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RECENT CASES

Civil Rights—Federal Criminal Code Protects Rights Secured by Fourteenth Amendment

Defendants were indicted by a federal grand jury[1] for conspiring to interfere with the civil rights of several Negro citizens in violation of the federal criminal code.[2] The district court dismissed the indictments on grounds that they alleged a violation of general rights secured by the fourteenth amendment, rather than specific rights "secured by the Constitution or laws of the United States" as the statute required.[3] On direct appeal to the United States Supreme Court, *held*, reversed. Section 241 of the federal criminal code prohibits violations of all rights and privileges secured by the Constitution or laws of the United States, including the right to travel interstate and those rights and privileges guaranteed by the due process and equal protection clauses of the fourteenth amendment. *United States v. Guest,* 383 U.S. 745 (1966).

The principal problem in applying section 241 of the federal criminal code is in determining whether the particular civil rights involved are protected either by the Constitution or by the laws of the United States within the meaning of that section. Since section 241 contains no reference to state action, it was held in *United States v. Williams*[4] to

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1. The indictment charged that defendants conspired to "injure, oppress, threaten, and intimidate" Negroes in the free exercise of certain rights, including: (1) the right to equal use of public facilities managed by the State of Georgia; (2) the right to full and equal use of Georgia's public streets and highways; and (3) the right to travel freely upon the facilities and instrumentalities of interstate commerce within Georgia. The indictments further alleged that the conspiracy achieved these violations by shooting, beating, threatening, and killing Negroes, and by causing their arrest by false accusations to state authorities. For the full indictment, see United States v. Guest, 383 U.S. 745, at 747-48 n.1.

2. 18 U.S.C. § 241 (1964) [hereinafter cited as § 241]. "If two or more persons conspire to injure, oppress, threaten, or intimidate any citizen in the free exercise or enjoyment of any right or privilege secured to him by the Constitution or laws of the United States, or because of his having so exercised the same; or

"If two or more persons go in disguise on the highway, or on the premises of another, with intent to prevent or hinder his free exercise or enjoyment of any right or privilege so secured—

"They shall be fined not more than $5,000 or imprisoned not more than ten years, or both."

3. United States v. Guest, 246 F. Supp. 475, 483-84 (M.D. Ga. 1964).

4. 341 U.S. 70 (1951). See also United States v. Guest, *supra* note 3. The restriction of § 241 to private interference would have precluded prosecutions for the violation of rights under the fourteenth amendment, since the equal protection and due process clauses apply only where state action is involved. See 54 Nw. U.L. Rev. 616, 620 (1960). In further distinguishing rights protected under § 241 from those not so protected, the Court in *Williams* held that the section prohibits violations of

reach only violations of those specific rights and privileges which the federal government may protect from interference by private individuals. The right to travel freely from state to state is such a right, either as an incident of national citizenship[5] or because the commerce clause pre-empts state regulation in the area.[6] However, another line of cases established that section 241, or its similar predecessor,[7] was not applicable to private interferences with fourteenth amendment rights,[8] since section 5 of that amendment[9] empowered Congress to act only within the scope of the rest of the amendment, which spoke only of state actions.[10] In the words of the Court in *The Civil Rights Cases,*

> . . . the last section of the amendment invests Congress with power to enforce it by appropriate legislation. To enforce what? To enforce the prohibition. To adopt appropriate legislation for correcting the effects of such prohibited State law and State acts, and thus to render them effectually null, void, and innocuous. This is the legislative power conferred upon Congress, and this is the whole of it.[11]

Furthermore, the Court has held that rights secured under the due process and equal protection clauses are not included under section 241 because such inclusion would render the section invalid due to

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rights which are substantive, but not those which are remedial. Substantive rights are those which are granted in the specific language of the Constitution or statutes (or necessarily and properly implied therefrom), such as the right to petition Congress for redress of grievances, United States v. Cruikshank, 92 U.S. 542 (1875), to be protected from violence while in the lawful custody of a United States marshal, Logan v. United States, 144 U.S. 263 (1892), or the right to travel freely from state to state, discussed in the text above. Remedial rights, on the other hand, are those which are protected against infringement by state action under the fourteenth amendment, which would presumably include protection against illegal search and seizure, Mapp v. Ohio, 367 U.S. 643 (1961), the right against self-incrimination, Malloy v. Hogan, 378 U.S. 1 (1964), and the right to counsel, Gideon v. Wainwright, 372 U.S. 335 (1963).

5. Crandall v. Nevada, 73 U.S. (6 Wall.) 35 (1867).

6. Edwards v. California, 314 U.S. 160 (1941). Note that the negative implications of the commerce clause have no reference to prohibitions of state action under the fourteenth amendment. Thus, the Court, using this approach, found congressional authority to affect private persons in the Civil Rights Act of 1964, 78 Stat. 243, 42 U.S.C.A. § 2000a. Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241 (1964); Katzenbach v. McClung, 379 U.S. 294 (1964).

7. "That if two or more persons . . . shall conspire together, or go in disguise upon the public highway or upon the premises of another for the purpose . . . of depriving any person . . . of the equal protection of the laws, or of equal privileges or immunities under the laws, . . . [they] shall be deemed guilty of a high crime . . . ." Civil Rights Act of 1871 § 2, 17 Stat. 13-14.

8. United States v. Harris, 106 U.S. 629 (1882).

9. "The Congress shall have power to enforce, by appropriate legislation, the provisions of this article." U.S. CONST. amend. XIV, § 5.

10. Civil Rights Cases, 109 U.S. 3 (1883); *Ex parte* Virginia, 100 U.S. 339 (1879); United States v. Cruikshank, *supra* note 4.

11. *Supra* note 10, at 11.

vagueness.[12] This latter construction was based upon the reasoning that rights protected by section 241 must be sufficiently definite to place potential violators on notice as to the acts prohibited by that section. Since both equal protection and due process are vague terms which may not be clearly defined judicially, they were held to be outside the purview of the statute.[13]

The *Guest* case was decided in conjunction with *United States v. Price.*[14] Noting that *Price* had held that those rights protected by section 241 included rights under the due process clause, the Court found that rights under the equal protection clause are included as well, thus bringing all fourteenth amendment rights under section 241. For a violation of section 241 to exist, there must be both a specific intent to interfere with the civil rights of a citizen of the United States *and* specific rights, the violation of which may be prosecuted. The Court found that the requirement of a specific intent is met by the very nature of section 241, since proof of the conspiracy required under that section would necessarily include proof of the requisite specific intent.[15] The requirement of the existence of a specific right also presented no serious difficulty, since a long line of prior decisions has firmly and precisely established specific rights protected by the fourteenth amendment.[16] Such judicial specificity

12. Screws v. United States, 325 U.S. 91 (1945). For this proposition of the vagueness and its relation to the constitutionality of § 241, the district court in the instant case also relied upon United States v. Williams, 341 U.S. 70 (1951). But the Supreme Court pointed out in the companion case of United States v. Price, 383 U.S. 787, 798 (1966), that in *Williams* the question was left open by an even split of the Court.

13. See materials cited in note 4 *supra.*

14. *Supra* note 12. *Price* also involved alleged violations of 18 U.S.C. § 242 (1964), which prescribes the penalty for violations, under color of state law, of rights under the due process clause. "Under color of any law" has been construed to include positive acts involving state officials, such as violent extortion of confessions from prisoners by prison officials, United States v. Jones, 207 F.2d 785 (5th Cir. 1953), and the beating to death of a prisoner by a sheriff, Clark v. United States, 193 F.2d 294 (5th Cir. 1951), as well as passive acts, or inaction, in the face of the duty to act affirmatively, such as permitting members of the Ku Klux Klan to remove prisoners from jail and beat them, Lynch v. United States, 189 F.2d 476 (5th Cir. 1951), and a sheriff's removing his badge to indicate divestment of official role in subsequent beating to death of a prisoner, Crews v. United States, 160 F.2d 746 (5th Cir. 1947).

15. The specific intent requirement had also caused difficulty in prosecutions under § 242, *supra* note 14. In the leading case of Screws v. United States, *supra* note 12, the Court held that § 242 could be constitutionally upheld only if the statute were read to require a showing of specific intent to deprive the victim of civil rights, with the result that prosecution was made more difficult. See 1961 U.S. COMM'N ON CIVIL RIGHTS REP. 45-67; Note, 65 HARV. L. REV. 107, 138 (1951); Note, 74 YALE L.J. 1297 (1965). However, once state involvement was found, even private persons who joined state officers in the violations could be prosecuted under § 241, in conjunction with the general federal conspiracy statute, 18 U.S.C. § 371 (1964).

16. For the Court's citations to cases specifying these rights under the equal protection clause, see 383 U.S. at 754 n.6.

eliminated any argument that the section might be unconstitutionally vague if interpreted as enforcing rights secured by the fourteenth amendment. But in expanding the rights included under section 241, the Court stressed that the section "incorporates no more than the Equal Protection Clause itself."[17] Furthermore, while reasserting that rights under the equal protection clause are protected only from state action, the Court pointed out that the actual involvement of the state need not be either exclusive or direct. It therefore concluded that the allegation that defendants caused the arrest of Negroes by making false accusations to authorities[18] indicated a possibility of sufficient state involvement to require denial of a motion to dismiss this paragraph of the indictment.[19] The Court next considered the district court's dismissal of that paragraph of the indictment alleging that defendants had conspired to interfere with the rights of Negroes to travel freely and to use the facilities of interstate commerce. Reviewing earlier decisions[20] concerned with the right to free travel, the Court found that right to be secured by the Constitution, and, therefore, within the purview of section 241. In a separate opinion, Mr. Justice Brennan dissented from that portion of the majority holding which he interpreted as requiring state action for application of section 241 to discriminatory practices. He maintained that enforcement of section 241 should not require a showing of state action, since in passing the section Congress had exercised the power granted by section 5 of the fourteenth amendment "to enforce the provision of this article." Arguing that the provision of section 241 requiring that rights be "secured by the Constitution or laws of the United States" is met if the provision in question "arises under [or] is dependent upon" the fourteenth amendment, he concluded that Congress had proscribed all interferences with constitutional rights, be they state-connected or private.[21] Mr. Justice Harlan also dissented, finding

17. *Id.* at 754. Although the Court is unclear as to the meaning of this statement, it would appear to suggest that rights which are considered remedial, or protected against state action by the fourteenth amendment, are not automatically implemented by § 241 as are substantive rights, but must await a case-by-case determination and application.

18. See note 1 *supra.*

19. It must be kept in mind that the instant case was never tried, but rather was dismissed in the district court for insufficiency of the indictment. The Court here is only ruling on that dismissal.

