence is an impermissible classification of persons with respect to the laws of the state. The United States Supreme Court has decided that to withstand an equal protection attack:

[The classification must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike.]

There are those, Justice Barbieri apparently among them, who believe that the presence of two categories of public employees, those covered by the civil service statutes and those not, violates the latter's right to the equal protection of the law. The argument is that the distinction between the two groups of public employees is arbitrary and discriminatory since it does not treat all public employees alike, and there is no rational purpose served by the distinct classifications. Where the distinction made between individuals in a similar class—public employees—is based solely on an arbitrarily drawn line, giving to some the benefit of the law and withhold-

the relief requested, namely clearance to classified material, the rational was consistent. The majority held:

Neither do we think that the standard here involved is lacking in a particularized enunciation adequate to satisfy due process elements of notice and rationality. DOD 5220.6 sets forth many "Criteria," which include ample indication that a practicing homosexual may pose serious problems for the Defense Department in making the requisite finding for security clearance. They refer expressly to the factors of emotional instability and possible subjection to sinister pressures and influences which have traditionally been the lot of homosexuals living in what is, for better or worse, a society still strongly oriented towards heterosexuality.


53. Moreover, since the state stipulated the reasons for its action, those are the only grounds upon which the action may be judged. In this vein, Justice Frankfurter wrote: "The grounds upon which an administrative order must be judged are those upon which the record discloses that its action was based." SEC v. Chenery Corp., 318 U.S. 80, 87 (1943).


56. Justice Barbieri wrote:

Indeed the failure of the legislature to provide civil service protection to some state employees and not to others is in itself an obvious form of discriminatory treatment.

443 Pa. at 544 n.6, 280 A.2d at 382 n.6 (Barbieri, J., dissenting).
ing it from others, its application denies those detrimentally affected the equal protection of the laws unless a legitimate and constitutionally permissible public purpose is demonstrated or inferred from the provision. In the instant case, it would seem that the petitioners were denied equal protection since they were excluded from the operation of the civil service law.

A second argument for overturning the dismissal of public employees for associational reasons can be posited on traditional equal protection reasoning. The Supreme Court, in *Wieman v. Updegraff*, held that dismissal from public employment because of membership in a “Communist-front” organization was a violation of equal protection absent a showing of the employee’s actual knowledge of the illegal nature and purpose of the organization. The Court concluded that constitutional protection does extend to public employees, and that on these facts the state statute was “patently arbitrary and discriminatory.” The Court reasoned that this classification was not appropriate since the purpose of the law was to deny public employment on the basis of association, and the state had made no showing that the persons excluded were “those and only those persons” that the state had a legitimate interest in excluding. In the instant case, there is presumably no illegal nature or purpose of the association in question. The classification therefore could not have been based upon a proper constitutional purpose. Thus, the exclusion of employees because of their political affiliation was patently arbitrary, and hence, such employees were arguably denied equal protection under the fourteenth amendment.

The plaintiffs’ final equal protection claim was that the right violated by their dismissal, that of association, is a fundamental right and, therefore, any infringement of it is subject to the most rigid scrutiny by the court, such as that given a “suspect classification.” The Supreme Court has decided “that where fundamental rights and liberties are asserted under the Equal Protection Clause, classification which might invade or restrain them must be closely scrutinized and carefully confined.” The test of whether a right is fundamental is difficult, but would seem to go

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59. Id. at 191.
60. Id. at 192.
61. Id. at 191-92.
62. Mr. Justice White, in discussing the effect of labelling a classification “suspect,” wrote: There is involved here an exercise of the state police power which trenches upon the constitutionally protected freedom from invidious official discrimination based on race. Such a law bears a heavy burden of justification and will be upheld only if it is necessary, and not merely rationally related, to the accomplishment of a permissible state policy. *McLaughlin v. Florida*, 379 U.S. 184, 196 (1964).
to the preciousness of that right in terms of individual liberty.\textsuperscript{64} If it is fundamental, then as in the case of suspect classifications, the "most rigid scrutiny"\textsuperscript{65} is given to it, and the burden is on the state to show that it is more than reasonable, but in fact necessary to accomplish a constitutional purpose.\textsuperscript{66} It would appear that first amendment rights are of the type the courts would consider fundamental. To date the Supreme Court has recognized interests such as voting,\textsuperscript{67} procreation,\textsuperscript{68} criminal procedural rights,\textsuperscript{69} and travel\textsuperscript{70} as fundamental. One recent discussion, after analyzing the types of rights considered fundamental, continued:

Other interests, such as those protected by the first amendment, would likely call forth this same strict scrutiny in the equal protection contexts, but courts commonly use other provisions of the Constitution to safeguard them...\textsuperscript{71}

Mr. Chief Justice Warren's statement in \textit{Robel} appears consonant with this position:

Wherever one would place the right to travel on a scale of constitutional values, it is clear that those rights protected by the First Amendment are no less basic in our democratic scheme.\textsuperscript{72}

In \textit{NAACP v. Alabama},\textsuperscript{73} Mr. Justice Harlan commented that state action which has the effect of curtailing political association "is subject to the closest scrutiny..."\textsuperscript{74} It is submitted that if the right to freedom of association is accepted as a fundamental right, then the Commonwealth would have a difficult, if not impossible, task of showing that the continuation of the patronage system "is necessary... to the accomplishment of a permissible state policy..."\textsuperscript{75} The record in the instant case makes no mention of a constitutionally permissible object necessarily dependent upon the "spoils system," and the heavy burden on the Commonwealth to show a "compelling state interest" would seem insurmountable.

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\textsuperscript{64} The Court has never stated the standard by which one could determine what rights are "fundamental." Apparently it is done on a case-by-case basis. However, implicit in the Court's reasoning seems to be certain factors such as the nature of the right itself, the extent and manner of the state infringement and the Court's view as to the effects of such a deprivation on the individual. Perhaps simply a list of the rights declared fundamental would be the best "definition" of the concept. \textit{See} notes 67-70 and accompanying text infra.

\textsuperscript{65} Korematsu v. United States, 323 U.S. 214, 216 (1944).


\textsuperscript{68} Skinner v. Oklahoma \textit{ex rel.} Williamson, 316 U.S. 535, 541 (1942).

\textsuperscript{69} \textit{See}, e.g., Griffin v. Illinois, 351 U.S. 12 (1956).

\textsuperscript{70} Shapiro v. Thompson, 394 U.S. 618 (1969).

\textsuperscript{71} Comment, \textit{Developments in the Law — Equal Protection}, 82 \textit{Harv. L. Rev.} 1065, 1128 (1969). To that above list of fundamental rights, the authors added that education, after \textit{Brown v. Board of Educ.}, 347 U.S. 483 (1954), was also a fundamental right "to a lesser degree." \textit{Id.} at 1127.

