NOTES

COVERAGE OF BUILDING MAINTENANCE EMPLOYEES UNDER THE FAIR LABOR STANDARDS ACTS OF 1938

Consonant with the spirit and broad language of the Fair Labor Standards Act, which was designed to improve working conditions throughout the country, has been the general extension of its coverage to maintenance workers employed in buildings occupied by tenants engaged in the “production of goods for [interstate] commerce.” The Act provides that an em-

2. The FLSA was designed as an instrument of national policy, using the federal commerce power as a vehicle, to alleviate the lot of more than ten million underprivileged workers by the establishment of minimum wage and maximum hour scales. Perhaps the best summary of the evils which led to the passage of the Act is found in § 2, which reads: “(a) The Congress hereby finds that the existence, in industries engaged in commerce or in the production of goods for commerce, of labor conditions detrimental to the maintenance of the minimum standard of living necessary for health, efficiency, and general well-being of workers (1) causes commerce and the channels and instrumentalities of commerce to be used to spread and perpetuate such labor conditions among the workers of the several States; (2) burdens commerce and the free flow of goods in commerce; (3) constitutes an unfair method of competition in commerce; (4) leads to labor disputes burdening and obstructing commerce and the free flow of goods in commerce; and (5) interferes with the orderly and fair marketing of goods in commerce.” For discussions of the background and legislative history of the Act see de Vvyver, Regulation of Wages and Hours Prior to 1938 (1939) 6 LAW & CONTEMP. PROB. 323; Douglas and Hackman, The Fair Labor Standards Act of 1938 I (1933) 53 POL. SCI. Q. 491. For a comprehensive study of the number of workers covered by the Act see Daugherty, The Economic Coverage of the Fair Labor Standards Act: A Statistical Study (1939) 6 LAW & CONTEMP. PROB. 405. For a discussion of some of the economic factors underlying the Act see Nathan, Favorable Economic Implications of the Fair Labor Standards Act (1939) 6 LAW & CONTEMP. PROB. 416.
ployer must pay prescribed minimum wages and compensation for overtime "to each of his employees who is engaged . . ." in such production; 4 and states that employees are "deemed" to be so engaged if they are employed "in any process or occupation necessary" to "production." "Production" is defined by the Statute as meaning "produced, manufactured, mined, handled, or in any other manner worked on." 5

The Supreme Court has evolved two rules in the application of this statute to maintenance workers. It was first held that where processing or manufacturing by either owners or tenants takes place upon the premises, maintenance workers have a sufficiently close relation to production to be covered by the Act. 6 Later, a correlative doctrine developed that if goods are not


4. Section 206(a) provides: "Every employer shall pay to each of his employees who is engaged in commerce or in the production of goods for commerce wages at the following rates—(1) during the first year from the effective date of this section, not less than 25 cents an hour, (2) during the next six years from such date, not less than 30 cents an hour. . . ." Section 207(a) states: "No employer shall, except as otherwise provided in this section, employ any of his employees who is engaged in commerce or in the production of goods for commerce—for a workweek longer than forty-four hours during the first year from the effective date of this section, (2) for a workweek longer than forty-two hours during the second year from such date, or (3) for a workweek longer than forty hours after the expiration of the second year from such date, unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed."

Two distinct criteria have been developed for the purpose of determining coverage under the Act, one applicable to employees "engaged in commerce" and the other applicable to employees "engaged in the production of goods for commerce." The test laid down for employees "engaged in commerce" in the leading case of McLeod v. Threlkeld, 319 U.S. 491, 497 (1943) was "not whether the employee's activities affect or indirectly relate to interstate commerce but whether they are actually in or so closely related to the movement of the commerce as to be a part of it." It has uniformly been held that building maintenance employees do not meet this test, and can only come within the scope of the Act if they are engaged in occupations "necessary to the production of goods for [interstate] commerce." See 10 E. 40th Street Building v. Callus, 65 Sup. Ct. 1227 (U.S. 1945), 8 WAGE & HOUR REP. 619. For decisions holding that building maintenance workers, employed in buildings the tenants of which are engaged in interstate commerce, do not come within the provisions of the Statute, see Johnson v. Dallas Downtown Development Co., 132 F. (2d) 287 (C. C. A. 5th, 1942); Johnson v. Masonic Building Co., 138 F. (2d) 817 (C. C. A. 5th, 1943); Cochran v. Florida National Building Corp., 45 F. Supp. 830 (S. D. Fla. 1942); Tate v. Empire Building Corp., 5 WAGE & HOUR REP. 475 (E. D. Tenn. 1942). The Supreme Court in effect affirmed these decisions when it denied certiorari in the Johnson case, 321 U.S. 780 (1944). The Administrator of the Wage and Hour Division has deplored this dual standard, however. See 5 WAGE & HOUR REP. 813; Wage & Hour Division release R-1890, October 17, 1942.

5. Section 203(j) provides: "'Produced' means produced, manufactured, mined, handled, or in any other manner worked on in any State; and for the purposes of this chapter an employee shall be deemed to have been engaged in the production of goods if such employee was employed in producing, manufacturing, mining, handling, transporting, or in any other manner working on such goods, or in any process or occupation necessary to the production thereof, in any State."

physically handled in the building, such maintenance employees will be protected if their employer is engaged in interstate business, but not when tenants are taking part in interstate activity and the employer merely operates the building.

The manufacturing test was first applied by the Court in 1942 in *Kirschbaum v. Walling.* In that case maintenance employees of a loft building, whose tenants engaged principally in manufacturing, buying, and selling of clothing, were held necessary to the production of goods for interstate commerce within the meaning of the Act, on the theory that the tenants could not produce without the light, heat, and power provided by the workers. The test based upon the nature of the employer's business was evolved in two recent cases decided the same day. In *Borden v. Borella* the laborers were employed in an office building owned and largely occupied by the Borden Company, an interstate producer of milk products. No processing, handling or manufacturing took place within the building, but it contained the executive offices from which the Borden enterprise was controlled. In holding the maintenance workers were engaged in occupations necessary to the "production of goods for commerce" and were protected by the Act, Mr. Justice Murphy, writing for the majority, stressed the usual test of the relation of the employees to "production," which the Court held included management as well as manufacturing. Mr. Justice Frankfurter concurred in the result.

But in the companion case, *10 East 40th St. v. Callus,* the tenants, instead of the owner, were engaged in interstate activity, preparing nationally circulated magazines for publication, designing posters and displays for a large out-of-state lithographer, operating sales agencies for mining and manufacturing firms, writing and distributing publicity releases for national concerns, "handling" and repairing machines for customers in different states, and supervising plants "manufacturing" goods for interstate commerce. The employer merely operated the building. The Second Circuit Court of Appeals held for the maintenance workers on the theory that a substantial part of the building was occupied by firms "producing" goods.


8. 316 U. S. 517 (1942).

9. 65 Sup. Ct. 1223 (U. S. 1945), 8 WAGE & HOUR REP. 621.

10. "And since the respondent maintenance employees stand in the same relation to this production as did the maintenance workers in the Kirschbaum case, it follows that they are engaged in occupations 'necessary' to such production, thereby qualifying for the benefits of the Fair Labor Standards Act." *Id.* at 1225, 8 WAGE & HOUR REP. 622.

11. *Id.* at 1226, 8 WAGE & HOUR REP. 623.

12. 65 Sup. Ct. 1227 (U. S. 1945), 8 WAGE & HOUR REP. 619.

13. See *Callus v. 10 East 40th Street Building, Inc.,* 146 F. (2d) 438 (C. C. A. 2d, 1944).


15. The Second Circuit Court of Appeals has suggested that courts adopt the Administrator's criterion of enforcement, based on 20% of the space occupied, as their test of sub-
for commerce. In an opinion by Mr. Justice Frankfurter, the Supreme Court reversed, rejecting the reasoning of the *Borden* case, stressing the fact that the owners of the building were not engaged in interstate commerce. While manufacturing by either owners or tenants would extend the Act to maintenance workers under the *Kirschbaum* case, the *Callus* and *Borden* holdings seem to mean that where the activity in the building is something removed from physical processing of goods, such as managing or advertising, the maintenance workers will only be protected if such interstate activity is done by their direct employer.

