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Statutory Construction When Legislation Is Viewed As A Legal Institution

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The author suggests that abuse of existing tools of statutory construction has led to judicial encroachment upon the constitutionally-guaranteed independence of statutory law. To re-establish the requisite separation of the judicial and legislative processes, Professor Thomas urges that some of these tools be refashioned, and that others be discarded.

I. INTRODUCTION

THE Constitution of the United States declares that all legislative power is vested in Congress,[1] and that the judicial power is vested in the courts.[2] Under this clear separation of powers it is for Congress to make the law, while it is for the courts to say what the law is.[3] In finding and applying the law, the courts look to two sources. First they look to statutes, and second they look to the common law. It is with the judicial approach to the first of these two sources of law that this paper will deal. Moreover it is the author's position that full appreciation of the constitutional separation of powers is vital to any such analysis.

Because of the importance and significance of the separation concept, at least two initial observations are in order. First, when speaking of statutory construction, one must realize that what the common law teaches and what courts in other countries say will serve little purpose in the United States. In this country

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1. U.S. CONST. art. I, § 1

2. U.S. CONST. art. III, § 1: "The judicial power of the United States, shall be vested in one Supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish."

3. Marbury v. Madison, 1 Cranch 137, 177 (1803). "It is emphatically the province and duty of the judicial department to say what the law is."

Congress and the courts are not without limitations.[4] They are bound to remain within their respective constitutional provinces. Yet in spite of the constitutional mandate, some writers insist that there is no clear separation of powers doctrine.[5] It has been suggested that judicial law-making should not necessarily be condemned. Rather it is advised that we merely recognize it for what it really is.[6] We are told that the legislative body, for a variety of reasons, consciously *delegates* to the judiciary the task of creating general principles that it finds too difficult to establish. This conscious delegation is accomplished by using words of obvious ambiguity in a statute.[7] This paper does not attempt to include consideration of the subtleties surrounding the jurisprudential theory of judicial law-making. Rather it is suggested in the following pages that those who attempt to support a theory of judicial law-making based on the presence of ambiguous or general statutory words stand on a weak foundation. Through proper statutory construction ambiguous words find clarity and general words find limitation. Admittedly, courts may occasionally usurp legislative authority. But what the courts do is one thing — what they should do is another. This paper is concerned primarily with what the courts should do in the field of statutory construction.

The second observation deals more specifically with the constitutional function of the courts. Chief Justice Marshall, in *Marbury v. Madison*,[8] declared that it was the "duty of the judicial department *to say what the law is.*" What do these words mean? It is difficult to comprehend how one can construe Marshall's statement to mean that courts are the law-makers, no

4. For a brief comparative discussion of Parliament and Congress, see COOLEY, CONSTITUTIONAL LIMITATIONS 103-06 (5th ed. 1883).

5. Miller, *Statutory Language And the Purposive Use of Ambiguity*, 42 VA. L. REV. 23, 30 (1956). See also GRAY, THE NATURE AND SOURCES OF THE LAW (2d ed. 1921); BRUCE, THE AMERICAN JUDGE (1924); *Symposium On Judicial Law Making In Relation To Statutes*, 36 IND. L. J. 411 (1961).

6. Dickerson, *Symposium On Judicial Law Making in Relation To Statutes — Introduction*, 36 IND. L.J. 411, 414 (1961).

7. Cohen, *Judicial "Legisputation" and the Dimensions of Legislative Meaning*, 36 IND. L.J. 414, 415-16 (1961); Miller, *supra* note 5. To support their position, both Professor Cohen and Professor Miller cite the general language used in the Sherman Antitrust Act. In this Act, says Professor Miller, "the courts have delegated power to determine what combinations in restraint of trade are." *Id.* at 31.

8. See note 3 *supra* (emphasis added).

matter how many times Professor Gray quoted Bishop Hoadly.[9] To say what a thing "is" presupposes its prior existence. If I pick up an object and say, "This is an apple," I am identifying the object; I am not creating it. Since we all know what an apple is, there is no identification problem. But what if I am unable to identify the object? What if I should examine a ring with a simulated diamond and identify it to be a genuine stone? Would my identification make it real? The answer is obvious. An erroneous identification of the object will not change its physical characteristics. So with a statute. The function of the court is to say what the law is — to identify the statute. Should an erroneous construction be placed on the statute, its characteristics remain the same. Merely because the erroneous construction regulated the human behavior of the parties involved does not alter this conclusion unless it is applied to future cases under the doctrine of stare decisis. Attention is thus focussed on another stumbling block to the recognition of legislation as a legal institution. It is the author's position, and one which will be developed later in this paper, that the doctrine of stare decisis serves no useful purpose in the field of statutory construction.

Before leaving this discussion of the idea that the courts' duty is "to say what the law is," mention should be made of certain replacement terms used by some writers. Professor Witherspoon says that the function of a court is to assign a meaning to statutes.[10] "To say what the law is" and "to assign a meaning to statutes" have two entirely different meanings. The first emphasizes the separation of powers doctrine and places the statute on an institutional plane. The second suggests that there is more than one meaning that can be assigned to the statute. Under this concept, courts are given broader discretion. Indeed, the suggestion is that the legislation cannot stand alone — that the statute represents only a general guide for the courts. Under this view, what limitations are imposed on the courts? Professor Witherspoon recognized limitations when he stated: "Once the statutory principle is discovered or formulated, the

9. Gray, *op. cit. supra* note 5, 172. "To quote a third time the words of Bishop Hoadly: 'Whoever hath an *absolute authority* to *interpret* any written or spoken laws, it is *he* who is truly the *Law-giver* to all intents and purposes, and not the person who first wrote or spoke them.'"

10. Witherspoon, *The Essential Focus of Statutory Interpretation,* 36 IND. L.J. 423, 441 (1961).

court is as bound to preserve and enhance that principle as it was in the first instance to discover or formulate it."[11] But his limitation statement and his theory of construction are not consistent. If courts are given discretion to formulate principles consistent with the statutory purpose they are free to roam beyond the constitutional province of the judiciary.[12] It is difficult to understand how Professor Witherspoon can recognize the broad discretion of the courts and at the same time recognize the necessity of according to statutes their proper weight.[13]

Statutes will never be accorded their rightful status until courts generally accept the idea that theirs is a limited function — to determine the meaning of the statute. Achievement of this goal will necessitate a re-examination of questions pertinent to the interpretive process. The question is not whether a particular statute should be "strictly" or "liberally" construed. Judicial constriction or expansion in the reading of statutes ignores the limited function of the court.[14] If legislation is to be considered a legal institution it must be able to stand on its own. This can be accomplished only by eliminating from our statutory construction vocabulary all modifying words, all so-called methods or techniques of interpretation, and all rules and canons of construction. The only question of concern should be: What is the meaning of the statute?

This question forces attention to the substance of the statute; it diverts attention from the methods of construction. But one cannot stop with this single question. We must ask: How is this meaning determined? Writers too numerous to cite have sought an answer to this question. The problem with most analyses, however, has been their failure to identify and to prop-

11. *Id.* at 436.

12. Professor Witherspoon's inconsistency is further demonstrated when he aligns his views with those of Professor Fuller. *Id.* at 429. See Fuller, *Positivism and Fidelity to Law — A Reply to Professor Hart*, 71 HARV. L. REV. 630 (1958). In the article, Professor Fuller demonstrates that he is preoccupied with the purpose of a statute. He fails to show any real limitation placed on courts in the construction process.

13. Witherspoon, *supra* note 10, at 430.

14. Frankfurter, *Some Reflections On The Reading of Statutes*, 47 COLUM. L. REV. 527, 533 (1947) "As a matter of verbal recognition certainly, no one will gainsay that the function in construing a statute is to ascertain the meaning of words used by the legislature. To go beyond it is to usurp a power which our democracy has lodged in its elected legislature. The great judges have constantly admonished their brethren of the need for discipline in observing the limitations. A judge must not rewrite a statute, neither to enlarge nor to contract it."

erly characterize the relationship of the courts to the legislative declaration. Justice Frankfurter, recognizing the problem, admonished writers in this field: "I confess unashamedly that I do not get much nourishment from books on statutory construction, and I say this after freshly reexamining them all, scores of them."[15] Concurring with this observation, I suggest that the great majority of articles written on the subject of statutory construction could and should be ignored. Instead of solving, they tend to perpetuate the problems. In the following pages several approaches to the determination by the courts of the meaning of a statute are considered.

That the judicial function in finding the meaning of a statute is neither clearly defined nor uniformly understood by the courts themselves is illustrated by the frequent reversal by the Supreme Court of lower court interpretations. During the 1963 term, the Court reversed 85 percent of the cases dealing with statutory construction. During the 1964 term, it reversed 74 percent of such cases.[16] What conclusions can be drawn from these astonishingly high figures? It might be argued that this proves that the Court is legislating.[17] It might be argued that there is an apparent need for more uniform statutory standards.[18] I suggest, however, that these explanations would be inadequate. A

15. *Id.* at 530.

16. In calculating these percentages, I considered all the cases involving statutes other than criminal. The following shows the breakdown and number of cases included:

Type Case	*1963 Term*			*1964 Term*		
	A	*R*	*Total*	*A*	*R*	*Total*
Antitrust	—	8	8	2	5	7
Immigration & Naturalization	1	3	4	—	—	—
Federal Power Comm.	—	3	3	—	4	4
Interstate Commerce Act	2	2	4	1	—	1
Labor	1	9	10	2	9	11
Patents — Unfair Comp.	—	2	2	—	1	1
Securities	1	1	2	0	0	0
Taxation	1	2	3	3	3	6
Civil Rights	0	0	0	1	2	3
Other	—	3	3	1	4	5
	6	33	39	10	28	38
Percentages	15%	85%	100%	26%	74%	100%

17. For an extreme view, see Dutton, *The Supreme Court's Natural Gas Act: Northern Natural Gas Co. v. Kansas Completes Judicial Legislation,* 1 TULSA L. J. 31 (1964).

18. Friendly, *The Federal Administrative Agencies: The Need For Better Definition of Standards,* 75 HARV. L.REV. 863 (1962).

more plausible answer would be that our lower federal courts have not yet attained the Supreme Court's sophistication in statutory construction. They have either failed or refused to accept the Court's mandate regarding the interpretive process. It is to the purpose of drawing these courts closer together that legal research should be dedicated. Realizing this to be a magnanimous task, we should best accomplish it by closing the books and starting afresh. As I shall attempt to demonstrate, history has been one of the most significant stumbling blocks in this quest.

II. The Purpose Theory

In the prior section we arrived at the question: How is the meaning of a statute determined? The Supreme Court would answer this question by saying that the meaning is determined by examining the legislative words in light of their purpose.[19] This is not to be considered as a rule of construction that can be mechanically applied to a statute to determine its meaning. As the late Justice Frankfurter said: "Unhappily, there is no table of logarithms for statutory construction."[20] Unlike mathematical symbols, the phrasing of a statute seldom attains more than approximate precision. Resorting to statutory purpose to add clarity to the words is merely recognition of the fact that language is inexact. The meaning of a particular word will depend on how and under what circumstances it is being used.[21] Should I make the statement: "Help me," I may wish you to take hold of one end of a table; or I may be seeking to be rescued from possible physical injury. Clarity is gained only when one knows the circumstances under which the phrase was uttered.

19. I cite only a few cases where the Court has made this declaration: J.I. Case Co. v. N.L.R.B., 321 U.S. 332 (1944); Lehigh Valley Coal Co. v. Yensavage, 218 Fed. 547, 553 (2d Cir. 1914), *cert. denied,* 235 U.S. 705 (1915); N.L.R.B. v. Hearst Publications, Inc., 322 U.S. 111 (1944); S.E.C. v. Ralston Purina Co., 346 U.S. 119 (1953); U.S. v. Stapf, 375 U.S. 118 (1963); S.E.C. v. Capital Gains Research Bureau, Inc., 375 U.S. 180 (1963); U.S. v. Wiesenfeld Warehouse Co., 376 U.S. 86 (1964); Brooks v. Missouri Pac. R.R. Co., 376 U.S. 182 (1964).

20. Frankfurter, *supra* note 14, at 543.

21. In Towne v. Eisner, 245 U.S. 418, 425 (1918), Justice Holmes stated: "A word is not a crystal, transparent and unchanged, it is the skin of a living thought and may vary greatly in color and content according to the circumstances and the time in which it is used."

Use of legislative purpose serves a limited function which is to add clarity or meaning to statutory words. Furthermore this limitation must be preserved if the separation of powers concept is to have meaning and if we are to accomplish the goal of elevating legislation to an institutional plane. Two strong supporters for this position are Justice Frankfurter and Professor H. L. A. Hart. While recognizing the importance of legislative purpose, Justice Frankfurter maintained that the judge is limited by the words of a statute.[22] Professor Hart, in his "core and penumbra" theory, also recognized the limited function of legislative purpose.[23] He observed that the general words we use must have some standard instance in which no doubts are felt about their application.[24] When a case falls within what Professor Hart calls the core, or settled meaning, of the rule, it would not be necessary to look to the purpose, aims, and policy of the statute. But recognizing the fact that there will be penumbral or debatable cases, Professor Hart would look to the legislative purpose not as a controlling factor, but rather for clarification of the words.

While Professor Hart, in presenting his views on the use of legislative purpose, was not particularly concerned with the constitutional separation of powers concept,[25] his contribution was most significant. It clearly places the use of "legislative purpose" in the proper perspective. As I noted earlier, we are not developing a new canon or rule of construction. Instead, what is said about "purpose" in connection with statutory construction can be applied to any form of verbal or written communication. The failure of many writers and courts to recognize or accept this explains the error of their position.

Professor Fuller heads the list of those writers who have misconceived the function of legislative purpose.[26] Professor Fuller's

22. Frankfurter, *supra* note 14. For a comparison of views concerning Justice Frankfurter, see Mendelson, *Mr. Justice Frankfurter on the Construction of Statutes,* 43 CALIF. L. REV. 652 (1955); Miller, *supra* note 5.

23. Hart, *Positivism and the Separation of Law and Morals,* 71 HARV. L. REV. 593 (1958).

24. *Id.* at 607.

25. Professor Hart was defending the position of analytical jurisprudence. His position was that an understanding of the "law as it is" can be gained only through a linguistic analysis.

26. Fuller, *supra* note 12.

preoccupation with legislative purpose means that there can be no separation of the "legislative process" from the judicial process. He rejects the view of Professor Hart that words have a standard instance of settled meaning.[27] Instead, where a rule is easy to apply, it is because we can see clearly what the rule is aiming at in general.[28] This preoccupation with "purpose" is perpetuated by Professor Witherspoon.[29]

Professor Witherspoon's position is made clear when he says: "It is the author's position that a new, broader-gauged, and longer-ranged concept of legislative purpose must be given effect in *statutory administration*."[30] Two points emerge from this statement. The first concerns the determination of the legislative purpose which, according to Professor Witherspoon, must include far more than immediate historical purposes at work in the legislative process that produces a particular statute.[31] The second point, which is more pertinent to our present discussion, concerns the words "statutory administration." It is the view of Professor Witherspoon that "the central aim in administration of a statute is to discover or formulate, as well as give effect to, principles or formulas for elaborating the purposes bearing upon the statute and for administering its precepts."[32] The court is described as an agency of administration relative to a statute.[33]

To summarize the position of Professor Witherspoon, the function of the court is to ascertain the legislative purpose in a broad sense and then assign a meaning to the statute which will effectuate this legislative purpose. He states:[34]

> In the view of the author . . . the court is not an interpreter whose function is merely to discover the historical meaning of language used in statutory rules and to apply these rules as so

27. *Id.* at 663-64. "If in every context words took on a unique meaning, peculiar to that context, the whole process of interpretation would become so uncertain and subjective that the ideal of a rule of law would lose its meaning."

28. *Id.* at 664. He inquires: "[I]s it really ever possible to interpret a word in a statute without knowing the aim of the statute?"

29. Witherspoon, *supra* note 10, at 429.

30. *Id.* at 433 (emphasis added).

31. More will be said about the proposition when I discuss the question how the legislative purpose must be determined. For the present discussion it should be noted that how purpose is determined can affect the separation of powers concept.

32. Witherspoon, *supra* note 10, at 435.

33. *Id.* at 436.

34. *Id.* at 441.

> interpreted to individual cases. More accurately the court is engaged in assignment of meaning to statutes or in making statutes meaningful for administration.

It is obvious that Professor Witherspoon is preoccupied, as is Professor Fuller, with legislative purpose at the expense of the constitutional separation of powers and legislative fidelity. If statutes are to be accorded proper respect within our legal system, this preoccupation must be rejected.[35]

There are basically two schools of opposition to the proposition that a statute can stand alone. Professor Witherspoon is representative of one school. Under his natural law theory, he does not accept the idea that law can be bound up wholly in the notion of a legal rule. This idea, says Professor Witherspoon, is the error of legal positivism.[36] Thus his opposition is based on a jurisprudential belief. I suggest, however, that in presenting his position he has failed to consider the constitutional limitations.

The second school of opposition is the more important to the practical problems of statutory construction. Judicial law-making is justified by this school on the basis of the alleged "purposive use of vague words or ambiguity" by the legislative body.[37] Writers taking this position are laboring under a misconception. They assume that there is ambiguity without considering whether clarity can be supplied through an examination of the words in light of the legislative purpose. Other writers, without considering legislative purpose, take the position that there is a need

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35. It is interesting to note that Professor Witherspoon uses this same argument to support his position. He says that the position taken by Professor Hart "fails to accord to statutes their rightful status — indeed commits statute law to a second-class citizenship in the city of law." *Id.* at 430.

36. *Ibid.* This is the view also of Professor Fuller, who insists that there can be no meaning in the rule itself. Meaning is reached only through the purpose. See note 28 *supra.*

37. Cohen, *supra* note 7; Miller, *supra* note 5. Jaffe, *An Essay On Delegation of Legislative Power,* 47 COLUM. L. REV. 359, 360 (1947). "Even the most traditional lawyer will admit that under the Sherman Act a court has no choice but to formulate its standards as to what is a restraint of trade or a monopoly and that the formulation must express the court's notions of policy. The Sherman Act is an extreme case but all great statutes force the judge at some point or other, be he ever so reluctant, to devise a 'common-law' of the statute. We have it from good authority that the legislative draftsman on occasion (for tactical reasons) deliberately fails to make explicit provision for a foreseen case."

for greater certainty through more precise standards.[38] Judge Friendly, who takes this position, says that it would be better if Congress could be somewhat more specific at the outset,[39] but he recognizes that standards sufficiently definite could be developed by administrative agencies[40] and the courts.[41]

Before replying to these commentators, certain inquiries must be made. How exact must the statutory words be? How precise must be the standards? Professor Sullivan says that when we are faced with the realities of a given act of legislation as opposed to a constitutional possibility, companies, for example, have at least two related rights. First, he says that companies subject to statutory regulation have the right to a practical degree of certainty, without which it is impossible to establish effective business dealings. Secondly, he says that companies have the right to be regulated to the extent of the law and only to the extent of the law.[42] What Professor Sullivan seeks is a formulary type certainty which by the nature of a statute is impossible. In *Boyce Motor Lines v. U.S.*,[43] the Supreme Court stated:[44]

> . . . few words possess the precision of mathematical symbols, most statues must deal with untold and unforeseen variations in factual situations, and the practical necessities of discharging the business of government inevitably limit the specificity with which legislators can spell out prohibitions. Consequently, *no more than a reasonable degree of certainty can be demanded.*

Should Professor Sullivan present his views to the Supreme Court, he might well receive as a reply "that one who deliberately goes perilously close to an area of proscribed conduct shall take the risk that he may cross the line."[45] Statutory standards are sufficiently definite and precise if they allow Congress, the

38. Friendly, *supra* note 18.
39. *Id.* at 873. See also Dickerson, *The Diseases of Legislative Language,* 1 HARV. J.LEGIS. 5 (1964).
40. Friendly, *supra* note 18, at 867.
41. *Id.* at 876.
42. Sullivan, *Federal Power Commission Jurisdiction Over Commingled Gas,* 30 GEO. WASH. L. REV. 638, 642 (1962).
43. 342 U.S. 337 (1952).
44. *Id.* at 340 (emphasis added).
45. *Ibid.* This thought was re-affirmed by the Court in FTC v. Colgate-Palmolive Co., 380 U.S. 374, 393 (1965).

courts, and the public to ascertain if the agency has conformed to those standards.[46]

If the critic will objectively examine the statutory words in light of the purpose or circumstances under which they are used, he will find clarity. He will realize that there is more certainty than will be found through the use of other theories and methods devised by courts and writers who have failed to recognize the independent nature of a statute. There is no certainty when one attempts to construe a statute through logic or the excessive use of logic.[47] A formalistic or literal interpretation of the general statutory terms would cast the law into a sea of uncertainty, for there are no limitations to logic. And as Professor Hart so rightly observed: "Decisions made in a fashion as blind as this would scarcely deserve the name of decisions; we might as well toss a penny in applying a rule of law."[48] Nor will a preoccupation with purpose add clarity, for even here there are no limitations.

Under the "purpose theory" as advocated by Professor Hart — and as practiced by Justice Frankfurter — we are able to develop standards sufficiently precise that men can reasonably direct their behavior without crossing the line of proscribed conduct. To show how predictability and greater certainty is attained by adopting this view, one might try applying it to the so-called general and ambiguous Sherman Antitrust Act.[49] Section 1 of the Act provides that:[50]

> Every contract . . . in restraint of trade . . . is hereby declared to be illegal . . . .

Blind or naked logic serves no useful purpose in the construction of the statute for the words would have infinite meaning.

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46. Yakus v. U.S., 321 U.S. 414, 426 (1944).

47. "Logic," says Professor Hart, "does not prescribe interpretation of terms; it dictates neither the stupid nor intelligent interpretation of any expression. Logic only tells you hypothetically that *if* you give a certain term a certain interpretation then a certain conclusion follows." Hart, *supra* note 23, at 610. For a good example of what Professor Hart is referring to see counsel's argument (which was rejected) to the court: Inland Steel Co. v. N.L.R.B., 170 F.2d 247 (7th Cir. 1948).

48. Hart, *supra* note 23, at 611.

49. This is the statute that most writers cite in support of their position of judicial law-making — purposive use of ambiguity. See note 37 *supra*.

50. Sherman Act § 1, 26 Stat. 209 (1890), 15 U.S.C. § 1 (1958).

Conceivably one could argue that all contracts or agreements restrain trade to a limited extent — contracts to sell or buy one's entire production, contracts not to compete, ancillary to the main contract to sell a business, or exclusive dealing contracts. Today, one would say that this would be an unwarranted interpretation of the Sherman Act; however, I suggest that this is exactly the conclusion to be reached through a literal or logical construction. There is nothing to place a limitation on the words, and the fact that it does lead to an obviously ridiculous result is the very reason why it must be rejected.

We arrive at an equally absurd conclusion when the statute is construed by one preoccupied with purpose. Assuming that the purpose and policy of the Act is to restore and preserve free competition, we are again left with no limitations. There are many acts that might be considered injurious to free competition; yet, they are not violations of the Sherman Act. If a single company sells goods below cost with an intent to drive its competitors out of business, competition would certainly be injured. Such activity would be a clear violation of section 1 of the Sherman Act if its purpose were controlling. One might argue that this is fallacious reasoning, that its weakness is in the identification of purpose. Instead of saying that the purpose and policy of the Act is to restore and preserve free competition, it should have been described as prohibiting contracts that interfere with the restoration and preservation of free competition. This would, I admit, be a reasonable argument; however, for that position to be established, it is necessary to resort to the statutory word "contract."

By making reference to the statutory word "contract," a limitation is placed on the legislative purpose and policy. Moreover, reference to the purpose and policy will place a limitation on the words. No longer can we read the Act to cover all conceivable contracts that might restrain trade. The area of reference is limited, making it possible to accomplish greater certainty and predictability. It should again be emphasized that in applying statutory provisions, courts must limit themselves to the words. Legislative aims, purpose, and policy can be used only to add clarity to the words.

Determining the legislative purpose is the key to the theory.

Ascertained erroneously, an aberrant meaning of the words will result. So how do we discover this legislative purpose? The Supreme Court says that the "purpose" can be found from historical developments leading to the enactment of the statute.[51] Justice Frankfurter says that "since *'a page of history is worth a volume of logic,'* courts have looked into the background of statutes, the mischief to be checked and the good that was designed . . . ."[52] But in ascertaining the legislative purpose, judges should try to eliminate as far as possible their own personal views of policy. Legislative purpose, said Jerome Frank, "is the resultant of the pressure of conflicting interest in the legislature."[53]

Professor Witherspoon warns that relevant legislative purposes include far more than immediate historical purposes at work in the legislative process that produces a particular statute.[54] He says that we may see that legislative purposes developed subsequently to the enactment of a statute must also have their impact on the administration of that statute. These subsequent legislative purposes may be expressed through legislative oversight[55] and administrative action[56] or through the enactment of new and related statutes.[57] If these factors can shed light on the legislative purpose of the particular statute involved, then I would agree that resort should be had to them. I can

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51. Auto Workers v. Wisconsin Board, 336 U.S. 245, 257 (1949). The bare language of the statute (§ 7 of the National Labor Relations Act) cannot be construed to immunize employees from strike injunction in all cases. In light of labor movement history, the purpose of the statute becomes clear. This case was cited because it offered an example of how statutory words can be limited as well as expanded by reference to the legislative purpose.

52. Frankfurter, *supra* note 14, at 543 (emphasis added), citing New York Trust Co. v. Eisner, 256 U.S. 345, 349 (1921).

53. Frank, *Words and Music: Some Remarks on Statutory Interpretation,* 47 COLUM. L. REV. 1259, 1265 (1947). See also: COX, *Judge Learned Hand and the Interpretation of Statutes,* 60 HARV. L. REV. 370, 378-80 (1947); Landis, *A Note On "Statutory Interpretation,"* 43 HARV. L. REV. 886, 891 (1930).

54. Witherspoon, *supra* note 10, at 433. "These are the purposes that have been the main focus of 'middle road' scholars."

55. See: Horack, *Congressional Silence: A Tool of Judicial Supremacy,* 25 TEX.L.REV. 247 (1947); Levi, *An Introduction To Legal Reasoning,* 15 U. CHI. L. REV. 501, 523-40; Note, *Congressional Silence and the Supreme Court,* 26 IND. L. J. 388 (1951).

56. SUTHERLAND, STATUTORY CONSTRUCTION § 5106 (3rd ed. Horack 1943).

57. Interpretation by analogy to other statutes is said to be a well settled rule which is based upon public policy. Sutherland, *op cit. supra* note 56, §§ 6101-6105 (3rd ed. Horack 1943).

see how administrative action can furnish valuable insight into this "purpose," for an agency is charged with the duty of carrying out the legislative policy. Agencies have become the experts. One should, however, look to administrative action with only a limited objective. Such an examination should be to define the purpose, and not to apply a meaning to the words. This is the fallacy of the other two factors — legislative oversight and interpretation by analogy. It is difficult to see how these can be used for the limited function of determining the legislative purpose. They are more apt to be used to apply meaning to a statute without regard to the purpose of the particular statute involved. Thus, we begin to see how the separation of powers concept is eroded.

Rather than enumerating all the sources of legislative policy, it would be more meaningful to say that we should look to anything that could prove or establish the legislative purpose. It, like any other fact in a trial, is determined from relevant and material evidence. How does an attorney prove that the defendant negligently drove his automobile? He traces all the relevant evidence of events which took place before, during, and after the accident. The idea is to determine exactly how and why the accident took place. So with a statute. To determine its purpose, we must determine why and how it was enacted. It is up to the lawyer, under our adversary system, to develop this purpose just as he would develop any other trial factor. The history of the times will be relevant to the question of why the original bill was enacted. Additional evidence can be secured from the Committee reports and Congressional debates, and from the statutory section setting out the purpose. Once the purpose is ascertained, it is not applied to the case involved; it is used only to clarify the words of the statute.[58] At the ex-

58. This is luminously shown in an opinion written by Mr. Justice Goldberg in F.T.C. v. Sun Oil Co., 371 U.S. 505 (1963). In this opinion, involving the construction of § 2(b) of the Robinson-Patman Act, Justice Goldberg first considers the language of the statute, giving to the words their normal and usual meaning (*Id.* at 512-16). Next he seeks to determine if the interpretation of the language is consonant with the overall rationality and broader statutory consistency and legislative purpose. A review of legislative history (*Id.* at 516-17) and legislative purpose (*Id.* at 518-23) are separated in the opinion, and comparing the two, Justice Goldberg says that from the fundamental "purposes" of the Act, we obtain guidance more impressive than that found in the recited legislative history. (*Id.* at 518). Actually, a review of the legislative history

pense of being redundant, I again repeat that one must recognize this limited function of "purpose" to appreciate the independence of the legislative process.

III. What Keeps Us From Reaching This Goal?

While a number of writers have recognized the "purpose theory" as being the proper approach to statutory construction, few if any have considered how the legal profession is to realize this goal in its completeness. If we are ever to raise the legislative process to an institutional level; if we are to preserve the separation of powers doctrine, we must identify the concepts that have acted as stumbling blocks. I shall now identify and discuss some of the problems that must be recognized and solved before reaching our predetermined destination.

Over-emphasis of the common law principles is the most significant interference with the legislative process. We are still plagued with the heated codification controversy between David Dudley Field and James Carter, and between Stephen J. Field and Professor Pomeroy. This controversy, said Dean Pound: "In part . . . grew out of the hostility toward English institutions and English law in the period after the Revolution and favor toward things French which went along with Jeffersonian democracy."[59] David Dudley Field sought to reduce all laws to written form for two principal reasons.[60] First, the legislative and judicial departments of our government should be kept distinct. The same person must not be allowed to be both lawmaker and judge. Secondly, every person who is required to obey the law should have knowledge of the law. And the only way of insuring dissemination is through codification. To this, James Carter, a great proponent of the common, or unwritten, law, replied:[61]

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expounded by the Justice shows that it further clarifies the "purpose" and could well have been placed in the same section for discussion. Finally Justice Goldberg clearly rejects application of the legislative purpose; he says that we are bound by the Congressional words. *Id.* at 521.

59. III Pound, Jurisprudence 709 (1959).

60. Honnold, The Life of the Law 113 (1964).

61. *Id.* at 118.

> [W]ritten law offers a means by which *certainty* may, in some cases, be better attained, though it must frequently happen at the sacrifice of *justice;* and that unwritten law offers a means by which justice may be better attained, though it must sometimes happen at the sacrifice of certainty.

The Field-Carter controversy was not merely whether our laws should be codified. A question which more exactly identifies its true nature would be: *Should the common law be abolished?* To this question, a negative answer was given in New York where, except for the code of civil procedure, the Field codes were rejected. In California, the story was different: in 1874 the Field Civil Code was adopted, including both the procedural and substantive laws.[62]

Following the enactment of the California Civil Code, Professor Pomeroy insisted that, in order to avoid confusion and uncertainty, some uniform rule of construction should be established and followed.[63] The new code was described by Professor Pomeroy as being incomplete, imperfect, and partial. It was argued that the familiar common law terminology had been replaced by unfamiliar expressions which have no definitely settled legal meaning. Consequently it was proposed:[64]

> that except in the comparatively few instances where the language is so clear and unequivocal as to leave no doubt of an intention to depart from, alter or abrogate the common-law rule concerning the subject-matter, the courts should avowedly adopt and follow without deviation the uniform principle of interpreting all the definitions, statements of doctrines and rules contained in the code in complete conformity with the common-law definitions, doctrines and rules, and as to all the subordinate effects resulting from this interpretation.

So, with the Pomeroy proposal, the controversy continued: *Should the common law be abolished?* There can be no denial that David Dudley Field, when he prepared the code draft, intended that the common law be abolished. The fact that

62. The standard bearer of the California codification movement was Stephen J. Field, brother of David Dudley Field.

63. Harrison, *The First Half-Century of the California Civil Code,* 10 CALIF. L. REV. 185, 189 (1922).

64. *Id.* at 189-90. For a general discussion of the common law "derogation rule," see Page, *Statutes in Derogation of Common Law: The Canon as an Analytical Tool,* 1956 WIS. L. REV. 78 (1956).

familiar common law terminology had been replaced by unfamiliar expressions would lead one to conclude that there was an effort to make a break from the past. But even though California adopted the code, the courts were unwilling to make the break. In most cases, the courts have without discussion of the proper method of interpretation, followed the Pomeroy proposal.[65] And even today, many courts cling to the common law derogation rule.[66]

What is this common law that demands a strict construction of statutes? Common law by its very nature was rigid. While gaining some degree of independence from the Crown, the English courts lost their discretionary powers. "Their procedure became rigid and mechanical, unchangeable save by parliamentary statute. Reform, if it came at all, came from without."[67] With the development of this formulary system, one might find the court asserting: "[W]e will not and cannot change ancient usages"; "statutes are to be taken *strictly*"; and even where an innocent man lies in jail or a creditor is being deprived of his remedy through the manipulation of procedural rules, the court might say "we can do nothing without a statute."[68] Slowly evolving a system of forms of action, the common law was stunted and crippled to such an extent that an entirely new system of prerogative courts of equity was needed.[69]

This formalistic system was transported to this country where its rigidity continued to develop. For the purposes of this paper it is not necessary to discuss the details of this development. We are all familiar with decisions where the court has denied relief because the cause of action filed did not fit any known writ.[70] But we can't stop here. To understand the current problems of statutory construction, one must not stop with the direct effects of the common law. Its subtle features must also be recognized. The subtlety of the common law is that it has created a *state of mind* — a logical, literal, and mechanical state of mind.

Because law schools have a tendency to over-emphasize the

65. Harrison, *supra* note 63, at 190.
66. SUTHERLAND, *op. cit. supra* note 56, § 6201 (3rd ed. Horack 1943, Supp.1964).
67. PLUCKNETT, A CONCISE HISTORY OF THE COMMON LAW 157 (5th ed. 1956).
68. *Id.* at 158. (Emphasis added.)
69. *Id.* at 159.
70. For different views of individual judges, see Reid, *The Reformer and the Precisian: A Study in Judicial Attitudes,* 12 J. L. ED. 157 (1959).

common law, it is only natural that lawyers and judges will have a tendency to follow a strict and literal approach in all legal matters, including statutory construction. These lawyers and judges are products of the law schools. Thus, with the ever-growing importance of statutory law,[71] perhaps legal education should be reappraised in light of the product being turned out. That some type of positive action is needed becomes manifest in any examination of the absurdities of statutory construction cases.[72] Until there is a complete separation of the common law from statutory law the problems will be left unresolved.