\textsuperscript{72} United States v. Robel, 389 U.S. 258, 263 (1967).

\textsuperscript{73} 357 U.S. 449 (1958).

\textsuperscript{74} \textit{Id.} at 460-61.

\textsuperscript{75} McLaughlin v. Florida, 379 U.S. 184, 196 (1964).
Therefore, unless the Commonwealth could establish such a necessarily related reason for a classification based upon political affiliation, the labelling of this right as fundamental, which seems proper, would carry the equal protection argument for the plaintiffs.

Finally, a cause of action under the Civil Rights Act of 1871 would seem to exist if any of the previous arguments were upheld. The Supreme Court has determined that if a claim under the due process clause, equal protection clause or the first amendment exists, then a claim also exists under the Civil Rights Act of 1871. Further, one of the permissible remedies pursuant to that Act is the equitable remedy of injunctive relief. Lower federal courts have applied the Act in the area of public employees' rights in fashioning remedies for non-tenured public school teachers, and municipal and county employees discharged or denied rehiring on account of membership in a union, since the exercise of that right was cognizable under the first amendment. Similar decisions have been rendered with regard to school community workers not rehired due to their active participation in a school-tax question; a non-tenured professor not rehired because of classroom discussion of controversial


[M]isuse of power, possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law is action taken "under color of" state law.


80. See note 21 supra.

81. McLaughlin v. Tilendis, 398 F.2d 287 (7th Cir. 1968). In that case, Circuit Judge Cummings wrote:

Public employment may not be subjected to unreasonable conditions, and the assertion of First Amendment rights by teachers will usually not warrant their dismissal.

He concluded:

Even though the individual plaintiffs did not yet have tenure, the Civil Rights Act of 1871 gives them a remedy if their contracts were not renewed because of their exercise of constitutional rights.

Id. at 288-89.

82. American Federation of State, County and Municipal Employees v. Woodward, 406 F.2d 137 (8th Cir. 1969).

83. Service Employees Int'l Union v. Butler County, 306 F. Supp. 1080 (W.D. Pa. 1969). There, the court wrote:

The complaint alleges a discharge from employment because of membership in the labor association. Plaintiffs do not allege the breach of any contract of employment, or denial or protection of any civil service or tenure statute. It is admitted that their employment was at will. Does such an allegation state a cause of action under the Civil Rights Act of 1871? We believe that such a cause of action has been recognized in the reported decisions . . . as well as the general judicial construction of the Act.

Id. at 1082 (emphasis added).

subjects;\textsuperscript{85} and a non-tenured professor not rehired presumably because of strongly vocalized opinions relating to school administration.\textsuperscript{86} All were held to have been denied their civil rights on account of their discharge for exercise of first amendment guarantees. Following the reasoning of these decisions, one could clearly conclude that the plaintiffs, having been denied public employment because of membership in a lawful and established political party, would have similar success under the Civil Rights Act of 1871.

In asserting the unconstitutionality of the Commonwealth's action, the plaintiffs did not argue the specific question of its illegality under section 706 of the Public Employe Relations Act.\textsuperscript{87} Therefore, the question of “just cause” for the discharge required by that statute was not an issue here, but was a separate claim.\textsuperscript{88}

The effects of this case, while drastic for the plaintiffs, would seem to be limited. For many of the reasons discussed, it would seem that the holding in the instant decision is directly opposed to contemporary rulings in analogous cases. Because of the narrow and perhaps outdated view the court took on the matter of public employment, it would seem that few

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\textsuperscript{86} Roth v. Board of Regents, 310 F. Supp. 972 (W.D. Wis. 1970).
\textsuperscript{87} Public Employe Relations Act, PA. STAT. tit. 43, § 1101.706 (Supp. 1971), provides:
\begin{quote}
Nothing contained in this act shall impair the employer's right to hire employees or discharge employees for just cause consistent with existing legislation.
\end{quote}
\textsuperscript{88} On August 17, 1971, the Pennsylvania supreme court, in a 5-2 decision, denied the union's request for a reargument. 443 Pa. at 545, 280 A.2d at 383. Because of this ruling, the previous commonwealth court injunction was dissolved. The union moved the next day for a new injunction from the commonwealth court. It was granted on the basis of section 706, PA. STAT. tit. 43, § 1101.706 (Supp. 1971), but after rehearing the commonwealth court dissolved the latter injunction also. The Commonwealth then fired 1500 more employees. The union, which had become the certified bargaining agent of the employees, then brought a new suit on the ground that the Commonwealth was refusing to bargain with the representative of the bargaining unit, a violation of section 201(a)(5), PA. STAT. tit. 43, § 1101.201(a)(5) (Supp. 1971). A preliminary injunction was issued again. The parties then agreed to bargain and reached agreement on all matters except the state of the 3500 discharged employees. Both sides agreed to binding arbitration as permitted under section 804, PA. STAT. tit. 43, § 1101.804 (Supp. 1971). The arbitration board ruled that the original firings would be sustained, but that the latter group of employees should be reinstated.
\end{flushright}
other jurisdictions would rely on the reasoning used in this decision. In Pennsylvania, the result would seem to be limited also. The controversy surrounding the "spoils system" is being put to rest as the legislature increasingly limits its scope, and thereby the number of employees affected. However, for those persons still subject to the archaic system, the effect of the instant holding is severe. The severity of this effect may supply the impetus necessary to hasten further legislative action whether such action merely limits further the jobs under control of the patronage system or does away with it altogether.89 One reason for the court's decision may have been the majority's reluctance to decide a question so basic to the way political parties have traditionally functioned. For example, Chief Justice Bell wrote:

Politics or political patronage is and always has been an important part and parcel of our Local, State and National Governments, and unless changed by the Legislature, will, we believe, undoubtedly continue to be a part of our Country's Governments — Local, State and National.90

Thus, the court may have felt that when so many "pure" political questions were involved, the legislature should make the final determination. However, the necessity for further revision of the law regarding non-Civil Service public employees within the Commonwealth depends to a large degree upon how the court will interpret "just cause," since the new Civil Service Act generally covers all employees not covered by other protective legislation.91 Thus, if "just cause" were read much as the due process requirement under the fourteenth amendment is read, then perhaps the present legislation would be sufficient.

