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Antitrust Law—Conspiracy To Eliminate Discounters From Automobile Market a Per Se Violation of Sherman Act

The United States brought a civil action under section 1 of the Sherman Act[1] against General Motors Corporation and three associations of Chevrolet dealers in the Los Angeles area. The complainant sought to enjoin defendants from conspiring to prevent certain franchised dealers from maintaining sales relationships with discount houses. As a result of pressure from dealers injured by such practices,[2] General Motors notified all franchisees that "in some instances" the discount practices represented violations of the Dealer Selling Agreements, and elicited promises from the dealers to discontinue the relationships. The defendant associations jointly financed the policing of these promises and, as violations were discovered, General Motors enforced compliance. The defendants contended that their activities were a lawful attempt to enforce the "one location clause" in the Dealer Selling Agreements,[3] while the government maintained that a provision limiting sales to discounters was unlawful since it amounted to a boycott and would have the effect of maintaining resale prices. The district court held that General Motors was legally entitled to enforce its contracts and that the mere requests of some of the dealers for General Motors' assistance would not support the findings of a conspiracy.[4] On direct appeal[5] to the United States Supreme Court, *held*, reversed and remanded. Elimination of discount houses from access to the retail

1. "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal . . . ." 26 Stat. 209 (1890), as amended, 15 U.S.C. § 1 (1964).

2. Frequently the discount outlets involved were located near the non-participating franchisees. As a result, these dealers were injured not only through lost sales, but also by having to perform warranty services on vehicles which the discounters marketed. The discounter-dealer sales relationships were basically of two types: (1) "referral selling, whereby the discounter would obtain the customer and refer him to the dealer; and (2) "bootlegging," whereby the dealer would actually sell the vehicle to the discounter for resale. Most of the arrangements were of the referral type. United States v. General Motors Corp., 384 U.S. 127, 131-32 (1966).

3. This clause prohibited a dealer from establishing "a new or different location, branch sales office, branch service station, or place of business . . . without prior written approval of Chevrolet." *Id.* at 130.

4. United States v. General Motors Corp., 234 F. Supp 85, 89 (S.D. Cal. 1964).

5. A direct appeal was taken under the Expediting Act § 2, 32 Stat. 823 (1903), as amended, 15 U.S.C. § 29 (1964).

automobile market by joint collaborative action on the part of automobile dealers, their associations, and the manufacturer constitutes a per se violation of the Sherman Act. *United States v. General Motors Corp.*, 384 U.S. 127 (1966).

A successful prosecution for a section 1 Sherman Act violation requires the finding of a "contract, combination . . . or conspiracy . . . in restraint of trade." In *Standard Oil of New Jersey v. United States*,[6] the Supreme Court established the criteria for determining the existence of such a restraint. *Standard Oil* held that the Sherman Act prohibits only those restraints of trade found to be unreasonable, and that the application of this "rule of reason" requires that the ends sought in each case be weighed against the means used to achieve them. The *Standard Oil* Court also indicated that some activities would constitute a per se violation of the act.[7] Boycotts and resale price-maintenance schemes, for example, are per se violations which have been enjoined regardless of their purpose or effect.[8] Of the two, resale price-maintenance has presented the more subtle problems.[9] Contracts for resale price-maintenance were declared per se violations by the Supreme Court in *Dr. Miles Medical Co. v. John D. Park & Sons Co.*[10] However, *United States v. Colgate & Co.*[11] appeared to limit *Dr. Miles* by declaring that a manufacturer has the right to "announce in advance the circumstances under which he will refuse to sell" and to stop dealing with a distributor for "reasons sufficient to himself."[12] Theoretically, then, a manufacturer could refuse to deal with distributors in furtherance of a price-maintenance scheme despite the earlier ruling that a

6. 221 U.S. 1 (1911).

7. The court stated that the restraint imposed by some activities would be so great that their unreasonableness would be conclusively presumed. *Id.* at 65.

8. "Boycott" as used in this article means to refrain by group action from purchasing or supplying certain goods and/or services or from dealing with certain individuals or classes of individuals. "Resale price-maintenance" as used in this article means vertical price control, *i.e.*, a supplier attempts to control the price at which his product is resold by his customer.

9. Boycotts have been enjoined even in the face of a clear showing that competition has not been lessened. Klor's, Inc. v. Broadway-Hale Stores, Inc. 359 U.S. 207 (1959). See also Fashion Originators' Guild of America, Inc. v. FTC, 312 U.S. 457 (1941) wherein the purpose of the boycott was to curb tortious activities. The Court held that the purpose of the boycott was immaterial. Other cases include Eastern States Retail Lumber Dealers' Ass'n v. United States, 234 U.S. 600 (1914). On resale price-maintenance, see cases discussed in text accompanying notes 10-16 *infra*. See also Turner, *The Definition of Agreement Under the Sherman Act: Conscious Parallelism and Refusals to Deal*, 75 HARV. L. REV. 655 (1962); Rahl, *Conspiracy and the Anti-Trust Laws*, 44 ILL. L. REV. 743 (1950).

10. 220 U.S. 373 (1911).

11. 250 U.S. 300 (1919). In this case the district court interpreted the criminal indictment as having failed to charge an agreement, and the Snpreme Court felt bound by this interpretation. No conviction can be had on conspiraey charges without a showing of agreement.

12. *Id.* at 307.

price-maintenance was unlawful per se. Subsequent cases, however, rendered almost illusory this supposed right by holding that refusals to deal could not be used in furtherance of a combination to restrain trade. In the year following *Colgate,* the Supreme Court extended the per se illegality of resale price-maintenance schemes to cases involving implied agreements.[13] Thus, if an agreement can be implied from a course of dealing, the fact that the manufacturer, as in *Colgate,* furthered his scheme by refusing to deal is no defense. Any substantial element beyond simple refusal to deal will support the finding of an implied agreement.[14] The narrow limits of the theoretical right announced in *Colgate* are illustrated in *United States v. Parke, Davis & Co.*[15] There the manufacturer refused to deal with retailers who sold below a designated price and with the wholesalers who continued to supply those retailers. By involving the wholesalers in its scheme to stop the flow of its goods to those retailers, Parke, Davis & Co. created a combination in restraint of trade and thus removed itself from the protective sphere of *Colgate.*[16]

Although both the government and General Motors urged the importance of the "one location clause," the Supreme Court considered neither the scope of the clause nor its enforceability in light of the antitrust laws. Rather, it found a "classic conspiracy in restraint of trade," to eliminate a class of competitors.[17] The essential elements of a conspiracy were found in the dealers' solicitation of General Motors' aid, the promises obtained from the violators by General Motors, and the joint policing of those promises.[18] Stating that where joint action is involved, no finding of explicit agreement is necessary, the majority concluded that the promises obtained from the offending dealers created a "fabric interwoven by many strands of joint action."[19] The Court noted that this joint action contained the elements of two

13. United States v. A. Schrader's Son, Inc. 252 U.S. 85 (1920).

14. In United States v. Bausch & Lomb Optical Co., 321 U.S. 707 (1944), in which a distributor refused to supply those dealers who violated a price schedule, the Court stated, "Whether this conspiracy and combination was achieved by agreement or by acquiescence of the wholesalers coupled with assistance in effectuating its purpose is immaterial." *Id.* at 723. In FTC v. Beech-Nut Packing Co., 257 U.S. 441 (1922), the Court stated, in effect, that a trader is not guilty of violating the Sherman Act by merely refusing to sell to those who will not sell his goods at the prices he wishes, but he may not go further and by contracts or combinations, express or implied, unduly hinder the free flow of commerce. *Id.* at 452-53. Referring to *Colgate* and *Schrader's* in Frey & Son, Inc. v. Cudahy Packing Co., 256 U.S. 208 (1921), the Court said, "Apparently the former case . . . [*Colgate*] was misapprehended. The latter opinion . . . [*Schrader's*] distinctly stated that the essential agreement, combination or conspiracy might be implied from a course of dealing or other circumstances." *Id.* at 210.

15. 362 U.S. 29 (1960).

16. *Id.* at 45-46.

17. 384 U.S. at 139-40.

18. *Id.* at 143.

19. *Id.* at 142-44.

per se violations, boycotts and resale price-maintenance. The elimination of the discounters from the market was accomplished by a boycott,[20] and a collateral effect of this combination was a substantial restraint upon price competition, a per se violation under *Parke, Davis*.[21]

The *General Motors* opinion indicates that any combination resulting in a substantial restraint upon a competitor's access to the market or upon price competition is a per se violation of the Sherman Act.[22] When *Parke, Davis* and the instant case are considered together, it would seem that quite narrow limits have been placed upon a supplier's use of refusals to deal. The two decisions raise a strong presumption of illegality whenever refusals to deal are used to control either prices or a competitor's access to a market in which the supplier has many customers.[23] This raises a question as to the present status of *Colgate*. *Parke, Davis* held that the right to refuse to deal, as set forth in *Colgate*, cannot be used to induce group compliance with a price-maintenance scheme.[24] The *General Motors* case did not further limit this right; in fact, the Court explicitly reserved the question of General

20. *Ibid.*

21. *Id.* at 147. Mr. Justice Harlan submitted a concurring opinion in which he stated that although he considered *Parke, Davis & Co.* to represent a basically unsound antitrust doctrine, he could not escape the fact that its rule governed this case. *Id.* at 148-49. Although *Parke, Davis & Co.* involved alleged price-fixing, and the instant case involved boycotting, Mr. Justice Harlan could see no reason for differentiating the two cases. In the *Parke, Davis* case, Mr. Justice Harlan dissented on the ground that Parke, Davis & Co.'s conduct was permissible under the *Colgate* doctrine. He felt that what the Court was really doing in *Parke, Davis & Co.* was overruling *Colgate* while professing to distinguish it. United States v. Parke, Davis & Co., *supra* note 15, at 49. In the instant case Harlan conditioned his concurring opinion on his interpretation of the majority opinion as saying nothing to prevent General Motors from enforcing the "one location clause" by unilateral action. 384 U.S. at 148.

22. "And the per se rule applies even when the effect upon prices is indirect." 384 U.S. at 147.

23. One could make an argument that the presumption is conclusive but the facts of the two cases must be considered. In each case the primary defendant held a large market share and sold to many customers who were involved in *intrabrand* as well as *interbrand* competition. The cases therefore do not indicate what would be the result when only interbrand competition is involved. It is too early to say that this area too is subject to a per se rule.

24. The majority opinion in *Parke, Davis & Co.* makes clear that it is not overruling *Colgate*, although under their interpretation, the *Colgate* privilege is severely limited. 362 U.S. at 44. For opinions that *Parke, Davis & Co.* leaves some life in *Colgate*, see Levi, *The Parke, Davis-Colgate Doctrine: The Ban on Resale Price Maintenance*, THE SUPREME COURT REVIEW 258, 325 (Kurland ed. 1960) suggesting that the protected area of *Colgate* extends only to first purchasers; Bicks, *The Enforcement Policies of the Department of Justice and the Small Businessman*, 16 A.B.A. ANTI TRUST SECTION 54, 55 (1960) wherein the then Acting Assistant Attorney General in charge of the Antitrust Division interpreted *Parke, Davis & Co.* as sounding "the death knell for vertical price fixing activities — except to the extent protected by state law — beyond the manufacturer's simple unilateral refusal to deal with price cutting retailers."

Motors' right to enforce the "one location clause" unilaterally.[25]

As the Court noted, the case does have similarities to situations involving boycotts and price-fixing, but the purpose of the combination is more complex. General Motors was not concerned with maintaining resale prices, nor with denying the discounters access to the market. Rather, it was threatening refusal to deal in an effort to protect its distribution system, and this additional factor, the presence of the franchise as a distributional system, makes the per se approach undesirable in this situation.[26] The determination of the unreasonableness of the restraints imposed by this particular franchise system should include consideration of such factors as: (1) the extent of interbrand competition promoted by the system; (2) the degree of increased efficiency in production and distribution; and (3) the increased potential for market development. If the restraint imposed upon interbrand competition by the system is unreasonable in light of these considerations, the inquiry need go no further. But even if the system is reasonable in terms of *interbrand* competition, a determination must still be made as to the reasonableness of the system's restraints upon *intrabrand* competition. This determination turns upon a balancing of the need for the distributional system with the detrimental effects it produces upon competition at the dealer-discounter level. Here, the relevant considerations go beyond price competition and include such elements of competition at the consumer level as pre-delivery servicing and warranty maintenance. If the restraints imposed by the distribution scheme are unreasonable because of the burden upon intrabrand competition, then the Sherman Act has been violated.

In this case these questions were not reached. The Court found a situation similar to boycotts and price-fixing, and apparently classified the entire system as a per se violation without considering the economic benefits which the franchise system might contain. The Court has repeatedly stated that it protects competition rather than com-

25. 384 U.S. at 139-40. See Boro Hall Corp. v. General Motors Corp., 124 F.2d 822 (2d Cir. 1942), *rehearing denied*, 130 F.2d 196 (2d Cir. 1942), holding that General Motors could, under the "one location clause" restrict a dealer from establishing a used car lot outside his area.

26. For an excellent study, economically oriented, of restricted distributional practices in various types of industries disfavoring the per se approach to such problems under the antitrust laws, see Note, 75 HARV. L. REV. 795 (1962). The article concludes that the business analysis of the vertical restraints indicated that oftentimes the manufacturer-supplier's interest in higher sales volume and interbrand competition actually is pro-competitive and sufficient justification for the exclusive arrangements employed. See also ATT'Y GEN. NAT'L COMM. ANTITRUST REP. 29 (1955) wherein the committee concludes that where exclusive dealerships result in merely ancillary restraints, reasonably necessary to protect the parties' main lawful business purposes, they should be upheld when the effect is not to unreasonably foreclose competition within the dealer's market.

petitors,[27] but recent decisions under the Clayton Act[28] indicate that the Court actually equates an increased number of competitors with increased competition.[29] The Court's concern in the instant case for the discounters, rather than competition, parallels its use of the numerical test in the merger field. If the Court continues its present trend toward labeling as per se violations any arrangement which has the effect of reducing or restricting the numbers of competitors, businessmen must face the problems of distribution in new ways. One suggested solution is the operation of vertically integrated outlets,[30] but the effect of this plan would be to squeeze out small businessmen who now perform such distribution functions, a result surely not within the spirit of the antitrust laws.[31] A more practical solution is underway in a proposal to amend the Sherman Act to provide that exclusive territorial franchises, under limited circumstances, do not constitute restraints of trade.[32]

Antitrust Law—Merger of Two Major Competitors in Industry with History of Concentration Violates Section 7 of Clayton Act

The United States sued to enjoin the merger of Von's Grocery Company and its direct competitor, Shopping Bag Food Stores, as a violation of section 7 of the Clayton Act.[1] Prior to the merger, Von's ranked third in sales in the Los Angeles grocery market with 4.7 per cent of the sales, and Shopping Bag ranked sixth with 4.2 per cent. The merger created the second largest grocery chain in Los Angeles with 7.5 per cent of total sales. The evidence revealed a history of concentration in the Los Angeles retail grocery industry. Acquisitions and mergers within the industry were occurring at an increasingly rapid rate. Both Von's and Shopping Bag were expanding firms, although neither had acquired new outlets by merger. The district court held that there was "not a reasonable probability" that the

27. See, *e.g.*, Brown Shoe Co. v. United States, 370 U.S. 294, 320 (1962).

28. Section 7, 38 Stat. 731 (1914), as amended, 15 U.S.C. § 18 (1964).

29. United States v. Von's Grocery Co., 86 Sup. Ct. 1478 (1966), in which the Court struck down a merger as causing a substantial lessening of competition, indicating that the crucial point was the total decrease in the number of separate competitors.