Two products of the common law, rules of construction and stare decisis, have particularly obstructed the orderly development and growth of the legislative institution. Turning first to rules of construction, there are not too many legal scholars who would take the position that rules and maxims of statutory construction are legal rules. To be considered a rule of law or to carry the weight of legal precedent, the construction canon must be necessary to decide the particular case. Professor Goodhart supports this with his view that the ratio decidendi of a case is determined through a combination of the material facts and the conclusion.[73] Judicial reasoning in support of a decision is immaterial in the determination of the ratio decidendi. When judges say that a certain statute must be construed strictly because it abrogates the common law or because it is a penal statute, they are giving a reason or attempting to find support for the decision.[74]

But even though these canons do not carry the weight of legal

71. Justice Frankfurter, in 1947, observed that cases not resting on statutes have been reduced almost to zero. Frankfurter, *Some Reflections On The Reading of Statutes,* 47 COLUM.L.REV. 527 (1947). See also MacDonald, *The Position of Statutory Construction in Present Day Law Practice,* 3 VAND.L.REV. 369 (1950).

72. A few of these absurdities will suffice: In U.S. v. Perryman, 100 U.S. 235 (1879) the Court denied relief to an Indian injured by a "Negro" because the statute protected the Indians against a "white person." In Inland Steel Co. v. N.L.R.B., 170 F.2d 247 (7th Cir.1948), *aff'd.,* 339 U.S. 382 (1950), the lawyer for the Company offered a logical distinction between "tenure" and "condition of employment." It was rightly rejected by the court, which declared that the statute must be examined in light of its purpose. See also Porter v. Plymouth Gold Min. Co., 29 Mont. 347, 74 Pac. 938 (1904); Pace v. Pace Bros. Co., 91 Utah 132, 59 P.2d 1 (1936); Shore Gas & Oil Co. v. Humble Oil and Refining Co., 224 F. Supp. 922 (D.N.J. 1963); Mary Carter Paint Co. v. F.T.C., 333 F.2d 654 (5th Cir. 1964), *reversed,* 86 S. Ct. 219 (1965).

73. GOODHART, ESSAYS IN JURISPRUDENCE AND THE COMMON LAW 1-26 (1931); VANDERBILT, STUDYING LAW 493-525 (1945).

74. "When a judicial decision is pegged on one rule of interpretation and in a succeeding case the contrary result is dictated by a conflicting but equally

precedent in any strict sense, they are used as a vehicle — to reach a judicial decision. By means of this technique or method, attention is diverted from the real task of determining the meaning of the statute. Justice Frankfurter recognized that while construction canons were not rules of law they are on occasion leaned upon by the Court as a crutch.[75]

As generalizations of experience, Justice Frankfurter believed that construction rules have worth.[76] Professor Llewellyn was more specific on the usage of the maxims. He viewed the canons as an accepted conventional vocabulary that provides *lawyers* with a technical framework for maneuver. For every thrust there is a parry; and "to make any canon take hold in a particular instance, the construction contended for must be sold."[77] Think of this. If, under the adversary system, lawyers are to advocate the acceptance of a particular canon, a determination of the true meaning of the statute is being neglected. The goal of the advocate is preconceived; he is dedicated to winning the fight. His victory will be sought through the use of schemes, devices, tactics, and the art of rhetoric.[78] Jerome Frank noted that lawyers should not be blamed for using these techniques; it is part of a "system which treats a law-suit as a battle of wits and wiles."[79] The point is that when a court uses one of the rules of construction as a crutch, lawyers are quick to take hold and cite the rule as if it were law. The same is true with dicta found in a decision. Lawyers will cite the dictum of a case as if this was its ratio decidendi or holding. So it is with the construction canons, which, as a result of our adversary system, become the determinative factor of a decision.

It is not enough that most legal scholars recognize the true nature of interpretation maxims. We must consider how they are being used by lawyers and the courts. What is said by a

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authoritarian rule, it is time to recognize that we are dealing neither with 'rules' nor with 'interpretation,' but with 'explanations' of decisions independently determined." Horack, *The Disintegration of Statutory Construction,* 24 IND. L. J. 335 (1949).

75. Frankfurter, *supra* note 71, at 544.

76. *Ibid.*

77. 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, 401 (1950).

78. FRANK, COURTS ON TRIAL 80-102 (1950).

79. *Id.* at 85. Frank was speaking of the lawyer in relation to fact-finding under the adversary system.

professor in his writings does not decide cases. There must be found a way to correct the aberration at the lower court level, Until this is done, the legislative process can never be elevated to an institutional plane. Rules and canons of statutory construction must be abolished and eliminated from the legal vocabulary.[80] Students of the law must be shown that these rules are a hindrance and not an aid to statutory understanding.[81] To a great extent, the Supreme Court has abolished these rules (except when used as a crutch); it has in cases too numerous to cite issued a mandate that statutes be examined in light of the legislative purpose.

When one advocates abstersion of our statutory construction language, it is imperative that an alternative be offered. There have been moves to abolish certain of the many rules of construction. The problem has been, however, with the alternative offered. What is the alternative to the rule that "statutes in derogation of the common law must be strictly construed," or to the rule that "a strict construction must be given to a penal statute"? We are generally offered as an alternative the antithesis of a strict construction — a liberal construction. Professor Merrill, speaking of the strict construction rule, for penal statutes, declared that: "the criminal is at war with society and much is to be said for the proposition that laws designed to establish safeguards against anti-social conduct should be construed liberally in society's behalf."[82] Professor Hall would reach the same alternative by advocating the enactment of a general interpretation statute to abolish the rule that penal statutes shall be strictly construed.[83]

80. Professor Fordham would remark to this: "When one considers the huge grab bag of rules of interpretation available to an American judge he is likely to indulge the very human wish that we could discard the whole lot and start afresh. It would be bootless to dwell upon the thought. We cannot break abruptly with the past, even if we would." Fordham & Leach, *Interpretation of Statutes in Derogation of the Common Law,* 3 VAND. L. REV. 438 (1950).

81. Professor Merrill, citing Justice Sharp, said that rules of statutory construction "are so many lights to assist the court in arriving with more accuracy at the true interpretation of the intention . . . ." He then stated: "To my students, in the course in Legislation, I emphasize that the function of the lawyers, in a suit involving statutory construction, is to see that *all* the sources of light in favor of the respective claims of their clients are made available to the court." Merrill, *Judicial Interpretation of Legislation,* 32 OKLA. BAR. JO. 1347, 1353 (1961).

82. *Id.* at 1351.

83. Hall, *Strict or Liberal Construction of Penal Statutes,* 48 HARV. L.REV. 748, 769 (1935).

Use of general interpretation statutes is nothing new. A great majority of the states have enacted statutes abrogating the rule of strict construction of statutes in derogation of the common law.[84] It is not necessary here to delve into any discussion of the effectiveness or the constitutionality of these interpretation statutes.[85] It is enough to say that the alternative — liberal construction — whether accomplished by judicial construction or through legislation is nothing more than another rule. Thus we are back where we started. The efforts to remove the restrictiveness of statutory interpretation must fail, for they are offered without identifying the problem. They fail to recognize the separation of the legislative function and the judicial function. Ascertainment of the meaning of a statute remains the exclusive province of the judiciary and this can be accomplished only after the court learns how to work with the language in light of the legislative purpose. And to again repeat Professor Dickerson's statement, "A court that was interested only in ascertaining the meaning of a statute would have little occasion to construe it either 'strictly' or 'liberally'."[86]

Like the rules of construction, the doctrine of stare decisis has also been a stumbling block to the orderly development of the legislative process. By its very nature, the application of stare decisis makes it impossible to ever attain the recognition of the separation of powers concept. What happens when a court erroneously construes a statute? Under the doctrine of stare decisis that part of the decision which carries with it the weight of legal precedent must be applied to future cases involving the same or similar facts. The second case arising under the same statute is no longer controlled by the statute alone. It is governed by the statute as erroneously construed in the

84. Fordham & Leach, *supra* note 80, at 449. As of 1950, 41 states and 3 territories were reported to have such a statute. An example of this type statute: "The rule of the common law, that statutes in derogation thereof are to be strictly construed, has no application to the laws of this State, which are to be liberally construed with a view to effect their objects and to promote justice." Okla. Stat. Ann. tit. 25, §29 (1951).

85. Fordham & Leach, *supra* note 80, at 448-53. At 448 it is noted: "Any serious suggestion at this day that since interpretation is a judicial function a general interpretive act, applicable only to future statutes, would be unconstitutional, could hardly be taken seriously." I strongly disagree with this statement. When a statute seeks to control the attitude or the subjective thoughts of the judiciary, the separation of powers doctrine has been ignored.

86. Dickerson, *Symposium On Judicial Law Making In Relation To Statutes — Introduction,* 36 IND. L. J. 411, 414 (1961).

first case. The parties are no longer regulated by the legislature; they are governed by the judiciary. Thus separation of powers is destroyed.

That the belief in stare decisis is a firmly entrenched principle does not make it justified. I suggest that adherence to this outdated doctrine is a holdover from the Field-Carter and the Field-Pomeroy codification controversy — a controversy that was settled only by neglect. It is about time that the fires be rekindled so that a more rational conclusion can be reached. Preservation of this common law tenet is at the expense of an equally entrenched belief — the constitutional separation of powers. It makes statutory construction dependent on a factor foreign and thus repugnant to the legislative process. I do not attack the doctrine of stare decisis generally for it has been a most significant complement to the orderly development of the substantive common law. But a statute's orderly development is assured by the prescribed legislative machinery.

Under the separation of powers concept, the doctrine of stare decisis has no place in statutory construction cases. But even more important than preserving a constitutional principle, preservation of this common law doctrine is at the expense of the attainment of greater certainty and predictability in the field of legislation. The meaning of statutes can be intelligently understood only after archaic and chaotic interpretation standards are abolished. There will be workable communications among the courts and lawyers only after there has been a general acceptance of the notion that statutes must be independently examined. By adhering to the constitutional separation of powers concept, this independence is secured. The greater certainty is then gained through an understanding of the purpose theory.

But even one of the most eminent proponents of the purpose theory, Justice Frankfurter, insisted that a court must follow legal precedent in statutory construction cases. As Professor Mendelson observed, his deep respect for established decisions is seen in case after case. Continuing, Professor Mendelson notes:[87]

87. Mendelson, *Mr. Justice Frankfurter On The Construction of Statutes*, 43 CALIF. L. REV. 652, 663 (1955) (emphasis added).

> The Justice's position simply is that long-settled judicial construction of a statute, and established doctrines which have grown up around a statute, *are part of the statute itself.* Alteration then is a matter for the legislature. As one of his famous predecessors said, it is usually not so important that a law be "just," whatever that may mean, as that it be settled; for stability and predictability themselves are important elements in a healthy legal system. Moreover, "judicial legislation" of this type entails serious problems of retroactivity.

Support is found for the argument that prior judicial decisions become part of the statute itself especially where Congress has failed to take action to change the interpretation. This, however, is idle fiction for it fails to consider the complicated legislative machinery. It fails to consider the subtle political forces that influence not only the passage of a law but also the very introduction of a bill. Furthermore, it presupposes that all judicial decisions come to the attention and are scrutinized by Congress. Professor Horack who labors under this fiction says that courts are bound, at the risk of being wrong, to make a decision. When the decision is made, the statute becomes more determinate, "or, if you will, *amended* to the extent of the Court's decision."[88] He then declares that:[89]

> The decision changes the rule of conduct under which society lives. The decision is neither formal nor theoretical — it is law. *Men must order their affairs by the new law.* All the sanctions of society — civil, criminal, administrative — will be marshaled to insure its vitality.

He would continue by saying that when the court does change a prior construction it is invading the legislative province.[90] If the interpretation is wrong then it is for the legislature to change it. While there may be a jurisprudential foundation for Professor Horack's position, it lacks constitutional support. The Constitution says that *all* legislative powers shall be vested in a

88. Horack, *Congressional Silence: A Tool of Judicial Supremacy,* 25 TEX.L.REV. 247, 250 (1947).

89. *Id.* at 251 (emphasis added).

90. *Ibid.* "Even assuming that the prior interpretation was incorrect, if the Court now reverses the position it took in the first case it is affirmatively changing an established rule of law under which society has been operating. *This is explicitly and unquestionably the exercise of a legislative function.*" (Emphasis added.)

Congress. Professor Horack then is not consistent with his recognition of the separation of powers concept. First he says that the Court has power to make law when the statute is first interpreted and applied to particular facts. In subsequent cases, involving the same facts, he says that the Court no longer has power to make law — it is bound by the previous decision.[91]

If judicial construction of a statute becomes part of the statute itself, and if men must order their affairs by the new law, then the Court should clarify the statute as far as possible. It should not limit itself to the controversy involved. This, however, is what Justice Frankfurter believed the function of the Court to be. "Judicial abstention is imperative unless real conflicting interests have reached a point of immediate litigious ripeness."[92] He observed that narrow concrete issues are more wisely decided than broad conjectural ones.[93] This of course is the very nature of our adversary system. The litigants come into court with one pre-conceived object — to win. Theoretically this system is supposed to bring out the truth; however, it is not conceivable that the parties have any notion that they are representing the general public in formulating a new law through the judicial decision. Nor should such a responsibility be placed upon their shoulders. When statutes are enacted, the public interest is protected through elected officials. This is far different from having statutory law made through individuals seeking to protect their own interest.

Adherence to the doctrine of stare decisis where statutory construction is involved cannot be justified.[94] One argument in favor of recognizing legal precedent has been that there might otherwise be a serious problem of retroactivity.[95] This, however, offers no problem, for if we are to recognize that the statute is the source of law then our lives will be controlled by the statute and not by judicial decisions. The general public receives know-

91. For a well written note on this subject, see Note, *Congressional Silence and the Supreme Court,* 26 IND.L.J. 388 (1951).

92. Frankfurter & Hart, *The Business of the Supreme Court at October Term,* 1934, 49 HARV. L. REV. 68,94 (1935).

93. *Id.* at 95.

94. Statutory law and a purely common law situation must be distinguished. Common law is judge-made law and to have any degree of certainty the doctrine of stare decisis must be adhered to strictly.

95. See note 87 *supra.*

ledge of the law through statutes and not through judicial decisions which may or may not be published, and to which few people will have access. There really are not many retroactivity problems. What we are doing under disguise is clinging to a well-settled common law principle.

Another argument given in support of legal precedent is that it furnishes greater certainty, stability, and predictability. I question this and suggest that a little research will reveal that what we have is uncertainty. Such is demonstrated by the many conflicts among different courts.[96] It is further demonstrated by the high percentage of reversals handed down by the Supreme Court. Certainty will be gained only by examining the words of the statute in light of the legislative purpose. Where there is over-emphasis of legal precedent, the advocates direct their argument to the applicability of prior judicial decisions. They fail to consider the words of the statute. What I mean by this can be seen through a short case study.

Amerada Petroleum Corp. v. F.P.C.[97] concerned the jurisdiction of the Federal Power Commission under the Natural Gas Act:[98]

> The provisions of this chapter shall apply to . . . interstate commerce of natural gas for resale . . . and to natural-gas companies engaged in such . . . sale, but shall not apply to any other . . . sale of natural gas . . . or to the production or gathering of natural gas.

Under this statute, natural gas produced for resale and ultimate consumption in the same state would not fall within the jurisdiction of the Commission. But what if this non-jurisdictional gas is commingled in a pipe line with jurisdictional gas? It would lose its non-jurisdictional identity, unless there could be adequate separation by means of contractual provisions. In other words, the producer agrees to sell the gas under a contract which includes a provision that the purchaser will consume the gas within

96. N.L.R.B. v. Hearst Publications, Inc., 322 U.S.111 (1944). Whether newsboys are employees cannot be decided according to the imports of common-law standards. Such would introduce variations into the statute's operation as wide as the differences the forty-eight states and other local jurisdictions make in applying the distinction for wholly different purposes. See also United Gas Improvement Co. v. F.P.C., 381 U.S. 392 (1965).

97. 334 F.2d 404 (8th Cir. 1964).

98. 52 Stat. 821 (1938), 15 U.S.C. 717(b) (1958).

the production state — in this manner satisfying the exemptive statutory language.

The Commission, reversing its prior rulings on this question, held that all the commingled gas comes within its jurisdiction.[99] Its previous refusal to take jurisdiction over commingled gas where there was a separation contract had been affirmed in *State of North Dakota v. F.P.C.*[100] Facts in that case were similar to those in the *Amerada*[101] case and the Federal Power Commission declined jurisdiction because it believed the gas separated by contract retained its intra-state nature. In support of its original position, the Commission had relied on a weak dictum found in *U. S. v. Public Utilities Commission of California.*[102] This case involved the jurisdiction of the Commission over the sale of electric energy to the Navy Department. Jurisdiction in this area extends to sales of electric energy for resale in interstate commerce. The energy sold under a single contract would not have become jurisdictional had the Navy consumed the entire contract amount; however, it resold part of the energy to tenants at its low cost housing project. Because of the resale, the entire contract amount became subject to the Federal Power Commission's jurisdiction. In reaching this holding, the Court by dictum said that:[103]

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99. The Commission first shifted its policy on this question in Lo-Vaca Gatherin Co., 26 F.P.C. 606 (1961), *reversed,* Lo-Vaca Gathering Co. v. F.P.C., 323 F.2d 190 (5th Cir. 1963).

100. 247 F.2d 173 (8th Cir. 1957).

101. Brief for Amerada, pp.23-24, *supra* note 97.

102. 345 U.S. 295 (1953).

103. *Id.* at 318. How lawyers and lower courts take individual words or dicta expressed by the Supreme Court and attempt to apply them to future cases as controlling factors is well demonstrated by a series of cases involving the Robinson-Patman Act. In Standard Oil Co. v. F.T.C., 340 U.S.231, 242 (1951), the Court, discussing § 2(b) of the Robinson-Patman Act, 49 Stat. 1526 (1936), 15 U.S.C. § 13(b) (1958), stated.

> . . . wherever a lawful lower price of a *competitor threatens* to deprive a seller of a customer, the seller, to *retain that customer,* may in good faith meet that lower price. (Emphasis added.)

The actual section of the Act reads:

> That nothing herein contained shall prevent a seller rebutting the prima facie case . . . by showing that his lower price . . . was made in good faith to meet an equally low price of a competitor . . . .

Thus, one can see that the statute says nothing about a "lawful lower price," that a "competitor threatens" or that the lower price is made "to retain that customer." Yet in Tri-Valley Packing Association, 60 F.T.C. 1134, 1173 (1962), the Commission in an opinion written by Chairman Dixon stated that: "The

> there is no record evidence of separate rates, separate negotiations, separate contracts, or separate rate regulation by official bodies; in short [there is no evidence] that the "sales" themselves were separate.

From this dictum one could argue logically that if there had been a separate contract for the energy consumed and one for the energy sold for resale then the agency jurisdiction would have been limited. And this is the position adopted by the Commission in the *North Dakota* case, *supra.*

When the Commission changed its policy it was criticized, in *Lo-Vaca Gathering Co. v. F.P.C.*,[104] for ignoring legal precedent. The court stated that the separation contract was carefully tailored to the "caveat" of the Supreme Court and then after reviewing a number of cases, including the *North Dakota* decision, held that "these cases are controlling here."[105] There was no discussion of what the statute meant.

While the court in the *Amerada* case did briefly discuss the statute, the legislative purpose was not considered.[106] It is apparent that the court was more concerned with the fact that the Commission made an abrupt change in its position. The Commission sought to distinguish the *North Dakota* decision and, following the example of the petitioners, it drew out a long list of cases to support its position, and neglected a discussion of the statute itself.

In the Signal Oil[107] brief in the *Amerada* case, 34 of the 36 pages discussed legal precedent, particularly the *North Dakota* case. There was a discussion to show how the facts of this case were similar to the *North Dakota* case, the conclusion being that under the doctrine of stare decisis the court is bound to follow precedent. After the long discussion of legal precedent and

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Supreme Court in Standard Oil Co. v. F.T.C. . . . [clearly] indicated that the lower price which may be met by a seller under the proviso must be a 'lawful' price." Then in Sunshine Biscuits, Inc. v. F.T.C., 306 F.2d 48 (7th Cir. 1962), the Commission taking literally the Court's language in the Standard Oil case, *supra,* argued unsuccessfully that the 2(b) proviso could be used only in self defense against competitive price attacks and not when the seller reduces his price to obtain new customers.

104. 323 F.2d 190 (5th Cir. 1963).

105. *Id.* at 192-93.

106. Amerada Petroleum Corp. v. F.P.C., *supra* note 97, at 408.

107. There were two petitioners in this case, Amerada Petroleum and Signal Oil and Gas Co.

matters unrelated to the statutory meaning, one finally discovers a comment about the pertinent statute. In totality all that was said was:[108]

> And in addition, we do emphasize that Section 1(b) of the Natural Gas Act confers jurisdiction over transportation or sale of natural gas only if it is "in interstate commerce."

With such brief mention of the statute, it is difficult to see how one can determine its meaning. The longest discussion of the pertinent statute is found in the Amerada brief.[109] Here we are correctly told that the starting point in ascertaining the jurisdiction of the Commission is with the statute. The discussion then, however, becomes too logical; it, too, fails to consider the legislative purpose. It further shows a preoccupation with legal precedent as controlling statutory construction.[110]

When none of the parties involved in the *Amerada* case, including the Commission itself, considered in sufficient detail the meaning of the statutory words, it is no wonder that there is a lack of communication between lower federal courts and the Supreme Court. (After decisions based on case law precedent in the lower federal courts, both *Lo-Vaca*[111] and *Amerada* [112] were reversed by the Supreme Court.) When one party to a case cites a number of decisions in support of its position and the other party attempts to distinguish them and cites others in support of its position the ultimate result is confusion.[113] Furthermore, statutory law is delusively turned into common law.

108. Brief for Signal Oil, p.35, Amerada Petroleum Corp. v. F.P.C., *supra* note 97.

109. Brief for Amerada, pp.14-17, *ibid.*

110. Counsel for Amerada shows this pre-occupation when he states: "The immediate reaction upon reading these opinions, *by one schooled in the common law,* is: By what authority does the Commission arrogate unto itself the power to 'overrule' the Court of Appeals for the Eighth Circuit?" *Id.* at 20. (Emphasis added.)

111. 379 U.S. 366 (1965). It is regrettable that the Court, in reversing *Lo-Vaca,* did not adequately identify the purpose of the statute. When it spoke of purpose it was referring only to the Congressional regulatory scheme. Thus anything that caused a gap in these regulations was not in accordance with this legislative purpose. This has been fairly common in Federal Power Commission cases. The impression left is that Congress regulates for the sake of regulating, which is a repugnant thought. *But see* United Gas Improvement Co v. F.P.C., 381 U.S. 392 (1965), where the Court viewed the purpose of the Natural Gas Act as that of protecting consumers against exploitation at the hands of natural gas companies.

112. 379 U.S. 687 (1965).

113. When courts recognize the doctrine of stare decisis, it, at times, becomes necessary to resort to fiction to avoid legal precedent. Use of such a technique is

Certainty, if this is desirable, will be attained only after the legal profession accepts the fact that statutory law must remain independent. It cannot be made dependent on prior judicial decisions. Had the parties in the *Amerada* case concentrated their efforts on the determination of the legislative purpose and used this to clarify the jurisdictional words of the statute the judicial decision would have been predictable. I don't mean to suggest by this statement that prior decisions be ignored, but only that they not be given the weight of binding legal precedent. They may still demonstrate or clarify the legislative purpose, and, thus, be used to better convey the meaning of statutory language.

IV. Conclusion

To maintain the constitutional separation of powers concept and at the same time elevate the legislative process to a true institutional status, the proposals I have made must be accepted. We must be able to shake off the remnants of the Field-Carter controversy. We must place legal precedent where it belongs — with the development of what remains of the common law. And we must recognize that the use of legislative purpose is nothing more than the natural or logical way of determining the meaning of language — statutory language. The question is: How can we accomplish these things?

Research. We must first re-orient legal research in this field to avoid perpetuating the problems. The purpose of this article was not to discuss the field of inquiry in detail; rather, it was to make a survey of the total subject. Many questions were not raised and many of those posed were left unanswered. Much research is needed to explain the high percentage of Supreme Court reversals. I suggest that one could develop some valuable information from a comparison of briefs with the lower court decisions and a comparison of these decisions with Supreme

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well demonstrated by the Court in United Gas Improvement Co. v. F.P.C., *supra* note 110, 85 S. Ct. 1517, 1524. "The language of [F.P.C. v. Panhandle Eastern Pipeline Co.] is unquestionably broad. But flat statements such as 'of course leases are an essential part of production,' should not be taken to cover more than the particular kind of leases that were before the Court . . . ." For a discussion of how courts manipulate decisions while creating an illusion of certainty, see Thomas, *The Judge,* 2 Tulsa L. J. 93, 99-101 (1965).

Court opinions. In carrying out any research project, one should not become blinded by pre-conceived jurisprudential notions. Certain of these theories fail to explain the peculiar situation present in this country — constitutional separation of powers. And finally there is a great need for research to determine the purpose of particular legislative enactments. One great problem with law is that an attorney does not have the time to research in detail to determine undisclosed legislative purpose. In this area he needs the assistance of the legal scholar and students of the law.

Legal Education. With the increased importance of legislation, law schools must reappraise their program to determine if sufficient emphasis is being given to this field. If students are trained only in the common law, their restrictive, logical, and mechanical way of thinking will affect their preparation and presentation of statutory construction cases. Statutory courses must be increased; however, this will not be enough. We must not limit our teaching to the substantive aspects; but we must always remain conscious of the interpretative process. This is exactly what we have done with the regular common law courses. The student studies the body of the law and then in each course he is forced to consider and learn to work with common law principles such as stare decisis.

To reach our goal, judges must also be instructed in the legislative process. This can be done case by case for it is not the judges' duty to understand; it is the lawyer's duty to make himself understood. And the lawyer who complains that the judge has misunderstood him discredits himself.[114] So the key is to adequately educate the student who will one day take his place at the Bar.

There has been so little done in the field of statutory construction that we could well close the pages of the past and start afresh. Merely because we have lived with an aberrant set of "rules" for so many years does not mean that we must live with them forever. Remember that *Erie R. R. v. Tompkins*[115] overruled *Swift v. Tyson,*[116] and with it a doctrine of nearly 100

114. CALAMANDREI, EULOGY OF JUDGES 22 (2d ed. 1956, tr. by Adams and Phillips).

115. 304 U.S. 64 (1938).

116. 16 Pet. (U.S.) 1 (1842).

years. Remember *Brown v. Board of Educ.*[117] and its restriction, if not complete abandonment, of *Plessy v. Ferguson.*[118] In reaching its decision in *Brown,* the Court made a statement that is quite pertinent to our present discussion:[119]

> In approaching this problem, we cannot turn the clock back to 1868 when the Amendment was adopted, or even to 1896 when *Plessy v. Ferguson* was written. We must consider public education in the light of its full development and its present place in American life throughout the Nation. Only in this way can it be determined if segregation in public schools deprives these plaintiffs of the equal protection of the laws.

So with statutory construction. We cannot be controlled by the past. We must consider it in the light of its present place in the legal system and determine if the legislative process has been deprived of its proper status.

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117. 347 U.S. 483 (1954).
118. 163 U.S. 537 (1896).
119. 347 U.S. at 492.

The Statute of Anne: Copyright Misconstrued

LYMAN RAY PATTERSON*

The Statute of Anne, enacted by Parliament in 1709, has had a seminal impact upon the American law of copyright. Professor Patterson in this article examines the history of the English statute and concludes that its early misconstruction by English and American courts has resulted in the failure to accord legal recognition to what he calls the "creative interest" of an author in the integrity of his work after he has sold the copyright. Professor Patterson argues that the copyright bill currently before Congress should expressly recognize this interest and afford protection to the author through the federal courts.

I. INTRODUCTION

THE Statute of Anne[1] has deeply affected the American law of copyright, including the copyright bill now before Congress.[2] The first English copyright act, as it is called, was passed in 1709. It was used in this country during the 1780's as a model for copyright laws enacted by twelve of the thirteen states,[3] primarily in response to a resolution of the Continental Congress.[4] Later, it served as a model for the first federal copyright act,[5] passed in 1790. The line of descent can be traced through the three major revisions of the copyright law, in 1831,[6] 1870,[7] and 1909,[8] and the present proposed revision.

The copyright provided for by these statutes is called an

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1. 8 Anne, c. 19.
2. H. R. 4347, 89th Cong., 1st Sess. (1965).
3. See the compilation of these statutes in COPYRIGHT LAWS OF THE UNITED STATES OF AMERICA, 1783-1962 at 1-21 (Copyright Office 1962) [hereinafter cited COPYRIGHT LAWS].
4. COPYRIGHT LAWS 1.
5. 1 Stat. 124.
6. 4 Stat. 436.
7. 16 Stat. 198.
8. 35 Stat. 1075.

author's right, and this concept of copyright is largely a product of the construction of the Statute of Anne in 1774, sixty-five years after its enactment, by the House of Lords in *Donaldson v. Beckett.*[9] The *Donaldson* case exercised great influence on American copyright law; when the federal copyright act of 1790 was construed in 1834 by the Supreme Court in *Wheaton v. Peters,*[10] the construction not unnaturally followed that of the English court's interpretation of the Statute of Anne. In spite of this impressive authority, however, copyright is an author's right only in a limited sense.

An author has two basic interests in his works, an economic interest and a creative interest, and it is the former alone which statutory copyright protects. The economic interest is the one the author shares with the publisher. Since copyright protects only the owner, when the publisher becomes the copyright owner, which is the usual case, the copyright protects the publisher rather than the author. Thus, copyright can be properly viewed as being in fact a publisher's right more than an author's right.

The creative interest, that interest an author as creator has in his work as a product of his imagination, intelligence, and personality, is given recognition in other systems of law under the term "moral right."[11] The former term is here used in preference to the latter, although they may be viewed as being substantially synonymous. The author's creative interest is not recognized as such in the common law, but Lord Mansfield in 1769 in the famous case of *Millar v. Taylor,*[12] gave an excellent statement of the rights it might have entailed had it been recognized. In speaking of an asserted author's common law copyright after publication, he said that without such a continuing right:[13]

> The author may not only be deprived of any profit, but lose the expence he has been at. He is no more master of the use of his own name. He has no control over the correctness of his own

9. 4 Burr. 2408, 98 Eng. Rep. 257; 2 Bro. P.C. 129, 1 Eng. Rep. 837; 17 COBBETT'S PARL. HIST. 953

10. 8 Pet. (U.S.) 591 (1834).

11. See Strauss, *The Moral Right of the Author,* 4 AM. J. COMP. L. 506 (1955); Katz, *The Doctrine of Moral Right and American Copyright Law—A Proposal,* 24 So. CAL. L. REV. 375 (1951); Roeder, *The Doctrine of Moral Right: A Study in the Law of Artists, Authors and Creators,* 53 HARV. L. REV. 554 (1940).

12. 4 Burr. 2303, 98 Eng. Rep. 201 (K.B).

13. 4 Burr. at 2398, 98 Eng. Rep. at 252.

> work. He can not prevent additions. He can not retract errors. He can not amend; or cancel a faulty edition. Any one may print, pirate, and perpetuate the imperfections, to the disgrace and against the will of the author; may propagate sentiments under his name, which he disapproves, repents and is ashamed of. He can exercise no discretion as to the manner in which, or persons by whom his work shall be published.

It is one of the unrecognized ironies of legal history that the case from which this perceptive statement of the author's creative interest is taken is probably a major reason the common law does not today recognize the author's creative interest as such. To appreciate this point, it is necessary to understand three different copyrights, the stationer's copyright, the statutory copyright created by the Statute of Anne, and the common law copyright of the author after publication, recognized in the *Millar* case, and to know that the *Millar* case was a prelude to *Donaldson v. Beckett, supra,* in which the House of Lords gave the definitive interpretation of the Statute of Anne.

The stationer's copyright was the one granted by the Stationers' Company, the London company to which members of the book trade belonged. The stationers developed their copyright in the 1500's as a means of maintaining order in the trade and protecting the property of its members. It received legal sanction from the various acts of censorship, and except for the printing patents, it was the only copyright in England until the statutory copyright created by the Statute of Anne, in 1709, supplanted it. The copyright statute, however, continued the stationer's copyrights then in existence for twenty-one years from the date of the act. The new copyright differed from the old in that it was limited to a term of years and was available to anyone complying with the provisions of the act; the stationer's copyright was limited to members of the company and existed in perpetuity. The Statute of Anne, by limiting copyright to a term of years, posed a threat to the unlimited monopoly of the booksellers which, indeed, it was intended to destroy. Even so, the statutory copyright was modelled on the stationer's copyright, and except for the differences between them mentioned above, the former was not intended to be any different from the latter. The point is significant because the stationer's copyright, developed by and for publishers, was clearly a publisher's

right, not an author's right (which the statutory copyright was later deemed to be).

The third copyright, the asserted common law copyright of the author after publication, was the copyright recognized in the *Millar* case, and it is to be distinguished from the common law copyright which had been held to exist in unpublished works.[14] After the limited statutory copyright replaced the unlimited stationer's copyright, the booksellers who had a monopoly based on the stationer's copyrights of old works sought to have the courts recognize a common law copyright apart from the statutory copyright, one which would exist in perpetuity. Such a copyright, they contended, existed in the author. This was the issue in the *Millar* case. The court held that the author did have a common law copyright in perpetuity, and in so doing treated copyright as an author's right. It was the first time that copyright was delineated by a common law court, and the court treated copyright, contrary to the historical development of the stationer's copyright, as embracing both the economic and creative interests of the author. The result of the *Millar* decision was the recreation of the stationer's copyright unlimited in time, under the guise of a common law copyright, which was what the booksellers wanted so as to continue their monopoly.

It was this monopoly which led the House of Lords in *Donaldson v. Beckett*,[15] five years later, to overturn the *Millar* case, leaving the author with the statutory copyright as his sole protection after publication. Had the *Millar* case not brought the author's creative interest within the scope of an asserted common law copyright after publication, it is possible, and even probable, that the creative interest of the author would have been recognized as such in the common law apart from copyright.

The failure of the common law in this regard can be traced directly to a misunderstanding of the concept of copyright as it was originally developed in England, and to the consequent misconstruction of the Statute of Anne in the *Millar* and *Donaldson* cases. To support this thesis, it is necessary to go to history and to show the historical developments in some detail. This

14. Duke of Queensberry v. Shebbeare, 2 Eden 329, 28 Eng. Rep. 924 (Ch. 1758).
15. *Supra* note 9.

paper will sketch briefly the background of the Statute of Anne, analyze the statute, and explain how and why the misconstruction of the statute occurred. After relating these historical aspects of copyright to the bill now before Congress, it will conclude with suggestions for a law of literary property consisting of two parts: (1) copyright to protect the economic interest of the publisher (and author); (2) a common law of literary property to protect the creative interest of the author.