The court has seen fit to continue the viability of the "spoils system" so far as Pennsylvania is concerned. The statement by Chief Justice Bell that "[t]hose who . . . live by the political sword must be prepared to die by the political sword,"92 amply illustrates the manner in which the majority viewed the problem. The court reasoned that since these men received favored treatment at hiring time, they should not complain when they are treated summarily at discharge time. While this view might seem appropriate in the Old Testament sense, it certainly is out of step with current views of public employees' constitutional rights. If the court

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89. The court condemned the continuation of the whole "spoils system" and in effect challenged the legislature to legislate it out of existence. Id. at 536, 280 A.2d at 378. For example, part of the reason for this litigation was the refusal of the employees to change party registration because of the expected "donation" to the new party which customarily accompanies it.
90. Id. at 536 n.4, 280 A.2d at 378 n.4.
91. Pa. Stat. tit. 43, § 1101.301(2) (Supp. 1971). This section provides that the exclusions include elected officials, appointees of the governor when senate confirmation is necessary, management level employees, confidential employees, and those employees affiliated with some religious purpose. In addition, the protection of the Act apparently does not extend to those who are not represented by a bargaining agent.
92. 443 Pa. at 536, 280 A.2d at 378.
relied upon hiring standards, then it should have waited until a party claimed he had been denied a job because of his political affiliation to rule upon that aspect of the system. Instead, the majority upheld a system which denies basic rights to employees throughout, in the interest of insuring that employees hired because of politics do not receive unfair advantages.

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LABOR LAW — RAILWAY LABOR ACT — “EVERY REASONABLE EFFORT” REQUIREMENT OF RAILWAY LABOR ACT, SECTION 2, FIRST, HELD TO BE JUDICALLY ENFORCEABLE.

Chicago & North Western Railway Co. v. United Transportation Union (U.S. 1971)

Petitioner, Chicago & North Western Railway Company, brought suit in the United States District Court for the Northern District of Illinois to enjoin a threatened strike by the respondent, the United Transportation Union, after the two parties had failed to reach a settlement of their labor dispute. The railway company alleged that the injunction should issue because the union had not performed all of its obligations under the Railway Labor Act (the “RLA”) and therefore was not entitled to resort to self-help measures. Specifically, the petitioner alleged that the union had not exerted “every reasonable effort” to settle the dispute, as required by Section 2, First of the RLA.

1. Chicago & N.W. Ry. v. United Transp. Union, 402 U.S. 570 (1971). The dispute between the railway and the union concerned the number of brakemen who were to be employed by the railway. Generally, this type of dispute is labeled a “crew consist” dispute. Chicago & N.W. Ry. v. United Transp. Union, 422 F.2d 979, 980 (7th Cir. 1970). Pursuant to an arbitration board award in 1963, some 8,000 brakemen across the nation had lost their jobs. Unhappy with this situation, the union, in July 1965, served notices on the railway pursuant to 45 U.S.C. § 156 (1970) of an intended change in their existing agreement. The union wanted to restore most of the brakemen jobs that had been lost as a result of the arbitration award by having the railway company employ at least two brakemen for every freight and yard crew. The railway responded by serving section 6 notices upon the union in December 1965, requesting an agreement that the existing rules regarding minimum crews be rescinded and that crew size be left to managerial discretion.

The parties then invoked the procedures of the RLA, holding conferences pursuant to section 6, and requesting the services of the National Mediation Board pursuant to section 5. 45 U.S.C. §§ 155, 156 (1970). The parties could not reach a settlement, and the NMB suggested submission of the dispute to arbitration. When the union declined arbitration, the NMB terminated its jurisdiction on October 16, 1969.

The RLA provides for one last step at this point to forestall self-help — a Presidential Emergency Board. Id. § 160. However, the President failed to invoke this provision and when the thirty day cooling off period of section 5 expired, the union threatened to strike. 402 U.S. at 584-86.


3. Id. § 152, First. This section provides:
   It shall be the duty of all carriers, their officers, agents, and employees to exert every reasonable effort to make and maintain agreements concerning rates of
court held that it had no jurisdiction to enforce Section 2, First, and on appeal, the United States Court of Appeals for the Seventh Circuit affirmed. The United States Supreme Court granted certiorari to resolve a conflict in the circuit courts. In a 5 to 4 decision, the Court reversed the decision of the court of appeals, holding that: (1) Section 2, First, imposes a legal obligation upon both carriers and unions to exert every reasonable effort to reach an agreement; (2) this legal obligation is judicially enforceable; and (3) section 4 of the Norris-LaGuardia Act does not prohibit the issuance of a strike injunction to enforce compliance with the duty of Section 2, First. Chicago & North Western Railway Co. v. United Transportation Union, 402 U.S. 570 (1971).

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Originally enacted in 1926, the Railway Labor Act was the product of almost fifty years of experimental legislation regulating labor-management relations in the railroad industry. Both carriers and unions were well aware of the gravity of railway labor disputes and their potentially catastrophic effect on commerce. Motivated by this consideration and by a strong sense of public duty, the industry exerted a united effort to achieve a workable system for settling disputes. The parties, having agreed upon a proposal, sought the aid and cooperation of Congress to enact it into law.

Prior to the enactment of the RLA, an extensive inquiry into the proposed legislation was conducted by the House Committee on Interstate and Foreign Commerce. The committee's hearings reveal that the primary goal of the RLA was to establish a system for the voluntary settlement of railway labor disputes with minimal governmental intervention and compulsion.


13. During the aforementioned hearings, Mr. Richberg remarked:

This bill ... represents the product of months of negotiations and conferences between the representatives of 20 railroad labor organizations and the Association of Railway Executives representatives, representing the great majority, practically all, of the carriers by railroad. House Hearings, supra note 12, at 9; H.R. REP. No. 328, 69th Cong., 1st Sess. 1-3 (1926); S. REP. No. 606, 69th Cong., 1st Sess. 1-3 (1926).

14. The purpose of the framers of the RLA in approaching Congress was to seek the legislature's cooperation and not its compulsory powers. House Hearings, supra note 12, at 11, 21-22.

15. This proposed legislation was adopted without any significant change by the Congress. As Mr. Justice Frankfurter observed, "[i]t is accurate to say that the railroads and the railroad unions between them wrote the Railway Labor Act of 1926 and Congress formally enacted their agreement." Railway Employes' Dep't v. Hanson, 351 U.S. 225, 240 (1956) (concurring opinion) (emphasis added), quoted in International Ass'n of Machinists v. Street, 367 U.S. 740, 758 (1961). For a detailed discussion of the formation of the Act, see Murphy, Agreement on the Railroads — The Joint Conference of 1926, 11 Lab. L.J. 823 (1960).

16. The parties wanted legal compulsion to be minimal for two main reasons. First, they were afraid that a system of compulsion would stifle the spirit of free and peaceful negotiation which the bill was intended to promote. Secondly, they did not think that enforcement provisions would be necessary. Three reasons account for the latter position: (1) the framers hoped that the spirit of cooperation which had been prevalent during the earlier conferences would continue and instill in all of the parties the moral duty to comply with the Act's provisions in good faith, (House Hearings, supra note 12, at 21); (2) it was hoped that the persuasive powers of the
government by the industry, the courts on a number of occasions have intervened to enforce various provisions of the Act. Prior to the instant case, however, the Supreme Court had never held Section 2, First to be judicially enforceable, although the circuit courts were split on the issue.