20. See Crandall v. Nevada, *supra* note 5 and accompanying text; Edwards v. California, *supra* note 6.

21. 383 U.S. at 781. Mr. Justice Clark, in a separate opinion joined by Justices Black and Fortas, would seem to agree, at least in result. He contended that "there now can be no doubt that the specific language of § 5 [of the fourteenth amendment] empowers the Congress to enact laws punishing all conspiracies—*with or without state action*—that interfere with Fourteenth Amendment rights." *Id.* at 762. (Emphasis added.)

that although the right to travel freely from state to state has been established in previous cases, those holdings dealt with unreasonable *governmental* interference. He thought that the right to free travel should be incorporated in the due process clause of the fourteenth amendment, but he indicated that since due process protects individuals only from governmental action, the violation of that right in *Guest* by individuals was not within the protection of section 241.

The most significant aspects of the instant case lie in the implications of the various opinions of the Justices rather than in the actual holding. While the Court reaffirmed the established proposition that state action is required for application of the fourteenth amendment, it indicated that if any state connection with the violation can be found, there will be sufficient grounds to sustain an indictment under section 241. Since there was at least a possibility of state action in *Guest*, the majority was able to avoid the question of whether strictly private interferences with civil rights might be reached through section 241 and the fourteenth amendment. However, Justices Clark and Brennan spoke directly to this question in their separate opinions. Both noted that Congress could certainly prohibit such private interferences, under the authority given it in section 5 of the fourteenth amendment to enact "appropriate legislation" for enforcement of the fourteenth amendment.[22] Since each opinion was joined by two other Justices,[23] six votes supported this proposition. Assuming that these six Justices will continue to support this line of thought, the implications of *Guest* could be of paramount significance in the area of federal civil rights. First, the separate opinions raise considerable doubt as to the current validity of the *Civil Rights Cases*.[24] Congress apparently still accepted these early rulings in 1964, since the Civil Rights Act of that year was based primarily upon the power of Congress to legislate under the commerce clause.[25] This fact is significant in that the 1964 Act was virtually the same in its application to public accommodations as the Civil Rights Act of 1875[26] which the Court had

22. *Id.* at 762, 782. Mr. Justice Brennan argued further that § 241 is itself such an enactment.

23. Mr. Justice Clark was joined by Justices Black and Fortas. The Chief Justice and Mr. Justice Douglas joined Mr. Justice Brennan's opinion.

24. *Supra* note 10. These cases have never been expressly overruled by the Court.

25. "Each of the following establishments which serves the public is a place of public accommodation within the meaning of this subchapter *if its operations affect commerce* . . . . " (Emphasis added.) The places of public accommodation included are inns, hotels, or motels which provide lodging for transient guests, eating places, and places of entertainment. Civil Rights Act of 1964, 78 Stat. 243, 42 U.S.C.A. § 2000a(b).

26. 18 Stat. 335 (1875). The act provided "That all persons within the jurisdiction of the United States shall be entitled to the full and equal enjoyment of the accommodations, advantages, facilities, and privileges of inns, public conveyances on land or water, theatres, and other places of public amusement . . . ." 18 Stat. 336 (1875).

held unconstitutional when based upon the fourteenth amendment.[27] When the validity of the 1964 act was questioned in *Heart of Atlanta*[28] and *Ollie's Barbecue*,[29] the Court based its decisions, upholding the act, completely upon the commerce clause; yet in both of these cases, it seemed to be stretching to find a connection between interstate commerce and the statute.[30] Under the commerce clause alone, it is probable that the Court would have had considerable difficulty in finding a sufficient effect upon interstate commerce to enable Congress to enact the housing section of the pending 1966 act.[31] However, if the Court should follow the reasoning of Mr. Justice Brennan in *Guest*, Congress would be empowered to enact both the 1964 act and the proposed 1966 act through section 5 of the fourteenth amendment without having to rely on some tenuous connection with commerce. In fact, Congress seems already to have accepted the implications of the separate opinions by failing to mention any required connection with commerce in the proposed 1966 act. However, the Court would still have to find that Congress had a rational basis for determining that the prohibition of discrimination by individuals is an appropriate means of preventing discrimination by states.

Completely aside from the broadened scope of possible future congressional legislation which was affected by *Guest*, the expansion of section 241 to include violations of fourteenth amendment rights may have significant implications under existing laws. This decision suggests a willingness to bring within the purview of the federal civil rights conspiracy statute those rights which might be considered more sophisticated than rights formerly included by the case law. Previous prosecutions under section 241 usually involved cases of extreme brutality and violence,[32] which readily met the requirement of a specific intent to violate a right secured by the Constitution or by statutes.[33] Since the Court had held that any less specific showing

27. Civil Rights Cases, *supra* note 10.

28. Heart of Atlanta Motel, Inc. v. United States, *supra* note 6.

29. Katzenbach v. McClung, *Supra* note 6.

30. In Katzenbach v. McClung, *supra* note 6, the relation to commerce was the food bought and served, which food had traveled in interstate commerce (or at least some of it had so traveled). The Court admitted, "It goes without saying that, viewed in isolation, the volume of food purchased by Ollie's Barbecue from sources supplied from out of state was insignificant when compared with the total foodstuffs moving in commerce." *Id.* at 300-01.

31. H.R. 14765, 89th Cong., 2d Sess. tit. IV (1966). "It shall be unlawful for *any* person . . . To refuse to sell . . . a dwelling to any person because of race, color, religion, or national origin . . . ." (Emphasis added.) H.R. 14765, 89th Cong., 2d Sess. § 403 (1966).

32. See cases cited in note 14 *supra*.

33. See 1961 U.S. COMM'N ON CIVIL RIGHTS REP. 45-67. For example, it would not be difficult to show prior knowledge of the illegality of the act of killing another person. In such cases, the intent to violate a civil right of the victim is almost a

of intent would render the section void for vagueness, prosecutors were restricted to only the most blatent violations.[34] But in discussing some of the specific rights included under the fourteenth amendment, and presumably now under section 241, the majority in the instant case cited decisions involving integration of public facilities,[35] as contrasted with cases involving beating of prisoners,[36] the extortion of confessions,[37] or the violent treatment of unwanted canvassers.[38] This emphasis upon the less violent civil rights cases, when considered in conjunction with the argument for inclusion of due process and equal protection among those rights protected by section 241, would seem to indicate that prosecutions under this section will now be more numerous. These results could follow, even if the Court in the future should go no further than the actual holding of *Guest*.

A third immediate implication of the instant case, without reference to the separate opinions, is its possible effect upon application of the civil counterpart to section 241, which gives a victim of civil rights violations a cause of action for damages against the violator. Since this civil provision is similar in wording to section 241,[39] its development has closely paralleled that of its criminal counterpart.[40] In fact, the courts seem to consider holdings in both the criminal prosecutions and the civil actions when deciding either type of case.[41] This practice has led to considerable confusion in the civil cases, where, for example, violations of equal protection rights give rise to a cause of action while denials of due process do not.[42] If this parallelism in the interpretation of the civil and criminal sections continues, it would follow that the victim of any rights violation would now have a cause of action against the violator. This possibility is particularly

foregone conclusion. However, proof of a prior intent to violate the victim's right to due process of law would be substantially more difficult, especially since even the Supreme Court has had difficulty in deciding just what would constitute such a violation.

34. 1961 U.S. Comm'n on Civil Rights Rep. 45-67.

35. 383 U.S. at 754 n.6.

36. Clark v. United States, *supra* note 14.

37. United States v. Jones, *supra* note 14.

38. Catlette v. United States, 132 F.2d 902 (4th Cir. 1943).

39. "If two or more persons . . . conspire or go in disguise on the highway or on the premises of another, for the purpose of depriving . . . any person . . . of the equal protection of the laws, or of equal privileges and immunities under the laws . . . whereby another is injured in his person or property, or deprived of . . . any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages . . . ." 12 Stat. 284 (1861) (amended by 17 Stat. 13 (1871), 42 U.S.C.A. § 1985(3) (1964).

40. See generally Monroe v. Pape, 365 U.S. 167 (1961).

41. *Compare* United States v. Jones, *supra* note 14, *with* Lewis v. Brautigam, 227 F.2d 124 (5th Cir. 1955).

42. *Compare* Collins v. Hardyman, 341 U.S. 651 (1951), *with* Lewis v. Brautigam, *supra* note 41.

significant in light of some of the recent decisions reversing convictions based upon evidence obtained by local and state authorities in violation of the fourth, fifth and sixth amendments, as applicable to the states through the fourteenth amendment.[43] Furthermore, these civil actions would be relatively easy to institute, since no diversity of citizenship or jurisdictional amount is necessary for access to the federal courts.[44] Thus, unless some further decision of the Court dictates otherwise, the instant case may serve as a basis both for broadening federal legislative involvement in all areas of civil rights, and for an increasing line of criminal and civil actions aimed toward the vindication of these same rights.

Civil Rights–Removal–Strict Interpretation of Federal Removal Statute Affirmed

Defendants were arrested and indicted under the Georgia antitrespass statute[1] in the spring of 1963 when they tried to obtain service at privately owned restaurants open to the general public in Atlanta, Georgia. The defendants petitioned the federal district court for removal of the cases under the civil rights removal statute.[2] The district court's denial of removal was reversed by the Court of Appeals for the Fifth Circuit.[3] On certiorari to the United States Supreme

43. See cases cited in note 4 *supra*. See also Escobedo v. Illinois, 378 U.S. 478 (1963).

44. Ortega v. Ragen, 216 F.2d 561, 562 (7th Cir. 1954).

1. GA. CODE ANN. § 26-3005 (Cum. Supp. 1965): "*Refusal to leave premises of another when ordered to do so by owner or person in charge.*–It shall be unlawful for any person, who is on the premises of another, to refuse and fail to leave said premises when reqnested to do so by the owner or any person in charge of said premises . . . ."

2. 28 U.S.C. § 1443 (1964): "Any of the following civil actions or criminal prosecutions, commenced in a State court may be removed by the defendant to the district court of the United States for the district and division embracing the place wherein it is pending:

(1) Against any person who is denied or cannot enforce in the courts of such State a right under any law providing for the equal civil rights of citizens of the United States, or of all persons within the jurisdiction thereof;

(2) For any act under color of authority derived from any law providing for equal rights, or for refusing to do any act on the ground that it would be inconsistent with such law."

3. Rachel v. Georgia, 342 F.2d 336 (5th Cir. 1965). The court held that because of state legislation the appellants had been denied the right of immunity from state trespass prosecutions guaranteed under the public accommodations sections of the Civil Rights Act of 1964, §§ 201-03, 78 Stat. 243-44, 42 U.S.C. §§ 2000a-2000a-2, as interpreted in Hamm v. City of Rock Hill, 379 U.S. 306 (1964).

Court, *held*, affirmed. Removal of a case to a federal court is warranted because pending state prosecutions forbidden by a federal civil rights law lead to a clear prediction that defendants' civil rights will be denied. *Georgia v. Rachel*, 384 U.S. 780 (1966).