Prior to the *Callus* case, however, it was generally understood that the relation of the individual employees to "production" rather than the nature

*substantiality.* The Administrator, however, has cautioned against setting up such a standard since many cases have held that a "much smaller proportion of interstate business may suffice to bring employees engaged in occupations necessary to such business within the scope of the Act." Brief for the Administrator of the Wage and Hour Division, as amicus curiae, p. 17, n. 8, 10 East 40th Street Building v. Callus, 65 Sup. Ct. 1227 (U. S. 1945), 8 WAGE & HOUR REP. 619 (1945). Employees have been covered under the Act when less than 1 per cent of the employer's business was devoted to interstate business. In the following cases, cited in the amicus brief at 28, footnote 14, in which the proportion of the employer's business moving in interstate commerce varied from 4% to less than 1%, the employees were held to be covered by the Act: Sun Publishing Co. v. Walling, 140 F. (2d) 445 (C. C. A. 6th, 1944), cert. denied, 322 U. S. 728 (1944); Davis v. Goodman Lumber Co., 133 F. (2d) 52 (C. C. A. 4th, 1943); New Mexico Public Service Co. v. Engel, 145 F. (2d) 636 (C. C. A. 10th, 1944); Schmidt v. Peoples Telephone Union of Maryville, Mo., 138 F. (2d) 13 (C. C. A. 8th, 1943); Strand v. Garden Valley Telephone Co., 51 F. Supp. 898 (D. Minn. 1943); Cooper v. Gas Corp. of Michigan, 4 WAGE & HOUR REP. 550 (C. C. Mich. 1941); Steger v. Beard & Stone Elec. Co., 4 WAGE & HOUR REP. 411 (N. D. Tex. 1941); Lewis v. Nailling, 36 F. Supp. 187 (W. D. Tenn. 1940); Fleming v. Lowell Sun Co., 36 F. Supp. 320 (D. Mass. 1940), rev'd on other grounds, 120 F. (2d) 213 (C. C. A. 1st, 1941), aff'd without opinion, 315 U. S. 784 (1942); Ling v. Currier Lumber Co., 50 F. Supp. 204 (E. D. Mich. 1943).

The press release announcing the Administrator's enforcement policy reads: "In view of recent decisions of the courts in 'employee suits brought by maintenance employees in office and bank buildings, L. Metcalfe Walling, the Administrator of the Wage and Hour and Public Contracts Divisions, announced today that until the courts indicated that the act applied, or until further notice, he would take no further enforcement action under the wage and hour provisions of the Fair Labor Standards Act, with respect to maintenance employees in buildings in which less than 20 percent of the space is occupied by firms engaged there or elsewhere in the production of goods for commerce. He also stated that, in the interests of simplicity and uniformity in the application of this policy, for the present he would not include in the computation of the 20 percent banking firms or other firms whose interstate activities are limited to the preparation and transmission of documents, communications or correspondence, although in his opinion such activities involve production of goods for commerce as defined in the Fair Labor Standards Act and of course involve engaging in commerce." See PR-19 (rev.) WAGE & HOUR DIVISION, November 19, 1943, contained in the amicus brief cited supra note 15 at 33–4.

16. "But an office building exclusively devoted to the purpose of housing all the usual miscellany of offices has many differences in the practical affairs of life from . . . the office building of a manufacturer." 10 East 40th Street Building v. Callus, 65 Sup. Ct. 1227, 1230 (U. S. 1945), 8 WAGE & HOUR REP. 619, 620.
of the employer's business was the test for protection by the statute. In fact, as first drafted, the Act made the nature of the employer's enterprise the test of coverage for his employees, but in its final form the employees' duties were adopted as the criterion: the workers were to be protected if engaged in any process or occupation necessary to the production of goods for commerce. "Necessary" has been construed to mean "convenient" rather than "indispensable." The administrator has said, "the benefits of the statute are extended to such employees as maintenance workers, watchmen, clerks, stenographers, messengers, all of whom must be considered as engaged in processes or occupations 'necessary to the production' of goods. Enterprises cannot operate without such employees. If they were not doing work 'necessary to the production' of the goods they would not be on the payroll." In addition, "production" has been given an equally broad meaning by the courts and the administrator. Under the test advocated by the administrator and sanctioned by the Second Circuit Court of Appeals, if 20 percent of the space in the building is being used for production, maintenance workers are covered by the Act.

As this test of the relation of the employees to production was used in the Kirschbaum decision, it was apparently intended to apply to interstate activities other than manufacturing. Instead of limiting its holding to manufacturing, the Court wrote in the disjunctive: "Practically all of the tenants manufacture or buy and sell ladies' garments." In any event, the clear implication of the opinion is that the Court intended no such limitation, but used "manufacturing" only as a component part of the broader statutory definition of "production," i.e. "produced, manufactured, mined, handled or in any other manner worked on." Clearly, therefore, a substantial percentage of the 10 E. 40th St. tenants were engaged in "production" ac-

18. For a comparison of the original Senate bill, S 2473, and the House bill, HR 7200 (75th Congress, 1st Session, 1937) with the conference report which was finally enacted, see 83 Cong. Rec. 9246 (1938), especially at 9252 where the question of coverage is discussed. See also Cooper, The Coverage of the Fair Labor Standards Act and Other Problems in Its Interpretation (1939) 6 LAW & CONTEMP. PROB. 333, 338-9; (1944) 29 IOWA L. REV. 606, 610; and Administrator's Interpretative Bull. No. 1 (issued Sept. 22, 1938) 1941 WAGE & HOUR MAN. 27, par. 1.
19. "Every employer shall pay to each of his employees who is engaged in commerce or in the production of goods for commerce..." 52 Stat. 1062 (1938), 29 U. S. C. § 206a (1940).
20. See Administrator's Interpretative Bull. No. 1, id. at 28, par. 5.
21. See note 15 supra.
22. See 10 East 40th Street Building, Inc. v. Callus, 146 F. (2d) 438, 440 (C. C. A. 2d, 1944). "The Division's 20% standard seems to us a sensible one for the courts to adopt."
24. See note 5 supra.
according to the meaning suggested by the language of the Kirschbaum decision.

It was upon this test of coverage that Mr. Justice Murphy based his decision in the Borden and his dissent in the Callus case. Under the majority opinion in the latter decision it is still necessary to apply the criterion of the workers' relation to production, but it is only applied in the non-manufacturing cases after the test of the employer's occupation has been met.

In addition to limiting the coverage of the FLSA, the Callus decision has given rise to confusion in the lower courts. For example, Roberg v. Phipps Estate, on the authority of the Callus decision, denied coverage to maintenance workers employed in buildings where actual "manufacturing" was taking place. The District Court decided that although no manufacturing was carried on at 10 East 40th Street, the reasoning used by the Supreme Court in the Callus case was applicable. This appears to be an unwarranted

27. Eleven and one-half percent of the rentable area was devoted to manufacturing goods for interstate commerce. The District Court decided this was too small a percentage to satisfy their test of substantiality. Eleven and one-half percent of the rentable space might be enough to satisfy the substantiality requirement. "As was said in the Engel case, an employee's interstate activities are sufficiently substantial to bring him within the scope of the Act if such activities constitute 'a part of the work-a-day duties of the employee,' and his contribution to production is 'both consistent and continuous,' 'not merely sporadic and isolated.' (145 F. 2d at 640). No reason appears why this principle should not apply to maintenance employees performing service indiscriminately for tenants who engage in production of goods for commerce and for tenants who do not. In all cases where the interstate and intrastate business is commingled, the problem is to determine whether the interstate aspects are substantial, or merely incidental and inconsequential. The problem here does not differ in substance from that of employees in a factory producing goods only a fraction of which is intended for shipment in interstate commerce. In such cases, while the proportion of goods shipped in commerce may be regarded as some indication of the substantiality of the employee's interstate activities, it is recognized that no flat percentage standard can be applied. In some cases the proportion of interstate business has been as low as a fraction of 1%, but nevertheless has been held substantial enough to bring within the Act employees whose regular day-to-day duties relate indiscriminately to the interstate as well as the intrastate business." Amicus brief cited supra note 15, at 27-9.
28. Roberg v. Phipps Estate, Inc., 8 Wage & Hour Rep. 771, 773 (S. D. N. Y. 1945), opinion modified in 8 Wage & Hour Rep. 885 (S. D. N. Y. 1945) to conform to Judge Clark's opinion in the Baldwin v. Emigrant Savings Bank case cited supra n. 29. The District Court in its first opinion found that 35,920 square feet or eleven and one-half percent of the rentable area was occupied by firms engaged in the production of goods for commerce. On the basis of what Judge Clark said constituted production of goods for commerce, the court was compelled to add 25,385 square feet to its original estimate and hence obtained a total of 61,305 square feet. This total, however, according to the court, still fell 695 feet short of the twenty percent required by the Administrator, since there was rental area of 310,000 square feet. But as has been pointed out the Administrator's standard is not the absolute minimum required for coverage (see notes 15 and 17 infra) and is merely an administrative rule of thumb. The Administrator would undoubtedly recommend that the employees of the Roberg case be covered.
conclusion, as the language of the majority in the Callus opinion clearly affirms the Kirschbaum decision and indicates it would have reached a different result if enough of the tenants of the 10 East 40th Street building had been engaged in the manufacturing of goods for commerce. Thus it seems the Court in the Roberg case would have been compelled to reach a different result had it recognized the employer test of the Callus opinion as an alternative criterion, in addition to the usual production tests of the Borden and Kirschbaum decisions.