In the instant case, the majority enumerated three issues that had to be decided: (1) whether the "reasonable effort" requirement of Section 2, First imposed a legal obligation upon the railway parties; (2) if it were a legal obligation, whether it was judicially enforceable; and (3) if it were judicially enforceable, whether section 4 of the Norris-LaGuardia Act deprived the federal courts of jurisdiction to grant injunctive relief.

In addressing the first issue, the Court concluded that Section 2, First does impose a legal obligation on the parties to exert every reasonable effort to make and maintain agreements and to settle all disputes. Its decision was grounded in both case law and the legislative history of the RLA. In analyzing the decisional law, the Court deemed *Virginian Railway v. System Federation* to be the principal case on the legal obligation theory, and relied on its language which strongly suggested that the duty to exert every reasonable effort is a legal obligation. To buttress its conclusion, the Court cited several cases re-

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NMB would assist in securing adherence to the Act's provisions (id. at 65-66); and (3) it was expected that informed public opinion would pressure the parties into compliance with the Act. *Id. at 19."

17. In general, the courts have intervened to afford injunctive relief in four situations in the major dispute area: (1) the status quo provisions of the RLA (45 U.S.C. §§ 155, 156, 160 (1970); see note 58 infra); (2) Section 2, Third, which provides for the designation of representatives without interference by either party (45 U.S.C. § 152, Third (1970); see note 58 infra); (3) the union's duty to represent employees in a craft without invidious discrimination (see note 57 infra); and (4) the carrier's duty to treat with the union's representatives under Section 2, Ninth (45 U.S.C. § 152, Ninth (1970): see note 56 infra).


The instant case dealt with the major dispute provisions of the RLA and their enforcement, because the dispute concerned the formation of a new agreement. 325 U.S. at 723. In the minor dispute area, the courts have intervened to compel compliance with some of the provisions of the RLA. *See, e.g., Brotherhood of R.R. Trainmen v. Chicago River & Ind. R.R.*, 353 U.S. 30 (1957); *Elgin, J. & E. Ry. v. Burley*, 325 U.S. 711 (1945); *Flight Eng'rs Int'l Ass'n v. Eastern Air Lines*, Inc., 359 F.2d 433 (2d Cir. 1966); *Aaxico Airlines, Inc. v. Air Lines Pilots Ass'n*, 331 F.2d 433 (5th Cir. 1964).

18. *See note 7 supra."

19. 300 U.S. 515 (1937). The *Virginian Railway* Court held that Section 2, Ninth's mandate that the carrier treat with the certified union representative was judicially enforceable. The Court reasoned that judicial enforcement was appropriate because it did not compel the parties to reach an agreement, only to meet and confer with each other. *Id. at 547-48."

20. The *Virginian Railway* Court had stated that:

The statute [RLA] does not undertake to compel agreement between the employer and employees, but it does command those preliminary steps without which no agreement can be reached. It at least requires the employer to meet and confer with the authorized representative of its employees, to listen to their complaints,
affirming this same position. Of even greater significance, however, in bolstering the Court's holding is the legislative history of the RLA. Mr. Justice Harlan, writing for the Court, cited from the House hearings the testimony of Donald R. Richberg, counsel for the organized railway employees. In the cited passage, Mr. Richberg asserted that Section 2, First imposes a legal obligation on the parties to exert every reasonable effort to reach agreement. This affirmation was reiterated on several other occasions in the legislative history.

Contrary to these findings, the Seventh Circuit, relying on the Supreme Court's decision in General Committee of Adjustment v. Missouri-Kansas-Texas Railroad, had ruled that Section 2, First is merely a statement of the purpose and policy of the RLA and is not a judicially enforceable legal obligation. However, the Chicago & North Western Court rejected the Seventh Circuit's view and concluded that, in light of the authority previously mentioned, the passing reference in General Committee to Section 2, First as an expression of policy did not have the impact which the court of appeals had indicated.

*to make reasonable effort to compose differences — in short, to enter into a negotiation for the settlement of labor disputes such as is contemplated by § 2, First.*


24. 320 U.S. 323 (1943). In General Committee, the validity of a mediation agreement between the carrier and the bargaining representatives of the firemen craft was challenged by the engineer union as violative of Section 2, Ninth, 45 U.S.C. § 152, Ninth (1970) (establishing procedures for the resolution of representational disputes). The Court held that Congress via Section 2, Ninth had clearly entrusted the settlement of these disputes to the NMB, and nothing in the statute or legislative history authorized judicial intervention. Therefore, according to the Court, “[t]he inference is strong that Congress intended to go no further in its use of the processes of adjudication and litigation than the express provisions of the Act indicate.” *Id.* at 333.

*In Chicago & North Western, the Seventh Circuit relied on language in General Committee to the effect that “§ 2, Second, like § 2, First, merely states the policy which those other provisions buttress with more particularized commands,” 320 U.S. at 334. Thus, the circuit court concluded that Section 2, First was not a legal obligation. 422 F.2d at 985. In addition, reliance was placed on passages from General Committee which stressed restraint in implying judicial remedies in the RLA area. 320 U.S. at 332-33. As a result the Seventh Circuit concluded that Section 2, First could not be enforced by the courts. 422 F.2d at 985-86.

It is interesting to note that the Seventh Circuit's holding of non-justiciability rested solely upon the authority of General Committee, whereas the dissent, in the Supreme Court opinion, reached the same result, ignoring that case and relying on other cases and the legislative history. See notes 49-64 and accompanying text infra.

25. 422 F.2d at 985; *see note 5 supra.*

26. Although the Chicago & North Western Court had good reason for disposing of the General Committee case with respect to the legal obligation issue, that was the last mention the Court made of the case. This is noteworthy in light of the fact that the Seventh Circuit relied on General Committee to support not only its ruling as to
Having decided that Section 2, First imposed a legal obligation on the parties, the Court addressed the crucial question of whether this legal obligation could be judicially enforced. Noting that duties created by the RLA had been enforced in the past, the Court announced its test for determining the propriety of judicial enforcement of a given section of the RLA:

Our cases reveal that where the statutory language and legislative history are unclear, the propriety of judicial enforcement turns on the importance of the duty in the scheme of the Act, the capacity of the courts to enforce it effectively, and the necessity for judicial enforcement if the right of the aggrieved party is not to prove illusory.