II. The Background

The Statute of Anne is called the first copyright statute, but the origin of copyright preceded the enactment of the statute by more than one hundred and fifty years.[16] During this century and a half, copyright was continually supported by legislation, and the Statute of Anne can properly be viewed as the sixth, and perhaps the seventh,[17] copyright statute in England. The earlier copyright acts were the Star Chamber Decrees and acts of press control and censorship: the Star Chamber Decrees of 1586[18] and 1637,[19] the Ordinances of 1643[20] and 1649,[21] and

16. The line of demarcation here used is the date of the Charter of the Stationers' Company, 1557. It is almost certain that the stationer's copyright preceded the incorporation of the Brotherhood of Stationers. In a document entitled, "The Appeal of William Seres the Younger to Lord Burghley," December, 1582, the following language appears. ". . . [Y]t appeareth by the auntyent orders of stacyoners hall *(by which the craft that preceded the Company is evidently intended)* that no copie of any buke grete or small should be pryinted before yt was brought thether and beinge ther allowed yt is our order that no man should prynt any other mans copie." II Arber, A Transcript of the Stationers' Registers 1554-1640 at 771-72 (1875) [hereinafter cited Arber].

17. See note 18 *infra.*

18. Item 4 of the Star Chamber Decree of 1586 provided that no person "shall ymprynt or cawse to be ymprynted any book, work or coppie against the fourme and meaninge of any Restraynt or ordonnaunce conteyned or to be conteyned in any statute or lawes of this Realme, or in any Iniunctyon made, or sett foorth by her maiestie, or her highnes pryvye Councell, or against the true intent and meaninge of any Letters patentes, Commissions or prohibicons vnder the great seale of England, or contrary to any allowed ordynaunce sett Downe for the good governaunce of the Cumpany of Staconers within the Cyttie of London, ..." II Arber 810. The prohibition of printing against ordinances of the Stationers' Company gave protection to the stationer's copyright, which was regulated by ordinances of the company.

The Star Chamber Decree of 1566 forbade the printing of any work against "the Statutes or Lawes of this Realme, or in anie Iniunctions, Letters patents, or ordinances, passed or set foorth or to be passed or set foorth by the Queenes most excellent Maiesties grant, commission, or authoritie." I Arber 322. Pre-

the Licensing Act of 1662.[22] That the Statute of Anne stands at the end of this line of legislation has been obscured by the emphasis on censorship in the earlier statutes and the emphasis on copyright in the last. However, the earlier statutes, although not generally recognized as such, were in fact trade regulation acts for the book trade as well as acts of censorship; and the Statute of Anne, again although not recognized as such, was simply a trade regulation statute designed to destroy and prevent monopoly in the book trade. As will be shown later, most

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sumably the ordinances referred to were ordinances of the Stationers' Company. If so, it could be said that the Star Chamber Decree of 1566 was the first copyright act.

19. The Star Chamber Decree of 1637 provided explicit copyright protection. Item II of the Decree required that works to be printed be first "entred into the Registers Booke of the Company of Stationers." IV ARBER 530. Item VII provided: "That no person or persons shall within this Kingdome, or elsewhere imprint, or cause to be imprinted, nor shall import or bring in, or cause to be imported or brought into this Kingdome, from, or out of any other His Maiesties Dominions, nor from other, or any parts beyond the Seas, any Copy, book or books, or part of any booke or bookes, printed beyond the seas, or elsewhere, which the said Company of Stationers, or any other person or persons haue, or shall by any Letters Patents, Order, or Entrance in their Register book, or otherwise, haue the right, priuiledge, authoritie, or allowance soly to print, ..." IV ARBER 531.

20. "Nor [any] other Book Pamphlet, paper, nor part of any such Book, Pamphlet, or paper shall from henceforth be printed, bound, stitched or put to sale by any person or persons whatsoever, unless the same be first approved of and licensed . . . and entred in the Register Book of the Company of Stationers, according to ancient custom, and the Printer thereof to put his name thereto. And that no person or persons shall hereafter print, or cause to be reprinted . . . any Book or Books lawfully licensed and entred in the Register of the said Company for any particular member thereof, without the license and consent of the Owner or Owners thereof." I FIRTH & RAIT, ACTS AND ORDINANCES OF THE INTERREGNUM 184-85 (1911).

21. "[N]o person or persons whatsoever in this Commonwealth, shall hereafter print or reprint . . . any Book or Books, or part of Book or Books, now entred in the Register Book of the said [Stationers'] Company, or which hereafter shall be duly entered in the said Register Book, for any particular member of the said Company, without the like consent of the owner or owners thereof; . . . ." II FIRTH & RAIT, *op. cit. supra* note 20, at 251.

22. "And be it further enacted by the authority aforesaid, That no person or persons shall within this Kingdom, or elsewhere, Imprint or cause to be Imprinted, nor shall Import or bring in, or cause to be Imported or brought into this Kingdom . . . any Copy or Copies, Book or Books, or part of any Book or Books . . . which any person or persons by force or virtue of any Letters-Patents granted or assigned, or which shall hereafter be granted or assigned to him or them, or (where the same are not granted by any Letters Patents) by force or virtue of any Entry or Entries thereof duly made or to be made in the Register-Book of the said Company of Stationers . . . ." Sec. 5, 13 & 14 Car. II, c. 33.

of the provisions of the Statute of Anne can be related directly to provisions in the Licensing Act of 1662.

The key to the relationship between the acts of censorship and the copyright act is the Stationers' Company[23] and the stationer's copyright, which served as the model for the statutory copyright. The Stationers' Company, composed of members of the book trade, bookbinders, printers, and booksellers (in modern terms, publishers), developed the stationer's copyright as a protective device for maintaining order in the company which, since the company had a monopoly, meant order in the book trade. The company was able to develop and sustain the stationer's copyright because of its powers, which were large, even for a London company of the Elizabethan and Jacobean periods.[24] The reason for such powers was the need of the government for an effective policeman of the book trade. The Catholics, Philip and Mary, granted the stationers' charter in 1557 for this specific purpose.[25] The Protestant Elizabeth confirmed it without change in 1559,[26] and the stationers served continually as policemen of the trade until the final lapse in 1694 of the Licensing Act of 1662, although after 1622 their policing function decreased in importance.[27]

The advantages of this system to the government for purposes of press control and to the company for protecting the property of its members are obvious. The company provided a record of publications,[28] and as long as censorship prevailed, both the official licenser and the wardens of the company had to

23. For a history of the Stationers' Company, see BLAGDEN, THE STATIONERS' COMPANY (1960).

24. "No other company, it is true, ever attained the same degree of monopoly as that which the State thought it expedient to confer on the Stationers. . . ." UNWIN, THE GILDS AND COMPANIES OF LONDON 261 (3d ed. 1938).

25. According to the charter's preamble, Philip and Mary incorporated the stationers to provide a suitable remedy against seditious and heretical material printed by schismatical persons, because such material moved the sovereign's subjects not only against the crown, but also against the "faith and sound Catholic Doctrine of Holy Mother Church." The charter is printed in I ARBER XXVIII-XXXII.

26. I ARBER XXXII.

27. Their duties were shared under the Licensing Act with the Surveyor of the Press, an association disliked by the Stationers. See BLAGDEN, *op. cit. supra* note 23, at 172-73.

28. The titles of printed works were required to be entered in the Company's register book. "Although the perhaps not very reliable evidence at our disposal suggests that something like a third of the copies were unregistered, entrance was in theory obligatory." GREG, LONDON PUBLISHING 1550 TO 1650 at 68 (1956).

approve material to be printed, although at times the wardens also acted as official licensers.[29] Since the government had no interest in the private ownership of copyright, it left this matter wholly to the company. The press control legislation gave the company power to control printing and printing presses, and gave the stationer's copyright itself official sanction by making it, at first, unlawful to print works contrary to the ordinances of the company, and later, to print copyrighted works without the owner's consent.

A brief review of the acts of censorship is enough to show their relevance to copyright. Prior to Elizabeth, acts of censorship were largely a matter of proclamation by the sovereign, but a proposed censorship act apparently failed of enactment by Parliament because of the death of Mary in 1558.[30] Elizabeth's first act for regulating the press was the fifty-first of the Injunctions of 1559.[31] Her first Star Chamber Decree for this purpose was in 1566,[32] which prohibited the printing or importation of books contrary to laws, injunctions, letters patent, or ordinances, the last apparently referring to ordinances of the Stationers' Company. She had first refused the Stationers' Company the large powers it sought, and had given them only a part of that power in the Decree of 1566. It was not until the Star Chamber Decree of 1586 that the stationers succeeded in getting legislation satisfactory to them.[33]

A primary reason for the Star Chamber Decree of 1586 was

29. *Id.* at 46.

30. The title of the bill was, "'That no Man shall print any Book or Ballad, &c. unless he be authorized thereunto by the King and Queen's Majesties License, under the Great Seal of *England.*' As this is the first Restraint to the Liberty of the Press, which we have yet met with, it is the more remarkable." 3 PARL. HIST. 354 (1661).

31. The fifty-first Injunction was unlike the other decrees of censorship in that it did not forbid printing contrary to statutes, ordinances, and so forth, but expressly required a license to print to be granted by named persons. It also made an exception for classical authors and "workes in any language, that hath ben heretofore commonly receyued or allowed in any the vnyuersities or Scoles: But the same may be prynted and vsed, as by good order they are accustomed." There was only one mention of the Stationers. "Accordynge to the whyche, her maiestye straightly commaundeth al manner her subiectes, and specially the wardens and company of Stationers, to be obedyent." I ARBER XXXVIII-XXXIX.

32. I ARBER 322.

33. The Star Chamber Decree of 1586 was designed primarily to regulate printing and printers. The Decree is transcribed at I ARBER 322.

a need to combat the rising tide of Puritanism. There was also, however, serious disorder within the book trade itself. Resentment against printing patents, limited to a comparatively few persons, led to widespread piracy, a dangerous condition for a government whose policies included press control. The printing patent was a copyright granted by letters patent from the sovereign to publish a particular work or class of works for a specified period of time, ranging from a term of years to life.[34] As a grant from the sovereign, it was a more desirable form of copyright than the stationer's copyright since it not only carried with it the sovereign's sanction, but usually covered the most profitable works to be printed. It was the concentration of the printing patents in the hands of a favored few that created the resentment, and the royal commission appointed to look into the controversy within the trade made a recommendation, the effect of which was that the grant of patents be limited to particular works and that general patents for classes of works be abolished,[35] a recommendation which was ignored. Here, for the first time, appears a recognition of the problem of monopoly that pervades the entire history of copyright. At later times, when the use of the printing patent by the sovereign declined, the charges of monopoly were to be directed, and justly so, against the company itself and against the stationer's copyright.

The Star Chamber Decree of 1586 was a press control rather than a censorship act in that it was designed primarily to regulate printers and printing.[36] Although it contained licensing provisions, its basic purpose was to limit the number of presses and keep them under the watchful eye of the government, and the press under Elizabeth "was probably the freest in Europe, as free indeed as the political situation at that time would admit of."[37] The point of particular interest here, however, is that the decree prohibited the printing of books against any statutes or laws of the realm or letters patent, "or contrary to any allowed

34. A patent granted to John Day on November 11, 1559 is transcribed at II ARBER 61.

35. "Their Lordships to be a meane to her maiestie that hereafter no generall title of bookes of Arte nor scholle bookes except bookes perteyning to her maiesties service be not Drawen into priviledge." From an *Extract of the Commissioners Order About the Stationers,* II ARBER 784-85.

36. See note 33 *supra.*

37. Comment of Arber at III ARBER 11.

ordynaunce sett Downe for the good governaunce of the Cumpany of Staconers,"[38] a provision which provided more explicit recognition of the stationers' power than the provision in the Decree of 1566.

The Star Chamber Decree of 1637 under Charles I was much more comprehensive and detailed than the Decree of 1586, expanding the nine items of the earlier decree to thirty-three.[39] It was a true censorship act, and for the first time it

38. Item 4 (see note 33 *supra*).

39. The Decree is too long to summarize in detail. However, the importance of the Decree as a model for the Licensing Act of 1662 warrants a summary of the first ten items.

The first paragraph of the 1637 Decree forbade the printing, selling, importing, or binding of "any seditious, scismaticall, or offensive Bookes or Pamphlets, to the scandall of Religion, or the Church, or the Government, or Governours of the Church or State, or Commonwealth, or of any corporations or particular person or persons whatsoeuer." Item II provided that no one should imprint any book or pamphlet "vnless the same Booke or Pamphlet, and also all and euery the Titles, Epistles, Prefaces, Proems, Preambles, Introductions, Tables, Dedications, and other matters and things whatsoeuer thereunto annexed or therewith imprinted" should be lawfully licensed and "also first entred into the Registers Booke of the Company of Stationers." Item III designated the persons authorized to license books. There were for law books, one of the chief justices or the chief baron; for books of history, or any other book of state affairs, one of the secretaries of state; for books concerning heraldry, titles of honor and arms, or otherwise concerning the office of the Earl Marshall, the Earl Marshall; and all other books "whatsoeuer," the Archbishop of Canterbury, or Bishop of London. The chancellor and vice-chancellor of both of the universities were authorized to license books printed at the universities, but were not to license books of law or matters of state. In all instances, the official licensers had the power to appoint one to act for them. The procedure for obtaining a license was given in item IV. Each licensee was to have two written copies of each book, one of which was to be retained for insuring that the copy was not altered, the other returned to the owner. The licenser was required to testify that there was nothing in the book contrary "to Christian Faithe, and the Doctrine and Discipline of the Church of *England,* nor against the State or Gouernment, nor contrary to good life, or good manners, or otherwise." The license was to be imprinted in the beginning of the book with the name of each licenser. Items V, VI and VII dealt with the importation of books. Every importer of books was required to submit a written catalogue of all imported books to the Archbishop of Canterbury of London; all packages of imported books were to be opened only in the presence of the Archbishop or Bishop with the master or one of the wardens of the company; and no book to which the copyright was held, either by patent or registration in the company's register, was to be imported. Item VIII required that the names of the author, printer, and publisher of all books, ballads, charts, and portraits were to be printed thereon, and item IX forbade the use of the "mark or vinnet" of the Stationers' Company or any person without the consent of the owner; and under item X, only persons who had been apprentices in the book trade for seven years were allowed to deal in any way with "Bibles, Testaments, Psalmbooks, Primers, Abcees, Almanacks, or other booke or bookes whatsoeuer."

The remaining twenty-three items were devoted largely to control of the indus-

required not only that all printed works should be licensed but that they be "also first entered into the Registers Booke of the Company of Stationers,"[40] and it specifically forbade the printing of copyrighted works without the consent of the copyright owner.[41] The Decree of 1637 was short-lived, since the Star Chamber was abolished in 1640.[42] Its importance, however, is greater than its short existence indicates, for it was revived by Charles II in the form of the Licensing Act of 1662.

During the Interregnum, Parliament passed several ordinances to regulate the press, the Ordinances of 1643,[43] 1647,[44] 1649,[45] and the Act of 1653,[46] reviving the ordinance of 1649. As might be expected, the ordinances were increasingly stringent, but the two ordinances of interest here are those of 1643 and 1649. Both contained provisions similar to those in the Star Chamber Decree of 1637, giving recognition to and support for the stationer's copyright by making it unlawful to print a copyrighted book without the consent of the copyright owner.[47]

The Licensing Act of 1662[48] was closely modelled on the Star Chamber Decree of 1637,[49] containing similar provisions requir-

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trial section of the book trade, including type founders. As an example of the detail of the provisions, Item XXX provided that employment in the casting of type be limited to journeymen apprentices, with an exception for a boy "pulling off the knots of mettle hanging at the ends of letters when they are first cast." The Decree is transcribed at IV ARBER 529.

40. *Id.* Item II.

41. *Id.* Item IX.

42. 16 Car. I, c. 10.

43. See note 20 *supra*

44. I FIRTH & RAIT, *op. cit. supra* note 20, at 1021-23.

45. See note 21 *supra.*

46. II FIRTH & RAIT, *op. cit. supra* note 20, at 696-99.

47. See notes 21, 22 *supra.*

48. 13 & 14 Car. II, c. 33.

49. Twenty-four clauses of the 1637 Decree were in the Licensing Act. The clauses which were omitted dealt with type-founders who were covered by the provisions on printers: the clause requiring the giving of bonds for good behavior, the finding of work for journeymen, and prohibiting interference with the printers at Oxford and Cambridge. The attempts to license reprints and to make authors produce two copies of a manuscript were omitted and the control of imports was lightened. Secs. V-IX. Additions to the Licensing Act included a clause regulating the booksellers in London, requiring a license from the Bishop, Sec. XX, and a clause protecting stallholders in Westminister who were in business on November 29, 1661. Sec. XXI. The press at York was allowed to continue, but the licensing right of the Archbishop of York was reserved, and it was not to print the Bible or English Stock books. Sec. XXIV. Three copies of each book were to be given to the king's library, and the library at Cambridge as well as the Bodleian Library at Oxford, which had been given this right in

ing that licensed books be entered in the register books of the Stationers' Company and making it unlawful for one to print a copyrighted work without the consent of the copyright owner.[50] The act was limited by its own terms to a period of two years, but was renewed from time to time[51] until it expired for the last time in 1694.[52]

The final lapse of the Licensing Act in 1694 removed the legal sanctions for the stationer's copyright, with resultant disorder and confusion in the book trade. The stationers sought new press control legislation,[53] and as these efforts to renew censorship failed, they concentrated their attention on getting a law merely to protect their copyrights and to bring order to the trade.[54] The great ground of opposition was their monopoly. The stationer's copyright was monopolistic in two respects. It was limited to members of the company, and it existed in perpetuity. During the early controversies over the copyright, the charge of monopoly had been directed against the printing patent, but not apparently against the stationer's copyright. In the latter part of the seventeenth century, however, the development of English literature made the stationer's copyright the most important form of copyright, and works of such men as Shakespeare, Milton, and Dryden were classics, the publication of which was extremely profitable. It was the copyright of such

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the 1637 Decree. Sec. XXV. The powers of search were restricted to houses of men in the trade, with a special warrant from the king required for any other searches. Sec. XIX. Finally, the act was not to apply to royal grants, or to John Streater. Sec. XXIII.

50. Item VI.

51. 16 Car. II, c. 8; 17 Car. II, c. 4; 1 Jac. II, c. 17; 4 & 5 W. & M., c. 24.

52. In February, 1694, the House of Commons omitted the Licensing Act from a bill for continuing certain acts, XI H. C. JOUR. 288. The House of Lords restored it by amendment, 1 HOUSE OF LORDS MANUSCRIPTS, N.S., 1693-5 at 540, which Commons rejected. On the same day it refused to renew the Licensing Act, the House of Commons appointed a committee to prepare and bring in a bill for better "Regulating of Printing and Printing Presses." XI H.C. JOUR. 228.

53. Petitions were submitted in March, 1694, XI H.C. JOUR. 288, December, 1697, XII H.C. JOUR. 3. On January 13, 1698, the House of Lords sent to Commons a bill entitled, "An act for the better Regulating of Printers, and Printing-Presses." XII H.C. JOUR. 466. It was rejected on February 1, 1698, XII H.C. JOUR. 468. The next, and last effort to secure press control legislation occurred in 1703 with a bill to prevent "Licentiousness of the Press," XIV H.C. JOUR. 249, and was apparently finally disposed of on January 18, 1703, when committed to a committee of the whole house. XIV H.C. JOUR. 287.

54. Petitions were submitted in 1706, XII H.C. JOUR.. 313, and 1709, XVI H.C. JOUR. 740. It was this last petition that resulted in the Statute of Anne.

works that was the basis of a monopoly of the booksellers within the company itself.

The objections to the stationers' monopoly were perhaps most convincingly expressed in a statement found in the House of Commons Journal, given in connection with the rejection of a bill for "Regulating of Printing and Printing Presses" in 1695.[55] Under the bill, books were required to be entered in the register of the Stationers' Company and of the eighteen objections stated to the bill, the most pertinent was that the stationers "are impowered to hinder the printing of all innocent and useful Books, and have an Opportunity to enter a title to themselves, and their Friends, for what belongs to, and is the Labour and Right of, others." When the Statute of Anne was finally enacted, it was drafted to deal with monopoly, as well as to bring order to the book trade.

III. The Statute of Anne

The Statute of Anne was not enacted until fifteen years after the final lapse of the Licensing Act of 1662, although during this interim efforts to secure new legislation continued. Censorship, which had so long provided the justification for legislation sustaining the stationer's copyright, was no longer acceptable, and the association of copyright with censorship is undoubtedly one reason for the reluctance of Parliament to act. Another reason, of course, was monopoly. Still, the economic confusion in the book trade demanded a means of restoring order to it.

At the time the Statute of Anne was drafted, censorship provisions were out of the question, but the problem of monopoly remained. The most natural person to turn to as an instrument against monopoly in the new act was the author. The stationers in their lobbying for censorship legislation in earlier times had used the interest of the author as a prime reason for their requests. Their reasoning was that if there were no copyright, the author could not be paid by the publisher, and "many Pieces of great worth and excellence will be strangled in the womb, or never conceived at all for the future."[56] The same basic argu-

55. XI H.C. Jour. 305-6.

56. From a petition of the Stationers' Company to Parliament in 1643 (?), I Arber 584, 587.

ment was used in petitions for copyright legislation in 1706[57] and 1709,[58] the last concluding with a request for leave "to bring in a Bill, for the securing of Property in such Books, as have been, or shall be, purchased from, or reserved to, the Authors thereof."

It is not surprising, then, that the copyright act was framed primarily in terms of the author. The expressed interest of the booksellers in the welfare of the author, however, is at least suspect. The author was a means to their ends, and it was not until their earlier petitions had been rejected that the petitioners urged copyright for the author. The tactic was one the monopolists were to use later in their famous fight for recognition of a perpetual common law copyright in the author. And while the new act clearly benefited the author, it was primarily an anti-monopoly trade regulation statute. That this is so can be seen by examining: (1) the relation between the Licensing Act of 1662 and the Statute of Anne; (2) the pattern of the statute in dealing with the problem of monopoly; and (3) the nature of the stationer's copyright.

A. The Licensing Act of 1662 and the Statute of Anne.

The Statute of Anne represented a fundamental change in purpose and method from the Licensing Act of 1662. The earlier statute, as a successor to the Star Chamber Decrees of press control, had been primarily concerned with censorship, and with copyright and trade regulation as a means to that end. The Statute of Anne was primarily concerned with trade regulation and with copyright as a means to provide order in the trade and to destroy monopoly. Even so, the latter statute can be viewed as a successor to the earlier one, and the provisions common to both indicate the continuity between the two.

Both statutes required registration of the title of a book in the register books of the Stationers' Company, though for different primary purposes: The Licensing Act for censorship, the Statute of Anne for copyright.[59] The penalties for infringe-

57. See note 54 *supra.*

58. *Ibid.*

59. *Cf.* Sec. II of the Statute of Anne and Sec. III of the Licensing Act. The former reads in part: "II. And whereas many persons may through ignorance offend against this act, unless some provision be made whereby the property in every such book, as is intended by this act to be secured to the proprietor or

ment of copyright were very similar,[60] and both statutes required delivery of books to the company for the royal library and various college libraries.[61] The price control provision in the Statute of Anne bears a marked resemblance to the provision in the Licensing Act naming the officials to act as licensers,[62] and while the earlier statute contained strict regulations for the importation of books,[63] the later one specifically provided that the importation of works in foreign languages should not be prohibited.[64] Both statutes reserved the rights and privileges granted by printing patents.[65]

Apart from the censorship provisions of the earlier statute, the principal distinction between it and the Statute of Anne was that the former enabled the stationers to monopolize the book trade, the latter was designed to destroy the monopoly. To this

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proprietors thereof, may be ascertained, as likewise the consent of such proprietor or proprietors for the printing or reprinting of such book or books may from time to time be known; be it therefore further enacted . . . that nothing in this act contained shall be construed to extend to subject any bookseller, printer, or other person whatsoever, to the forfeitures or penalties therein mentioned, for or by reason of the printing or reprinting of any book or books without such consent, as aforesaid, unless the title to the copy of such book or books hereafter published shall, before such publication, be entered in the register book of the company of stationers, in such manner as hath been usual, which register book shall at all times be kept at the hall of the said company, and unless such consent of the proprietor or proprietors be in like manner entred as aforesaid, for every of which several entries, six pence shall be paid, and no more; . . . ." The latter reads in part: "III. And be it further ordained and enacted . . . That no private person or persons whatsoever shall at any time hereafter Print or cause to be Printed any Book, or Pamphlet whatsoever, unless the same Book and Pamphlet . . . be first Entred in the Book of the Register of the Company of Stationers in *London*, . . . and unless the same Book and Pamphlet, . . . shall be first lawfully Licensed and Authorized to be Printed by such Person and Persons only as shall be constituted and appointed to License the same, according to the Direction and true meaning of this present Act herein after expressed, and by no other; . . . ."

60. *Cf.* Sec. I of the Statute of Anne and Sec. VI of the Licensing Act.

61. *Cf.* Sec. V of the Statute of Anne and Sec. XVII of the Licensing Act.

62. *Cf.* Sec. IV of the Statute of Anne and Sec. III of the Licensing Act.

63. Sec. V limited the importation of books to the Port of London only, under license granted by the Archbishop of Canterbury and Bishop of London, who were to examine all imported works before they were distributed. Sec. IX prohibited the importation of any works printed in English.

64. Sec. VII.

65. Section IX of the Statute of Anne. Read literally, section IX of the statute of Anne will not support this statement, because it contains no reference to printing patents, or privileges, another name for patents. However, when the section is compared with sections XVIII and XXII of the Licensing Act, it is clear that section IX can be interpreted only as preserving rights granted by printing patents.

end, there were two provisions in the later statute which had no counterpart in the earlier. Copyright of a work under the Statute of Anne was acquired by publication and entering the title in the register books of the Stationers' Company. Section III of the statute, however, specifically provided a means of acquiring copyright by advertising in the *Gazette,* should the clerk of the company refuse to register a title. And section XI of the copyright act gave the renewal term of copyright to the author. These two provisions, however, were only part of a larger antimonopoly pattern.

B. The Pattern of the Statute in Dealing with Monopoly.

The practical situation facing Parliament in the early 1700's was a book trade built up and still operated on the basis of a copyright which had enabled the stationers to develop an oppressive monopoly of three aspects. First, there was the monopoly of the Stationers' Company, which limited the grant of copyright to its members and recognized it as being perpetual; second, there was the monopoly of the wealthy booksellers who traded in old copyrights; and, finally, there was the printing patent, a problem of minor importance at this date.

The solution to this threefold monopoly was a remarkably sound one. The statute made copyright available to any person, not just the author, and limited the initial term of copyright to fourteen years,[66] with the renewal of a like term to the author;[67] it extended the old copyright, *i.e.,* existing stationer's copyrights, for a period of twenty-one years,[68] at the end of which the copy-

66. ". . . [T]he author of any book or books already composed, and not printed and published, or that shall hereafter be composed, and his assignee or assigns, shall have the sole liberty of printing and reprinting such book and books for the term of fourteen years, to commence from the day of the first publishing the same, and no longer; . . ." Sec. I.

67. "Provided always, That after the expiration of the said term of fourteen years, the sole right of printing or disposing of copies shall return to the authors thereof, if they are then living, for another term of fourteen years." Sec. XI.

68. ". . . [F]rom and after the tenth day of *April,* one thousand seven hundred and ten, the author of any book or books already printed, who hath not transferred to any other the copy or copies of such book or books, share or shares thereof, or the bookseller or booksellers, printer or printers, or other person or persons, who hath or have purchased or acquired the copy or copies of any book or books, in order to print or reprint the same, shall have the sole right and liberty of printing such book and books for the term of one and twenty years, to commence from the said tenth day of *April,* and no longer; . . ." Sec. I.

righted works would fall into the public domain; and it left the printing patents as they were.[69] As an added precaution, the statute contained an extensive section for controlling the prices of books.[70]

The nature of the copyright act as an antimonopoly statute has been overshadowed because it enabled the author for the first time to acquire copyright, and because it was deemed to have created a new form of property, statutory copyright. On the first point, except for section XI, the author was given no greater rights than any other copyright owner, and he had to secure copyright in the same way as anyone else. The only difference was that the author, of course, did not have to purchase the work to be copyrighted in the first instance. On the second point, copyright was not new, and the statute merely placed drastic limitations on an existing concept of copyright. The significant changes were that copyright was now available to anyone, not just stationers, and it was no longer perpetual, but limited to a term of years.

C. The Statutory Copyright and the Stationer's Copyright.

The most important question in regard to the Statute of Anne is whether the statutory copyright was intended to be comprehensive of all the author's interest in his work after publication. The evidence from the statute itself is not conclusive. The right secured was "the sole liberty of printing and reprinting . . . for a term of fourteen years, to commence from the day of first publishing the same, and no longer . . . ." It was granted to "the author . . . and his assignee or assigns," and at the expiration of the first term, the copyright was to return to "the authors, if they are then living, for another term of fourteen years." This last provision, however, was the only provision of the statute in which a right was conferred on the author alone. In all other instances, when a provision of the statute referred to the author, it also included the term "assignee or assigns or proprietor of copy." Thus, except for the renewal term, the Statute of Anne treated the author as simply another copyright owner. Did the statute intend that an author's interest in his works as author after publication be embodied entirely in copyright, which

69. See note 65 *supra*.
70. Sec. IV.

could be acquired by anyone who purchased the author's copy? An examination of the copyright that existed prior to the statute, the stationer's copyright, and the relationship of the author to that copyright indicates that the answer is almost surely no.

The stationer's copyright was essentially a guarantee that no one else would publish a work which the copyright owner was entitled to publish. It was granted by the Stationers' Company through the wardens, who would endorse the copy or manuscript.[71] A record of the copyright would then be entered by the clerk on the register books of the company. The company maintained close control over the disposition of copies, and whenever a dispute arose as to the ownership of copyright, it was settled by the governing body of the company, the Court of Assistants.[72] Subject to rules of the company, copyright could be assigned in whole or in part,[73] and the subject matter of copyright extended beyond literary compositions to include any printed matter, such as maps,[74] official forms and blanks,[75] and laws,[76]

71. *E.g.*, an entry in 1584 reads, "Abraham Cotton receaved of him for printing A ballet intituled *A Warnynge to Wytches* entred by commandment from master warden Newbery under his own handwryting on ye backside of ye wrytten copie." II ARBER 440.

72. *E.g.*, an order of the Court of Assistants dated January 17, 1598-99 involved a controversy about the ownership of a book, two entrances of which had been made. Ordinarily, the first entrance would prevail, but the order provided, "nowe vppon the examination & consideration thereof yt is ordered and agreed that the said mr Binge mr Ponsonby and mr man shall pte and ptelyke betwene [them] in Three equall ptes, hauve and enioye the said copye, nowe and at all tymes here after bearing ratablie charge for the same accordingly." GREG & BOSWELL, RECORDS OF THE COURT OF THE STATIONERS' COMPANY 1567-1602 at 67 (1930).

73. See, *e.g.*, entries at II EYRE & RIVINGTON, A TRANSCRIPT OF THE STATIONERS' REGISTERS 1640-1708 at 13, 308, 331.

74. See, *e.g.*, entry to Gyles Godhed at I ARBER 211, 212, which includes "The mappe of Englone and Skotlands;" I EYRE & RIVINGTON 50, entry to Thomas Warren, "The mapp of the citty of London in 7 sheets."

75. *E.g.*, the following entry: "Master Thos. Newcomb and Master Jno. Bellinger. Entred for their copies . . . certain formes of blank bonds or Obligacons & Conditions with other Blankes suited to sevall occaions, engraven on copper plates, to be printed or drawn off with a rolling presse . . . ." II EYRE & RIVINGTON 317.

76. There is a particularly full entrance to Charles Harper for the copyright of the laws of the Island of Jamaica in 1684, which reads in part: "These are therefore to authorise and impower Mr Charles Harper bookseller to print the said *Book of Laws* made for the use of that Island of Jamaica (from whom wee have received sattisfaccon for the same) and alsoe to forbid all other psons whatsoever to print the same without his leave first obtained, witnesse our hands the day and yeare withint." III EYRE & RIVINGTON 244.

things of which the copyryight owner could not claim ownership. Upon the death of the copyright owner, the disposition of his copyrights was determined by the company.[77]

Perhaps the most convincing evidence of the limited nature of the copyright is the analogous printing right, and the printing patent. The printing right was to a printer what the copyright was to a publisher. It gave the printer the right to print works subject to his printer's right, just as the copyright gave the publisher the right to publish works subject to his copyright, and both existed in connection with the same work.[78] The printing patent, a contemporary form of copyyright, was granted by the sovereign, but clearly the patentee did not own the subject work, because the patent was limited in time, and it covered such works as bibles, school books, and prayer books.

The author's role in this scheme requires some analysis. In order to obtain the copyright, the stationer was required to obtain the permission of the author, and it is common to speak of this permission as a conveyance of the copyright. However, since copyright was granted only by the Stationers' Company, it is obvious that the author could not convey the copyright. Moreover, not even the company could grant a right to print a particular work, for this permission could be acquired only from the licensing authorities. The stationer who wanted copyright was consequently concerned with three parties: the licensing authorities, the company, and the author. The licensing authorities gave permission to print, and the company gave protection from piracy by prohibiting others from printing the work. The most the author could contribute to copyright, however, was a promise not to object to or interfere with the printing of his

77. For example, an order of the company dated December 17, 1565 provided that upon the death of the license, *i.e.,* owner of the copyright gained by entrance, or the expiration of a privilege, *i.e.,* a patent, no person was "to emprente or cause to be emprented the same Copy withoute especiall lycense obtayned of the Mr Wardens and assestaunts of the sayd Companye." The order is reprinted in Blagden, *The English Stock of the Stationers' Company,* THE LIBRARY 163, 177 (5th ser. 1955).