30. This possible result was suggested in Stewart, *Franchise or Protected Territory Distribution*, 8 ANTITRUST BULL. 447 (1963).

31. See United States v. Von's Grocery Co., *supra* note 29; Brown Shoe Co. v. United States, *supra* note 27.

32. See S. 2549, 89th Cong. 1st Sess. § 1, 2 (1965).

1. 38 Stat. 731 (1914), as amended, 15 U.S.C. § 18 (1964).

merger would tend "substantially to lessen competition" or "create a monopoly" in violation of section 7.[2] On appeal[3] to the Supreme Court of the United States, *held,* reversed. The merger of two major competitors in an industry marked by a long and continuous trend toward concentration violates section 7 of the Clayton Act. *United States v. Von's Grocery Co.,* 384 U.S. 270 (1966).

Section 7 of the Clayton Act, as amended by the Celler-Kefauver Act of 1950,[4] proscribes any acquisition where "in any line of commerce in any section of the country, the effect may be substantially to lessen competition or tend to create a monopoly." The tests employed in implementing the statute can be classified under two broad standards: (1) the per se standard,[5] which is characterized by the assumption that an analysis of the structural characteristics of the market will be determinant of the competitive effects of a merger; and (2) the rule-of-reason standard,[6] which employs a case-by-case analysis of all relevant economic and structural factors with a view toward the determination of the probable economic consequences of a merger.[7] The Supreme Court first interpreted the amended section 7 in *Brown Shoe Co. v. United States.*[8] Speaking for the majority in that case, Mr. Chief Justice Warren viewed the amendment as indicating congressional concern with the "rising tide of economic concentration in the American economy."[9] He stated that "[t]aken as a whole, the legislative history (of the amendment) illuminates congressional concern with the protection of *competition,* not *competitors,* and its desire to restrain mergers only to the extent that such combinations may tend to lessen competition."[10] The Court then engaged in the process of determining the relevant "line of commerce" (product

2. 233 F. Supp. 976, 985 (S.D. Cal. 1964).

3. Appeal was brought under section 2 of the Expediting Act, 58 Stat. 272 (1944), as amended, 15 U.S.C. § 29 (1964).

4. 64 Stat. 1125 (1950), 15 U.S.C. § 18 (1964).

5. The earliest application of this standard appeared in Standard Oil Co. v. United States, 337 U.S. 293 (1949), a case under section 3 of the Clayton Act, where the Court adopted the rule of "quantitative substantiality." This rule states in essence that when a merger forecloses a quantitatively substantial portion of the market, it is legitimate to infer a significant lessening of competition. Under this test substantiality is determined in absolute rather than relative terms.

6. In Transamerica Corp. v. Board of Governors, 206 F.2d 163 (3d Cir.), *cert. denied,* 346 U.S. 901 (1953), the circuit court rejected the quantitative substantiality test in its application to section 7 cases and turned to the rule-of-reason approach. See also In the Matter of Pillsbury Mills, Inc., 50 F.T.C. 555 (1953).

7. Comment, 11 WAYNE L. REV. 739, 754 (1965).

8. 370 U.S. 294 (1962).

9. *Id.* at 315.

10. *Id.* at 320. In repeating this phrase later in the opinion the Court added a significant dictum: "But we cannot fail to recognize Congress' desire to promote competition through the protection of viable, small, locally owned businesses." *Id.* at 344.

market) and the "section of the country" (geographic market) within which the probable effect of the merger was to be measured. In ruling the merger in violation of section 7, the Court placed particular emphasis upon the market share[11] to be controlled by the merging companies and the history of concentration in the industry, and presented an elaborate array of economic data to support their conclusion. The *Brown Shoe* decision was hailed as supporting a variety of interpretations of section 7, but it was generally concluded that the Court had adopted the "rule-of-reason" approach.[12] However, in *United States v. Philadelphia Nat'l Bank*[13] the Court began a retreat from the empirical analysis which characterized *Brown Shoe* in favor of the application of mechanical tests, stating that the "intense congressional concern with the trend toward concentration warrants, dispensing, in certain cases with elaborate proof of market structure, market behavior, or probable anticompetitive effects."[14] This statement and the now-famous footnote 42[15] became the holding in two subsequent cases under section 7. In *United States v. Aluminum Co. of America*[16] and *United States v. Continental Can Co.*,[17] the Court failed to follow the *Brown Shoe* mandate and largely ignored the economic evidence presented by the parties, while dealing extensively with the structural aspects of the market.[18] This trend away from the rule-of-reason approach[19] has been marked by an increasing tendency to find a probable lessening of competition wherever there is a

11. The Brown Shoe merger had both horizontal and vertical aspects. In discussing the market share to be controlled by the merging companies, the Court viewed the market from the purchaser's point of view, while the horizontal aspects of the merger actually involved the manufacturer's market. However, it is clear that the Court intended the market share to be an important factor in determining the competitive effects of any horizontal acquisition brought before it under section 7.

12. Bock, *The Relativity of Economic Evidence in Merger Cases—Emerging Decisions Force the Issue*, 63 MICH. L. REV. 1355, 1357 (1963).

13. 374 U.S. 321 (1963). The Court invalidated a merger between the second and third largest of Philadelphia's 42 commercial banks.

14. *Id.* at 363.

15. "It is no answer that, among the three presently largest firms . . . , there will be no increase in concentration. . . . [I]f concentration is already great the importance of preventing even slight increases in concentration and so preserving the possibility of eventual deconcentration is correspondingly great." *Id.* at 365 n.42.

16. 377 U.S. 271 (1964). The Court invalidated the acquisition by Alcoa of the Rome Cable Corp. Alcoa manufactured aluminum conductor and Rome produced copper conductor.

17. 378 U.S. 441 (1964). The Court declared Continental Can's (the second largest producer of metal containers) acquisition of the Hazel-Atlas Glass Company (the third largest producer of glass containers) in violation of section 7.

18. Note, 10 VILL. L. REV. 734, 757 (1965).

19. The movement from the rule-of-reason approach to a per se standard has also characterized the FTC decisions under section 7. *E.g.*, *compare* In the Matter of Pillsbury Mills, Inc., *supra* note 6, *with* National Tea Co., 3 TRADE REG. REP. ¶ 17463 (1966).

possibility of injury to a competitor.[20] Two rules seem to be emerging. First, "where concentration is already great, even slight increases must be prevented; and second, where there is a strong trend toward oligopoly, further tendencies in that direction are to be curbed in their incipiency, whatever the number or vigor of the remaining competitors."[21]

In the instant case, the Court was faced with deciding the validity of a horizontal merger[22] in a market with a large number of competitors. Again it adopted the per se standard. Speaking for the majority, Mr. Justice Black stated that the purpose of the antitrust laws is "to preserve competition among a large number of sellers."[23] He then noted a decline in the number of grocery companies operating in the Los Angeles market in recent years, accompanied by a large number of mergers over the same period. To the Court, these facts presented "exactly the threatening trend toward concentration which Congress wanted to halt."[24] The Court concluded that any merger between large firms in a market characterized by a continuous trend toward fewer and fewer competitors would be in violation of section 7. Mr. Justice Stewart, joined by Mr. Justice Harlan, dissented, criticizing the majority for basing its decision "apparently on the theory that the degree of competition is invariably proportional to the number of competitors . . . ."[25] Citing *Brown Shoe*, he stated that every corporate acquisition is to be judged in light of the contemporary economic context of its industry and that the purpose of section 7 is to protect competition, not competitors.[26]

The opinion in the instant case affirms the Court's concern with concentration of industry in the economy and its dedication to the

20. Rill, *The Trend Toward Social Competition under Section 7 of the Clayton Act*, 54 GEO. L.J. 891, 898-99 (1966).

21. Singer, *The Concept of Relative Concentration in Antitrust Law*, 52 A.B.A.J. 246, 248 (1966).

22. "An economic arrangement between companies performing similar functions in the production or sale of comparable goods or services is characterized as 'horizontal.'" Brown Shoe Co. v. United States, 370 U.S. 294, 334 (1962).

23. 384 U.S. 270, 274 (1966). In footnote Mr. Justice Black quoted the famous dictum of Judge Learned Hand in United States v. Aluminum Co. of America, 148 F.2d 416, 429 (2d Cir. 1945): "Throughout the history of these statutes it has been constantly assumed that one of their purposes was to perpetuate and preserve, for its own sake and in spite of possible cost, an organization of industry in small units which can effectively compete with each other." 384 U.S. at 274 n.7.

24. 384 U.S. at 277.

25. *Id.* at 282 (dissenting opinion).

26. The dissent further pointed out that "[i]t is only among the single-store operators that the decline in the unit number of competitors, so heavily relied on by the Court, has taken place. Yet the tables . . . show not a trace of merger activity involving the aequisition of single-store operators." *Id.* at 293. The dissent also criticized the majority's failure to recognize the market extension aspects of the merger and those preceding it. *Id.* at 295.

per se approach when dealing with horizontal mergers. In reaching the conclusion that concentration in the Los Angeles retail grocery industry had progressed to the point that it must be halted, the Court applied the simplest available criterion—a history of a decreasing number of competitors in the market. The ramifications of this decision offer several grounds for comment. First, the application of the per se standard may present problems in borderline cases. In the instant case the Court was dealing with a "large" industry containing a large number of sellers, yet, to the Court, the industry was concentrated. In future cases the courts must determine a point at which the differences in market structure will be considered.[27] Furthermore, if the *Von's* rule is to apply only to large firms in a concentrated industry, the courts must find some criteria to be used in separating the large firms, which would be prohibited from participating in mergers, from the small firms where mergers might be allowed. However, these problems can be largely avoided if the enforcement agencies select only those cases that will lend themselves to the easy application of structural tests.[28]

Second, the Court's assertion that the antitrust laws are aimed at preventing concentration and preserving competition among a large number of sellers suggests that these laws have a dual purpose. The prevention of concentration in the economy stems from what the Court terms the "intense congressional concern with the trend toward concentration."[29] Undoubtedly, the "intense congressional concern" centered around the concentration of economic power into the hands of a few, but while the Court has interpreted "concentration" as a lessening of the number of competitors, concentration of economic power does not necessarily result from fewer competitors. The preservation of competition desired by the Court is not merely the preservation of any and all competition, but the preservation of a kind of competition, *i.e.*, competition among a *large number* of sellers. However, the preservation of a large number of sellers does not necessarily result in the preservation of the optimum level of workable competition. For example, some mergers which result in a decrease in the number of competitors may actually increase effective competition.[30] In describing the effects of the acquisition of Shopping Bag by Von's, the Court stated: "What we have . . . is simply

27. For example, a national steel industry composed of 100 producers would probably not be concentrated. Yet, in the instant case the Los Angeles grocery market, with over 3000 sellers was held to be concentrated.

28. Dirlam, *Recent Developments in the Anti-Merger Policy: A Diversity of Standards*, 9 ANTITRUST BULL. 381, 407 (1964).

29. United States v. Philadelphia Nat'l Bank, 374 U.S. 321, 363 (1963).

30. Stigler, *Mergers and Preventive Antitrust Policy*, 104 U. PA. L. REV. 176, 181 (1955).

the case of two already powerful companies merging in a way which makes them even more powerful than they were before. *If ever such a merger would not violate § 7*, certainly it does when it takes place in a market characterized by a long and continuous trend toward fewer and fewer owner-competitors . . . ."[31] The logical implications of this statement would suggest invalidation of any merger involving large firms in an industry evidencing a history of concentration, regardless of the competitive effects of the acquisition. Such a rule, on its face, would be inconsistent with the language and the congressional intent of the amended section 7.[32] The position of the Court implies that there may be a level of concentration within a given market beyond which no mergers will be allowed. The difficulties in determining this point are obvious, but of greater concern is the possibility that by creating a mergerless market, the Court may stifle progress within the industry. In such a mergerless situation, the Court might be preserving marginal competitors by depriving them of the ability to sell their operation at a profit. Preserving this kind of competition would be preserving little or no competition at all. The Court's approach in the instant case reflects the view that the preservation of a large number of sellers is itself a socially and politically desirable result to be achieved under the antitrust laws.[33] By equating these social and political values with the law's traditional goals, the Court has made it difficult to clearly define our basic antitrust policy under section 7. The adoption of the per se standard will add certainty to cases arising under that section, but certainty is no substitute for an economic policy aimed at encouraging the optimum level of workable and effective competition.[34]

31. 384 U.S. at 278. (Emphasis added.) Mr. Justice White concurred solely on the basis of this statement. *Id.* at 280.

32. The primary concern of Congress in adopting the 1950 amendment was to stop the socially and politically undesirable concentration of economic power into the hands of a few. Although the legislative history does not evidence a consensus on any particular standard to be applied in section 7 cases, it does indicate that Congress envisioned the courts examining relevant economic factors to determine anticompetitive effects. See H.R. REP. 1191, 81st Cong., 2d Sess. (1950); S. REP. 1775, 81st Cong., 2d Sess. (1950). The Attorney General's committee in 1955 expressed similar standards. REP. OF THE ATT'Y GENERAL'S COMM. ON THE ANTITRUST LAWS 122 (1955).

33. See KAYSEN & TURNER, ANTITRUST POLICY 11-23 (1959); MASSEL, COMPETITION AND MONOPOLY 16-19 (1962).

34. Since the *Von's Grocery* decision the Court has restated its determination to rely on structural tests in interpreting section 7. In United States v. Pabst Brewing Co., 384 U.S. 901 (1966), the Court held that proof of the relevant geographic market within which competitive effects must be measured will no longer be required as an element of proof of a prima facie case under section 7. Further, the Court held that the government need not prove that the trend toward concentration in the industry was caused by mergers.