The validity of the majority's test clearly depends upon whether the cases cited by Justice Harlan do, in fact, substantiate it. In each of the cases, the Supreme Court had supported its holding primarily by considering the importance of the duty to be enforced, the capability of the courts to enforce it, and the need for judicial involvement. One example is Texas & New Orleans Railroad v. Brotherhood of Railway Clerks, where the Court held that Section 2, Third (providing that employee representatives shall be designated without interference by either party) was judicially enforceable. In so concluding, the Court opined that: (1) the section was the essential foundation of the statutory scheme (importance); (2) the Court was capable of detecting coercive tactics since it must make similar determinations in applying rules of fraud and undue influence (capacity); and (3) Congress must have intended judicial enforcement because it was inconceivable that Congress would pass this specific statutory prohibition only to have it ignored by the courts (necessity of enforcement if right is not to prove illusory).

Given that the majority's test is supported by precedent, it is appropriate to question whether it is satisfied by the facts in the instant

legal obligation, but also its determination as to the judicial enforceability of Section 2, First. See note 24 supra.


28. 402 U.S. at 578 (emphasis added). The majority chose to rely upon this test as the sole justification for its holding that Section 2, First could be judicially enforced.

29. Justice Harlan, while stating that "our cases reveal" the test, did not specifically refer to which cases these were. It seems logical, however, that the Court meant the cases it had cited as having previously enforced the RLA provisions to be the "revealing cases" in question. See note 27 supra.

30. 281 U.S. 548 (1930).

case. The Court found that the first prong of the test — the importance of the duty in the scheme of the Act — was satisfied. The duty to exert every reasonable effort was, according to the Court, essential to the effective operation of the RLA because absent that reasonable effort during the negotiation process, the Act’s elaborate settlement machinery would be ineffective. The case law and legislative history utilized by the majority to conclude that the reasonable effort requirement is a legal obligation were also relied upon by the Court in its conclusion that the duty was crucial to the vitality of the Act.\(^{32}\) With respect to the second requirement of its test, the majority reasoned that because courts must determine the presence of a reasonable effort under section 8 of the Norris-LaGuardia Act,\(^ {33}\) and because the \textit{Virginian Railway} Court suggested that such issues are “everyday subjects of inquiry by [the] courts,”\(^ {34}\) the judiciary should be deemed capable of effectively enforcing the duty imposed by Section 2, First. Although the Court was justified in concluding that the courts are capable of enforcing the duty, it must be noted that mere capacity to enforce, alone, does not necessarily establish the authority to do so.\(^ {35}\) Finally, the \textit{Chicago & North Western} Court concluded that judicial enforcement of Section 2, First was necessary in order to prevent the right of the aggrieved party from being illusory.\(^ {36}\) Justice Harlan reasoned that because the Congress had not committed enforcement of Section 2, First to the National Mediation Board (the “NMB”), the conclusion was “inescapable” that it had intended judicial enforcement of the provision, for otherwise the duty would be unenforceable.\(^ {37}\)

It is reasonably certain that Congress did not intend the NMB to enforce Section 2, First.\(^ {38}\) The House hearings indicate that because

\(^{32}\) See notes 19–23 and accompanying text supra.

\(^{33}\) 29 U.S.C. § 108 (1970) provides:

No restraining order or injunctive relief shall be granted to any complainant . . . who has failed to make every reasonable effort to settle such dispute . . . .

\(^{34}\) 300 U.S. at 550.

\(^{35}\) The analogy made by the instant Court between Section 2, First and section 8 of the Norris-LaGuardia Act illustrates this point. It is logical to conclude that the same courts should be capable of ruling on the “reasonable effort” issue in both situations — the RLA and the Norris-LaGuardia Act. However, under the Norris-LaGuardia Act Congress specifically authorized the court to determine this issue, whereas the Congress made no such provision in the RLA.

\(^{36}\) Although the Court did not discuss the third prong of its test as such, one must assume that the majority’s analysis of the non-adjudicatory status of the NMB was directed at the conclusion that judicial enforcement would be necessary to vindicate both parties’ rights to “reasonable effort” bargaining by the other.

\(^{37}\) 402 U.S. at 579–81.

\(^{38}\) Nevertheless, the Seventh Circuit in the instant case held that the responsibility of enforcing Section 2, First should lie with the NMB and not with the courts. The circuit court recognized that the Board’s role is basically non-adjudicatory, but contended that it is better qualified than the court to determine whether the parties are exercising a reasonable effort because of the Board’s “expertise, proximity to the negotiation process and power to maintain the status quo . . . .” 422 F.2d at 988. This opinion is convincing since administrative agencies are generally established for the very reason that they can acquire greater expertise in a specific area than the courts. However, the NMB is apparently not the kind of board that can assume adjudicatory functions and continue to perform effectively its primary duty of mediation. See note 45 and accompanying text infra.
of the Railroad Labor Board's failure to effectuate settlements under the 1920 Transportation Act, attributed primarily to the Board's adjudicatory role under that statute, the NMB should be given no adjudicatory functions. Thus, although the NMB was given a dominant role in the settlement-negotiation process under the 1926 Act, it was not until the 1934 Amendments that it was granted any specific adjudicatory power. In those amendments, new provisions were added to Section 2, Ninth which gave the NMB the power to determine employee bargaining representatives. It is noteworthy, however, that even though some precautions were taken in Section 2, Ninth to assure protection of the Board's neutrality, it has been suggested that the NMB cannot effectively perform its Section 2, Ninth adjudicatory function because this role sharply conflicts with the responsibility and the necessity of the Board to maintain its status as an impartial mediator in the eyes of the parties.

Not only is it clear that the NMB has no authority to enforce Section 2, First, but, if the premise is accepted that Congress would not have established the duty of "reasonable effort" bargaining only to leave it unenforceable, then Justice Harlan's reasoning that the court can enforce the provision because the Board cannot is persuasive. Clearly, this premise had been accepted in previous cases as one basis for holding other provisions of the Act enforceable. There is, however, lan-
guage in the General Committee case which suggests that there may be situations where neither the NMB nor the courts can act. However, it is not clear whether any weight can be attributed to General Committee since it is factually distinguishable from the instant case, having involved representational disputes under Section 2, Ninth. Moreover, Justice Douglas, who wrote the majority opinion there, joined the dissenters in the instant case who made no mention of General Committee.