78. *E.g.,* On July 6, 1589, the Court of Assistants granted to Robert Harrison the right of printing Corderius' *Dialogues* "during the contynuance of the Ires patents graunted for the printinge thereof." One of the conditions expressed was that Harrison should always "prynte the same booke as the Copye of the said mr Harryson and mr Byshop." GREG & BOSWELL, RECORDS OF THE COURT OF THE STATIONERS' COMPANY 1576-1602 at 32 (1930). For other examples of the printer's right, see II ARBER 609, 650; III ARBER 289.

work. Thus, analytically, the conveyance of the author to the stationer was in the nature of a negative covenant. Milton's contract for the publishing of *Paradise Lost* sheds some light on this point.[79]

The contract recites that John Milton "hath given, granted, and assigned, and by these [presents] doth give, grant, and assigne, unto the said Sam[ll]. Symons, his executors and assignes, All that Booke, Copy or Manuscript of a Poem intituled Paradise lost, . . . now lately Licensed to be printed . . .." This language, similar to the language of a deed, implies complete ownership of the work, but it is characteristic of the conservatism of lawyers. The essence of the contract is the covenant on the part of Milton. "And the said John Milton . . . doth covenant with the said Sam[ll]. Symons, . . . that hee . . . shall at all tymes hereafter have, hold, and enjoy the same, and all Impressions thereof accordingly, without lett or hinderance of him, the said John Milton, . . . And that the said Jo. Milton, . . . shall not print or cause to be printed, or sell, dispose, or publish, the said Booke or Manuscript, or any other Booke or Manuscript of the same tenor or subject, without the consent of the said Sam[ll]. Symons. . . ."[80]

The stationer's copyright can thus be defined as the right of a stationer to prevent someone from publishing a work which

79. The contract is transcribed in 6 MASSON, LIFE OF JOHN MILTON 509 (1946).

80. *Cf.* the following note added to the entrance, October 24, 1586, of *A Treatise of Melancholy* by Doctor Bright: "Memorandum that master Doctour Bright hathe promised not to medle with augmenting or alteringe the said book vntill the impression which is printed by the said John Windet be sold." II ARBER 457. See also the discussion of the contracts under which Millar, the plaintiff in Millar v. Taylor, *supra* note 12, purchased the works in question, discussed in a report of Donaldson v. Beckett, *supra* note 9. When Thomson sold the works to Millar in 1729, the language of the contract indicates that he assigned only the right to publish them as he had written them. He "did assign to Millar, his executors, administrators and assigns, the true copies of the said tragedy and poem, and the sole and exclusive right and property of printing the said copies for his and their sole use and benefit, and also all benefit of all additions, corrections, and amendments which should be afterwards made in the said copies." Thomson also conveyed certain works to another bookseller, Millan, in 1729, who conveyed the works to Millar in 1738. This conveyance included "all the right, title, interest, property, claim, and demand of the said John Millan to or in the said copies." By virtue of these agreements, "Andrew Millar became lawfully entitled to all the profits arising by the printing and publishing of the several poems . . . and to all the sole and exclusive property and right of printing copies of them, and of vending and disposing of the same." 2 Brown 129, 1 Eng. Rep. 837, 838.

he as copyryight owner was entitled to publish by reason of permission from the author, approval of the licensing authorities, and permission of the Stationers' Company. It was this copyright which was the model for the statutory copyright, and the continuation of the old copyrights for twenty-one years by the statute clearly indicates that the only change in the concept as such was to limit its period of duration. It follows, then, that the statutory copyright was not intended to be any more comprehensive of an author's interest in his works than the stationer's copyright.

The essential point here is that copyright was only a right to which a given work was subject, *i.e.,* a right to the exclusive publication of a work, and the ultimate source of this right was the author. The purpose of the conveyance from the author to the stationer was not to sell the work to the stationer, but only to enable him to acquire the copyright. Unfortunately, however, the conveyance of the author was never analyzed in terms of its purpose. It was automatically assumed that when the author conveyed his copyright to the stationer, he divested himself of all interest therein. Since the right to a stationer's copyright depended, among other things, upon the conveyance from the author to the stationer, it was only natural to assume that copyright entailed the complete ownership of a work. If, however, the conveyance is analyzed in terms of copyright as it functioned, the conveyance of the author can best be construed as a negative covenant not to interfere with the publishing of the work. Since copyright was, functionally, only a right to which a given work was subject, it follows that all other rights naturally remained in the author.

The point became important only after the Statute of Anne, when the monopolists attempted to establish an author's common law copyright in perpetuity as a means of circumventing the restrictive provisions of the statute. It was then that copyright came to be treated as an author's right, and because it was treated as an author's right, it was the author's rights which had to be limited to prevent monopoly. Had the courts recognized that copyright was only a right to which a given work was subject, and construed the conveyance of the author accordingly, it would not have been necessary to foreclose the

development of a law recognizing the author's interest in his works apart from copyright.

The distinction here made between copyright as only a right to which a work is subject and copyright as ownership of the work itself is more than one of semantics. It has relevance to the entire area of intellectual property, because it involves the problem of whether intellectual property as a legal concept shall consist of one interest, the commercial interest, or two, the creative interest and the commercial interest. It was the failure of the English courts to make this distinction that ultimately determined the course of American copyright law.

IV. Copyright Becomes an Author's Right

Until the Statute of Anne, the author's role in copyright was minimal. Copyright had been developed by publishers for their own benefit, and in fact, the Statute of Anne did not change the practices in the book trade.[81] That the author could now acquire copyright did not alter his relations with the booksellers, because the bookseller could still acquire the copyright and as a part of his agreement with an author, the bookseller would simply require that the copyright be vested in himself.[82] More important to the booksellers, however, the statute continued the old copyrights for twenty-one years. Thus, the monopoly continued unabated.

When, under the terms of the statute, the old copyrights expired, the famous battle of the booksellers for perpetual copyright began. At first, the booksellers returned to Parliament

81. "[T]here grew up a tacit understanding among the booksellers of the eighteenth century that there should be no interference with each other's lapsed rights." Gray, *Alexander Donaldson and His Fight for Cheap Books*, 38 Juridical Rev. 180, 193 (1926).

82. "'In general, where authors keep their own copyright they do not succeed, and many books have been consigned to oblivion through the inattention and mismanagement of publishers, as most of them are envious of the success of such works as they do not turn to their own account. . . .' That some works having a poor sale while the author had the copyright, had a rapid one when it was sold, was asserted by Lackington to be indisputable; they were purposely kept back, he said, that the booksellers might obtain the copyright for a trifle from the disappointed author." Collins, Authorship in the Days of Johnson 43 (1938), quoting from Lackington, Memoirs 229.

seeking new legislation,[83] and when these efforts failed, they turned to the courts, where they almost succeeded.[84] Their prime weapon in the battle was, ironically, the author. In addition to the statutory copyright, they argued, the author had a common law copyright, a right which existed in perpetuity and which he could assign to booksellers.

The rights of authors were litigated for the first time during this period of controversy over the meaning of the statute, well over a century after the origin of copyright. There were two lines of cases, those directly involving authors,[85] and those involving booksellers.[86] In both groups of cases, the courts were sympathetically disposed to the rights of authors, and it is in the former line of cases that the so-called common law copyright of the

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83. Petitions for new legislation were submitted in 1734, XXII H.C. JOUR. 400, in 1736, XXII H.C. JOUR. 741, and 1738, XXIII H.C. JOUR. 158. A Bill against the importation of books, with the secondary purpose of abolishing the price control provision of the Statute of Anne was passed in 1739. 12 Geo. II, c. 36. The booksellers, however, had failed in their principal goal, which was to secure legislation to renew the expired copyrights.

84. "The truth is, the idea of a common-law right in perpetuity was not taken up till after that failure (of the booksellers) in procuring a new statute for an enlargement of the term. If (say the parties concerned) the legislature will not do it for us, we will do it without their assistance; and then we begin to hear of this new doctrine, the common law right. . . ." Lord Chief Justice De Grey in Donaldson v. Beckett, 17 COBBETT'S PARL. HIST. 953, 992 (1813).

85. Webb v. Rose, 1 Black W. 331, 96 Eng. Rep. 184 (1732); Forrester v. Waller, 4 Burr. 2331, 98 Eng. Rep. 216 (1741); Duke of Queensberry v. Shebbeare, 2 Eden. 329, 28 Eng. Rep. 924 (1758); Macklin v. Richardson, Amb. 694, 27 Eng. Rep. 451 (1770).

86. Most of the cases involving booksellers were actions in chancery for injunctions, and though often cited and discussed are not reported, and are not very instructive individually. See Tonson v. Collins, 1 Black. W. 301, 96 Eng. Rep. 169 (1761), and Millar v. Taylor, *supra* note 12, for a discussion of the cases. Lord Chief Justice De Grey in Donaldson v. Beckett, 17 COBBETT'S PARL. HIST. 953, at 958 said: "The causes which have come before the court of Chancery since the statute, I find to be 17 in number. Of these eight were founded on the statute right: in two or three, the question was, whether the book was a fair abridgment; and all the rest were injunctions granted *ex parte*, upon filing the bill, with an affidavit annexed. In these cases the defendant is not so much as heard; and can I imagine that so many illustrious men, who presided in the court of Chancery, would, with a single argument, have determined so great and copious a question and which has taken up so much of your Lordship's time? In fact, none of them wished to have it said he had formed any opinion on the subject." The booksellers finally resorted to the extreme of a collusive action at law in Tonson v. Collins, argued twice before the King's Bench and appealed to the Exchequer Chamber before being dismissed for collusion. 1 Black. W. 301, 321, 96 Eng. Rep. 169, 180 (1761), Millar v. Taylor was the first action at law brought to a successful conclusion by the booksellers.

author prior to publication was first recognized.[87] The two most important cases, however, involved booksellers only. They are *Millar v. Taylor*[88] and *Donaldson v. Beckett*,[89] already mentioned, the two landmark cases in copyright law which determined the concept of copyright as it exists today.

In the *Millar* case the booksellers finally succeeded in getting the court to recognize the author's perpetual common law copyright after publication. The ruling was overturned by the *Donaldson* case five years later, but it is the *Millar* case in which copyright became firmly fixed as a concept comprehensive of the entire ownership of a work. The case was an action brought in the King's Bench in 1767 by a bookseller, Andrew Millar, against Robert Taylor for printing *The Seasons* by James Thomson, which the jury found Millar had purchased from the author in 1729.[90] The works had been entered in the Stationers' Register, but the period of protection under the Statute of Anne had expired. The issues in the case were stated by Mr. Justice Willes:[91]

> If the copy of the book belonged to the author, there is no doubt but that he might transfer it to the plaintiff. And if the plaintiff, by the transfer, is become the proprietor of the copy, there is as little doubt that the defendant has done him an injury, and violated his right: for which, this action is the proper remedy.
>
> But the term of years secured by 8 Ann. c. 19 is expired. Therefore the author's title to the copy depends upon two questions —
>
> 1st. Whether the copy of a book, or literary composition, belongs to the author, by the common law;
>
> 2nd. Whether the common-law right of authors to the copies of their own works is taken away by 8 Ann. c. 19.

The majority of the judges answered the questions yes and no respectively.

The opinions of Mr. Justice Aston and Lord Mansfield in the *Millar* case indicate that to them copyright contained two basic

87. Duke of Queensberry v. Shebbeare, 2 Eden. 329, 28 Eng. Rep. 924 (1758).
88. Note 12 *supra.*
89. Note 9 *supra.*
90. 4 Burr. at 2306, 98 Eng. Rep. at 203. In fact, it appears that Millar purchased a part of the poem from Thomson in 1729, and a part from John Millan, another bookseller, in 1738. See Donaldson v. Beckett, 2 Brown 129, 130, 1 Eng. Rep. 837, 838; note 80 *supra.*
91. 4 Burr. at 2312, 98 Eng. Rep. at 206.

rights of the author, a right to the rewards of his labor, the commercial right, and a right to protect his fame, the creative right. Mr. Justice Aston said, ". . . [A] man may have property in his body, life, fame, labours, and the like; and, in short, in any thing that can be called his."[92] Lord Mansfield, in speaking of the author's common law copyright before publication, said the right is not found in custom or precedent, but is drawn "From this argument — because it is just, that an author should reap the pecuniary profits of his own ingenuity and labours. It is just, that another should not use his name, without his consent."[93] He then gave his statement of the creative right of the author quoted above in the introduction, the essence of which is that an author has a right to protect the integrity of these works.

Except for the monopoly of the booksellers, Lord Mansfield's statement might very well have become the basis of a law recognizing author's rights apart from copyright. Unfortunately, however, the plaintiff in the case was not an author, but a bookseller, relying on rights derived from the author. It was at this point that the failure to appreciate the nature of copyright as a limited right of the publisher was most damaging to the development of author's rights. The arguments in the interest of the author as given by Lord Mansfield were wholly compatible with the existence of a copyright in a publisher, if that copyright were simply one to which a work was subject, and if the purpose of copyright were simply to prevent piracy. Copyright would then be only a right the publisher could acquire with the permission of the author, but it would not be a concept comprehensive of the author's entire interest in his works. So long as the publisher held the copyright, he could prevent competitive publication. But while he held the copyright, and even after the expiration of the copyright, the author, on the basis of his natural ownership of the work, could prevent, as Lord Mansfield said, a "faulty, ignorant and incorrect edition" which would "disgrace his work and mislead the reader." This would not mean, of course, that after the expiration of copyright, the author could prevent his work from being in the public domain for purposes of publication, but it would mean that he would be in a position to continue to protect the integrity of his works.

92. 4 Burr. at 2338, 98 Eng. Rep. at 220.
93. 4 Burr. at 2398, 98 Eng. Rep. at 252.

The weakness in Lord Mansfield's argument was that once the author conveyed the copyright or the right to acquire copyright as he envisioned it, he conveyed everything, and thus relinquished all control over his works to the publisher. More important, however, the meaning given to copyright in *Millar v. Taylor* meant that if the author had a perpetual common law copyright after publication, one which he could assign to the publisher, the Statute of Anne would have no effect at all on the monopoly of booksellers. The result would be the stationer's copyright enlarged and enhanced under the guise of an author's copyright. It was, undoubtedly, this reason that led the House of Lords in *Donaldson v. Beckett* in 1774 to overturn *Millar v. Taylor,* which had not been appealed, and to hold that the only protection an author had for his works after publication was the statutory copyright. After the *Millar* case, it seemed the only way to make the Statute of Anne effective as an antimonopoly statute.

The facts in the *Donaldson* case were in point with those in the *Millar* case,[94] and the actual holding of the *Donaldson* case is that the author's common law right to the sole printing, publishing, and vending of his works, a right which he could assign in perpetuity, is taken away and supplanted by the Statute of Anne. These were the rights constituting copyright, but primarily because of the efforts of the booksellers and the *Millar* case, copyright had come to be thought of as embracing all of the author's rights in his works. It was this idea of copyright as an author's right that caused the misconstruction of the statute. Except for the concept of copyright as delineated in the *Millar* case, the *Donaldson* case properly interpreted is not inconsistent with the recognition of the author's rights apart from copyright. Unfortunately, however, it was assumed that copyright was coextensive

94. Millar had died in June, 1768, while his case against Taylor was pending, and the executors of his estate sold his copies at auction on June 13, 1769. Thomas Beckett and fourteen partners purchased in shares the copyrights of several poems by James Thomson from Millar's estate for 505 pounds. Alexander Donaldson, a Scottish bookseller, had been excluded from the sale of Millar's copyrights, and claimed the right to publish the works involved free of charge. In November, 1772, Beckett and his partners received, on the authority of Millar v. Taylor, a perpetual injunction to restrain Donaldson, who was alleged to have sold several thousand copies of *The Seasons* printed in Edinburgh. Donaldson appealed to the House of Lords. The appeal was brought "In order to obtain a final determination of this great question of literary property." See Donaldson v. Beckett, 2 Bro. 129, 130-32, 1 Eng. Rep. 837, 838-39.

with the author's rights, and not something independent of and separate from the author's ownership of his works.

The idea of copyright as an author's right was readily accepted in this country. The twelve state statutes, enacted during the period of the Articles of Confederation, were all apparently based on the Statute of Anne, and the preambles of eight of them clearly indicate that copyright was based on the author's natural right. Copyright was "perfectly agreeable to the principles of natural equity and justice,"[95] and "such security is one of the natural rights of all men, there being no property more peculiarly a man's own than that which is produced by the labour of his mind,"[96] and "nothing is more strictly a man's own than the fruit of his study,"[97] to quote from three of the preambles.

The state statutes were, of course, superseded by the first federal act in 1790,[98] which was also closely patterned on the Statute of Anne. When the question of the interpretation of the first federal act was brought to the Supreme Court in *Wheaton v. Peters*[99] in 1834, the Court was faced with the same question that was present in the *Millar* and *Donaldson* cases. Did the author have a perpetual common law copyright independent of the copyright statute? The Court, relying on the *Donaldson* case, said no, and held that the terms of the statute had to be strictly complied with in order to secure a copyright. The arguments of Mr. Justice Baldwin and Mr. Justice Thompson in the dissenting opinions, urging recognition of such a right, closely paralleled the argument in the *Millar* case, but they were not sufficient to overcome the fear of monopoly. Said Mr. Justice McLean, for the majority, an author has a property right in his manuscript before publication, "but this is a very different right from that which asserts a perpetual and exclusive property in the future publication of the work, after the author shall have published it to the world. . . . A book is valuable on account of the matter it contains, the ideas it communicates, the instruction or entertainment it affords. Does the author hold a perpetual property in these?"[100]

95. Connecticut, COPYRIGHT LAWS 1.
96. Massachusetts, COPYRIGHT LAWS 4.
97. North Carolina, COPYRIGHT LAWS 15.
98. 1 Stat. 124.
99. 8 Pet. (U.S.) 591 (1834).
100. *Id.* at 656-57.

The importance of the changing of copyright from a publisher's right to an author's right can be summed up by a play on words and a rhetorical question. As a publisher's right copyright was only a right to copy a work. Had the courts understood copyright as only a right to copy, would they have been willing to recognize a common law right in the author to prevent a distorted copy which would, as Lord Mansfield had said, "disgrace his work and mislead the reader"?

V. The Copyright Bill and the Author's Creative Interest.

The frequent resort to the legislative branch for new copyright laws indicates that the theory of statutory copyright in this country is that copyright is a right designed to protect the legal rights of an author. Thus, copyright determines what rights an author has in his works, and what rights he has are determined by copyright. It is coextensive with an author's legal rights, and since historically copyright was developed by and for publishers, it is not surprising that these rights are only economic in nature.

The first lesson to be learned from the early English history of the subject is that copyright as developed by the Stationers and as modified by the Statute of Anne was not intended to comprehend all of an author's interest in his work. The relevance of the lesson is made apparent by the fact that the copyright provided for in the copyright bill is the same in concept as the copyright provided for by the Statute of Anne.

A second lesson to be learned from history is that the absence of a satisfactory theory of copyright may well be a result of the misconstruction of the Statute of Anne. The point can be explained briefly. There never seems to have been any question in the history of copyright that the author owns the works he creates. But when there arose the question of defining what this ownership meant after publication, the author's ownership was treated in terms of a concept created by and for publishers, copyright. Thus, what was a right to which a given work was subject and which was designed only to prevent piracy, became comprehensive of an author's interest in his creations.

The point here is that a partial concept, so to speak, was turned

into a whole concept and it was done not in the interest of the author but from the fear of monopoly. The result was that, on the one hand, copyright was deemed to give an absolute monopoly for a limited time, and, on the other, that an author who published his work without copyright was deemed to have made a gift of his work to the world. The irony is that it was the publisher, not the author, who usually held the copyright and thus posed the threat of monopoly, and the irony is pointed up by the fact that in none of the three bedrock cases of Anglo-American copyright law, the *Millar, Donaldson,* and *Wheaton* cases, did the author participate.

The position here is that, historically, copyright up until the interpretation of the Statute of Anne was, and today functionally still is, only a right to which a given work is subject. Once this point is recognized, it is easy to see that there remains in the author who has conveyed his right to copyright an interest in his works which provides the basis for a recognition of the author's creative interest. The copyright bill should contain a provision specifically giving legal sanctions to this creative interest.

This question has been given consideration by a committee of Congress, but such a provision was not included, apparently because it was felt that there was no need for it. In a study on this subject, published by the Senate Committee on the Judiciary, the conclusion is that, "Without using the label 'moral right,' or designation of the components of moral right, the courts in the United States arrive at much the same results as do European courts. Substantially, the same personal rights are upheld, although often under different principles."[101]

Apart from doubts as to the soundness of the above conclusion, with which others have disagreed,[102] there are two points here. First, the proposed bill provides that after January 1, 1967, "all rights in the nature of copyright in works . . . are governed exclusively by this title. Thereafter, no person is entitled to copyright, literary property rights, or any equivalent legal or equitable right in any such work under the common law or statutes of any State."[103] The bill further provides that nothing in the title

101. STAFF OF SENATE COMM. ON THE JUDICIARY, 86TH CONG., 1ST SESS., THE MORAL RIGHT OF THE AUTHOR 141 (Comm. Print 1960).

102. Katz, *supra* note 11; Roeder, *supra* note 11.

103. H. R. 4347, 89th Cong., 1st Sess. §301(a) (1965).

annuls or limits rights or remedies under the law of any state with respect to "activities violating rights that are not equivalent to any of the exclusive rights within the general scope of copyright . . . including breaches of contract, breaches of trust, invasion of privacy, defamation, and deceptive trade practices such as passing off and false representation."[104]

This last provision was included apparently because the areas of law named contain the "different principles" under which what is termed the author's moral right can be protected. Aside from the fact (1) that only two of these areas of law, invasion of privacy and defamation, are not primarily economic in nature, and (2) that all of them are predicated on principles other than those of literary property, this means that the protection of the author's creative interest is left to the vagaries of the law of fifty states. If the author's interest as such should be protected, the need for a single federal law for this purpose is commensurate with the need for a single federal law of copyright. More significantly, however, the line of demarcation between what is a matter of federal law and what is a matter of state law in this area will pose extremely difficult problems. A sound theoretical basis is essential for resolving these problems, which leads directly to the second point.

The recognition of an author's creative interest in the copyright bill would provide the basis for a sound theory of both the law of literary property generally and the law of copyright in particular. Much of the difficulty surrounding the concept of copyright arises from the fact that while it protects economic rights, the concept of property involves rights other than economic rights. Copyright is unique because it is a special form of intangible property and should be limited to economic rights. But it is a derivative right, being derived from the larger property interest an author has in his works. As it exists today, the derived right destroys the larger property interest, but if the larger interest is recognized, the result is that literary property has two component parts—a commercial right and a creative right. Since one is primarily economic in nature and the other is primarily personal in nature, they provide both a basis for delineating problems of literary property, and a framework for resolving the problems in terms of purpose without resort to technicalities.

104. *Id.* §301(b)(3).

The lack of a satisfactory theory of copyright, resulting in the fear of copyright as a monopolistic weapon, has led to the treatment of copyright as a technical concept. The rigidity in the law created by this technical approach, *i.e.*, either absolute control granted by copyright or no control at all, has been alleviated by the development of the common law doctrine of fair use, and the copyright bill goes further to provide some flexibility in this area. While the bill designates the exclusive rights contained within copyright, it specifically recognizes the doctrine of fair use,[105] and provides other limitations on the exclusive rights granted. Among these limitations are exemption from copyright control of certain specified activities such as face-to-face teaching, transmission to classrooms, performance in religious assemblies, and performance of non-dramatic literary or musical works for private or educational, religious or charitable purposes and not for private financial gain.[106] The presence of such limitations indicates that the basic idea of copyright as giving absolute control over a copyrighted work continues.

The belief here is that the need for such specificity in the copyright bill can be attributed ultimately to the misunderstanding of copyright as it first developed and to the misconstruction of the Statute of Anne. Had copyright been understood as only a right to which a given work is subject, and the creative interest of the author recognized, it would have meant that the rights comprising copyright would not have been coextensive with all the rights in a given work, and any danger of monopoly could have been easily controlled. The legal rights which would have comprised the interest in a literary work would have been divided between two persons, the author and the copyright owner. The copyright owner's basic right would have been a right to object only to the commercial exploitation of the work in such a way as to interfere with his profits; the author's basic right would have been a right to object to the use of a work in such a way as to interfere with the integrity of the work and his reputation. Between these two rights, a large area of proper use of a copyrighted work would have naturally existed. Examples of such uses are the activities listed above. Such an approach would have marked

105. *Id.* §107.
106. *Id.* §109.

the middle way between the extremes of saying that the author publishing without copyright made an absolute gift of his work to the world, and that the copyright owner of a work retained absolute control of the work.

A suggested theory of literary property based on copyright and the creative interest of the author can be summarized as follows. An author, as creator of his work, is the owner of that work and his rights therein initially are absolute. When he presents his work to the world for purposes of commercial exploitation, the work is protected by copyright, the purpose of which is to prevent rival commercial exploitation by another. Copyright, however, whether it be held by the author or another, is only a right to which a given work is subject, and a published copyrighted work shall be available for all proper uses by the public not amounting to interference with commercial exploitation of the work by the copyright owner. Publication of a work, however, does not deprive the author of that work of his interest therein as creator. He retains the right, as long as he lives, of protecting the integrity of the work and of protecting his reputation in connection therewith.

The precise nature of the rights which would compose the author's creative rights should be left to the courts to determine. The doctrine of moral right as it exists in Europe provides some guidelines. That doctrine includes the right to create a work, the right to publish a work, the right to withdraw a published work from sale, the right to prevent excessive criticism of a work, and the right to prevent any other violation of the author's personality.[107] But it may be that not all of these rights are appropriate for American law, *e. g.*, the right to prevent excessive criticism. Moreover, to attempt to specify the content of the creative rights of the author in advance would deprive the courts of the opportunity of developing a well-reasoned doctrine in the light of principles and basic purposes. Without specific statutory sanction, however, the courts are not likely to feel free to develop such a body of law.

The author's creative rights are not incompatible with copyright as it exists when copyright is understood as only one of a number of rights to which a given work may be subject. And a

107. See Strauss, *supra* note 11.

legal recognition of the author's creative interest is not only in the interest of the author, but of the public as well. "The public has a definite interest in the doctrine for it protects the integrity of its culture and, protecting the creator, it stimulates creation."[108] A provision for this purpose in the copyright bill would not call for any major revisions. More important, however, it would empower the courts to deal with problems in the field of literary property which have long existed without adequate solution. Thus, it would provide a basis for solving existing problems which have too long been ignored. A first draft of such a provision as here suggested is the following:

> A living author, as creator of a work, retains a right to protect the integrity of his work, and his reputation in connection therewith, regardless of who holds the copyright thereof. Such right of the author shall not extend to interfere with the proper and fair use, by persons in the normal course of non-commercial activities, of a work made generally available.

108. Roeder, *supra* note 11, at 577 (1940).

Section 315: Analysis And Proposal

E. STEPHEN DERBY*

Section 315 of the Federal Communications Act of 1934 sets forth the obligations of broadcast licensees with respect to the grant of broadcast time to candidates for public office. Mr. Derby explores the four significant policy questions raised by section 315: What is the proper definition of legally qualified candidate, To what uses of broadcast facilities should the section apply, What is the proper role for the concept of equal opportunities, and How may rights created under this section be effectively enforced? The author's conclusions are embodied in a draft of proposed amendments to section 315 and its interpretative regulations.

I. The General Objectives of Section 315

THE awesome capacity of the broadcasting media, particularly television, to reach into the homes of great masses of people gives that media an extraordinary power to influence public opinion, both positively and negatively. The opportunity to employ this power on his own behalf is particularly important to a political candidate, whose success depends upon his power to influence public opinion favorably. It is also important to the public that all political candidates fairly be granted access to broadcasting facilities to enable the public to make a comparative evaluation. A recent Roper survey indicates that radio and television are now the public's primary sources of news and information concerning candidates in national elections.[1] Consequently, it is ncessary that the media be operated with a view toward the public interest.

Since broadcasting frequencies are limited in number and programing is restricted by time limitations, to insure its operation in the public interest Congress has seen fit to regulate the media comprehensively through the Federal Communications Act of 1934.

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1. Broadcasting, March 15, 1965, p. 140.

The specific concern of this paper is the manner in which Congress has sought to control the use of broadcasting facilities by political candidates in section 315 of the principal Act.[2] Is control desirable? How has Congress articulated the purposes of this section? Are the various congressional statements of purpose consistent? If not, how might the congressional purpose be better framed? Have the requirements of section 315 proven adequate to overcome the problem with which Congress was confronted? If not, how might the requirements be altered to better effect the basic objectives of the section?

The initial effort of Congress to regulate political broadcasts is found in section 18 of the Radio Act of 1927. It set forth the general standard which remains the basic rule of section 315:[3]

> If any licensee shall permit any person who is a legally qualified candidate for any public office to use a broadcasting station, he shall afford equal opportunities to all other such candidates for that office in the use of such broadcasting station. . . .

Provision was also made for the administering commission, origi-

2. Section 315 presently reads as follows: Sec. 315. (a) If any licensee shall permit any person who is a legally qualified candidate for any public office to use a broadcasting station, he shall afford equal opportunities to all other such candidates for that office in the use of such broadcasting station: *Provided,* That such licensee shall have no power of censorship over the material broadcast under the provisions of this section. No obligation is hereby imposed upon any licensee to allow the use of its station by any such candidate. Appearance by a legally qualified candidate on any—

(1) bona fide newscast,

(2) bona fide news interview,

(3) bona fide news documentary (if the appearance of the candidate is incidental to the presentation of the subject or subjects covered by the news documentary), or

(4) on-the-spot coverage of bona fide events, including but not limited to political conventions and activities incidental thereto), shall not be deemed to be use of a broadcasting station within the meaning of this subsection. Nothing in the foregoing sentence shall be construed as relieving broadcasters, in connection with the presentation of newscasts, news interviews, news documentaries, and on-the-spot coverage of news events, from the obligation imposed upon them under this Act to operate in the public interest and to afford reasonable opportunity for the discussion of conflicting views on issues of public importance.

(b) The charges made for the use of any broadcasting station for any of the purposes set forth in this section shall not exceed the charges made for comparable use of such station for other purposes.

(c) The Commission shall prescribe appropriate rules and regulations to carry out the provisions of this section. 48 Stat. 1088 (1934), as amended 73 Stat. 557 (1959), 47 U.S.C. § 315 (Supp. V, 1964).

3. 44 Stat. 1170 (1927).

nally the ICC but later the FCC, to implement the general provision with appropriate rules and regulations.

In later years when broadcasters argued that the provision violated their constitutionally guaranteed freedom of speech and freedom of the press, it was pointed out that the air waves are physically limited and are in the public domain.[4] Consequently, Congress has a duty to regulate the manner in which they are used. The "equal opportunities" provision does not deny anyone the right to speak over the air waves. Rather, it protects and guarantees that right by requiring that if one candidate speaks, all others must be given an equal chance. If the station which grants broadcasting opportunities to one candidate need not grant them to his opponents, the opponents may be effectively denied their right of free speech unless there is another broadcaster serving the same area who is willing to disrupt his program schedule to provide time on similar terms. As the FCC pointed out in its *Robert Harold Scott* decision, "freedom of speech can be . . . effectively denied by denying access to the public means of making expression effective. . . ."[5] What broadcasters are seeking when they argue for freedom of speech, therefore, is not unlimited free use of broadcasting facilities, but the right to exercise their discretion to restrict free use by denying individual candidates access to station facilities.

Although the objectives behind the enactment of section 18, later section 315, appear to have been both to guarantee all political candidates equal treatment by broadcasters and to provide the public with maximum access to the views of all candidates, Congress originally failed to foresee, and has since failed to resolve, many important practical difficulties involved in applying the section's general principles. Congressional failures in this respect have stemmed to a great degree from the inability of Congress to perceive clearly that the twin objectives mentioned above may be inconsistent when applied, and to resolve which of the objectives is the more fundamental when a conflict exists.

Senator Dill, the sponsor of the original provision, stressed the former objective — the need to protect candidates — when

4. See, *e.g.*, Petition for Reconsideration of the Lar Daly Decision, 18 R.R. 701, 738-40 (1959).

5. 3 R.R. 259, 262 (1946).

he explained section 18's operational objective in the following manner.[6]

> This provision simply says that if a radio station permits one candidate for a public office to address the listener it must allow all candidates for that public office to do so, and to that extent there must be no discrimination . . . .
>
> * * * *
>
> . . . [I]f it allows one candidate for governor to broadcast, then all the candidates for governor must have an equal right; but it is not required to allow any candidate to broadcast.

Congressional discussion of the provision further indicates an awareness that without some regulation, radio could be exploited by individual candidates to the detriment of others.[7]

Yet, in the same session of Congress Senator Howell stressed the latter objective — protection of the public interest — as the purpose behind section 18. Showing remarkable foresight, he pointed out that radio affords "a unique facility of publicity."[8] Distinguishing radio from the free press, he pointed out that while there were tens of thousands of publications and while anyone could start a newspaper, there was a limited amount of radio. Urging enactment of section 18, and even possible extension of its underlying requirement to all public questions, he stated:[9]

> . . . to perpetuate in the hands of a comparatively few interests the opportunity of reaching the public by radio and allowing them alone to determine what the public shall and shall not hear is a tremendously dangerous course for Congress to pursue.

Section 18 of the Radio Act of 1927 was incorporated verbatim in the Federal Communications Act of 1934 as section 315[10] and remained virtually unchanged for 32 years.[11] In this section Congress sought to control only appearances by political candidates themselves,[12] possibly on the theory that only an opponent

6. 67 CONG. REC. 12502 (1926).

7. See *id.* at 5483 (remarks of Representative Davis), 5555 (remarks of Representative Celler), 12356 (remarks of Senator Heflin).

8. *Id.* at 12503.

9. *Ibid.*

10. 48 Stat. 1088 (1934).

11. In 1952 section 315 was amended to prohibit broadcasters from charging political candidates rates higher than those charged other users. 66 Stat. 717 (1952).

12. See Felix v. Westinghouse Radio Stations, Inc., 186 F. 2d 1 (3d Cir. 1950), *cert. denied,* 341 U.S. 909 (1951).

could effectively reply to the speech of a political candidate. To prevent discrimination by broadcasters among the supporters of different candidates, Congress has been content to rely upon the administratively developed "fairness doctrine," formally enunciated by the FCC in 1949.[13] The doctrine requires generally that broadcasters treat issues of public importance without bias by presenting basic positions on all sides.

The rather narrow applicability and rigid requirements of section 315 apparently proved adequate to control abuses by radio and television broadcasters when the latter medium was in its infancy. As the potential of television has been realized, however, the concern of interested parties with striking the proper balance with respect to the interests of the public, the candidates, and the broadcasters has grown. The economic effect of section 315 on broadcasters and the political effect on the fortunes of candidates are far more significant now than in earlier years. This heightened concern led, in 1959, to the passage of amendments exempting appearances of candidates on certain news broadcasts from the section's purview.[14]

The purpose of Congress in enacting the 1959 amendments to section 315 was to overrule the FCC's *Lar Daly* decision.[15] In *Lar Daly* the Commission held that Lar Daly, candidate for both the Republican and Democratic nominations for Mayor of Chicago, was entitled to equal opportunities when his major opponents appeared in certain film clips included generally in regularly scheduled newscasts.

It is indicative of the shock and displeasure with which members of Congress viewed the *Lar Daly* decision that hearings began three days after it was released[16] and that a bill reversing the decision was passed in the same congressional session. The

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13. Editorializing by Broadcast Licensees, 13 F.C.C. 1246 (1949). See Applicability of the Fairness Doctrine in the Handling of Controversial Issues of Public Importance, 29 Fed. Reg. 10415 (FCC 1964).

14. 73 Stat. 557 (1959).