Criminal Law—Future Confessions Will Be Inadmissible Unless Specified Pre-trial Procedures Are Followed

Defendant, a mentally disturbed indigent, was arrested and taken to a police station where he was identified by the complaining witness and interrogated by police officers. After two hours of interrogation the defendant signed a written confession which included a typed statement that the confession was made voluntarily, without threats or promises, and "with full knowledge of my legal rights." However, at no time was defendant apprised of his right to have counsel present during the questioning. Over the objection of defense counsel, the trial court admitted into evidence the written confession and the testimony concerning the prior oral confession. The jury found the defendant guilty of kidnapping and rape and the Arizona Supreme Court affirmed the conviction, relying heavily upon the fact that the defendant made no request for counsel prior to or during the interrogation.[1] On certiorari to the United States Supreme Court, *held,* reversed. Where the defendant is not apprised of his right to counsel during the interrogation, and where there is no other effective protection of his privilege against self-incrimination, the mere signing of a typed statement that he has full knowledge of his legal rights does not constitute an intelligent waiver of these rights. *Miranda v. Arizona,* 384 U.S. 436 (1966).[2]

The fifth amendment privilege against self-incrimination has been applied to state court proceedings through the due process clause of the fourteenth amendment.[3] This privilege is the constitutional

1. State v. Miranda, 98 Ariz. 18, 28, 401 P.2d 721, 731 (1964). The Arizona Supreme Court also stated that Miranda had experienced encounters with the police which were sufficient to enable him to know what his constitutional rights were without a meticulous apprisal by the police, where such might be required for a less experienced accused. Thus the Arizona court appears to have espoused a subjective test for determining when an accused must be informed of his rights prior to interrogation. See Way, *The Supreme Court and State Coerced Confessions,* 12 J. PUB. L. 53, 57 (1963); see also Kamisar, *What Is An Involuntary Confession?,* 17 RUTGERS L. REV. 728 (1963).

2. Three other cases were decided in the *Miranda* opinion, and they each shared with *Miranda* the common feature of "incommunicado interrogation of individuals in a police-dominated atmosphere, resulting in self-incriminating statements without full warnings of constitutional rights." The interrogators elicited an oral confession in each case and signed admissions in three cases. The Court used the broad factual situations presented in these cases to support a holding which included certain requirements for safeguarding the coustitutional rights of the accused in all situations where police interrogation takes place. Vignera v. New York, 384 U.S. 436 (1966); Westover v. United States, 384 U.S. 436 (1966); California v. Stewart, 384 U.S. 436 (1966).

3. Malloy v. Hogan, 378 U.S. 1 (1964). Defendant was held in contempt by the

foundation,[4] if not the historical foundation,[5] upon which the inadmissibility of involuntary confessions is based. Early decisions did not apply this privilege to the states, but language in some opinions clearly foreshadowed a change. In *Twining v. New Jersey*,[6] holding the fifth amendment privilege against self-incrimination not applicable to the states through the fourteenth amendment, Mr. Justice Moody stated that "it is possible that some of the personal rights safeguarded by the first eight Amendments against National action may also be safeguarded against state action, because a denial of them would be a denial of due process of law . . . . [I]f this is so, it is not because those rights are enumerated in the first eight Amendments, but because they are of such a nature that they are included in the conception of due process of law."[7] *Brown v. Mississippi*[8] was the first case to apply the federal standard of inadmissibility to a state case involving a coerced confession.[9] Since the physical coercion there involved was so brutal,[10] the Court had little difficulty in deciding that such action by law enforcement officials was not consistent with the "fundamental principles of liberty and justice" required by the due process clause.[11] As the state cases developed, the standard for testing the admissibility of coerced confessions came to be the same as that applied in federal prosecutions since *Bram v. United States*.[12] The primary concern was whether the confession was

Supreme Court of Connecticut for failing to testify concerning his implication in a gambling pool. The United States Supreme Court released defendant, applying the fourteenth amendment to guarantee to defendants in state proceedings the protections afforded by the fifth amendment to federal prisoners.

4. Bram v. United States, 168 U.S. 532 (1897). In this case involving a confession of murder, the Court stated: "In criminal trials, in courts of the United States, wherever a question arises whether a confession is incompetent because not voluntary, the issue is controlled by . . . the Fifth Amendment . . . ." *Id.* at 542.

5. This contention is asserted by Justices Harlan and White, dissenting in *Miranda*, who contend that the rule against the admissibility of involuntary confessions developed independently of the privilege against self-incrimination, and the latter historically pertained to the defendant's privilege against incriminating himself during a criminal proceeding rather than during in-custody interrogation. They contend the inadmissibility of involuntary confessions is a rule founded in evidence and is not dependent in any way upon the privilege against self-inerimination. See 3 WIGMORE, EVIDENCE, § 823, at 249 (3d ed. 1940); see also Morgan, *The Privilege Against Self-Incrimination*, 34 MINN. L. REV. 1, 18 (1949).

6. 211 U.S. 78 (1908).

7. *Id.* at 99.

8. 297 U.S. 278 (1936).

9. This rule had obtained in federal proceedings since Bram v. Untied States, *supra* note 4.

10. Defendants were threatened by unruly mobs and beaten severely on several occasions by deputies with whips and leather belts until confessions were secured.

11. Brown v. Mississippi, *supra* note 8, at 286. In *Brown* the Court side-stepped *Twining* and declared that "the privilege against self-incrimination is not here involved . . . . Compulson by torture to extort a confession is a different matter." *Id.* at 285.

12. Malloy v. Hogan, *supra* note 3 (citing Bram v. United States, *supra* note 4).

"free and voluntary"[13] in order "to prevent fundamental unfairness in the use of evidence, whether true or false."[14] The Supreme Court generally has adhered to the practice of determining the admissibility of a confession by investigating the probable, rather than the actual, effect of the police methods used.[15] It is now clear that police conduct need not be so uncivilized that it shocks the conscience of the court for it to be held in violation of due process. It is sufficient if the confession is obtained under such circumstances as refusing to allow the accused to phone his wife,[16] the overbearing atmosphere of official interrogation,[17] or mere trickery by the interrogators.[18] The primary questions are "whether the defendant's will was overborne at the time he confessed,"[19] and whether the confession was the "product of any meaningful act of volition."[20] The Court has announced that the question of voluntariness of confessions must be answered by an examination of the total circumstances surrounding the arrest and interrogation of the accused.[21] In this examination, such factors as failing to remind the defendant that he is under arrest, failing to warn him that he may remain silent and that his statements may be used against him, and failing to advise him of his right to have counsel are considered as attendant circumstances bearing upon the admissibility of his confession, regardless of "[w]hatever independent consequence these factors may otherwise have . . . ."[22]

E.g., Haynes v. Washington, 373 U.S. 503 (1963) (defendant could not call his wife until he confessed); Lynumn v. Illinois, 372 U.S. 528 (1963) (defendant was told that unless she cooperated state financial aid to her children would be discontinued); Spano v. New York, 360 U.S. 315 (1959) (defendant could not see retained counsel until he confessed); Ashcraft v. Tennessee, 322 U.S. 143 (1944) (36 hours of incommunicado interrogation prior to confession).

13. Bram v. United States, *supra* note 4, at 542.

14. Lisenba v. California, 314 U.S. 219, 236 (1941).

15. The *McNabb-Mallory* rule, which is applied in federal courts, is said to be objective in that it looks only to the procedure followed by the police rather than to the actual effect such procedure has on the particular accused. McNabb v. United States, 318 U.S. 332 (1942); Mallory v. United States, 354 U.S. 449 (1957). This rule in federal courts has doubtless influenced the trend toward an objective test of coerced confessions in state cases. See Spanogle, *The Use of Coerced Confessions in State Courts*, 17 VAND. L. REV. 421, 438-47 (1964). However, the Court has not remained deaf to the different conditions of particular defendants. *E.g.*, Culombe v. Connecticut, 367 U.S. 568 (1961) (an illiterate mental defective); Blackburn v. Alabama, 361 U.S. 199 (1961) (an insane Negro); Spano v. New York, *supra* note 12 (an ignorant Italian immigrant); Crooker v. California, 357 U.S. 433 (1958) (defendant with one year of law school training held to know his rights and therefore not "taken advantage of"); Haley v. Ohio, 332 U.S. 596 (1948) (a fifteen-year-old Negro).

16. Haynes v. Washington, *supra* note 12.

17. Spano v. New York, *supra* note 12.

18. Massiah v. United States, 377 U.S. 201 (1964).

19. Lynumn v. Illinois, *supra* note 12, at 534.

20. Blackburn v. Alabama, *supra* note 15, at 211.

21. Haynes v. Washington, *supra* note 12.

22. *Id.* at 517.

Whether the defendant was given his constitutional right to counsel has become increasingly significant in determining the admissibility of a particular confession. *Gideon v. Wainwright*[23] made this sixth amendment[24] guarantee applicable to the states through the due process clause of the fourteenth amendment. Thereafter, the right was extended in a federal case, *Massiah v. United States*,[25] to include pre-trial aid of counsel; the holding was considered applicable to the states through *Gideon* on the theory that this right was co-extensive in state and federal courts.[26] Attempting to dispel any doubt concerning the applicability of *Massiah* in state proceedings, *Escobedo v. Illinois* held the right to counsel exists the moment police investigation focuses upon a suspect and the proceeding thereby takes on an accusatorial rather than an investigatorial character.[27] The decision, however, left a vague directive for satisfying the constitutional requirements of pre-trial criminal procedure, and state courts have differed significantly in their interpretation of *Escobedo*.

Chief Justice Warren's majority[28] opinion in *Miranda* recognized the need to delineate specific procedural safeguards that would guarantee the fifth amendment privilege against self-incrimination to an accused during in-custody interrogation. The Court reasoned that present day police methods utilizing incommunicado interrogation as a means of procuring confessions are no less violative of the fifth amendment, as a result of the psychological character of the coercive pressure, than were the physical methods employed in former years. The opinion asserted that the modern use of "third degree" practices allows police to rely extensively upon self-incriminating evidence obtained by pressuring the accused. In this manner, the Court articulated an intimate relationship between the constitutional privilege against self-incrimination and police custodial interrogation. Countering the argument that restrictions on in-custody interrogations will seriously impede effective law enforcement, the Court pointed to the exemplary record in law enforcement established by the FBI which employs substantially the same safeguards as called for in this decision. Emphasizing that the individual's privilege against self-incrimination can best be protected by guaranteeing the assistance

23. 372 U.S. 335 (1963).

24. U.S. CONST. amend. VI: "In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence."

25. *Supra* note 18.

26. See Dowling, *Escobedo and Beyond*, 56 J. CRIM. L., C.&P.S. 143, 151 n.57 (1965).

27. Escobedo v. Illinois, 378 U.S. 478 (1964). Since the defendant did not have counsel at the moment the police investigation focused upon him, the Court ruled that the confession obtained from him was inadmissable and reversed the conviction.

28. Justices Black, Brennan, Douglas, Fortas, and Warren comprise the majority.

of counsel at an early stage, the Court established the following safeguards as a prerequisite to the admissibility of any statement made by the defendant. Before any interrogation, the accused must be (1) advised of his right to remain silent, (2) warned that any statement may be used against him, (3) advised of his right to have counsel during interrogation, (4) told that if he is indigent counsel will be appointed, and (5) advised that he may cut off the interrogation at any time. These requirements attach when an individual is first taken into custody or otherwise deprived of his freedom. Furthermore, if the government claims the defendant waived his rights, it now has the the burden of showing that these requirements were fulfilled and that the waiver was made knowingly and intelligently. Mr. Justice White dissented,[29] contending that judicial precedent for connecting the rule against coerced confessions with the fifth amendment was unsound and far from unanimous. He also expressed the fear that the majority opinion gave too little consideration to the protection of the rights of the general public through effective law enforcement.

Miranda dispels any doubt which may have existed concerning the requirements of *Escobedo* with respect to pre-trial procedures and their effect upon the rights of the accused. The five safeguards set out in *Miranda,* together with the requirement of a knowing and intelligent waiver prior to any questioning in the absence of counsel, represent a judicial codification of the procedural steps necessary to protect the constitutional rights of an individual from the time he is taken into custody. General on-the-scene questioning of suspects pertaining to the facts surrounding the crime is not prohibited by this ruling, nor are spontaneous, volunteered confessions likely to be held inadmissible. However, it is imperative that no accusatory interrogation proceed without all five of the specific warnings. It is clear that an accused may effectively waive his rights, but the burden of proving a knowing and intelligent waiver rests upon the prosecution. This burden will undoubtedly force police departments to renovate their facilities and regulations in an effort to establish evidence that these safeguards were provided in each case.[30] It should be noted

29. Justices Harlan and Stewart joined in this dissent. Mr. Justice Harlan with whom Justices White and Stewart joined, thought the majority exaggerated the prevalence of third degree practices, that those who do use them now will equally be able to lie about warnings and waivers in the future, and that the rights of society are jeopardized by this decision. He further challenged the constitutional basis of the decision and charged that it was an erroneous mix-up of sixth amendment reasoning with a fifth amendment premise. Mr. Justice Clark believed the "totality of circumstances" rule should be continued with these safeguards considered as attendant circumstances, rather than arbitrarily applying the rigid fifth amendment test announced by the majority.

30. National Legal Aid and Defender Ass'n, Defender Newsletter Vol. III No. 4, July 1966, suggested for example, that officers carry plastic cards with the prescribed

that the Court indicated that a rapid, ritualistic warning would not effectively apprise an individual of his rights. Electronic devices, such as sealed cameras and recorders, may prove helpful in establishing that the defendant knowingly waived his rights. It also seems axiomatic that police stations should have ready access to an attorney or public defender at all times. There has been an abundance of speculation on the possible deleterious effect of *Miranda* on the efficiency of future law enforcement. However, in light of the success enjoyed by the FBI, which has functioned for years under substantially the same procedures as set out in *Miranda*, it would appear that local law enforcement agencies will not be rendered ineffective by this decision.

Escobedo and *Miranda* are applicable only prospectively.[31] Habeas corpus cases or cases on appeal from trials which began prior to *Miranda* will be affected, however, in that the absence of the specific safeguards required by *Miranda* will be considered as attending circumstances under the "totality of circumstances" rule of *Haynes v. Washington*.[32] It is conceivable that the absence of some or all of these safeguards might add enough to the circumstances demonstrating coercion to require the inadmissibility of a confession admissible under pre-*Miranda* law. *Miranda* left several questions unanswered and several terms undefined however. Since the decision requires the specified safeguards "unless other fully effective means are devised," future decisions may define what other procedures are equally as effective in protecting the individual's fifth amendment privilege. Future litigation with respect to the admissibility of confessions seemingly will focus on such questions as whether the accused was in custody within the meaning of *Miranda*, whether the incriminating statement was spontaneously volunteered, whether an illegal interrogation under *Miranda* tainted other evidence, and whether the defendant's waiver was a knowing and intelligent one. For example, though the majority makes it clear that an accused may *revoke* his waiver at any time, it does not say whether he may *invoke* his waiver at any time. In a case decided since *Miranda*, the defendant argued that once an accused asks for counsel he cannot waive his rights and be questioned until counsel arrives. The federal district court however, ruled that such a waiver was effective and that subsequent questioning was permissible under *Miranda*.[33] Since the five directives

warnings written on them.

