Vanderbilt Law Review

Volume 16
Issue 4 *Issue 4 - October 1963*

Article 11

10-1963

Recent Cases

Law Review Staff

RECENT CASES

Antitrust Law—Restraint of Trade—Applicability of Section 7 of Clayton Act to Bank Mergers

Two Philadelphia banks[1] sought to consolidate[2] under the Bank Merger Act of 1960.[3] The resultant bank would have been the largest in the Philadelphia metropolitan area[4] and would have had approximately thirty-six per cent of the area's total bank deposits, thirty-six per cent of the assets, and thirty-four per cent of the net loans. The Bank Merger Act authorizes such a merger subject to the approval of the Comptroller of Currency, who must obtain reports from the other two banking agencies and the Attorney General respecting the probable effects on competition of the proposed transaction. Although these reports stated that the consolidation would have anticompetitive effects, the Comptroller approved the merger.[5] The day after the merger was approved, the Justice Department brought an action in the federal district court charging violation of section 1 of the Sherman Act[6] and section 7 of the Clayton Act.[7] The district court held[8] that section 7

1. The Philadelphia National Bank and the Girard Trust Exehange Bank, a state bank member of the Federal Reserve System insured by the Federal Deposit Insurance Corporation, are respectively the second and third largest of 42 commercial banks in the Philadelphia metropolitan area.

3. 74 Stat. 129 (1960), as amended, 12 U.S.C. § 1828 (Supp. IV, 1963).

the creation of a new corporation and the termination of the constituent ones, whereas a merger signifies the absorption of one corporation by another, which retains its name and corporate identity with the added capital, franchises and powers of a merged corporation." 15 FLETCHER, CORPORATIONS § 7041, at 6 (Perm. ed. rev. vol. 1961). By the terms of the proposed agreement, the consolidation would take place under the Philadelphia National Bank's charter, the stockholders of which were to retain their share certificates, while Girard's stockholders would surrender their shares in exchange for shares in the consolidatcd bank. This combination is teehnically a consolidation; however, since the applicable statutes and the Court make no distinction between a merger and a consolidation, the term merger will be used throughout this diseussion.

3. 74 Stat. 129 (1960), as amended, U.S.C. § 1828 (Supp. IV, 1963).

4. This consists of the City of Philadelphia and three contiguous Pennsylvania counties.

5. No opinion was rendered at the time of the approval; however, the Comptroller explained the basis of his decision to approve the merger in his annual report to Congress. In his opinion, there was an adequate number of alternative sources of banking service in Philadelphia and in view of the benefieial effects of the increased national and international competition, the overall effect upon competition would not be unfavorable. In addition, the consolidated bank would be better able to serve the needs of the community and assist the city and state in attracting new capital and retaining industry. United States v. Philadelphia Nat'l Bank, 374 U.S. 321, 333 (1963).

6. 26 Stat. 209 (1890), as amended, 15 U.S.C. § 1 (1958).

7. 64 Stat. 1125 (1950), 15 U.S.C. § 18 (1958).

8. 201 F. Supp. 348 (E.D. Pa. 1962).

of the Clayton Act is not applicable to bank mergers; that even if section 7 is applicable, the Philadelphia metropolitan area is not the relevant geographical market area; that even if the Philadelphia metropolitan area is the relevant market, there is no reasonable probability that competition among commercial banks in the area will be substantially lessened as a result of the Act; thus the merger does not violate section 7 of the Clayton Act; *a fortiori*, it does not violate section 1 of the Sherman Act. On appeal[9] to the Supreme Court of the United States, *held*, reversed. Section 7 of the Clayton Act is applicable to bank mergers; the proposed merger would have serious anticompetitive effects and must be enjoined. *United States v. Philadelphia National Bank*, 374 U.S. 321 (1963).

Monopoly market power resulting from the consolidation of competing units was proscribed by the Sherman Act.[10] However, the Sherman Act could not attack such monopoly power until the power was exercised; therefore, antitrust policy often faced the task of dismembering huge corporations.[11] To provide authority to limit such concentrations before it reached monopoly proportions, Congress adopted the Clayton Act in 1914.[12] Original section 7 of the Clayton Act expressed the so-called incipiency doctrine and prohibited achievement of full monopoly power by limiting the acquisition by one corporation of the stock of another when such acquisition would result in a substantial lessening of competition between the acquiring and the acquired corporation, or when such acquisition would tend to create a monopoly in any line of commerce. This section was not effective, by its explicit terms, or as construed by the Supreme Court, to bar the acquisition by one corporation of the assets of another.[13] Although at the time of the passage of the Clayton Act the possibility of asset acquisitions was discussed, it was not thought to be an important consideration with respect to an act then directed primarily against the development of holding companies and the secret acquisition of competitors through the purchase of all or part of such competitors' stock.[14] Most mergers were held beyond the reach of the Clayton Act.[15] Even a stock acquisition was beyond attack if converted to an asset acquisition anytime before the issuance of the government's divestment

9. Appeal was brought under section 2 of the Expediting Act, 32 Stat. 823 (1903), 15 U.S.C. § 29 (1958).

10. Northern Sec. Co. v. United States, 193 U.S. 197 (1904).

11. See Note, *"Substantially To Lessen Competition . . .": Current Problems of Horizontal Mergers*, 68 YALE L.J. 1627 (1959).

12. 38 Stat. 731 (1914), 15 U.S.C. § 18 (1914).

13. See Arrow-Hart & Hegeman Elec. Co. v. Federal Trade Comm'n, 291 U.S. 587 (1934); Federal Trade Comm'n v. Western Meat Co., 272 U.S. 554 (1926).

14. See Brown Shoe Co. v. United States, 370 U.S. 294 (1962); H.R. REP. No. 1191, 81st Cong., 1st Sess. 4 (1949).

15. United States v. Celanese Corp. of America, 91 F. Supp. 14 (S.D.N.Y. 1950).

order.[16] Failure of the original section 7 to cover asset acquisitions[17] and a fear of what was considered to be a rising tide of economic concentration led to an amendment of section 7 to cover asset acquisitions by those corporations subject to the jurisdiction of the Federal Trade Commission. Section 7, as amended in 1950 by the Celler-Kefauver Antimerger Act, provides in part:

> No corporation engaged in commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share capital and no corporation subject to the jurisdiction of the Federal Trade Commission shall acquire the whole or any part of the assets of another corporation engaged also in commerce where in any line of commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly.[18]

Since banks were not subject to the jurisdiction of the Federal Trade Commission,[19] subsequent to the passage of the amendment it was the opinion of the Department of Justice[20] and various members of Congress[21] that section 7 was not applicable to bank mergers. As a result of a trend toward increased concentration in banking,[22] and apparently in the belief that section 7 was not applicable to bank mergers,[23] Congressional committee hearings were held on a total of seven bills dealing with competitive aspects of bank mergers.[24] These hearings reflected opposing views as to the best method of halting the trend

16. Arrow-Hart & Hegeman Elec. Co. v. Federal Trade Comm'n, *supra* note 13; see Neal, *The Clayton Act and the Transmerica Case,* 5 STAN. L. REV. 179 n.4 (1953).

17. United States v. Columbia Steel Co., 334 U.S. 495 (1948).

"The purpose of the proposed legislation [the 1950 amendments to section 7] is to prevent corporations from acquiring another corporation by means of the acquisition of its assets, whereunder the present law it is prohibited from acquiring the stock of said corporation. Since the acquisition of stock is significant chiefly because it is likely to result in control of the underlying assets, failure to prohibit direct purchase of the same assets has been inconsistent and paradoxical as to the over-all effect of existing law." S. REP. No. 1775, 81st Cong., 2d Sess. 2 (1950). See H.R. REP. No. 1191, 81st Cong., 1st Sess. 2 (1949).

18. 64 Stat. 1125 (1950), 15 U.S.C. § 18 (1958).

19. 72 Stat. 1750 (1958), 15 U.S.C. § 45(a)(6) (1958).

20. Attorney General Brownell told the Senate Committee on Banking and Currency with regard to bank mergers: "On the basis of these provisions the Department of Justice has concluded, and all apparently agree, that asset acquisitions by banks are not covered by section 7 as amended in 1950." *Hearings on the Financial Institutions Act of 1957 Before a Subcommittee of the Senate Committee on Banking and Currency,* 85th Cong., 1st Sess., pt. 2, at 1030 (1957).

21. See, *e.g.,* remarks of Representative Spence, "The Clayton Act is ineffective as to bank mergers because in the case of banks it covers only stock acquisitions and bank mergers are not accomplished that way." 106 CONG. REC. 7257 (1960).

22. H.R. REP. No. 1416, 86th Cong., 2d Sess. 3, 5 (1960).

23. "Since bank mergers are customarily, if not invariably, carried out by asset acquisitions, they are exempt from section 7 of the Clayton Act." S. REP. No. 196, 86th Cong., 1st Sess. 1 (1959); see H.R. REP. No. 1416, 86th Cong., 2d Sess. 9 (1960).

24. Wemple & Cutler, *The Federal Bank Merger Law and the Antitrust Laws,* 16 BUS. LAW. 994 (1961).

toward concentration; the Department of Justice favored amending the Clayton Act to make section 7 applicable to bank asset acquisitions, whereas the federal bank supervising agencies recommended the regulatory approach which finally prevailed[25] in the Bank Merger Act of 1960.[26] As originally introduced, the bill permitted, but did not require, the banking agency to seek the opinion of the Attorney General as to the effect of the proposed merger on competition;[27] the Bank Merger Act makes this a mandatory requirement except in emergency situations. The Act does not contain an express antitrust exemption for bank mergers which are approved by the appropriate agency, such as those found in statutes applicable to certain other regulated industries.[28] Although the Senate Committee report stated that competition is desirable in banking,[29] it further stated that competitive factors were not to be controlling,[30] and that the banking agencies were not bound by the conclusions of the Attorney General on the competitive factors.[31]

The instant case presented the Court with a question of first impression as to the applicability of amended section 7 to an acquiring corporation not subject to the Federal Trade Commission's jurisdiction. In enjoining the proposed merger of the two banks, the Court held

25. *Ibid.*

26. Under this Act, the appropriate banking agency passing upon the merger or consolidation shall take into consideration the following banking factors: (1) the financial history and condition of each bank involved; (2) the adequacy of its capital structure; (3) its future earning prospects; (4) the general character of its management; (5) the convenience and needs of the community to be served; and (6) whether or not its corporate powers are consistent with the purposes of this Act.

In addition, "the appropriate agency shall also take into consideration the effect of the transaction on competition (including any tendency toward monopoly), and shall not approve the transaction unless, after considering all of such factors, it finds the transaction to be in the public interest. In the interest of uniform standards, before acting on a merger, consolidation, acquisition of assets, or assumption of liabilities under this subsection, the agency . . . shall request a report on the competitive factors involved from the Attorney General and the other two banking agencies . . . ." 74 Stat. 129 (1960), as amended, 12 U.S.C. § 1828 (Supp. IV, 1963).

27. Wemple & Cutler, *supra* note 24.

28. 54 Stat. 905 (1940), 49 U.S.C. § 5(11) (1958). This provision exempts from antitrust laws certain consolidations approved by the Interstate Commerce Commission.

29. S. REP. No. 196, 86th Cong., 1st Sess. 16 (1959); see Klebaner, *Federal Control of Commercial Bank Mergers*, 32 IND. L.J. 287 (1962).

30. "But it is impossible to require unrestricted competition in the field of banking, and it would be impossible to subject banks to the rules applicable to ordinary industrial and commercial concerns, not subject to regulations and not vested with a public interest." S. REP. No. 196, 86th Cong., 1st Sess. 16 (1959).

31. "The Committee wants to make crystal clear its intention that the various banking factors in any particular case may be held to outweigh the competitive factors, and that the competitive factors, however favorable or unfavorable, are not, in and of themselves, controlling on the decision. And, of course, the banking agencies are not bound in their consideration of the competitive factors by the report of the Attorney General." *Id.* at 24.

that by its terms section 7 reaches asset acquisitions only of corporations "subject to the jurisdiction of the Federal Trade Commission." Although this section would not bar a bank merger if it were construed as a pure asset acquisition, the Court reasoned that a merger fitted into the category neither of a pure asset acquisition nor of a pure stock acquisition, but rather lay someplace between the two. Therefore, section 7 would reach bank mergers and "the specific exception for acquiring corporations not subject to the FTC's jurisdiction excludes from the coverage of § 7 ouly assets acquisitions by such corporations when not accomplished by merger."[32] The Court based this construction on a congressional design not only to reach transactions involving a simple purchase of assets, which is not a merger, but also to close the merger loophole. The Court reasoned that banks are clearly embraced by the stock-acquisition provision and "that Congress, in amending § 7, considered a distinction for antitrust purposes between acquisition of corporate control by purchase of stock and acquisition by merger unsupportable in reason, and sought to overrule the decisions of this Court which had recognized such a distinction."[33] To exempt mergers of industries not subject to the jurisdiction of the Federal Trade Commission "would create a large loophole in a statute designed to close a loophole."[34] Congress was aware of the difference between a merger and a pure asset-acquisition; therefore,

> the stock-acquisition provision of § 7, though reenacted *in haec verba* by the 1950 amendment, must be deemed expanded in its new context to include, at the very least, acquisitions by merger or consolidation, transactions which entail a transfer of stock of the parties, while the assets-acquisition provision clearly reaches corporate acquisitions involving no such transfer.[35]

In further support of its decision, the Court stated that immunity from the antitrust laws is not lightly implied, especially in view of Congress' failure to exempt the banking industry from the stock-acquisitions provision. While conceding that there may have been some uncertainty as to the scope of section 7 and that this may have been a contributing factor in the passage of the Bank Merger Act, the Court felt that it did "no violence to that design by dispelling the uncertainty."[36] In disposing of the argument that the Bank Merger Act repeals *pro tanto* the application of section 7 to the banking industry, the Court pointed out that there was no express immunity and that repeals by implication are disfavored and "have only been found in cases of plain

32. 374 U.S. 321, 342 (1963).
33. *Id.* at 343.
34. *Ibid.*
35. *Id.* at 346.
36. *Id.* at 349.

repugnancy between the antitrust and regulatory provisions."[37] "Although the Comptroller was required to consider effect upon competition in passing upon appellees' merger application, he was not required to give this factor any particular weight; he was not even required to (and did not) hold a hearing before approving the application; and there is no specific provision for judicial review of his decision."[38] The Court did not find the doctrine of "primary jurisdiction" applicable; that doctrine would not oust the Court's jurisdiction but merely postpone it, and in the instant case, the Comptroller's proceedings were completed before the antitrust action was commenced. "Furthermore, the considerations that militate against finding a repeal of the antitrust laws by implication from the existence of a regulatory scheme also argue persuasively against attenuating, by postponing, the Courts' jurisdiction to enforce those laws."[39] Therefore, section 7 of the Clayton Act was held to cover the mergers of the banks and the Court did not reach the further question of the alleged violation of section 1 of the Sherman Act.