Mr. Justice Brennan authored the dissenting opinion in Chicago & North Western and, although he did not directly challenge either the validity or the application of the majority's test for determining the propriety of judicial enforcement under Section 2, First, he concluded that judicial review of the relative merits of each party's bargaining position was clearly prohibited. In arriving at this conclusion, the dissent focused initially upon the legislative history of the RLA, on the ground that this was essential in order to determine whether judicial enforcement of Section 2, First was intended. Noting that the thrust of the Act was voluntary settlement through the traditional means of conciliation and mediation, with few expressly enforceable provisions, the dissent examined the role of Section 2, First's reasonable effort requirement in this scheme. From the testimony of Mr. Richberg at the House hearings, Justice Brennan concluded that the general understanding among Congress, the unions and carriers was "that the duty 'to exert every reasonable effort' was judicially enforceable at least to the extent of requiring the parties to sit down at the bargaining table and talk to each other." An examination of that testimony reveals that only an arbitrary refusal to even meet and confer with the other party would constitute an enjoinable violation of Section 2, First. Therefore, in light of Justice Harlan's remark as to the "great weight" that must be afforded the statements of the party spokesmen at the

47. Mr. Justice Douglas, speaking for the majority in General Committee, stated:

There may be as a result many areas in this field where neither the administrative nor the judicial function can be utilized. But that is only to be expected where Congress still places such great reliance on the voluntary process of conciliation, mediation and arbitration. Courts should not rush in where Congress has not chosen to tread.

320 U.S. at 337.

48. See note 24 supra. It has been suggested that General Committee merely illustrated the Court's reluctance to interfere with the NMB's authority over representational disputes under Section 2, Ninth, and therefore its holding is limited to such disputes. Note, supra note 43, at 936.

49. That is, irrespective of the fact that the NMB was not intended to enforce the duty, the courts are not authorized to do so either. 402 U.S. at 587-88.

50. Id. at 588-91. See House Hearings, supra note 12, at 21, 65-66; notes 12-16 and accompanying text supra.


52. Justice Brennan noted that Mr. Richberg's testimony had not been controverted by the carrier representatives who were present at the hearings. 402 U.S. at 593 n.7.

53. Id. at 593.

hearings, Justice Brennan's argument is persuasive — that the legislative history does not support the conclusion that it was to be the courts' function to enforce Section 2, First to the extent of determining what is and is not reasonable effort bargaining.

With this legislative history as background, Justice Brennan examined the situations in which the Court had intervened in the past to afford injunctive relief in the major dispute area of the RLA. Only three such situations were discovered: (1) violation of the carrier's duty to treat with the union representative; (2) invidious discrimination by union representatives against employees; and (3) violations of the Act's status quo provisions.

Justice Brennan concluded that there were two critical distinctions between these situations and the instant case. First, the instant case did not follow the pattern of the prior cases in that in each of them the scheme of the RLA could not have begun to operate without judicial involvement. This distinction is sound. Enforcement of the carrier's Section 2, Ninth duty to treat with the union representatives is necessary to initiate RLA procedures since negotiations cannot occur if the carrier does not even meet with the union representatives. The provisions as to status quo, non-discriminatory representation and free designation of representatives (Section 2, Third) must be enforced in order

55. 402 U.S. at 576. See note 12 supra.
56. The judicial enforceability of the carrier's duty to treat with the union's representative (45 U.S.C. § 152, Ninth (1970)), was established in Virginian Ry. v. System Fed'n, 300 U.S. 515 (1937). Since this mandate to "treat with" was interpreted by the Virginian Railway Court as requiring the employer to at least meet and confer with the employee representative (id. at 548), the Court was acting consistently with Mr. Richberg's opinion that the absolute refusal to meet and confer with the other party could be judicially enjoined. 402 U.S. at 593-94; House Hearings, supra note 12, at 66, 84-85. The Virginian Railway Court, however, did not refer to the 1926 House hearings for authority, but this is understandable since the duty the Court was enforcing was not added to the Act until the 1934 amendments.
57. It is well established that the Court will use its injunctive power to prevent invidious discrimination on the part of a union as against employees. Brotherhood of R.R. Trainmen v. Howard, 343 U.S. 768, 773-74 (1952); Tunstall v. Brotherhood of Locomotive Firemen, 323 U.S. 210, 213-14 (1944); Steele v. Louisville & N.R.R., 323 U.S. 192, 202-03 (1944). The leading case on this point is Steele, where the Court held that the authority to enforce equal representation could be drawn from the language of the sections dealing with employee representatives read in view of the general purpose of the Act — to promote free representation and negotiation. 323 U.S. at 202-03.
58. Detroit & T.S.L. R.R. v. United Transp. Union, 396 U.S. 142, 150 (1969). Basically, the status quo provisions include: (1) section 6, 45 U.S.C. § 156 (1970) (requiring 30 days written notice of any intended changes in agreements affecting wages, rules or working conditions, and providing that once notice is given, such terms shall not be altered until the controversy is acted upon); (2) section 5, 45 U.S.C. § 155 (1970) (prohibiting such changes during the 30 days following the termination of the NMB proceedings); and (3) section 10, 45 U.S.C. § 160 (1970) (providing that there shall be no change in wages, rules or working conditions while the Emergency Board is making its findings and for 30 days thereafter, except by agreement).
59. 402 U.S. at 595.
for the bargaining process to proceed smoothly and undisturbed. If these mandates were not enforced, any chance of a negotiated settlement would be seriously jeopardized because the parties' attentions would be diverted from the bargaining table. In the instant case, on the other hand, the step-by-step procedures of the RLA had already been completed and the dangers of the earlier cases which had demanded judicial intervention were not present. Thus, enforcement of Section 2, First is not needed either to start the bargaining process or to keep it running smoothly.

The second distinction found by Justice Brennan was that in each of the prior cases "the judicial involvement was minimal and in keeping with the central theme of the Act — to bring about voluntary settlement," while in the instant case the role of the court is no longer to merely initiate the bargaining process, but rather to review extensively the bargaining positions of the parties "after the entire statutory scheme has run its course." The dissent maintained that such involvement violated both the contemplated enforcement of Section 2, First and the general policy of the Act — voluntary settlement with minimal government interference. It is submitted that Justice Brennan's conclusions are valid in light of the legislative history. As previously examined, the history does not support the view that it was to be the court's function to review the actual bargaining positions of the parties to determine if a reasonable effort has been expended. Furthermore, since the court is now given some control over the substance of the negotiations, in that it can control the subject matter about which the parties may or may not bargain based on its determination of what is a reasonable effort, the general policy of self-government in the industry is contravened. Justice Harlan, in fact, recognized that caution must be exercised in this area so as not to infringe upon "the strong federal labor policy against governmental interference with the substantive terms of collective-bargaining agreements."

Although the dissent did not mention it, there is another distinction between the situations in which judicial enforcement had previously been permitted and the present case in terms of the legislative history.