By contrast, in Baldwin v. Emigrant Industrial Savings Bank, the Second Circuit Court of Appeals interpreted the Callus decision as establishing the doctrine that there must be "actual physical production" of goods on the premises before maintenance workers can be covered by the Act, and held that "handling" constituted such "physical production." This holding, which recognized that the employer-occupation test was not relevant where physical production took place within the building, seems to interpret the Callus case more correctly than the Roberg decision.

As Mr. Justice Frankfurter suggested, in the Callus case the Court was endeavoring to draw a practical line which was "bound to appear arbitrary when judged solely by bordering cases." In defense of this stand, he pointed out this task was put upon the courts, and not upon a legislative or administrative group, since Congress failed to exhaust its power over commerce by establishing adequate statutory criteria, or by creating an expert administrative group.

Such arguments, however, do not answer the objection that the particular line was not wisely drawn. The pre-Callus cases indicated that the relation of the particular employee to production, and not the employer's occupation, controlled. The introduction of a second test seems a needless complication. In fact, six of the nine Justices maintained consistent positions in the Borden and Callus cases on the application of the older doctrine of the relation of the employee to production. In both the Borden and Callus decisions, Justices Murphy, Black, Reed, and Rutledge voted to extend the protection of the Act to maintenance employees where interstate activity, but no physical handling of goods, took place within the building; and in both cases the Chief Justice, and Mr. Justice Roberts were against extending the Act to the workers. Only Justices Frankfurter, Jackson, and Douglas changed their position for the Callus case, at the same time introducing

30. Id. at 525.
32. Id. at 1229, 8 Wage & Hour Rep. at 619. Compare his language in Kirschbaum v. Walling, 316 U. S. 517, 523 (1942).
33. These four were joined by Justices Frankfurter, Jackson, and Douglas to make a 7–2 majority.
34. The changing over of the three gave the 5–4 margin against the workers in the Callus case.
the employer-occupation test. Since this latter criterion was not stressed by any opinion in the *Borden* decision, and is apparently advanced by only three Justices, it is at least possible that it will not play a major role in future cases.

As a matter of policy it would seem consistent with the spirit of the FLSA to extend its coverage as widely as the commerce power will allow.\(^3\) This can best be done by continued liberal interpretation of the terms “necessary” and “production” and by repudiation of doctrinal limitations such as the employer-occupation test.\(^3\)

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**PRESS ASSOCIATIONS AND RESTRAINT OF TRADE\(^*\)**

While it is well established that the newspaper industry is within the ambit of the Sherman Act,\(^1\) it has long been a question to what extent the practices of newspaper publishers are subject to its provisions.\(^2\) The recent

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3. “It is clear that the purpose of the Act was to extend federal control in this field throughout the farthest reaches of the channels of interstate commerce.” Walling v. Jacksonville Paper Co., 317 U.S. 564, 567 (1943).

36. Five identical bills are pending in Congress at the present time which would raise the FLSA minimum wage to 65 cents, 75 cents after two years, provide higher minima for other than unskilled jobs, and extend coverage of the Act. See 8 WAGE & HOUR REP. 729–32 for a discussion of proposed amendments. Impetus has been given to this contemplated legislation by President Truman’s recent message to Congress, the concluding portion of which reads: “I therefore recommend that the Congress amend the Fair Labor Standards Act by substantially increasing the minimum wage specified therein to a level which will eliminate substandards of living, and assure the maintenance of the health, efficiency, and general well-being of workers. The scope of the Fair Labor Standards Act also should be clarified and extended. In view of changes which have occurred since 1938, I believe it is no longer necessary to exclude from the minimum wage program the large number of workers engaged in agricultural processing who are now excluded. There now exists a twilight zone in which some workers are covered, and others, doing similar work, are not. Extension of coverage would benefit both workers and employers, by removing competitive inequities. Our achievements in this field during the last seven years of establishing minimum wages have been gratifying; but we must continue to move forward, step by step.” 8 WAGE & HOUR REP. 891–892.


2. See Inter-Ocean Publishing Co. v. Associated Press, 184 Ill. 438, 56 N. E. 822 (1900); International News Service v. Associated Press, 248 U.S. 215 (1918). The INS case established that AP and other cooperative associations are engaged in business for profit. This was affirmed in American Medical Ass’n v. United States, 317 U.S. 519, 528 (1943).
Associated Press 3 case 4 indicates that a co-operative news service may not deny applicants access to its facilities solely because of their competitive relation to existing members.

Charging a combination and conspiracy in restraint of trade and commerce and an attempt to monopolize within the meaning of the Sherman Act, 5 the government, in an injunction proceeding, challenged as restrictive and exclusionary the membership by-laws 6 of the defendant association, a co-operative, non-profit agency for the gathering and interchange of news. 7 On motion for summary judgment, 8 a special three-judge District Court 9 concluded that the by-laws relating to requirements for admission to membership 10 were, on their face, illegal restraints of interstate trade in news. Their continued enforcement was enjoined with directions to amend them so that established members in the same city and "field" 11 should not have the power to impose or dispense with conditions upon admission, and so that such by-laws state affirmatively that competitive considerations 12 will be disregarded in passing upon applicants. 13 The court did not attempt, however, to interfere with AP's employment of other criteria in selecting its members. The by-law proscribing communication by members of "spot" news 14 and AP news dispatches to non-members or to rival news agencies was held to be illegal only when considered in conjunction with the admis-

3. Hereinafter called AP.
4. 65 Sup. Ct. 1416 (U.S. 1945).
6. A summary of the history of AP's by-laws is contained in the majority opinion of the Supreme Court. See 65 Sup. Ct. 1416, 1418-20 (U.S. 1945).
8. Pursuant to Rule 56 of the Fed. R. Civ. P., 48 Stat. 1064 (1934), 28 U.S.C. following § 723c (1940). This rule requires the court, in a proceeding on motion for summary judgment, to confine its attention to facts which, based upon the pleadings, depositions, admissions, and affidavits on file, are undisputed, or as to which the dispute does not raise any substantial issue. See 52 F. Supp. 362, 364 (S.D.N.Y. 1943).
11. The fields are morning, evening, and Sunday.
12. By "competitive considerations" is meant taking into account the effect of admitting an applicant upon his ability to compete with established members who operate in the same city and time-field.
14. News of spontaneous or local origin; that is, newsworthy events which occur in the member's district (the territorial extent of which is fixed by AP's board of directors) without "deliberate and individual enterprise" on the part of any employee of the member newspaper. See By-laws (1942), Art. VIII, § 4.
sion restrictions. Likewise, AP's contract with Canadian Press, by which AP and its members secured exclusive rights in this country to the news reports of the only comprehensive news service in Canada, was declared to be but collaterally illegal. These latter two were enjoined conditionally, pending revision by AP of its membership by-laws. No attempt to monopolize was found. This decree was affirmed in all particulars by the Supreme Court.

An adjudication under the Sherman Act as to the competitive effects of the by-laws of a press association would seem to require 1) an analysis of the market in which they operate: the comparative and absolute size and importance of the rival associations in the industry, their relations to each other, to their respective subscribers and rejectees, and to the reading public; 2) an inquiry into the degree to which these relationships have been affected by the restrictions embodied in the defendant association's by-laws; and 3) a determination of the forms of relief which the antitrust law provides.