Since section 7 applies to bank mergers an examination of the economic data must be undertaken to determine whether the merger is proscribed by section 7. The statutory test of a proposed merger under section 7 is whether the effect "in any line of commerce in any section of the country" may be substantially to lessen competition or to tend to create a monopoly. A merger is to be viewed functionally in the context of its particular market.[40] In examining an alleged violation of section 7, the court must initially determine the relevant market in order to ascertain whether the merger will substantially lessen competition within it.[41] The relevant market is composed of two components, a product or services market (line of commerce) and a geographic market (any section of the country). As to the former, the court should consider factors bearing on the cross-elasticity of demand between the service itself and those of substitutes for it.[42] The most characteristic product of commercial banks is the commercial loan and as to this trade credit is the only important substitute, although doubt has been expressed as to whether even this constitutes a significant substitute.[43] Various substitutes exist for many other com-

37. *Id.* at 351.
38. *Ibid.*
39. *Id.* at 354.
40. Brown Shoe Co. v. United States, 370 U.S. 294, 336 (1962).
41. United States v. E. I. Dupont de Nemours & Co., 353 U.S. 586, 593 (1957); see Mann & Lewyn, *The Relevant Market Under Section 7 of the Clayton Act: Two New Cases—Two Different Views*, 47 VA. L. REV. 1014, 1015 (1961).
42. Brown Shoe Co. v. United States, *supra* note 40, at 325.
43. "At best, however, even trade credit is a highly imperfect substitute for bank loans, and, under most conditions, does not constitute a competitive alternative source of supply." ALHADEFF, MONOPOLY AND COMPETITION IN BANKING 19 (1954).

mercial bank services,[44] these being provided by a diverse group of non-bank institutions.[45] However, these non-bank institutions may be derivatively dependent upon banks for credit.[46] In determining the geographic market, "Congress prescribed a pragmatic, factual approach . . . not a formal, legalistic one. The geographic market selected must, therefore, both 'correspond to the commercial realities' of the industry and be economically significant."[47] The committee report shows that Congress thought of relevant market as an effective area of competition rather than simply a recognized geographic section of the country.[48] The relevant market will vary according to the product under consideration.[49] After defining the relevant market, a court must determine the permissibility of foreclosing a portion of the market by a proposed merger. The tests for measuring legality under the Clayton Act are less stringent than those of the Sherman Act, but a "foreclosure of a *de minimis* share of the market will not tend 'substantially to lessen competition.' "[50] Nor did Congress "adopt a definition of the word 'substantially' . . . by which a merger's effects on competition were to be measured."[51] The tests under section 7 as amended "are intended to be similar to those which the courts have applied in interpreting the same language as used in other sections of the Clayton Act."[52] In *Standard Stations*,[53] a case under section 3 of the Clayton Act, the primary test for illegality was the market share foreclosure. This rule of "quantitative substantiality" says in essence that when a merger forecloses a substantial portion of the market, it is legitimate to infer a significant lessening of competition. This has been criticized[54] as an automatic test of illegality; a contrary view contends that

44. For example: loans (real estate, agricultural, consumer, etc.), issuance of letters of credit, securities transactions, rentals of safety deposit boxes, and trust services, to name but a few.

45. For example: savings and loan associations, insurance companies, government, consumer lending agencies, and private individuals.

46. See Klebaner, *Federal Control of Commercial Bank Mergers*, 37 IND. L.J. 287 (1962).

47. Brown Shoe Co. v. United States, *supra* note 40, at 336-37.

48. "What constitutes a section will vary with the nature of the product. Owing to the differences in the size and character of markets, it would be meaningless, from an economic point of view, to attempt to apply for all products a uniform definition of section, whether such a definition were based upon miles, population, income, or any other unit of measurement." S. REP. No. 1775, 81st Cong., 2d Sess. 5 (1950).

49. See Note, *Section 7 of the Clayton Act: A Legislative History*, 52 COLUM. L. REV. 766, 778 (1952).

50. Brown Shoe Co. v. United States, *supra* note 40, at 328-29.

51. *Id.* at 321.

52. H.R. REP. No. 1191, *supra* note 14, at 8.

53. Standard Oil Co. v. United States, 337 U.S. 293 (1949).

54. "Sometimes, the market share foreclosed may be so large as to support the necessary inference of substantially lessening of competitive opportunity. In others, different market factors may be equally significant in determining whether section 7 has been transgressed. In no merger case—horizontal, vertical or conglomerate—can a

"substantial" has two distinct meanings for antitrust purposes: (1) that it is an alternative to *de minimis* and signifies the fact that insubstantial restraints are ignored by antitrust laws and that substantial restraints are proscribed; (2) that "substantial" is not determined by whether the share goes somewhat beyond *de minimis*, but rather whether it has at least a demonstrable potentiality of significant anticompetitive effect.[55] If such an effect is found, further proof of the effect on competition is foreclosed by the inference that the forbidden slackening of competitive activity will necessarily follow.[56] The Third Circuit in *Transamerica Corp. v. Board of Governors*[57] vacated a Federal Reserve Board antimerger order on the basis that the Board had misapplied the relevant market test. By way of dictum the court added that the quantitative substantiality test of *Standard Stations* was inapplicable to section 7 and that the reasonable probability of a substantial lessening of competition "must appear from the circumstances of the particular case and be found as facts before the sanctions of the statute may be invoked. Evidence of mere size and participation in a substantial share of the line of business involved . . . is not enough."[58] In the recent *Tampa Electric Co. v. Nashville Coal Co.*[59] case arising under section 3, the Court implied that illegality would not be based solely on market foreclosure and that it would look beyond the inference from the foreclosure and examine the potential short-run and long-run effects on competition.[60] Since section 7 speaks in terms of the future effect of the merger, a history of concentration within the industry is a factor to be considered.[61]

The Court concluded from an examination of the economic factors that the proposed merger was unlawful under section 7. It determined that commercial banking was a distinct "line of commerce" which is " 'sufficiently inclusive to be meaningful in terms of trade realities.' "[62] This finding was predicated upon the distinctiveness of some services (checking accounts), the cost advantages of others (personal loans), and finally "a settled consumer preference"[63] for still others. With

'quantitative substantiality' rule substitute for the market tests section 7 prescribes." ATTORNEY GENERALS' NATIONAL COMMITTEE TO STUDY THE ANTITRUST LAWS 122 (1955).

55. Kessler & Stern, *Competition, Contract and Vertical Integration*, 69 YALE L.J. 1, 30-31 (1959).

56. Raskind, *Trade Regulation—1961 Tennessee Survey (II)*, 15 VAND. L. REV. 965, 969 (1962).

57. 206 F.2d 163 (3d Cir.), *cert. denied*, 346 U.S. 901 (1953).

58. *Id.* at 170.

59. 365 U.S. 320 (1961).

60. See 15 VAND. L. REV. 617 (1962).

61. Brown Shoe Co. v. United States, *supra* note 40, at 332.

62. 374 U.S. at 357, quoting from Crown Zellerbach Corp. v. Federal Trade Comm'n, 296 F.2d 800, 811 (9th Cir. 1961).

63. 374 U.S. at 357.

regard to the relevant geographic market, the Court recognized that the size of the borrower may determine where he does his banking business, the large borrower perhaps finding it practical to bank outside his home community, the very small borrower possibly confined to his immediate neighborhood. Defining the geographic market to take into account only the largest borrowers would resnlt in a market so expansive that the effect of the merger upon competition would be insignificant, while considering only smallest borrowers would result in placing appellees in a different market. Therefore, the four county area "in which bank customers that are neither very large nor very small find it practical to do their banking business, is a more appropriate 'section of the country' in which to appraise the instant merger than any larger or smaller or different area."[64] The Court said the proper question "is not where the parties to the merger do business or even where they compete, but where, within the area of competitive overlap, the effect of the merger on competition will be direct and immediate."[65] After so defining the relevant market, the Court turned to the question of whether the proposed merger would result in a "substantial lessening of competition." In response to this, it said:

> [W]e think that a merger which produces a firm controlling an undue percentage share of the relevant market, and results in a significant increase in the concentration of firms in that market, is so inherently likely to lessen competition substantially that it must be enjoined in the absence of evidence clearly showing that the merger is not likely to have such anticompetitive effects.[66]

Since the resulting bank would control at least thirty per cent of the bank assets of the area the Court found this to be an undue threat to competition. The appellees proposed three affirmative justifications for the merger: that only through merger could the banks follow their customers to the suburbs; that the increased lending limit of the resulting bank will enable it to compete with large out-of-town banks (countervailing power argument);[67] and that Philadelphia needed a larger bank to bring business and stimulate its economic development. Each of these propositions was examined by the Court and rejected. It was noted that there had been a strong trend toward mergers in the area, the Court stating in this regard: "A fundamental purpose of amending § 7 was to arrest the trend toward concentration, the *tendency* to monopoly, before the consumer's alternatives disappeared through merger, and that purpose would be ill-served if the law stayed

64. *Id.* at 361.
65. *Id.* at 357.
66. *Id.* at 363.
67. See generally GALBRAITH, AMERICAN CAPITALISM (1952).

its hand until 10, or 20, or 30 more Philadelphia banks were absorbed."[68]

In determining whether a proposed merger violates section 7, it would seem that the Court must consider the market consequences in terms of structure and performance within the context of the particular industry. The assets of a commercial bank are largely generated by loans to and deposits of both large and small customers, who are not necessarily within the same geographic market for banking services. As the Court recognized, the largest of those depositors function within a national, even an international market; the smaller depositors seek loans and banking services within the city in which they reside. It would therefore appear that merely to determine the total assets of the proposed merger and predicate a resulting economic effect upon this total would not necessarily be an adequate reflection of the degree of market foreclosure. A determination of the character of the depositors according to size might be preferable. Then the assets considered in determining the degree of market foreclosure could be limited to those generated by customers who are in fact in the geographic market. It is conceivable that two banks in the practice of catering to the larger customer could merge and the resulting percentage of the total commercial bank assets might be substantial. However, if their customers in fact functioned within a national market, there would seem to be no substantial lessening of competition within the community. Merely looking to the total asset concentration that would result from a proposed merger of commercial banks is not itself a complete guide for antitrust purposes, even if the character of the demand deposits is considered. In determining competition in banking, alternative sources of supply are important,[69] and as to the smaller customers, the number of banks in a community may measure alternative sources.[70] In the instant case, there would have been forty-one banks remaining in the Philadelphia area if the merger had been consummated. If the relevant geographic market is defined as the metropolitan area, perhaps the decline in the number of banks would be material. Since the Court is extending section 7 to a regulated industry such as banking, the tests designed to reflect the actual anticompetitive effects must take into consideration the particular character and relevant market in the context of its regulation. Section 7's test of illegality is a modified quantitative substantiality doctrine. This is derived from the Court's principal reliance upon market share foreclosure, and although the majority does not specify the smallest market share it would consider as a threat of

68. 374 U.S. at 367.
69. ALHADEFF, *op. cit. supra* note 43, at 21.
70. *Ibid.*

undue concentration, they held it "clear that 30% presents that threat."[71] However, the Court's examination of the appellee's affirmative justifications suggests that the quantitative share has been modified to a standard in the nature of a rebuttable presumption and that the Court is willing to consider arguments justifying the lessening of competition. The case's significance lies in the Court's application of section 7 to mergers of corporations not subject to the jurisdiction of the Federal Trade Commission. Justification for this appears tenuous, for at the time of the passage of amended section 7 judicial decisions had rendered the stock-acquisitions clause powerless to bar mergers. The addition of an assets-acquisition provision which excluded from its operation industries not subject to the jurisdiction of the FTC does not seem to manifest an intent on the part of Congress to subject such industries to the application of section 7 with respect to mergers. As the Court points out, although " '[T]he views of a subsequent Congress form a hazardous basis for inferring the intent of an earlier one,' "[72] the legislative history of the Bank Merger Act indicates an intent on the part of Congress to treat the banking industry under a different standard than that embodied in section 7. In substance, this opinion requires the Comptroller to consider the anticompetitive consequences of a proposed merger within the context of section 7; if he approves such a merger having anticompetitive effects sufficient to otherwise be proscribed by section 7, he must justify his approval by considerations of solvency, stability, or monetary policy. However, the effect is to give the courts the ultimate determination of whether the merger meets the "public interest" criterion of the Bank Merger Act. There is a body of opinion contending that congressional preference for the competitive mode should not be conclusive in banking, for as expressed by Professor Berle:

> Operations in deposit banking not only affect the commercial field, but also determine in great measure the supply of credit, the volume of money, the value of the dollar, and even, perhaps, the stability of the currency system. Within this area considerations differing from and far more powerful than mere preservation of competition may be operating under direct sanction of law . . . . A bank failure is a community disaster, however, wherever, and whenever it occurs. While competition may be desirable up to a point in deposit banking, there is a clear bottom limit to its desirability.[73]

In view of the interest in a stable banking system, perhaps the bank regulatory authorities should be permitted to weigh the effects of a merger in relation to the banking system as a whole and to predicate

71. 374 U.S. 321, 364 (1963).

72. *Id.* at 348-49, quoting from United States v. Price, 361 U.S. 304, 313 (1960).

73. Berle, *Banking Under the Anti-trust Laws,* 49 COLUM. L. REV. 589, 592 (1949); see Funk, *Antitrust Legislation Affecting Bank Mergers,* 12 BUS. LAW. 496, 505 (1957).

decisions upon considerations of a national monetary policy rather than being limited by antitrust definitions of "substantial lessening of competition." This seems especially true in view of the fact that Congress has repeatedly refused to make section 7 considerations determinative of whether a bank merger is in the "public interest" and therefore to be permitted. Also, it is doubtful whether the courts are the optimum forum for reconciling the interest in competition with the often countervailing interests of stability and solvency.

Constitutional Law—Appointment of Counsel for Indigent Defendants in State Criminal Trials

Defendant, charged with the felony[1] of breaking and entering with intent to commit a misdemeanor, appeared in a state court without funds to employ a lawyer. His request that counsel be appointed to assist him was denied on the ground that the state statute[2] provided for appointment of counsel only in "capital cases where the defendant is insolvent . . . ." Defendant conducted his own defense during the trial and was found guilty by a jury. A habeas corpus petition, alleging that the trial court's refusal to appoint counsel for him was a denial of his constitutional rights, was presented to the Florida Supreme Court and was denied without opinion.[3] On certiorari in the Supreme Court of the United States, *held*, reversed. An indigent defendant in a non-capital state criminal prosecution has the right to appointed counsel as a requisite of due process of law under the fourteenth amendment. *Gideon v. Wainwright*, 372 U.S. 335 (1963).

At common law in England an accused had the right to employ counsel in misdemeanor cases, but not in trials for felony.[4] Even before the Revolution, American courts were generally more liberal than the English, and permitted counsel to assume an increasingly greater role in criminal defense; but as late as 1800 only two states provided lawyers for indigent defendants, and the right to counsel in other states meant only the right to be represented at trial at one's own expense.[5] In *Powell v. Alabama*[6] the Supreme Court held that the right

1. FLA. STAT. ANN. § 810.05 (1944).
2. FLA. STAT. ANN. § 909.21 (Supp. 1962).
3. 135 So. 2d 746 (Fla. 1961).
4. BEANEY, THE RIGHT TO COUNSEL IN AMERICAN COURTS 8-9 (1955).
5. *Id.* at 21.
6. 287 U.S. 45 (1932).

to appointed counsel in certain capital cases[7] in state courts is a "fundamental" right embraced within the due process clause of the fourteenth amendment, and is therefore essential to a valid conviction. *Hamilton v. Alabama*[8] held this to be an unqualified right in every capital case.[9] In 1938 the sixth amendment's guarantee of counsel[10] in federal courts was placed on a jurisdictional basis in the case of *Johnson v. Zerbst*;[11] that case was the first to construe the sixth amendment as having the effect of depriving a federal court of jurisdiction if counsel were not appointed for an indigent defendant.[12] In the noncapital case of *Betts v. Brady*[13] the Court considered "whether due process of law demands that in every criminal case, whatever the circumstances, a State must furnish counsel to an indigent defendant."[14] A divided Court held that the particular circumstances of each case must be considered to determine whether, upon an appraisal of all the facts, the refusal of counsel was "offensive to the common and fundamental ideas of fairness and right . . . ."[15] Subsequent right-to-counsel cases were judged by this standard,[16] and "special circumstances" were found with such increasing regularity[17] that Mr. Justice Black was prompted to comment in one case that "twenty years' experience in the state and federal courts with the *Betts v. Brady* rule has demonstrated its basic failure as a constitutional guide. Indeed, it has served not to guide but to confuse

7. "All that it is necessary now to decide, as we do decide, is that in a capital case, where the defendant is unable to employ counsel, and is incapable adequately of making his own defense because of ignorance, feeble mindedness, illiteracy, or the like, it is the duty of the court, whether requested or not, to assign counsel for him as a necessary requisite of due process of law . . . ." *Id.* at 71.