The removal provision[4] was upheld as constitutional by the United States Supreme Court in 1880[5] in *Strauder v. West Virginia*.[6] *Strauder* further held that the West Virginia statute excluding Negroes from jury service was a sufficient denial of petitioner's equal rights to warrant removal under the statute.[7] On the same day that *Strauder* was decided, however, the Court in *Virginia v. Rives*[8] denied a petition for removal based on a similar jury exclusion question. Since no state statute specifically excluded Negroes from jury duty, the Court held that petitioner had not shown the inevitable denial of rights essential to the granting of removal.[9] In *Neal v. Delaware*,[10] the Court upheld the denial of a removal petition on the ground that petitioner had failed to show that the alleged jury exclusion was sanctioned either by state statute or constitutional provision.[11] This stringent requirement of a statutory denial of rights was affirmed in a series of Supreme Court cases from 1881 to 1906.[12] With the notable exception of the

4. Since the Fifth Circuit Court of Appeals dealt only with questions arising under 28 U.S.C. § 1443(1) (1964), the Supreme Court confined its review to that subsection. Rachel, 384 U.S. at 788.

5. The statute was then REV. STAT. § 641 (1875). The minor modifications in the provision since that time have not changed either the language or the concept of a defendaut "who is denied or cannot enforce" a right secured "under any law providing for equal civil rights."

6. 100 U.S. 303 (1880) (a Negro indicted for murder).

7. The Court pointed specifically to § 1977 of the Revised Statutes (now 42 U.S.C. § 1981 (1964)) as a "law providing for equal civil rights" which would inevitably be denied by an application of the discriminatory state jury statute.

8. 100 U.S. 313 (1880).

9. The Court held that the petitioner's *apprehension* that his rights would be denied at trial was not a sufficient ground for the required *affirmation* of an inevitable denial.

10. 103 U.S. 370 (1881).

11. It was held that since the alleged discrimination did not result from either the state's laws or its constitution, it could not possibly be made manifest until *after* the action had commenced in the state court, thus precluding pre-trial removal. Although removal was denied, the Court did find evidence of grand jury discrimination and reversed the conviction.

12. With one exception, all of these cases concerned allegations of systematic exclusion of Negroes from juries. In Bush v. Kentucky, 107 U.S. 110 (1883), the required discriminatory statute had been repealed before petitioner's indictment, thus precluding the kind of predictability essential for removal. In Gibson v. Mississippi, 162 U.S. 565 (1896); Smith v. Mississippi, 162 U.S. 592 (1896); and Murray v. Louisiana, 163 U.S. 101 (1896), murder convictions were affirmed and removal denials sustained because of failure to show direct, statutory or constitutional denial of rights. In Williams v. Mississippi, 170 U.S. 213 (1898), petitioner for removal alleged discriminatory origin, application and administration of the state's laws and constitution, but failed to convince the Court that such claims *assured* a denial of his rights at trial. In its most recent interpretation of the removal statute, the Court in Kentucky v. Powers, 201 U.S. 1 (1906), refused removal of a case in which the exclusion of

Fifth Circuit,[13] the lower federal courts have consistently followed this line of authority.[14] Prior to the instant case the Court has had little opportunity to re-examine its interpretations of the statute since appeal of remand orders in removal cases was not authorized until the passage of the Civil Rights Act of 1964.[15]

The Court in *Rachel* first discussed the legislative history and development of the provision. Dealing initially with the nature of the "right" referred to in the removal statute, the Court concluded that the provision protected only a specific right of racial equality con-

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Republicans from juries was alleged to be due to the corrupt acts of administrative officials unauthorized by the laws or constitution of the state.

13. In Peacock v. City of Greenwood, 347 F.2d 679 (5th Cir. 1965), the court distinguished the earlier Supreme Court decisions on the ground that they were limited to cases involving the question of systematic jury exclusion, as opposed to those involving the arrest and charging process. The court then proceeded to broaden the scope of the removal statute by allowing removal for civil rights workers *arrested* for obstructing a street. The significance of the decision lies in the fact that the alleged denial of equal rights did not appear with certainty either on the face of the statute or in its application in the arresting and charging process. The court felt that the allegations of harassment and intimidation of voter registration by means of the arrest warranted a hearing in the federal district court since convictions under the statute, if applied as alleged, would violate the equal protection clause. A short time later, in Cox v. Louisiana, 348 F.2d 750 (5th Cir. 1965), the court allowed removal in the case of a Negro minister charged with attempting to obstruct justice by demonstrating near the court house. The charge was filed just after the Supreme Court had reversed the same defendant's conviction for the substantive offense of obstructing justice which arose out of the same court house demonstration. Cox v. Louisiana, 379 U.S. 559 (1965). Again, the relevant state statute was neither invalid on its face nor in its application, but the defendant's allegations that he was charged for reasons of racial discrimination were held to be sufficient to warrant removal. The court summarized its holdings in *Peacock* and *Cox*: "The defendants, as a result of their actions in advocating civil rights, are being prosecuted under statutes, valid on their face, for conduct protected by federal constitutional guarantees. . . ." 348 F.2d 750, 754-55.

14. See, *e.g.*, Baines v. City of Danville, 357 F.2d 756 (4th Cir. 1965) (prosecutions of civil rights workers for violating state court injunction not removable); City of Chester v. Anderson, 347 F.2d 823 (3d Cir. 1965) (per curiam) (allegations of public hostility and precipitous trial not grounds for removal); New York v. Galamison, 342 F.2d 255 (2d Cir.), *cert. denied*, 380 U.S. 977 (1965) (city hall and traffic-blocking sit-in prosecutions not removable).

In addition to following the *Strauder-Rives* interpretation, *Galamison* (Friendly, J.) explicitly states what the Supreme Court's interpretations of the removal statute had strongly implied, namely, that "When the removal statute speaks of 'any law providing for equal rights,' it refers to those laws that are couched in terms of equality, such as the historic and the recent equal rights statutes, as distinguished from laws, of which the due process clause and 42 U.S.C. § 1983 are sufficient examples, that confer equal rights in the sense, vital to our way of life, of bestowing them upon all." 342 F.2d at 271. For a vigorous challenge to this view, see Amsterdam, *Criminal Prosecutions Affecting Federally Guaranteed Civil Rights: Federal Removal and Habeas Corpus Jurisdiction To Abort State Court Trial,* 113 U. PA. L. REV. 793, 863-74 (1965).

15. The Civil Rights Act of 1964, § 901, 78 Stat. 266, amending 28 U.S.C. § 1447(d) (1964), expressly authorized appellate review of remand orders in removal cases.

ferred by law.[16] It then decided that the defendants' right to obtain service at public accommodations without fear of prosecution was a right under section 201(a) of the 1964 Civil Rights Act,[17] and that defendants were being denied that right by virtue of the pending prosecutions in the courts of Georgia. In reaching this conclusion, the Court saw the *Strauder-Rives* doctrine as requiring that a clearly predictable denial of rights be made manifest in a formal expression of state law. Applying the *Strauder-Rives* rule to the facts of *Rachel*, it held that any trespass proceedings against the defendants in the state court would constitute a denial of rights conferred by the Civil Rights Act of 1964.[18] The Court concluded that to refuse removal would be to allow a denial of the defendants' right to be free from prosecution for a protected activity. This denial in the state court was held to be clearly predictable and to stem directly from what would be an unconstitutional application of state law.[19]

The Court's decision in *Rachel* is closely in line with most authority on the removal issue. Its tightly restrictive interpretation of the statute necessarily follows from adherence to the spirit of the *Strauder-Rives* principles. However, the Court was not forced to go beyond the *Strauder-Rives* statutory interpretation since the facts permitted it to reach the desired result while remaining within this restricted framework. Yet a slight factual variation within a similar civil rights situation could produce an entirely different result, as demonstrated by the Court's decision in *City of Greenwood v. Peacock*,[20] handed down on the same day as *Rachel*. In *Greenwood*, the defendants were charged with obstructing a street, an offense which was not prohibited

16. Rachel, 384 U.S. at 792. In its extended examination of the present § 1443, the Court traced its origin to the Civil Rights Act of 1866, ch. 31, § 3, 14 Stat. 27. Although the phrase, "any law providing for . . . equal civil rights" did not appear in this initial provision, removal was to be allowed only in cases involving the rights of racial equality guaranteed in the first section of the act. The language of § 1443 first appeared in REV. STAT. § 641 (1875), the specific provision interpreted by the Supreme Court in all previous cases. After 1875 the removal statute underwent only minor modification, leading the Court in the instant case to say: ". . . [F]or the purposes of the present case, we are dealing with the same statute that confronted the Court in the cases interpreting § 641." Rachel, 384 U.S. at 802.

17. 78 Stat. 243 (1964), 42 U.S.C. § 2000a (1964): "All persons shall be entitled to the full and equal enjoyment of the goods, services, facilities, privileges, advantages, and accommodations of any place of public accommodation, as defined in this section, without discrimination or segregation on the ground of race, color, religion, or national origin." § 203 of the Civil Rights Act of 1964, 78 Stat. 244, 42 U.S.C. § 2000a-2, forbids prosecution for exercising the rights guaranteed by § 201(a).

18. The Court cited Hamm v. City of Rock Hill, 379 U.S. 306 (1964), for its holding that the Civil Rights Act of 1964 immunized from prosecution attempts to gain admittance to establishments covered by the Act. Rachel, 384 U.S. at 804.

19. Although the Georgia anti-trespass statute is neither discriminatory nor unconstitutional on its faee, its *application* to defendants in the instant case *automatically* results in the denial of rights required for removal.

20. 384 U.S. at 808.

from prosecution under a federal civil rights law; they had chosen a public street instead of a public accommodation as a forum for their protest and were thus denied removal of their cases.[21] A key concern underlying the decisions in both cases is that a broader interpretation of the removal statute would bring about a "wholesale dislocation of the historic relationship between the state and the federal courts in the administration of the criminal law."[22] But it seems unlikely that this broader interpretation would have such a substantial effect on the federal-state relationship if it is limited to cases involving harassment proceedings against civil rights workers. In any case, an application of the statute to allow removal under the facts in *Greenwood* would have been a logical extension of the *Strauder-Rives* principles. Although the right would not be directly related to a civil rights law, and the denial of it not so clearly predictable as in *Rachel*, the requirement of firm evidence of a prospective denial of rights could have been met.[23] The Court's refusal to broaden its interpretation, however, is curious in light of its active role in recent years in the judicial promotion of equal civil rights. It is not unlikely that the *Greenwood* decision will produce a "chilling effect on a federal guarantee of civil rights"[24] as Negroes and civil rights workers are forced to turn to excessively time-consuming and cumbersome

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21. Reversing the Court of Appeals for the Fifth Circuit, the Court held that civil rights workers arrested for obstructing traffic, disturbing the peace, and parading without a permit were not entitled to removal of their cases under § 1443. The Court further held that the defendants failed to show a *right* conferred by a law providing for equal rights, a right which would be predictably denied in the state court. The Court distinguished *Rachel* from *Greenwood* on this point by acidly noting that the only right allegedly denied to the defendants in the latter case was the right "to obstruct a public street, to contribute to the delinquency of a minor, to drive an automobile without a license, or to bite a policeman." *Id.* at 826-27.