Probably the outstanding condition of existence for a daily newspaper today is access to at least one comprehensive news service. Pressures of time render it literally impossible for any newspaper single-handedly to secure rapid, reliable, and efficient coverage and transmission service from all parts of the world. Thus, unless possessed of a sizeable independent fortune, an entrepreneur simply will not launch a newspaper without assurance of access to the requisite news-gathering facilities. Of the three leading news agencies in the United States, United Press and International News Service, organized for profit, are prepared to sell their reports to any

16. Ibid.
17. Ibid. See Mr. Justice Douglas, concurring, 65 Sup. Ct. 1416, 1426 (U.S. 1945).
18. Ibid. See Mr. Justice Douglas, concurring, 65 Sup. Ct. 1416, 1425–6 (U.S. 1945). Mr. Justice Black wrote the majority opinion, Justices Douglas and Frankfurter concurring in separate opinions. Dissents were written by Justices Murphy and Roberts. The Chief Justice joined in the opinion of Mr. Justice Roberts.
21. The only conspicuous recent attempt was made by Marshall Field, who, in December 1941, founded The Chicago Sun, and, without AP service, developed it into one of the 64 newspapers in the United States with a circulation of over 50,000. Indeed, in July 1942 its daily circulation was 327,000, its Sunday circulation over 400,000. For an account of The Sun's problems in obtaining adequate press services, particularly during the first few months of its existence, of its filing of a complaint against AP in February 1942, and of the reactions to the Government's move in bringing suit against AP in August 1942, see M. FIELD, FREEDOM IS MORE THAN A WORD (1945) 122–8, 136–146.
22. The United Press hereinafter will be referred to as UP, and International News Service as INS.
newspaper publisher, but AP, the largest of the three agencies, serves its members exclusively.

AP's dominance in the field is indicated by almost any standard of comparison. In 1941 it served 1247 newspapers in this country, to UP's 981. Of 110 morning dailies with a circulation of more than 25,000, 107 were AP members while only 62 were subscribers to UP. Approximately 100,000 people contributed to the gathering of news received by AP as compared with UP's 2,855 employees; AP had 290,000 miles of leased wires as against 176,000 operated by UP; and had an annual budget of $12,000,000 as compared with UP's budget of $7,000,000. AP's preeminence as to domestic coverage is generally conceded, but there is a difference of opinion concerning the relative merits of their foreign services.

There was no suggestion, in the instant suit, that AP achieved or is maintaining this position of prominence by eliminating rivals or controlling their business practices. On the contrary, the net practical result of AP's by-laws is to keep its news services from all non-member publishers, thereby stimulating subscriptions to UP and INS services. The instant scheme, however, by allowing existing publisher-members to block the access of competitors to a large and desirable segment of the news market, seems similar in its effects to others held illegal under the Sherman Act.  

23. UP and INS enter into "asset-value" contracts with their subscribers, the asset-value being a specified sum which "competing" newspapers, desirous of securing UP or INS news, must pay to a newspaper in the same city and field which already holds such a contract. See 52 F. Supp. 362, 366-7 (S. D. N. Y. 1943).

24. . . AP is a vast, intricately reticulated, organization, the largest of its kind, gathering news from all over the world, the chief single source of news for the American press, universally agreed to be of prime consequence." 52 F. Supp. 362, 373 (S. D. N. Y. 1943).

25. By-laws (1942), Art. VII, § 4. By the terms of its by-laws, the association is a clearing house for both the news which its staff gathers and the local news contributed by the staffs of its members. Id., Art. VIII, §§ 3-4. AP obtains much of its domestic news from its 94 news bureaus located throughout the United States, and from its "string" (part-time) correspondents. Foreign news is secured from its foreign news bureaus, from foreign news agencies with whom AP has entered into reciprocal contracts for the exchange of news reports, and from its foreign string correspondents.

26. Serving only 338 newspapers in 1941, and trailing the other two agencies in every activity relating to news collection and distribution, INS may be eliminated from comparative discussion. As part of the King Features Syndicate it is important in the industry, but its own ("straight") news services do not approach in scope or value those of AP or UP.


28. This is reflected by the fact that more than 300 newspapers, including most of the leading ones, are both members of AP and subscribers to UP. 52 F. Supp. 362, 367 (S. D. N. Y. 1943).


30. Compare Montague & Co. v. Lowry, 193 U. S. 38 (1904); Fashion Originators' Guild, Inc. v. Federal Trade Commission, 312 U. S. 437 (1941); Eastern States Retail Lumber Dealers' Ass'n v. United States, 234 U. S. 600 (1914). See cases cited in 65 Sup. Ct. 1416, 1424 (U. S. 1945). It seems doubtful that the Associated Press case will have a wide application to ordinary business situations, since the co-operative structure of AP is not a usual form of organization.
AP's by-laws provided the framework within which the restrictive and exclusionary practices complained of in this suit were carried out. The by-laws on voting requirements for admission are framed in the alternative, depending upon whether or not the applicant is competing or is likely to compete with existing members. Thus, if there is no existing member in the city and field, or if all members in that city and field have waived their rights, request by a newspaper for AP membership is followed by a simple vote of the directors. But if there is a member in the applicant's city and field and he has not waived his rights, approval must be demonstrated by a majority vote of the "regular" members at a membership meeting. It is this provision which has always operated, and under the 1942 amendments had continued to operate, to empower a member to block the application of competitors. Concerted negative voting, whenever a single member registers his desire to keep out a competitor-applicant, stems from an awareness by the other members that at some future time a competitor of theirs may apply for admission. This restrictive result has been further assured by the provisions of the by-laws which grant additional voting power to members holding AP bonds.

31. Where a newspaper publisher purchases an existing AP franchise in a city, none of the standards or procedures are brought into play: his newspaper is admitted automatically without even having to make formal application. By-laws (1942), Art. II, § 3. Marshall Field tried, without success, to purchase the morning AP franchise of The Chicago Herald-American in December, 1941. See Field, op. cit. supra note 21, at 127-8.


33. The 1942 amendments, which formed the basis of this suit, established a majority vote, 10% assessment payment (see infra note 36), and relinquishment of exclusive rights to other news or news picture services, as requirements for admission to AP whenever an existing member exercised his "right of protest" to the application of a publisher who was actually or potentially his competitor. See 65 Sup. Ct. 1416, 1420 (U. S. 1945).

In 1900 when AP was incorporated under Illinois laws, its by-laws gave stockholding members an unconditional veto over membership applicants within a 60-mile radius. Members at that time were forbidden, subject to fine and suspension, to receive news from, or furnish news to, persons or firms declared to be "antagonistic" by AP's board of directors. See Inter-Ocean Publishing Co. v. Associated Press, 184 Ill. 438, 443, 56 N. E. 822, 823 (1900); V. Rosewater, History of Cooperative News-Gathering in the United States (1930) c. XXI.

34. This is analogous to Senatorial courtesy. For an analysis of the compelling considerations involved, see 52 F. Supp. 362, 370 (S. D. N. Y. 1943).

During the years 1900-1942, 95% of all applicants under such circumstances were rejected. In contrast, for the ten-year period 1932-42, 95% of those applying were elected where there was no member paper in that city and field or where the members affected waived their protest rights. Brief for the United States, p. 26, Associated Press et al. v. United States, 65 Sup. Ct. 1416 (U. S. 1945).

35. The by-laws grant one vote to each regular member because of his membership and one additional vote for each $25 of AP bonds registered in his name and held by him (provided he files with AP's Secretary a waiver of his claim to interest thereon), up to $1,000. By-laws (1942), Art. XII, § 3. Specified limitations, however, prevent all members from
Beyond the voting procedures, the by-laws set two further conditions precedent to membership. First, the elected applicant must pay to AP a sum equal to ten percent of the total regular assessments paid since October 1, 1900, by the members in his city and field. This sum is then distributed among such members in proportion to assessments paid. No payment is exacted if there is no established member in the applicant's city and field, although such an applicant becomes entitled, on admission, to a share in AP's capital assets. Secondly, the applicant must undertake to surrender the exclusive character of any news or news-picture service he may be subscribing to, a condition which was apparently not considered illegal; and further, a competing member may insist that the applicant obtain such owning an equal amount of bonds. Thus in 1942 out of 1247 members, only 99—including most of those in the large cities—held sufficient bonds to entitle them to the maximum number of votes. These totaled more than 50% of the outstanding bonds and gave the 99 almost 80% of the membership's total voting capacity. 52 F. Supp. 362, 366 (S. D. N. Y. 1943); 65 Sup. Ct. 1416, 1419 n. 2 (U. S. 1945).