8. 368 U.S. 52 (1961).

9. "When one pleads to a capital charge without benefit of counsel, we do not stop to determine whether prejudice resulted." *Id.* at 55.

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

11. 304 U.S. 458 (1938).

12. "Since the Sixth Amendment constitutionally entitles one charged with crime to the assistance of counsel, compliance with this constitutional mandate is an essential jurisdictional prerequisite to a federal court's authority to deprive an accused of his life or liberty. When this right is properly waived, the assistance of counsel is no longer a necessary element of the court's jurisdiction to proceed to conviction and sentence." *Id.* at 467-68.

13. 316 U.S. 455 (1942).

14. *Id.* at 464.

15. *Id.* at 473.

16. See, *e.g.*, Carnley v. Cochran, 369 U.S. 506 (1962); Pennsylvania *ex rel.* Herman v. Claudy, 350 U.S. 116 (1956); Chandler v. Fretag, 348 U.S. 3 (1954); Palmer v. Ashe, 342 U.S. 134 (1951); Gibbs v. Burke, 337 U.S. 773 (1949); Uveges v. Pennsylvania, 335 U.S. 437 (1948); Bute v. Illinois, 333 U.S. 640 (1948).

17. "In noncapital cases, the 'special circumstances' rule has continued to exist in form while its substance has been substantially and steadily eroded. In the first decade after *Betts*, there were cases in which the Court found special circumstances to be lacking, but usually by a sharply divided vote. However, no such decision has been cited to us, and I have found none, after . . . 1950." Gideon v. Wainwright, 372 U.S. 335, 350-51 (1963) (Harlan, J., concurring). (Footnote omitted.)

the courts as to when a person prosecuted by a State for crime is entitled to a lawyer."[18]

In the principal case a unanimous Court specifically overruled *Betts v. Brady*, explaining that that case had "departed from the sound wisdom upon which the Court's holding in *Powell v. Alabama* rested."[19] Using the *Powell* decision as the basis for its reasoning,[20] the Court held that the sixth amendment's guarantee of counsel is one of the fundamental rights which are esssential to a fair trial under the fourteenth amendment. However, Mr. Justice Black's majority opinion did not specify that all of the provisions of the sixth amendment were made obligatory upon the states through the fourteenth amendment, as he has recently urged in a concurring opinion in *Carnley v. Cochran*,[21] and as Mr. Justice Douglas advocated in his separate opinion in the principal case. Mr. Justice Clark, concurring in the result, noted that *Gideon* simply abolished the rule that classified the need for appointed counsel according to whether the accused was charged with a capital or a noncapital crime. A separate concurring opinion by Mr. Justice Harlan expressed the view that the "special circumstances" rule of *Betts v. Brady* had been eroded over the years, yet was entitled to a more respectful burial as a part of the evolution of cases interpreting the due process clause. In conclusion he added, "In what is done today I do not understand the Court to . . . embrace the concept that the Fourteenth Amendment 'incorporates' the Sixth Amendment as such."[22]

In the instant case the Court formally abandoned the concept that the need for an attorney's assistance, and consequently the right to appointed counsel for indigent defendants, can be ascertained on the basis of a distinction between capital and noncapital crimes. However, the extent of this right was purposely left undefined. It is submitted that the need for legal representation[23] is not necessarily lessened by virtue of the fact that an accused is charged with a misdemeanor rather than a felony, or a crime that carries a short prison sentence instead of a lengthy one. As was observed in *Betts v. Brady*, if charges of

18. Carnley v. Cochran, 369 U.S. 506, 518 (1962) (concurring opinion).

19. Gideon v. Wainwright, 372 U.S. 335, 345 (1963).

20. "While the Court at the close of its *Powell* opinion did by its language, as this Court frequently does, limit its holding to the particular facts and circumstances of that case, its conclusions about the fundamental nature of the right to counsel are unmistakable." *Id.* at 343.

21. *Supra* note 18.

22. 372 U.S. at 352.

23. A survey found that approximately 30% to 60% of defendants appearing in criminal courts are without funds to employ an attorney. SPECIAL COMMITTEE OF THE ASS'N OF THE BAR OF THE CITY OF NEW YORK & THE NATIONAL LEGAL AID & DEFENDER ASS'N, EQUAL JUSTICE FOR THE ACCUSED 80 (1959) [hereinafter cited as EQUAL JUSTICE].

small crimes and capital offenses equally require a lawyer's assistance, the right-to-counsel argument might apply with equal force even in traffic courts and civil cases,[24] as well as at arraignment, habeas corpus hearings, and upon appeal. It is unlikely, however, that the right to appointed counsel will be extended to every conceivable offense. Later refinements of the *Gideon* holding may therefore delineate a practical rule that would require the appointment of attorneys for indigent accused only for certain serious offenses and their related hearings and appeals, such as felonies, certain misdemeanors, or, as Mr. Justice Harlan noted in his concurring opinion in the principal case, crimes which "carry the possibility of a substantial prison sentence."[25] Nevertheless, a precise rule that will afford equal justice in every instance will be difficult to formulate, and it has been suggested that a comprehensive standard may also have to depend upon an evaluation of facts and circumstances, in the manner in which the now-abandoned "special circumstances" rule of *Betts v. Brady* was applied to more serious crimes.[26] It is also likely that *Gideon* will encourage reconsideration of the methods by which lawyers are selected to defend the indigent, with a view toward improving the quality of representation and the provisions for compensating assigned counsel.[27]

Constitutional Law—Civil Rights—State Action—Effect of Standard Urban Redevelopment Land Use Covenant

Defendants own and operate a motel in an urban redevelopment project financed jointly by federal, state, and local governmental agencies and developed by the Nashville Housing Authority. The land on which the motel stands was conveyed to defendants by warranty deed,[1] subject to certain recorded covenants running with the land.

24. "[A]s the Fourteenth Amendment extends the protection of due process to property as well as to life and liberty . . . logic would require the furnishing of counsel in civil cases involving property." 316 U.S. at 473.

25. 372 U.S. at 351.

26. Kamisar, *Betts v. Brady Twenty Years Later: The Right to Counsel and Due Process Values*, 61 MICH. L. REV. 219, 260-72 (1962).

27. For an evaluation of the various systems used for the appointment of counsel for the indigent accused, see EQUAL JUSTICE; Note, *The Representation of Indigent Criminal Defendants in the Federal District Courts*, 76 HARV. L. REV. 579 (1963).

1. This was a standard-form warranty deed. Deeds of this type are used whenever land which has been redeveloped partially with federal funds is sold. This fact brings within the scope of this holding vast properties located in jointly financed urban redevelopment projects across the United States.

By these covenants, the deed, and the contract of sale, the Housing Authority retains a measure of control over the use of the property. All uses, constructions, alterations, or changes of the property are subject to the approval of the Authority, and the Authority retains the right to sue for injunctive relief as well as for damages in the event the covenants should be broken. Plaintiff, a Negro, requested and was denied accommodations at the motel because of his race. He brought a class action in the United States District Court for the Middle District of Tennessee for declaratory judgment to restrain defendant from continuing these discriminatory practices, alleging them to be in violation of the fifth amendment and the equal protection clause of the fourteenth amendment to the Constitution of the United States. Defendants contended that the discriminatory practices described by plaintiff constituted private action, and that all governmental involvement had ended with the execution of the warranty deed. *Held*, judgment for plaintiff. The equal protection clause prohibits racial discrimination by a privately-owned business enterprise situated on land in an urban redevelopment project, subject to standard urban redevelopment land use covenants. *Smith v. Holiday Inns of America, Inc.*, 220 F. Supp. 1 (M.D. Tenn. 1963).

The Supreme Court established in the *Civil Rights Cases*[2] the doctrine that the equal protection clause of the fourteenth amendment protects the individual only against that discriminatory action which can properly be called state action. This "state action" doctrine was later defined by the Court to include the acts of state agencies[3] at any level of the state government,[4] as well as the acts of an executive officer of the state,[5] even when the officer acts in violation of a state statute.[6] The acts of private groups have been found to constitute state action when the private group assumes or is clothed with a measure of governmental authority,[7] or when the group acts under powers granted by the state.[8] State action has also been found when

2. 109 U.S. 3 (1883). A single opinion by the Court announced the decision in five separate cases testing the constitutionality of the Civil Rights Act of 1875 (Act of March 1, 1875, 18 Stat. 335), which in part prohibited racial discrimination on public conveyances and in inns, theaters, and other places of public amusement.

3. Virginia v. Rives, 100 U.S. 313 (1879).

4. Carter v. Texas, 177 U.S. 442 (1900).

5. *Ex parte* Young, 209 U.S. 123 (1908).

6. Monroe v. Pape, 365 U.S. 167 (1961); Screws v. United States, 325 U.S. 91 (1945); United States v. Classic, 313 U.S. 299 (1941); Williams, *The Twilight of State Action*, 41 TEX. L. REV. 347, 352-55 (1963).

7. Thus state action was found when officials of a company-owned-and-operated municipality failed to guarantee the religious liberties of its citizens. Marsh v. Alabama, 326 U.S. 501 (1946).

8. State action was found in the acts of a political party, acting under authority granted by the state, in conducting a primary election in a discriminatory manner. Smith v. Allwright, 321 U.S. 649 (1944). Even when the state discontinues all participa-

the government by its inactivity permits private individuals to deprive other citizens of their constitutionally guaranteed liberties.[9] In *Shelley v. Kraemer*[10] the Court held that although private individuals could enter into agreements containing racially discriminative covenants, any attempt by the state judiciary to enforce these covenants by granting injunctive relief would constitute state action. A similar result was later reached with respect to the awarding of damages by a state court.[11] The Court held in *Burton v. Wilmington Parking Authority*[12] that when a private party leases government property and conducts business activities thereon in a discriminatory manner, his acts constitute state action because the state still maintains a significant involvement in the enterprise.[13]

The court in the instant case applied the test for state action[14] which was established by the Supreme Court in *Burton*. This test involves the sifting and weighing of relevant facts to ascertain the true significance of the state's involvement in the private conduct. Private acts would constitute state action, according to this test, if the state is found to be involved in the enterprise to a "significant extent."[15] Considering the facts in the instant case—the state's right of approval of the use and alteration of the land or buildings constructed thereon,

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tion in political parties and primaries and exercises no control whatsoever, federal courts have still declared the acts of the parties to be state action because political parties have become in effect state institutions. Baskin v. Brown, 174 F.2d 391 (4th Cir. 1949); Rice v. Elmore, 165 F.2d 387 (4th Cir. 1947), *cert. denied*, 333 U.S. 875 (1948). Many devices have been employed to attempt to separate the private political organization from the state. The Court has nonetheless looked at the results and held that when primary victory is tantamount to election the party or group acts as the state no matter how far removed from state control it may be. Terry v. Adams, 345 U.S. 461 (1953).

9. Smith v. Illinois Bell Tel. Co., 270 U.S. 587 (1926). State action was found when the local sheriff failed to grant protection to a Jehovah's Wituess group meeting within his jurisdiction, thus allowing private citizens to deprive them of their constitutional right to gather and worship. Catlette v. United States, 132 F.2d 902 (4th Cir. 1943). This "state inaction" theory has, however, been rejected by a majority of federal courts. See 21 LA. L. REV. 433, 447 (1961).

10. 334 U.S. 1 (1948).

11. Barrows v. Jackson, 346 U.S. 249 (1953).

12. 365 U.S. 715 (1961).

13. Whether the lease is a good faith agreement, as in *Burton*, or one created for the express purpose of avoiding the enforced cessation of discriminatory practices, as in Lawrence v. Hancock, 76 F. Supp. 1004 (S.D.W. Va. 1948), is not the primary consideration. The controlling factor seems to be the substantial interest in the property retained by the municipality.

14. 220 F. Supp. at 7-8.

15. "[P]rivate conduct abridging individual rights does no violence to the Equal Protection Clause unless to some significant extent the State in any of its manifestations has been found to have become involved in it. . . . [T]o fashion and apply a precise formula for recognition of state responsibility under the Equal Protection Clause is an 'impossible task' which 'this Court has never attempted.' *Kotch v. Pilot Comm'rs*, 330 U.S. 552, 556. Only by sifting facts and weighing circumstances can the nonobvious involvement of the State in private conduct be attributed its true significance." Burton v. Wilmington Parking Authority, 365 U.S. 715, 722 (1961).

and the over-all public purpose of the project[16]—and applying this test to them, the court reached the conclusion that it could not be realistically denied that the state had retained a significant interest and involvement in the motel.[17] The court dismissed the fact that *Burton* dealt with a lease while the instant case concerns the sale of property, declaring the difference between the two to be "more technical than real"[18] and restating that the crucial issue is not the form of the transaction but rather the presence of significant state involvement.

The court in the instant case, while purporting to follow the spirit of *Burton*, may have overextended the principle of that case. *Burton* did set up a test, albeit not a standard, for courts to employ in ascertaining the presence of state action in other situations. But by its own application of the test, the Court in *Burton* also demonstrated by example the type of factual situation which constitutes a "significant involvement." In *Burton* the building which housed the discriminatorily operated enterprise was built with public funds, owned by the city, and used primarily for a public purpose. Public funds were used for its upkeep and maintenance.[19] The restaurant located therein was considered an integral part of the public service. Considering all of these facts the Court found the state to be a "joint participant" in the challenged activity.[20] None of these significant factors were present in the instant case. The motel was privately financed, owned, and operated, and was maintained on private property. The only public purpose manifested in the project is the city's desire to keep

16. "So completely are the private owners in the Capitol Hill Redevelopment Project burdened with governmental restrictions and controls that not even the slightest change can be made in the use of their properties without the prior approval of a public agency. Nor without similar public approval can alterations or improvements of any kind be made in any buildings or structures located upon such properties." 220 F. Supp. at 8.

In addition to this element of control retained over future use and enjoyment of the property, the court empbasized the fact that the net project cost is estimated to be $7,810,768, of which two-thirds, or $5,207,179, will be provided in grants from the federal government; the remaining one-third, or $2,603,589, is to come from state and local governments; income from the sale of the land will cover little over one-third of the gross cost. *Id.* at 4. The government thus helped to establish these private enterprises at a cost to the taxpayer of almost eight million dollars.

17. "[State involvement is evident] not only in the conception formulation, development, and carrying out of the overall public plan and project, but also in its continuation and perpetuation." *Id.* at 8.

18. *Ibid.*

19. "Upkeep and maintenance of the building, including necessary repairs, were responsibilities of the [Wilmington Parking] Authority and were payable out of public funds." 365 U.S. at 724.

20. "Specifically defining the limits of our inquiry, what we hold today is that when a State leases public property in the manner and for the purpose shown to have been the case here, the proscription of the Fourteenth Amendment must be complied with by the lessee as certainly as though they were binding covenants written into the agreement itself." *Id.* at 726.

the area physically attractive and free from undesirable enterprises. For this purpose the city retained some control over the land through the restrictive covenants. To hold that the result in *Burton* requires the result reached in the instant case is to extend the *Burton* test well beyond the facts to which it was there applied.[21] The wisdom of this extension is at least doubtful, considering the applicability of the reasoning in this decision to discriminatory practices within other private enterprises conducted on property redeveloped partially with federal funds and conveyed by similar warranty deed.