22. *Id.* at 831. Similarly, the *Rachel* decision spoke of the possible involvement of "federal judges in the unseemly process of pre-judging their brethren of the state courts." Rachel, 384 U.S. at 803-04. The *Greenwood* dissent (Douglas, J.) speaks to these apprehensions: "The district judge could not lightly assume that the state court would shirk its responsibilities, and should remand the case to the state court unless it appeared by clear and convincing evidence that the allegations of an inability to enforce equal civil rights were true." Greenwood, 384 U.S. at 852.

23. The basic elements for federal removal were present in *Greenwood*, i.e., both the *right* (to be free from interference as provided by the Voting Rights Act of 1965, 79 Stat. 443, 42 U.S.C. § 1973(i)(b) (1964)) and the probable *denial* of that right (by prosecution for "disorderly conduct" and "breach of the peace"). The only element lacking was the clear inevitability of the denial, a requirement which the Court of Appeals for the Fifth Circuit did not see as *essential* to removal. Nor can it be seriously contended that the only way to allow removal in *Greenwood* would have been to overrule the *Strauder-Rives* line of authority. In fact, the Court's decision in *Rachel* went beyond the stricter requirement of a facially unconstitutional state statute as the instrument of the denial and ruled that the unconstitutional *application* of that statute was sufficient. Rachel, 384 U.S. at 804.

24. Greenwood, 384 U.S. at 845 (dissent).

remedies[25] in order to vindicate rights denied by harassment prosecutions in state courts.

Labor Law—Judicial Review of Arbitrator's Authority To Imply Contractual Condition

The Torrington Company unilaterally discontinued its policy of allowing workers time off with pay to vote on election day,[1] a practice it had unilaterally instituted twenty years earlier. The collective bargaining agreement in effect at the time the policy was discontinued did not include such a provision.[2] When negotiations for the current collective bargaining agreement began, both the company and the union proposed continuing the existing contract, but each suggested certain specific amendments. The voting benefit policy was not included in the discussions,[3] and no provision in the adopted agreement referred to the voting benefit. Just prior to election day the company restated its decision to discontinue its former policy, and the union filed a grievance which was submitted to arbitration under the arbitration provisions of the new contract.[4] The arbitrator

25. Among the remedies suggested: direct review by the Supreme Court, injunction, habeas corpus, civil sanctions against state officers. Rachel, 384 U.S. at 829-30. The *Greenwood* dissent answers this argument by stating: "These defendants' federal civil rights may, of course, ultimately be vindicated if they persevere, live long enough, and have the patience and the funds to carry their cases for some years through the state courts to this Court. But it was precisely that burden that Congress undertook to take off the backs of this persecuted minority and all who espouse the cause of their equality." Greenwood, 384 U.S. at 854.

1. The company indicated that the decision to terminate the practice was due to an extension of voting hours and the utilization of voting machines at polling places, which made it no longer necessary to provide the workers with time off to vote. Torrington Co. v. Metal Prods. Workers, 362 F.2d 677, 678 (2d Cir. 1966).

2. The agreement also contained a narrow arbitration provision. Therefore, the union chose to file a complaint with the National Labor Relations Board charging that the voting policy change constituted an unfair labor practice. This charge was later dropped, however, and the complaint was dismissed by the Board. 362 F.2d at 678.

3. The union's original written demands included the voting benefit, but its later written proposals omitted it. No agreement was reached by the time the existing contract expired and a long strike ensued which lasted through election day. Employees who worked throughout the duration of the strike were not given paid time off to vote. *Ibid.*

4. Portions of Article V of the agreement included:

"Section 1.—If a grievance is not settled after it has been processed through the three [grievance steps] . . . it may be submitted to arbitration. . . .

"Section 3.—The arbitrator shall be bound by and must comply with all of the terms of this agreement and he shall have no power to add to, delete from, or modify, in any way, any of the provisions of this agreement.

"Section 4.—The decision of the arbitrator shall be binding on both parties during the life of this agreement unless the same is contrary, in any way, to law." *Id.* n.2.

found that the dispute was arbitrable, that the voting benefit was a firmly established practice, and that since the company had the burden of changing such a policy only through negotiation with the union, the parties had not agreed to the change. Consequently, he made an award granting the voting benefit to the employees.[5] The company successfully petitioned the district court to vacate the award[6] on the ground that the arbitrator exceeded his authority. On appeal to the Court of Appeals for the Second Circuit, *held*, affirmed. The question of an arbitrator's authority to expand the terms of a collective agreement on the basis of a prior practice of a party to the agreement is subject to judicial review, and the arbitrator's decision that he has such authority should not be accepted where the reviewing court can clearly perceive that he has derived it from sources outside the collective bargaining agreement. *Torrington Co. v. Metal Products Workers*, 362 F.2d 677 (2d Cir. 1966).

Arbitration clauses are commonly included in collective bargaining agreements as a means of settling grievance disputes arising from inherent ambiguities in the collective agreement.[7] Prior to 1960, the controversy over jurisdiction of the arbitrator with respect to the collective bargaining agreement centered around two problems—the arbitrability of the issues and the extent of the contractual authority vested in the arbitrator to make awards. *United Steelworkers v. Warrior & Gulf Navigation Co.*[8] settled one aspect of the controversy by holding that a grievance is arbitrable "unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute."[9] At the same time,

5. "Employees who took time off to vote on November 3, 1964 [new contract] shall be paid up to a maximum of one hour and all other employees who worked during the election hours on that Election Day and who were paid this benefit on November 6, 1962 [old contract] shall be paid for the same amount of time off for Election Day 1964 as they received for Election Day 1962." The Torrington Co., 45 Lab. Arb. 353, 357 (1965).

6. Labor Management Relations Act (Taft-Hartley Act) § 301, 61 Stat. 156 (1947), 29 U.S.C. § 185(a) (1964).

7. HAYS, LABOR ARBITRATION, A DISSENTING VIEW 13, 14 (1966). Labor arbitration has been defined as ". . . the submission for determination by a third party of a dispute arising under a collective agreement." *Ibid.*

8. 363 U.S. 574 (1960).

9. 363 U.S. at 582-83. See also United Steelworkers v. American Mfg. Co., 363 U.S. 564 (1960) (even a frivolous claim is arbitable); New Bedford Defense Prods. Div. v. Local 1113, UAW, 258 F.2d 522 (1st Cir. 1958) (issue arbitrable even though it could be correctly decided only one way). Several subsequent cases have indicated that arbitration occupies a preferred position in the settlement of industrial disputes in order to promote harmony between labor and management. Arbitration is preferred to the extent that the dispute is arbitrable even where the collective bargaining agreement is silent concerning the subject matter in controversy. See Local 702, Int'l Bd. of Elec. Workers v. Central Ill. Pub. Serv. Co., 324 F.2d 920 (7th Cir. 1963) (gas discount to company workers); Arkansas-Louisiana Gas Co. v. Local 5-283, Oil, Chem. & Atomic Workers, 320 F.2d 62 (10th Cir. 1963) (use of non-union supervisory

United Steelworkers v. Enterprise Wheel & Car Corp.[10] broadened the arbitrator's authority to make awards by holding that while an arbitrator must draw the essence of his award from the collective bargaining agreement, he could "look for guidance from many sources"[11] in interpreting and applying the agreement to the dispute. Nevertheless, the arbitrators were cautioned not to dispense their own brand of industrial justice.[12] In following these broad guidelines, courts seem to uphold arbitration awards unless the arbitrator was not justified in deviating from the plain mandate of the agreement.[13] Where ambiguities exist due to the necessarily broad and general language of the agreement, arbitrators frequently look to such criteria as the "common law of the shop"[14] upon which to base their awards. Past practice is often helpful in fashioning awards where the terms of the agreement are ambiguous,[15] but past practice has occasionally been extended to include in the agreement implied conditions where none previously existed.[16] An examination of arbitration awards reveals that the criteria used by arbitrators to determine whether past practice has become a part of the collective bargaining agreement include: (1) the length of time the practice has been established, (2) the origin and continuity of the practice, (3) the relation of the practice to a major condition of employment, (4) reliance by employees on a continuation of the practice, (5) the nature of absolute and unconditional privileges, and (6) the percentage of employees

personnel to perform work); Harris Structural Steel Co. v. Local 3682, United Steelworkers, 298 F.2d 363 (3d Cir.), *cert. denied,* 369 U.S. 851 (1962) (Christmas bonuses). Contractual clauses that exclude matters from arbitration have been strictly construed. See IUE v. General Elec. Co., 332 F.2d 485 (2d Cir.), *cert. denied,* 379 U.S. 928 (1964) (grievance arbitrable unless clearly excluded); Local 12298, UMW v. Bridgeport Gas Co., 328 F.2d 381 (2d Cir. 1964) (exclusionary clause must be clear and unambiguous); O'Malley v. Wilshire Oil Co., 59 Cal. 2d 587, 381 P.2d 188 (1963) (exclusion must be manifest).

10. 363 U.S. 593 (1960).

11. 363 U.S. at 597.

12. See *ibid.*

13. *E.g.,* H. K. Porter Co. v. United Saw, File & Steel Prod. Workers, 333 F.2d 596 (3d Cir. 1964) (deviation from pension plan requirements justified due to past practice of not requiring strict compliance). *But cf.* Local 784, Truck Drivers & Helpers v. Ulry-Talbert Co., 330 F.2d 562 (8th Cir. 1964) (arbitrator exceeded his authority by ruling that contract provision was too severe).

14. Wilson H. Lee Co. v. Local 74, New Haven Printing Pressmen, 248 F. Supp 289, 290 (D. Conn. 1965). See generally Cox, *Reflections Upon Labor Arbitration,* 72 HARV. L. REV. 1482 (1959).