There is a startling contrast between the amounts payable under the UP "asset-value" system (see supra, note 23) and under the AP scheme. "The 'asset-value' of six of the UP contracts was under $10,000; of twenty it was between $10,000 and $20,000; of fifteen, between $20,000 and $30,000; of six, between $30,000 and $40,000; of four, between $40,000 and $50,000; of one, between $50,000 and $60,000; and of one, between $60,000 and $70,000." 52 F. Supp. 362, 367 (S. D. N. Y. 1943). Compare the following figures on AP admission fees:

<table>
<thead>
<tr>
<th>City</th>
<th>Mornings and Sunday</th>
<th>Evening</th>
</tr>
</thead>
<tbody>
<tr>
<td>New York</td>
<td>$824,333.82</td>
<td>$575,033.49</td>
</tr>
<tr>
<td>Chicago</td>
<td>334,250.46</td>
<td>342,310.35</td>
</tr>
<tr>
<td>Detroit</td>
<td>152,789.68</td>
<td>154,605.86</td>
</tr>
<tr>
<td>Los Angeles</td>
<td>228,126.82</td>
<td>134,709.20</td>
</tr>
<tr>
<td>St. Louis</td>
<td>182,323.42</td>
<td>185,832.23</td>
</tr>
<tr>
<td>Baltimore</td>
<td>169,163.73</td>
<td>148,653.13</td>
</tr>
<tr>
<td>Boston</td>
<td>253,650.16</td>
<td>218,917.92</td>
</tr>
<tr>
<td>Cleveland</td>
<td>144,365.63</td>
<td>131,474.18</td>
</tr>
<tr>
<td>Philadelphia</td>
<td>286,719.35</td>
<td>288,115.26</td>
</tr>
<tr>
<td>Pittsburgh</td>
<td>183,598.87</td>
<td>147,605.41</td>
</tr>
<tr>
<td>Washington, D. C.</td>
<td>118,930.08</td>
<td>88,293.20</td>
</tr>
</tbody>
</table>


37. The directors are empowered to apportion among the members the expenses of news collection and distribution, and to levy assessments against them. By-laws (1942), Art. IX, § 1. The apportionment is based upon the population of the area within which the newspaper circulates. Where there is more than one member in the same city and field the expenses are shared equally, irrespective of the newspapers' differing circulations. Assessments are payable weekly and in advance, and for delay in payment the directors may impose a fine of $1,000 or suspend a member (news service to a member is discontinued during periods of suspension), with no right of appeal against such action. By-laws (1942), Art. IX, § 2; Art. X, §§ 1, 2, 5. Assessments may also be levied in order to accumulate a surplus fund. Id., Art. IX, § 1.

The directors are elected by the regular members, under the same scheme for rewarding AP bondholders as prevails in voting on applicants for membership. 65 Sup. Ct. 1416, 1419 n. 2 (U. S. 1945).
service for him on the same terms as it is available to the applicant. The latter condition, as well as the initial payment scheme, was held to violate Section 1 of the Sherman Act. 38

The vague, inclusive quality of the Sherman Act's key phrases has imposed upon the courts from the outset the burden of defining the scope of their application to powerful combinations and abusive practices. 39 The very generality of their language, however, has ensured their adaptability in solving the problem of widely divergent industries, 40 and under "the rule of reason" some less uncertain common law concepts have been utilized in appraising the extent of restraint and the responsibilities of business units to competitors and the public. 41 In this process it has been recognized that "questions of reasonableness are necessarily questions of relation and degree." 42 To provide effective accommodation to specific cases, whenever a combination has been declared illegal and ordered to be restrained or dissolved, the court painstakingly has sought to make its mandate the resultant of the equities and the economic realities of the industry under consideration. 43 Mr. Justice Black, in the instant case, showed a realistic appreciation of the strength and weakness of the rule of reason by phrasing his opinion in terms of competition and the operative forces in the news market, and by basing his judgment upon the specific by-laws complained of and their impact upon non-member newspaper publishers. 44

On the other hand, Judge Learned Hand's majority opinion in the lower


40. See HAMILTON and TILL, op. cit. supra note 39, at 74.

41. For an instructive summary of the status of the Sherman Act up to 1904, see Mr. Justice Harlan's majority opinion in Northern Securities Co. v. United States, 193 U. S. 197 (1904). The common law influence upon the language and spirit of the Sherman Act is described in A. H. Walker, HISTORY OF THE SHERMAN LAW (1910) 47-62. For the history of the rule of reason, see Handler, op. cit. supra note 39, at 3-9. This norm seems to be in judicial favor today in the federal courts. The principal case is illustrative of this fact, for all five opinions in the Supreme Court purported to rest upon it.


42. Chief Justice Hughes, speaking for the majority in The Sugar Institute, Inc. v. United States, 297 U. S. 553, 600 (1936).

43. For the varying judicial applications of the rule of reason to American industry, see the cases cited and discussed in Handler, op. cit. supra note 39.

See Taft, op. cit. supra note 39, at 63, 65-6 for a demonstration that the alternating endorsement and discardng of the rule of reason has not affected the substantive outcome of any case decided under the Sherman Act. Taft insists that the common law norm was applied even in those instances where it was articulately rejected.

44. 65 Sup. Ct. 1416 (U. S. 1945).
court and Mr. Justice Frankfurter's concurring opinion in the Supreme Court both rested their conclusions upon the special public interest in, and dependence upon, diversity in the assemblage, interchange, and distribution of news. Under such an interpretation of "the rule of reason," courts would look beyond the industry's economic structure into its "public function," and prescribe in this light the rules of its activity. A number of recent writings have suggested that this principle be given wider currency in suits to regulate restrictive practices and combinations in certain fields. Consideration of the public nature of the enterprise and commodity involved admittedly influences a judicial conclusion as to the legality of a particular "evil." But it seems an historical oversimplification to regard the Sherman Act as giving the courts, so long as they speak in the name of the general welfare, full discretion to impose special standards of conduct on particular industries. If any legislative intent may be inferred from the provisions of the Act and the contemporary debates thereon, it was to identify the public interest with the protection of full and untrammeled competition as the

45. "... even if this were a case of the ordinary kind: the production of fungible goods, like steel, machinery, clothes or the like, it would be a nice question whether the handicap upon those excluded from the combination, should prevail over the claim of the members to enjoy the fruits of their foresight, industry and sagacity. But in that event the only interest we should have to weigh against that of the members would be the interest of the excluded newspapers. However, neither exclusively, nor even primarily, are the interests of the newspaper industry conclusive; for that industry serves one of the most vital of all general interests: the dissemination of news from as many different sources, and with as many different facets and colors as is possible. . . .

"... to deprive a paper of the benefit of any service of the first rating is to deprive the reading public of means of information which it should have; it is only by cross lights from varying directions that full illumination can be secured." 52 F. Supp. 362, 372 (S. D. N. Y. 1943).

"... in addition to being a commercial enterprise, it [AP] has a relation to the public interest unlike that of any other enterprise pursued for profit. . . . Truth and understanding are not wares like peanuts or potatoes. And so, the incidence of restraints upon the promotion of truth through denial of access to the basis for understanding calls into play considerations very different from comparable restraints in a cooperative enterprise having merely a commercial aspect. . . . The interest of the public is to have the flow of news not trammeled by the combined self-interest of those who enjoy a unique constitutional position precisely because of the public dependence on a free press." 65 Sup. Ct. 1416, 1428 (U. S. 1945).

But Mr. Justice Murphy invoked this fact to justify an opposite result. 65 Sup. Ct. 1416, 1439 (U. S. 1945).

46. See, especially, Mr. Justice Frankfurter's majority opinion in National Broadcasting Co., Inc. v. United States, 319 U. S. 190, 225-6 (1943) (held, the FCC may, through denial of broadcasting licenses to offending broadcasting stations, regulate and outlaw monopolistic contracts and understandings between stations and network companies when these violate the antitrust laws; such practices are to be tested by considerations of "public interest, convenience, or necessity").

Applied to the principal case, this position logically leads to the "equal access to news" principle set forth in several of the briefs. The result to AP of adopting this principle would be identical to that demanded by public utility proponents (see p. 000 infra): the difference is solely one of legal route.
sine qua non of all commercial activity. By marking differences of degree in the enforcement of the competitive principle, the “public interest” concept would seem to go beyond the policy of the Sherman Act and to introduce an additional variable into an already complicated formula for the public control of business.