31. Johnson v. New Jersey, 384 U.S. 719 (1966). *Escobedo* and *Miranda* were decided on June 22, 1964 and June 13, 1966 respectively.

32. *E.g.*, Davis v. North Carolina, 384 U.S. 737 (1966) (taking these factors into consideration, but obviously not needing them in reversing the conviction).

33. United States v. Arnold, (M.D. Tenn. July 1966)(Crim. No. 13672). Defendant had asked for his attorney, but his attorney was unavailable; he then consented to be questioned. Judge Miller reasoned that so long as the primary requirement of knowledge

listed by the *Miranda* Court obviously do not present a complete solution to the problems surrounding pre-trial criminal procedure, more specific guidelines are needed, and the extensive efforts in trying to devise legislation on the subject have not been wasted.

Juvenile Courts—Juvenile Delinquent Entitled to Hearing On Question of Waiver of Jurisdiction

Kent, a sixteen-year-old boy,[1] was tried and convicted for robbery and housebreaking[2] in a criminal proceeding in a federal district court. Upon his arrest, the defendant moved for a hearing before the juvenile court on the question of whether the juvenile court should waive its exclusive jurisdiction. Defendant also moved for access to his Social Service file[3] which was available to the juvenile court. After full investigation, however, the juvenile judge waived jurisdiction[4] and directed that the defendant be tried as an adult under the criminal procedures of the district court. At the trial, Kent moved to dismiss the indictment on the ground that the juvenile court's waiver was defective since the court stated no reasons for the waiver, made no findings, and denied him access to his Social Service file.[5] The

and intelligence was present, there was nothing in *Miranda* to prohibit a waiver at any time.

1. Defendant was subject to the exclusive jurisdiction of the juvenile court. D.C. CODE ANN. § 11-907 (1961), now § 11-1551 (Supp. V, 1966).

2. Defendant was previously on probation with the juvenile court for a prior offense. Kent v. United States, 383 U.S. 541, 543 (1966).

3. The Social Service file contains such matters as the case worker's report on the child, prior delinquency, and background including home life and emotional problems.

4. D.C. CODE ANN. § 11-914 (1961), now § 11-1553 (Supp. V, 1966) states the circumstances in which jurisdiction may be waived and the child held for trial under adult procedures. "If a child sixteen years of age or older is charged with an offense which would amount to a felony in the case of an adult, or any child charged with an offense which if committed by an adult is punishable by death or life imprisonment, the judge may, after full investigation, waive jurisdiction and order such child held for trial under the regular procedure of the court which would have jurisdiction of such offense if committed by an adult; or such other court may exercise the powers conferred upon the juvenile court in this subchapter in conducting and disposing of such cases."

5. Defendant also contended that his detention and interrogation were unlawful; that the police failed to follow the procedure described by the Juvenile Court Act since they failed to notify the child's parents and the Juvenile Court itself; that petitioner was deprived of his liberty for about a week without a determination of probable cause which would have been required in the case of an adult; that he was interrogated by the police without warnings of his rights to remain silent or advice as to his right to counsel in violation of rights that he would have if he were an adult; that petitioner was fingerprinted in violation of the asserted intent of the Juvenile

district court denied the motion because the statute did not require a hearing,[6] and the District of Columbia Court of Appeals affirmed.[7] On certiorari to the United States Supreme Court, *held*, reversed. Read in the context of due process and the right to counsel, the District of Columbia Juvenile Court Act entitles the juvenile defendant to a hearing on the question of waiver, access to his Social Service file, and a statement of reasons for the court's decision. *Kent v. United States*, 383 U.S. 541 (1966).

Juvenile delinquency matters in all jurisdictions are considered to be civil rather than criminal.[8] Accordingly, constitutional rights relevant to criminal cases are not necessarily provided in juvenile proceedings.[9] Nevertheless, some courts have held that due process,[10] or "fundamental fairness"[11] may require the application of certain specific constitutional safeguards to insure that the adjudication of the juvenile is not unjustly made.[12] Generally, however, the adolescent's only rights are those provided by statute and those secured by due process as that concept is applicable to civil actions.[13] The philosophy underlying the civil classification of juvenile proceedings is that the state, acting as *parens patriae*,[14] is determining how best to

Court Act; and that the fingerprints were unlawfully used in the district court proceeding. 383 U.S. at 551.

6. The district court refused to go beyond the juvenile judge's recital that his order was entered after "full investigation." 383 U.S. at 549.

7. Kent v. United States, 343 F.2d 247 (D.C. Cir. 1965).

8. Pee v. United States, 274 F.2d 556 (D.C. Cir. 1959); Thomas v. United States, 121 F.2d 905, 907 (D.C. Cir. 1941); Cinque v. Boyd, 99 Conn. 70, 121 Atl. 678, 680-81 (1923). For a complete list of all jurisdictions that have provisions to the effect that an adjudication of delinquency is not a conviction of a crime, see Pee v. United States, *supra* at 561-62 app. A.

9. White v. Reid, 125 F. Supp. 647 (D.D.C. 1954); People v. Silverstein, 121 Cal. App. 2d 140, 262 P.2d 656 (Dist. Ct. App. 1953); Petition of Morin, 95 N.H. 518, 68 A.2d 668 (1949); *In re* Holmes, 379 Pa. 599, 109 A.2d 523, *cert. denied*, 348 U.S. 973 (1954).

10. See, *e.g.*, People v. Dotson, 46 Cal. 2d 891, 299 P.2d 875 (1956); *In re* Contreras, 109 Cal. App. 2d 787, 241 P.2d 631 (Dist. Ct. App. 1952).

11. See, *e.g.*, Harling v. United States, 295 F.2d 161, 163 (D.C. Cir. 1961); United States v. Dickerson, 271 F.2d 487 (D.C. Cir. 1959).

12. *E.g.*, *In re* Poff, 135 F. Supp. 224 (D.D.C. 1955) (right to counsel applied). *Contra*, *In re* Holmes, *supra* note 9. Hampton v. State, 167 Ala. 73, 52 So. 659 (1910) (privilege against self-incrimination extended). *Contra*, *In re* Santillanes, 47 N.M. 140, 138 P.2d 503 (1943); *In re* Mont, 175 Pa. Super. 150, 103 A.2d 460 (1954). Trimble v. Stone, 187 F. Supp. 483 (D.D.C. 1960) (right to bail applied). *Contra*, *In re* Holmes, *supra* note 9. *In re* Mantell, 157 Neb. 900, 62 N.W.2d 308 (1954) (right to confront witness applied). *Contra*, Cinque v. Boyd, *supra* note 8. Garza v. State, 369 S.W.2d 36 (Tex. Crim. App. 1963) (freedom from double jeopardy extended). *Contra*, *In re* Satillanes, *supra*.

13. Matter of McDonald, 153 A.2d 651, 654 (D.C. Munic. Ct. App. 1959).

14. The action is civil in that the state acts as *parens patriae* for the child's protection in the way it does in a guardianship matter and not accusing the child with a view to punishment as it does in a prosecution for crime. United States *ex rel* Yonick v. Briggs, 266 Fed. 434 (W.D. Pa. 1920) (no right to trial by jury since not trial for

serve the interests of a delinquent child. If necessary, the state will provide care and assistance in order to make him a useful member of society.[15] While many jurisdictions give the juvenile court exclusive control over the determination,[16] several of these allow the court to waive its jurisdiction so that the minor may be prosecuted as an adult in criminal court.[17] A waiver of jurisdiction by the juvenile court amounts to a determination that a youth would not benefit from the special treatment afforded by the *parens patriae* doctrine.[18]

The District of Columbia has been one of the more liberal jurisdictions in extending rights to the juvenile delinquent. In *Shioutakon v. District of Columbia*,[19] the court of appeals granted juveniles the right to counsel in juvenile proceedings, and later extended this right to the preliminary hearing on the question of waiver.[20] The District of Columbia has further regulated its waiver procedure by requiring that there be a preliminary investigation and that counsel have access to the minor's Social Service file.[21] These decisions were reached because the court felt, as it stated in *Black v. United States*, that due process and "fundamental fairness" are of even greater importance in waiver proceedings than in the usual juvenile case, since waiver contemplates the potential imposition of criminal sanctions.[22]

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crime); *Ex parte* Januszewski, 196 Fed. 123 (S.D. Ohio 1911) (state acts as guardian saving children from conviction of crime); *In re* Sharp, 15 Idaho 120, 96 Pac. 563 (1908) (juvenile statute not penal but parental in nature); Marlowe v. Commonwealth, 142 Ky. 106, 133 S.W. 1137 (1911) (commitment for minor's protection not punishment); Bryant v. Brown, 151 Miss. 398, 118 So. 184 (1928) (proceeding civil not criminal); Commonwealth v. Fisher, 23 Pa. 48, 62 Atl. 198 (1905) (juvenile proceeding is for protectiou of delinquent child); Childress v. State, 133 Tenn. 121, 179 S.W. 643 (1915) (purpose of proceeding is to protect child); *In re* Johnson, 173 Wis. 571, 181 N.W. 741 (1921) (exercise of police power of state for protection of child).

15. Thomas v. United States, *supra* note 8; People v. Dotson, *supra* note 10; Cinque v. Boyd, *supra* note 8. Rule v. Geddes, 23 App. D.C. 31 (Ct. App. 1904). The *parens patriae* has been criticized seriously by many authorities. "While the juvenile court law provides that adjudication of a minor to be a ward of the court shall not be deemed to be a conviction of crime, nevertheless, for all practical purposes, this is a legal fiction, presenting a challenge to credulity and doing violence to reason." *In re* Contreras, *supra* note 10, at 789, 241 P.2d at 633. See *In re* Holmes, *supra* note 8, at 610, 109 A.2d at 528 (dissenting opinion).

16. D.C. CODE ANN. § 11-907, now § 11-551 (Supp. V, 1966); CONN. GEN. STAT. ANN. § 17-59 (1958); GA. CODE ANN. § 24-2408 (1959); KY. REV. STAT. ANN. § 208.020 (1963); ME. REV. STAT. ANN. ch. 403 § 2551 (1964); N.H. REV. STAT. ANN. § 169:29 (1964); N.J. REV. STAT. § 2A:4-14 (1952); N.D. CENT. CODE § 27-16-08 (1960); R.I. GEN. LAWS ANN. § 14-1-5 (1956).

17. *E.g.*, D.C. CODE § 11-914 (1961), now § 11-1553 (Supp. V, 1966; ME. REV. STAT. ANN. ch. 403 § 2554 (1964); N.H. REV. STAT. ANN. § 169:29 (1964).

18. Watkins v. United States, 343 F.2d 278, 282 (D.C. Cir. 1964); Green v. United States, 308 F.2d 303, 305 (D.C. Cir. 1962) (waiver of jurisdiction also judicial finding of probable cause); *In re* Smith, 326 P.2d 835, 840 (Okla. Crim. App. 1958).

19. 236 F.2d 666 (D.C. Cir. 1956).

20. Black v. United States, 355 F.2d 104, 106 (D.C. Cir. 1965).

21. Watkins v. United States, *supra* note 18.

22. Black v. United States, *supra* note 20, at 106.

Underlying the Court's decision in the instant case was the "critical" importance of the waiver proceeding to the juvenile, since a determination of waiver anticipates the transfer of the case to a criminal setting. Moreover, the "spirit" of the juvenile act in providing the youth with special care and guidance was inconsistent with the juvenile court's disregard of the defendant's request for a hearing and access to the files used by the court in reaching its decision to waive jurisdiction. The majority found that there was no place in the juvenile court system for reaching a result of such consequence without a hearing, and they added the additional stipulations that effective assistance of counsel required access to the youth's Social Service file, and that meaningful review necessitated a statement of the judge's reasons for his decision. Since these procedural defects with respect to the critical determination of waiver of jurisdiction had deprived the defendant of the benefits which the *parens patriae* philosophy should afford a young offender, the Court remanded the case. It specifically refused to decide whether all constitutional rights applicable in a criminal trial are equally applicable in a juvenile proceeding or whether the hearing must meet the standards of a criminal or administrative proceeding.[23]

Generally, a juvenile judge has wide discretion in determining the rights of a juvenile offender, the procedure to be followed, and the factors to be considered in determining the appropriate sanction. The instant case's requirement that the essentials of due process and "fundamental fairness" be afforded the juvenile limits this discretion.[24] However, the failure to specify what basic individual rights are to be included within this vague standard of "fairness" considerably restricts the import of this decision.[25] At most, the Court has merely laid a groundwork from which it can later formulate concrete procedural requirements. Furthermore, since the majority relied heavily upon the wording and spirit of the particular statute involved, the case may be limited to the District of Columbia and thus be only persuasive authority in other jurisdictions. It is significant to note, however, that, in granting certiorari, the Supreme Court for the first time expressed a tangible interest in the juvenile court system. It may be that the Court will eventually require that the juvenile be afforded all the safeguards applicable to an adult in a criminal proceeding in order to assure "fundamental fairness." The effect of this would be to abandon the non-adversarial proceeding in favor of an adversa-

23. 383 U.S. at 562.

24. See Handler, *The Juvenile Court and the Adversary System*, 1965 WIS. L. REV. 1.

25. Paulson, *Fairness to the Juvenile Offender*, 41 MINN. L. REV. 547 (1957) presents an excellent discussion of rights which would not be inconsistent with the *parens patriae* doctrine.

rial one and to impair the rehabilitative purpose underlying the juvenile court system. On the other hand, recognizing the philosophy behind the juvenile court acts, the Court might simply preserve the status quo. However, this would not remedy the injustice which often results from inadequate administration in the juvenile courts. Between these two extremes lies the third possibility of preserving the non-adversarial nature of juvenile proceedings and still guaranteeing the youth certain basic rights now available to adults in criminal proceedings. Rights, such as the right to counsel, right to a hearing, and the right to confront witnesses, would protect the juvenile from a capricious determination of his case but would not detract from a parental atmosphere. Although it is presently impossible to determine how this vague standard will be further defined, the Justices may have an opportunity to clarify their position in the instant case in *In re Gault*,[26] a recent Arizona decision in which they noted probable jurisdiction.[27] In the final analysis, however, it may be that the Supreme Court was justified in not laying down specific standards, since the basic interests served by the *parens patriae* theory are those of the social state as well as those of the juvenile, and the problem may thus be better handled by the state legislature.