Constitutional Law—Free Exercise of Religion—Denial of Unemployment Compensation to Seventh-Day Adventist

Petitioner, a Seventh-Day Adventist, had been dismissed by her employer for her refusal to work on Saturdays as required by new work rules.[1] She subsequently refused to accept employment at other mills which required Saturday work on the ground that it was contrary to her religious beliefs to work on Saturday.[2] In accordance with the relevant South Carolina law petitioner filed a claim for unemployment compensation benefits with the South Carolina Employment Security Commission.[3] The Commission denied petitioner's claim, ruling that she did not meet the statutory requirements that an applicant must (1) be available for work and (2) accept suitable work when offered, unless having good cause to refuse.[4] Petitioner commenced an action

21. This is still not as much of an extension as Justice Douglas suggests in his concurring opinion in Lombard v. Louisiana, 373 U.S. 267 (1963), where he suggests that any time a state licenses a business it has sufficient interest and activity with the business to cause it to be state action when the business is conducted discriminatorily. "State licensing and surveillance of a business serving the public also brings its service into the public domain." *Id.* at 282.

1. She had been employed for thirty-five years by Spartan Mills, a textile firm. During this time Saturday work had been a voluntary matter left to the discretion of the individual employees. Sherbert v. Verner, 240 S.C. 286, 125 S.E.2d 737 (1962).

2. Petitioner could find no other suitable work which did not require Saturday work. Out of 150 Seventh-Day Adventists in the area only petitioner and one other were unable to find suitable employment not requiring Saturday work. Sherbert v. Verner, 374 U.S. 398 (1963).

3. S.C. Code §§ 68-113, -114 (1952).

4. Sherbert v. Verner, *supra* note 1. Section 68-113 makes one eligible for benefits only if he is available for work. Section 68-114 disqualifies any applicant who fails, without good cause, to accept suitable work. Thus the statute imposes a double requirement, one of eligibility, and one of qualification. South Carolina found petitioner failing in both requirements.

seeking judicial review of the Commission's ruling. The trial court dismissed the action and the Supreme Court of South Carolina affirmed.[5] On certiorari in the Supreme Court of the United States, *held*, reversed. A state court's denial of unemployment compensation benefits on the ground that refusal because of a religious conviction to accept a job entailing Saturday work is a failure without good cause to accept suitable work denies the applicant his constitutional right to the free exercise of his religious beliefs under the first amendment as applicable through the fourteenth amendment.[6] *Sherbert v. Verner*, 374 U.S. 398 (1963).

The unemployment compensation laws of all fifty states have provisions requiring (1) that a claimant must be available for work before becoming eligible for unemployment benefits and (2) that a claimant must accept suitable work when offered or become disqualified from receiving benefits.[7] While it is conceivable that a person might satisfy one provision and fail to fulfill the other, in most cases it is found either that both requirements were met, or that neither was met.[8] Generally a person is available for work if he is physically able and is willing to accept suitable work which he does not have good cause to refuse.[9] The question of what work is suitable is generally determined by a consideration of the reasonableness of the work in the light of the claimant's past experience and his present situation.[10] The close rela-

5. Sherbert v. Verner, *supra* note 1.

6. U.S. CONST. amend. I. "Congress sball make no law respecting an establishment of religion, or prohibiting the free exercise thereof. . . ." While Justice Brennan spoke of the state statutory grounds in terms of the provisions of S.C. CODE § 68-114 (accepting of suitable work), the South Carolina Supreme Court applied the provisions of S.C. CODE § 68-113 (requiring a person to be available for work) as well.

7. ALTMAN, AVAILABILITY FOR WORK 74 (1950). For a list of the availability provisions in each state code, see *id.* at 264-82. See Sanders, *Disqualification for Unemployment Insurance*, 8 VAND. L. REV. 307 (1955), for a discussion of the acceptance-of-suitable-work doctrine. See Williams, *Eligibility for Benefits*, 8 VAND. L. REV. 286 (1955), for a discussion of the available-for-work doctrine. See also Freeman, *Able To Work and Available for Work*, 55 YALE L.J. 123 (1945); Comment, 4 VAND. L. REV. 206 (1950).

8. The distinction between the two requirements is made in Krauss v. Karagheusian, Inc., 13 N.J. 447, 100 A.2d 277 (1953).

9. Williams, *supra* note 7, at 290.

10. Sanders, *supra* note 7, at 325-33, gives a complete list of the relevant factors in determining the suitability of work. The following are some illustrative cases of what courts consider to be suitable or unsuitable accommodations to the statutory requirements: Work is suitable if it is identical with the claimant's previous type of employment, Sweeney v. Unemployment Compensation Bd. of Review, 177 Pa. Super. 243, 110 A.2d 843 (1955), or if the plaintiff is capable of performing the work, Hess Bros. v. Unemployment Compensation Bd. of Review, 174 Pa. Super. 115, 100 A.2d 120 (1953). However, even part time work, to be suitable, must be similar to previous employment conditions. Texas Employment Comm'n v. Hays, 353 S.W.2d 924 (Tex. Civ. App. 1962). The claimant must be willing to work an average work week. Unemployment Compensation Comm'n v. Tomko, 192 Va. 463, 65 S.E.2d 524 (1951). He cannot refuse to work solely because of personal hardship. Mills v. South Carolina Unemploy-

tionship between the two requirements of availability for and acceptance of suitable work is evidenced by the fact that the other state courts which have considered the issue have largely failed to distinguish the two requirements.[11] The highest courts of Michigan, North Carolina, and Ohio have decided the question of whether a religious conviction against working on Saturday is "good cause" for refusal to accept employment within the meaning of their unemployment compensation statutes; they have uniformly held that a person refusing work because of such religious conviction is "available for work" and has not refused to "accept suitable work" within the meaning of the applicable statute.[12] Each of these state courts based its decision on a

ment Compensation Comm'n, 204 S.C. 37, 28 S.E.2d 535 (1944) (claimant unable to work third shift because of lack of babysitter for her four children).

In each instance if a person has either left his employment, or refused to accept available employment, the courts will determine if good cause for his action exists. Marriage is good cause for leaving employment. Shaw v. Lubin, 6 App. Div. 2d 354, 177 N.Y.S.2d 1 (1958). Refusal to take a loyalty oath is sufficient. Syrek v. California Unemployment Ins. Appeals Bd., 54 Cal. 2d 519, 354 P.2d 625 (1960). The following were found to be insufficient reasons for claims to be allowed: Inability to work a rotating shift because of college studies. Douty v. Unemployment Compensation Bd. of Review, 194 Pa. Super. 220, 166 A.2d 65 (1960). Claimant's failure to cross hostile picket lines. Deere Mfg. Co. v. Iowa Employment Security Comm'n, 249 Iowa 1066, 90 N.W.2d 750 (1958). Workers laid off because of labor dispute. Adamski v. State of Ohio, Bureau of Unemployment Compensation, 108 Ohio App. 198, 161 N.E.2d 907 (1959).

11. It is interesting to note that the several opinions by the United States Supreme Court in *Sherbert* failed to clearly distinguish the two statutory bases for compensation. This may be due in part to the fact that the Court was not interested in an interpretation of the statute, but was concerned with the effect of denying benefits to someone in petitioner's position.

12. Swenson v. Michigan Employment Security Comm'n, 340 Mich. 430, 65 N.W. 2d 907 (1954); *In re* Miller, 243 N.C. 509, 91 S.E.2d 241 (1956); Tary v. Board of Review, Bureau of Unemployment Compensation, 161 Ohio St. 251, 119 N.E.2d 56 (1954). The *Tary* case clearly sets forth Ohio's position on the issue, and the Ohio court cleared up any doubt by distinguishing Kut v. Albers Super Mkts., Inc., 146 Ohio St. 522, 66 N.E.2d 643 (1946), one of the cases relied upon by the South Carolina Supreme Court. 161 Ohio St. at 257, 119 N.E.2d at 59. The following state unemployment commissions similarly have said that persons refusing to work on their Sabbath are not ineligible for benefits: Arizona, California, Colorado, Connecticut, Idaho, Illinois, Kansas, Maryland, Michigan, New York, Pennsylvania, Tennessee, Virginia, Washington, and the District of Columbia. Sherbert v. Verner, *supra* note 1, at 310, 125 S.E.2d at 749 (Bussey, J., dissenting). Judge Bussey gives as a reference for such information the Benefits Series Service, a publication of the Department of Labor. *Ibid.* The South Carolina Supreme Court felt that the legislature did not intend for persons in petitioner's position to receive benefits. 240 S.C. at 293, 125 S.E.2d at 740. This interpretation has been criticized as being too narrow. 76 HARV. L. REV. 854 (1963). *Contra*, 14 S.C.L.Q. 567 (1962). See also 111 U. PA. L. REV. 253 (1962). Many cases have dealt with the problem of whether the claimant had good cause for quitting work, and was thus available for work. *E.g.*, Kut v. Burcau of Unemployment Compensation, 329 U.S. 669, *rehearing denied*, 329 U.S. 827 (1946); Gatewood v. Iowa Iron & Metal Co., 251 Iowa 639, 102 N.W.2d 146 (1960); Kut v. Albers Super Mkts., Inc., *supra*; Sun Shipbuilding & Dry Dock Co. v. Unemployment Compensation Bd. of Review, 358 Pa. 224, 56 A.2d 254 (1948); Stone Mfg. Co. v. South Carolina Employment Security Comm'n, 219 S.C. 239, 64 S.E.2d 644 (1951); Mills v. South Carolina Unemployment Compen-

construction of the particular statute involved, an adequate state ground, making it unnecessary to reach any constitutional issue. That all the states, other than South Carolina, which have been presented with the issue of whether a religious belief was "good cause" within the meaning of the unemployment compensation statutes have reached the same result may bear on the constitutional issue in that the result emphasizes the strong individual interest at stake, while indicating no strong state interest to the contrary. The central inquiry in these cases seems to be the reasonableness of the restrictions which the claimant himself places upon his availability, and the reasonableness of claimant's refusal to work at a particular type job when it is offered.

The Supreme Court has never before been presented with the precise issue of the instant case. However, since 1947 the Court has been confronted with numerous cases involving first amendment[13] questions of religious freedom and the relationship of church and state.[14] The controlling principle has been stated to be one of required governmental neutrality in matters of religion—that is, the government must refrain from handicapping or favoring religious beliefs or practices as such. On the same day the instant case was decided, the Court handed down its decision in the *Schempp* case,[15] holding on the basis of the establishment clause that a government which is neutral cannot

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sation Comm'n, *supra* note 10; Unemployment Compensation Comm'n v. Tomko, *supra* note 10.

13. The fourteenth amendment makes applicable to the states the free exercise clause of the first amendment and thus prohibits any state from obstructing any person's free exercise of his religious beliefs. Cantwell v. Connecticut, 310 U.S. 296 (1940). Although it is clear that the fourteenth amendment applies the requirements of the first amendment to the states, the Court and particularly Mr. Justice Black have been criticized on this point. BRADY, CONFUSION TWICE CONFOUNDED 171 (2d ed. 1955).

It has been said that the first amendment reflects the philosophy that church and state must be separate. Zorach v. Clauson, 343 U.S. 306 (1952); Illinois *ex rel.* McCollum v. Board of Educ., 333 U.S. 203 (1948); Everson v. Board of Educ., 330 U.S. 1 (1947); Reynolds v. United States, 98 U.S. 145 (1878). The *Everson* and *McCollum* decisions are criticized in BRADY, *op. cit. supra*, at 184-92.

For a discussion of cases dealing with separation of church and state, see Kurland, *Of Church and State and the Supreme Court*, 29 U. CHI. L. REV. 1 (1961); Paulsen, *State Constitutions, State Courts and First Amendment Freedoms*, 4 VAND. L. REV. 620, 635 (1951).

14. The cases since World War II dealing with religious freedom are too numerous and far-reaching to be covered in this comment. Those cases dealing with the establishment clause have been treated in 16 VAND. L. REV. 205 (1962). In the landmark case of Everson v. Board of Educ., *supra* note 13, the Court upheld a state statute authorizing reimbursement to parents for money expended for transportation to parochial schools. Recently in Engel v. Vitale, 370 U.S. 421 (1962), a New York school practice of compulsory prayer recitation at the beginning of each school day was held unconstitutional. This was followed by Abington School Dist. v. Schempp, 374 U.S. 203 (1963), handed down the same day as the *Sherbert* case, in which the required reading of Bible verses and the recitation of the Lord's Prayer in public schools were held to violate the establishment clause of the first amendment.

15. Abington School Dist. v. Schempp, *supra* note 14.

require essentially religious ceremonies to be carried out in its schools. All of the cases interpreting the free exercise clause of the first amendment necessarily represent some claimed infringement of a person's right to exercise his religious beliefs or practices. The Court has sometimes found a sufficiently strong state interest in promoting some secular or non-religious objective to allow an infringement on religious practices without violating this constitutional right.[16] Thus, it was held that the practice of polygamy might be constitutionally restricted, though the restriction interfered with the religious practices of a certain sect.[17] But more often the Court has refused to restrain the religious practices, finding that the alleged state secular interest was unsupported by compelling reasons which would justify the attempted infringements.[18] The permitted state infringements upon the exercise of religious practices or scruples may be classified according to the sanctions imposed, that is, the burden placed upon the person for continuing to exercise his religious scruple.[19] The Court will proceed to examine the state interest, moral, economic, or whatever, and compare this with the individual's scruple and the sanction imposed on its exercise. Thus, if the state finds the exercise of the religious scruple to be especially objectionable to the public interest, it may well directly impose a criminal sanction on the exercise of that scruple.[20] In other instances the state legislature may decide not to directly prohibit the exercise of the scruple, but may cause a burden to be placed on such exercise. Such was the case in *Braunfeld v. Brown*,[21] which involved a state law prohibiting the operation of certain businesses on Sunday. Even though the petitioner in that case closed his store on Saturday for religious reasons, and thus had one less day of business each week, his

16. "However, the freedom to act, even when the action is in accord with one's religious convictions, is not totally free from legislative restrictions." Braunfeld v. Brown, 366 U.S. 599, 603 (1961).

17. Reynolds v. United States, *supra* note 13. This case involved the Morman practice of taking more than one wife, which was within the keeping of the tenets of their religion. For other examples of state interests which justified certain infringements, see Cleveland v. United States, 329 U.S. 14 (1946); Prince v. Massachusetts, 321 U.S. 158 (1944).

18. In Torcaso v. Watkins, 367 U.S. 488 (1961), the state's proven interest in obtaining the veracity of notaries puhlic was not a sufficient reason for the infringement of appellants' religious freedom by denying them that office because of their refusal to take a required oath of belief in God.

19. In Reynolds v. United States, *supra* note 13, the religious scruple involved was the practice of polygamy; the sanction for such exercise was a criminal law. In Prince v. Massachusetts, *supra* note 17, a criminal statute was held valid which denied children under a certain age the freedom to distribute literature, although the child's religious faith compelled her to do so.

20. *But cf.* Myer v. Nebraska, 262 U.S. 390 (1923), where the Court held invalid a state statute prohibiting the teaching at a private school in a foreign language. In Harden v. State, 188 Tenn. 17, 216 S.W.2d 708 (1948), 2 VAND. L. REV. 694 (1949), a statute prohibiting snake handling by a religious sect was held valid.