15. Kelsey-Hayes Co., 37 Lab. Arb. 375 (1961).

16. Elberta Crate & Box Co., 32 Lab. Arb. 228 (1959) (past practice of lunch period became part of contract); California Cotton Mills Co., 14 Lab. Arb. 377 (1950) (past practice concerning layoff became part of contract). This tends to encroach in the area thought by management to be legitimate functions of management and serves as a source of dissatisfaction with arbitration awards and appeals to the courts. See generally HAYS, *op. cit. supra* note 7, at 20-21; Lowden, *Labor Arbitration Clauses: Draftsmanship Avoids Litigation,* 43 VA. L. REV. 197, 208 (1957).

involved.[17] As a general rule judicial review of arbitration awards[18] is limited to an examination of the arbitrator's jurisdiction to arbitrate the dispute and his authority to fashion and render an award, thus precluding a judicial examination of the merits.[19] The third case in the Steelworkers "trilogy," *United Steelworkers v. American Mfg. Co.*,[20] stressed the limited function of the judiciary in labor arbitration cases by holding that a court is restricted to ascertaining whether the claim made by the party seeking arbitration is governed by the contract.[21] All questions of contract interpretation should be left to the arbitrator, and the courts were told that they had no business weighing the merits of a dispute or seeking equity in a claim.[22] Thus, while both interpretation and application of the collective bargaining agreement are within the province of the arbitrator, his authority to fashion awards is subject to the stipulated contractual limitations despite a lack of available alternative remedies under the contract.[23] Consequently, to give effect to the intention of the parties as manifested in the agreement, and at the same time to restrain the arbitrator from performing a legislative function, many collective agreements contain arbitration clauses restricting the arbitrator to interpreting its terms.[24]

While observing that the dispute in the instant case was arbitrable and that the voting benefit was an established prior practice, the court viewed the collective bargaining agreement as a contract that affirmatively stated the specific restraints upon the arbitrator's freedom of action. The majority drew on *Enterprise Wheel*[25] to support its holding that judicial review of arbitration awards is authorized to determine whether the arbitrator has exceeded the limits of his contractual authority in fashioning the award. Having determined that judicial review was so authorized, the court looked to the contract itself, the negotiations leading to its formulation, and the application

17. Jacob Rupert, 35 Lab. Arb. 503 (1960) (criteria applied to determine binding effect of past practice); Telemental Prods., Inc., 33 Lab. Arb. 139 (1959) (absolute and unconditional privileges); Ingalls Iron Works Co., 32 Lab. Arb. 960 (1959) (duration of uninterrupted past practice); Elberta Crate Box Co., *supra* note 16 (factors should be considered). Compare Columbus Auto Parts Co., 36 Lab. Arb. 166 (1961) (unilaterally established practice could be unilaterally discontinued).

18. Under the Labor Management Relations Act § 301, 61 Stat. 156 (1947), 29 U.S.C. § 185(a) (1964).

19. Ficek v. Southern Pac. Co., 338 F.2d 655 (9th Cir.), *cert. denied*, 360 U.S. 988 (1964). *But see* HAYS, *op. cit. supra* note 7, at 79. "Arbitration cannot properly call upon the courts to act as rubber stamps for whatever arbitrators may do. If the processes of the courts are to be available to enforce arbitration, then courts must examine and pass upon what it is that they are enforcing." *Ibid.*

20. 363 U.S. 564 (1960).

21. 363 U.S. at 567-68.

22. 363 U.S. at 568.

23. Carey v. General Elec. Co., 315 F.2d 499 (2d Cir. 1963).

24. *Id.* at 507.

25. 363 U.S. at 597.

of the contract to the dispute. It concluded that the arbitrator misinterpreted the contract by reading into it a past practice which was discussed during negotiations but omitted from the contract.[26] The court expressly rejected the arbitrator's opinion that the burden of obtaining an express contract provision reflecting the new voting policy was on the company and held that the award upholding the voting benefit was beyond the scope of the arbitrator's authority. Judge Feinberg, in a dissenting opinion, viewed the court's decision as a judicial examination of the merits of the dispute under the new guise[27] of determining the extent of the arbitrator's authority to fashion an award. He felt that the scope of review should be limited to determining whether the award in fact drew "its *essence* from the collective bargaining agreement" and "whether the arbitrator's words manifest an *infidelity* to this obligation." (Emphasis added.)

The *Steelworkers* trilogy lends support to both sides of the issue as presented to the instant court. Since the voting benefit was not included in the collective bargaining agreement, even after consideration during the bargaining process, it follows that an award upholding the benefit could not be considered as "drawing its essence from" the agreement. Yet, the arbitrator concluded that past practice placed the voting benefit within the purview of the collective agreement. An examination of the correctness of this interpretation requires a judicial inquiry which comes dangerously close to an examination of the merits of the dispute, an act prohibited under the trilogy. While it is generally recognized that past practice is useful in filling in the details[28] of a collective bargaining agreement, it is an inappropriate vehicle for amending the contract itself.[29] However, where interpretation ends and amendment begins often depends upon the extent of the arbitrator's authority under the agreement. Consequently, effective judicial review may often require a comprehensive judicial inquiry into the "essence" of the collective bargaining agreement. But since *Enterprise Wheel* and *American* stressed the limited function of the

26. The court held that the union was attempting to add to the contract a benefit that it did not think of sufficient importance during negotiations to insist on having it included in the terms of the contract. 362 F.2d at 682.

27. The old attempts to obtaiu judicial review of the merits were made on the basis of arbitrability. The issues were alleged to be so clear that they were not arbitrable. 362 F.2d at 684. The *Warrior* decision settled this area of contention. 363 U.S. 574 (1960).

28. "Gaps may be left to be filled in by reference to the practices of the particular industry and of the various shops covered by the agreement." 363 U.S. at 580.

29. "The arbitrator . . . does not have such superior authority to impose implied conditions. The implications which he may find are only those which may reasonably be inferred from some term of the agreement." Shulman, *Reason, Contract, and Law in Labor Relations*, 68 HARV. L. REV. 999, 1012 (1955).

courts in the settlement of labor disputes[30] and cautioned against a judicial usurpation of the arbitrator's function, the courts would seem precluded from an in-depth examination of the agreement, the circumstances attending its formulation, and the claims of the disputants. However, the broad guidelines established by the *Steelworkers* cases do not in fact define the limits on judicial inquiry where a court is faced with distinguishing between "interpretation of" and "addition to" a collective bargaining agreement, and it seems obvious that where the disputed benefit is not mentioned in the contract, some knowledge of the attending circumstances and the rationale of the arbitrator must be obtained by the court before it can determine if the abritrator exceeded his authority. Undoubtedly the broad policy of limitation enunciated by the Supreme Court in the *Steelworkers* cases serves as a benchmark from which lower courts must adjust the scope of their review. The implication that the "essence" and "fidelity" tests require no more than a mechanical application to the review of arbitration awards indicates that the instant case represents an outer limit of the scope of judicial review. Deeper inquiry into matters considered and weighed by the arbitrator could have a substantial effect on future judicial review in that more restrictive standards may be forthcoming if lower courts expand their review power to examine the merits of an arbitrated dispute.

30. Since the Norris-LaGuardia Act, 47 Stat. 70 (1932), 29 U.S.C.A. § 101 (1964), it has been the labor policy of the United States that the courts should not intervene in the settlement of labor disputes.

Labor Relations—Federal Preemption of Defamation Suits Arising in Course of Organizational Campaign

A company manager filed suit against a union in a federal district court,[1] charging that leaflets circulated by the union during the organizational campaign in plaintiff's plant defamed him under state law. The complaint alleged neither malice nor actual or special damages, but proceeded on the theory that the leaflets were libelous per se.[2] The district court dismissed the complaint on the ground

1. Plaintiff sued in a federal court on the basis of diversity of citizenship. The cause of action is based upon state law.

2. "The respondents had circulated among the employees leaflets which stated *inter alia*:

'(7) Now we find out that Pinkerton's has had a large volume of work in Saginaw they have had it for years.

'United Plant Guard Workers now has evidence

'A. That Pinkerton has 10 jobs in Saginaw, Michigan.

'B. Employing 52 men.

'C. Some of these jobs are 10 yrs. old!

'(8) Make you feel kind sick & foolish.

that an action for defamation arising out of a labor dispute is arguably subject to the National Labor Relations Board's exclusive jurisdiction as defined in the National Labor Relations Act.[3] The Sixth Circuit Court of Appeals affirmed and on certiorari to the United States Supreme Court, *held*, reversed. The NLRA does not forbid the use of state remedies[4] for the redress of defamation arising in the course of a union organizational campaign where the complainant pleads and proves malice and actual damage. *Linn v. Local 114, United Plant Guard Workers*, 383 U.S. 53 (1966).[5]

The leading Supreme Court decisions on the question of preemption, though not dealing exclusively with tortious actions, are *Garner*,[6] *Laburnum*,[7] *Russell*,[8] and *Garmon* II.[9] In *Garner* a Pennsylvania court held that the state court lacked jurisdiction to grant an injunction against picketing by a union attempting to enlist company employees. The United States Supreme Court affirmed,[10] holding that a conflict of remedies (*i.e.*, injunction in state court versus a finding of unfair labor practice under NLRA), even though addressed to different rights (*i.e.*, the state's right to maintain peace as opposed to the union's right to organize and peacefully picket under NLRA), was sufficient to bring the supremacy clause into play and preempt the field for the NLRB.[11] The *Laburnum* case, on the other hand, held that tortious injury inflicted during violent union activity would support a cause of action in a state court since Congress had not prescribed another procedure for dealing with this injury, and since the state had a

'(9) The men in Saginaw were deprived of the *right to vote* in three NLRB elections. Their names were not summitted [*sic*]. These guards were voted into the Union in 1959! These Pinkerton guards were *robbed* of pay increases. The Pinkerton managers were *lying* to us—all the time the contract was in effect. No doubt the Saginaw men will file criminal charges. Somebody may go to Jail!'" Linn v. Local 114, United Plant Guard Workers, 383 U.S. 53, 56 (1966).

3. 61 Stat. 136, 29 U.S.C. 141 (1964).

4. This implies that a similar action brought in a state court would be allowed, as a federal court sitting in diversity cases acts as another state court.

5. Because the petitioner here did not plead malice or actual injury, his petition was ultimately sent back for further proceedings below.

6. Garner v. Local 776, Teamsters Union, 346 U.S. 485 (1953), 54 COLUM. L. REV. 997 (1954), 29 NOTRE DAME LAW. 495 (1954), 7 VAND. L. REV. 422 (1954).

7. United Constr. Workers v. Laburnum Constr. Co., 347 U.S. 656 (1954), 35 B.U.L. REV. 193 (1955), 40 CORNELL L.Q. 156 (1954), 6 HASTINGS L.J. 97 (1954), 29 TUL. L. REV. 155 (1954).

8. UAW v. Russell, 356 U.S. 634 (1958), 47 GEO. L.J. 189, J. PUB. L. 498, 61 W. VA. L. REV. 67, 68 YALE L.J. 308.

9. San Diego Bldg. Trades Council v. Garmon, 359 U.S. 236 (1959), 58 MICH. L. REV. 288, 19 OHIO ST. L.J. 784, 13 VAND. L. REV. 416.