15. Columbia Broadcasting System, Inc. (WBBM-TV), 18 R.R. 238 (1959) (Lar Daly).

16. *Hearings on Political Broadcasting Before the Communications Subcommittee of the Senate Committee on Interstate and Foreign Commerce,* 86th Cong., 1st Sess. (1959). Four bills to amend section 315 were introduced in the Senate and eight in the House during this session of Congress — S. 1585, S. 1604, S. 1858, S. 1929, H.R. 5389, H.R. 5675, H.R. 6326, H.R. 7122, H.R. 7180, H.R. 7206, H.R. 7602, H.R. 7985, 86th Cong., 1st Sess. (1959).

remarks of Senator Pastore, chairman of the subcommittee which drafted the amendments, express this displeasure rather well.

> It was never considered that when a candidate does not initiate a program himself, he is making use of the facility, especially in a routine news case.[17]
>
> * * * *
>
> Now that we have taken "panel discussions" out of the bill, I submit to the Senate that generally insofar as news is concerned we are in no different position than we have been for the past 32 years up until last February when the Lar Daly case was decided.
>
> * * * *
>
> If it is desired to place a blackout on the people of this country, if we want to stop all important news of political campaigns getting to the American people, let the Lar Daly decision stand.[18]

In *Lar Daly* the FCC appears to have envisioned protection of the candidates as the primary objective of Congress in enacting section 315, and consequently, recognizing that any appearance by an opponent could be disadvantageous to a candidate, protected Lar Daly by granting him equal opportunities. Senator Pastore's remarks, however, indicate that Congress felt its primary purpose to be protection of the public's free access to the news.

Although the statements of Senator Pastore seem to portray accurately the subjective reaction of Congress, an objective appraisal must temper them somewhat. In 1956 CBS sponsored a bill, substantially similar to the amendments enacted in 1959, exempting news broadcasts from the requirements of section 315.[19] Had broadcasters felt that Senator Pastore's view of the then existing law was accurate, there would have been no need to introduce this bill.

Thus, from the history of section 315 its general objectives may be analyzed. On the one hand, Congress wished to withhold from broadcasters the power to prefer one candidate over another by employing discriminatory practices in allocating the use of station facilities.[20] Senator Dill expressed the opinion that if

17. 105 CONG. REC. 14442 (1959).

18. *Id.* at 14456.

19. H.R. 6810, 84th Cong., 1st Sess. (1955). See *Hearings on Communications Act Amendments Before a Subcommittee of the House Committee on Interstate and Foreign Commerce,* 84th Cong., 2d Sess. 29, 171 (1956).

20. See notes 6-9 *supra*; 105 CONG. REC. 14439 (1959) (remarks of Senator Pastore).

one candidate were denied the use of a station's facilities, all candidates should similarly be denied, rather than permit discriminatory treatment. Although he did not feel this result was desirable, he noted that with or without this section a broadcaster could refuse all candidates.[21] From its examination of section 315's legislative history in reconsidering the *Lar Daly* decision, the FCC concluded that[22]

> . . . Congress' primary and dominant purpose in enacting Section 18 was to equalize the advantages of radio and television broadcasting to candidates by requiring equal opportunities in the use of such facilities. . . .

Although the point has not been specifically made during congressional debate of section 315, by enacting and reenacting the section to cover "all" legally qualified candidates, Congress seems to have intended to protect even the most minor of minority candidates. Representatives of the broadcasting industry have not been loathe to inform Congress of the burden they feel section 315 imposes upon the industry because minority candidates come under its unbrella.[23] Broadcasters complain that rather than promote coverage of the candidates, section 315 retards it because to avoid the burden of providing the many minor candidates with equal opportunities, they are often forced to deny all candidates access to their facilities.[24]

On the other hand, as the 1959 amendments tend to show, Congress did not mean to discourage responsible news reporting. Conversely, it was to encourage such news coverage of political campaigns in the public interest that some discretion was given to broadcasters by the 1959 amendments in the form of an exemption from the equal opportunities requirement. The amendments provided, however, that the presentation of candidates during political campaigns must be in the exercise of a broadcaster's "bona fide" judgment as to newsworthiness and that the broadcaster was to remain subject to the fairness standard. The Conference Report on the 1959 amendments explains that[25]

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21. 67 CONG. REC. 12502 (1926).
22. 18 R.R. 701, 733-34 (1959).
23. See, *e.g., Hearings on Political Broadcasting, supra* note 16, at 125-26.
24. See *Hearings on Communications Act Amendments, supra* note 19, at 171-90.
25. H.R. REP. No. 1069, 86th Cong., 1st Sess. 4 (1959).

> . . . the expression "bona fide news events" instead of "news events" is used to emphasize the intention to limit the exemptions from the equal time requirement to cases where the appearance of a candidate is not designed to serve the political advantage of that candidate.

Referring to the "fairness doctrine," the report continues, "It is a restatement of the basic policy of the 'standard of fairness' which is imposed on broadcasters under the Communications Act of 1934."[26] Congress is thus coming to realize that neither of the overall objectives of section 315 should be permitted to supercede the other, and that care must be taken to achieve a delicate balance between them.

Four specific areas in which significant questions concerning the proper administration of section 315, in light of its legislatively declared purposes, have arisen will be considered in the following pages. First, what is the proper definition of legally qualified candidate? Second, to what uses of broadcast facilities does the section apply? Third, what is the proper role for the concept of equal opportunities? Last, how may the rights created under this section be effectively enforced? In considering each of the areas from which these questions spring, the existing law and its evolution, the problems arising under it, and possible avenues of approach to their solution will be explored.

II. Legally Qualified Candidate

Who is a legally qualified candidate for public office for section 315 purposes? The term is not defined by statute. The regulations, however, set forth four prerequisites.[27] First, the candidate must publicly announce his intention to seek office. Second, he must qualify under the applicable law to hold the office if elected. Third, he must be eligible to receive votes which, if sufficiently numerous, will result in his election. This requirement is satisfied if the candidate has qualified for a place on the ballot or if he may receive write-in or sticker votes. Fourth, the candidate must have either been nominated by a known political party or

26. *Id.* at 5.

27. 47 C.F.R. §§ 73.657 (a) (TV), 73.120 (a) (AM), 73.290 (a) (FM), 73.590 (a) (non-profit educational FM) (1965).

have made a substantial showing that he is a bona fide candidate for election or nomination.

To determine if these prerequisites for candidacy are met, reference must be made to the law of the state in which an election will be held.[28] When an appropriate state official has ruled as to a candidate's legal qualifications, this ruling will be conclusive unless there is a contrary judicial determination.[29] If there has been no ruling, the broadcaster may require a claimant seeking to invoke the requirements of section 315 to prove that both he and his opponent who has been permitted to use broadcasting facilities are legally qualified.[30]

The appearance of a candidate's name on the ballot raises a presumption of propriety, and direct proof of qualification is then unnecessary.[31] If a candidate's name does not appear on the ballot, he cannot be legally qualified since he is not eligible to receive votes, unless write-in or sticker votes are permitted under state law.[32] When write-in votes are permitted, before a candidate may qualify for equal opportunities he must submit substantial proof of his bona fide candidacy to the broadcaster prior to the election.[33] Afterwards, he is no longer a legally qualified candidate as a matter of definition. Since a candidate becomes legally qualified merely by publicly announcing his candidacy in states where write-in votes are permitted, the tendency among better known candidates and incumbents is to delay this announcement whenever possible, hoping thereby to obtain additional broadcasting coverage since broadcasters will then not be subject to the section 315 requirement to grant equal opportunities to all opponents.[34]

Section 315 applies separately to each primary or general election contest and each contest for nomination by party convention.[35] Consequently, a broadcaster may permit candidates

28. Mrs. Eleanor Clark French, 3 R.R.2d 811 (1964).
29. Use of Broadcast Facilities by Candidates for Public Office, 27 Fed. Reg. 10063, 10069, para. 41 (FCC 1962).
30. 47 C.F.R. §§ 73.657 (f), 73.120 (f), 73.290 (f), 73.590 (f) (1965).
31. Lamb v. Sutton, 164 F. Supp. 928 (D. Tenn. 1958).
32. Socialist Labor Party of America, 7 R.R. 766 (1951).
33. Lar Daly, 14 R.R. 713 (1956), *appeal dismissed as moot,* Daly v. U.S., Civil No. 11,946 (7th Cir. 1957), *cert. denied,* 355 U.S. 826 (1957).
34. 105 CONG. REC. 14444 (1959) (remarks of Senator Magnuson).
35. KWFT, Inc., 4 R.R. 885 (1948); Arnold Petersen, 11 R.R. 234 (1952); Carbondale Broadcasting Co. (WCDL), 11 R.R. 243 (1953).

in a party primary contest to use his facilities and deny equal opportunities to the winner of another party primary for the same office during the general election campaign because it is a different election. This result tends to perpetuate single parties in states where they presently exist. Since nomination by the dominant party virtually assures election, the dominant party primary election campaigns and candidates tend to receive greater broadcasting coverage than the general election campaigns which include the candidates of the other parties who, because they receive less coverage, find it difficult to improve their position. To the extent this pattern prevails, the congressional intent to have the public exposed to varying points of view is thwarted.

Rights under section 315 arise only when an opposing candidate is granted access to broadcasting facilities. The section is not applicable when the supporters of a candidate appear on radio or television.[36] This result is consistent with the section's legislative history. When he initially proposed the equal opportunities amendment to the Radio Act of 1927, Senator Dill acknowledged that it was intentionally restricted to candidates because to extend its scope to include "questions affecting the public" would make its applicability too broad and uncertain.[37] In 1934, amendments to section 18 of the Radio Act enlarging its scope to include both supporters of candidates and questions of public importance were eliminated in committee before the enactment of the Federal Communications Act.[38] Similar proposals were abandoned in 1952.[39]

An equal opportunity is granted by section 315 to a candidate as an individual and not as his party's nominee. Therefore, a candidate is still entitled to only a single measure of equal opportunity if he is nominated by more than one party.[40] Similarly, a candidate for nomination by more than one party is entitled only to a single opportunity to reply to single appearances by his opponents for each nomination.[41]

Once a candidate has shown himself to be bona fide, he has

36. *Cf.* Felix v. Westinghouse Radio Stations, Inc., *supra* note 12.
37. See 67 CONG. REC. 12358 (1926).
38. *Compare* S. REP. No. 781, 73rd Cong., 2d Sess. (1934) *with* H.R. REP. No. 1918, 73d Cong., 2d Sess. 26, 49 (1934) (conference report).
39. H.R. REP. No. 2426, 82d Cong., 2d Sess. 20-21 (1952).
40. Thomas W. Wilson, 11 R.R. 231 (1946).
41. Lar Daly, 18 R.R. 750 (1959).

an absolute right to equal opportunities whenever an opponent is granted use of broadcast facilities. A broadcaster may not deny equal opportunities because a candidate's election appears extremely unlikely.[42] In 1952, the FCC held William R. Schneider entitled to equal opportunities as a candidate for the Republican nomination for President, even though he entered only the New Hampshire and Oregon presidential primaries, received only 230 votes in New Hampshire, and was later unable to secure a ticket for admission to the Republican Convention.[43]

The fundamental deficiency of the definition evolved for a legally qualified candidate is that it encompasses too many candidates. Supporters of the broadcasting industry's viewpoint argue that when there are many legally qualified candidates for an office, broadcasters are reluctant to permit any of them to use their facilities because the burden of providing equal opportunities (equal time on equal terms) for all is heavy.[44] Broadcasters are particularly reluctant first, in primary elections where candidates are generally numerous, and second, when free public service time is involved. To the extent that broadcasters refrain from presenting candidates for these reasons the public is deprived of a valuable source of political information and Congress should attempt to alleviate the situation.

The difficulty of defining "candidate" for section 315 purposes presents itself in two different contexts, each of which raises slightly different problems. The first is in the context of presidential campaigns. Presidential candidates are subject to the various election laws of fifty different states, but they must be eligible to receive votes in only one state to be legally qualified. In presidential campaigns the major candidates require little protection since they are dealing with networks which are subject to national scrutiny. Minor candidates require protection if they are to be fairly heard, however, because, since their chances of success are extremely slight, they draw little sympathy from the public or from the networks upon whom they may impose an extreme financial burden, in absolute amounts, relative to their ability to capture public interest.

42. Julius F. Brauner, 7 R.R. 1189 (1952).

43. *Ibid.*; *Hearings on Communications Act Amendments, supra* note 19, at 175.

44. Erbst, *Equal Time For Candidates: Fairness or Frustration,* 34 So. CAL. L. REV. 190, 202 (1961); Salant, *Political Campaigns and the Broadcaster,* 8 PUB. POLICY 336, 340-41 (Friedrich and Harris ed. 1958).

The second context is that of state-wide and local campaigns. Here the election laws of only one state are involved. Since in these elections, particularly those for lesser offices, abuses by individual broadcasters would seem less likely to arouse the active interest of politically effective groups, and since various local station policies are involved, the danger of favoritism by stations is greater. Furthermore, at these levels the possibility of independent candidates or the nominees of newly formed political parties, particularly reform candidates, being elected is much greater. Therefore, the opportunity for these new entrants onto the political scene not only to speak, but also to speak for a time sufficient to develop the support necessary for election, should be protected.

The area in which the efforts of broadcasters are most inhibited is in the granting of free time to leading candidates in the public interest. In 1964 there were twelve Presidential candidates.[45] For every minute of free time granted a major candidate, ten minutes was required for candidates about whom few people had heard or cared. The economic loss to the networks, especially when prime time was involved, was prohibitive. That this burden is an inhibiting factor is demonstrated by comparing the amounts of free time the networks granted presidential candidates in 1956 and in 1960 when the presidential campaign was exempted from the requirements of section 315.[46] In 1956 CBS granted presidential and vice presidential candidates only slightly over one hour of free network television time, while in 1960 it provided approximately nine hours without charge.[47] The figures for NBC, measuring from the party conventions rather than September 1 as with CBS, were slightly under six in 1956 and almost fourteen hours in 1960.[48] These figures must be qualified somewhat by the fact that the 1960 exemption was an experiment and the networks, in all likelihood, were attempting to create a favorable impression.

When paid time is involved, the problem is far less severe

45. N.Y. Times, Nov. 1, 1964, p. 71, col. 3.
46. 74 Stat. 554 (1960).
47. *Hearings on Equal Time Before the Subcommittee on Communications of the Senate Committee on Commerce,* 88th Cong., 1st Sess. 241 (1963) (statement of Frank Stanton, President, CBS, Inc.).
48. *Id.* at 259 (letter from Howard Monderer).

because the burden upon broadcasters is primarily only the inconvenience of rearranging program schedules. Financially, they are free to charge political candidates normal rates. Furthermore, the cost factor means that fewer candidates will be able to take advantage of equal opportunities that are theirs.

Presidential election results provide little basis for justifying the right of all minority candidates to equal opportunities, in view of either the sacrifice required of broadcasters when they provide candidates with time, or the information denied the public when they do not. In 1964 the two major candidates polled 99.4 per cent of the total popular vote cast for President, and of the 374,000 votes cast for other candidates, 265,000 were for the unpledged slate of Democratic electors in Alabama.[49] Practically speaking, if the vote is going to be cast for the Democratic and Republican nominees in such overwhelming numbers, it seems unwise to continue a system which in practice deprives the electorate of a means of evaluating candidates simply to preserve the right of obscure minority candidates to present their views on an equal basis.

It would not be desirable, however, totally to exclude minority candidates from the scope of the protection offered by section 315. With their limited resources such exclusion may deny them all access to broadcasting facilities, even though their views are often beneficial. Although minority candidates may have little chance of victory, consideration of their views is a means of testing the platforms of major candidates. Minority party platforms have many times been the predecessors of policies later adopted by the major parties. Serious minority parties should be given some opportunity to present their case but broadcasters should not be burdened with those individuals seeking only personal publicity.

There is a popular tendency to feel that the equal opportunities provisions should apply only to the major presidential candidates;[50] yet these candidates least need protection. The status of minority parties is bothersome; Congress and the broadcasting industry have little immediate interest in preserving them since their appeal to the public is slight and the political savings which

49. N.Y. Times, Dec. 13, 1964, p. 85, col. 3.
50. See, *eg.*, 105 CONG. REC. 14447 (1959) (editorial of Howard K. Smith).

could be effected by eliminating them from the scope of section 315 is significant. Senate bill 3171, introduced in 1960 and the subject of extensive hearings,[51] is indicative of the fact that congressional concern is primarily for the major parties. In S. 3171, a requirement that a nominee's party have polled four per cent of the vote for President in the last election before he could claim free time under an amended version of section 315 was set. Not only would this in fact have presently eliminated all but the Republican and Democratic parties, but the language of some of the remaining sections indicates that they were drafted on the assumption that only two candidates would qualify.[52] The danger then is that if the requirement of equal opportunities for all legally qualified candidates, as presently defined, is not satisfactorily modified, Congress may, under pressure from broadcasters, enact legislation which may effectively deny most minority candidates access to broadcasting facilities.

Local elections raise the same problem of multiple candidates. An extreme example presented itself in 1952 when there were 72 candidates for Milwaukee County sheriff.[53] While the absolute sums involved may not be as great, the financial burden which may be imposed upon a local station by demands for free time may be relatively greater because of the station's more limited resources. Furthermore, because of the lower cost of time, more candidates may be able to take advantage of equal opportunities for paid time. Also, in local elections there is a tendency for businessmen to run for office merely for advertising purposes.

The likelihood of multiple candidates qualifying for section 315 protection is greatest when write-in candidates are permitted under state law. Whenever write-in votes are accepted, anyone may legally qualify as a candidate merely by making a public announcement of candidacy and offering some proof of bona fide intent. The proof required is often minimal since broadcasters are not permitted to make subjective determinations of the candidate's chances of success. This means that a

51. See *Hearings on the Presidential Campaign Broadcasting Act Before the Communications Subcommittee of the Senate Committee on Interstate and Foreign Commerce,* 86th Cong., 2d Sess. 2 (1960).

52. See, *e.g.,* S. 3171, 86th Cong., 2d Sess. § 2(e) (1960).

53. See *Hearirngs on Communications Act Amendments, supra* note 19, at 74, 189.

person may become a legally qualified candidate for president if he publicly announces his candidacy in but one state permitting electors to vote for write-in candidates.

What may be done to limit the number of candidates covered by section 315 while still protecting the right of serious minority candidates to equal opportunities? It has been suggested that the problem of multiple candidates may not be the fault of section 315, but rather of the local election laws which permit so many candidates to qualify.[54] This suggestion indicates that a solution might be to enact state legislation severely restricting write-in and sticker candidates. The approach has the advantages of covering both candidates for state and federal office and of leaving the control of election procedures with the states, where it has traditionally been.

A resolution of the problem in this manner, however, is decidedly impractical. The possibility of securing the passage of adequate legislation in all states seems remote and would be extremely time-consuming. Furthermore, most states now permit voting for write-in candidates, and the majority rule is that the right to cast write-in votes is constitutionally guaranteed under the various clauses in state constitutions guaranteeing the right of suffrage.[55] The argument is that the guaranteed right to vote includes the right to cast a vote for whomever the elector may choose which, in turn, requires that there be no material impairment of the opportunity to write in a name on the ballot. The passage of constitutional amendments to alter these constitutional provisions on a comprehensive basis is highly unlikely. In 1962 an amendment to the Georgia Constitution requiring write-in candidates to give notice in advance of an election was defeated in the general election.[56] Furthermore, the right of unrestricted suffrage is important in our democratic society, both as a means of registering a protest and as insurance that an election need not be defaulted if some calamity befell the duly nominated candidate of a party before the election. Merely permitting fringe candidates to receive votes is not itself contrary to the public interest.

54. Branscomb, *Should Political Broadcasting Be Fair or Equal? A Reappraisal of Section 315 of the Federal Communications Act*, 30 GEO. WASH. L. REV. 63,66 (1961).

55. Jackson v. Norris, 173 Md. 579, 195 Atl. 576 (1937).

56. Note, Ga. Code Ann. § 34-1926 (Supp. 1963).

It would seem more satisfactory to provide a federally enacted definition of legally qualified candidate for section 315 purposes. The rights of the states to regulate their own election procedures and to determine what candidates are eligible for voting purposes would not be affected by this approach, and the entire problem could be handled by a single enactment.

One proposal which, in various forms, has received support in Congress is that a legally qualified presidential candidate must be the nominee of a political party whose presidential candidate in the preceding election received at least four per cent of the total popular vote.[57]

There are many difficulties with this approach, however. First, there is no provision for the qualification of candidates of new parties.

Second, a candidate may not qualify for equal opportunities in an election campaign when he has significant support, but he may qualify in a campaign when his party's appeal has subsided and his support does not warrant such protection, *e.g.*, the Progressive (Bull Moose) Party candidates in 1912 and 1916.

Third, the determination of the legitimate successor to a party polling votes in a previous election may invite litigation.

Fourth, any overall-percentage-of-the-vote requirement, particularly in presidential campaigns, would tend to exclude sectional candidates who polled significant votes in one area but failed to compile a significant total vote. While excluding these candidates from broadcasting over nationwide facilities might be justified, it would seem that they should be given equal opportunities in areas in which they do have significant support.

Fifth, if the voting percentage approach is adopted, serious dispute is bound to arise concerning the appropriate percentage. Senator Pastore's committee recognized this factor when it did not recommend this type of proposal in 1959.[58] Four per cent does seem high since in the twentieth century only two minority presidential candidates have been that successful — Theodore

57. S. 1858, 86th Cong., 1st Sess. (1959); S. 3171, 86 Cong., 2d Sess. (1960) (proposal would require broadcasters to provide some free time for presidential candidates). *Cf.* S. 1287, 89th Cong., 1st Sess. (1965) (proposed bill limits requirement of equal opportunities where free time is involved to nominees for Federal offices and gubernatorial nominees whose parties received ten per cent of the total vote in the preceding election).

58. See 105 CONG. REC. 14445-46 (1959).

Roosevelt in 1912 and Robert LaFollette in 1924.[59] Neither Henry Wallace of the Progressive Party nor Strom Thurmond of the Dixiecrats polled that heavily in 1948, but they were the leaders of significant protest movements. Further, state election laws indicate a wide divergence of opinion. To qualify for a place on the ballot Ohio requires a petition signed by seven per cent of the electorate,[60] while Tennessee requires the signatures of only twenty-five qualified electors.[61]

Last, the percentage approach is not readily adaptable for the purpose of defining candidates for nomination by party primary convention, also a significant problem.

Another means of reducing the number of minority candidates, particularly those with little support, might be to require candidates to post a bond as evidence of their bona fide candidacy. This bond would be forfeited if the candidate later failed to poll a certain percentage of the total vote cast and used to reimburse broadcasters for any losses incurred in presenting that candidate. This approach is an extension and adaptation of the English system.[62] It is suitable for both general election and nominating campaigns.

It seems unwise, however, to impose another financial burden upon candidates seeking election. Not only are the existing risks sufficiently great to discourage qualified people from campaigning, but it seems contrary to our democratic heritage to impose this kind of artificial restriction upon the free opportunity to run for public office.

Perhaps the most profitable line of approach, because it is simple, clear, and may be brought within the existing statutory framework, would be to define legally qualified candidate as a candidate who has qualified to appear on the ballot in a state served by the broadcasting licensee. This approach would eliminate the problem of write-in or sticker candidates. Emergency candidates would be excluded unless a state had some provision for qualifying them, but these situations would be rare and they

59. PETERSEN, A STATISTICAL HISTORY OF THE AMERICAN PRESIDENTIAL ELECTIONS (1963).

60. Ohio Rev. Code Ann. § 3513.25.8 (Page 1960).

61. Tenn. Code Ann. § 2-1206 (Supp. 1964).

62. See *Report of the Committee on Broadcasting, 1960,* CMD. No. 1753, at 92-94 (1962); Representation of the People Act, 1949, 12 & 13 Geo. 6, c. 68, § 16(1), 2d sched., pt. II, rules 10(1), 54 (1), (4).

would still be covered by the broadcaster's obligation to treat all candidates fairly under the "fairness doctrine." Meeting the prerequisites for appearance on the ballot would require some serious effort of candidates and would thereby tend to limit their number. All states require a candidate to register a prescribed time before an election to appear on the ballot. Additionally, for the general election ballot all states require something else of the candidate, such as nomination by a recognized political party or a petition signed by a specified number of voters, or both.

Minority candidates would possess a fair opportunity to qualify for section 315 protection under this approach. It might not greatly reduce the number of legally qualified candidates in all instances because some states have extremely liberal requirements concerning qualification for the ballot,[63] but it would limit opportunists and reduce the risk of surprise candidates demanding equal opportunities. Broadcasters would be provided with certain knowledge, at least after the filing date, of the identity of all candidates for a particular office and be better able to plan their political broadcast schedule.

It should be noted that broadcasters now have some protection from surprise claims because requests for equal opportunities must be submitted within one week of the broadcast giving rise to the claim.[64] This requirement prevents candidates from accumulating time to which they are entitled and claiming it late in a campaign, and it means that late entries in a political race are not entitled to equal opportunities for all the time previously used by their opponents. If under the proposal there are still too many candidates legally qualifying for the ballot to permit adequate broadcasting coverage, state statutes regulating appearance on the ballot may be amended without raising constitutional problems.

This requirement that candidates qualify for the ballot does not significantly reduce the potential burden placed upon broadcasters by presidential campaigns. In 1964 twelve presidential candidates qualified for the ballot in at least one state.[65] Requiring presidential candidates to qualify for the ballot in at least

63. See note 61 *supra* and accompanying text.
64. 47 C.F.R. §§ 73.657(e), 73.120 (e), 73.290 (e), 73.590(e) (1965).
65. See text accompanying note 45 *supra*.

three states before they are covered by the mantle of section 315 might help this situation somewhat. It would require some effort and seriousness of candidates. To increase the requirement, however, might seriously impede the development of sectional parties.

Further incentive to increase political broadcasting might be given broadcasters by restricting the applicability of section 315 to a limited time period immediately preceding elections.[66] Such a proposal would have the merit of clearly defining the limits of a broadcaster's liability. Eight weeks prior to a general election would seem appropriate since the major party national conventions often are not held until the end of the summer preceding the election, *e.g.*, the Democratic convention of 1964. It would seem to provide ample time to counter the effects of any prior campaigning by an opponent. Similarly, four weeks would seem to be an adequate period preceding a primary election or nominating convention since interest usually develops later for these elections.

It may be argued that limiting the election period for purposes of section 315 would not necessarily limit the period of actual campaigning and therefore provide an opportunity for favoritism. This argument appears faulty. If campaigns are actually begun prior to this period, broadcasters will have the opportunity to give major candidates additional coverage, thus supplying the public with beneficial information. They will not, however, be free to exclude minority candidates because they will still be subject to the standard of fairness. The standard of fairness will be enforceable prior to the commencement of an election period since the treatment of candidates can be evaluated as of the beginning of the period. Thereafter the absolute requirements of section 315 will govern. There would, consequently, be sufficient time to judge the merits of any complaint and to order redress before an election.

It might be argued that the standard of fairness would provide sufficient protection in all cases and that, therefore, section 315 should be repealed. Although such an approach, being more flexible, would relieve many of the burdens upon broadcasters, it would not by itself sufficiently protect candidates. The fair-

66. See Broadcasting, Nov. 16, 1964, p. 86; Branscomb, *supra* note 54, at 80.

ness doctrine is inadequate to cope with unfair treatment of candidates because a determination of unfairness can only be made after a full evaluation of all the surrounding facts and circumstances, including the record of a broadcaster over the entire campaign. The delay necessary to make such a determination would render it impossible to grant an aggrieved candidate effective relief.

A remaining problem is raised by campaigns for nomination by party convention. To be nominated by a convention a candidate need not have announced his candidacy, have secured delegates in advance, or even expressed a willingness to accept a nomination if it were offered him. There is no requirement that candidates qualify for a ballot. A person ultimately nominated for President need not even have entered a state primary. Yet, in a real sense, such a non-declarant may be a worthy opponent of an avowed candidate. While there will be such situations where a non-declarant uses broadcasting facilities and later is nominated for office by convention, to determine in advance when a non-declarant who is not an incumbent is a legitimate candidate would be difficult. It would seem unwise to provide that a candidate may prove a non-declarant a *de facto* candidate whose appearance entitles him to equal opportunities because this would invite litigation, would administratively delay determinations in other cases, would subject broadcasters to great risks, and sap section 315 of some of its basic strength, certainty.

Before permitting a candidate to claim equal opportunities, however, it would seem fair to require him at least to announce publicly his candidacy. To prevent an incumbent from delaying the announcement of his candidacy to gain additional publicity without bringing section 315 into effect, it would seem wise to create a presumption that an incumbent is a legally qualified candidate during the election period. This is necessary for general and primary elections as well as for conventions because state filing deadlines are occasionally within the election period.

Sections 315 (a) (1) and (a) (2) of the proposed statute, Appendix, *infra,* incorporate the conclusions reached in the above discussion of the problems arising when a definition of legally qualified candidate is attempted.

III. Uses

What is a use of broadcasting facilities by a political candidate which requires that equal opportunity be given all opponents? Except for enumerated exemptions involving newscasts, "use," as its definition has been evolved by the FCC, is virtually synonymous with "appearance." Consequently, if a legally qualified candidate appears but does not discuss matters related to his candidacy,[67] or if he merely makes a brief introductory appearance on a variety show program,[68] or if an incumbent candidate for Congress merely delivers one of his regular weekly reports from Washington,[69] it is a use which entitles his opponents to equal opportunities. The rationale is that any appearance by a candidate over a broadcasting facility is uniquely valuable in that it serves to acquaint the voter with him. Therefore, his opponents must be granted equal access to the facilities. Since the candidate need not discuss either his candidacy or his political beliefs for his appearance to be a use, the purpose behind the broad definition seems to be primarily to protect the candidates and not to insure the public access to the views of all candidates.

It is possible for a broadcaster to avoid some of the obligations imposed by section 315 by not permitting any candidate for a particular office to appear over his facilities.[70] He may not, however, totally escape section 315 by arbitrarily denying all candidates for all offices access to his facilities because he would thereby fail to meet his affirmative obligation to present programs dealing with controversial issues of public importance.[71] Although the language appearing in 73 Stat. 557 (1959) and 47 U.S.C. § 315 (a) (Supp. V, 1964)—"No obligation is imposed upon any licensee to allow the use of its station by any such candidate"—might be read to mean that a broadcaster could refuse to permit any political broadcasting by candidates, this interpretation would not be logically sound in view of the purpose of the section to encourage the dissemination of complete

67. See Earle C. Anthony, Inc. (KFI), 11 R.R. 242 (1952); WMCA, Inc., 7 R.R. 1132 (1952).

68 Use of Broadcasting Facilities, *supra* note 29, at para. 6.

69. Radio Station KNGS, 7 R.R. 1130 (1952).

70. Robert M. McIntosh, 20 R.R. 55 (1960); John P. Crommelin, 19 R.R. 1392 (1960).

71. Obligation of Licensee to Carry Political Broadcasts, 25 R.R. 1731 (FCC 1963).

political information. The phrase "any such candidate" is preferably read to mean all candidates for a particular office rather than all candidates for all offices, thus permitting a broadcaster to exclude candidates in individual but not all races. This interpretation makes even more sense literally if the word "hereby" is reinserted in the provision so that it reads "No obligation is hereby imposed . . . . " The word "hereby" was lost somewhere between the 1952 amendments[72] and the 1958 edition of the United States Code[73] without an amendment in the interim. The word was apparently dropped as an editorial change because it was thought to be redundant,[74] but it seems to add significant meaning to the provision. The pronounced inference to be drawn from the presence of the word "hereby" is that although section 315 itself imposes no obligation upon a broadcaster to present any programs featuring political candidates, the broadcaster is not relieved of other obligations. One of these other obligations is the affirmative responsibility to provide a reasonable amount of time for the presentation of programs devoted to controversial issues of public importance.

Since the law was evolving in the direction of making every appearance by a legally qualified candidate over broadcasting facilities a section 315 use, the *Lar Daly* decision is not entirely surprising. The FCC had come to view the requirements of section 315 as unequivocal and without exception in guaranteeing an opponent equal opportunities for an appearance of a legally qualified candidate on the broadcasting medium. Otherwise, the increasingly obvious fact that any broadcast exposure of a candidate in any capacity, especially on television, inured to the candidate's benefit would subvert what the FCC saw as the congressional purpose behind section 315, namely, that broadcasting facilities, limited in number by Congress, should not be used to benefit one candidate to the disadvantage of others. Without inflexible and certain standards the FCC believed the protection prescribed by section 315 would prove ineffective. The flood of complaints foreseen by the FCC, the difficulties of evaluation, and the impossibility of timely enforcement would

72. 66 Stat. 717 (1952).
73. 47 U.S.C. § 315(a) (1958).
74. Obligation of Licensee to Carry Political Broadcasts, *supra* note 71, at 1732 n.1.

render the provisions of little value in practice. Exceptions would be particularly harmful to minority candidates not deemed newsworthy by broadcasters. In its reconsideration of *Lar Daly* the FCC quoted with approval the statement submitted by ABC in opposition to the CBS-sponsored H.R. 6810 (1956) which exempted certain information-type programs from the scope of section 315.[75]

> With the ever increasing role which television plays, it cannot be denied that any exposure of a candidate on television is advantageous to him. . . . The candidate of a minority party needs the protection of a law which guarantees to him that his opposing candidate cannot be given this valuable exposure at no cost to him without the broadcaster according the minority candidate similar opportunity.
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> * * * *
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> While the political scene is as presently constituted with two major parties, it may seem of less importance that candidates of parties who represent fractional interests in our country be accorded the same opportunity as those representatives of the major parties. It is, however, impossible to foresee that this situation will always remain and the possibility of a third party is ever present. [Broadcasters should not be permitted to judge the importance of third party candidates.]

The FCC, therefore, in order to fully and effectively satisfy one of the declared congressional objectives, protection of the candidates, had come virtually to ignore another congressional objective, furtherance of the public interest in impartial and informative news coverage of political candidates. The Commission's approach was, in part, a consequence of Congress' failure to satisfactorily resolve the conflict between its twin declarations of purpose. The *Lar Daly* decision, which equated use with exposure, made vividly evident to Congress that it had failed to convey congressional intent in such a way that it might be effectively applied in practice. Since most of the appearances determined to be uses were contained in regular newscasts, the freedom of broadcasters to present the news coverage of political campaigns was seriously curtailed by the probable application of the equal opportunities obligation. This meant that the public was to be deprived of a valuable source of information upon which to base its election decisions.

75. Petition for Reconsideration of the Lar Daly Decision, *supra* note 4, at 727.

Even the approach espoused by the FCC in *Lar Daly*, however, contained elements of unfairness to candidates. Since a candidate may conduct an equal opportunity program in any manner he wishes because broadcasters have no right of censorship,[76] a candidate replying to the appearance of an opponent on a newscast possesses a decided advantage. He may control his appearance and present himself in his most engratiating manner, but the candidate appearing on the newscast has no control over the nature of his appearance. While some candidates might be able to avoid newscast appearances, it is virtually impossible for incumbents because they must participate in many newsworthy ceremonial functions.