21. 366 U.S. 599 (1961).

interest was held to be outweighed by the state interest in providing a uniform day of rest.[22] The indirect economic burden imposed in that case was in some respects similar to the one imposed in the instant case, and will later be considered in such light. As is evidenced by the present case, in no event will any sanctions be upheld unless the Court feels that morals, safety, health, or some other paramount state interest demands such sanctions.[23]

Mr. Justice Brennan, writing for the Court, went immediately to the free exercise issue.[24] He found that a burden was placed on the exercise of petitioner's religious convictions,[25] which burden was not outweighed by any paramount state interest.[26] The Court found that the only possible state interest was that the allowing of such a claim would raise the possibility of unscrupulous persons filing fraudulent claims

22. *Ibid.* This is one of the Sunday Closing Law cases. In Braunfeld v. Brown, *supra* note 21, and Gallagher v. Crown Kosher Super Mkt., 366 U.S. 617 (1961), there was no denial of free exercise. The free exercise issue was not raised in McGowan v. Maryland, 366 U.S. 420 (1961), and Two Guys from Harrison-Allentown, Inc. v. McGinley, 366 U.S. 582 (1961).

23. Thus a state may protect the moral standards of its citizens by prohibiting the practice of polygamy even though it is an integral part of a person's religious convictions. Reynolds v. United States, *supra* note 13. However, the Court made clear in Fowler v. Rhode Island, 345 U.S. 67, 69-70 (1953), that this is a narrow exception to the general rule that religious beliefs of all kinds are protected. Under certain conditions a state may require a license before a group may hold religious services in a public park. Poulos v. New Hampshire, 345 U.S. 395 (1953). The great majority of cases, however, sustain the rights of religious minorities to act without governmental interference. Torcaso v. Watkins, *supra* note 18; Poulos v. New Hampshire, *supra;* Kunz v. New York, 340 U.S. 290 (1951); Niemotko v. Maryland, 340 U.S. 268 (1951); Marsh v. Alabama, 326 U.S. 501 (1946); Tucker v. Texas, 326 U.S. 517 (1946); Follett v. McCormick, 321 U.S. 573 (1944); Murdock v. Pennsylvania, 319 U.S. 105 (1943); West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624 (1943); Jamison v. Texas, 318 U.S. 413 (1943); Largent v. Texas, 318 U.S. 418 (1943); Jones v. Opelika, 316 U.S. 584 (1942), *vacated and rev'd on rehearing,* 319 U.S. 103 (1943); Cantwell v. Connecticut, *supra* note 13.

24. 374 U.S. at 402. However, Mr. Justice Harlan, dissenting, quotes from the South Carolina Code and declares that the purpose of the statute was to provide relief to persons for whom work was unavailable, and that within the meaning of that statute work was available for petitioner: "The fact that these personal considerations sprang from her religious convictions was wholly without relevance to the state court's application of the law. Thus in no proper sense can it be said that the State discriminated against the appellant on the basis of her religious beliefs or that she was denied benefits *because* she was a Seventh-Day Adventist. She was denied benefits just as any other claimant would be denied benefits who was not 'available for work' for personal reasons." *Id.* at 420.

25. *Id.* at 403. "Here not only is it apparent that appellant's declared ineligibility for benefits derives solely from the practice of her religion, but the pressure upon her to forego that practice is unmistakable. The ruling forces her to choose between following the precepts of her religion and forfeiting benefits, on the one hand, and abandoning one of the precepts of her religion in order to accept work, on the other hand. Governmental imposition of such a choice puts the same kind of burden upon the free exercise of religion as would a fine imposed against appellant for her Saturday worship." *Id.* at 404.

26. *Id.* at 407.

based on religious grounds.[27] He also pointed out that although unemployment compensation is only a privilege granted by the government, and not a constitutional right, such privilege once extended cannot be qualified in a manner which denies a constitutional right.[28] The Court's holding was based entirely on the free exercise clause and gave little weight to the argument concerning an establishment of religion,[29] pointing out that it was only insuring the neutrality of government in areas of religious differences.[30] Nevertheless, Mr. Justice Stewart, concurring, found two things wrong with the majority opinion.[31] He felt that the decision was inconsistent with the Court's interpretation and application of the establishment clause, as most recently expressed in the Bible reading cases.[32] In addition, he could not reconcile the decision with the Court's reasoning as to the free exercise clause in the Sunday Closing Law cases. Mr. Justice Douglas, also concurring, pointed out some requirements of various religious groups and warned that decisions such as *Braunfeld* tend to trample these religious views. He said that the result should be based on the interference itself, regardless of the degree of harm involved.[33] The dissenters felt that the instant decision of necessity overruled *Braunfeld*, this being one basis for their dissent.[34] They felt it was essentially a matter for the state to make a legislative judgment as to whether petitioner's case should be carved out as an exception.[35]

Certainly the importance of this decision lies in its interpretation of the free exercise clause, as its result merely affirms the stand of most

27. *Ibid.*

28. *Id.* at 404-05 & n.6. The footnote collects numerous cases supporting this proposition.

29. The establishment argument would be that since workers who for religious reasons do not work on Sunday may not be denied benefits, S.C. CODE § 64-4 (1952), this prefers these persons and their religion over that of petitioner, whose religion is given no such preference. On the troublesome problem of accommodation between the two clauses, see KURLAND, RELIGION AND THE LAW 112 (1962); Katz, *Freedom of Religion and State Neutrality*, 20 U. CHI. L. REV. 426 (1953).

30. *Id.* at 409. The Court distinguished Braunfeld v. Brown, *supra* note 21, by saying that it differed substantially in that the state offered a sufficient interest in providing one uniform day of rest, Sunday, for all workers. 374 U.S. at 408. The Court qualified its holding by concluding that it was only affirming the principle laid down in the *Everson* case several years ago. *Id.* at 410.

31. 374 U.S. at 413.

32. "[T]he Establishment Clause as construed by this Court not only *permits* but affirmatively *requires* South Carolina equally to deny the appellant's claim for unemployment compensation when her refusal to work on Saturdays is based upon her religious creed." *Id.* at 415. Justice Stewart, dissenting in the *Schempp* case, stated that the Court, in its application of the establishment clause, was mistakeuly interpreting the clause as representative of a philosophy of absolute separation of church from state, an idea which he feels is too mechanistic. 374 U.S. at 309.

33. 374 U.S. at 411-12.

34. *Id.* at 421.

35. *Id.* at 423.

states on the issue of unemployment benefits.[36] The Court in interpreting the freedom of religion clause of the first amendment, while recognizing its two parts, has had considerable difficulty in drawing a clear line between them.[37] The problem exists because state "recognition" of a religious scruple[38] may be necessary to preserve an individual's right to the free exercise of that scruple, while, on the other hand, to recognize such a scruple may result in an establishment of religion. The instant case shows that a state's recognition of a scruple is necessary whenever there is lacking any substantial secular reason for not so recognizing it. In the absence of such a substantial secular interest, an unreasonable and unconstitutional burden is placed on an individual's right to exercise his religious belief. The Court has decided that there is not a sufficient secular reason for a state to deny unemployment benefits to the claimant, and since such denial places a burden on the exercise of her scruple, it is unconstitutional. Conversely, the state's establishment of a secular exercise, when such exercise appears to be preferential toward some religion, is justifiable only when there is a sufficient non-religious reason for the state's action. Since the reading from certain religious books inevitably prefers some religions over others, it will be an unconstitutional state practice in the absence of a sufficient secular reason for so doing. The idea of preferential treatment of one religion over another, which was not considered in the opinion, could have been a basis for the Court to find in the instant case that the petitioner was denied equal protection of the laws, since the South Carolina code specifically protected one not accepting Sunday work for religious reasons.[39] Although the recent decision in *Braunfeld v. Brown* may be distinguished on the basis that in that case there was an established state interest in providing a uniform day of rest, as well as on the basis that the resultant burden there was less

36. From one standpoint the Supreme Court cases dealing with religious freedom are consistent, with the exception of the *Braunfeld* case and the other Sunday Closing Law cases. This consistency is that the Court has steadfastly protected the religious activities of minority groups. In this light *Sherbert, Schempp,* and *Vitale* may be reconciled and approved. The Court's attempt to justify *Braunfeld* on the basis of the state's interest in providing one uniform day of rest is subject to criticism. The decisions since *Braunfeld* may be an attempt by the Court to abandon the position taken there, and to reinforce the position of religious minorities.

37. "Although these two clauses may in certain instances overlap, they forbid two quite different kinds of governmental encroachment upon religious freedom. The Establishment Clause, unlike the Free Exercise Clause, does not depend upon any showing of direct governmental compulsion and is violated by the enactment of laws which establish an official religion whether those laws operate directly to coerce nonobserving individuals or not." Engel v. Vitale, *supra* note 14, at 430.

38. The term "recognition of a religious scruple" denotes making allowances for the scruple within a frame of reference in which that scruple becomes relevant. For example, in the instant case not making allowance for the scruple (non-availability for Saturday work) was relevant in the frame of reference of the unemployment compensation law.

39. S.C. CODE § 64-4 (1952). See note 29 *supra.*

direct than in the instant case, where claimant loses her total source of income, the cases are substantially alike in dealing with the placing of an economic burden on the exercise of a religious belief. The Court's decision in *Sherbert* rightfully recognizes such economic burden and raises the possibility that the *Braunfeld* case may be limited in the future by the placing of a stronger emphasis on the burden imposed on the religious practice and the requirement of a stronger balance in favor of the secular interest sought to be promoted by the state.

Constitutional Law—Self Incrimination—Effect of a Defendant's Comment on His Codefendant's Silence

Codefendants de Luna and Gomez were jointly tried in a federal district court for violating federal narcotics laws.[1] De Luna did not testify; Gomez did testify, asserting his innocence and de Luna's guilt. Over de Luna's attorney's objection, Gomez's attorney emphasized de Luna's silence to persuade the jury of Gomez's credibility and innocence.[2] The court instructed the jury that no inference of de Luna's guilt could be drawn from his silence and that Gomez's testimony should be scrutinized as that of any other witness. The jury acquitted Gomez, but convicted de Luna. On appeal to the United States Court of Appeals for the Fifth Circuit, *held*, reversed and remanded. In a joint criminal trial in federal court when one codefendant testifies in his own defense while another remains mute, the privilege against self-incrimination prohibits any comment by the former on the latter's silence. The court stated as dictum that a codefendant's right of confrontation[3] gives him the right to comment on a defendant's failure to

1. Narcotic Drugs Import and Export Act, 70 Stat. 570 (1956), 21 U.S.C. § 174 (1958).

2. Gomez's attorney argued, "I want to tell you there is a difference between these two men. We know a little something about Adolfo Gomez. We knew [*sic*] that for fifteen or twenty years, more or less, he has worked day after day at hard labor. I don't know what this man does for a living. *He could have gotten up and told you.*" 308 F.2d at 142 n.1 (emphasis added by the court). The attorney also said, "He [Gomez] has told you how the narcotics came into his possession, if it came into his possession, as 'possession' is defined in the charge. That fleeting instant when it was tossed to him and he tossed it out. *I haven't heard anyone deny that.*" *Ibid.* Later the attorney argued, "*Well, at least one man was honest enough and had courage enough to take the stand and subject himself to cross examination, and tell you the whole story,* and tell you that, 'Yes, I first colored the story, but when I got back to my senses I told the truth, and that's the whole thing.' *You haven't heard a word from this man [de Luna].*" *Ibid.*

3. Judge Bell's concurring opinion implies that Judge Wisdom's opinion placed this holding upon a defendant's right to a fair trial: "There is no authority whatever for

testify;[4] *semble*, separate trials must be ordered whenever one defendant exercises his privilege not to testify and another defendant desires to comment on this silence. *De Luna v. United States*, 308 F.2d 140 (5th Cir. 1962).

This case involved three important considerations: (1) a defendant's right against self-incrimination, (2) one codefendant's right to comment on another's failure to testify, whether this right is based on the right of confrontation or the right to a fair trial, and (3) the wisdom of and need for joint trials. Concerning the first, the fifth amendment states: "No person . . . shall be compelled in any criminal case to be a witness against himself." Not originating in the Constitution, this right began evolving in the thirteenth century in opposition to the *ex officio* oath which was imposed by ecclesiastical courts to discover violations of church law.[5] Later it became a recognized part of the common law as a protection from the inquisitorial methods of the Court of the High Commission and the Court of the Star Chamber.[6] Although at first[7] the right was a privilege against being interrogated until accused, it was expanded to become the right to remain silent about one's crimes.[8] However, since an accused was incompetent as a

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the proposition that Gomez would in any wise have been deprived of a fair trial if the comments regarding the failure of de Luna to testify had not been made. He had no right to go that far." *Id.* at 155 (concurring opinion). Yet, Judge Wisdom placed the right on a more specific ground, stating that "his [Gomez's] right to confrontation allows him to invoke every inference from de Luna's absence from the stand." *Id.* at 143.

4. The statement that a codefendant's right of confrontation allows him to comment on a defendant's failure to testify can be considered dictum, provided that dictum is defined as anything which is not absolutely necessary to sustain the judgement. However, in future cases this statement may be cited as authority or at least as persuasive dictum since it can be considered an element of the rule stated in the case. For an acute analysis of the problem of dicta, see Llewellyn, *Remarks on The Theory of Appellate Decision and the Rules or Canons About How Statutes Are To Be Construed*, 3 VAND. L. REV. 395 (1950). See generally LLEWELLYN, THE COMMON LAW TRADITION: DECIDING APPEALS (1960).

5. For a succinct, thorough discussion of the historical development of this right, see the discussion in the instant case, 308 F.2d 140 at 144-52. See generally CORWIN, THE CONSTITUTION OF THE UNITED STATES, ANALYSIS AND INTERPRETATION 841-44 (1953).

6. Corwin, *The Supreme Court's Construction of the Self-Incrimination Clause* (pts. 1, 2), 29 MICH. L. REV. 1, 191 (1930); Morgan, *The Privilege Against Self-Incrimination*, 34 MINN. L. REV. 1 (1949).

7. The Latin maxim, *nemo tenetur prodere seipsum* (nobody is bound to accuse himself), is referred to as the origin of the right. Wigmore states that the first person to use these four words was Coke. Wigmore, *Nemo Tenetur Seipsum Prodere*, 5 HARV. L. REV. 71, 84 (1891). In the same article, Wigmore also states: "The fact is that the maxim *nemo tenetur* was an old and established one in ecclesiastical practice." *Id.* at 83. However, Corwin refutes this assertion and shows that instead it was a protest against that law. Corwin, *supra* note 6, at 3 n.3.

8. "Moreover, during all the period of agitation against the inquisitional oath of the ecclesiastical courts, down to the time of Lilburn's case, it was the unchallenged practice of the common law judges in criminal trials to question the accused and bully him to admit his guilt. It is true, he was not under oath, for he was then incompetent as a witness, but there was no thought that he could not be called on to

witness for himself at common law and could not, therefore, be forced to testify against himself, the precise ambit of a defendant's right was academic. During this period in its development,[9] the right was guaranteed to defendants by the Virginia Bill of Rights,[10] and several early state constitutions included similar provisions.[11] Gradually, statutes relieved defendants of their incompetency as witnesses.[12] These historical developments form the bases for distinguishing between a defendant's statutory option to testify in his own behalf and his constitntional right against self-incrimination.[13] The constitutional right itself has been subdivided into two parts: (1) any witness's right not to answer incriminating questions, and (2) a defendant's right not to be called as a witness.[14] If a defendant waives his right not to testify, he assumes the status of a regular witness and must respond to questions on cross-examination.[15] But to protect defendant's self-incrimination privilege,

incriminate himself. By 1641, as an aftermath of Lilburn's case, defendants began to claim, and judges to be persuaded, that an accused on trial was not to be compelled to disclose his guilt. Here again by the early 1700s the revolution was complete . . . . The maxim which once meant that no man shall be questioned until he has been first accused comes to mean that no man shall ever be required to answer about his crimes." MCCORMICK, EVIDENCE § 120 (1954).