10. Garner v. Local 776, Teamsters Union, 346 U.S. 485 (1953).

11. "To the extent that the private right may conflict with the public one, the former is superseded. To the extent that public interest is found to require official enforcement instead of private initiative, the latter will ordinarily be excluded." *Id.* at 501.

"compelling interest" in maintaining peace.[12] Here the remedies were said to complement one another. *Russell,* also involving violence and the state's interest in maintaining civil peace, followed *Laburnum* in holding that the state had jurisdiction. The rationale was that the conduct of the union was not arguably protected by federal law and that conflict between federal and state law arises only where the conduct of the defendant union may be within the area protected by Congress.[13] In 1959, the Supreme Court decided *Garmon* II which undertook to provide a test for future determinations of federal jurisdiction over causes of action arising from labor disputes. In an earlier case between the same parties (*Garmon* I), the Court had held that the Board's refusal to exercise its jurisdiction in a matter over which it had exclusive jurisdiction did not permit state action to fill the void.[14] On remand, the state court found that, since the case involved a tort action, the state court had jurisdiction and the Board was not competent to decide the dispute.[15] The decision was appealed and came before the Supreme Court a second time. In rejecting the reasoning of the California court, the Supreme Court noted two exceptions to the broad preemption of jurisdiction over labor disputes by the NLRB: (1) where the activity reached deeply rooted local feelings and responsibility; and (2) where the activity was merely a peripheral concern of the NLRA. In its attempt to provide a test to be applied in future preemption cases, the Court stated: "When an activity is arguably subject to § 7 or § 8 of the Act, the states as well as the federal courts must defer to the exclusive competence of the National Labor Relations Board if the danger of state interference

12. The Court phrased it: "To the extent . . . that Congress has not prescribed procedure for dealing with the consequences of tortious conduct already committed, there is no ground for concluding that existing criminal penalties or liabilities for tortious conduct have been eliminated." United Constr. Workers v. Laburnum Constr. Co., 347 U.S. at 665.

13. The Chief Justice, joined by Mr. Justice Douglas, dissented in this case on policy grounds. Mr. Justice Black was not present. "The *Laburnum* and *Russell* cases sustained state judgments awarding damages to an employer and an individual employee who suffered economic losses as a result of union violence which was an unfair labor practice under section 8(b)(1). Under one view these cases were simply illustrations of the principle that the states are free to deal with the violence despite the applicability of the NLRA. Under another view, which had ample support in both opinions, the *Laburnum* and *Russell* cases stood for the proposition that although the states may not grant preventive relief against conduct prohibited by the NLRA, they may nonetheless award a compensatory remedy for tortious conduct already completed. A few state courts extended this interpretation to awards of damages for losses suffered as a result of protected union activities . . . . All nine justices agreed [in *Garmon*] that a state may not award damages to an employer for losses suffered as a result of conduct which is protected by section 7 or which the NLRB might reasonably consider protected by section 7." Cox, *Major Decisions of the Supreme Court October Term 1958*, 1959 A.B.A. PROCEEDINGS, SECTION OF LABOR RELATIONS LAW 23, 24.

14. San Diego Bldg. Trades Council v. Garmon, 353 U.S. 27 (1957).

15. Garmon v. San Diego Bldg. Trades Council, 49 Cal. 2d 595, 320 P.2d 473 (1958).

with national policy is to be averted."[16] The fact that the NLRB could not give the same remedy that otherwise would be available in a state court was immaterial. Mr. Justice Harlan, joined by three members of the Court concurred specially on the narrow ground that in this case the activity in question was arguably subject to the exclusive jurisdiction of the NLRB and therefore the state court could not act until the NLRB had determined whether or not the activity in question was protected. He concluded that "[I]n instances in which the Board declines to exercise its jurisdiction, the states are entirely deprived of power to afford any relief."[17] Although the decision in *Garmon* II was intended to delineate more clearly the limits of preemption,[18] subsequent decisions of various courts evidenced continued confusion in the area.[19]

Faced with the familiar problem of preemption, the majority of the Court in *Linn* first noted that the applicable test is the one set out in *Garmon* II.[20] It then pointed out that the Board's concern with the use of language is limited to determining if the language is coercive or misleading with respect to the employee's right to exercise a truly free choice in Board conducted elections,[21] while the state's concern is addressed to the issue of defamation of one of its citizens and the redressing of that wrong.[22] Relying upon this distinction, the majority concluded that the state had a compelling interest in the settlement of the dispute, and that the remedy provided by the state was not at "cross purposes" with federal policy. Furthermore, finding the defama-

16. San Diego Bldg. Trades Council v. Garmon, 359 U.S. at 245.

17. *Id.* at 253.

18. "Indeed, when applied other than to protect unions in their use of economic force from state restrictions, the *Garmon* formula may impale us on the thorns." Summers, *Decisions of the Supreme Court 1962 Term,* 1963 A.B.A. PROCEEDINGS, SECTION OF LABOR RELATIONS LAW 1, 3.

19. For a summary of this situation see *Report of the Committee on Development of Law Under the National Labor Relations Act,* 1965 A.B.A. PROCEEDINGS, SECTION OF LABOR RELATIONS LAW, 15, 119-20. For a case holding that the NLRA should not be a shield for tortious conduct which is at most a peripheral concern of the NLRB see Brantley v. Devereaux, 237 F. Supp. 156 (E.D.S.C. 1965), where the court distinguishes cases on grounds that persons here involved are individuals and that this was a bargaining session and not an organizational campaign. Meyers v. Local 107, Teamsters Union, 416 Pa. 401, 206 A.2d 382 (1965) (two justices dissenting), a case cited by the majority, is very much like *Linn* and follows the same reasoning. For a well written case following the reasoning of the minority opinions in *Linn,* see Blum v. International Ass'n of Machinists, 42 N.J. 389, 201 A.2d 46 (1964) (three justices dissenting). For a very recent case, see Westmoreland v. Gordons Transp., Inc., 61 L.R.R.M. 2699 (La. Cir. Ct. 1966).

20. See note 9 *supra* and accompanying text.

21. Linn v. Local 114, United Plant Guard Workers, 383 U.S. at 63.

22. *Id.* at 64. These safeguards are based on New York Times Co. v. Sullivan, 376 U.S. 254 (1964). The definition of malice which is stated in *Linn* is ". . . knowledge of their falsity or with reckless disregard of whether they were true or false . . . ." 383 U.S. at 65.

tion issue to be peripheral to the administration of the NLRA, the Court brought *Linn* within the second of the *Garmon* exceptions and reversed the lower court's dismissal of the complaint. Mr. Justice Black dissenting,[23] stated that Congress knew labor disputes tend to involve vituperative exchanges and had not intended to purify these exchanges, but only to free them so that disputes could be peacefully settled. He concluded that the present decision was in conflict with the basic purposes of the NLRA and would lead industrial relations back to the "law of the jungle." Mr. Justice Fortas, joined by Mr. Chief Justice Warren and Mr. Justice Douglas, also dissented,[24] expressing concern that the decision of the majority would be disruptive of the painfully achieved stability in industrial relations.

The Court's decision, though welcomed with praise in quarters representing management,[25] is neither as strong[26] nor as well reasoned as it might have been. For example, the contention that the distinction between a cause of action for libel and one for unfair labor practice keeps their respective remedies from conflicting is contrary to the reasoning in *Garner* that remedies which are sanctions for the same act are inevitably in conflict.[27] Moreover, reliance upon the argument that if jurisdiction over libel claims is denied to state courts, plaintiffs will be left remediless (an argument which the rationale of *Laburnum* would seem to support)[28] directly conflicts with the Court's position in *Garmon* II that such a result is not relevant to the claim of jurisdiction.[29] The most serious objection to the majority opinion, however, is based upon the policy considerations expressed in the minority opinions. Suits of this nature may well be used to harass the union—such harassment is in direct conflict with the basic policy of maintaining peace in industrial relations. The majority's suggestion that requiring the plaintiff to plead and prove both malice

23. *Id.* at 67.

24. *Id.* at 69.

25. Wall Street Journal, March 2, 1966, p. 8, cols. 1 & 2; Robert C. Isaacs (1966 N.Y.U. Conference on Labor Law) 61 LAB. REL. REP. (BNA News & Background, April 25, 1966).

26. However the five-to-four split of the Court, its reservations about deciding anew, and its failure to explain precisely where courts below erred are weak points. On the other hand, the fact that this decision was rendered with a very weak factual situation before the Court, may indicate that it is in fact a very strong opinion which marks the beginning of a trend to restrict the area preempted by Congress.

27. Garner v. Local 776, Teamsters Union, 346 U.S. at 478-79. A possible distinction however is that in *Garner*, the remedies would necessarily conflict, whereas here they could in fact be supplemental.

28. United Constr. Workers v. Laburnum Constr. Co., 347 U.S. at 663-64. The reasoning of *Laburnum* would seem to support the opinion of the majority in that one factor in their decision was that Congress had provided no procedure for dealing with situations of the kind before the Court.

29. San Diego Bldg. Trades Council v. Garmon, 359 U.S. at 246.

and actual damage will avoid the dangers of spurious suits does not answer the argument that the mere initiation or threat of such suits may disrupt the stability of industrial relations. Finally, there are two minor points which weaken the majority opinion: (1) an indication of pique that labor unions are not assuming adult responsibilities now that they have come of age;[30] and (2) the statement that if experience shall indicate its desirability, the Court will be free to reconsider its holding in this case.[31] While it is difficult to draw any meaningful inferences from the Court's approach in the instant case, it may at least be said that the question of jurisdiction over defamation suits arising in the course of labor disputes is now resolved in favor of state power in so far as one five-to-four decision can settle it.[32]

State and Local Taxation—Economic Exploitation Sufficient Connection To Require Non-Resident Seller To Collect Use Tax

Defendant, a non-resident mail order vendor, was sued under an Illinois Use Tax provision, which required retailers to collect a use tax for Illinois if they solicited orders within the state by means of catalogues or other advertising.[1] Defendant contended that the due process clauses of the Illinois[2] and federal[3] constitutions[4] prohibited

30. Weber v. Anheuser-Busch, Inc., 348 U.S. 468 (1955). See also Local 20, Teamsters Union v. Morton, 377 U.S. 252 (1964).

31. Linn v. Local 114, United Plant Guard Workers, 383 U.S. at 63.

32. Subsequent to the decision in *Linn*, a United States Court of Appeals held statements made during a grievance hearing to be absolutely privileged, citing the policy of industrial peace as recognized in *Linn* as a ground for its holding. This would tend to show that at least one circuit is holding to the traditional position of privilege and is giving effect to the policy of the *Linn* dissenters though the language is couched in terms of the majority's recognition of the policy of preserving peace. General Motors Corp. v. Mendicki, 54 CCH LAB. CAS. ¶ 11488 (10th Cir. 1966).