60. Specifically, "all parties were fairly represented, the status quo was being maintained, and, most important, each bargaining representative met and conferred with his counterpart." Id. at 596.
61. Id. at 595.
62. Id. at 596. As was stated by the Seventh Circuit in the instant case:
To imply judicial enforcement to [Section] 2, First, would insert a judicial inquiry into every step of the Railway Labor procedures to determine in each case if reasonable effort is being exerted; this is a role which we believe Congress did not intend the courts play in the settlement of Railway disputes. 422 F.2d at 985.
63. See notes 51-55 and accompanying text supra.
64. 402 U.S. at 596. See notes 13-16 and accompanying text supra.
65. See notes 51-55 and accompanying text supra.
67. 402 U.S. at 579 n.11.
The House hearings reveal that in three of the four areas of enforcement by the Court — the duty of Section 2, Ninth to "treat with,"
the status quo provisions; and the duty of Section 2, Third not to interfere with the designation of representatives — such involvement was specifically contemplated by the drafters of the Act. The fourth area of enforcement, racial discrimination, was not mentioned in the hearings, but it is significant that enforcement of the other three provisions would not be objectionable because of any conflicting legislative history as in the instant case.

It is interesting to note that both the majority and the dissent in the Chicago & North Western case arrived at their opposite conclusions while relying on essentially the same cases. The majority concentrated on the reasoning used to justify judicial enforcement in each of those cases. From those opinions, Justice Harlan deduced the factors which had motivated the Court in reaching its decisions and combined these factors into a "test" for determining the propriety of judicial enforcement. The dissent, on the other hand, looked not to the particular rationale of the Court in the previous cases, but focused on the nature of the provisions involved therein. Hence, what was critical to the dissent was the pattern established by those holdings and not the reasons which supported them. In this way, both opinions drew support from the case law, although the majority's would appear to be the more reliable and rational of the two.

Moreover, there were several factors raised by the majority which not only support judicial enforcement but demand it. It cannot be

70. 45 U.S.C. § 152, Third (1970). See House Hearings, supra note 12, at 41; note 58 supra. A further indication that enforcement of this provision was contemplated by Congress is the fact that in 1934 amendments Congress added Section 2, Tenth which made willful violation of Section 2, Third a criminal offense. 45 U.S.C. § 152, Tenth (1970).
71. It should be noted, however, that none of the prior cases specifically relied upon the hearings to support their holdings of judicial enforceability.
72. No mention of racial discrimination was made probably because discrimination, a social problem, would not have been a prime subject of concern at the legislative hearings.
73. A fourth possible distinction between the past cases and the instant case is that, aside from racial discrimination, the provisions enforced were specific statutory mandates, while the reasonable effort requirement is a general standard of conduct which has not yet been defined by Congress. However, although the reasonable effort requirement is not defined in the RLA, the standard is substantially the same as that developed by the National Labor Relations Board and the courts with respect to the duty to bargain in good faith under the National Labor Relations Act. Therefore, reliance on NLRA precedents in determining whether there has been reasonable effort bargaining under Section 2, First would be appropriate. Harper, Major Disputes Under the Railway Labor Act, 35 J. AIR L. & COM. 3, 34-39 (1969). For an excellent discussion of the development of the duty to bargain in good faith under the NLRA, see Cox, The Duty to Bargain in Good Faith, 71 HARV. L. REV. 1401 (1958).
74. See notes 28-31 and accompanying text supra.
75. See notes 56-64 and accompanying text supra.
76. See notes 32-45 and accompanying text supra.
denied that the duty to exert every reasonable effort is the "heart" of the RLA\textsuperscript{77} and that some kind of enforcement of the reasonable effort requirement is needed since "[t]he bargaining status of a union can be destroyed by going through the motions of negotiating almost as easily as by bluntly withholding recognition."\textsuperscript{78} Although the House hearings emphasize that judicial enforcement of the RLA provisions was to be minimal, this was largely due to the assumption that the good faith and spirit of cooperation of the parties would make enforcement unnecessary\textsuperscript{79} — an assumption that may have been true in 1926 but is probably no longer viable. Furthermore, since the NMB was neither designed nor equipped to enforce Section 2, First,\textsuperscript{80} judicial enforcement is the only possible and practical means of enforcing this provision at the present time. Moreover, the National Labor Relations Board, with the aid of judicial review, has been enforcing the duty to bargain in "good faith" under the National Labor Relations Act for years, and if such enforcement is necessary under that Act, perhaps it is time for similar action with respect to the RLA.\textsuperscript{81} Finally, the dispute in the instant case had been going on since 1963, and something had to be done to resolve it.\textsuperscript{82}

Nevertheless, it must be noted that both the dissenting and majority opinions have merit in their positions and each apparently recognized this fact. The majority probably realized that the legislative history did not support a holding of judicial enforcement here, since Justice Harlan avoided reference to the hearings on this issue, while relying heavily on the hearings in resolving the questions of legal obligation\textsuperscript{83} and the non–adjudicatory status of the NMB.\textsuperscript{84} Likewise, the dissent made no attempt to refute the validity of the majority's test or its application. In fact, Justice Brennan hinted that enforcement of the reasonable effort requirement may indeed be necessary under today's changed labor conditions. However, he deferred to Congress to fashion a remedy for this deficiency in the Act.\textsuperscript{85} This is the essence of the division between the two opinions. Both were obviously cognizant of the need for some type of enforcement on the one hand, and the problems of judicial authority to enforce on the other. To the majority, the compelling need for enforcement so outweighed the lack of authority argument as to make the result "unavoidable if we are to give effect to all our labor laws . . . ."\textsuperscript{86}

\begin{thebibliography}{99}
\bibitem{78} Cox, \textit{supra} note 73, at 1413.
\bibitem{79} \textit{House Hearings, supra} note 12, at 65–66. \textit{See note 16 supra.}
\bibitem{80} 402 U.S. at 580–81; \textit{House Hearings, supra} note 12, at 18; 67 \textit{Cong. Rec.} 4670 (1926) (remarks of Representative Arentz); \textit{see} notes 39–45 and accompanying text \textit{supra}. \\
\bibitem{81} \textit{See} Cox, \textit{supra} note 73; Harper, \textit{supra} note 73, at 38–39.
\bibitem{82} 402 U.S. at 573, 584–85.
\bibitem{83} \textit{Id.} at 576–77. \textit{See} notes 22–23 and accompanying text \textit{supra}.
\bibitem{84} 402 U.S. at 580–81. \textit{See} notes 38–45 and accompanying text \textit{supra}.
\bibitem{85} 402 U.S. at 599.
\bibitem{86} \textit{Id.} at 583.
\end{thebibliography}
RECENT DEVELOPMENTS

To the dissent, the lack of authority for judicial enforcement made it the duty of the Congress, and not the Court, to correct the situation. 87

After holding that Section 2, First was judicially enforceable, the Chicago & North Western court discussed the effect of section 4 of the Norris-LaGuardia Act 88 on the enforceability of Section 2, First. In enforcing provisions of the RLA, the courts have expressed a policy of reconciliation with Norris-LaGuardia which has been labeled the accommodation doctrine. 89 Based upon this doctrine, the Court in the instant case concluded that the Norris-LaGuardia Act did not prohibit the use of a strike injunction to enforce the duty of Section 2, First of the RLA. 90 Once it is decided, however, that the duty of Section 2, First is enforceable, then Norris-LaGuardia does not present much of an obstacle, due to the well established accommodation principle.