Neither a literal reading of section 315 nor its legislative history compelled the *Lar Daly* decision. Rather, the decision was based upon what the FCC felt was the best means for effectuating what it saw as the pervasive, primary, and dominant purpose of Congress in enacting the section—to equalize among candidates the advantages of broadcasting coverage.[77]

The language of section 315—". . . shall permit any person . . . to use a broadcasting station . . . "—seems, however, literally to require an active use by a candidate rather than a passive appearance on a newscast.

The legislative history of the section, as noted by the FCC in refusing to reconsider the *Lar Daly* decision, ". . . is barren of specific mention of the problem involved here. . . ."[78] Senator Dill did state, though, in reply to a remark expressing the fear that the section could be read to apply to ceremonial speeches, "I recognize that . . . construction . . . *might* be put upon the amendment;" but he felt such an interpretation would stretch the construction of the statute. He added that the Commission could insure that this possibility would be avoided by propounding rules.[79] Senator Howell described the effect of the bill by stating, "We . . . provided in this bill that if one candidate was allowed *to address* his constituency his opponents should be allowed *to make addresses* also,"[80] which indicates that he was only

76. WMCA, Inc., *supra* note 67.
77. Petition for Reconsideration of the Lar Daly Decision, *supra* note 4, at 732-34.
78. *Id.* at 732.
79. 67 CONG. REC. 12503 (1926) (emphasis supplied).
80. *Id.* at 12504 (emphasis supplied).

thinking of the bill in the context of its application to speeches by candidates. This approach was reiterated by Senator Dill in his testimony before the Senate committee considering the 1959 amendments when he said:[81]

> . . . some candidates do things, as you probably well know and I do, to get into the news. But that is one of the ills that come with a thing of this kind. . . . [T]he term "use" was intended to be a use initiated by the candidate.

These opinions on the manner in which the equal opportunities principle would operate, however, were formulated before the influence of television was foreseen, and they do not invalidate the FCC's determination of the proper means of effectuating the underlying congressional purpose in a new broadcast environment.

The *Lar Daly* decision was particularly shocking to some because earlier decisions of the FCC had indicated a more flexible approach which did balance the public interest in news with the need to protect candidates. In 1956 the FCC had held a nonpartisan report to the nation by President Eisenhower on the Middle East-Suez crisis to be exempt from the requirements of section 315.[82] Also, in the 1957 *Allen H. Blondy* decision [83] the FCC unanimously held exempt the swearing-in ceremonies for an interim judicial term when they involved one of twenty-one candidates for Detroit municipal judgeships. The candidate, however, was not shown in individual sequences, although his name was mentioned. The FCC concluded it had not been shown that the candidate had ". . . in any manner or form directly or indirectly initiated or requested either filming of the ceremony or its presentation by the station, or that the broadcast was more than a routine news broadcast by station WWJ-TV in the exercise of its judgment as to newsworthy events."[84] In denying the petition for reconsideration of the *Lar Daly* decision the FCC distinguished the exemptions of the Eisenhower report and the Blondy appearance. It noted that no presidential broadcast was involved and considered *Blondy* de minimus since in that case the broadcast had resulted in no advantage to the candidate or disadvantage to his opponents.

81. S. REP. No. 562, 86th Cong., 1st Sess. 5 (1959).
82. Columbia Broadcasting System, 14 R.R. 720 (1956).
83. 14 R.R. 1199 (1957).
84. *Ibid.*

The holding in *Lar Daly* that charitable appeals by candidates are uses is good law. There are no exceptions in the statutory section for appearances in the public interest or as a public service. This type of appearance projects an extremely favorable image of a candidate and can be controlled by him within limits. Decisions on this point have been consistent. In both 1956 and 1964, proposed appearances by incumbent presidential candidates Eisenhower[85] and Johnson,[86] respectively, for the United Fund were held within the purview of section 315, even though these appeals were made regularly in non-election years.

It was, then, to negate the adverse effects of the *Lar Daly* decision that the 1959 amendments, exempting certain types of news broadcasts from section 315, were passed.[87] Congress concluded that broadcasters must be free to include candidates in newscasts in the exercise of their bona fide news judgment without thereby invoking the equal opportunities requirement. Otherwise, all candidates might be excluded, and the public would be deprived of valuable political information. The danger of abuse was reduced by provisions specifically providing that broadcasters would be subject to the fairness standard in the exercise of the discretion given them. Additional incentive to operate in good faith was provided by including a section declaring the intent of Congress to review the provisions in operation.[88]

Congress intended the exemptions for bona fide newscasts, bona fide news interviews, bona fide news documentaries, and on-the-spot coverage of bona fide news events to permit the presentation of news on regularly scheduled news programs where the format, content, and participants were determined solely by the broadcaster in the good faith exercise of his "news" judgement.[89] The bona fide requirement was designed to exclude situations where the program was designed to promote the political advantage of a candidate.[90] Furthermore, the length of a candi-

85. Columbia Broadcasting System, Inc., 14 R.R. 524 (1956).
86. United Community Campaigns of America, 3 R.R. 2d 320 (1964).
87. See H.R. REP. No. 802, 86th Cong., 1st Sess. (1959); S. REP. No. 562, *supra* note 81.
88. 73 Stat. 557 § 2 (1959).
89. See H.R. REP. No. 802, *supra* note 87; No. 562, *supra* note 81; H.R. Rep. REP. No. 1069, *supra* note 25; 105 CONG. REC. 14439-52, 17776-82, 17829-31 (1959).
90. H.R. REP. No. 1069, *supra* note 25.

date's appearance on a newscast was not to be disproportionate with reference to the length of the newscast and the significance of the news event. The news interview exemption was meant to encompass such programs as "Face the Nation," "Meet the Press," "Youth Wants To Know," "Capital Cloakroom," and "College Press Conference,"[91] where the informational value is great and the questioning is controlled by the broadcasters or reporters, but not panel discussions or debates where the candidates are able to control the broadcast's content. The attempt was to strike a proper balance between guaranteeing substantial equality of opportunity for candidates and providing broadcasters with the freedom to present news in the public interest.

In the context of this historical background the FCC decided three particularly significant cases in 1964 involving the use of broadcast facilities by an incumbent presidential candidate. These were *Columbia Broadcasting System, Inc.*[92] (presidential press conference case), *Republican National Committee*[93] [*Goldwater v. FCC*], and *Republican National Committee*[94] (fairness doctrine). In the first, *Columbia Broadcasting System, Inc.*, the FCC held that the complete coverage of a presidential press conference was not exempt from the requirements of section 315, either as a bona fide news interview or as on-the-spot coverage of a bona fide news event. The Commission did concede, however, that a portion of such a conference used as part of a bona fide newscast would not be a section 315 use. A presidential press conference was not considered a bona fide news interview because, although press conferences were periodically scheduled, they were not regularly scheduled. The Commission thus interpreted the congressional intention that exempt news programs be regularly scheduled to mean that programs be presented at predetermined intervals rather than whenever circumstances require. Furthermore, although it was acknowledged that newsmen could question the President freely, the FCC felt the control test was not met because the press conference's content, format, and

91. 105 CONG. REC. 17829 (1959) (remarks of Senators Engle and Pastore).
92. 3 R.R. 2d 623 (1964).
93. 3 R.R. 2d 647 (1964), *aff'd by an equally divided Court sub nom.* Goldwater v. FCC, Civil No. 18, 963, D.C. Dir., Oct. 27, 1964, *cert. denied,* 379 U.S. 893 (1964) (Black and Goldberg dissenting).
94. 3 R.R. 2d 767 (1964).

participants were determined by the President. He called the press conferences when he wished, made his own statement prior to any questioning, and determined the time allowed for questions. Since the President could control segments, the entire broadcast was subject to section 315. The FCC did not deem the judgment of broadcasters as to newsworthiness sufficient to satisfy the requirement of control over content and participants.

Although it cannot be denied that a presidential press conference is news, the Commission rejected the contention that it was within the exemption for on-the-spot coverage of a bona fide news event. If that exemption were construed as encompassing all coverage a broadcaster deemed newsworthy, the Commission felt the equal opportunities requirement would be read out of the Federal Communications Act. The congressional desire to give all candidates equal opportunity to present their views would be subverted. Any statement by a candidate arousing interest could be considered news and broadcasters would thus be able to ignore section 315. If such a test were adopted, furthermore, the other specific exemptions would have no meaning. It thus appears that there are some limits to the rather broad category of news events. What the limits are was left unanswered because the Commission restricted the decision to the "matters raised" and noted that it did not extend to "extraordinary and unusual factual situations."

The presidential press conference decision seems sound since broadcasters were left free from the equal opportunities burden to present the more significant aspects of the conference on their regular newscasts, thus encouraging them to fulfill the public need for information, while opposing presidential candidates were protected from prolonged coverage.

Furthermore, the decision was consistent with other decisions of the FCC since 1959. In the *National Broadcasting Company, Inc.* decision of 1962 the Prohibition Party candidate for Governor of California was held entitled to equal opportunities when a debate between former Vice President Richard Nixon and Governor Brown was broadcast in the course of the UPI annual convention, even though the debate was arranged by UPI as part of its convention, the broadcasters had nothing to do with its arrangement, and the broadcasters had merely seized a note-

worthy opportunity in the exercise of their bona fide judgment as to newsworthiness.[95] Newsworthiness was again found not to be enough to bring the debate within the news exemption. The Commission concluded that Congress was exempting only news excerpts and not full coverage of a debate, which it viewed as radically different.[96]

> The sweeping effect of the argument advanced would place on the same footing as an exempt program under Section 315 both the hour-long broadcast of the full text and joint appearance of Governor Brown and Mr. Nixon in debate and also the brief excerpt from this joint appearance "which was included in a news broadcast furnished by CBS Television Network to its affiliates and by CBS News in Newsfilm syndication sent to subscribers." But no argument is given in support of the equating of these two radically different types of appearances as exempt under Section 315, notwithstanding that only the latter type of appearance, i.e., on a newscast, is comparable to those involved in the "Lar Daly decision" which gave rise initially to Congressional consideration of the Section 315 amendment adopted in 1959.

The Commission went on to observe that a contrary interpretation would undercut the protection of Section 315 because any campaign attracting interest would justify broadcasting all speeches, "And this would be so whether the statement and appearance is a debate with an opposing candidate *or is a separate speech and individual appearance of but one candidate.* . . . [T]he 1959 amendment . . . reflected a resistance by Congress to any such broad scale delimitation. . . ."[97]

The FCC reached the same result in *The Goodwill Station, Inc. (WJR)* case.[98] There a debate between the Michigan Republican and Democratic gubernatorial candidates was broadcast as one of the regularly scheduled broadcasts of the weekly luncheon programs of the Economic Club. The broadcast had been made upon the advice of counsel that it would be exempt because of its exceptional newsworthy character, so there was no question as to the bona fide intent of the broadcaster. In holding it was not exempt the FCC made two additional points as to the requirements for exemption as on-the-spot coverage of

95. National Broadcasting Co., Inc., 24 R.R. 401 (1962).
96. *Id.* at 402.
97. *Id.* at 403 (emphasis supplied).
98. 24 R.R. 413 (1962).

a news event. First, the appearance cannot constitute the principal aspect of the news event if it is to come within the exemption. Second, the event must be news in-and-of itself and not merely an event staged by the candidate.

The second decision involving a use by an incumbent presidential candidate in 1964 was the *Goldwater* case.[99] This case arose when the incumbent Democratic candidate for President, Lyndon B. Johnson, was granted approximately nineteen minutes of broadcasting time without charge by all major radio and television networks to address the nation. His address, given on the evening of October 18, dealt with the explosion of an atomic device by the Communist Government of China on October 16, a change of government in the Soviet Union on October 15, and the election of a new government in the United Kingdom on October 15. Each network was asked to grant Barry Goldwater, the Republican presidential nominee, equal opportunities to reply, and when the requests were denied, a complaint was filed with the FCC. The FCC held on alternative grounds that the broadcast by President Johnson was not a use entitling his opponents in the presidential campaign to equal opportunities. The first ground was the authority of the 1956 decision exempting incumbent President Eisenhower's report on the Middle East Crisis. The second alternative ground was that the President was speaking in his capacity as President, rather than as candidate, and that his speech was news in-and-of itself, thus exempting the broadcast from section 315 as on-the-spot coverage of a bona fide news event. Both of these grounds are open to serious question.

The *Eisenhower* decision is extremely weak authority. Eisenhower's report was made on October 31, 1956 and the decision was made in haste. The FCC first notified the networks on November 1 that it declined to rule on the request for equal opportunities because the decision would be ". . . dependent on such an involved and complicated legal interpretation. . . ."[100] Thereupon the networks granted equal opportunities to Stevenson and other presidential candidates. The FCC then reversed itself on the eve of the election and ruled that the report was exempt because Congress had not intended ". . . to grant equal time

99. Republican National Committee, *supra* note 93.
100. Columbia Broadcasting System, *supra* note 82, at 720.

to all Presidential candidates when the President uses the air lanes in reporting to the Nation on an *international crisis*."[101] The decision, however, was by a split vote. Three commissioners were unqualifiedly in favor, one dissented, two continued to maintain that the issue was too complex, and the last commissioner concurred because he thought it doubtful that Congress meant to so inhibit the President and because he felt time was of the essence. The networks were consequently then compelled to offer time to Eisenhower to reply to Stevenson, but it was so close to the election that Eisenhower declined.[102] This decision was never appealed, and there has never been a judicial determination on the point.

There was and is now no specific exemption for a presidential report in the statute. The FCC argued in *Goldwater* that Congress knew of the *Eisenhower* decision and since it did not positively reject it when enacting the 1959 amendments, it had sanctioned the presidential report exemption. In his dissent Commissioner Hyde argued that the statute gave the FCC no discretion to read in such exceptions and that the failure of Congress to provide a fifth exception incorporating the 1956 ruling meant it did *not* sanction it, rather than that it had approved it by silence. A decision based upon either line of reasoning is pure speculation.

In its releases of interpretative rulings regarding the use of broadcasting facilities by candidates for public office the FCC has not listed the 1956 presidential report decision.[103] In his appellate brief Barry Goldwater argued he had a right to rely on what was contained in, or excluded from, the FCC releases because the Commission has a mandatory duty to prescribe rules,[104] but reliance is an extremely weak argument for Goldwater to make in this case. The Commission announced its determination that President Johnson's report was not a section 315 use on the day following the broadcast which was fourteen days before election day. Goldwater, therefore, could not have significantly refrained, to his detriment, from seeking broadcast-

101. *Id.* at 722 (emphasis supplied).

102. N.Y. Times, Nov. 6, 1956, p. 71, col. 3.

103. See Use of Broadcast Facilities, *supra* note 29; Supplement to Use of Broadcast Facilities by Candidates for Public Office. 3 R.R. 2d 1539 (FCC 1964).

104. Brief for Petitioner, pp. 22-23, 31-33, Goldwater v. FCC, Civil No. 18,963, D.C. Cir., Oct. 27, 1964.

ing time to reply in reliance upon his belief that he would be entitled to equal opportunities. Reliance would be a better argument for a licensee who has granted time, relying upon a Commission ruling that it would be exempt from section 315, and later finds he must grant equal opportunities to others.

As support for its alternative ground that presidential reports were within the news events exemption, the Commission quoted with favor a statement made by Senator Pastore in urging passage of the 1959 amendments.[105]

> If the President of the United States were a candidate for reelection he could not stand up in front of the American flag and report to the American people on an important subject without every other conceivable candidate standing up and saying, "I am entitled to equal time."

In context this was a description of what might happen if the amendments did not pass. From the statement the FCC concluded that the amendments must have altered this result. If the statement is accepted, however, it means that a member of Congress responsible for recommending legislation to amend section 315 was not aware of any existing exemption for presidential reports. Consequently, Congress could not have incorporated the *Eisenhower* decision by reference.

Last, the standard for the exemption set forth in the *Eisenhower* decision was that the presidential report be on an "international crisis." It seems doubtful that the events discussed in Johnson's speech constitute international crises in the same sense as the Suez crisis. An international crisis in this sense requires a decisive moment, a turning point in international affairs which directly affects the United States and requires a major policy decision to be made with some urgency. The events Johnson discussed did not involve open conflict or troop movements as in 1956. The ascendency of a new political party into power in the United Kingdom, a civilized country, by orderly election hardly seems to be a crisis warranting a presidential report to the nation exempt from the inconvenience of the equal oportunities requirement. Yet, such an appearance by the President in his official capacity during the campaign is particularly advantageous to him. The change in leadership in the Soviet Union, while cause

105. 105 CONG. REC. 14456 (1959).

for slightly more concern, was not then an international crisis. As for the Chinese nuclear explosion, its significance had been evaluated exhaustively in the press and the consensus, supported by assurances from the White House, was that it posed no immediate danger. President Johnson impliedly acknowledged the lack of immediate crisis by merely commenting upon these events, two and three days after the facts, and by failing to announce any major moves of the United States to meet, or which might cause, an international crisis. Even the cumulative effect of these events does not appear to have constituted a crisis. In rendering its decision, therefore, the FCC found section 315 inapplicable to the Johnson report on the basis of a standard for exempting presidential reports newly created for that purpose. It held the report was exempt because it concerned specific, current, and extraordinary events.

Examining the alternative ground for the *Goldwater* decision—that Johnson's report was made by him in his official capacity as President, not as a candidate, and was exempt under the "news event" category—little support is found in the legislative history. There is only the questionable statement of Senator Pastore quoted above and some speculative statements made in committee hearings.[106] The question of whether and when presidential broadcasts should be exempted from section 315 was never directly considered by Congress.

It is not clear from a literal reading of the section's language that any presidential exemption exists, or that the FCC possesses the power to make discretionary rulings. Furthermore, full coverage of a presidential report indicates that the principal event is the candidate's appearance. The appearance thus fails to meet the test set forth in *The Goodwill Station, Inc. (WJR)* and *National Broadcasting Company, Inc.* cases. These decisions represent the FCC's conclusion, after an examination of the legislative history of the 1959 amendments, that for a news event to be exempt, any appearance by a candidate in connection with it must be incidental. These cases are forthright authority for the conclusion that newsworthiness is not sufficient alone to exempt a news event.

The status of a candidate as an incumbent is immaterial since

106. See, *e.g., Hearings on Political Broadcasting, supra* note 16, at 298.

section 315 applies to *any* person who is a candidate. This conclusion is illustrated by the cases which hold that regular weekly congressional reports are uses once an incumbent has attained the status of a legally qualified candidate.[107] The fact that a candidate is making an appearance in his official capacity as a public servant has likewise been held irrelevant.[108] The statute makes no exemption based upon the status in which a candidate is appearing.

Occasionally, a candidate may be presented in his official capacity within the news event exemption. He must, however, have no control over the content of any remarks, his appearances must be regularly scheduled, and there must be no special identification of him as a candidate. In the *Thomas R. Fadell, Esq.*[109] decision the FCC held the presentation of local court proceedings on an hour-long program broadcast regularly, four days a week for fourteen years, did not entitle the judge's opponent for mayor to equal opportunities because it was a bona fide news event. Similarly, it was held in *Brigham v. FCC*[110] that a weatherman's daily appearances on radio and television, when he was identified only as the "TX Weatherman," did not entitle his opponent for the state legislature to equal opportunities. The appearances were found to arise from the candidate's regular employment and not to be a product of the campaign. The court concluded that the appearances constituted a bona fide effort to present news. Because of the lack of personal identification, the candidate was given no advantage. When a program's content can be even partially controlled by an appearing candidate, however, the appearance is not exempted. In the case of *William S. Freed (WCLG)*[111] a sheriff running for Congress concluded his regular daily report of sheriff's office activities with a thought for the day. The report was consequently held to be subject to the equal opportunities requirement. A presidential report does not satisfy these exemption requirements because it is not regularly scheduled, the President is identified, and he dictates the report's content.

In the *Goldwater* case the FCC argued that the President's

107. See, *e.g.*, Hon. Clark W. Thompson, 23 R.R. 178 (1962).

108. Earle C. Anthony, Inc. (KFI), *supra* note 67; Radio Station KNGS, *supra* note 69.

109. 25 R.R. 288 (1963), *aff'd*, Fadell v. FCC (7th Cir. 1963).

110. 276 F.2d 828 (5th Cir. 1960), *affirming sub nom.* KWTX Broadcasting Co., 19 R.R. 1075 (1960).

111. 19 R.R. 1391 (1960).

control over the content of his report was irrelevant since the control standard was applicable only to the news interview exemption and not to the news event exemption. It noted that excerpts from speeches used on newscasts are always from material prepared by the speaker. This argument ignores some additional factors. News interviews are subject to section 315 if their content is controlled by the candidate, and the same standard would appear applicable to news events when the candidate controls the entire event. The candidate is similarly able to present only what is favorable to him. A candidate comes within the news events exemption when although he controls his speech, the broadcaster exercises his own control in selecting the excerpts to be broadcast.

Last, the presidential press conference case demonstrates that the President is not exempt from section 315 because of the nature of his office. Since once a broadcast is subject to section 315 it cannot be exempted by incorporating it into a news program,[112] surrounding the Johnson address with news commentary would not seem adequate to avoid the section's requirements.

The *Goldwater* decision was affirmed by an equally divided Court of Appeals, three to three.[113] A petition for certiorari was denied by the Supreme Court, but Justices Black and Goldberg dissented and Justice Goldberg wrote a dissenting opinion.[114] In his dissent Justice Goldberg pointed out that the statute requires a licensee who permits "any" legally qualified candidate to use his facilities to afford equal opportunities to "all" other candidates.[115]

> No exemption is made for a legally qualified candidate who is the incumbent President of the United States. The express exceptions to the broad scope of the statute . . . do not appear to apply to the address made by the President on Sunday, October 18, 1964, which does not seem to fit into any of these categories.

Citing the Eisenhower report on the Suez crisis which was held exempt and the Johnson press conference which was held subject to the section 315 as examples, Goldberg concluded that the FCC had been inconsistent.[116]

112. Hon. Clark W. Thompson, *supra* note 107.
113. Goldwater v. FCC, *supra* note 93.
114. 379 U.S. 893 (1964).
115. *Id.* at 894.
116. *Id.* at 895.

> These varied holdings of the Commission, and the express language of the Act, confirm my view of the substantiality of the question and the need for immediate argument and speedy decision of the case.
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> * * * *
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> The statute reflects a deep congressional conviction and policy that in our democratic society all qualified candidates should be given equally free access to broadcasting facilities, regardless of office or financial means, if any candidate is granted free time.

Perhaps two reasons for the Supreme Court's reluctance to grant certiorari were that an immediate ruling was required if relief was to be granted before the impending election and, as the FCC had recognized in 1956, the issue was complex. The need for immediate action was recognized by Goldberg and the point was made in the petition for certiorari.[117]

The third decision in 1964 involving broadcast appearances by an incumbent presidential candidate was *Republican National Committee*.[118] After Goldwater's claim for equal opportunities had been denied, he demanded fair time under the fairness doctrine to appear personally to reply to the Johnson report. He contended that he was the only one who could properly present his viewpoint, just as Johnson was the only one who could effectively present his. Although this contention represents an underlying premise of section 315, once that section is found inapplicable, the fairness doctrine requires only that a candidate's views be presented and not that he present them personally. NBC thus fulfilled its obligation when it granted fifteen minutes to Dean Burch, Chairman of the Republican National Committee, to reply.

The FCC held the fairness doctrine applicable to presidential reports, and licensees were therefore required to provide reasonable opportunities for the presentation of conflicting views. The networks in this Goldwater case were found to have met this obligation. The rule of law thus expressed is sensible, but its application in this fact situation is troublesome.

CBS had taken no steps to fulfill any obligation it may have incurred under the fairness doctrine as a result of the Johnson speech to present an opposing viewpoint because it maintained

117. Petition for Writ of Certiorari, p. 10, Goldwater v. FCC, *cert. denied,* 379 U.S. 893 (1964).

118. *Supra* note 94.

that the fairness doctrine was inapplicable to presidential reports. With the exception of NBC, no network altered its scheduling plans as a consequence of the broadcast. The FCC, however, still found the networks had presented or would present dissenting views fairly within their existing program schedule. While it is possible that the fairness standard is sufficiently flexible to absorb a presidential report without imposing any additional requirement upon networks to present opposing views, if it is ever to be applicable and to impose an obligation upon broadcasters, it would seem that it should be in a case such as this where there was a special broadcast of significant duration by a candidate receiving extensive coverage and dealing with fresh issues of current importance.

In its decisions the FCC has tended to confuse the concept of overall reasonable opportunity and good faith judgments by broadcasters required by the fairness doctrine and the concept of a bona fide effort to present news required for exemption from section 315. In *The Goodwill Station, Inc. (WJR)* and *National Broadcasting Co., Inc.* it was reasoned that if the bona fide judgement as to newsworthiness were the only test for the section 315 exemptions, the specific exemptions enumerated would be meaningless. This means, in effect, that there must be a two step evaluation process to determine news presentations exempt under section 315. First, the broadcast must be of the type that is eligible for exemption, and second, within these limits the broadcaster must exercise his bona fide judgment as to newsworthiness. That there is a distinction between the bona fide and fairness standards is supported by the FCC's description of the fairness doctrine:[119]

> Generally speaking, [the fairness doctrine] does not apply with the precision of the "equal opportunities" requirement. Rather, the licensee, in applying the fairness doctrine, is called upon to make reasonable judgments in good faith on the facts of each situation — as to whether a controversial issue of public importance is involved, as to what viewpoints have been or should be presented, as to the format and spokesmen to present the viewpoints, and all the other facets of such programming. . . . In passing on any complaint in this area, the Commission's role is not to substitute its judgment for that of the licensee as to any of the above program-

119. Applicability of the Fairness Doctrine, *supra* note 13, at 10416 (emphasis supplied).

> ming decisions, but rather to determine whether the licensee can be said to have acted reasonably and in good faith. *There is thus more room for considerably more discretion on the part of the licensee under the fairness doctrine than under the "equal opportunities" requirement.*

Yet, in *Goldwater* the Commission repeatedly stressed the bona fide nature of the networks' judgment as to newsworthiness in determining that the President's report was a news event exempt from section 315. It failed to take the initial step of determining whether the broadcast was of a type which could be within the exempted category before it considered the question of whether the broadcasters had acted in good faith. The Commission posed the crucial question in the following terms: "The question is whether . . . this broadcast falls within the reasonable latitude for the exercise of good faith news judgment on the part of the [licensee]. . . ."[120] The conclusion was that the networks could "reasonably" conclude that the President's statements did constitute news in its statutory sense. The opinion stresses the Commission's subjective judgment as to the good faith of the licensees. This is the type of judgment to be made under the fairness doctrine. The strength of section 315 is its certainty, its ability to be effectively enforced because it sets objective standards. Although the congressional history does lend some support to the notion that a subjective determination should be made as to the licensee's intent to further the political fortunes of a candidate, the Commission has not adhered to this approach in the past. Rather, it has wisely looked to whether the political fortunes of the candidate were in fact promoted, whether the candidate in fact had some control over the nature of the broadcast, and not to whether the broadcaster actually intended to help the candidate.[121]

As a practical matter it is not difficult to see why the FCC reached its decisions in *Goldwater* and *Republican National Committee*. It is virtually impossible to imagine that Congress intended to inhibit the President of the United States in acting as he thought necessary to meet an international crisis or emergency. Furthermore, the networks were in a very difficult situation. They were not in a position to refuse a presidential

120. Republican National Committee, *supra* note 93, at 648.

121. See, *e.g.*, The Goodwill Station, Inc. (WJR), *supra* note 98.

request for free time nor to restrict the amount of time requested. Such an affront to presidential discretion is unthinkable. If the Johnson broadcast were subject to the equal opportunities requirement, the networks would have been required to grant free time to all of the remaining eleven presidential candidates. Since it is estimated that the Johnson broadcast on a paid time basis would have cost $500,000,[122] the total burden upon the networks would have been in the neighborhood of six million dollars, and the public would have been subjected to sustained broadcasts by candidates in whom it had little interest.

The FCC has had a tendency to rule strictly when there was no potential burden such as this. The presidential press conference decision and the decisions concerning appearances for charity by incumbent presidential candidates were declaratory rulings. The Suez report decision was handed down after equal opportunities had already been offered. This approach may be practical, but it does not produce the kind of law upon which one may rely.

One of the problems with the presidential report exemption as expounded in *Goldwater* is that it has little basis in the law. Consequently, there is no way of determining its limits, and broadcasters are bound to be placed in some very difficult positions in the future. For instance, does the exemption extend to severe domestic crises or regional disasters? Although it would not seem to extend to legislators or judges because their capacity to act and lead in emergencies is restricted, does the exemption extend to other public executives such as governors and mayors when a state or city is confronted with a crisis? The rationale behind the exemption would seem to make these extensions possible.

It is in emergency situations, however, that an executive appears favorably because it is here that the electorate is looking for someone upon whom it can rely. These appearances thus work the most severe disadvantage upon political opponents and most severely undercut the principles underlying section 315.

It would be wise, therefore, to legislate in such a manner

122. Brief for Petitioner, p. 2, n. 2, Goldwater v. FCC, *supra* note 104.

that all interests are properly balanced. Opposing candidates should be protected by permitting section 315 to apply whenever feasible. This may be accomplished by setting a clear standard which must be met before a presidential report will be exempted and by limiting the length of such reports. The burden upon broadcasters should be defined and limited. This objective will be furthered by exempting some presidential reports from section 315 only if they fall within a clearly delineated category. Furthermore, if the proposals for limiting the number of legally qualified candidates and modifying the requirements of equal opportunities made in this paper are adopted, the potential burden upon broadcasters in non-exempt situations will be greatly reduced. In the national interest the President should be completely free to use broadcasting facilities when such use is necessary.

In determining the situations in which reports by public officials should be exempted during political campaigns, it should be remembered that the problem is not to determine when these reports should be permitted, because section 315 by its terms does not bar appearances by an incumbent in his official capacity. Rather, the issue is when such appearances should be free from the section 315 requirement that broadcasting opportunities also be granted other candidates. Furthermore, the problem is serious only when the incumbent public official is initially granted free time. When the initial appearance has been purchased, broadcasters are not subjected to a severe financial burden, and the number of requests for opportunities to reply is significantly reduced.

A provision which would exempt only presidential reports on current international crises which directly affect the United States seems to strike an appropriate balance among all interests. When disagreement over foreign policy has arisen, the opposition has generally shown restraint by confining its criticism to periods preceding major policy decision and to periods when policy is being reevaluated. It has been recognized that in periods of crisis the nation must present a unified posture to the world. Since the President must take unilateral action to meet international crises, it is not inconsistent to permit him to use broadcasting facilities in such situations, during an election period,

without granting his opponents equal opportunity. Also, through the broadcasting media, the President is perhaps best able, because of the accompanying publicity, immediately to make the position of the United States convincingly clear and certain to all nations.

In the absence of a crisis, however, it does not seem too harsh to require an incumbent presidential candidate either to postpone a report discussing foreign policy until after the campaign or to speak subject to the requirements of section 315. However, to avoid unnecessary restriction on a President's freedom to speak, the requirements of section 315 should apply to his appearances only during the election period preceding the general election. The nomination of incumbent presidential candidates is seldom seriously contested.

During the election period, though, it seems unnecessary to exempt incumbent presidential reports on domestic crisis. This will not prevent a President from making broadcast appearances in dealing with these domestic crises, it will only permit his opponents to criticize his action. Action of the party in power to meet domestic crises has traditionally been a source of campaign issues, and such criticism does not adversely affect the national security. Furthermore, domestic crises can, more easily than international crises, be handled through personal representatives and through brief personal assurances in news broadcasts supplemented by editorial explanation. Similar reasoning leads to the conclusion that reports by governors and mayors should not be exempted from section 315.

Although exempt presidential reports by incumbents should be minimized to protect opponents and reasonable limits may be put upon their length for this purpose, it would be unwise to restrict the number of exempt broadcasts because it is impossible to foresee when international crises will arise. Also, the exemption should encompass significant developments in existing international crises, and these developments cannot be foreseen either.

Proposed section 315(c)(2), Appendix, *infra,* incorporating the conclusions reached in this part should be a sufficient addition to the section 315 exceptions — especially since it is explicit — to resolve the problems created by the existing definition of "use."

IV. Equal Opportunities

The same argument advanced by those disagreeing with an all-inclusive definition of legally qualified candidate can be made as effectively against the requirement that *equal* opportunities be given all candidates. This argument is that because *equal* opportunities must be given all candidates when one or more of the major candidates is permitted to use a broadcaster's facilities the burden is so great that broadcasters tend to deny all candidates for particular offices the use of their facilities. To the extent broadcasters do deny candidates broadcasting opportunities, the public is deprived of a valuable source of information for evaluating candidates, and lesser known newcomers, who must convince the electorate to change its vote, are particularly prejudiced.

As it presently exists, the requirement of equal opportunities forbids any broadcaster from distinguishing among candidates for the same office as to rates charged, facilities offered, services rendered, or regulations imposed.[123] This obligation, however, does not require a broadcaster to notify all candidates for a particular office when he has permitted one to use his facilities. It means only that he must keep a public record of the disposition of each request for time by a candidate.[124]

Since all candidates must be charged the same rates, if one candidate purchases enough time to obtain the benefit of bulk rate, other candidates must also be able to get the bulk rate if they purchase a sufficient amount of time. If a group of candidates purchases enough time to secure the bulk rate, the broadcaster must grant time at the bulk rate to opponents of all candidates using that time, regardless of how much time is purchased, because the right to equal opportunity is one granted the individual candidate.[125] Similarly, a candidate appearing at no cost to himself on a program purchased by a commercial advertiser creates in each of his opponents an individual right to equal opportunities without charge.[126]

However, where the political committee of a labor union

123. 47 C.F.R. §§ 73.657(c), 73.120(c), 73.290(c), 73.590(c) (1965).
124. 47 C.F.R. §§ 73.657(d), 73.120(d), 73.290(d), 73.590(d) (1965).
125. Hon. Mike Monroney, 11 R.R. 238 (1952).
126. Hon. Mike Monroney, 10 R.R. 451 (1954).

purchases time for a candidate, his opponents are not entitled to free time because the candidate has, in effect, paid for the time.[127] Once one candidate has become unable to afford more time, it would not seem that a broadcaster need cease selling time to other candidates as long as he remains ready to provide equal opportunities if requested.[128]

While the requirement of equal opportunities does not demand that the same time during the day on the same day of the week be provided, it does require that the time granted have a comparable capacity to reach a similar listening audience.[129] Where time during the early morning, noon, and evening hours was granted one candidate, therefore, the Commission held in *D.L. Grace* that time granted an opponent only during the early morning and noon hours did not constitute equal opportunities.[130] Furthermore, networks are held to the same standards as individual broadcasters.[131] This is necessary because they have the capacity to reach voters in many areas. A candidate reaching voters throughout his election district, even though fewer in each area, reaches a more effective audience politically than a candidate who may reach as many voters over a single station, but in a more limited area. Proper network diffusion is accomplished in practice because most stations will take advantage of a network offered opportunity to fulfill any equal opportunity obligation they have incurred as the result of network presentations. Only those stations serving a candidate's election district, however, must grant the equal opportunities.[132]

The equal opportunities requirement may often conveniently be satisfied by inviting all candidates for an office to appear together on a panel discussion or debate-type program.[133] If one arbitrarily refuses and the remaining candidates conduct the program, the one refusing will not later be able to claim equal opportunities. Although the format of the program may be determined by the broadcaster, he must take care to insure that the format and restrictions on discussion matter are reasonable and

127. Metromedia, Inc., 3 R.R.2d 774 (1964).
128. *Cf.* Mrs. M. R. Oliver, 11 R.R. 239 (1952).
129. E. A. Stephens, 11 F.C.C. 61 (1945).
130. 17 R.R. 697 (1958).
131. See Columbia Broadcasting System, Inc., 11 R.R. 240 (1952).
132. Hon. Mike Monroney, *supra* note 126.
133. Use of Broadcast Facilities, *supra* note 29, at 10071, para. 63 (1962).

generally acceptable to all the candidates. The offer cannot be made on a "take it or leave it" basis. In the case of *Nicholas Zapple, Esq.*[134] one candidate refused to appear on a program with other candidates because he found the format set by the licensee objectionable. When the program was subsequently conducted without him, his claim for equal opportunities was upheld by the FCC. To hold otherwise, reasoned the Commission, would permit broadcasters to censor a candidate by controlling the context in which he appears, and broadcasters are denied the power of censorship over a candidate's material by section 315.