Labor Law—Public Carrier Can Make Unnegotiated Unilateral Changes in Collective Agreements When "Reasonably Necessary" To Maintain Service

Employees of defendant, Florida East Coast Railway, went on strike[1] after negotiations under the Railway Labor Act[2] failed to settle a wage dispute.[3] The defendant resumed partial operations soon thereafter by employing a substantially different labor force under individual con-

26. 99 Ariz. 181, 407 P.2d 760 (1965).
27. *In re* Gault, 384 U.S. 997 (1966).

1. The non-operating unions struck the Florida East Coast Railway [hereinafter referred to as FEC] after their demand for a wage increase was not met. The operating unions honored the picket lines and would not return to work. Thus, in effect, both unions had struck.

2. 44 Stat. 577 (1926), as amended, 45 U.S.C. §§ 151-60, 181-88 (1964) [hereinafter referred to as RLA]. The amendment in 1936 was passed to include carriers by air. The RLA specifies negotiation procedures which provide an opportunity for settlement without disrupting carrier service. These procedures will be discussed in greater detail in note 11 *infra*.

3. After negotiation procedures failed, the union was entitled to self-help. Generally self-help for the union is the right to strike. Pan American World Airways v. Flight Eng'rs Int'l Ass'n, 306 F.2d 840 (2d Cir. 1962).

tracts. These contracts differed significantly from the collective bargaining agreements with respect to pay rates, working rules and working conditions. The district court enjoined such unilateral changes[4] as violations of the Railway Labor Act, but permitted the Florida East Coast Railway to make temporary changes "reasonably necessary" to maintain service.[5] The Fifth Circuit Court of Appeals[6] upheld the district court, and on certiorari[7] to the United States Supreme Court, *held,* affirmed. After exhaustion of all applicable negotiation procedures under the Railway Labor Act, a carrier covered by this act,[8] who is faced with a strike due to a good-faith bargaining deadlock may institute such temporary unilateral changes as are reasonably necessary for the maintainance of services, even though these changes have not been discussed during the negotiation proceedings. *Brotherhood of Ry. & S.S. Clerks v. Florida East Coast Ry.,* 384 U.S. 238 (1966).

Railway Labor Act disputes are classified as either "major" or "minor." Where a party seeks to change a term of an existing collective bargaining agreement, the dispute is classified as a major one.[9]

4. Unilateral changes by the company are departures from the existing collective bargaining agreements without agreement with the union. If these changes affect the rates of pay, rules, or working conditions, then they must be negotiated under the RLA negotiation procedures. Thus, one must carefully distinguish changes which affect these various areas from those which do not. Brotherhood of Ry. & S.S. Clerks v. Southern Ry., 341 F.2d 217 (5th Cir. 1965).

5. In a concurrent suit against the FEC the Fifth Circuit Court of Appeals enunciated the principle that although the FEC could not abrogate the existing collective bargaining agreement, it could make changes as were "reasonably necessary" to operate under strike conditions. Florida E.C. Ry. v. Brotherhood of Ry. Trainmen, 336 F.2d 172 (5th Cir. 1964). The district court in the *Trainmen's* case and this case applied the principles laid down in the *Trainmen's* case and allowed some departures which were "reasonably necessary." Florida E.C. Ry. v. United States, 348 F.2d 682, 684 (5th Cir. 1965).

6. Florida E.C. Ry. v. United States, 348 F.2d 682 (5th Cir. 1965).

7. Brotherhood of Ry. & S.S. Clerks v. Florida E.C. Ry., 382 U.S. 1008 (1966).

8. Carriers by railroad which are covered by this act are those railroads which are subject to the Interstate Commerce Act or any company which is owned or controlled by such a railroad and which performs services for such transportation. Street, interurban, or suburban electric railroads are not covered by this act unless they are an operating part of a system which is covered by the act. Carriers by air which are covered are those which engage in interstate commerce or are under government contract to carry mail. The employees of all carriers covered by this act are also covered. Railway Labor Act § 1 First, 44 Stat. 577 (1926), 45 U.S.C. § 151 First (1964), as amended, § 201, 49 Stat. 1189 (1936), 45 U.S.C. § 181 (1964).

9. Elgin, J. & E. Ry. v. Burley, 325 U.S. 723, 725 (1945). *Accord,* Elgin, J. & E. Ry. v. Brotherhood of R.R. Trainmen, 196 F. Supp. 158 (D.C. Ill. 1961), *aff'd,* 302 F.2d 540 (7th Cir.), *cert. denied,* 371 U.S. 823 (1962) (union desire for changes in a pension plan held a major dispute). A minor dispute arises in relation to the meaning or application of such agreement to a specific situation. Elgin, J. & E. Ry. v. Burley, *supra. Accord,* Brotherhood of Locomotive Eng'rs. v. Louisville & N. R.R., 373 U.S. 33 (1963), holding that a dispute over a time lost award was a minor dispute as it involved the interpretation and application of the collective agreement between the union and the railroad. Under the "minor" dispute procedures compulsory arbitration

This means that the management's prerogatives are limited by section 2, Seventh, of the act, which provides: "No carrier, its officers, or agents shall change the rates of pay, rules, or working conditions of its employees, as a class, as embodied in the agreements except in the manner prescribed in such agreements or in section 6 of this Act."[10] Section 6 requires that railroads follow the negotiation procedures set out in the act for settling major disputes.[11] If such procedures are exhausted without settlement the parties may resort to self-help.[12] Al-

is provided for. Railway Labor Aet § 3, First (i) and (m), 44 Stat. 578 (1926), as amended, 45 U.S.C. § 153 First (i) and (m) (1964).

10. Railway Labor Act § 2 Seventh, 48 Stat. 1188 (1934), as amended, 45 U.S.C. § 152 Seventh (1964).

11. Section 6 of the RLA, 44 Stat. 582 (1926), as amended, 45 U.S.C. § 156 (1964), requires, in a major dispute, that the party desiring a change in the collective agreements must give the other party a 30-day notice (called a § 6 notice). Within ten days upon receipt of the notice, the time and place of conference between the parties interested therein must be agreed upon. If these conferences fail to settle the dispute, the National Mediation Board (NMB) may proffer, or may be asked by either party, to render its services. In either case the parties must accept. If the NMB fails to settle the dispute, the parties may resort to self-help subject only to the limitations of either the creation of a Presidential Emergency Board (as provided for in Railway Labor Act § 10, 44 Stat. 586-87 (1926), as amended, 45 U.S.C. § 160 (1964), or action by Congress. If the President invokes the Emergency Board, the Board will make recommendations to the President, but these will not be binding upon the parties. If Congress acts it may require compulsory arbitration which is not provided for in the RLA (for example, in 1963 Congress passed Public Law 88-108, 77 Stat. 132, which provided for compulsory arbitration). In each of the RLA negotiation procedures — conferences, mediation, and the Emergency Board — two conditions are attached. First, the parties must bargain in good faith. Good faith has been defined as the absence of bad faith. To prove bad faith a party must show that the other party entered into negotiations with the intention of never coming to an agreement. Brotherhood of Ry. & S.S. Clerks, Freight Handlers & Station Employees v. Atlantic C.L. R.R., 201 F.2d 36 (4th Cir. 1953). American Airlines, Inc. v. Air Line Pilots Int'l Ass'n, 169 F. Supp. 777 (S.D.N.Y. 1958). For a more complete description of good faith see Cox, *The Duty to Bargain In Good Faith*, 71 HARV. L. REV. 1401 (1958). Second, the parties must maintain the status quo while the negotiation procedures are active. Florida E.C. Ry. v. Brotherhood of Ry. Trainmen, 336 F.2d 172 (5th Cir. 1964), *cert. denied*, 379 U.S. 990 (1965). Railway Labor Act § 6, 44 Stat. 582 (1926), as amended, 45 U.S.C. § 156 (1964). If the parties violate the Act they may be enjoined from committing such violations. Railway Labor Act § 2 Tenth, 48 Stat. 1189 (1934), as amended, 45 U.S.C. § 152 Tenth (1964).

12. The idea of self-help is indicated in the RLA, in conjunction with the "cooling off" periods. Railway Labor Act § 5, 44 Stat. 580 (1926), 45 U.S.C. § 155 (1964), provides that if the NMB fails and arbitration is refused (voluntary arbitration being provided for in Railway Labor Act § 7, 44 Stat. 582 (1926), 45 U.S.C. § 157 (1964)), "no change shall be made in the rates of pay, rules or working conditions or established practices prior to the time the dispute arose . . ." until 30 days after the NMB discontinues services. Railway Labor Act § 6, 44 Stat. 582 (1926), 45 U.S.C. § 156 (1964), provides that changes cannot be made in rates of pay, rules, or working conditions after the conferences unless 10 days has elapsed since their conclusion and the NMB has not proffered, and the parties have not asked for, its services. Railway Labor Act § 10, 44 Stat. 586 (1926), 45 U.S.C. § 160 (1964), provides that no change shall be made except by agreement between the parties "in the conditions out of which the dispute arose . . ." until 30 days after the Presidential Board has made its report. These sections indicate that while each section is in operation, and for the designated period

though self-help has never been defined in a concise statement,[13] it is generally understood to mean the unilateral exercise of economic force after the legal processes have failed to secure a settlement.[14] Its purpose is to allow the carrier to exercise its right to continue operations and to coerce the opposing disputant to reach a settlement. For example, after exhaustion of the negotiation procedures under the Railway Labor Act, the carrier may either put into effect the changes proposed at the bargaining table,[15] or threaten individual strikers with replacement if they refuse offers for retraining.[16] Essentially, the remedy of self-help allows the "free-play" of the forces involved in order to reach a voluntary agreement. To avoid indefinite postponement of the use of this remedy, courts refuse to allow the parties to invoke the negotiation procedures a second time by merely raising new issues.[17]

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afterwards, no unilateral changes shall be made. After these "cooling off" periods have expired, the parties may resort to self-help to settle the dispute. Brotherhood of Locomotive Eng'rs v. Baltimore & O. R.R., 372 U.S. 284 (1963).

13. Self-help has rarely been defined since labor disputes under the RLA are normally resolved before the self-help device becomes available.

14. In comparison, self-help under the National Labor Relations Act (Wagner Act), 49 Stat. 449 (1935), as amended, Labor Management Relations Act (Taft-Harley Act), 61 Stat. 136 (1947), as amended, Labor-Management Reporting and Disclosure Act (Landrum-Griffin Act), 73 Stat. 519 (1959), 29 U.S.C. §§ 141-88 (1964), has been more fully defined. It must be remembered that under the NLRA these unilateral changes, which have been termed self-help devices, are discussed in terms of unfair labor practices. For example, in NLRB v. Erie Resistor Corp., 380 U.S. 300 (1965), the Court held that "super-seniority" was an unfair labor practice. But it is similar to self-help under the RLA, since it deals with the company's ability to bring good-faith economic pressure on the union in order to break the strike. The reason for citing the NLRA cases is to indicate in what direction and in what manner the Supreme Court may be heading in handling labor problems under the RLA. Several cases will exemplify self-help under the NLRA: American Ship Bldg. Co. v. NLRB, 380 U.S. 300 (1965) (temporary lock-out of employees of single employer permissible); NLRB v. Truck Drivers Union, 353 U.S. 87 (1957) (lock-out permissible in whipsaw strike); Robinson Freight Lines, 144 N.L.R.B. 1093 (1955), *enforcement granted,* NLRB v. Robinson, 251 F.2d 639 (6th Cir. 1958) (threatening workers with replacement if they did not return to work); NLRB v. Mackay Radio & Tel. Co., 304 U.S. 333 (1938) (replacing permanently economic strikers). Self-help under the NLRA does not include either, "super-seniority" for replacements, NLRB v. Erie Resistor Corp., 373 U.S. 221 (1963), or instituting unilateral changes substantially different from those proposed at the bargaining table, NLRB v. Crompton-Highland Mills, Inc., 337 U.S. 217 (1949).

15. Brotherhood of Locomotive Eng'rs v. Baltimore & O. R.R., 372 U.S. 284 (1963), indicated that self-help may be instituted only after the use of the required RLA negotiation procedures.

16. Flight Eng'rs Int'l Ass'n, EAL Chapter v. Eastern Airlines, 208 F. Supp. 182 (S.D.N.Y.), *aff'd,* 307 F.2d 510 (1962), *cert. denied,* 372 U.S. 945 (1963) (these tactics were reasonable efforts to persuade all of Eastern's employees to return to work).

17. American Airlines v. Airlines Pilots Ass'n Int'l, 169 F. Supp. 777 (S.D.N.Y. 1958); Northwest Airlines Inc. v. Airline Pilots Ass'n Int'l, 185 F. Supp. 77 (D. Minn. 1960); Pittsburgh & L.E. R.R. v. Brotherhood of Ry. Trainmen, 179 F. Supp. 271 (W.D. Penn. 1959); Pan American World Airlines v. Flight Eng'rs Int'l Ass'n, 306 F.2d 840 (2d Cir. 1962), all held that RLA negotiation procedures could not be commenced

In the instant case, the Supreme Court not only refused to permit the union to set the Railway Labor Act negotiation procedures into motion again, but also allowed the railroad to effectuate unilateral changes which were "reasonably necessary" to maintain services despite noncompliance with the negotiation procedures.[18] The Court specifically allowed the railroad to "exceed the ratio of apprentices to journeymen and age limitations established by the collective agreements to contract out certain work and to use supervisory personnel to perform certain specified jobs where it appeared that trained personnel were unavailable."[19] The majority felt this temporary permission was necessary for three reasons. First, the railroad's responsibility to the public required that it use reasonable efforts[20] to continue service, since a lack of railroad service might curtail the distribution of vital products and services to the area involved. Second, if each of the unilateral changes had to be approved through the purposefully long and involved negotiation procedures, self-help would be effectively available only to the union.[21] Third, the denial of self-help would halt railroad operations because the railroad would have neither union nor replacement personnel with whom to operate. The Court, however, cautioned that unilateral changes made without compliance with the negotiation procedures must be strictly limited and temporary in nature. It felt that if an employer could easily avoid collective agreements during a strike, labor-management relations would be chaotic and collective bargaining agreements would be meaningless. Mr. Justice White dissented, arguing that these unilateral changes should not be made even with the consent of the courts, since the Railway Labor Act does not so provide.[22]

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again by a party, merely by serving a § 6 notice raising new issues.

18. Brotherhood of Ry. & S.S. Clerks v. Florida E.C. Ry., 384 U.S. 238 (1966). The company was allowed to make unilateral changes without going through the RLA negotiation procedures which are normally required before unilateral changes may be invoked.