The majority and dissenting opinions in the instant case both recognized that, notwithstanding the question of jurisdiction, there are other serious problems with judicial enforcement of the reasonable effort obligation and the issuance of strike injunctions to enforce this duty. Among these problems are the danger that the parties will bargain with an eye on the courts rather than channelling their efforts toward the negotiations at hand, 91 and that enforcement proceedings will unreasonably postpone the parties' right to self-help measures so as to vitiate them as effective bargaining tactics. 92 Furthermore, a party interested in maintaining the status quo may be less willing to compromise during the settlement process if he feels there is a possibility of postponing

87. Id. at 599.
89. Although it had been previously held that the Norris-LaGuardia Act was not an absolute bar to the federal courts' use of injunctive relief in labor disputes, (Brotherhood of R.R. Trainmen v. Howard, 343 U.S. 768, 774 (1952); Graham v. Brotherhood of Locomotive Firemen, 338 U.S. 232, 237–40 (1949); Virginian Ry. v. System Fed'n, 300 U.S. 515, 549–53, 562–63 (1937)), it was not until Brotherhood of R.R. Trainmen v. Chicago River & Ind. R.R. that the Supreme Court first articulated the accommodation doctrine. 353 U.S. 30 (1957). In that case the Court held that:

[T]he Norris-LaGuardia Act cannot be read alone in matters dealing with railway labor disputes. There must be an accommodation of that statute and the Railway Labor Act so that the obvious purpose in the enactment of each is preserved.

We think that the purposes of these Acts are reconcilable. Id. at 40.

90. 402 U.S. at 581–84. The dissent also recognized the need for accommodating the two statutes, but felt that because there was no specific mandate for an injunction in this case, Section 2, First being unenforceable, the more general provisions of the Norris-LaGuardia Act controlled. Id. at 598.

91. Id. at 583. See Risher, The Railway Labor Act, 12 B.C. IND. & COM. L. REV. 51, 55–56 (1970). The author discusses how RLA dispute resolution procedures may produce less effective bargaining because the parties will become conditioned to expect government intervention to avoid threatened strikes. Id. He points out, however, that the Supreme Court has indicated that drawing out the settlement process is a deliberate measure to motivate the parties to resolve the dispute by voluntary agreement. Id. at 58–59.

92. 402 U.S. at 598. A delay may be critical in situations where the prolonged passage of time will weaken the bargaining position of the defendant party or make resort to self-help measures impractical when it becomes permissible. Note, supra note 43, at 95.
through legal proceedings the other party's recourse to self-help. There is also a chance that the carefully planned scheme of the Act, “of gradually escalating pressures” to reach a settlement, will be impaired since the parties will realize that self-help can be enjoined even after the statutory mechanism has run, without any guidance as to where in the bargaining process the parties are to be remanded. In addition, the undefined standard of reasonable effort bargaining could “provide a cover for freewheeling judicial interference.” Compounded with these considerations is the lack of administrative machinery in the RLA to guide and facilitate enforcement of this provision. The NLRA does not have the same void. Under the NLRA, the NLRB has the primary function of enforcing the “good faith” bargaining duty, with the courts merely reviewing its orders. It should also be noted that upon review, the court has the advantage of prior expert screening by the Board in deciding the complex issue of “good faith” bargaining.

Despite all of these factors, the Court concluded that the duty to exert every reasonable effort was simply so crucial to the successful operation of the RLA scheme that it had to be enforced not only to preserve the RLA but “to give effect to all our labor laws...” Such a conclusion is not devoid of merit. The RLA certainly does not compel agreement, but agreement is, without doubt, the intended result of the legislation. The Court's decision will at least assure all the parties of reasonable effort bargaining and, in this respect, should foster the prospects of settlement. As for the practical problems with enforcing the reasonable effort obligation, they have all been encountered under the NLRA and enforcement of that Act’s “good faith” bargaining requirement continues despite them.

94. Justice Brennan felt that the step-by-step bargaining process of the RLA was designed to exert varying pressures on the parties to reach settlement at each step. He argued that the Act did “not evidence an intention to return to any step once completed,” as the decision in this case would require. 402 U.S. at 597.
95. Id.; Note, supra note 43, at 936.
96. 402 U.S. at 583. But see note 73 supra. Justice Harlan also noted that: Section 8(d) of the National Labor Relations Act, 29 U.S.C. § 158(d) [(1970)], [which defines the meaning of “to bargain collectively”] was added precisely because of congressional concern that the NLRB had intruded too deeply into the collective-bargaining process under the guise of enforcing the duty to bargain in good faith. 402 U.S. at 583 n.19.
97. It is interesting to note that the dangers mentioned by the Court in the instant case, with regard to enforcement of the reasonable effort requirement, have been also recognized as arising under the NLRA. Cox, supra note 73, at 1435-42. There, the author highlights the problems and suggests caution in light of them. This approach is similar to that of Mr. Justice Harlan who stated that “[t]hese weighty considerations indeed counsel restraint in the issuance of strike injunctions based on violations of [Section] 2, First.” 402 U.S. at 583.
99. Id. § 160(f).
100. 402 U.S. at 583.
101. Cox, supra note 73, at 1435-42.
In the final analysis, it is clear that the Court's holding is not the final solution, but rather must be recognized as a temporary measure to protect the bargaining process until Congress acts to redress the deficiencies in the present legislation. It is submitted that a procedure similar to that under the NLRA, with enforcement entrusted initially to an administrative agency possessing adjudicatory powers, would best handle the delicate issue of "reasonable effort" bargaining. Such an agency would be better qualified to determine this issue because of expertise acquired through specialization and proximity to the actual negotiations. This system would relieve the federal courts of the heavy burden of direct enforcement by assigning to them the role of reviewing agency action. Perhaps Justice Harlan had this in mind when he stated "the conclusion is inescapable that Congress intended the enforcement of [Section] 2 First to be overseen by appropriate judicial means ...." 102 Finally, even though there are dangers when either a court or agency attempts to enforce a concept as vague as "reasonable effort," protection can be secured by a tight legislative framework.

In any event, it is the duty of Congress to concentrate its attentions on fresh legislation in the railway area that will afford an efficient and comprehensive system for the settlement of disputes and assure the public of uninterrupted service on our nation's railroads.

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102. 402 U.S. at 581 (emphasis added).