9. "In the American colonies the precedents are few, but it is highly probable that for all practical purposes the privilege was pretty generally recognized prior to 1789, though the varying language in the colonial constitutions leaves doubt as to the scope of the protection which it afforded." MORGAN, BASIC PROBLEMS OF EVIDENCE 144-45 (1962).

10. Section 8 of the Virginia Declaration of Rights, written in 1776, states: " 'That in all capital or criminal prosecutions a man hath a right to demand the cause and nature of his accusation . . . nor can he be compelled to give evidence against himself.' " (As quoted in Corwin, *supra* note 6, at 2.)

11. The constitutions of the following states prohibited self-incrimination in varied phrases: Maryland (1776), Massachusetts (1780), New Hampshire (1784), North Carolina (1776), Pennsylvania (1776), Vermont (1777), and Virginia (1776).

12. See, *e.g.*, 18 U.S.C. § 3481 (1958): "In trial of all persons charged with the commission of offenses against the United States and in all proceedings in courts martial and courts of inquiry in any State, District, Possession or Territory, the person charged shall, at his own request, be a competent witness. His failure to make such request shall not create any presumption against him." See generally Popper, *History and Development of the Accused's Right to Testify*, 1962 WASH. U.L.Q. 454.

13. Recently, a criminal lawyer emphasized "the fundamental differences inherent in the protective aspects of the Fifth Amendment to the United States Constitution, and the statutory option embodied in Section 3481, Title 18, U.S.C." Friloux, *Federal Court's Charge on Defendant's Failure To Testify*, 6 So. TEX. L.J. 15 (1961).

14. Courts still recognize this distinction. In reversing a conviction for using the mail to defraud, one court said: "The error made arises from confusing the privilege of any witness not to give incriminating answers with the right of the accused not to take the stand in a criminal proceding against him. Both come within the protection of . . . the 5th Amendment . . . ." United States v. Housing Foundation of America, Inc., 176 F.2d 665, 666 (3d Cir. 1949).

15. Raffel v. United States, 271 U.S. 494 (1926). The Court there answered "no" to the following certified question: "Was it error to require the defendant, Raffel, offering himself as a witness upon the second trial, to disclose that he had not testified as a witness in his own behalf upon the first trial." *Id.* at 496. "When he [defendant] takes the stand, in his own behalf, he does so as any other witness, and

to give him a genuine and free option, and to maintain the presumption of innocence, the federal government and most states prohibit comment on a defendant's refusal to testify. Some states,[16] however, do allow comment on the refusal, and the United States Supreme Court has held that such comment in a state court does not violate the fourteenth amendment.[17] Basically, proponents of the latter view argue that an innocent defendant has nothing to hide and that the protection is artificial since in daily activities laymen do infer guilt from silence, a characteristic which certainly accompanies them, as jurors, into the courtroom.[18]

As background for examining a codefendant's right to comment on a non-testifying codefendant's silence, it is necessary to analyze the right of confrontation[19] on which the court in the instant case based

within the limits of the appropriate rules he may be cross-examined as to the facts in issue." *Id.* at 497.

"The privilege of the defendant against self-incrimination and its corollary, the prohibition against comment by counsel for the government upon his failure to testify, have been jealously protected by the courts. But, when the defendant elects, voluntarily, to testify, he waives his privilege . . . and makes comment upon his testimony entirely proper." Tomlinson v. United States, 93 F.2d 652, 656 (D.C. Cir. 1937), *cert. denied*, 303 U.S. 646 (1938).

16. Six states allow comment on a defendant's refusal to testify. They are California, Connecticut, Iowa, New Jersey, Ohio, and Vermont. 308 F.2d 140, 151 n.35. The constitution of every state except New Jersey and Iowa affirms the right against self-incrimination; both of those states recognize the right by statute and by common law. In fact, the due process clause of the Iowa constitution has been held to include this right. Morgan, *supra* note 6, at 1-23. See generally Reeder, *Comment Upon Failure of Accused to Testify*, 31 MICH. L. REV. 40 (1932).

17. Adamson v. California, 332 U.S. 46 (1947) (5-4 decision). California's constitution and statutes allow both the court and counsel to comment on a defendant's failure "to explain or to deny" evidence or facts against him, regardless of whether he testified. Affirming defendant's conviction of first degree murder, the Court held that the self-incrimination privilege is not inherent in either a fair trial or due process.

18. "In support it is asked why the jury should not take the silence into account. In daily life we should most certainly do so. In any event, how can we in fact prevent the jury from doing so? The only real effect of the prohibition on comment is that in the excitement of the concluding argument the prosecuting attorney may, perhaps inadvertently, make a remark which is of no practical significance but which will be seized on as grounds for reversal by a higher court." PUTTKAMMER, ADMINISTRATION OF CRIMINAL LAW 196 (1953).

In proposing reforms in criminal procedure, Mr. Hiscock argues for the adoption of this view. "But at least the repeal of this provision [which prohibits comments on defendant's failure to testify] would cure what is frequently a species of legal hypocrisy, whereby courts and jurors are compelled to assume an appearance of disregarding and forgetting something which it is practically impossible for either of them to disregard or forget and it would also remove the danger, by no means an inconsequential one, that a conscientious district attorney in the heat of a trial may, with honest inadvertence, say something which may be regarded as an intrusion into this prohibited field of comment and thereby furnish a claim for reversal." Hiscock, *Criminal Law and Procedure in New York*, 26 COLUM. L. REV. 253, 259 (1926).

19. For a terse discussion on the use of legal history, see Orfield, *Early Federal Criminal Procedure*, 7 WAYNE L. REV. 503, 533-34 (1961).

this right to comment.[20] "[T]o be confronted with witnesses against him" is a defendant's right guaranteed by the sixth amendment. An integral element of a fair trial, this right of confrontation evolved at common law concurrently with the development of the accusatorial system.[21] Essentially, the purpose was to prevent the use of ex parte affidavits which denied the defendant the opportunity to cross-examine and to have the jury observe witnesses' demeanor in order to properly evaluate the credibility of their testimony.[22] In 1926 the United States Supreme Court reaffirmed its position that the constitutional guarantee merely preserved that common law right and did not expand it.[23] However, this does not mean that the Court has not been diligent in protecting criminal defendants' rights. Since other concepts, such as due process and fair trial, have been expanded to meet new situations,[24] perhaps neither need nor reason has been presented to base new hold-

20. "Gomez [the testifying co-defendant] has rights as well as de Luna [the mute defendant], and they should be no less than if he were prosecuted singly. His right to confrontation allows him to invoke every inference from de Luna's [the mute defendant's] absence from the stand." 308 F.2d at 143.

21. See generally CORWIN, *op. cit supra* note 5, at 844.

22. "The primary object of the constitutional provision in question was to prevent depositions or *ex parte* affidavits, such as were sometimes admitted in civil cases, being used against the prisoner in lieu of a personal examination and cross-examination of the wituess in which the accused has an opportunity, not ouly of testing the recollection and sifting the conscience of the wituess, but of compelling him to stand face to face with the jury in order that they may look at him, and judge by his demeanor upon the stand and the manner in which he gives his testimony whether he is worthy of belief." Mattox v. United States, 156 U.S. 237, 242-43 (1895).

23. "The right of confrontation did not originate with the provision in the Sixth Amendment, but was a common-law right having recognized exceptions. The purpose of that provision, this Court often has said, is to continue and preserve that right, and not to broaden it or disturb the exceptions." Salinger v. United States, 272 U.S. 542, 548 (1926). As examples of this position, the Court has stated that the admission in evidence of a wituess's testimony at a former trial of the defendant does not abridge defendant's right, Reynolds v. United States, 98 U.S. (8 Otto) 145 (1878); that dying declarations are not precluded by the sixth amendment, Kirby v. United States, 174 U.S. 47 (1899); Robertson v. Baldwin, 165 U.S. 275 (1897) (habeas corpus proceeding); that the sixth amendment does not give a defendant the right to the names of grand jury witnesses, Wilson v. United States, 221 U.S. 361 (1911); that if wituesses are dead the stenographic report of their testimony at defendant's former trial is admissible, Mattox v. United States, *supra;* that if a witness's absence is due to the prosecutor's negligence the testimony given in a preliminary hearing cannot be introduced, Motes v. United States, 178 U.S. 458 (1900); and that letters which were answered by defendant were admissible although the correspondent was not a witness, Salinger v. United States, *supra.* These decisions demonstrate the Court's tendency to preserve the right of confrontation without expanding it to meet new situations.

24. Barton v. United States, 263 F.2d 894 (5th Cir. 1959), where the judgment of conviction was reversed for the court's denial of defendant's motion for severance which resulted in his being denied the right of confrontation. The court also said that "over the past thirty-five years, the Supreme Court, followed by lower federal courts, has employed a developing use of the due process clause of the Fourteenth Amendment as a means of asserting a sort of supervisory jurisdiction to assure fundamental fairness in state criminal proceedings." *Id.* at 898 n.6.

ings on the vital, but relatively inert, right of confrontation.[25] From this background there seems to be little support for the proposition that the right of confrontation gives one codefendant the right to comment on another's silence.

That joint trials[26] aid in the efficient administration of criminal justice has not seriously been questioned.[27] However, it is basic that procedure is merely a means to an end—justice—and that only when a fair trial is assured should other factors influence procedure.[28] Historically, joint trials were accepted at common law, and this tradition is followed in courts of the United States.[29] Although some states by statute currently give defendants an absolute right to separate trials,[30] in federal courts defendants do not have this right.[31] Granting

25. Recently, lower federal courts have held the following in criminal cases: (1) The judge's description, without defendant's or his counsel's presence, of physical surroundings to a jury viewing scenes affecting alleged narcotic dealings was not prejudicial. Shannon v. United States, 263 F.2d 596 (9th Cir. 1959). (2) Codefendant's written confession which also accused defendant of acting with him in the alleged offenses deprived defendant of his right of confrontation since defendant had no opportunity to cross-examine the codefendant and since the jury could not carry out the instruction not to treat the statement as evidence against defendant. Barton v. United States, *supra*. (3) Admitting in evidence against one tried for fraudulently representing himself as a personal envoy of the President an authenticated affidavit of a White House personnel official that no record had been found of defendant's employment was not a denial of defendant's right of confrontation. T'Kach v. United States, 242 F.2d 937 (5th Cir. 1957). (4) Not allowing defendant to examine suppressed original records of wire tapping of defendant's phone was a violation of his rights where the court based its findings on its reading of these records in chambers. United States v. Coplon, 185 F.2d 629 (2d Cir. 1950). (5) The prosecutor's procedure of introducing evidence against a particular defendant in a joint trial for conspiracy and of later moving, as he had reserved the right to do, to admit this evidence against the other eight defendants did not violate defendants' right of confrontation. Bridgman v. United States, 183 F.2d 750 (9th Cir. 1950). (6) No deposition can be read against defendant. United States v. Haderlein, 118 F. Supp. 346 (N.D. Ill. 1953). See also Young v. United States, 214 F.2d 232 (D.C. Cir. 1954).

26. "Joint trials" can mean either a joinder of defendants, a joinder of offenses, or both. In this discussion, however, the term is restricted to mean a joinder of defendants.

27. Orfield, *supra* note 20.

28. Mr. Justice Brandeis eloquently noted the purpose of criminal procedure. "[I]n the development of our liberty insistence upon procedural regularity has been a large factor. Respect for law will not he advanced by resort, in its enforcement, to means which shock the common man's sense of decency and fair play." Burdeau v. McDowell, 256 U.S. 465, 477 (1921) (Brandeis, J., dissenting).

29. Whether or not to grant separate trials "is a matter of discretion in the court, and not of right in the parties." United States v. Marchant, 25 U.S. (12 Wheat.) 305 (1827). Note that the defendants were joined without question and that the question of whether to grant separate trials arose later. See also United States v. Bayaud, 16 Fed. 376 (S.D.N.Y. 1883).

30. See, *e.g.*, MINN. STAT. ANN. § 631.03 (1945); W. VA. CODE ANN. § 6197 (1961) (applied in State *ex rel.* Zirk v. Muntzing, 120 S.E.2d 260 (W. Va. 1961), 64 W. VA. L. REV. 110 (1961)).

31. "Two or more defendants may be charged in the same indictment or information if they are alleged to have participated in the same act or transaction or in the same

separate trials is plainly within the discretion of the federal trial judge.[32] The requirement of a separate trial for each defendant, especially in large conspiracy trials,[33] would increase the burdens of federal courts whose dockets already are crowded, and would present numerous other problems.[34]

In the instant case the court in an opinion by Judge Wisdom presents a well documented historical analysis of the right against self-incrimination. Interpreting this development in the common law tradition of continuously improving legal concepts to fit the times,[35] the

series of acts or transactions constituting an offense or offenses. Such defendants may be charged in one or more counts together or separately and all of the defendants need not be charged in each count." FED. R. CRIM. P. 8(b).

"The court may order two or more indictments or informations or both to be tried together if the offenses, and the defendants if there is more than one, could have been joined in a single indictment or information. The procedure shall be the same as if the prosecution were under such single indictment or information." FED. R. CRIM. P. 13.

"If it appears that a defendant or the government is prejudiced by a joinder of offenses or of defendants in an indictment or information or by such joinder for trial together, the court may order an election or separate trials of counts, grant a severance of defendants or provide whatever other relief justice requires." FED. R. CRIM. P. 14. In the "Notes of Advisory Committee on Rules" it is stated: "This rule is a restatement of existing law under which severance and other similar relief is *entirely in the discretion of the court* . . . ." (Emphasis added.) For a good judicial discussion of these rules, see Ingram v. United States, 272 F.2d 567 (4th Cir. 1959).

32. "It is provided in the Sixth Amendment to the Constitution of the United States that in all criminal prosecutions the accused shall enjoy the right to a trial by an impartial jury. That it was within the discretion of the court to order the defendants to be tried together there can be no question, and the practise [*sic*] is too well established to require further consideration." Stilson v. United States, 250 U.S. 583, 585 (1919).

Defendant "was not entitled to a separate trial as a matter of right. His motion for a severance was addressed to the discretion of the trial court, and no abuse of discretion is shown." Guon v. United States, 285 F.2d 140, 142-43 (8th Cir. 1960).

"Ordinarily the granting of such motions is within the discretion of the trial court and, where the charge against all the defendants may be proved by the same evidence and results from the same series of acts as was the case here, the discretion should not be interfered with." United States v. Cohen, 124 F.2d 164, 165-66 (2d Cir. 1941).

33. See, *e.g.*, Bruno v. United States, 308 U.S. 287 (1939) (eighty-eight defendants jointly tried); United States v. Stromberg, 268 F.2d 256 (2d Cir. 1959) (nineteen defendants jointly tried).

34. In addition, witnesses may become tired of the repetitious procedure; they would waste hours; they might be intimidated to prevent their testimony; the cost of the extra trials would burden taxpayers; the administrative problems, such as obtaining new panels of jurors, would be multiplied; and the case would eventually become stale. Hiscock, *supra* note 19, at 257. All of these problems would become so serious, especially during the trials of fifty or more alleged conspirators, that one wonders just how fair the trials would be toward the end. Analogous factors also would penalize defendants whose trials were unduly postponed. Consider, for example, defendants who would lose favorable witnesses from death, or, more frequently, from lapse of memory; defendants who would be pre-judged as guilty by society because their indictment was pending so long and who consequently would suffer a loss of reputation; and defendants who could not obtain bail (either because they could not secure the requisite bond or because they were held without bail) and consequently who must suffer prolonged pre-trial incarceration. These are indicative of the problems which would arise if joint trials were abolished.