1. The Illinois Use Tax Law, which became effective in 1955, imposes a tax "upon the privilege of using in this State tangible personal property purchased at retail . . . from a retailer." The tax is to be collected by retailers "maintaining a place of business in this State . . . ." ILL. REV. STAT. ch. 120, § 439.3 (1961). The constitutionality of this statute was confirmed in Turner v. Wright, 11 Ill. 2d 161, 142 N.E.2d 84, *appeal dismissed*, 355 U.S. 65 (1957). The original statute was amended in 1961 to include in the definition of retailers maintaining a place of business in the state, any retailer "Engaging in soliciting orders within this State from users by means of catalogues or other advertising, whether such orders are received or accepted within or without this State." ILL. REV. STAT. ch. 120, § 439.2 (1963).

2. "No person shall be deprived of life, liberty or property, without due process of law." ILL. CONST. art. II, § 2. Presumably, the court was discussing this section at the same time it was speaking of the due process clause of the federal constitution.

3. "[N]or shall any State deprive any person of life, liberty, or property, without due process of law . . . ." U.S. CONST. amend. XIV, § 1.

4. Defendant also relied on the negative implications of the commerce clause,

Illinois from requiring defendant to collect the tax because its only connection[5] with the state was the regular mailing of advertisements[6] to its Illinois customers. Defendant also claimed that Illinois could not exercise in personam jurisdiction over it to enforce liability without violating the due process clauses of both state and federal constitutions.[7] Summary judgment was entered against the defendant by the Circuit Court of Cook County, after defendant appeared specially to contest jurisdiction. On appeal to the Supreme Court of Illinois, *held,* affirmed. The economic exploitation of a local consumer market through continuous mail order solicitation is constitutionally sufficient both to impose and enforce liabiilty on a non-resident corporation to collect a local use tax. *Department of Revenue v. National Bellas Hess, Inc.,* 34 Ill. 2d 164, 214 N.E.2d 755 (1966), Sup. Ct. *prob. juris noted,* 87 U.S. 58 (1966).

"The Congress shall have power . . . to regulate commerce with foreign nations, and among the several States, and with the Indian tribes . . . ." U.S. CONST. art. I, § 8, cl. 3. This objection was not discussed in the opinion, but probably for the reason that use taxes, even with a burden of collection, are levied on the in-state use of property. As such, interstate commerce has ended. See Henneford v. Silas Mason Co., 300 U.S. 577 (1937) (use tax upheld against commerce clause objection).

5. Defendant was incorporated in Delaware, and was qualified to do business only in Delaware and Missouri. Its only plant was located in Missouri, from which it did all mailing of advertisements, accepting of orders, shipping of goods, and receiving of customer payments. The company owned no real or personal property in Illinois, and did not have within the state any agent, salesman, or other representative to sell or take orders, deliver merchandise, accept payments or service merchandise. Further, defendant did no advertising through Illinois newspapers, billboards, radio or television. Department of Revenue v. National Bellas Hess, Inc., 34 Ill. 2d 164, ——— 214 N.E.2d 755, 756-57 (1966).

6. The advertising which defendant sent into Illinois annually consisted of two main catalogues and a number of intermediate smaller sales books or flyers. Defendant mailed the catalogues to a restricted list of customers, which contained 5,000,000 names when acquired in 1932, and which was kept current with active and recent customers. The flyers were mailed to a larger group of potential customers, occasionally in bulk addressed to "occupant" or enclosed with ordered goods. *Id.* at ———, 214 N.E.2d at 756.

7. Defendant made other contentions in the supreme court, each of which was summarily dismissed. First, it argued that the Illinois Use Tax was actually a tax on the out-of-state collector, and not on the in-state user of the purchased goods. The court, however, pointed to the *Scripto* case, *infra* note 13, in which a similar burden on the collector was sustained because it arose when the seller failed to collect the tax from the consumer. 34 Ill. 2d at ———, 214 N.E.2d at 760.

Second, defendant contended that the Illinois statute providing for substituted service of process did not use a reasonable method of notification. The statute, ILL. REV. STAT. ch. 120, § 439.113 (1961), required that a true and certified copy of process or notice be sent to the taxpayer by registered or certified mail at its last known place of bnsiness. Since almost an identical statute was upheld in International Shoe Co. v. Washington, *infra* note 19, the Illinois statute was deemed to give sufficient notice. 34 Ill. 2d at ———, 214 N.E.2d at 762.

Two issues of statutory interpretation were also raised by defendant. The service of process statute allegedly did not apply because defendant had not "accepted" the privilege of maintaining a place of business in the state as required by the statute. However, the court pointed out that the statute applies to defendant since by the

A state may constitutionally impose and enforce tax liability upon a non-resident only if the non-resident has sufficient contacts with the taxing state. Due process requires "some definite link, some minimum connection, between a state and the person, property or transaction it seeks to tax."[8] It is settled that a state may require a non-resident seller who has submitted to state jurisdiction to collect a use tax on goods destined for the taxing state.[9] Thus, sufficient contacts to give the state court jurisdiction to impose and enforce liability exist where a seller has qualified to do business within the state,[10] or does business there from offices located in the state.[11] Jurisdiction is more questionable, however, where the non-resident is not qualified to do business in the taxing state, has no personal or real property there, and has no employees working out of offices in the state. This situation arose in *General Trading Co. v. Tax Commission*,[12] where the seller's only contact with the taxing state was through traveling salesmen. The Supreme Court found this connection sufficient to give the state jurisdiction to impose liability for the use tax. Since that decision, the Supreme Court has held similar solicitation by independent brokers is equally sufficient for jurisdiction.[13]

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terms of the statute defendant does maintain a place of business within the state. Whether the privilege was extended by Illinois, or "accepted" by the retailer, was declared academic. *Ibid.* Defendant also noted that the service of process statute provided for notice to the "taxpayer," and that since it was only the "collector," it was not within the scope of the statute. It should be pointed out that defendant's position here is contrary to that taken at the outset—that the tax was on the collector, not the user. The supreme court dismissed this argument after stating that service of process was to apply to persons who have incurred liability under the statute. The statute also specifically stated that it applies to non-resident vendors, so that "taxpayer" was being used in a generic, rather than a technical, manner. *Id.* at _____, 214 N.E.2d at 762-63.

Other arguments posed by amici curiae and the defendant concerned equal protection of the laws (dismissed for lack of proof concerning credit sales); sales for resale (dismissed since none were revealed in the record); absence of personal signature on the verification of the complaint (unnecessary under ILL. REV. STAT. ch. 110, § 35 (1961)); entry of summary judgment since genuine issues of fact were stated (dismissed because no such issues were stated by defendant or revealed by the record); and lack of signatures on two affidavits (unnecessary because no genuine issue of fact was present). *Id.* at _____, 214 N.E.2d at 763.

8. Miller Bros. Co. v. Maryland, 347 U.S. 340, 344-45 (1954).

9. See Nelson v. Montgomery Ward & Co., 312 U.S. 373 (1941); Nelson v. Sears, Roebuck & Co., 312 U.S. 359 (1941); Felt & Tarrant Mfg. Co. v. Gallagher, 306 U.S. 62 (1939); Monamotor Oil Co. v. Johnson, 292 U.S. 86 (1934). See generally HARTMAN, STATE TAXATION OF INTERSTATE COMMERCE 172-74 (1953); RESTATEMENT (SECOND), CONFLICT OF LAWS § 90 (Tent. Draft No. 3, 1956).

10. The out-of-state sellers were qualified to do business in the taxing states in Nelson v. Montgomery Ward & Co., 312 U.S. at 373; Nelson v. Sears, Roebuck & Co., 312 U.S. at 362; Monamotor Oil Co. v. Johnson, 292 U.S. at 91.

11. In-state offices existed in Nelson v. Montgomery Ward & Co., 312 U.S. at 374; Nelson v. Sears, Roebuck & Co., 312 U.S. at 362, Felt & Tarrant Mfg. Co. v. Gallagher, 306 U.S. at 64-65; Monamotor Oil Co. v. Johnson, 292 U.S. at 91.

12. 322 U.S. 335 (1944).

13. Scripto, Inc. v. Carson, 362 U.S. 207 (1960).

Whether performed by salesmen or brokers, however, this solicitation must be continuous.[14] The physical presence of agents making only occasional deliveries of goods has been found to be an insufficient connection, even where the seller has occasionally mailed circulars into the taxing state and has regularly purchased newspaper, radio, and television advertising that reach the taxing state.[15] These decisions have been primarily concerned with the power of a state to impose tax liability, that is, the state's substantive law jurisdiction.[16] The power of a state to enforce tax liability, that is, its judicial jurisdiction,[17] has generally been handled summarily once the power to impose the tax has been established.[18] Other decisions, therefore, must be reviewed to determine what constitutes sufficient connections with a taxing state for purposes of judicial jurisdiction. In *International Shoe Co. v. Washington,*[19] the Supreme Court held that for judicial jurisdiction purposes due process requires certain "minimum contacts" with the forum by the non-resident such that maintenance of the suit will not offend the "traditional notions of fair play and substantial justice."[20] There the contacts consisted of continuous solicitation by traveling salesmen, a situation where the judicial jurisdiction problem was not dealt with because the defendant taxpayer had voluntarily

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14. See *id.* at 212 ("regular, systematic displaying"); Miller Bros. Co. v. Maryland, 347 U.S. at 346-47 ("continuous local solicitation" and "active and aggressive operation").

15. Miller Bros. v. Maryland, *supra* note 8.

16. Substantive law jurisdiction is the permissible range within which a state may create legal rights and duties. The term "substantive" jurisdiction is preferred to "legislative" jurisdiction, which is used in the RESTATEMENT (SECOND), CONFLICT OF LAWS § 43 (Tent. Draft No. 3, 1956), because this type of jurisdiction includes both statutes and common law. See also CHEATHAM, PROBLEMS AND METHODS IN CONFLICT OF LAWS 264-71 (1960).

17. Judicial jurisdiction means the extent to which a state's court may render valid judgments. This type of jurisdiction is discussed in the RESTATEMENT (SECOND), CONFLICT OF LAWS §§ 74-117 (Tent. Draft No. 3, 1956). See also CHEATHAM, *op. cit. supra* note 16.