Also, lack of adequate notice, in the context of surrounding circumstances, may entitle a candidate to refuse to appear with other candidates and later successfully claim equal opportunities. In *KTRM, Inc.*[135] the FCC held that four day notice by a Texas station to a Congressman in Washington while Congress was in session was not notice adequate to constitute an equal opportunity.

Once a candidate's right to equal opportunities has vested it is absolute. A broadcaster cannot refuse to grant a candidate those opportunities because all available time allotted for political broadcasting has been scheduled. He must cancel commercial programs if necessary to fulfill his obligation.[136] At the same time it would seem that the broadcaster would have to take care not to grant the second user more desirable time than initially granted his opponent, as this would deprive the first user of equal opportunities.

It is not those aspects of the application of the equal opportunities requirement discussed above that present problems. In these respects the law as presently evolved seems fair and should be preserved. Problems arise because equal opportunities have virtually come to mean equal time. This development is not surprising because whether or not an equal length of time has been granted is the most certain, quickly determined, and objective standard for judging whether equal opportunities have been granted. It is the equal time requirement, however, that can place a severe financial burden upon a broadcaster and thereby either discourage him from granting any time to political candidates or encourage him to grant candidates only time for spot

134. 24 R.R. 861 (1962).
135. 23 R.R. 472 (1962).
136. E. A. Stephens, *supra* note 129.

announcements rather than for more informative speeches and discussions. It is desirable to seek a means of altering this requirement to encourage the increased presentation of candidates to the public while still insuring that all candidates will be fairly treated.

The broadcasting industry tends to favor the out-right repeal of section 315.[137] In virtually every session of Congress in recent years there has been a bill to repeal the section.[138] It is argued that the fairness doctrine would be sufficient to insure equitable treatment of all interests, but, as has been previously noted, it is virtually impossible to enforce the fairness doctrine with sufficient speed to provide any adequate remedy for an aggrieved candidate prior to a particular election. The danger of favoritism is perhaps not so critical on the national level where networks are subject to national scrutiny as on the local level where the pressures against certain types of discrimination are often less intense.[139]

It may be argued that because there were no major abuses prior to the *Lar Daly* decision with regard to news programs, broadcasters probably would not violate their public responsibility to act fairly if the section were repealed. This reasoning ignores the fact that the law was somewhat in doubt as to the status of news programs prior to *Lar Daly,*[140] and this doubt would have inhibited broadcasters from liberal use of their programing discretion. It also ignores the fact that extensive broadcasting coverage has been recognized, to a significantly greater degree since *Lar Daly,* as an essential element of political success for candidates at all levels. Since 1956 campaign spending for broadcasting coverage has quadrupled, and about half of this spending is now on behalf of candidates for other than national office.[141]

The British and Australian independent radio and television systems seem to operate successfully with more flexible standards

137. See, *e.g.,* Broadcasting, Dec. 14, 1964, p. 54 (remarks of David Sarnoff); Broadcasting, Nov. 23, 1964, p. 146 (editorial).

138. See, *e.g.,* S. 673, 89th Cong., 1st Sess. (1965); S. 1696, 88th Cong., 1st Sess. (1963).

139. See 106 CONG. REC. 14474 (1960) (remarks of Senator Yarborough concerning the presidential campaign exemption bill).

140. See note 19 *supra* and accompanying text.

141. See Broadcasting, Nov. 2, 1964, pp. 23-24.

regarding political broadcasts. In the United Kingdom the Independent Television Authority must assure itself that "due impartiality" is preserved when broadcasts deal with matters of political controversy.[142] The Australian statutory requirement is that if a licensee broadcasts any election matter, he must afford "reasonable opportunities" for broadcasting election matter to "all" political parties contesting the election.[143] In these two countries, however, campaigning is with heavy party identification, and the government regulations are concerned with insuring fairness among parties.

In the United States there has traditionally been an emphasis upon individual initiative both in political campaigning and in political action by elected officials. Consequently, it would seem unwise to permit party leaders to control the allocation of time among party candidates because it would be a powerful weapon to force subservience, and the party leaders could significantly control elections by the manner in which they allocated broadcasting time. Furthermore, the government controlled BBC in the United Kingdom and National Broadcasting Service in Australia provide fairly allocated amounts of free time during each election campaign for political party broadcasts. These broadcasts reduce the potential adverse effects abuse by independent broadcasters might have.

Broadcasters argue that the repeal of section 315 would remove the shackles from broadcasters and enable them to present the full spectrum of news in the public interest. FCC Chairman E. William Henry aptly described the dangers inherent in this argument.[144]

> [Those seeking repeal of section 315 are asking] . . . for a great deal more than the freedom to disregard frivolous candidates. In dealing with major candidates, they want the right to pick and choose, to broadcast some of their words but not all of them. They want the right to censor, and to treat candidates unequally. . . .
>
> * * * *
>
> My doubts about the wisdom of the repeal of Section 315 . . . arise . . . out of questions concerning the wisdom of placing that power in the hands of any single group of men.

142. Television Act, 1964, 12 & 13 Eliz. 2, c. 21, § 3(1) (e).
143. Broadcasting and Television Act, 1942-63, § 116(3).
144. Broadcasting, Jan. 18, 1965, p. 77.

That Congress feels some sympathy with those favoring repeal of section 315 is demonstrated by a statement in the Senate report on the 1959 amendments to the effect that the committee would have no hesitation in removing the restrictions if broadcast frequencies were not limited.[145] This statement seems strange in light of the testimony of David Sarnoff, quoted in the same report, that there are now two and one half times as many radio and television stations as there are newspapers.[146] The assumption that anyone can get in print while broadcasting opportunities are limited seems somewhat undercut by this statistic. The justification for restricting candidate broadcasts must be developed on other grounds. Such grounds are: that the public interest requires that all candidates be insured fair access to broadcasting media which is not dependent upon the discretion of individual broadcasters, because the media is so influential; and that while available broadcasting time is absolutely limited, newspapers are more flexible in the amount of space which can be devoted to political candidates, since there is no absolute limitation on pages.

There is, however, some merit to the repeal argument in that broadcasters could, and probably would, better fulfill their public responsibility to present candidates if the restrictions were removed. Consequently, a scheme of partial repeal should be investigated. In 1960 section 315 requirements were suspended for the presidential campaign.[147] Broadcasters had expressed their willingness to offer candidates time without charge voluntarily, but they did not wish to be compelled to give it as proposed in S. 3171.[148] Consequently, Congress decided to assume the risk, limited to a single presidential campaign, that broadcasters might abuse their discretion, in order to test the sincerity of the broadcasting industry's expressed desire to work voluntarily in the public interest by fairly presenting all candidates. Congress hoped to determine whether some or all of the section 315 restrictions could safely be permanently repealed.[149]

The 1960 suspension was successful. The Kennedy-Nixon debates were a by-product. Networks substantially increased the

145. S. REP. No. 562, *supra* note 81, at 15.
146. *Id.* at 22.
147. 74 Stat. 554 (1960).
148. See S. REP. No. 1539, 86th Cong., 2d Sess. 5 (1960).
149. See *Id.* at 6-7; 106 CONG. REC. 14472 (1960) (remarks of Senator Pastore).

amounts of free time offered political candidates, and although the amount of free time granted minority candidates was substantially reduced, it was not eliminated.[150] Senator Magnuson immediately submitted a bill to make the suspension for presidential campaigns permanent.[151]

The significance of these results must be tempered, however, by the fact that the broadcasting industry knew the results of this experiment would be carefully analyzed by Congress in considering future legislation, and therefore, it would naturally have been trying to make a good impression. Congress had even served notice in the exemption bill itself of its intention to review these results.[152] Furthermore, this experiment was with a presidential campaign in the national spotlight, and whether an analogy may be drawn to predict the success of a complete repeal of the section is open to question.

In 1963 it was proposed that section 315 again be suspended for the 1964 presidential election.[153] The bill was passed with little opposition in both the House and the Senate amidst numerous declarations that the suspension was designed to serve the public, not the candidates.[154] Since the bill was passed in slightly different forms in the House and Senate, it required revision by a conference committee. When the bill in its final form ultimately came before the Senate in August, 1964, members of Congress apparently had come to believe that President Johnson did not wish to debate his opponent, and the measure was consequently tabled by a vote of 44 to 41.[155] This radical change in the attitude of Congress, particularly its Democratic members, toward the desirability of suspending section 315 for the presidential campaign tends to support Senator Cotton's charge that the bill was tabled because it no longer served the purposes of an influential candidate.[156] It may be concluded, therefore, that there is some feeling among members of Congress that section 315 protects incumbent candidates and that, despite declarations that the public interest is its primary concern, Congress will be

150. *Hearings on Equal Time, supra* note 47, at 241, 259.
151. S. 204, 87th Cong., 1st Sess. (1961).
152. 74 Stat. 554 § 2 (1960).
153. H.R.J. Res. 247, 88th Cong., 1st Sess. (1963).
154. See, *e.g.*, 109 Cong. Rec. 17620 (1963) (remarks of Senator Hartke). See also H.R. Rep. 1415, 88th Cong., 2d Sess. (1964) (conference report).
155. 110 Cong. Rec. 19413 (1964).
156. *Id.* at 19411.

hesitant to repeal or alter section 315 unless it feels the campaigns of its members will be furthered thereby.

It has been contended that repeal of section 315 would lower campaign costs because it would encourage broadcasters to give increased amounts of free time to major candidates.[157] To reduce campaign costs is desirable because it will permit candidates with more limited financial resources and smaller political organizations to run, and it will reduce the large campaign deficits political parties are now incurring. If broadcasters offer relatively as much free time to all candidates as they did to presidential candidates in 1960, lower costs would seem to result. Although between 1956 and 1960 overall radio and television campaign costs increased significantly, there was virtually no change in these costs for the major presidential campaigns.[158] The fact that there was no change in presidential campaign broadcasting costs despite the exemption and the consequent additional free time offered the major candidates might provide a basis for the conclusion that candidates would spend the same amount to purchase time whether or not they received free time, and that the free time was just a bonus. This conclusion was severely weakened, however, when presidential campaign broadcasting expenses rose significantly again in 1964 when the exemption was not in effect.[159] This increase is not entirely explained by increased charges.

Would a requirement that broadcasters grant free time to candidates be a satisfactory method to insure the appearance of all candidates before the public? If equal amounts of free time for all candidates for all offices were required, the burden upon broadcasters would be extremely heavy, and the major candidates would probably not be adequately presented because the time periods granted, of necessity, would be short. The burden would likely be even greater because additional candidates would enter political campaigns merely to take advantage of the free publicity. If broadcasters are forced to incur a financial loss by a requirement that they grant more free time than they can reason-

157. *Hearings on Equal Time, supra* note 47, at 117 (letter of Walter N. Thayer, President, Herald Tribune).

158. *Hearings on the Temporary Suspension of the Equal Time Provision Before the Communications Subcommittee of the Senate Committee on Interstate and Foreign Commerce,* 87th Cong., 1st Sess. 22-25, 112-13 (1961).

159. Broadcasting, *supra* note 141.

ably absorb, to remain in existence they will be forced to recover the loss in some other manner. One obvious way would be to increase charges to other users. Another would be to curtail some of their public service programs. In either case the public would be deprived of programs of value which might otherwise be presented. Small and independent stations with small financial resources would suffer most acutely.

The financial burden imposed by a free time requirement might be relieved by providing that the government finance broadcasting by political candidates.[160] This approach seems unwise for two reasons. First, many taxpayers might object to subsidizing candidates whom they oppose or consider to be crackpots. Second, if broadcasters are able to provide a reasonable amount of free time without a government subsidy, it would seem unwise either to burden the government or to risk government interference in political campaigns. If broadcasters are required to provide time without charge, it would seem more satisfactory to reduce the burden placed upon them by making the requirement applicable only to campaigns for the more important offices.

The British system[161] of allocating a fair amount of free time for each political party's broadcasts and then forbidding the parties to purchase additional time would not work well in the United States, unless it were limited only to the presidential campaign. With the emphasis on individual effort and initiative in American political campaigning, it would seem unwise to restrict the ability of candidates to purchase additional time beyond that which is allocated to them. Although the amount of money that a candidate can raise should not be determinative of his ability to run for political office, it is some indication of his popular support. He should be able to take advantage of the benefits his fund raising efforts provide without restriction.

From the above discussion of the merits of imposing a free time requirement upon broadcasters during political campaigns, it may be concluded that requiring broadcasters to grant time without charge to presidential candidates would be desirable. The public and the candidates would be benefited, and, by restricting the requirement to presidential candidates, broadcasters

160. See, *e.g.*, S. 1595, 88th Cong., 1st Sess. (1963).

161. See generally *Report of the Committee on Broadcasting*, 1960, *supra* note 62.

would not be subject to an onerous burden. Since each of the major radio and television networks voluntarily granted approximately ten hours of free time to presidential candidates during the exempted 1960 campaign, all valid complaints of broadcasters concerning the burden imposed upon them should be eliminated by fixing the total amount of free time required near that figure. Broadcasters, of course, could grant additional time subject to the normal requirements of section 315 if they desired. Presidential primary and convention campaigns should be excluded from this scheme for the same reasons that local elections are excluded — too many candidates, too many parties, and too many administrative difficulties — and because it is often impossible to determine who is officially a candidate for party nomination.

The public would be benefited because it would be insured the opportunity to evaluate each legally qualified presidential candidate on the basis of a personal appearance. Furthermore, it is the presidential campaign which generally arouses the greatest voter interest in an election, and this interest would generally be carried over to other campaigns.

The candidates will receive the potential benefit of lower campaign costs. Party campaign deficits might be reduced. Presidential candidates might purchase additional time or emphasize other aspects of their campaigns. Last, since approximately one fourth of the Republican and Democratic party budgets are allocated for broadcasting coverage of the presidential and vice presidential campaigns, it would seem that funds might be made available to support other candidates. A statutory provision to require broadcasters to grant time to presidential candidates without charge is found in section 315 (d) of the proposed statute. See Appendix, *infra*.

Continuous time is required by the proposed statute so that all candidates will appear on the same broadcast and the public will better be able to compare them. Candidates are prevented from refusing this time on these special broadcasts and later claiming equal opportunities, to further the intended comparative effect. The notice requirement is designed to protect broadcasters from last minute requests and to enable candidates to plan their presentations with certain knowledge of the time available to them. The Commission is to receive such notice because it is

accessible to all interested parties, while to require every candidate to notify every licensee would be an unreasonable burden.

The problem of minority parties still remains. Even within the context of a required grant of free time to presidential candidates, the interests of broadcasters in not offending their audiences with the presentation of numerous minority candidates in whom there is little interest, and of the public in having access to longer presentations by the major candidates for whom most will vote, must be weighed with the compelling democratic interest in not silencing vocal political minorities. As the equal opportunities requirement has functioned in practice, it has failed to fulfill its objectives. Instead of promoting fair treatment among candidates, it has resulted in unfair treatment. Instead of promoting the dissemination of the personally stated views of all candidates, it has tended to inhibit all broadcasting presentation of candidates. When all candidates are denied access to broadcast facilities, it is the lesser known candidates, who need the exposure to develop a following, that are treated less than equally or fairly.

The primary obstacle has been the adherence to the concept of *equal* time . A satisfactory manner by which to surmount this obstacle would be to require that proportional amounts of time, rather than equal time, be granted on an equal basis. Such an adjustment would be appropriate for both paid and free time. If proportionate time were based upon the support a candidate could demonstrate he possessed, broadcasters would be less inhibited in presenting candidates because their obligation would be less extensive and their audiences would not be subjected to long exposure of minority candidates. The right of vocal minorities to gain some access to the broadcast media would be protected and such opportunities might arise more often because individual broadcasters would be less likely to exclude all candidates. Minorities would thus be provided a greater opportunity to attract followings and thereby to become entitled to greater proportions of time in future campaigns.

That responsible minority parties might be amenable to a proportional time requirement is demonstrated by the testimony of Norman Thomas of the Progressive Party in 1952 before a Senate committee considering amendments to section 315. He

made a suggestion modelled upon the British system and supported by many of the arguments given above.[162]

Formulating a definition of proportionate time which in practice will avoid the problems and achieve the objectives set forth above without creating new problems raises several issues. To encourage the presentation of views and to guarantee candidates qualifying only for small proportions of time a meaningful amount of time to reply to major candidates making relatively short appearances, it would seem wise to set a minimum grant to which a candidate may be entitled. If no candidate has exceeded this minimum, however, proportions are meaningless, no great burden is involved for broadcasters, and equal time should be granted.

If a minimum grant is required, the objective of limiting minority candidates to proportionate time will be subverted if the proportion is to be determined on the basis of each appearance by an opponent. Minor candidates would receive a disproportionately large amount of time if they were granted their minimum time on each occasion an opponent appears, since major candidates often make several brief appearances rather than one lengthy appearance. On the other hand, if broadcasters may accumulate time granted major candidates until it is sufficiently great to entitle a minority candidate to the minimum grant, the appearances of the minor candidate may be so long delayed as to negate the potential effect of his broadcast. An appropriate compromise would seem to be to require weekly computations of proportionate time based upon total appearances by an opponent during the week.

Setting the proper proportions is extremely difficult. Because the fortunes of candidates and parties fluctuate and because the allocation of broadcasting time should not discriminate among candidates effectively competing with each other, it would seem best to apportion time equally among all candidates who can demonstrate prescribed minimum levels of support and proportionately among candidates demonstrating support above and below the various prescribed levels.

There are various ways in which candidates can demonstrate

162. *Hearings on Proposed Amendments to the Federal Corrupt Practices Act Before the Subcommittee on Privileges and Elections of the Senate Committee on Rules and Administration*, 82nd Cong., 1st & 2d Sess. 192-93 (1951-52).

support, and to avoid prejudicial treatment of some candidates, all should be permitted. The most natural means would be to examine the percentage of the total vote received by the nominee of the candidate's party in the previous election. This test, however, will not always be applicable because independent candidates may run, new political parties may be formed, and parties may have grown significantly since the previous election. Consequently, candidates should be able to demonstrate the extent of their support by petition. Since it would be practically impossible to canvass the entire electorate for signatures, petition requirements should be lower than voting requirements. To avoid duplication of effort it would seem sensible to permit the use of petitions which many states require before a candidate may qualify for the ballot. Last a candidate who has run for an office before, such as Theodore Roosevelt, may become the candidate for the same office of a new party formed from a wing of the old. In such a situation it would seem fair to permit the candidate to qualify for proportionate time on the basis of his own previous showing.

Determining workable levels upon which to base grants of equal time and the proportion to be granted within each level is something subject to so many variables that it would be best to make these determinations on the basis of practical experience. Rather than freeze speculative determinations into the statute, it would seem better to incorporate only the general principles and leave the details to be worked out by the Federal Communications Commission in regulations.

The determination of relative support for candidates for party nominations would be exceedingly difficult and subject to great error. Many significant candidates have never previously sought nomination to the particular office, and meaningful petitions would be extremely burdensome upon individual candidates who would not have the party organization at their disposal to collect signatures. Also, at conventions compromise candidates without initial support are often chosen. It would, therefore, seem preferable to retain the equal time requirement for nominating campaigns. Broadcasters can protect themselves by excluding candidates in certain nomination races.

A statutory section and interpretative regulation setting forth the framework for allotting proportionate time are: proposed

section 315 (a) (3), and proposed 47 C.F.R. §§ 73.120(a) (1), 73.290 (a) (1), 73.590 (a) (1), 73.657 (a) (1), Appendix, *infra*. They are set forth as the definition of "proportionately equal opportunity," a term which may be substituted for the term "equal opportunities" presently used in section 315. Proportionately equal opportunities include all of the requirements evolved by the FCC for equal opportunities except that the concept of proportionate time is substituted for that of equal time.

V. The Candidate's Remedy

A remaining problem is how to provide an effective means of enforcing the requirements of section 315. Under the present procedure[163] a candidate who believes he has been denied equal opportunities to which he is entitled may file a complaint with the FCC. This complaint is given priority consideration by the Commission because the Commission realizes that timely action must be taken if aggrieved candidates are to be granted effective relief prior to an election. Usually within days the FCC will issue an informal declaratory ruling on the basis of the information it has collected. Although this ruling is not a formal order of the Commission and the statutory provision granting the right of appeal from FCC decisions use the word "order,"[164] an informal FCC ruling upon a question raised under section 315 appears to be sufficient to permit a party feeling himself aggrieved to appeal directly to the Court of Appeals.[165]

Once a ruling has been made, broadcasters usually comply, but there is no effective means to compel them to do so if they refuse. Action must be taken quickly since the only appropriate relief is broadcasting time before the election. There is no post-election remedy available to a defeated candidate. In 1956 Lar Daly sought a declaration that he was a legally qualified candidate for the Republican nomination for president, but he failed to submit adequate proof prior to the nominating election.[166] After the Republican Convention had nominated Eisenhower, but

163. See Supplement to Use of Broadcast Facilities, *supra* note 103.
164. 48 Stat. 1093 (1934), 47 U.S.C. § 402(a) (1958).
165. Brigham v. FCC, *supra* note 110 (dictum).
166. Lar Daly, *supra* note 33.

before the general election, his complaint was dismissed as moot since he was no longer a candidate and therefore had no right to equal time.[167] There was, therefore, no longer an actual controversy.

If a broadcaster wrongfully denies a candidate equal opportunities after the Commission has ruled he is entitled to them, the candidate does not even have a right to recover damages. In 1959 after the FCC had ruled that Lar Daly was entitled to equal opportunities as a result of Mayor Daley's appearances, CBS failed to grant him the time to which he was entitled. When he subsequently sued for damages, the courts held that section 315 (a) did not authorize the bringing of a private cause of action to recover damages for its violation.[168] The Court of Appeals felt the purpose of the statute was regulation in the public interest rather than the creation of private rights.

If a broadcaster fails to comply with an FCC ruling under section 315, it would seem that a candidate could seek injunctive relief in a federal district court.[169] The statutory provision authorizing this remedy, however, also requires an order of the Commission upon which to act. Even though courts consider an informal declaratory ruling by the FCC an order for purposes of appeal, they may well be more reluctant to require of a broadcaster positive action against his interests upon the basis of such an informal ruling. Were the Commission to issue formal orders, decision-making would be greatly delayed and, as noted before, speed is essential. For this reason it has been the Commission's policy to encourage negotiation between the licensees and candidates seeking broadcast time to make arrangements mutually agreeable to all parties.[170]

Furthermore, the injunctive procedure seems generally unworkable in the context of political campaigns. The process is time-consuming. A hearing is required by statute. The facts should be carefully reviewed by the court. An erroneous decision would technically require the broadcaster in turn to grant opportunities to all other candidates, although the time factor would virtually eliminate this risk in practice. If a broadcaster has

167. *Ibid.*

168. Daly v. Columbia Broadcasting System, Inc., 309 F.2d 83 (1962), *affirming* Daly v. West Central Broadcasting Co., 201 F. Supp. 238 (1962).

169. 48 Stat. 1092 (1934), 47 U.S.C. § 401(b) (1958).

170. Supplement to Use of Broadcast Facilities, *supra* note 103.

appealed an FCC ruling, injunctive relief should be stayed until the decision upon appeal has been rendered. Otherwise, the broadcaster's appeal might become moot because the broadcaster would have had to grant the time to which he was objecting. Were this the situation, appeals by broadcasters would be encouraged to delay final resolution until after the election when the issue would become moot.

It does not appear that candidates could by-pass the FCC and appeal directly to the courts for relief. In *Massachusetts Universalist Convention v. Hildreth and Rogers Co.*[171] the court dismissed a suit to recover damages and to require the defendant to provide broadcasting facilities for the delivery of a religious sermon with the following statement.[172]

> The enforcement of the Act and the development of the concept of public interest under the Act are thus entrusted primarily to an administrative agency. The only function of the courts in the enforcement of the Act is the exercise of the right to enforce or review orders of the Commission under Sections 401 and 402 of the Act.

Although the case is not directly in point, it does indicate that the courts will only provide relief after the FCC has orginally made a ruling. Effective enforcement of section 315 must therefore be provided by the FCC itself, but the means open to it are also ineffective in the context of political campaigns.

The FCC is authorized to suspend a broadcaster's license for violations of the Communications Act[173] and to revoke a license for willful or repeated violations of the Act or regulations adopted pursuant to it.[174] These powers, however, provide no relief for an aggrieved candidate except insofar as they deter a broadcaster from denying him equal opportunities, and their deterrence value does not seem great in the area of political broadcasting. As the FCC pointed out in its decision in *E. A. Stephens,* it is reluctant to revoke a broadcaster's license and thereby deprive the public of a valuable service.[175] It is impracti-

171. 183 F.2d 497 (1st Cir. 1950).
172. *Id.* at 500.
173. 48 Stat. 1082 (1934), as amended, 50 Stat. 190 (1937), 47 U.S.C. § 303(m)(1)(A) (1958).
174. 66 Stat. 716 (1952), as amended, 74 Stat. 893 (1960), 47 U.S.C. § 312(a)(4) (Supp. V, 1964).
175. *Supra* note 129.

cal to imagine the FCC suspending the license of stations owned by CBS because Lar Daly was denied a few minutes of broadcasting time to which he was entitled. The broader public interest simply would not be served by such an action. In fact, there is no evidence that the FCC has ever suspended or revoked a broadcaster's license for unfair political broadcasting.[176]

Furthermore, the threat of suspension or revocation is a remote one. Such action would probably be taken only after a thorough review of a broadcaster's overall performance, and such a review is made regularly only at three year intervals when licenses are renewed.[177] Such a comprehensive review makes it less likely that a suspension would result from a single infraction regarding a political candidate.

The FCC also may issue cease and desist orders,[178] but this power is of little use in dealing with denials of equal opportunities because such orders may be issued only after a hearing, and this hearing cannot be held sooner than thirty days following the service of a show cause order upon the licensee involved.[179]

Last, fines and even imprisonment for an individual in certain circumstances may be imposed for willful and knowing violations of the Act or of rules and regulations prescribed pursuant to it.[180] Since these are penal sanctions, however, it is extremely unlikely they would be applied as a result of section 315 violations. Even if fines were imposed, they would provide no relief for the individual candidate.

As the situation now exists, therefore, all a broadcaster must do to avoid an equal opportunities burden is stall until the election passes. After the election it seems he has little to fear as a result of neglecting his section 315 obligations.

It would seem wise to provide a more effective means of enforcement so that the fortunes of a candidate would not be dependent upon a broadcaster's discretion. But what is the proper solution? It must enable the candidate to secure time to which he is entitled before an election; its application must be quick and effective; it should motivate broadcasters to fulfill their obli-

176. See Branscomb, *supra* note 54, at 75.

177. 48 Stat. 1083 (1934), as amended, 74 Stat. 889 (1960), 47 U.S.C. § 307(d) (Supp. V, 1964).

178. 66 Stat. 716 (1952), as amended, 74 Stat. 893 (1960), 47 U.S.C. § 312(b) (Supp. V, 1964).

179. 66 Stat. 716 (1952), 47 U.S.C. § 312(c) (1958).

180. 48 Stat. 1100 (1934), 47 U.S.C. §§ 501-02 (1958); 48 Stat. 1101 (1934), as amended, 74 Stat. 894 (1960), 47 U.S.C. § 503 (Supp. V, 1964).

gations. Damages alone are inadequate because the candidate will receive them only after the election. Broadcasters should be protected from frivolous claims. The candidate should be able to take the initiative, and pre-election administrative procedures should be at a minimum if relief is to be quickly granted. Relief should be designed to provide broadcasting time rather than money.

Proposed section 315 (g) seems to satisfy these requirements. It permits a candidate who feels he has been denied section 315 broadcasting opportunities to which he believes himself entitled to immediately purchase that time from another broadcaster. After the campaign if it is determined that he actually was entitled to these opportunities, he may recover from the broadcaster refusing the time the additional expense he incurred in purchasing that opportunity from another broadcaster. Litigation will occur after the election when time is no longer a critical factor. Broadcasters will be protected from frivolous claims because a candidate will have to be sure of his case if he is to take the financial risk. Cooperating broadcasters are protected from demands for equal opportunities by other candidates by a special exemption. Whether other broadcasters will cooperate can only be determined by experience. Damages under this provision are readily adaptable to the needs of each case. It is thus a preferable alternative to fixed damages. Provision is made for interest and attorneys' fees so that a candidate wrongfully aggrieved will have suffered no financial loss. A one year statute of limitations seems adequate because the full extent of damages may be readily determined immediately after the election.

VI. Conclusion

The revised version of section 315 and interpretive regulations, found in the Appendix, which have been evolved from the preceding discussion incorporate the conclusions reached in this paper. They attempt to protect and to balance the legitimate private interests involved with candidate broadcasting in a manner which will best serve the public's interest in comprehensive presentation of the news and of the candidates. This version of section 315 should be compared with the present section 315, set forth in footnote 2, *supra*, which it substantially incorporates.

APPENDIX

Section 315. *Broadcasts by political candidates.*

(a) *Definitions.*

As used in this section these terms shall have the following meanings.

(1) *Legally qualified candidate.* A "legally qualified candidate" is a person seeking nomination for, or election to, an office —

(A) who has met the qualifications prescribed by law to hold the office; and

(B) (I) who has done, or has had done on on his behalf, all that is required by law to qualify his name to appear on either the general election ballot or a party primary election ballot for the office, or

(II) who has publicly announced his candidacy for the nomination of a party nominating convention for the office, or

(III) who presently holds the office, unless he has in good faith publicly announced his intention not to stand for re-election; but

(C) a legally qualified candidate for President or Vice President in a general election campaign must have done, or have had done on his behalf, all that is required by law to qualify his name, or the names of presidential electors pledged to vote for him, to appear on the general election ballots of at least three (3) states.

(2) *Election period.* An "election period" is both the eight weeks immediately preceding a general election and the four weeks immediately preceding a party primary election or a party nominating convention.

(3) *Proportionately equal opportunity.* A "proportionately equal opportunity" is a similar chance for a candidate to use all facilities and to take advantage of all services under the same regulations and at parallel rates —

(A) preceding a party primary election or a party nominating convention for an equal length of time, and

(B) preceding a general election for a length of time which reflects within broad ranges the support which a candidate possesses relative to the support of other legally qualified candidates for the office.

(I) A candidate shall have the burden of demonstrating the extent of his support.

(II) A candidate may demonstrate his support by —

(i) reference to the percentage of the total popular vote in the immediately preceding election for the office polled by his present political party's nominee, or

(ii) reference to the percentage of the total popular vote in one of the two (2) immediately preceding elections for the office polled by himself, or

(iii) a petition signed by electors qualified under state law and residing in his election district.

(III) When a candidate is seeking election to a newly created office, petition requirements shall be based upon the total popular gubernatorial vote in the immediately preceding election cast in the candidate's election district.

(IV) The amount of time to which a candidate is entitled shall be computed on the basis of the total time granted an opponent for each seven day period preceding an election, but the time granted presidential candidates pursuant to subsection (d) shall not be included in making this computation.

(V) If a candidate is entitled to proportionately equal opportunity, he is entitled to at least two (2) minutes, unless no legally qualified candidate receives more than two (2) minutes, in which case he is entitled to equal time.

(b) *General requirement.*

During an election period if a licensee shall permit a legally qualified candidate for public office to use a broadcasting station, he shall afford proportionately equal opportunities to all other such candidates for that office in the use of such broadcasting station.

(c) *Exceptions*

The following appearances shall not be deemed uses of a broadcasting station within the meaning of this section:

(1) a legally qualified candidate on —

(a) a bona fide newscast, or

(b) a bona fide news interview, or

(c) a bona fide news documentary (if the appearance of the candidate is incidental to the presentation of the subject or subjects covered by the news documentary), or

(d) on-the-spot coverage of bona fide news events (including but not limited to political convention and activities incidental thereto), and

(2) the President on —

(a) a bona fide presentation during the election period preceding a party presidential primary election or a party presidential nominating convention of a report by the President on a matter of current national or international importance, or

(b) a bona fide presentation during the election period preceding a general presidential election of a single report by the President on a current international crisis or significant development in connection therewith directly affecting the United States, but only the initial ten (10) minutes of such report.

(d) *Presidential campaign broadcasting.*

(1) *Time to be provided without charge.* Each week during the election period preceding a general presidential election all licensees shall make available without charge at least one hour of continuous prime broadcasting time to be apportioned among legally qualified candidates for President.

(2) *Effect of notice.* A licensee shall grant a proportionately equal opportunity to use the time provided under this subsection to every legally qualified candidate who notifies the Commission at least one week prior to the time made available of his intention to use such time.

(3) *Effect of failure to provide notice.* A candidate who fails to notify the Commission in the manner prescribed in paragraph (2) of this subsection shall neither be entitled to a portion of the time provided under this subsection nor to a proportionately equal opportunity based upon an opponent's use of the time provided under this subsection.

(4) *Basis for allocating time.* The determination of proportionately equal opportunities to use the time provided under this subsection shall be based upon the time to be used by the candidate entitled to the greatest proportion of time.

(e) *Restrictions.*

(1) *Censorship.* A licensee shall have no power of censorship over material broadcast under the provisions of this section.

(2) *Charges.* The charges made for the use of a broadcasting station for any of the purposes set forth in this section shall not exceed the charges made for comparable use of such station for other purposes.