Nor would it have been any more apposite, as some writers suggest, to class the newspaper industry with common carriers, innkeepers, warehousemen, and wharfingers as among the “public callings” respecting which the common law imposed the obligation to serve all who apply on equal terms and at a reasonable price. Indeed, if the common law is to be the frame of reference, it should be borne in mind that under the common law private property was zealously protected, and hence property rights were granted liberally in the products of one’s creative imagination, sagacity, or effort.

47. See, e.g., W. W. Thornton, Combinations in Restraint of Trade (1928) cc. 1, 2; Walker, op. cit. supra note 41; Taft, op. cit. supra note 39; Hamilton and Till, op. cit. supra note 39.

48. See, e.g., Small, Anti Trust Laws and Public Callings: The Associated Press Case (1944) 23 N. C. L. Rev. 1, 20. The author suggests that AP be required to furnish its news services to all who desire them and are willing to pay a reasonable price therefor. Mention is made of the fact that Arkansas, Kansas, Kentucky, Nebraska, Tennessee, and Utah have imposed by statute this public calling duty upon all corporations and associations dispensing news.

In Inter-Ocean Publishing Co. v. Associated Press, 184 Ill. 438, 56 N. E. 822 (1900), the Supreme Court of Illinois held that AP was a “business affected with a public interest” within the doctrine of Munn v. Illinois, 94 U. S. 113 (1876), and that it must furnish its news on fair and equal terms to all applicants willing to pay a reasonable rate therefor. The Inter-Ocean case graphically illustrates the inadequacy of State regulation of large enterprise. For following the drastic pronouncement of the Illinois Court, AP merely dissolved the Illinois incorporated organization and, transferring its assets, incorporated as a non-profit membership association in New York with the avowed purpose of employing the same practices and accomplishing the same results as were enjoined by the Illinois decree. See Rosewater, op. cit. supra note 33, cc. XXI, XXII. For a similar instance, see Standard Oil Co. of N. J. v. United States, 221 U. S. 1, 38-42 (1911).


Mr. Justice Roberts argued in his dissent that it was impossible to find support for a conclusion that AP was guilty of monopoly or unreasonable restraint and asserted that the public utility notion was what really motivated the majority, regardless of the grounds upon which they articulated their decision. 65 Sup. Ct. 1416, 1436 (U. S. 1945). Judge Swan, dissenting below, charged that the court had enjoined AP’s by-laws simply because it believed “that a news gathering organization as large and efficient as AP is engaged in a public calling, and so under a duty to admit ‘all qualified applicants on equal terms.’ ” 52 F. Supp. 362, 375 (S. D. N. Y. 1943).


51. For historical and critical discussion of this topic, see Comment (1938) 48 Yale L. J. 288; Comment (1934) 47 Harv. L. REV. 1419.
The defendants relied upon the First Amendment to avoid the consequences of their conduct. But it should be apparent that the decree has no tendency to interfere with the editorial policies of any newspaper or to discourage individual discretion in editing, coloring, accentuating, or excluding particular news events. It aims simply at furthering a wider dissemination of news reports by eliminating a specific trade restraint, thereby emphasizing that newspaper agencies enjoy no special constitutional immunity when their business practices violate applicable federal laws. The natural tendency of the decree is to promote the freedom of the press, if it be conceded that one manifestation of that freedom is the infusion of new blood into the newspaper industry. Charges of intent to "shackle" the press and analogy to press controls in totalitarian countries seem, therefore, alarmist. The "clear and present danger" doctrine appears equally irrelevant. For neither a specific utterance nor a prior restraint was at issue, but rather a group of business practices reflecting a policy which demanded judicial appraisal in terms of the spirit of the Sherman Act.

Apart from retention of jurisdiction by the District Court, the final decree authorized no special means for overseeing the future entrance requirements of AP. Thus only the two traditional weapons would remain for that purpose: publisher-applicants excluded for competitive reasons could now appropriately have recourse to triple-damage suits for all the services.

52. The objective of the constitutional protection of the press is set forth in the leading case of Grosjean v. American Press Co., 297 U. S. 233, 250 (1936): "The predominant purpose of the grant of immunity here invoked was to preserve an untrammeled press as a vital source of public information."

53. "The effect of our judgment will be, not to restrict AP members as to what they shall print, but only to compel them to make their dispatches accessible to others." 52 F. Supp. 362, 374 (S. D. N. Y. 1943).

54. At the close of his elaborate dissent, Mr. Justice Roberts says: "The decree . . . threatens to be but a first step in the shackling of the press, which will subvert the constitutional freedom to print or to withhold, to print as and how one's reason or one's interest dictates. . . . It is not protecting a freedom but confining it to prescribe where and how and under what conditions one must impart the literary product of his thought and research." 65 Sup. Ct. 1416, 1437 (U. S. 1945).

55. "The tragic history of recent years demonstrates far too well how despotic governments may interfere with the press and other means of communication in their efforts to corrupt public opinion and to destroy individual freedom. . . . Proof of the justification and need for the use of the Sherman Act to . . . remove unreasonable impediments from the channels of news distribution should therefore be clear and unmistakable." Mr. Justice Murphy, dissenting, 65 Sup. Ct. 1416, 1439 (U. S. 1945).

56. See Bridges v. California, 314 U. S. 252, 261-3 (1941); 65 Sup. Ct. 1416, 1418 (U. S. 1945).

57. From the date the District Court entered final judgment, AP was given 120 days in which to make its membership by-laws conform to the provisions of the decree. 52 F. Supp. 362, 375 (S. D. N. Y. 1943). The District Court retained the cause so that if discrimination against competitors of AP members continued after the by-laws were modified, it would be able to grant appropriate supplemental relief to realize in full the provisions and general purpose of the decree. Ibid.

58. Section 7 of the Sherman Act provides: "Any person who shall be injured in his
AP has refused to make available from the date when application for membership first was made; and either such rejectees or the Department of Justice may bring an action for contempt of the decree if AP continues its long-standing policy toward "competing" applicants. Should these remedies prove unavailing or inadequate to prevent discriminatory restraints against non-member newspapers, the government could, of course, institute a new antitrust action in the hope that a full-dress trial might yield broader results.

At a recent special membership meeting the regular members elected four publisher-applicants and approved a series of amendments designed to bring the by-laws into accord with the mandate of the lower court. The revised by-laws affirmatively declare that no member or director shall take into account, in voting upon an applicant for membership, the effect of his admission to AP upon his ability to compete with existing members in the same city and field.

The new by-laws are silent concerning two of the important issues in the case: relinquishment of exclusive news rights to other services and initial payments. But one of the amended sections requires that before an elected applicant may enjoy the rights of membership he must not only agree to be bound by the by-laws, but also must enter into a written contract with AP business or property by any other person or corporation by reason of anything forbidden or declared to be unlawful by this act, may sue therefor in any district court of the United States in the district in which the defendant resides or is found, without respect to the amount in controversy, and shall recover three fold the damages by him sustained, and the costs of suit, including a reasonable attorney's fee." 26 STAT. 210 (1890). Cf. 38 STAT. 731 (1914); 15 U.S.C. § 15 (1940).

59. The Chicago Sun and The Washington Times-Herald have been publicly associated with the present suit, having had their applications rejected at the annual membership meeting in April 1942. The other two applicants, the Oakland Post-Enquirer and the Detroit Times, though never having sought entrance before, are likewise located in large cities. All four newspapers were admitted by an overwhelming majority. See N. Y. Times, Nov. 29, 1945, p. 1, col. 2 and p. 20, col. 2.

The most dramatic aspect of the members' action at this meeting was the election of Marshall Field, whose efforts to obtain AP service had been resisted vigorously for almost four years. N. Y. Herald Tribune, Nov. 29, 1945, p. 22, cols. 6-7. From the statements made just before the balloting took place, it seems evident that he was successful on this occasion principally because AP's lawyers were convinced that a negative vote would constitute a contempt of court. N. Y. Times, Nov. 29, 1945, p. 20, col. 5.

The Chicago Sun had requested merely associate membership because an existing contract required that it furnish its local news to UP. "Mr. Field had explained . . . that he was interested only in getting the news report of the AP and was not concerned with voting rights and other privileges that are granted to regular members . . ." Id. at col. 4.