19. *Id.* at 245. The district court denied FEC's request to: (1) completely disregard craft and seniority district restrictions; (2) use supervisors to perform craft work at any time; (3) be relieved of the duty to provide seniority rosters; (4) contract out work whenever trained persounel was unavailable; (5) void the union shop with respect to replacement personnel.

20. *Id.* at 244-45. The language used by the Court is similar to that in Railway Labor Act § 2 First, 44 Stat. 577 (1926), as amended, 45 U.S.C. § 152 First (1964).

21. If § 2 Seventh, of the act were applicable after a strike, the railroad would have to maintain the status quo as required. The railroad would be unable to use replacement personnel under either the collective agreements since it would not be feasible or the individual contracts since these would not be allowed by § 2 Seventh. Thus, the railroad could not exercise its right to self-help — unilateral use of econonic force; whereas the union would have already exercised its right to self-help — the strike.

22. In addition, Mr. Justice White felt Congress had not contemplated this type of "receivership," particularly since its effect was to facilitate the avoidance of RLA negotiation procedure requirements. Finally, since Congress did not provide for com-

While the Supreme Court has remained within the purposes of the Railway Labor Act by keeping the defendant railroad operating,[23] in so doing, it has abandoned its practice of avoiding direct involvement in resolving union-management disputes over working conditions. In promulgating the act, Congress sought to avoid compulsory arbitration; yet a single party can now force the court into the role of temporary arbiter in this situation.[24] Thus, the effect of the instant decision is to allow the courts to aid companies in avoiding the most severe consequence of a union strike,[25] that is, the prolonged shutdown. However, the public interest may justify this judicial intervention, even in the face of the nearly unequivocal language of section 2, Seventh,[26] if the district courts will heed the Supreme Court's admonition to construe strictly what are "reasonably necessary" changes. Judicious employment of the unnegotiated unilateral change device will allow both the public interest and the goals of the act to be served. The instant Court utilizes this device to balance more equitably the economic power of the parties in a suit under the Railway Labor Act in a manner similar to that employed in recent National Labor Relations Board decisions.[27] The district courts will largely determine whether this case will be a stepping-stone to an expansion of self-help in Rail-

pulsory arbitration, they had not anticipated that the court's aid could be invoked to enforce unilateral changes. 384 U.S. at 248-50.

23. Railway Labor Act § 1(a), 44 Stat. 577 (1926), as amended, 45 U.S.C. § 151a (1964), which sets out the purposes of the act. The first purpose is to avoid any interruption in commerce.

24. The court would be a temporary arbiter in that it would either grant the requests of the company or deny them. This granting or denying is the function of the arbiter in the typical arbitration case. It must be noted that the Supreme Court itself has stated: "No authority is empowered to decide the dispute and no such power is intended, unless the parties themselves agree to arbitration." Elgin, J. & E. R.R. v. Burley, 325 U.S. 723, 725 (1945).

25. Another form of self-help occurred in 1958 when the Civil Aeronautics Board approved the "mutual aid pact" between six major airlines which applied to any strike except those in which the carrier violated the RLA or refused to settle on basis of the Presidential recommendations. Each party to the pact had to pay an amount equal to its net income from strike-diverted traffic to the struck carrier. CAB Order Nos. E-13233 and E-13308 (1958). Another situation is the government subsidy of airline losses. It has been held that the Board should not determine whether strike losses should be included or excluded as such, but rather should determine the inclusion or exclusion on the basis of statutory and judicial tests already existing. American Overseas Airlines v. Civil Aeronautics Bd., 254 F.2d 744 (D.C. Cir. 1958). Therefore, it is possible that the government would subsidize airline losses due to a strike. Thus, if strike losses are subsidized and self-help in the present form could be invoked, the carrier could avoid the more severe consequences of a strike.

26. See note 10 *supra* and accompanying text.

27. See note 14 *supra* and cases cited therein. In comparing these cases with the instant case, similarity can be noted in the process of arriving at a result. In all of the cases, the court balances the economic interest of the parties involved so that it may more nearly equate the countervailing powers of the union and the company. For a more detailed discussion of this balancing aspect see Schatzki, *The Employer's Unilateral Act — A Per Se Violation — Sometimes*, 44 TEXAS L. REV. 470 (1966).

way Labor Act disputes paralleling that experienced under the National Labor Relations Act.[28] In determining what unnegotiated unilateral changes are "reasonably necessary," the district courts must consider the interests of the company, the union, Congress, and the paramount interest of the public in the continuance of service. They must analyze the factual situation of each party to determine what is "reasonably necessary" to maintain railroad operations without destroying the economic balance between the union and the railroad and without violating the spirit of the Railway Labor Act. It appears unlikely that this expanded concept of self-help will be extended into other areas, because it is unusual for the public interest to be so integrally involved. However, the Supreme Court may reach the same result in other public service cases if negotiation procedures have failed, the union has struck, the economic balance between the parties needs modifying, the company can continue service with minimal revisions of existing agreements and the public interest is significantly involved.

Labor Law—In Future NLRB Elections, Employer Must Furnish List of Employees' Names and Addresses

During campaigns preceeding two elections conducted by the National Labor Relations Board, employers mailed letters containing anti-union material to their employees, but denied the unions' request for a list of the employees' names and addresses. After losing the elections, the unions claimed that although the employers' refusal was not an unfair labor practice,[1] the Board should, nevertheless, set aside the elections because of employer interference in refusing to furnish the requested list. The Board, however, certified the elections upon the recommendations of the regional directors; but announced that all future NLRB elections[2] would be invalidated unless the employer filed the names and addresses of the eligible voters with the regional di-

28. See note 14 *supra.*

1. National Labor Relations Act § 8(a) (1), 49 Stat. 453 (1935), as amended 29 U.S.C. § 158 (1964): "It shall be an unfair labor practice for an employer — (1) To interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7." National Labor Relations Act § 7, 49 Stat. 452 (1935), as amended, 29 U.S.C. § 157 (1964): "Employees shall have the right to self-organization, to form, join or assist labor organizations, to bargain collectively. . . ."

2. The rule does not apply to expedited elections conducted pursuant to § 8 (b) (7) (c) of the act. However, this is the only exception.

rector who would make this information available to all parties concerned.[3] *Excelsior Underwear, Inc.*, CCH LAB. L. REP. ¶ 20180 (NLRB Feb. 4, 1966).

The particular holding of the instant case is directly in line with prior Board policy.[4] Its significance lies in the effect the Board's new rule will have upon the solicitation and distribution of campaign material during an NLRB election campaign. In the past, the Board has imposed other procedural election requirements[5] under its broad power to control election proceedings and to see that the elections are conducted fairly.[6] The Board has stated that its function in this connection is "to provide a laboratory in which an experiment may be conducted, under conditions as nearly ideal as possible, to determine the uninhibited desires of the employees."[7] It has been said that these laboratory conditions can best be achieved by insuring that "the avenues of communication" are kept open to both sides.[8] There has been considerable controversy, however, as to how these concepts should ap-

3. The rule was stated as follows: "[W]ithin 7 days after the Regional Director has approved a consent election agreement . . . or has directed an election . . . the employer must file with the Regional Director an election eligibility list, containing the names and addresses of all the eligible voters. The Regional Director, in turn, shall make this information available to all parties in the case. Failure to comply with this requirement shall be grounds for setting aside the election whenever proper objections are filed." Excelsior Underwear Inc., CCH LAB. L. REP. ¶ 20180, at 25403-04 (NLRB Feb. 4, 1966).

4. In the past, the Board has refused to set aside an election on the ground that the employer did not furnish the union with a list of the names and addresses of the employees. It has required the filing of an eligibility list containing the names of all employees eligible to vote in the NLRB election, but this filing could be delayed until immediately before the election date and was thus of little benefit during the campaign.

5. See, *e.g.*, Peerless Plywood Co., 107 N.L.R.B. 427 (1953). In that case the Board formed a rule prohibiting unions and employers from making election speeches on company time to employees within 24 hours before the scheduled time for the election. See also Higgins, Inc., 106 N.L.R.B. 845 (1953) (use of sound trucks prohibited).

6. NLRB v. Waterman S.S. Corp., 309 U.S. 206 (1940). The Supreme Court upheld a Board order which had been reversed by the Fifth Circuit as based on mere suspicion. The Board had found, among other things, that the employer had interfered with an election directed by the Board. In the course of its opinion, the Court stated: "the control of the election proceeding, and the determination of the steps necessary to conduct that election fairly were matters which Congress entrusted to the Board alone." *Id.* at 226.

7. General Shoe Corp., 77 N.L.R.B. 124, 127 (1948). The Board held that where the employees' freedom of choice was impaired, the election might be set aside even though the conduct in issue did not amount to an unfair labor practice. This argument is still valid today, Dal-Tex Optical Co., 137 N.L.R.B. 1782 (1962), and could have important effects upon the application of the Board's new rule. See, *e.g.*, note 27 *infra* and accompanying text.

8. Bonwit Teller, Inc. v. NLRB, 197 F.2d 640, 646 (2d Cir. 1952), *cert. denied*, 345 U.S. 905 (1953). The particular holding in this case has been severely limited by later decisions. However, the basic idea of assuring freedom of communication still appeals to the Board and the courts as the best means of maintaining the required "laboratory conditions." For a view that other means should be considered, see Gould, *Union Activity on Company Property*, 18 VAND. L. REV. 73, 85 (1964).

ply in particular situations. Problems usually arise when union organizers or pro-union employees attempt to use company premises to distribute material or to solicit employees' votes in personal conversations. The problem of oral *solicitation* has been distinguished by some from that of *distribution* of materials;[9] but while the two leading cases in the area concerned distribution problems, both spoke in general terms of "solicitation" without making such a distinction.[10] The Board's current position on oral solicitation appears in *Livingston Shirt*,[11] where it stated: "In the absence of either an unlawful broad no-solicitation rule (prohibiting union access to company premises on other than working time) or a privileged no-solicitation rule (broad, but not unlawful because of the character of the business) an employer does not commit an unfair labor practice if he makes a pre-election speech on company time and premises to his employees and denies the union's request for an opportunity to reply."[12] The general principles governing solicitation and distribution of campaign material on company property were enunciated in two Supreme Court cases. In *NLRB v. Babcock & Wilcox Co.*,[13] the Court stated that an employer did not commit an unfair labor practice by maintaining a no-solicitation rule which precluded distribution on his premises by *nonemployees*[14] so long as there was no discrimination in the rule's application and the union, through reasonable efforts, could reach the employees through other available channels of communication. Two years later the Court decided *NLRB v. United Steelworkers*,[15] involving union charges that the companies' no-distribution rules, when viewed in conjunction with the presence of other unfair labor practices, constituted unfair labor

9. See Bok, *The Regulation of Campaign Tactics in Representative Elections Under the National Labor Relations Act*, 78 HARV. L. REV. 38, 93 (1964).

10. NLRB v. United Steelworkers, 357 U.S. 357 (1958); NLRB v. Babcock & Wilcox Co., 351 U.S. 105 (1956). Thus the relation of these cases to problems involving oral solicitation is not yet clear. The distinction between oral solicitation and distribution was made by the Board, however, in Stoddard-Quirk Mfg. Co., 138 N.L.R.B. 615 (1962).

11. 107 N.L.R.B. 400 (1953).

12. *Id.* at 409.

13. *Supra* note 10.

14. Generally, a no-solicitation rule which interferes with the right of *employees* to solicit on nonworking time violates § 8(a) (1) of the act, and is an unfair labor practice. See Republic Aviation Corp. v. NLRB, 324 U.S. 793 (1945). However, department stores have long been exempted from the application of this rule because the nature of the business is such that solicitation, in selling areas, even on nonworking time, would unduly interfere with the retail store operations. See, *e.g.*, Marshall Field & Co. 98 N.L.R.B. 88 (1952). See also Stoddard-Quirk Mfg. Co., *supra* note 10, where the Board decided that even though under *Babcock* nonemployees might be barred from distributing literature on the employer's plant, employees could not be so restricted. The Board held that the company might properly exclude all distribution by *anyone* in the *working areas* of the plant, but employees must be permitted to solicit in nonworking areas on their own time.

15. *Supra* note 10.

practices. The Court rejected the union charges on the grounds that no request was made to relax the rules and that no attempt was made to show the Court that the no-solicitation rules truly diminished the union's ability to reach the employees. The Court then stated: "If, by virtue of the location of the plant and of the facilities and resources available to the union, the opportunities for effectively reaching the employees with a pro-union message, in spite of a no-solicitation rule, are at least as great as the employer's ability to promote the legally authorized expression of his anti-union views, there is no basis for invalidating these 'otherwise valid' rules."[16] The ramifications of the Court's emphasis on the availability of other channels of communication as a basis for determining the significance of the employer's conduct are as yet undetermined, particularly since distribution and oral solicitation were not clearly distinguished in either *Babcock* or *Steelworkers*.[17] In *May Department Stores Co.*,[18] for example, the Sixth Circuit rejected the per se approach of *Livingston Shirt* on the ground that *Steelworkers* required the Board to consider the other channels of communication available to the union even where the employer maintained a legally broad no-solicitation rule and had made a non-coercive antiunion speech on company time and premises, refusing to allow the union an opportunity to reply. The Board has since voiced disagreement with the Sixth Circuit's interpretation of *Steelworkers*, however,[19] and it is in this limited area that the *Excelsior* rule may have the most significant impact.

In *Excelsior* the Board felt that in the absence of employer disclosure of its employees' names and addresses, the union would not be able to present its side to the voters because of the practical difficulties involved in disseminating such information.[20] Since the Board's duty was to conduct elections free from elements impeding a free and reasoned choice, and since a lack of information concerning one side of

16. NLRB v. United Steelworkers, *supra* note 10, at 364.

17. *E.g.*, in *Steelworkers* one of the union objections centered around the oral solicitation of employees by the company's supervisory personnel. Confusion as to the exact implications of this holding have precipitated the controversy between the Board and the Sixth Circuit discussed at note 18 *infra* and accompanying text.

18. 136 N.L.R.B. 797 (1962), *enforcement denied*, 316 F.2d 797 (6th Cir. 1963). *May* involved a legally broad no-solicitation rule which, under *Livingston Shirt*, meant that the employer committed an unfair labor practice per se if he made a noncoercive antiunion speech on company time and refused to allow the union to use the premises to reply. The Sixth Circuit rejected this per se approach, however.

19. The Board "respectfully disagreed" with the Sixth Circuit's interpretation of *Steelworkers*, and reaffirmed its *May* decision in Montgomery Ward & Co., 145 N.L.R.B. 846 (1964), *enforced as modified*, 339 F.2d 889 (6th Cir. 1965), which the Sixth Circuit enforced as modified after carefully distinguishing *May* by finding in *Montgomery Ward* an illegally broad no-solicitation rule and other unfair labor practices. See also S & H Grossinger's Inc., CCH LAB. L. REP. ¶ 20100 (NLRB Dec. 21, 1965).