18. In the early cases in which property was owned in the state or the foreign corporation was qualified to do business, there was little need to discuss judicial jurisdiction. Discussing the *Monamotor* case, one writer described the "jump" from constitutional taxability to constitutional collectibility made there (292 U.S. at 95) as the precedent later used to make "short shrift" of the objeetion to collectibility. HARTMAN, *op. cit. supra* note 9, at 173. Collectibility became significant only in the later cases with less obvious physical contacts in the taxing state. In *General Trading,* however, the issue was not raised because the taxpayer voluntarily submitted itself to the court's jurisdietion. See note 21 *infra.* In *Miller Bros.,* the Court never reached the issue, since substantive jurisdiction was found lacking. In *Scripto,* Inc. v. Carson, the out-of-state vendor brought suit in the taxing state to contest the constitutionality of the tax. 105 So. 2d 775 (1958), *aff'd,* 362 U.S. 207 (1960). Defendant correctly stated in the instant case, therefore, that the issue of judicial jurisdiction had not been raised, at lease effectively, in any of the earlier use tax collection cases. Department of Revenue v. National Bellas Hess, Inc., *supra* note 5, at _____, 214 N.E.2d at 760.

19. 326 U.S. 310 (1945).

20. *Id.* at 316.

appeared and filed an answer,[21] almost identical to the earlier case of *General Trading*. Solicitation need not be continuous to establish judicial jurisdiction, however, as illustrated by *McGee v. International Life Ins. Co.*,[22] where the solicitation of a single life insurance policy satisfied the minimum contacts requirement.[23]

In the instant case, the Supreme Court of Illinois had first to determine whether mere solicitation by mail was sufficient to give the state substantive jurisdiction. After examining the major tax cases involving the element of solicitation,[24] the court concluded that "continuous local solicitation followed by delivery of ordered goods" was the most tenuous connection that a non-resident could have and still be within the substantive jurisdiction of the state.[25] The court then declared that defendant's solicitation was within this definition, and that defendant was therefore subject to the liability imposed.[26] The fact that this solicitation was by mail order catalogues, and not by use

21. *General Trading* was cited in *International Shoe* as a precedent for substantive law jurisdiction. See HARTMAN, *op. cit. supra* note 9, at 175-76. *General Trading*, however, was controlling on the issue of substantive law jurisdiction, and was cited by the Court as such. International Shoe Co. v. Washington, 326 U.S. at 322.

22. 355 U.S. 220 (1957). The importance of solicitation as a contact for judicial jurisdiction was implied in the subsequent case of Hanson v. Denckla, 357 U.S. 235 (1958). In finding no judicial jurisdiction there, the Court distinguished *McGee* by noting that "the record discloses no solicitation . . . in person or by mail" as there was in *McGee. Id.* at 251.

23. Judicial jurisdiction can, of course, be achieved through numerous other means. See HARTMAN, *op. cit. supra* note 9, at 176.

24. The earliest case in which solicitation was present was Nelson v. Montgomery Ward & Co., *supra* note 9. Substantive jurisdiction there was based on qualification for doing business in the state, and property and agents there. Some emphasis was placed, however, on the solicitation of mail orders by the defendant as a "further fact in this record which makes a reversal . . . necessary." *Id.* at 376.

The solicitation in *General Trading* was through traveling salesmen in the state. The continuous nature of their activities was the basis for substantive jurisdiction (see explanation in Miller Bros. Co. v. Maryland, 347 U.S. at 346), as it was in International Shoe Co. v. Washington, 326 U.S. at 320. The solicitation in *Miller Bros.*, which was insufficient to give jurisdiction, was distinguished by the Court: "[T]here is a wide gulf between this type of active and aggressive operation [in *General Trading*] . . . and the occasional delivery of goods sold at an out-of-state store with no solicitation other than the incidental effects of general advertising." 347 U.S. at 347. This general advertising consisted of regular out-of-state newspaper, radio, and television advertising, as well as occasional sales circulars mailed to in-state customers. *Id.* at 349-50. The solicitation in *Scripto* was similar to that in *General Trading*, except that it was performed by independent brokers. 362 U.S. at 209.

25. "In short, 'continuous local solicitation followed by delivery of ordered goods to the customers' apparently forms a constitutional basis for a 'State's decision to regard such a rivalry with its local merchants as equivalent to being a local merchant.' [citation]" Department of Revenue v. National Bellas Hess, supra note 5, at _____, 214 N.E.2d at 759.

26. *Id* at _____, 214 N.E.2d at 760. It is curious that under these same facts, Illinois could not constitutionally impose a sales tax on defendant. See McLeod v. J. E. Dilworth, 322 U.S. 327 (1944); HARTMAN, *op. cit. supra* note 9, at 174-75.

of salesmen, brokers, or local advertising, was deemed immaterial.[27] The court did not, however, base its holding solely upon the solicitation connection. Rather, it declared that this continuous solicitation was simply the means used for the economic exploitation of the local consumer market, and that this exploitation was in fact the true "minimum connection" with the state.[28] The court noted that both *Miller Brothers Co.*[29] and *Scripto*[30] were based, at least in part, on this view, which was first espoused by Mr. Justice Rutledge in his separate opinion in *General Trading*.[31] The court then proceeded to the question of judicial jurisdiction. Relying on *International Shoe*, the court concluded that the same continuous solicitation that provided the requisite "minimum connections" for substantive jurisdiction was adequate to satisfy the "minimum contacts" necessary for judicial jurisdiction purposes. Since *McGee* had sustained judicial jurisdiction on the basis of a single solicitation, the court saw little difficulty in finding such jurisdiction over the defendant in the instant case.

The court here was faced with a pattern of continuous solicitation which would clearly support judicial jurisdiction, but which might not be sufficient under the due process clause to establish substantive jurisdiction. The finding of the latter in the instant case may be interpreted as simply an extension of the idea of continuous solicitation to the problem of mail order vendors. Under exisiting law the continuous solicitation by sales representatives, followed by delivery of the ordered goods, is a minimum counection sufficient for substan-

27. Department of Revenue v. National Bellas Hess, *supra* note 5, at ——, 214 N.E.2d at 759. This step was significant in that physical presence of some agent, either salesman or broker, was implicitly eliminated as having been a basis of past holdings. Considering the history of substantive jurisdiction as developed from the requirement of local real or personal property to that of local representatives, this step away from physical presence is a significant one.

28. "The important question is whether there is 'exploitation of the consumer market' by continuous solicitation and not whether the company used local advertising, salesmen, brokers or catalogues since the vendor will use that type of solicitation which most effectively and economically exploits the consumer market." *Ibid.*

29. 347 U.S. at 347; cited in Department of Revenue v. National Bellas Hess, *supra* note 5, at ——, 214 N.E.2d at 759.

30. 362 U.S. at 212; cited in Department of Revenue v. National Bellas Hess, *supra* note 5, at ——, 214 N.E.2d at 759.

31. Mr. Justice Rutledge concurred in General Trading, 322 U.S. at 349, and in International Harvester Co. v. Department of Treasury, 322 U.S. 340, 349 (1944) and dissented in McLeod v. J. E. Dilworth Co., 322 U.S. at 349. He recognized that "regular, continuous, persistent solicitation has the same economic, and should have the same legal, consequences as does maintaining an office for soliciting aud even contracting purposes or maintaining a place of business, when the goods actually are shipped into the state from without for delivery to the particular buyer." *Id.* at 354.

Employing an economic approach to substantive jurisdiction has received some support from the profession. See HARTMAN, *op. cit. supra* note 9, at 178; Note, *Sales and Use Taxes: Collection From Absentee Vendors*, 57 HARV. L. REV. 1086, 1089 (1944).

tive jurisdiction; and the extension to mail order solicitations does not seem unreasonable. But the instant case has broader implications. It is an express recognition that the economic effect of a taxpayer's connections with the taxing state will determine whether those connections are constitutionally sufficient to allow a state to exercise substantive and judicial jurisdiction over him.[32] The court's reliance on the economic effect of the taxpayer's connection might well have been precipitated by the court's concern that the continuous solicitation rule would not apply, since that rule could easily be interpreted as requiring some physical presence within the taxing state.[33] Nevertheless, the step toward an economic exploitation standard is praiseworthy as a realistic approach to the problem of what constitutes substantive jurisdiction.[34] The Illinois court has apparently determined that continuous solicitation indicates an economic exploitation of a consumer market, which will support substantive jurisdiction. A truly economic approach, however, would probably not produce a standard which required that the solicitation be "continuous." For example, sporadic advertising might be particularly exploitative for certain types of products involving discount sales; concentrated solicitation schemes over short periods of time might well exploit a local market by effectively competing with local merchants; and radio, television and newspaper advertising are undoubtedly as effective as mail order catalogues in reaching local consumer markets. Thus, under a broad interpretation of the economic exploitation theory, these "connections"

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32. Both the *Miller Bros.* and *Scripto* decisions discussed "economic exploitation" as a contributing factor, but neither found it determinative. In *Miller Bros.*, the Court first held that the "occasional" delivery of goods and the mere "incidental effects" of general advertising distinguished the situation before it from that in *General Trading.* Only then did the Court add, "Here was no invasion or exploitation of the consumer market in Maryland." 347 U.S. at 347. Exploitation was apparently another means of phrasing the earlier ideas.

In *Scripto,* the Court reiterated the "exploitation" idea in distinguishing *Miller Bros.* from *General Trading,* but seemed to treat exploitation as a separate factor. "Miller had no solicitors in Maryland; there was no 'exploitation of the consumer market'; no regular, systematic displaying of its products by catalogues, samples or the like." 362 U.S. at 212. However, the holding in *Scripto* was based squarely on the *General Trading* idea of continuous solicitation, *Ibid.*, with exploitation mentioned only with regard to the prior decisions.

33. No prior cases sustaining substantive jurisdiction lacked that element. Representation in *Scripto* was through independent brokers; in *General Trading* and *International Shoe,* by traveling salesmen; and in *Sears Roebuck, Montgomery Ward, Felt & Tarrant* and *Monamotor,* by permanent in-state sales personnel.

34. This standard is premised on the idea that a state which provides benefits and protection to a non-resident has a legitimate interest in taxing the non-resident. Profit-seeking within a state would seem as reasonable a basis for jurisdiction as the well-established basis of enjoyment of state highways. See Hess v. Pawloski, 274 U.S. 352 (1927) (long-arm motorist statute). For a discussion of this analogy, especially to the mail order situation, see HARTMAN, *op. cit. supra* note 9, at 178. See also, Note, *supra* note 31.

could greatly expand the taxable base of many states. The policy favoring exaction of a tribute from the non-resident beneficiary of the local consumer market must be balanced, however, by the fairness to the non-resident in subjecting him to tax burdens in numerous jurisdictions. The seller's intent to reach a particular market might be a reasonable criterion for determining his tax liability arising from radio and television solicitation. The logical extension of the economic approach could be the equalization of the tests for substantive and judicial jurisdiction. Presently, the test for judicial jurisdiction can apparently be satisfied by the minimal contact of a single solicitation.[35] Since in many cases a single solicitation might well "exploit" a local consumer market, the merger of the tests, guarded vigorously by the traditions of fair play and substantial justice, would not seem unreasonable.

35. See McGee v. International Life Ins. Co., *supra* note 22.