60. N. Y. Times, Nov. 29, 1945, p. 1, col. 2; N. Y. Herald Tribune, Nov. 29, 1945, p. 22, col. 6. The directors took this opportunity to introduce a great number of other changes into the by-laws [hereinafter cited as By-laws (1945)], most of which only condense or substantially alter the former wording, in order to adjust their provisions to AP's current operations.

which will specify the news services to be furnished, the uses to which the member may put them, and any other terms and conditions which the directors may see fit to prescribe. In view of the directors' plenary power over the levy of assessments, it is possible this provision will be the means for continuing a scheme of initiation payments. However, it seems clear from the opinion of the District Court that any payments exacted will have to approximate the acquired share in AP's capital assets, and there is a strong implication that they may not be distributed by AP among member-competitors of the successful applicant as compensation for the resulting loss in value of their membership.

As the subjective issue of motive is made the touchstone of legality in AP's future membership policy, the decree may encounter difficulties of enforcement. While it might seem that AP members still have wide latitude in the process of selection among applicants, as a practical matter there remain few criteria that could be employed consistently with the decree; political grounds and journalistic standards might perhaps be invoked. But whatever reasons may be given, the possibility that competitive considerations undercut the stated criteria makes it likely that the District Court will carefully examine particular exclusions and conditions upon admission, to test their compliance with the present decision. Since the future membership policy of AP, rather than the phraseology of its by-laws or the fate of four individual applicants, is the core of the case, it would seem that the District Court can best insure compliance with the decree by indefinitely retaining jurisdiction.

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62. By-laws (1945), Art. II, § 8. "The terms of the proposed fixed-term contracts have not been definitively decided upon as yet." Communication to Yale Law Journal from John T. Cahill, counsel for AP, Dec. 18, 1945. The reason assigned by the directors for inaugurating a system of individual membership contracts was to clarify and fortify relations between AP and its members in order to achieve more fully AP's prime purpose of furnishing an impartial news report. See N. Y. Times, Nov. 29, 1945, p. 20, col. 4.

63. By-laws (1942), Art. IX, § 1; By-laws (1945), Art. VI, § 3.


65. Such exclusion would probably be defended in terms of the "disreputable" or "subversive" purposes of the newspaper, or its "radical" editorial policies. It is worth noting that the present membership of AP comprehends almost the entire gamut of representative political persuasions in the United States. It seems clear that AP might exclude applicants who were not up to journalistic standards of honesty in reporting or who did not conduct a bona fide newspaper.

66. AP has announced it will petition the District Court for relinquishment of its continuous jurisdiction over the cause. See Report of AP's directors, as reprinted in N. Y. Times, Nov. 29, 1945, p. 20, cols. 3-6, at col. 6. "It is inconceivable to the board of directors, as it must be to the whole membership, that the Associated Press or any similar organization engaged in the cooperative collection of news should attempt to operate under permanent injunction of the courts." Ibid.
STATE REGULATION OF LABOR UNIONS*

Following the passage of the Wagner Act, ten states enacted similar and supplementary legislation protecting the right of collective bargaining for employees of intrastate businesses. But the inevitable reaction to labor’s political and legal ascendency has recently produced an even larger crop of state legislation, not to be confused with the above, which purports to regulate all labor unions operating within the state, whether or not engaged in intrastate commerce.

These statutes are all founded on the state police power and vary in content from a simple prohibition against violence in picketing to a complete prohibition of picketing. Largely inspired by anti-union sentiment, they are opposed by labor. Their provisions are broadly of two types.

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5. The anti-labor provisions are in some instances to be found in the State Labor Relations Acts themselves. See for example amended and substituted acts of Pennsylvania and Wisconsin respectively, cited supra note 2, specifying unfair employee labor practices.


7. Idaho Laws 1943, c. 76, § 3.

8. Milner and Brissenden, Union Regulation by the States (1943) 108 New Republic 790; Roberts, Union-Busting in Kansas (1943) 108 New Republic 443; Taper, Dixie Drive on Labor (1942) 154 Nation 569; Villard, op. cit. supra note 3; Business Week, March 27, 1943, p. 101, ("A severe antiunion measure. . . . ").

1) those curtailing the privilege to strike and picket, and 2) those of a regulatory nature requiring licensing and registration of agents and unions, disclosure of union financial matters, and regulation of union internal affairs.

The increase in union power subsequent to the Wagner Act has raised economic and social problems which, it has been argued, should be met with some measure of public control. Generally the type of legislation advocated is that which contains provisions to safeguard union funds from embezzlement, guarantee a more democratic process in union elections, make unions more easily amenable to process, and protect members and non-members from discrimination at the hands of a sole bargaining representative.


11. Picketing in agricultural employment is completely prohibited by Idaho Laws 1943, c. 76, §§ 3 and S. D. Laws 1943, c. 86, § 3.


15. See supra note 3.

16. See United States v. White, 322 U. S. 694, 700 (1944). "The scope and nature of the economic activities of incorporated and unincorporated organizations and their representatives demand that the constitutional power of the federal and state governments to regulate those activities be correspondingly effective." Ibid. See also Hard, Regulating Unions for the Common Good (September 1942) 41 Reader's Digest 43; Villard, loc. cit. supra note 3 at 670; "... there is a preponderant and temperate demand for some measure of reform in union practice, imposed from without. Wage earners, moreover, joined in the demands in about the same proportion as the rest of the public." The Fortune Survey (February 1944) 29 Fortune 94, 112. Some labor leaders are not averse to this type of regulation. See Villard, supra, at 667.

17. Some progress has been made recently by the Supreme Court in placing more responsibility on labor organizations in the absence of legislation. In United States v. White, 322 U. S. 694 (1944), the union was made to produce its records for trial. Also in Steele v. Louisville & Nashville Ry., 323 U. S. 192 (1944), Tunstall v. Brotherhood of Locomotive Firemen and Enginemen, 323 U. S. 210 (1944) and Railway Mail Ass'n v. Corsi, 65 Sup. Ct. 1483 (U. S. 1945), the sole bargaining representative was prevented from discriminating against non-members.
unfortunate that in these state statutes it should have been so often com-
mimgled with anti-union legislation.\textsuperscript{18}

One line of cases, based on the free speech and assembly provisions of the
Fourteenth Amendment, has dealt at length with the privilege of peaceful
picketing, which was at first declared, in \textit{Thornhill v. Alabama},\textsuperscript{19} to be a
proper subject of state regulation only in the face of "clear and present dan-
ger" \textsuperscript{20} to civil order, but which has, in subsequent refinements of the \textit{Thorn-
hill} doctrine, been held subject to reasonable state legislative control even in
the absence of such danger.\textsuperscript{21}

\textit{Hill v. Florida} \textsuperscript{22} is the first case to bring before the Supreme Court a labor
statute,\textsuperscript{23} purely regulatory in nature, which only indirectly affects free
speech and assembly.\textsuperscript{24} The issue here arose from the attempt of the At-
torney General of Florida to enjoin \textsuperscript{25} a labor union \textsuperscript{26} and its business agent
from functioning \textsuperscript{26} as such until they complied with the licensing and regis-
tration provisions of the Florida statute. Section 4 required the business
agent of a labor union to be licensed by a special board upon the agent's
showing of compliance with certain standards of citizenship and character.\textsuperscript{23}

18. See general summary of provision of these statutes in (1943) 56 MONTHLY LABOR
REV. 941-4 and (1943) 57 MONTHLY LABOR REV. 778-80.

19. 310 U. S. 88 (1940) which held that peaceful picketing is protected by the fourteenth
amendment as a right of free speech.

Board, 237 Wis. 164, 185, 295 N. W. 791, 800 (1941) where the Court said: "The federal act
[NLRA] deals with a situation that has arisen. The state act [Wisconsin Employment
Peace Act, Wis. STAT. (1943) § 111.01] seeks to forestall action which may lead to disorder
and loss of life and property."

watering down of the \textit{Thornhill} doctrine, see majority opinion of Stapleton v. Mitchell, 60

22. 65 Sup. Ct. 1373 (U. S. 1945).


24. Thomas v. Collins, 323 U. S. 516 (1945) involved the constitutionality of a Texas
Statute, TEX. ANN. REV. CIV. STAT. (Vernon, Supp. 1945) Art. 5154(a), similar to that of
Florida. But the Texas violation having occurred during a public assembly, the majority
opinion in finding an infringement of the right of free speech reads much like a decision
under the \textit{Thornhill} doctrine.