35. As Professor Llewellyn phrased it: "There *is* a Duty to Account *honestly* to the

court concluded that the effect of comment upon a defendant's silence is detrimental, regardless of whether the judge, the prosecutor, or a codefendant's counsel makes the comment.[36] Although the prosecutor argued that the fifth amendment applies only to the federal government and not to private citizens (such as defense attorneys), the court emphasized that this trial was in a federal court under the sanctions of federal law, procedure, and practice, and that the judge's instructions to the jury were insufficient to remove the prejudicial effect of *any* comment upon the defendant's silence. Consequently, the defendant's right against self-incrimination was abridged. Incidental to its reversal, the court also stated that it would protect the codefendant's right, based on confrontation, to make such comment,[37] but supported this statement with no authority. This position[38] was strenuously criticized by Judge Bell in his concurring opinion,[39] which emphasized the importance of joint trials, but which did not analyze fully the precise scope of a defendant's rights to a fair trial and to confrontation in relation to his commenting on a codefendant's silence.

That a defendant's right against self-incrimination is abridged by a codefendant's comment on his silence seems clear after analyzing the nature of that right. However, it is difficult to accept the proposition that the sixth amendment right to confrontation gives one defendant the right to comment on another defendant's silence and by doing so to abridge the latter's right against self-incrimination.[40] If one ac-

authorities." LLEWELLYN, *op. cit. supra* note 4, at 389.

36. "Indeed, the effect on the jury of commeut by a co-defendant's attorney might be more harmful than if it comes from judge or prosecutor." 308 F.2d at 152.

37. "The ruling that counsel for appellant [defendant] had a legal right to comment on the failure of his co-defendaut to take the stand is one of first impression upon which neither the appellant nor appellee took a position in their respective briefs." Petition for Rehearing, p. 2, de Luna v. United States, 308 F.2d 140 (5th Cir. 1962).

38. See note 3 *supra*.

39. 308 F.2d at 155 (Bell, J., concurring specially).

40. Although the point was not in issue aud was not argued in the instant case, a testifying codefendant could make the following argument to demonstrate that disallowing his comment on the other codefendant's silence would abridge his constitutional rights. The sixth amendment to the Constitution grants every defendant the right "to have compulsory process for obtaining witnesses in his favor," a right which is implemented by federal statute. FED. R. CRIM. P. 17. If separate trials were granted, one codefendant could require the other to take the stand at the former's trial, although that other could refuse to answer any specific question by relying on his right against self-incrimination. (See State v. Gambino, 221 La. 1039, 61 So. 2d 732 (1952), which is noted in the instant case, 308 F.2d at 153. The Louisiana Supreme Court held that a defendant could force another person jointly charged with him in the same information for the same offense, but not on trial with him, to testify over that other person's objection. On the stand that other person could refuse to answer any question which required an incriminating answer, and therefore his right against self-incrimination would not be infringed.) When the other defendant as a mere witness at codefendant's trial, did refuse to answer questions, codefendant could emphasize this refusal to persuade the jury of his innocence. Therefore, codefendant's rights were abridged by disallow-

cepted this proposition, he could argue by analogy that the sixth amendment right to compel witnesses to testify in his favor includes the right to compel a codefendant to testify—a result which has been uniformly rejected.[41] Instead of depending on such technical arguments, however, the alternative positions should be weighed qualitatively with reference to what effect each would have on the three considerations—a defendant's right against self-incrimination, one codefendant's right to comment on another's refusal to take the stand, and the administrative advantages of joint trials—and to base the conclusion on the grounds of this evaluation. To avoid error, it is necessary to restrict one of these factors under facts similar to the instant case.[42] Of course, if before trial the judge knew that one defendant would testify and another would not and that their defenses conflicted, he should order separate trials,[43] thus protecting the rights of both defendants and avoiding at the joint trial the dilemma of whether to allow one codefendant to comment on the other's silence. However, the holding of the court presents complex problems in numerous situations. Consider the cases in which two defendants, in order to obtain separate trials, tell their attorneys and the judge that one will testify and the other will not; or the cases in which two defendants might conceal this fact in order to use the unavoidable error effect of their joint trial. Affecting professional ethics and their enforcement among members of the bar, the holding of the court also creates problems in cases where attorneys might use the holding either to effect error intentionally or for automatic severance, and especially in cases where the defendant who honestly had planned not to testify changes his mind after the prosecution had rested its case. These are examples of possible practical problems which may arise under the court's holding. Although there may be no satisfactory solution under the holding of

ing such comment at a joint trial, since a joint trial should not diminish a criminal defendant's rights. Also this basic argument supports a motion for severance under the particular facts of the instant case and demonstrates that the refusal to grant separate trials was an abuse of the trial court's discretion, which would seem to be a sound basis on which to protect the rights of the testifying codefendant. See Barton v. United States, *supra* note 25.

41. See notes 5-19 *supra* and accompanying text.

42. Given a joint trial where one codefendant starts to comment on the other's silence, as in the instant case, the trial judge must either allow such comment or not allow such comment. If he allows such comment, the mute defendant's right against self-incrimination is infringed. If he does not allow such comment, the codefendant's right of confrontation is infringed. Therefore, the rights of at least one defendant will be infringed in the joint trial and he will obtain a reversal of any conviction in that trial. In short, it is not possible to have a joint trial and also to protect fully the rights of both defendants as indicated in the holding.

43. Even in separate trials, there may be a problem of the order of these trials. This problem, however, is not as serious as the dilemma presented by a joint trial. See generally Sullivan, *A Comparative Survey of Problems in Criminal Procedure*, 6 ST. LOUIS U.L.J. 380 (1961).

this case, abolishing all joint trials is certainly not one.[44] After weighing these practical problems with the three elements discussed above, it seems that the court should have limited its holding by stating that one codefendant has no right to comment on another's refusal to take the stand. If the precise issue of a defendant's right to comment on a codefendant's silence were argued, the court, emphasizing the inherent conflict between each defendant's rights in a joint trial and the court's duty to protect both, could grant separate trials on the ground that not to do so would be an abuse of discretion, and not on the ground that one codefendant has a right to comment on another's refusal to take the stand.

Labor Law—Ability of Individual Employee To Bring Suit Under Section 301 of Taft-Hartley Act

Plaintiff employee, individually and as assignee of employees similarly situated, sued in a state court for breach of a collective bargaining agreement with the union to which plaintiff belonged. The complaint alleged that the defendant employer refused to allow plaintiff to report for regular work during a strike called by a second union, while employees not covered by any collective bargaining agreement were permitted to report to work and were paid full wages even though there was no work available. This, plaintiff alleged, violated the collective bargaining agreement which provided that "there shall be no discrimination against any employee because of his membership or activity in the guild."[1] The trial court sustained defendants' motion to dismiss on the grounds that if the employer's violation of the collective bargaining agreement were proven, an unfair labor practice would have been made out, and hence the subject matter was within the exclusive jurisdiction of the National Labor Relations Board. The

44. To abolish joint trials is not the best solution, although this currently is being done by a district judge. "[D]etermination of the issue [of whether codefendant can comment] may not be essential to the case and the consequences of the ruling can be far reaching, it having already had a significant effect on joint trials in the Western District of Texas *in that joint trials have been and are now automatically severed and not permitted* within the San Antonio, Austin and Waco Divisions." Petition for Rehearing, p. 2, de Luna v. United States, 308 F.2d 140 (5th Cir. 1962). (Emphasis added.) See text accompanying notes 27-37 *supra*, demonstrating that this penalizes defendants by causing them loss of witnesses, loss of reputation, prolonged incarceration, etc.

1. Brief for Petitioner, p. 4, Smith v. Evening News Ass'n, 371 U.S. 195 (1962).

Michigan Supreme Court affirmed.[2] On certiorari[3] in the Supreme Court of the United States, *held,* reversed. An individual employee may sue for damages for breach of a collective bargaining agreement within the scope of section 301 of the Labor Management Relations Act even though the facts alleged would also constitute an unfair labor practice within the primary jurisdiction of the National Labor Relations Board. *Smith v. Evening News Ass'n,* 371 U.S. 195 (1962).

One of the earliest interpretations of section 301 of the LMRA was *Westinghouse Salaried Employees v. Westinghouse Electric Corp.*[4] Mr. Justice Frankfurter's opinion in that case denied federal court jurisdiction over a union's suit to enforce wage claims due individual employees. His opinion was bottomed on two premises: (1) that section 301 of the LMRA did not result in the creation of a body of federal substantive rights derived from collective bargaining agreements; and (2) that an employee's personal or individual claims, as opposed to union or management claims, under such agreements were in any event not cognizable under that section. The first of these premises was shortly overturned by the Court in *Textile Workers Union v. Lincoln Mills.*[5] Beginning with *Lincoln Mills,* the Supreme Court embarked upon the process of fashioning a body of federal common law for the enforcement of collective bargaining agreements subject to section 301 of the Taft-Hartley Act.[6] Under this federal common law, it is now clear that state courts have concurrent jurisdiction with federal courts in suits arising under section 301,[7] and that the substan-

2. Smith v. Evening News Ass'n, 362 Mich. 350, 106 N.W.2d 785 (1962). "Plaintiff may not characterize an act which constitutes an unfair labor practice as a contract violation and thereby circumvent the plain mandate of Congress—that jurisdiction of such matters be vested in the national labor relations board and that Federal and State trial courts are without jurisdiction to redress by injunction or otherwise unfair labor practices." *Id.* at 364-65, 106 N.W.2d at 793.

3. 369 U.S. 827 (1962).

4. 348 U.S. 437 (1955).

5. 353 U.S. 448 (1957). The Court in *Lincoln Mills* stated that "the substantive law to apply in suits under § 301(a) is federal law, which the courts must fashion from the policy of our national labor laws. . . . The Labor Management Relations Act expressly furnishes some substantive law. It points out what the parties may or may not do in certain situations. Other problems will lie in the penumbra of express statutory mandates. Some will lack express statutory sanction but will be solved by looking at the policy of the legislation and fashioning a remedy that will effectuate that policy. The range of judicial inventiveness will be determined by the nature of the problem." *Id.* at 456-57. See also Mendelsohn, *Enforceability of Arbitration Agreements Under Taft-Hartley Section 301,* 66 YALE L.J. 167 (1956).

6. 61 Stat. 156 (1947), as amended, 29 U.S.C. § 185(a) (1958).

7. Dowd Box Co. v. Courtney, 368 U.S. 502 (1962). "On its face § 301(a) simply gives the federal district courts jurisdiction over suits for violation of certain specified types of contracts. The statute does not state nor even suggest that such jurisdiction shall be exclusive. It provides that suits of the kind described 'may' be brought in the federal district courts, not that they must be. . . . Concurrent jurisdiction has been a common phenomenon in our judical history, and exclusive federal court jurisdiction over cases arising under federal law has been the exception rather than the rule. . . . To hold

tive law which is to be applied in either the state court[8] or the federal court[9] is federal law. The jurisdiction of the courts to handle a suit arising under section 301 is not preempted by the fact that the subject matter of the suit is also an unfair labor practice which is within the competence of the National Labor Relations Board.[10] Even though the labor-management agreement may not be a collective bargaining con-

that § 301(a) operates to deprive the state courts of a substantial segment of their established jurisdiction over contract actions would thus be to disregard this consistent history of hospitable acceptance of concurrent jurisdiction. . . . The legislative history makes clear that the basic purpose of § 301(a) was not to limit, but to expand, the availability of forums for the enforcement of contracts made by labor organizations. Moreover, there is explicit evidence that Congress expressly intended not to encroach upon the existing jurisdiction of the state courts." *Id.* at 506-09. See also Feldesman, *Section 301 and the National Labor Relations Act*, 30 TENN. L. REV. 16, 17 (1962); Fleming, *Arbitrators and the Remedy Power*, 48 VA. L. REV. 1199 (1962).

8. Local 174, Teamsters Union v. Lucas Flour Co., 369 U.S. 95 (1962). The Court found that the Washington court had erroneously applied state law to reach their result. However, as the same result would be reached under federal law the Supreme Court affirmed the Washington court's decision. Speaking for the Court, Mr. Justice Stewart reasoned that "The dimensions of § 301 require the conclusion that substantive principles of federal labor law must be paramount in the area covered by the statute. Comprehensiveness is inherent in the process by which the law is to be formulated under the mandate of *Lincoln Mills*, requiring issues raised in suits of a kind covered by § 301 to be decided according to the precepts of federal labor policy. More important, the subject matter of § 301(a) 'is peculiarly one that calls for uniform law.' . . . The possibility that individual contract terms might have different meanings under state and federal laws would inevitably exert a disruptive influence upon both the negotiation and administration of collective agreements. Because neither party could be certain of the rights which it had obtained or conceded, the process of negotiating an agreement would be made immeasurably more difficult by the necessity of trying to formulate contract provisions in such a way as to contain the same meaning under two or more systems of law which might someday be invoked in enforcing the contract." *Id.* at 103. See Feldesman, *supra* note 6, at 18; Sovern, *Section 301 and the Primary Jurisdiction of the NLRB*, 76 HARV. L. REV. 529, 534 (1963).

9. Textile Workers Union v. Lincoln Mills, 353 U.S. 448 (1957). See note 5 *supra*.

10. Local 174, Teamsters Union v. Lucas Flour Co., 369 U.S. 95 (1962). "Since this was a suit for violation of a collective bargaining contract within the purview of § 301(a) of the Labor Management Relations Act of 1947, the pre-emptive doctrine of cases such as *San Diego Building Trades Council v. Garmon*, 359 U.S. 236, based upon the exclusive jurisdiction of the National Labor Relations Board, is not relevant. . . . As pointed out in *Charles Dowd Box Co. v. Courtney*, 368 U.S., at 513, Congress 'deliberately chose to leave the enforcement of collective agreements "to the usual processes of law."' . . . It is, of course, true that conduct which is a violation of a contractual obligation may also be conduct constituting an unfair labor practice, and what has been said is not to imply that enforcement by a court of a contract obligation affects the jurisdiction of the N. L. R. B. to remedy unfair labor practices, as such." *Id.* at 101 n.9. See also Dunau, *Contractual Prohibition of Unfair Labor Practices: Jurisdiction of the NLRB*, 57 COLUM. L. REV. (1957); Feldesman, *supra* note 7; Sovern, *supra* note 8.

In the *Smith* case the alleged conduct of the employer was "not only arguably, but concededly . . . an unfair labor practice within the jurisdiction of the National Labor Relations Board." Mr. Justice White stated that "the authority of the Board to deal with an unfair labor practice which also violates a collective bargaining contract is not displaced by § 301, but it is not exclusive and does not destroy the jurisdiction of the courts in suits under § 301." 371 U.S. at 197. For additional commentary on the preemption aspect of the *Smith* case see Kovarsky, *Unfair Labor Practices, Individual Rights and Section 301*, 16 VAND. L. REV. 595, 609 (1963); Sovern, *supra* note 8.

tract and may not grant the union exclusive recognition, it is still cognizable in suits under section 301.[11] Where the collective bargaining agreement provides that a dispute shall be settled exclusively and finally by compulsory arbitration, the courts in section 301 suits will imply a no-strike agreement.[12] The various remedies which have been sought for the breach of a no-strike clause include suits for damages for breach of contract, arbitration, and injunctive relief. The courts have held that whether the relief should be couched in terms of an award of damages or whether arbitration is the proper remedy is a question which must be decided by the terms of the contract entered into by the parties.[13] However, the Court has decided that federal

11. Retail Clerks Int'l Ass'n v. Lion Dry Goods, Inc., 369 U.S. 17 (1962). Contracts as envisioned by § 301(a) are not limited to collective bargaining contracts concerning wages, hours, and conditions of employment which have been concluded as a direct result of the bargaining processes between employers and unions which are exclusive representatives of the employees. "Had Congress contemplated a restrictive differentiation, we may assume that it would not have eschewed 'collective bargaining contracts' unwittingly." *Id.* at 25.