20. Excelsior Underwear, *supra* note 3, at 25405 & n.11.

the issue necessarily impeded such a choice, the Board announced the rule requiring disclosure by the employer in all future NLRB elections. The employers urged that *Babcock* and *Steelworkers* required that the Board consider the alternative channels of communication available to the unions before issuing the rule. These two cases were distinguished, however, on the ground that they were concerned with unfair labor practices rather than the validity of a NLRB election. Furthermore, they required consideration of alternative channels of communication only where the opportunity to communicate, as made available by the Board, interfered with a significant employer interest—such as controlling the use of his own property. The Board concluded that the "employer has no significant interest in the secrecy of employee names and addresses,"[21] and thus it did not feel compelled to investigate alternative channels of communication. It decided to apply the rule prospectively, however, and certified the instant elections on the ground that the particular facts did not warrant setting them aside.[22]

This rule reflects the Board's attempt to insure a realistic opportunity for both sides to present their arguments to all the eligible voters in an NLRB election.[23] On the one hand, it has the significant effect of preserving the most effective forum for the employer. He alone can utilize the emotion-packed speech at the company plant on company time, a political device far more effective than the mere mailing of a letter to an employee's home. On the other hand, the unions, in addition to solicitation by mail, will be able to solicit the employees personally in their homes, a practice forbidden employers[24] and not always possible for unions before *Excelsior*, since employees' addresses were not readily available.[25] The extent of the unions' advantage in this area, however, will depend upon whether such factors as the number of employees and the distances they live from the plant render extensive

21. *Id.* at 25407.

22. On the day *Excelsior* was handed down, the Board also decided *General Electric*, CCH LAB. L. REP. ¶ 20181 (NLRB Feb. 4, 1966), which involved union objections to employer conduct prior to an NLRB election. The employers had denied a union request for an opportunity to reply to non-coercive speeches delivered on company time and premises. The Board refused to reconsider its holding in *Livingston Shirt* until the impact of the *Excelsior* rule had been evaluated, and, thus, certified the election.

23. Some means of securing this equality of opportunity is needed, but legal commentators have differed over the means best suited to resolving the problem. The *Excelsior* rule has been suggested by some as a possible means of allowing communication without encouraging numerous artificial and arbitrary rules regulating election conduct. *Compare* Bok, *supra* note 9, *with* Gould, *supra* note 8, at 102-03.

24. See, *e.g.*, Peoria Plastic Co., 117 N.L.R.B. 545 (1957).

25. The employers in the instant case argued that the privacy of the employees would be invaded and that they might well be harrassed in their homes. The Board did not feel, however, that the possibility of abuse of its rule by the unions warranted the refusal to announce the rule. Also the Board indicated that relief would be provided if the rule were abused.

personal contact impractical. The *Excelsior* rule may also have an important effect upon cases involving oral solicitation of the type formerly proscribed under *Livingston Shirt*. Denial of a union's request to reply to a noncoercive antiunion speech on company time made by an employer who maintains a broad, but not unlawful, no-solicitation rule and who has complied with the Board's new rule, would be an unfair labor practice per se under *Livingston Shirt*.[26] However, in light of the Supreme Court's "avenues of communication" approach in *Babcock* and *Steelworkers*, the courts may be persuaded that no unfair labor practice was in fact committed since the union clearly had other available channels of communication by virtue of the employer's compliance with *Excelsior*'s rule. Unless *Babcock* and *Steelworkers* are to be limited to distribution situations, such a ruling would appear correct even though it expressly contradicts *Livingston Shirt*. If the Board could show that the union's opportunities for communication were limited in spite of *Excelsior*, the Courts of Appeals would apparently affirm, but such a showing would probably be quite difficult given the nature of the rule.

The Board expressly refused to decide whether a violation of the rule would be an unfair labor practice, but since the Board may set aside an election because of conduct not amounting to an unfair labor practice,[27] an employer refusing to comply with the new rule will face at least a new election.[28] Should the Board adopt the position that a violation of *Excelsior* will be upheld by the Courts of Appeals as an courts may reverse on the ground that consideration of the other available channels of communication is required even when there is only a small employer interest involved. However, since the purpose of the *Excelsior* rule is to provide the union with the very avenues of communication suggested by the Supreme Court, it is quite possible that a violation of *Excelsior* will be upheld by the Courts of Appeals as an unfair labor practice, if the Board so regards it.

26. See note 18 *supra* and accompanying text.

27. See, *e.g.*, Dal-Tex Optical Co., *supra* note 7; General Shoe Corp., *supra* note 7. For a criticism of the doctrine in *General Shoe*, see 38 N.Y.U.L. REV. 243, 274 (1963).

28. Excelsior Underwear Inc., *supra* note 3, at 25407.

Taxation—Thin Incorporation Not Tantamount to Disqualification From Subchapter S

Taxpayers incorporated Century House in 1959 to build and operate a motel near the Seattle World's Fair. The corporation's authorized capital stock was 500 shares of no-par value stock, and paid-in capital was 500 dollars. The taxpayers each owned the same number of shares. They intended to obtain 100 per cent permanent financing from outside sources, but, because of the many tourist facilities being constructed for the fair, this became impossible. Therefore, to meet operating expenses between 1960-1962, taxpayers advanced over 252,000 dollars of their own money to the corporation, in approximately equal shares, in exchange for six per cent demand notes. At no time was interest on these notes either paid or demanded, nor was any effort made to enforce payment. In January, 1961, Century House filed an election under subchapter S or the Code,[1] which allows shareholders of electing small business corporations to deduct corporate net operating losses on their individual income tax returns.[2] The Commissioner ruled that, since subchapter S of the code expressly provides that each electing small business corporation must possess only a single class of stock, Century House could not qualify.[3] In finding a second class of stock, the Commissioner relied upon a regulation which provided that any purported debt obligation which is in reality equity capital, is a second class of stock per se.[4] On review by the Tax Court, *held*, a corporation's demand notes, given to secure advances made by stockholders, which are in reality contributions of equity capital, do not constitute a second class of stock where these notes do not give the stockholders rights and interests different from

1. INT. REV. CODE OF 1954, §§ 1371-78.

2. "A net operating loss of an electing small business corporation for any taxable year shall be allowed as a deduction from gross income of the shareholders of such corporation . . . ." INT. REV. CODE OF 1954, § 1374(a). Relying upon this provision, taxpayers claimed deductions for their pro rata shares of the corporation's net operating losses for 1961 and 1962 on their individual tax returns for those years. The Commissioner disallowed the deductions.

3. "For purposes of this subchapter, the term 'small business corporation' means a domestic corporation . . . which does not . . . (4) have more than one class of stock." INT. REV. CODE OF 1954, § 1371(a)(4).

4. "A corporation having more than one class of stock does not qualify as a small business corporation . . . . If the outstanding shares of stock of the corporation are not identical with respect to the rights and interest which they convey in the control, profits, and assets of the corporation, then the corporation is considered to have more than one class of stoek. Thus, a difference as to voting rights . . . or liquidation preferences of outstanding stock will disqualify a corporation . . . . *If an instrument purporting to be a debt obligation is actually stock, it will constitute a second class of stock.*" (Emphasis added.) Treas. Reg. § 1.1371-1(g) (1959), as amended, T.D. 6667, 1963-2 CUM. BULL. 343.

those possessed by the holders of the nominal stock. *W.C. Gamman*, P-H TAX CT. REP. & MEM. DEC. ¶ 46.1 (April 4, 1966).

Subchapter S was passed in 1958 for the purpose of allowing businessmen to select their organization form "without the necessity of taking into account major differences in tax consequences."[5] Qualifying corporations retained certain corporate characteristics,[6] but were to be treated like partnerships for purposes of taxation.[7] The Code expressly provides that an electing corporation cannot qualify for subchapter S treatment if it has more than one class of stock.[8] Since the Commissioner's regulation[9] declares any loan which is in reality equity capital to be a second class of stock per se, closely held corporations might readily be disqualified from subchapter S treatment. This is an extension of the "thin incorporation doctrine" into subchapter S.[10] Prior to *Gamman* only two cases applied the second class of stock regulation,[11] and neither case challenged its validity. In *Catalina Homes, Inc.*,[12] a shareholder advanced funds to the corporation in return for five per cent demand notes on which interest was payable "from time to time as determined by the Board of Directors." Dividends of the corporation were not to be declared until the corporation's debts were fully paid. In classifying these advances as equity capital rather than debt, the court cited *Isidor Dobkin*[13] for the proposition that where a corporation arbitrarily designates a major portion of necessary funds as loans, a strong inference arises that the entire

5. S. REP. No. 1983, 85th Cong., 2d Sess. 87 (1958). For a sharp criticism of subchapter S, see Caplin, *Subchapter S vs. Partnership: A Proposed Legislative Program*, 46 VA. L. REV. 61 (1960).

6. For a discussion of the private law advantages of the corporate form, see Strecker, *When Will the Corporate Form Save Taxes?*, 18 VAND. L. REV. 1695, 1697 (1965).

7. *Id.* at 1725.

8. INT. REV. CODE OF 1954, § 1372(3).

9. *Supra* note 4.

10. Thin incorporation, for tax purposes, deals with the problem of whether advances made by stockholders are legitimate debt obligations as opposed to equity capital investments, subject to the risks of business. In order to avoid taxes on corporate income, shareholders developed the practice of "lending" operating funds to the corporation. The "interest" on these "loans" was deducted from corporate earnings, thereby reducing the corporation's gross income and minimizing the corporate tax. Since 1946 several different factors have influenced the courts in determining whether an advance is debt or equity. Where the ratio of debt to equity was high the Supreme Court ruled that the advances were equity. John Kelly Co. v. Commissioner, 326 U.S. 521 (1946); another test was the true intent of the parties, Rowan v. United States, 219 F.2d 51 (5th Cir. 1955). For a thorough discussion of the problems involved and proposed solutions to the debt-equity problem, *compare* Gilbert v. Commissioner, 248 F.2d 399 (2d Cir. 1957), *remanding* 15 CCH Tax Ct. Mem. 688 (1956), *with* O.H. Kruse Grain & Milling v. Commissioner, 279 F.2d 123 (9th Cir. 1960). See also Caplin, *The Caloric Count of a Thin Incorporation*, N.Y.U. 17 INST. ON FED. TAX 771 (1959).

11. *Supra* note 4.

12. 23 CCH Tax Ct. Mem. 1361 (1964).

13. 15 T.C. 31 (1950), *aff'd per curiam*, 192 F.2d 392 (2d Cir. 1951).

amount is equity capital. Significantly, the court did not declare these advances a second class of stock simply because they constituted equity capital. Instead, it found that the advances were preferred in fact over the common stock, and therefore constituted a second class of stock. In *Henderson v. United States*,[14] the court held that certain shareholders' advances were investments of equity capital, and, under the Commissioner's regulation constituted a second class of stock as a matter of law.

The majority in the instant case found that the Commissioner's regulation enlarged the scope of the statute beyond the intent of Congress in that it restricted stockholders from making advances to electing corporations. The court held, therefore, that to classify all debt obligations found to be equity capital as a second class of stock per se, was beyond the Commissioner's powers. The court then considered whether the notes in question were, in fact, a second class of stock. It examined the notes to determine whether they gave the holders any rights and interests in the corporation different from those they owned as holders of the nominal stock. The court found that no new rights or interests were created by the notes because the advances were made by the sole shareholders of the corporation in direct proportion to their stock interests in the corporation. Neither stockholder gained any preference over the other because of these notes, and whatever preferences were present, were only preferences over themselves as stockholders. The court found that the advances were neither true debt obligations nor a second class of stock. Rather, they were merely capital contributions and, in reality, reflected the value of the common stock already held. The majority distinguished *Catalina Homes*[15] and *Henderson v. United States*[16] on the grounds that those cases were decided only on the issue of whether advances by stockholders were in fact loans or equity capital, and did not involve the validity of the Commissioner's regulation. The concurring judges did not think it necessary to question the validity of the Commissioner's regulation because even under the regulation, these notes were not "actually stock." To be "actually stock," all the elements of the debt obligation had to be the same as the elements characterizing a share of stock. The concurring judges were unable to find any such characteristics in these demand notes.[17]

14. 245 F. Supp. 782 (M.D. Ala. 1965).
15. *Supra* note 12.
16. *Supra* note 14.
17. In a separate concurring opinion, two judges expressed a fear that under the Commissioner's regulation any type of loan would throw a cloud over a small business corporation. It was reemphasized that the second class of stock doctrine, as stated in the regulations, was inconsistent with the intent of Congress and likely to produce grave inequities. W.C. Gamman, P-H TAX CT. REP. & MEM. DEC. ¶ 46.1, at 46-9.

By striking down the per se application of the second class of stock rule, *Gamman* will relieve some of the uncertainties of future tax treatment to shareholders making advances to electing corporations. The thin incorporation problem of whether advances constitute debt or equity capital should no longer affect businesses electing under subchapter S because the taxpayer may now freely acknowledge that the purpose of a loan is a contribution to equity capital. The Commissioner will now be forced to show that contributions to equity capital convey new and different rights and interests in the corporation from those held by the present stockholders. The decision is desirable since thin incorporation has no logical relation to the question of whether there is in fact a second class of stock. While thin incorporation is relevant for determining the deductibility of interest payments on purported debt obligations, it is arbitrary, if not illogical to argue that because a purported debt is in reality equity capital, it is necessarily a second class of stock. Thin incorporation is still applicable to an electing subchapter S corporation where purported interest payments to creditors are in fact dividends to shareholders. However, for purposes of determining whether there is more than one class of stock, the test should be whether the shareholders' advances create new rights and interests in the corporation. Accordingly, the decision has the beneficial effect of permitting a small businessman to use personal funds to capitalize his venture without being penalized by the tax laws. As a practical matter, shareholders' loans are not usually made unless outside financing is impossible. It is unrealistic to disqualify an electing corporation from subchapter S because it has behaved in a manner calculated to carry out the express purpose of the act. While the decision does not offer a specific test for determining what constitutes a second class of stock, it is now clear that equity capital must create new rights and interests before disqualification will result.[18]

The dissenting opinion stated that the second class of stock regulation fell within the Commissioner's rule-making power and was clearly not inconsistent with the statute. Since the loans had been held to be equity capital, they should have been classed as a second class of stock because of different rights and liabilities which made the notes resemble cumulative non-participating redeemable preferred stock. It was thought to be "no answer" that these different rights and liabilities were, as found by the majority, not to be enforced. *Ibid.*

18. In Lewis Bldg. & Supplies, Inc., 25 CCH Tax Ct. Mem. 844 (June 30, 1966), the court denied the Commissioner's contention that promissory notes issued by two shareholders in proportion to their stock ownership, and which were non-interest bearing and had no fixed maturity date, were, as a matter of law, a second class of stock. The Tax Court held that these were equity advances, but did not constitute a second class of stock because they gave the holders no rights or interests different than those they already had. Note that this case follows *Gamman* and represents an even stronger decision for the taxpayer because the notes in question resembled debt obligations even less than did the notes in *Gamman*.