25. The Attorney General apparently elected to use an injunction to enforce the statute
although other penalties were provided by Section 14 of the Florida Statute, \textit{loc. cit. supra}
note 23, namely: "Any person or labor organization who shall violate . . . this Act, shall
. . . be adjudged guilty of a misdemeanor and be punished by a fine not exceeding Five
Hundred Dollars ($500.00) or by imprisonment . . . not to exceed six months, or by
both. . . ."

26. United Association of Journeymen Plumbers and Steamfitters of United States
and Canada, Local No. 234, affiliated with the American Federation of Labor.

27. The business agent was enjoined from organizing and the union from representing
the employees of the St. John's River Shipbuilding Company of Jacksonville, Florida.

28. Fla. Laws 1943, c. 21968 § 4 provided: "No person shall be granted a license . . .
as a business agent in the state of Florida, (1) who has not been a citizen of and has not
resided in the United States of America for a period of more than ten years. . . . (2) Who
has been convicted of a felony. (3) Who is not a person of good moral character, and every
NOTES

Section 6 required the union to file an annual report setting forth the location of its office and the names of its officers. Both the majority opinion of the court and the special concurring opinion of Chief Justice Stone viewed the imposition by Section 4 of arbitrary standards for the selection of a business agent as directly repugnant to the guarantee in the National Labor Relations Act of labor's complete freedom in the selection of bargaining representatives. Seven justices concurred in this finding, Frankfurter and Roberts dissenting on the theory that, since the Wagner Act is not concerned with labor union regulation, Congress had not preempted the field and Florida was "free to deal with these matters."

A majority of six justices, with Justice Black as their spokesman, found that the substantive requirements of Section 6 were not improper, but that a conflict with the Wagner Act resulted from the sanctions imposed for failure to comply with these requirements. Since the union had been enjoined by the state from functioning as a union, it could not bargain collectively without being "liable both to punishment for contempt of court and to conviction under the misdemeanor section of the act." The strange conclusion appears to be that Section 6 is valid but the violator cannot be punished, or at least not in this way. Chief Justice Stone argued that a state may use any of the conventional sanctions to enforce a valid regulation and that Supreme Court inquiry should be directly solely to the question of the validity of the state substantive requirements.

The question now remains in the form of a triple alternative: whether this person desiring to act as a business agent shall before doing so obtain a license by filing an application under oath therefor with the Secretary of State, accompanied by a fee of One Dollar. There shall accompany the application a statement of the labor organization for which he proposes to act as agent, showing his authority so to do. The Secretary of State shall hold such application on file for a period of thirty days during which time any person may file objections. After the expiration of the thirty day period, the Secretary of State shall submit the application, together with all information that he may have including any objections to a Board to be composed of the Governor as Chairman, the Secretary of State, and the Superintendent of Education. If a majority of the Board shall find that the applicant is qualified, pursuant to the terms of this Act and are of the opinion that the public interest requires that a license or permit should be issued to such applicant, then the Board shall by resolution authorize the Secretary of State to issue such license or permit, same shall be for the calendar year unless sooner surrendered, suspended, or revoked.

29. Section 6 provided: "Every labor organization operating in the State of Florida shall make a report in writing to the Secretary of State annually in such form as the Secretary of State may prescribe, and shall show the following facts:

(1) The name of the labor organization;
(2) The location of its office;
(3) The name and address of the president, secretary, treasurer, and business agent.

At the time of filing such report it shall be the duty of every such labor organization to pay the Secretary of State an annual fee therefor in the sum of One Dollar."

30. 65 Sup. Ct. 1373, 1383 (U. S. 1945).
31. Id. at 1375.
32. Id. at 1377.
opinion shall be taken purely on the level of its own internal logic, stressing the invalidity of a particular sanction; or whether the kind of argument used here by Justice Black will serve in future cases to invalidate all state regulation of labor unions (excepting, of course, that aimed solely at criminal or tortious conduct); or whether a more sophisticated analysis would appraise the *Hill* case in the light of the well-known anti-labor aura surrounding the whole Florida statute, a condition whose absence may in other cases allow a different result. Though the court gave no indication in the opinion that it was influenced by the anti-union origin of this statute or that it considered any sections other than the fourth and sixth, the lack of persuasiveness in the abstract rationale of the decision suggests that some such tacit considerations underlay the result. For if it is maintained that the Wagner Act makes it impossible to impose effective sanctions for violation of an otherwise unobjectionable law, any inquiry as to the substantive propriety of such law becomes meaningless. Had the court anathematized the injunction alone there might be some reason to believe that the less drastic sanctions of imprisonment or fine could be used to enforce such statutes. But the majority opinion states that liability for conviction under the misdemeanor section of the act is an "obstacle to collective bargaining"; and the language in a companion case indicates that such penalties cannot be imposed if they will interfere with the collective bargaining function of a labor union. Any attempt to imprison union officials under a misdemeanor clause then should logically meet with the same result as the injunction in the present case.

This leaves for consideration only the small statutory fine against the union or union officials. Of all the sanctions this is probably the only one which can be enforced and not be labeled an obstacle to collective bargaining. But, as in the case of other penal statutes, for instance, anti-trust and price control, where the benefit derived from illegal action may outweigh the cost of conviction, a single statutory fine is of little effect as a method of

33. Allen-Bradley Local No. 1111 v. Wisconsin Employment Relations Board, 315 U. S. 740 (1941). The Supreme Court sustained section 111.06(2) of the Wisconsin Statute, *loc. cit. supra* note 2, which prohibited violence in picketing. The court said that Congress did not intend to exclude such use of the state police power when it enacted the Wagner Act, but rendered a narrow opinion anticipating *Hill v. Florida* when it stated "If the order of the state Board affected the status of the employees, or if it caused a forfeiture of collective bargaining rights, a distinctly different question would arise." *Id.* at 751.


35. 65 Sup. Ct. 1373, 1375 (U. S. 1945).


37. The penalty provision of the Florida statute, *loc. cit. supra* note 23, is typical of the other state statutes. Minnesota alone prescribes the injunction; other states impose criminal penalties averaging from $300 to $500 in fines and from three to six months' imprisonment.


enforcement. And the cumulative effect of successive fines on union morale and finances might be deemed to impair the union’s bargaining position and thus run afoul of the rule in the instant case.

If the ultimate effect of such decisions is to fend off state enactments and increase the pressure for uniform federal labor legislation, they may have some merit. There is evidence today of the use of anti-labor laws by some states as inducements for industry to locate within the state. If unchecked, the inevitable result of such legislation will be to deepen the cleavage between industry and labor as these statutes become progressively more anti-union to stay in the competition. And the end product will be a heterogeneous collection of enactments by individual jurisdictions dealing with a problem which has been recognized to be of national importance and capable of national solution within the commerce clause doctrine.

After Hill v. Florida, it is difficult to see any significant future for existing regulatory state labor legislation. Exactly what limit can be set to the argument that such regulation constitutes an “obstacle to collective bargaining” is not clear. The phrase, we have seen, may be applied either to the substantive provisions of the statute or to the sanction imposed for their violation. Those provisions which, like Section 4 of the Florida statute, arbitrarily cut down a federally protected labor privilege, or subject it to administrative discretion unbounded by legislative standards, are of course doomed. Those reasonable and well defined provisions which neither require the disclosure of too much information of use to an employer nor interfere with the internal affairs of the union beyond securing the rights of members, are probably not “obstacles to collective bargaining” within the meaning of the majority opinion and may, in the context of a statute free from anti-labor pressures in its inception, be upheld regardless of the method of enforcement by whittling down the Hill v. Florida holding.

40. See Taper, op. cit. supra note 34; Business Week, June 16, 1945, p. 103.
41. Heaney, Labor Relations—A National or a State Problem (1941) 26 Minn. L. Rev. 359, 385; Villard, op. cit. supra note 3 at 670.
43. See NLRB v. Jones & Laughlin Steel Corp., 301 U. S. 1 (1937); Rottschaefer, The Constitution and a “Planned Economy” (1940) 38 Mich. L. Rev. 1133, 1149-50. Uniform federal legislation in this field is not unlikely in view of the vacuum left by the instant case. And, under the First Amendment, Congress is equally bound with the states to respect freedom of speech and assembly.