Mr. Justice Brennan stated that it was unnecessary to decide whether or not the strike settlement agreement was a collective bargaining agreement. "It is enough that this is clearly an agreement between employers and labor organizations significant to the maintenance of labor peace between them." *Id.* at 28. See also Feldesman, *supra* note 7; Sovern, *supra* note 8.

12. Local 174, Teamsters Union v. Lucas Flour Co., 369 U.S. 95 (1962). "The collective bargaining contract expressly imposed upon both parties the duty of submitting the dispute in question to final and binding arbitration. . . . [T]he Courts of Appeals of at least five Federal Circuits have held that a strike to settle a dispute which a collective bargaining agreement provides shall be settled exclusively and finally by compulsory arbitration constitutes a violation of the agreement. The National Labor Relations Board has reached the same conclusion. . . . We approve that doctrine. . . . [A] contrary view would be completely at odds with the basic policy of national labor legislation to promote the arbitral process as a substitute for economic warfare." *Id.* at 105. (Footnotes omitted.) See Isaacson, *The Grand Equation: Labor Arbitration and the No-Strike Clause,* 48 A.B.A.J. 914, 916 (1962).

13. Whether an employer's claim for damages for an alleged breach of a no-strike clause is an arbitrable matter "is a matter to be determined by the Court on the basis of the contract entered into by the parties." Atkinson v. Sinclair Ref. Co., 370 U.S. 238, 241 (1962). Where the grievance and arbitration provisions provide only for the submission of grievances by the union and arbitration "may be invoked only at the option of the union" the employer's suit for damages will not be stayed pending arbitration. *Id.* at 243. However, where the arbitration provisions cover "all complaints, disputes or grievances between them [the parties] involving . . . any act or conduct or relation between the parties" the claimed violation of the no-strike agreement presents an arbitrable issue requiring the issuance of a stay. Drake Bakeries Inc. v. Local 50, American Bakery Workers, 370 U.S. 254, 257 n.2 (1962).

In the *Steelworkers* trilogy the Court stated the relationship which was to be accorded between the courts and the arbitration processes:

"The function of the Court is very limited when the parties have agreed to submit all questions of contract interpretation to the arbitrator. It is confined to ascertaining whether the party seeking arbitration is making a claim which on its face is governed by the contract. Whether the moving party is right or wrong is a question of contract interpretation for the arbitrator. In these circumstances the moving party should not be deprived of the arbitrator's judgment, when it was his judgment and all that it connotes that was bargained for. . . . The courts, therefore, have no business weighing

courts cannot grant injunctive relief in section 301 suits for breach of a no-strike agreement.[14] When the union has been held liable for damages in a suit under section 301 for breach of the no-strike clause, these damages are not assessable against the officers or members,[15] These principles form the basic structure of the federal common law which, according to the first premise in *Westinghouse*, need not be created. The second premise in *Westinghouse*, relating to the individual claims under the collective bargaining contract, has been the subject of considerable litigation, and its scope and meaning is as yet unclear.[16]

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the merits of the grievance, considering whether there is equity in a particular claim, or determining whether there is particular language in the written instrument which will support the claim. The agreement is to submit all grievances to arbitration, not merely those which the court will deem meritorious." United Steelworkers v. American Mfg. Co., 363 U.S. 564, 567-68 (1960). (Footnotes omitted.)

"The collective bargaining agreement states the rights and duties of the parties. It is more than a contract; it is a generalized code to govern a myriad of cases which the draftsmen cannot wholly anticipate. . . . The collective agreement covers the whole employment relationship. It calls into being a new common law—the common law of a particular industry or of a particular plant." United Steelworkers v. Warrior & Gulf Nav. Co., 363 U.S. 574, 578-79 (1960). (Footnotes omitted.) "[T]he parties' objective in using the arbitration process is primarily to further their common goal of uninterrupted production under the agreement, to make the agreement serve their specialized needs. The ablest judge cannot be expected to bring the same experience and competence to bear upon the determination of a grievance, because he cannot be similarly informed." *Id.* at 582.

In United Steelworkers v. Enterprise Wheel & Car Corp., 363 U.S. 593 (1960), the Court pointed out that "plenary review by a court of the merits would make meaningless the provisions that the arbitrator's decision is final, for in reality it would almost never be final. . . . [T]he question of interpretation of the collective bargaining agreement is a question for the arbitrator. It is the arbitrator's construction which was bargained for; and so far as the arbitrator's decisions concerns construction of the contract, the courts have no business overruling him because their interpretation of the contract is different from his." *Id.* at 599.

For extensive treatment of the *Steelworkers* trilogy see NATIONAL ACADEMY OF ARBITRATORS, ARBITRATION AND PUBLIC POLICY 8-82 (1961); Aaron, *Arbitration in the Federal Courts: Aftermath of the Trilogy*, 9 U.C.L.A.L. REV. 360 (1962); Gregory, *Enforcement of Collective Agreements by Arbitration*, 48 VA. L. REV. 888 (1962); Kovarsky, *Comment: The Enforcement of Agreements to Arbitrate*, 14 VAND. L. REV. 1105 (1960); Smith, *The Question of "Arbitrability"—The Roles of the Arbitrator, the Court, and the Parties*, 16 SW. L.J. 1 (1962); Wellington, *Judical Review and the Promise To Arbitrate*, 37 N.Y.U.L. REV. 471 (1962).

14. Sinclair Ref. Co. v. Atkinson, 370 U.S. 195 (1962). "§ 301 was not intended to have any such partially repealing effect upon such a long-standing, carefully thought out and highly significant part of this country's labor legislation as the Norris-LaGuardia Act." 370 U.S. at 203. (Footnotes omitted.) "[W]hat is involved is the question of whether the employer is to be allowed to enjoy the benefits of an injunction along with the right which Congress gave him in § 301 to sue for breach of a collective agreement. . . . Congress was not willing to insure that enjoyment to an employer at the cost of putting the federal courts back into the business of enjoining strikes." *Id.* at 214. For a case comment on the *Sinclair* case see 16 VAND. L. REV. 245 (1963).

15. Atkinson v. Sinclair Ref. Co., 370 U.S. 238 (1962). "The national labor policy requires and we hold that when a union is liable for damages for violation of the no-strike clause, its officers and members are not liable for these damages." *Id.* at 249.

16. Local Lodge 2040, I.A.M. v. Servel, Inc., 268 F.2d 692 (7th Cir. 1959); Copra

In the instant case the Court noted the fact that in *Westinghouse*[17] a majority had concluded that section 301 did not cover suits brought by a union to enforce employee rights which are "peculiar in the individual" and "uniquely personal," and which arise from the separate employment contract between the employer and the individual.[18] Mr. Justice White speaking for the Court stated that "subsequent decisions . . . have removed the underpinnings of *Westinghouse* and its holding is no longer authoritative as a precedent."[19] Noting that *Lincoln Mills* had settled the fact that section 301 had substantive content, the opinion pointed out numerous applications of the enforcement of "individual rights" in section 301 suits.[20] Reasoning that individual claims lie at the heart of grievance and arbitration machinery, and are inevitably so intertwined with union interest that they cannot be separated, the Court stated that the only way to effectuate a uniform body of substantive labor law was to allow the unions to enforce these rights. Likewise the Court reasoned that the same policy considerations led to the conclusion that individual employees should be able to sue under section 301.[21] The Court summarily dismissed defendant's contention that in section 301 the word "between" refers to "suits" and not to "contracts,"[22] *i.e.*, that only suits between employers

v. Suro, 236 F.2d 107 (1st Cir. 1956) ("§ 301(a) gives jurisdiction only where the *suit* as well as the contract is *between* an employer and a labor organization." 236 F.2d at 113); Dimeco v. Fisher, 185 F. Supp. 213 (D.N.J. 1960) ("Not only is there grave doubt whether an individual employee may bring suit under § 301(a) of the Taft-Hartley Act, but there is even graver doubt that such uniquely personal suits as these for wrongful discharge are cognizable under § 301(a)." 185 F. Supp. at 215). See also Sanders & Bowman, *Labor Law and Workmen's Compensation—1959 Tennessee Survey*, 12 VAND. L. REV. 1231, 1240-44 (1959).

17. 348 U.S. 437 (1955).

18. "There was no suggestion that Congress, at a time when its attention was directed to congestion in the federal courts, particularly in the heavy industrial areas, intended to open the doors of the federal courts to a potential flood of grievances based upon an employer's failure to comply with terms of a collective agreement relating to compensation, terms peculiar in the individual benefit which is their subject matter and which, when violated, give a cause of action to the individual employee." *Id.* at 460.

19. 371 U.S. at 199.

20. "Section 301 has been applied to suits to compel arbitration of such individual grievances as rates of pay, hours of work and wrongful discharge, *Textile Workers v. Lincoln Mills, supra; General Electric Co. v. Local 205, UEW*, 353 U.S. 547; to obtain specific enforcement of an arbitrator's award ordering reinstatement and back pay to individual employees, *United Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593; to recover wage increases in a contest over the validity of the collective bargaining contract, *Dowd Box Co. v. Courtney, supra*; and to suits against individual union members for violation of a no-strike clause contained in a collective bargaining agreement. *Atkinson v. Sinclair Ref. Co., supra.*" *Id.* at 199-200.

21. *Id.* at 200.

22. "Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in con-

and unions are within the purview of section 301—stating that neither the language nor the legislative history of section 301 required such a restrictive interpretation.[23] To leave these individual claims to be governed by state law would thus thwart the congressional policy of uniformity.[24]

The instant decision reflects the importance the Court attaches to the achievement of uniformity in the body of law relating to the enforcement of rights under collective agreements within the scope of section 301.[25] All such rights, no matter by whom asserted and no matter in which tribunal, arise under the same body of federal law. While this case appears to have eliminated for the federal courts the problem created by the *Westinghouse* decision—what are the "peculiarly individual" rights that could not be enforced in section 301 suits —many problems still remain. The Court has decided that such "individual" rights as rates of pay, hours of work, and wrongful discharge are enforceable in union suits to compel arbitration under section 301.[26] In the instant case the Court has gone a step further by holding that a claim of damages for breach of a collective bargaining agreement may now be asserted under section 301 by an individual employee.[27] This case suggests a partial solution to the problem of enforcing individual rights, but gives little guidance for the solution of the many procedural problems that may accompany suits for the enforcement of such rights. As was pointed out by both the majority[28] and the dissent[29] the question remains open as to what rights an

troversy or without regard to the citizenship of the parties." 61 Stat. 156 (1947), as amended, 29 U.S.C. § 185(a) (1958).

23. 371 U.S. at 200.

24. *Id.* at 200-01.

25. See note 16 *supra*. See also Mendelsohn, *Enforceability of Arbitration Agreements Under Taft-Hartley Section 301*, 66 YALE L.J. 167, 194 (1956); Summers, *Individual Rights in Collective Agreements: A Preliminary Analysis*, 9 BUFFALO L. REV. 239 (1960); Summers, *Individual Rights in Collective Agreements and Arbitration*, 37 N.Y.U.L. REV. 362, 372 (1962); Note, 41 CORNELL L.Q. 320 (1956).

26. See note 20 *supra*.

27. The Court in a per curiam opinion in General Drivers, Local 89 v. Riss & Co., 372 U.S. 517 (1963), overruled *Westinghouse* on its facts.

28. "The only part of the colleetive bargaining contract set out in this record is the no-discrimination clause. Respondent does not argue here and we need not consider the question of federal law of whether petitioner, under this contract, has standing to sue for breach of the no-discrimination clause nor do we deal with the standing of other employees to sue upon other clauses in other contracts." 371 U.S. at 201 n.9.

29. "[T]he Court studiously refrains from saying when, for what kinds of breach, or under what circumstances an individual employee can bring a § 301 action and when he must step aside for the union to prosecute his claim. Nor does the Court decide whether the suit brought in this case is one of the types which an individual can bring. . . . It seems to me to be at least a slight deviation from the Court's normal practice to determine the law that would be applicable in a particular lawsuit while leaving open the question of whether such a lawsuit has even been brought in the particular case the court is deciding. . . . [S]ince the Court is deciding that this type

individual employee has standing to enforce in a section 301 suit. The rights which the Court indicates are enforceable by employees are those which are "inevitably intertwined" with union interests and those which raise "grave question concerning the interpretation and enforceability" of the collective agreement.[30] In allowing the individual employees to sue under section 301 in the instant case the Court has indicated that the individual rights question with which they are now concerned is not whether all such rights are subject to section 301 (they are), but rather which of these rights may be enforced by the individual employee. The impact of the *Smith* case may in the long run have raised more questions than it has answered: (1) Are there rights which even though relating to individual claims are *so* "inevitably intertwined" with union interests as still to be enforceable only by the union or in a suit in which the union is a necessary party? (2) Are suits by individual employees limited only to the enforcement of rights other than those in which the union has a direct interest? (3) If so, is the "uniquely personal" distinction discussed in *Westinghouse* brought forward in the "peculiarly individual" rights mentioned in the instant case, so that *Westinghouse* wonld still have some limited vitality? (4) Is the enlargement of the scope of section 301 so as to include suits in court by individual employees contrary to the general policy of the Court in fostering an internal method of settling collective bargaining disputes through arbitration? (5) Will allowing employees to sue impair effective bargaining by the union, since an employer will be more reluctant to negotiate with the union to settle a claim when he may nevertheless be subject to a later suit on the sanie claim by an employee? However limited the instant decision may be or however niany the problems which it presents,[31] it is still a welcome

of action can be brought to vindicate workers' rights, I think it should also decide clearly and unequivocally whether an employee injured by the discrimination of either his employer or his union can file and prosecute his own lawsuit in his own way." *Id.* at 204-05 (Black, J., dissenting).

30. 371 U.S. at 200.

31. Mr. Justice Frankfurter in his decision in *Westinghouse* gave as one of his reasons for deciding that employees could not sue under § 301 that the employee always had recourse to state courts to enforce his individual rights. 348 U.S. at 437. This is now a fact, at least in § 301 suits under the instant decision.

For a good treatment of the conflicting viewpoints on employee suits in state courts see Summers, *Individual Rights in Collective Agreements and Arbitration,* 37 N.Y.U.L. REV. 362, 363-70 (1962).

For a collection of cases illustrating the individual employee's difficulty in enforcing collective bargaining agreements against his employer see Annot., 18 A.L.R.2d 382 (1951).

For discussions of employee rights under collective agreements see generally Blumrosen, *Legal Protection for Critical Job Interests: Union—Management Authority Versus Employee Autonomy,* 13 RUTGERS L. REV. 631 (1959); Comm. on Improvements of Administration of Union-Employer Contracts, *Report,* in ABA SECTION OF LABOR RELATIONS LAW, PROCEEDINGS 33 (1954), reprinted at 50 Nw. U.L. REV. 143 (1955); COX,

relief for the individual employee, for now he at least has a forum in which to bring his suit.

Rights Under a Labor Agreement, 69 HARV. L. REV. 601 (1956); Hanslowe, *Individual Rights in Collective Labor Relations*, 45 CORNELL L.Q. 25 (1959); Howlett, *Contract Rights of the Individual Employee as Against the Employer*, 8 LAB. L.J. 316 (1957); Summers, *Individual Rights in Collective Agreements: A Preliminary Analysis*, 9 BUFFALO L. REV. 239 (1960); Summers, *Individual Rights in Collective Agreements and Arbitration*, 37 N.Y.U.L. REV. 362 (1962).