Torts—Damages—Recovery for Wrongful Death of Adult Daughter Should Include Compensation for Lost Investment

The parents of a twenty-one-year-old college girl brought an action under the Michigan wrongful death statute[1] to recover damages for their daughter's death in an automobile collision. The statute limited recovery to only the "pecuniary injury"[2] resulting from the wrongful death. The defendant conceded that loss of society and companionship was a pecuniary injury, but argued that the parents' investment in the child should not be considered by the jury in its assessment of damages since the parents were not financially dependent upon the child. The court submitted the case to the jury without instructions on the question of lost investment. On appeal from a judgment entered on a jury verdict of 26,500 dollars for loss of society and companionship,[3] the Supreme Court of Michigan, *held,* affirmed with respect to the award of damages for loss of society and companionship; remanded, however, with directions to consider elements of damage beyond mere loss of future companionship.[4] In a wrongful death action by the parents of a deceased adult dependent, recovery should compensate the parents for their lost investment, as well as for their loss of society and companionship, even though the parents were neither dependent upon nor could reasonably anticipate future contributions from the deceased. *Currie v. Fiting,* 375 Mich. 440, 134 N.W.2d 611 (1965).

At common law, the death of a person due to injuries sustained by the wrongful conduct of another extinguished any cause of action that the deceased party might have had,[5] and also left his surviving dependents with no legal remedy. However, every state has enacted statutes abrogating the harshness of this common law rule,[6] and

1. MICH. STAT. ANN. § 27A.2922 (2) (rev. 1962).

2. "[T]he court or the jury may give such damages, as, the court or the jury, shall deem fair and just, with reference to the *pecuniary injury* resulting from such death . . . ." *Ibid.* (Emphasis added.)

3. The award of $26,500 was arrived at by allowing $1000 per year for the average life expectancy of the decedent's parents (26.5 years). The total award was $32,778, which included, in addition to the $26,500 for loss of society and companionship, $3,147 for funeral and burial expenses and $3,131 for interest from the date of the accident.

4. This case was also remanded because the lower court had failed to reduce the $26,500, the amount awarded the parents for loss of society and companionship, as prospective damages, to its present worth. This was held to have been reversible error.

5. MCCORMICK, DAMAGES § 93 (1935); OLECK, DAMAGES TO PERSONS AND PROPERTY § 195 (rev. ed. 1961); TIFFANY, DEATH BY WRONGFUL ACT § 1 (2d ed. 1913); Smedley, *Wrongful Death—Basis of the Common Law Rules,* 13 VAND. L. REV. 605 (1960).

6. Van Beeck v. Sabine Towing Co., 300 U.S. 342 (1937). "In this country, statutes

several states now have Death Injury Acts,[7] which create in the decedent's nearest relatives a new cause of action based upon the wrongful death.[8] These acts permit recovery of whatever damages the jury deems "proportionate to the injury."[9] In many states, the legislatures have expressly limited recovery under these acts to "pecuniary" losses;[10] but in a few states it has been left to the courts to read a pecuniary limitation into their statutes.[11] In applying this pecuniary limitation, the courts have ostensibly employed a "strict pecuniary loss" formula to determine the amount of pecuniary injury suffered by the parents as a result of their child's wrongful death.[12] This formula permits recovery of the total filial contributions rea-

substantially the same in tenor [as Lord Campbell's Act] followed in quick succession in one state after another, till today there is not a state of the Union in which a remedy is lacking." *Id.* at 346; 2 HARPER & JAMES, TORTS § 24.1, at 1284 (1956); PROSSER, TORTS § 121, at 924 (3d ed. 1964); 1949 N.Y. Law Revision Comm'n 235 n.40; 51 CORNELL L.Q. 425 (1966).

7. Fatal Accidents Act (Lord Campbell's Act), 9 & 10 Vict., c. 93 (1846).

8. Survival Acts also exist which differ from the Wrongful Death Acts. The distinction between these statutes is that while the Wrongful Death Acts create a new cause of action, the Survival Acts merely continue in existence the injured person's claim after his death as an asset of his estate. MCCORMICK, *op. cit. supra* note 5, at 336; OLECK, *op. cit. supra* note 5, at 320; Evans, *A Comparative Study of the Statutory Survival of Tort Claims, For and Against Executors and Administrators,* 29 MICH. L. REV. 969 (1931).

9. See note 7 *supra.*

10. See, *e.g.*, ARK. STAT. ANN. § 27-909 (1962) ("such damages as will be fair and just compensation with reference to the *pecuniary injuries* . . . resultiug from such death . . . ."); ME. REV. STAT. ANN. ch. 18, § 2552 (1954) ("such damages as they shall deem a fair and just compensation, not exceeding $30,000, with reference to the *pecuniary injuries* resulting from such death . . . ."); N.J. STAT. ANN. § 2A 31-5 (1952) ("such damages as they shall deem fair and just with reference to the *pecuniary injuries* resulting from such death . . . ."); N.M. STAT. ANN. § 22-20-3 (1953) ("such damages, compensatory and exemplary, as they shall deem fair and just, taking into consideration the pecuniary injury or injuries resulting from such death . . . ."); N.C. GEN. STAT. § 28-174 (1950) ("such damages as are a fair and just compensation for the *pecuniary injury* resulting from such death.") (Emphasis added.)

11. See, *e.g.*, Fuentes v. Tucker, 31 Cal. 2d 1, 187 P.2d 752 (1947) ("just" damages consist of the pecuniary loss to the parents); Consolidated Stone Co. v. Staggs, 164 Ind. 331, 73 N.E. 695 (1905) (statute containing general language construed to mean compensation for the pecuniary loss sustained); Dow v. Legg, 120 Neb. 271, 231 N.W. 747 (1930) (statute containing general language construed to require that loss be of pecuniary nature); Evans v. Oregon Short Line Ry., 37 Utah 431, 108 Pac. 638 (1910) ("just" damages held to mean the present value of the future contributions and earnings minus the cost of living); Blake v. Midland Ry., 18 Q.B. 93, 118 Eng. Rep. 35 (1852) (compensation should be limited to the parents' pecuniary loss under the Fatal Injuries Act).

12. This formula is also referred to as the "child-labor" measure of pecuniary loss or as the "wage-profit yardstick of contributions less expenses" measure. In Wycko v. Gnodtke, 361 Mich. 331, 338, 105 N.W.2d 118, 122 (1960), the court, in expressly rejecting the formula, referred to it as "the child-labor measure of the pecuniary loss suffered through the death of the minor child, namely, his probable wages less the cost of his keep . . . ."

sonably anticipated by the parents, reduced by the probable parental expense of raising the deceased child to majority.[13] It generally does not include the reasonable anticipation of filial contributions beyond the child's minority.[14] More and more courts, however, have recognized the unreasonableness of this "strict pecuniary formula" and many now permit recovery for reasonably anticipated contributions beyond the child's minority.[15] Other courts have taken even longer strides in an attempt to broaden parental recovery under the Death Injury Acts. Some have permitted jury consideration of the parents' loss of society and companionship as an element of damage,[16] and some have allowed consideration of parental investment incurred in raising the child.[17] A few have even expressly disavowed adherence to the strict pecuniary loss formula.[18] *Wycko v. Gnodtke*,[19] the forerunner of the

13. When the child is in his majority no reduction for probable expenses of rearing is made from the recovery because it is assumed there will not be any more of such expenses.

14. Generally, the cases which have not permitted the consideration of future contributions to extend into majority have been old ones, which based this conclusion upon the idea that the loss of benefits after minority was too speculative to be the basis of an award since the minor might not have lived until majority, might have married, or might have been unable or unwilling to contribute to the support of his parents. See, *e.g.*, Agricultural & Mechanical Ass'n v. State, 71 Md. 86, 18 Atl. 37 (1886) (contributions after majority only a matter of "vague conjecture" which could furnish no "reasonable foundation" for a verdict); Parsons v. Missouri Pac. Ry., 94 Mo. 286, 6 S.W. 464 (1887) (damages for the pecuniary benefit the parents could hope to derive from the child could include only that benefit derived during his minority); Frantz v. Gower, 119 Pa. Super. 156, 180 Atl. 716 (1935) (no recovery for the value of services reasonably expected to be received after the child reached majority, notwithstanding that the decedent was the parents' mainstay at the time of his death).

15. See, *e.g.*, Herbertson v. Russel, 150 Colo. 110, 371 P.2d 422 (1962) (net pecuniary loss can include loss of services and support which parents would have reasonably anticipated during their "declining years"); Caldwell v. Abernathy, 231 N.C. 692, 58 S.E.2d 763 (1950) (damages can include amounts which will fairly and reasonably compensate for financial loss sustained after child reaches majority); Flory v. New York Cent. R.R., 170 Ohio St. 185, 163 N.E.2d 902 (1959) (loss of chance for future support proper consideration upon minor's death).

16. See, *e.g.*,. Fuentes v. Tucker, *supra* note 11 (damages consist of the pecuniary loss to the parents in being deprived of the services, earnings, society, comfort and protection of the child); da Silva v. J. M. Martinal Shipbuilding Corp., 153 Cal. App. 2d 397, 314 P.2d 598 (1957) (damages may include the value of the loss of comfort, society and protection of the deceased minor); Anderson v. Great No. Ry., 15 Idaho 513, 99 Pac. 91 (1908) (the jury in determining damages could consider the loss of compensation to the father occasioned by the child's death); Fussner v. Andert, 261 Minn. 347, 113 N.W.2d 355 (1961) (award to parents may include the value of the loss of the deceased child's comfort and society); Boroughs v. Oliver, 226 Miss. 609, 85 So. 2d 191 (1956) (the jury may consider the loss of companionship of the child in an award to its mother).

17. Currie v. Fiting, 375 Mich. 440, 134 N.W.2d 611 (1965); Wycko v. Gnodtke, *supra* note 12.

18. Hoyt v. United States, 286 F.2d 356 (5th Cir. 1961) (Congress did not intend for a deduction to be made for the cost of rearing the child to majority in an action for the death of seven-year-old boy brought under the Federal Tort Claims Act); Wycko

instant case, adopted all of these progressive trends in an action brought for the wrongful death of a fourteen-year-old boy. When read in light of this later decision, however, it assumes even more significance.

The majority in *Currie* affirmed the lower court's award of damages for loss of society and companionship. It remanded the case, however, directing the lower court to submit consideration of the parents' lost investment to the jury. In determining the extent of this loss the jury was to consider parental expenses of birth, food, clothing, instruction, nurture, and shelter.

This decision is important for several reasons. It extends the application of *Wycko* to a situation where the deceased was in her majority, and, for the first time, it clearly indicates that parents need no longer to show either the deceased child's past contributions and services, or those he could have potentially rendered in the future, in order to recover for the wrongful death. As a result of these two cases, there now exists a new element of damages unique to Michigan. This might be termed the "lost investment" element by virtue of which parents may now recover most of the expenses and costs incurred in raising the child. The question arises as to whether the application of this element of damages will lead to incongruous results. For example, it would appear that parents investing rather large amounts in raising their child to majority might recover a substantial sum, whereas parents making a more modest investment in their child might recover far less. Thus, the wrongful death statute might serve to aggrandize the wealthy while causing the poor to suffer from their own inability to expend more. In actual practice, however, this incongruity is probably more theoretical than real, since a substantial recovery for loss of society and companionship will usually be possible. *Currie* and *Wycko* have had a substantial cumulative impact on wrongful death recovery in Michigan. The Michigan statute expressly limits recovery to pecuniary loss,[20] and the court has consistently construed this requirement as permitting recovery only where reasonable anticipation of future contributions was shown. As a result of these two cases, however, it now appears this requirement is no longer necessary, and that the Michigan courts will, in the future, construe the statute so as to permit such recovery as will compensate fairly for the injury. Whether the other jurisdictions which still

v. Gnodtke, *supra* note 12 (the child-labor formula, namely, the deduction of the cost of the child's keep from his probable wages, is no longer applicable in determining the amount which parents may recover for the death of a minor child); Fussner v. Andert, *supra* note 16 (the court rejected the strict pecuniary loss test).

19. *Supra* note 12.

20. See note 2 *supra*.

purportedly apply the pecuniary loss formula will follow suit is open to speculation. Since parents of deceased children have been permitted substantial recovery in most of these jurisdictions,[21] it would seem that the pecuniary loss formula is not being strictly applied even in those jurisdictions claiming adherence to the formula.

21. See, *e.g.*, Southern Ry. v. Miller, 285 F.2d 202 (6th Cir. 1960), in which the Tennessee Supreme Court, interpreting the state's wrongful death statute, affirmed a $22,510 award for the death of two girls, ages 11 and 13, holding that the amount recoverable is the pecuniary value of the life of the deceased; Reed v. Gulf Oil Corp., 217 F. Supp. 370 (D.D.C. 1963), in which $20,000 was recovered for the death of a seven-year-old boy even though the jury was instructed that from the expected earnings and future contributions should be deducted the cost of rearing the deceased; Cronberg v. United States, 123 F. Supp. 693 (E.D.N.C. 1954), in which the estate of the deceased sixteen-year-old boy was allowed a recovery of $35,000 even though the measure of damages was said to be the present net value of the net pecuniary worth of the deceased, which was to be ascertained by deducting the probable cost of his own living expenses from the probable gross income derived from his own expectations; McKirdy v. Cascio, 142 Conn. 80, 111 A.2d 555 (1955), in which the court, although claiming to apply the strict pecuniary loss test, allowed a $50,000 award for the death of an eighteen-year-old high school boy with some musical talent, who was contemplating college and had a job available if he wished to work; Lafferty v. Wattle, 349 S.W.2d 519 (Mo. Ct. App. 1961), in which $15,000 was held not excessive for the death of a thirteen-year-old girl who was well liked, above average in school, and a great help around the house, even though the measure of damages allegedly applied was the pecuniary loss suffered by the parents less the anticipated costs of rearing the child to majority; Gluckauf v. Pine Lake Beach Club, Inc., 78 N.J. Super. 8, 187 A.2d 357 (N.J. App. Div. 1963), in which $32,000 was awarded for the death of a fifteen-year-old boy who ranked in the top of his class academically even though the jury was instructed the award should represent no more than the present value of the expectancy of future net pecuniary benefits.