(f) *Extent of the obligation.*

(1) *Use.* No obligation is imposed by this section upon a licensee to allow the use of its station by any legally qualified candidate, except as provided in subsection (d) (1).

(2) *Other obligation.* Nothing in this section shall be construed as relieving broadcasters, in connection with the presentation of newscasts, news interviews, news documentaries, on-the-spot coverage of news events, and reports by the President, from the obligation imposed upon them under this chapter to operate in the public interest and to afford reasonable opportunity for the discussion of conflicting views on issues of public importance.

(g) *Candidate's remedy.*

(1) *Recovery authorized.* A legally qualified candidate may maintain an action in a court of competent jurisdiction against a licensee denying him proportionately equal opportunities to which he is entitled under this subsection to recover the additional expenses incurred by such candidate to obtain comparable opportunities from another licensee, plus interest on the amount of such expense and reasonable attorney's fees.

(2) *Statute of limitations.* An action brought under this subsection must be commenced within one year of the conclusion of the election period during which the cause of action arises.

(3) *Co-operating licensees protected.* A licensee granting opportunities in good faith as a substitute for proportionately equal opportunities alleged by a legally qualified candidate to have been improperly denied him by another licensee need not afford proportionately equal opportunities to other legally qualified candidates claimed as a result of the grant of a use under this subsection.

(h) *Regulations.*

The Commission shall prescribe appropriate rules and regulations to carry out the provisions of this section.

Proposed Amendment to 47 C.F.R. §§ 73.120, 73.290, 73.590, 73.657 (1965)

(a) *Definitions.*

(1) *Proportionately equal opportunity.* A "proportionately equal opportunity" is a similar chance for a candidate to use all

facilities and to take advantage of all services under the same regulations and at parallel rates —

(A) preceding a party primary election or a party nominating convention for an equal length of time, and

(B) preceding a general election —

(I) for an equal length of time if —

(i) the candidate in one of the two (2) immediately preceding elections for the office contested or his present political party's nominee in the immediately preceding election for the office polled at least twenty (20) per cent of the total popular vote cast, or

(ii) the candidate submits, or has submitted on his behalf, a petition signed by electors qualified under state law and residing in his election district numbering at least eight (8) per cent of the total popular vote cast in the immediately preceding election for the office contested; or

(II) for one half (½) the length of time if —

(i) the candidate in one of the two (2) immediately preceding elections for the office contested or his present political party's nominee in the immediately preceding election for the office polled at least five (5) per cent but less than twenty (20) per cent of the total popular vote cast, or

(ii) the candidate submits, or has submitted on his behalf, a petition signed by electors qualified under state law and residing in his election district numbering at least three (3) per cent of the total popular vote cast in the immediately preceding election for the office contested; or

(III) for one sixth (1/6) the length of time if —

(i) the candidate in one of the two (2) immediately preceding elections for the office contested or his present political party's nominee in the immediately preceding election for the office polled at least one (1) per cent but less than five (5) per cent of the total popular vote cast, or

(ii) the candidate submits, or has submitted on his behalf, a petition signed by electors qualified under state law and residing in his election district numbering at least one half of one (.5) per cent of the total popular vote cast in the immediately preceding election for the office contested; or

(IV) for one thirtieth (1/30) the length of time if —

(i) the candidate in one of the two (2) immediately preceding elections for the office contested or his present political party's nominee in the immediately preceding election for the office failed to poll at least one (1) per cent of the total popular vote cast, and

(ii) the candidate fails to submit, or have submitted on his behalf, a petition signed by electors qualified under state law and residing in his election district numbering at least one half of one (.5) per cent of the total popular vote cast in the immediately preceding election for the office contested.

(V) Petitions required under state law to permit a candidate to qualify his name to appear on the ballot may be used in total or partial fulfillment of the requirements of this subsection.

(VI) When a candidate is seeking election to a newly created office, petition requirements shall be based upon the total popular gubernatorial vote in the immediately preceding election cast in the candidate's election district.

(VII) If the boundaries of an election district have been altered since an election upon which a percentage of the total popular vote required by this subsection is based, reference shall be made to the former election district most similar to that currently existing to determine the prescribed percentages of the vote and the numbers necessary to fulfill the percentage requirements.

(VIII) The amount of time to which a candidate is entitled shall be computed on the basis of the total time granted an opponent for each seven day period preceding an election, but the time granted presidential candidates without charge pursuant to section 315(d) shall not be included in making this computation.

(IX) The time granted presidential candidates pursuant to section 315(d) shall be apportioned as if it were the total time granted such candidates during a seven day period preceding an election.

(X) If a candidate is entitled to proportionately equal opportunity, he is entitled to at least two (2) minutes, unless no legally qualified candidate receives more than (2) minutes, in which case he is entitled to equal time.

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A State Municipal Administrative Procedure Act

This Act extends the coverage of existing procedural safeguards to administrative proceedings at the municipal and county levels. The draftsmen have attempted to adapt these safeguards to the problems of administrative regulation at such levels without destroying the flexibility now possessed by many local boards. The ultimate question to be tested by this proposal, however, is whether this type of legislation can find useful employment in local government.

Municipal licenses, required for a multitude of activities from altering buildings and selling liquor to peddling ice cream, are a vital part of the everyday life of the small American businessman. The current procedures under which licenses are granted or revoked vary widely from state to state and even among the various municipalities and counties within a singe state. The precedures themselves are generally of an *ad hoc* nature, and the potential dangers in the delegation of such broad discretion to country and municipal agencies[1] are of increasing concern as the changing character of American towns and cities lessens the likelihood of social pressure operating to prevent arbitrary action in licensing. Because expensive litigation is unlikely to help the victims of arbitrary action, and because the procedural questions involved do not lend themelves easily to intervention and correction by the judiciary, the protection of procedural rights in municipal licensing will only come through legislation aimed specifically at establishing general procedural requirements. Awareness of this problem led to the adoption in New York in 1962 of Senate Resolution No. 103 which directed the Law Revision Commission to study both state and local procedure and submit appropriate legislation prescribing general administrative standards.

A great number of states have administrative procedure acts[2]

1. This is not a new problem. See Note, *The Delegation of Discretion in Massachusetts Licensing Statutes,* 43 HARV. L. REV. 302 (1929), and *Opportunity to be Heard in License Issuance,* 101 U. PA. L. REV. 57, 69 (1952).

2. The following states have administrative procedure legislation: Alaska Stat. §§ 44.62.010 to .650 (1962); Ariz. Rev. Stat. Ann. §§ 12-901 to -914; §§ 41-1001 to -1008 (1956); Ark. Stat. Ann. §§ 5-701 to -725 (Supp. 1965); Cal. Gov't. Code §§ 11370-11529; Colo. Rev. Stat. Ann. §§ 3-16-1 to -16-6 (1963); Conn. Gen. Stat. Rev.

governing state agencies; the model act presented here is an attempt to extend procedural safeguards to the municipal and county level. Although the act is entitled "Municipal Administrative Procedure Act", its terms are intentionally broad enough to include any relevant action carried on by county, village, or township government. A general procedural scheme is presented which includes not only action involving specific parties, but the general rule-making power of the agencies as well. The scheme is broad enough to allow to the various agencies freedom to deal with specific local, substantive problems, yet direct enough to establish a general and uniform system calculated to minimize the dangers of arbitrary action and to preserve basic procedural fairness.

A recent case in the federal courts indicates that the Fourteenth Amendment does require such fairness even in the consideration of license applications. In *Hornsby v. Allen*,[3] Judge Tuttle held that the consideration of liquor license applications was an adjudicative act, that consequently due process required that notice, a hearing, and other safeguards be provided, and finally that the privilege doctrine was irrelevant. A similar result was reached by the Massachusetts Supreme Judicial Court in the recent case of *Milligan v. Board of Registration in Pharmacy*.[4] Since most cases of municipal licensing are decided in the state courts it is, therefore, unfortunate that the opinion in *Hornsby v. Allen* does not meet squarely the arguments of lack of sufficient

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§§ 4-41 to -50 (Supp. 1963); Fla. Stat. §§ 120.011-.017, .09, .20-.28, .30-.331 (1963); Hawaii Rev. Laws §§ 6C-1 to -18 (1961); Ill. Rev. Stat. ch. 110, §§ 264-79 (Smith-Hurd 1961); Ind. Ann. Stat. §§ 63-3001 to -3030 (1961); Iowa Code §§ 17A.1-.15 (Supp. 1964); Kan. Gen. Stat. Ann. §§ 77-401 to -414 (Supp. 1963); Me. Rev. Stat. Ann. tit. 5, §§ 2301 - 2452 (1964); Md. Ann. Code art. 41, §§ 244-56 (Supp. 1965); Mass. Gen. Laws Ann. ch. 30A, §§ 1-17 (1961, Supp. 1964); Mich. Stat. Ann. §§ 3.560 (7)-(21.10) (1961); Minn. Stat. §§ 15.0411-.0426 (Supp. 1964); Mo. Rev. Stat. §§ 536.010-.140 (Supp. 1964); Neb. Rev. Stat. §§ 84-901 to -919 (Supp. 1963); N.H. Rev. Stat. Ann. §§ 541:1-:22 (Supp. 1963); N.Y. Const. art. IV, § 8; N.Y. Civ. Prac. §§ 7801, 7803-05; N.C. Gen. Stat. §§ 143-195 to -198.1, - 306 to -316 (1964); N.D. Cent. Code §§ 28-32-01 to -22 (1960); Ohio Rev. Code Ann. §§ 119.01-.13 (Page Supp. 1964); Okla. Stat. tit. 75, §§ 301-25 (Supp. 1963); Ore. Rev. Stat. §§ 183.010-.510 (1963); Pa. Stat. Ann. tit. 71, §§ 1710.1-.51 (Supp. 1964); R.I. Gen. Laws Ann. §§ 42-35-1 to -18 (Supp. 1964); S.D. Code §§ 33.4201-.4216, 65.0106 (Supp. 1960); Tenn. Code Ann. §§ 4-501 to -506, 27-901 to -914 (1955); Va. Code Ann. §§ 9-6.1-.14 (1964); Wash. Rev. Code §§ 34.04.010-.930 (1965); Wis. Stat. §§ 227.01-.26 (Supp. 1965).

3. 326 F.2d 605 (5th Cir. 1964). The District Court dismissal was on the basis that due process is not required of a legislative body. The licensing there was, as is often the case, a function of the Board of Aldermen.

4. 348 Mass. ———, 204 N.E. 2d 504 (1965).

interest, and privilege which those courts have traditionally found controlling. Nor does it give them much guidance as to what procedure is required by the due process clause. While even a book-length treatment might not do justice to these problems, one must ask in each case the following questions: does the license applicant have a sufficient interest to warrant constitutional protection, what relevance does the privilege doctrine have to the problem, and what procedure will satisfy the due process requirement?

In adjudicative proceedings, an opportunity to be heard is normally said to be required by the due process clauses of the Fifth and Fourteenth amendments where there is a sufficient individual interest involved to overcome conflicting state interests.

In licensing, the only possible conflicting state interest is freedom not to consider the applicants' arguments and to make reasoned or unreasoned decisions on undisclosed bases; which freedom, being an invitation to discriminatory and arbitrary action, is, in the opinion of the draftsmen, not one deserving protection.[5] In fact, there are several state interests which *favor* procedural fairness. First, decisions are more likely to be just when there is an opportunity for the affected party to be heard. Second, where there is procedural fairness the applicant is able to participate meaningfully in the process and knows that he has been fairly treated. While state interests alone are not sufficient bases for determining that an individual has a due process right to be heard, certainly where the state and individual interests coincide, the latter need not be great to warrant protection. At stake here is the applicant's "liberty" to use his entrepreneurial talent to acquire capital and set up a liquor store or to engage in other desired activity. As with medical and legal practice this liberty may be reasonably restrained by the state.[6] However, when facts about the individual or applicant are at issue, imposition of restraints without giving him a fair opportunity to present his side of the case is not reasonable. It would seem that the right of the license applicant to due process is, and should be, no less than that of the accountant applying to practice before the Board of Tax Appeals.[7]

5. *But see* note 10 *infra.*

6. Dent v. West Virginia, 129 U.S. 114 (1889), and Schware v. Board of Bar Examiners of New Mexico, 353 U.S. 232 (1957).

7. Goldsmith v. Board of Tax Appeals, 270 U.S. 117 (1925).

In the state courts, the license applicant is almost invariably confronted by the privilege doctrine, on the basis of which the court denies that he has any right to procedural due process.[8] Any attempt to ascribe a single meaning to "privilege" will necessarily result in the conclusion that in dealing with "privileges" the courts act inconsistently and illogically.[9] In most of its uses in the area of due process the term indicates that the court has concluded that the individual's interests are not sufficient to deserve due process clause protection; since this is not an absolute but a determination, the same interest may be properly labeled a privilege in one context and a right deserving due process protection in another.

Due process problems arise in both substantive and procedural contexts.[10] As we have seen, the determination requires a comparison of the individual's interest with the conflicting interests of the state, if any. Substantive due process is a limit on the power of government. It involves a determination that legislation may in some instances conflict with an individual interest which is too important to be sacrificed. But in the area of procedural due process, on the other hand, the state interest may be coincident with the individual interest. Conflict is not inevitable.

It is occasionally suggested that municipal licensing agencies, because they must perform a vital role in protecting the neighborhood on a limited budget, must have the freedom to act on a "hunch". Yet even if this be accepted as a strong state interest (or a necessity) it would seem that little, if anything, is sacrificed by giving the individual an opportunity, if he desires it, to attempt to persuade the board to act in his favor. The result might even be better-educated "hunches".

Moreover, that an activity such as liquor selling has been deemed a privilege for the purpose of determining that legislation outlawing it is not a violation of the requirement of substantive due process *is not,* and *should not be,* determinative of whether there are sufficient interests involved to require compliance with procedural due process in the processing of liquor applications.[11] In fact, it may well be argued that the fewer the

8. Commonwealth v. Kinsley, 133 Mass. 578 (1882).

9. 1 DAVIS, ADMINISTRATIVE LAW § 7.12 (1958).

10. For an interesting discussion of the two contexts and their relationships to each other, see Justice Jackson's dissenting opinion in Shaughnessy v. U.S. *ex rel.* Mezei, 345 U.S. 206, at 222 (1953).

11. DAVIS, *op. cit. supra* note 9, § 7.19.

substantive restraints upon government power the more important the procedural restraints become. Therefore, courts should not feel reluctant to find that sufficient interests are involved to require procedural fairness in cases involving activities which, for substantive due process purposes, have been labeled privileges.

Unhampered by notions of privilege, the state courts, guided by such federal decisions as *Hornsby,* can determine whether a particular license applicant has a sufficient interest to have a right to procedural fairness. In doing so, an understanding of what procedural fairness requires may lead the courts to mistaken conclusions of conflict between the interests of the state and the individual. Constitutional requirements of procedural fairness do not relate to substantive rules or to their formulation but only to their application to the individual. The procedure must allow the applicant the maximum opportunity to participate in the process and contest disputed issues of fact. Only where there is a legitimate dispute as to an adjudicative fact, *i.e.,* a fact relating to the applicant, does procedural fairness require a trial-type hearing with opportunities for confrontation and cross-examination. Where the facts are not disputed, procedural fairness requires only that the individual be permitted to argue to the board the merits of his view on the applicability of the rules to his case or, if the rule is obviously applicable, to argue, in the context of a rule-making hearing, that the rule should be changed. The proposed statute meets the requirements just discussed by the establishment of the following procedure.

Action by the licensing agency will be started either with the submission of an application for a license or with a complaint that a license should be revoked. In either case the board will look at the evidence already before it, conduct preliminary investigation formally or informally, and reach a tentative conclusion. This conclusion, with the findings supporting it, will be delivered to the applicant or to the complainant, or both, and, where appropriate, be published. A party will either (1) dispute the factual findings, (2) agree with the findings of fact but assert that they do not support the intended decision, (3) agree with both of these but argue that the rule should be changed, or (4) agree with the decision. If the first, then he will be entitled to a trial-type hearing with confrontation and cross-examination; if the second, the hearing may be limited to arguments to the

board with or without briefs; if the third, the board, as in any such application, would hold a legislative-type hearing. In addition, there will be an opportunity for judicial review on the record.

The congruence of state and individual interests, the presence of an individual interest in entrepreneurial liberty, and the misapplication of the privilege doctrine may be seen throughout commercial licensing. It was with attention to fairness requirements, as well as the need throughout municipal procedure for more standardized and understandable procedures, that the proposed statute was drafted. In the areas of rule-making and judicial review heavy reliance has been placed on the work already done and presented in the Model State Administrative Procedure Act prepared by the National Conference of Commissioners on Uniform State Laws,[12] the Massachusetts Administrative Procedure Act,[13] and the New York Law Revision Commission's 1965 Report and Recommendations Relating to an Administrative Procedure Act, an Administrative Rule Making Procedure Act, and a Division of State Administrative Procedure Law.[14] In the area of judicial review the statute presented here, like the others in the field, leaves the most difficult and subtle issues to the dialogue between the courts and the scholars.[15] Unlike the New York proposal and the Federal Administrative Procedure Act,[16] this statute does not deal with the difficult questions of separation of functions, because of a belief that the cost of such separation at the municipal level would outweigh the advantages to be gained and the interests compromised.

The adoption of any such statute as this will necessarily be preceded by much study of the proceedings to which it is likely to apply in a particular state and submission to those officials who are to operate under it. Such a process would necessarily result in many modifications and adaptations, but it is the Bureau's hope that the legislative ideas proposed here may be helpful to those working in this field.

12. 9C U.L.A. 179 (1957, Supp. 1965).
13. Mass. Gen. Laws Ann. ch 30A, §§ 1-17 (1961, Supp. 1964).
14. N.Y. Legis. Doc. No. 65(A) (1965).
15. See generally Jaffe, Judicial Control of Administrative Action (1965).
16. 60 Stat. 237 (1946), 5 U.S.C. §§ 1001-1011 (1958).

THE STATUTE

PART I. SHORT TITLE; DEFINITIONS; RULES OF PRACTICE

SECTION 101. *Short title.*

This Act may be called "The Municipal Administrative Procedure Act of [19—]."

SECTION 102. *Definitions.*

(a) "Affected person" means the person or persons directly benefited or injured by a proceeding of a board. In licensing proceedings it means the license applicant or holder. This includes any person named or admitted as a party or entitled by constitution or statute to be so admitted.

(b) "Board" means any municipal [, county, or township] board, commission, committee or office authorized by law or ordinance to make rules or adjudicate individualized actions [, except . . .].

(c) "Individualized action" is a proceeding before a board in which the legal rights, duties, or privileges of specific parties are to be determined. It includes, but is not limited to, license applications, renewals, and revocation. It does not include rule-making procedure except when the proposed rule will affect fewer than six known parties.

(d) "Interested person" means any person with a significant interest in a proceeding. This need not be a property interest.

(e) "Person" means any individual, partnership, corporation, association, or public or private organization of any character, other than the board engaged in the particular rule-making, declaratory ruling, or individualized action.

(f) "Rule" includes the whole or any part of every rule, regulation, standard or other requirement of general application and future effect adopted by a board to implement or interpret the law enforced or administered by it, but does not include:

(1) advisory rulings issued under section 206 of this Act; or

(2) rules concerning only the internal management or discipline of any board, and not directly affecting the rights of, or the procedures available to, the public or that portion of the public affected by the board's activities; or

(3) decisions issued in individualized actions; or

(4) interpretative statements and statements of general policy [; or

(5) rules relating to the use of public works, including streets and highways, when the substance of such rules is indicated to the public by means of signs or signals].

SECTION 103. *Rules of practice.*

Each board, in addition to fulfilling other rule-making requirements imposed by law, shall adopt rules governing the procedures prescribed by this Act. Such rules shall include rules of practice before the board, together with forms and instructions.

PART II. RULE-MAKING

SECTION 201. *Rule-making where hearings are required by law.*

Prior to the adoption or amendment of any rule as to which a hearing is required by any provision of the [General Laws or town ordinances] [or any other rule the violation of which is punishable by fine or imprisonment, except a rule of board practice or procedure] a board shall comply with the following procedure:

(a) The board shall, within the time specified by any provision of the [General Laws or town ordinances], or, if no time is specified, then at least 14 days prior to the public hearing:

(1) publish notice of such hearing in such manner as is specified by any provision of the [General Laws or town ordinances], or, if none is specified, then in such newspapers, and, where appropriate, in such trade, industry, or professional publications as the board may select; and

(2) notify any person specified by any provision of the [General Laws or town ordinances], and, in addition, any interested person or group filing a written request with the board, such request to be renewed yearly in December, for notice of hearings on rules which may affect them. Notification shall be by mail or otherwise to the last address specified by the person or group.

(b) The public hearing shall comply with any requirements imposed by law, but shall not be subject to the provisions of this Act governing individualized actions.

(c) For the purposes of this section, the notice shall:

(1) refer to the statutory authority under which the action is proposed;

(2) give the time and place of the public hearing;

(3) either state the express terms or describe the substance of the proposed regulation or amendment, or state the subjects and issues involved; and

(4) include any additional matter required by any provision of the [General Laws or town ordinances].

(d) This section does not relieve any board from compliance with any provision of the [General Laws] requiring that its regulations be approved by designated persons or bodies before they become effective.

SECTION 202. *Rule-making in other cases.*

Prior to the adoption, amendment, or repeal of any rule other than those subject to section 201 of this Act, a board shall comply with the following procedure:

(a) The board shall, within the time specified by any provision of the [General Laws or town ordinances], or, if no time is specified, then at least 14 days prior to its proposed action:

(1) publish notice of its proposed action in such manner as is specified by any provision of the [General Laws or town ordinances], or, if no manner is specified, then in such newspapers, and where appropriate, in such trade, industry, or professional publications as the board may select; and

(2) notify any person specified by any provision of the [General Laws or town ordinances], and, in addition, any interested person or group filing a written request with the board, such request to be renewed yearly in December, for notice of hearings on rules which may affect them. Notification shall be by mail or otherwise to the last address specified by the person or group.

(b) The board shall afford interested persons an opportunity to present, orally or in writing, data, views, or arguments in regard to the proposed action. If the board finds that oral presentation is unnecessary or impracticable, it may require that presentation be made in writing.

(c) For the purposes of this section, the notice shall:

(1) refer to the statutory authority under which the action is proposed;

(2) give the time and place of any public hearing, or state the manner in which data, views, or arguments may be submitted to the board by any interested person;

(3) either state the express terms or describe the substance of the proposed action, or state the subjects and issues involved; and

(4) include any additional matter required by any provision of the [General Laws or the town ordinances].

(d) This section does not relieve any board from compliance with any provision of the [General Laws] requiring that its regulations be approved by designated persons or bodies before they become effective.

SECTION 203. *Petitions.*

Any interested person may petition a board requesting the adoption, amendment, or repeal of any rule. Each board shall prescribe by rule the procedure for the submission, consideration, and disposition of such petitions. Within 60 days after the submission of a petition, the board shall either deny the petition in writing (stating its reasons for the denial), or initiate rule-making proceedings concerning such petition in accordance with sections 201 or 202 of this Act.

SECTION 204. *Publication.*

(a) All boards shall file with the [town executive-secretary] a certified copy of each rule adopted by it. A rule shall not become effective until after filing.

(b) The [town executive-secretary] shall keep copies of the rules which boards have adopted and filed. They shall be indexed or compiled to permit easy reference. They shall be available for inspection by the public at the [town executive-secretary's] office. Copies of these rules shall be provided for persons requesting such copies upon payment of reproduction costs.

SECTION 205. *Declaratory judgments.*

The validity of any rule may be determined upon petition for a declaratory judgment thereon addressed to the [district court of the county in which the board has its main office,] when it appears that the rule, or its threatened application, interferes with or impairs, or threatens to interfere with or impair, the legal rights or privileges of the petitioner. The board shall be made a party to the proceeding. The declaratory judgment may not be rendered unless the petitioner has first requested the board to pass upon the validity of the rule in question; the board shall give its decision on the validity of a rule in writing. The board or the court shall declare the rule invalid if it finds that it violates constitutional provisions or exceeds the statutory authority of the board or was adopted without compliance with statutory rule-making procedures.

SECTION 206. *Declaratory orders.*

On petition of any interested person, any board may issue a declaratory order with respect to the applicability to any person, property, or state of facts of any rule or statute enforceable by it. A declaratory order, if issued after argument and stated to be binding, is binding between the board and the petitioner on the state of facts alleged, unless it is altered or set aside by a court. Such an order is subject to review in the [district court] in the manner hereinafter provided for the review of decisions in individualized actions. Each board shall prescribe by rule the form for such petitions and the procedure for their submission, consideration, and disposition.

PART III. INDIVIDUALIZED ACTION

SECTION 301. *Preliminary order.*

Upon receipt of a request for an individualized action the board shall conduct a preliminary investigation, including in that investigation material in an application form, if one is involved, its files, and information known

to it or its staff. Upon the basis of the information so obtained the board shall make findings of fact and formulate a preliminary order. However, if the board feels that it lacks adequate facts for even a preliminary order, it may order a hearing immediately by complying with section 304.

SECTION 302. *Notice.*

The preliminary order, if there is one, and the accompanying findings of fact shall be delivered to all affected persons with notification that if no hearing is requested, the order shall become final after 30 days. If there is no known person adversely affected, and the decision is that no action be taken, the board may file its order with the [town executive-secretary]. If the board concludes that there are public interests involved in its determination, and its preliminary order is in favor of the affected person, it may publish its preliminary order in the manner similar to that prescribed in section 201(a).

SECTION 303. *Requesting a hearing.*

An affected person may request a hearing by notifying the board of his objection to the preliminary order. This objection shall indicate the findings of fact to which objection is made, if any, or the grounds upon which the person affected alleges the insufficiency of the findings to support the order, or of the authority of the board to issue such an order. In addition, such a person may petition for a change in the rules adopted by the board by complying with section 203.

SECTION 304. *Ordering a hearing; notice of a hearing.*

(a) If it is requested by an affected person in the manner provided in the preceding section, the board shall order the type of hearing appropriate for the determination of the controversy. It may refuse the request only if it finds that the request is made in bad faith. In the absence of such a request the board may order a hearing where the public interest so requires. In either case all affected persons shall be notified of the scheduled hearing and the issues that have been raised. When appropriate such notice shall also be published in the manner provided in section 201(a).

(b) A hearing on the sufficiency of the findings to support the order, or the authority of the board to issue such an order may be limited to oral argument with or without briefs.

SECTION 305. *Record.*

The board shall prepare an official record, which shall include testimony and exhibits in each individualized action, but it shall not be necessary to transcribe stenographic or shorthand notes, or tapes, unless requested for purposes of rehearing or court review.

SECTION 306. *Rules of evidence; official notice.*

(a) Boards may admit and give probative effect to evidence which possesses probative value commonly accepted by reasonably prudent men in the conduct of their affairs. They shall give effect to the rules of privilege recognized by law. They may exclude incompetent, irrelevant, immaterial, and unduly repetitious evidence.

(b) All evidence, including records and documents in the possession of the board of which it desires to avail itself, shall be offered and made a part of the record in the case, and no other factual information or evidence shall be considered in the determination of the action. Documentary evidence may be received in the form of copies or excerpts, or by incorporation by reference.

(c) Every party shall have the right of cross-examination of witnesses who testify, and shall have the right to submit rebuttal evidence.

(d) Boards may take notice of judicially cognizable facts and in addition may take notice of general, technical, or scientific facts within their specialized knowledge in the evaluation of the evidence presented to them. Parties shall be notified either before or during hearing, or by reference in preliminary reports or otherwise, of the material so noticed, and they shall be afforded an opportunity to contest the facts so noticed. Boards may utilize their experience, technical competence, and specialized knowledge in the evaluation of the evidence presented to them.

SECTION 307. *Emergency action.*

A board may take emergency action to be effective immediately:

(a) Where necessary for the public health or welfare; but subject to change after a hearing, if requested, to be held at the earliest convenient time in no case later than [30 days] after the action; or

(b) In other cases where the necessary delay would render the action useless, and where there are no substantial adverse interests affected, except that upon the timely good faith objection of an interested person section 301-304 procedure shall become mandatory.

SECTION 308. *Judicial review.*

(a) Any affected or interested person, aggrieved by a final order in an individualized action, whether such order is affirmative or negative in form, is entitled to judicial review thereof under this Act.

(b) Proceedings for review shall be instituted by filing a petition in the [district court] within [30] days after the order becomes final. Copies of the petition shall be served upon the board and all other parties of record. The court, in its discretion, may permit other parties to intervene.

(c) The filing of the petition shall not stay enforcement of the board's order; but the board may do so, or the reviewing court may order a stay upon such terms as it deems proper.

(d) If the order was made after a hearing, within [30] days after service of the petition, or within such further time as the court may allow, the board shall transmit to the reviewing court the original or a certified copy of the entire record of the proceeding under review; but, by stipulation of all parties to the review proceeding, the record may be shortened. Any party unreasonably refusing to stipulate to a limitation of the record may be taxed by the court for the additional costs. The court may require or permit subsequent corrections or additions to the record when deemed desirable.

(e) If there was no hearing, within [30] days after service of the petition or within such further time as the court may allow, the board shall transmit the findings of fact and the order and a list of those to whom they were sent. In such cases the court shall either affirm the board's decision or, if it finds that it was made in conjunction with unlawful or unconstitutional procedure, it shall remand the case to the board for further proceedings in compliance with this Act, unless justice and expediency require the court to take evidence and make a determination itself.

(f) If application is made to the court for leave to present additional evidence on the issues in the case, and it is shown to the satisfaction of the court that the additional evidence is material and that there were good reasons for the failure to present it in the proceeding before the board, the court may order that the additional evidence be taken before the court or before the board, upon such conditions as the court deems proper. The board may modify its findings and order by reason of the additional evidence and shall file with the reviewing court, to become a part of the record, the additional evidence, together with any modified findings or order.

(g) Review shall be conducted by the court without a jury and shall be confined to the record, except that in cases of alleged irregularities in procedure before the board, not shown in the record, testimony thereon may be taken in court. The court shall, upon request, hear oral argument and receive written briefs.

(h) The court may affirm the order of the board, or remand the case for further proceedings; or it may reverse or modify the decision, if the substantial rights of the petitioners may have been prejudiced because the administrative findings, inferences, conclusions, or decisions are:

(1) in violation of constitutional provisions; or

(2) in excess of the statutory authority or jurisdiction of the board; or

(3) made in conjunction with unlawful procedure; or

(4) affected by other error of law; or

(5) unsupported by substantial evidence in view of the entire record as submitted; or

(6) arbitrary or capricious.

In making the foregoing determinations, the court shall give due weight to the experience, technical competence, and specialized knowledge of the board, as well as to the discretionary authority conferred upon it.

MEMORANDUM

PART I. SHORT TITLE; DEFINITIONS; RULES OF PRACTICE

SECTION 102. *Definitions.*

Words not defined in this section are expected to be construed in a common sense way, or, if they are terms of art, in accord with common law usage. As is typical of statutes in the administrative law area, the definitions play an important role in the statute.

The definition of "affected person" may perhaps best be understood through recognition that there should always be at least one in an "individualized action." Normally, though not necessarily, these will be the "specific parties" referred to in the definition of "individualized actions" as having their "legal rights, duties, or privileges" determined in the proceeding. Such parties are to receive the preliminary orders of a board according to section 302 and may request hearings as provided in section 303. In addition, section 102(c) provides that a rule-making procedure will be treated as an "individualized action" if less than six "affected parties" are involved. This definition, which is the analogue to those of "party" in the Federal Act and in most of the state acts, including the Model State Administrative Procedure Act, presents one of this act's most radical departures. In the others a "party" is defined as either a person named by the board or someone with a statutory or constitutional right to be heard. While such classes are certainly included within it, this definition has been written so that the outer limit of the class shall be determined by whether there is a direct benefit or injury to the person. This avoids the vagaries of constitutional law in this area and establishes a standard more meaningful to a layman using the statute. This provision is particularly applicable to the municipal level where litigation of constitutional rights is likely to be rare and the law in even more doubt than it is on the state or federal levels.

The definition of "board" is intended to include everything. The applicability of the prescribed procedure is to be governed by the type of proceeding, not the type of body conducting the proceeding. This is particularly important in municipal government where many bodies, and particularly the central governing body, are multi-functional. Although the proposed statute includes an "exceptions" clause, the draftsmen do not favor exceptions except where proceedings are governed by pre-existing statutes giving similar protection.

The term "individualized action" was selected instead of "adjudicative proceeding" or "judicial action" to make clear that this is a unique category any interpretation of which should depend on the purposes to be served by municipal administrative procedure requirements, rather than upon a comparison with state or federal statutes involving considerations other than language. As with "affected person" the analogous definitions in the Model State, Proposed New York, and Federal Administrative Procedure Acts are in terms of those cases where some other law requires that action be taken only after a hearing. For the same reasons, the draftsmen chose to have the statute independently determine when such a hearing is to be available. Thus, the determination of whether there shall be a hearing is shifted from the patchwork of varied statutes and constitutional law cases to the uniform standard of this statute. The definition here draws a line between decision-making for general application and decision-making where (1) the affected persons' identities are known to the decision makers and therefore are more likely to play an influential role in the process, and (2) the affected person is likely to be particularly knowledgeable upon the facts relevant to the decision. Another innovation in this area is the inclusion of rule-making procedure when there are less than six known affected parties. There are two fundamental reasons for this addition. First, such a statute as this will get little judicial review and consequently cannot easily be controlled by careful court checking of the generality of a rule. This provision gives a simple and clear determination of when the intended protection is being subverted. Second, in municipal government many rules of general application will in reality apply only to one or a very few persons. Where that is the case, it is hard to see any less reason for their being entitled to a hearing

than when the proceeding is addressed to specific parties by name. They are peculiarly familiar with the adjudicative facts (facts specifically concerning the affected parties), such facts are relevant considerations, and there is the same lack of political power on the side of those affected as is usually emphasized in distinguishing the procedure imposed upon an individual from that applied generally.

The concept of an "interested person" is used to indicate standing to invoke judicial review (section 308), to indicate a sufficient stake in an administrative proceeding to receive notice of proposed rule-making (sections 201 (a) (2) and 202 (a) (2)), to present views under section 202 rule-making, to petition for the adoption, amendment, or repeal of rules (section 203), and to request an advisory ruling (section 206). Therefore, the meaning of the term, determined in the first instance by a board subject to review by the courts, will depend upon the section of the act in which it is used. The purpose of the definition is to establish that the interest need not be a property interest. For example, an "interested person" may be a resident of a neighborhood where a license applicant seeks to establish a bar, or a resident who objects to a zoning plan on esthetic grounds, even though neither of these persons can demonstrate a potential property loss.

The definition of "person" is that employed in the New York State Law Revision Commission draft of an administrative procedure act for the State of New York.[17] By comparison, federal statute[18] would exclude all boards from the definition, whereas the Massachusetts Administrative Procedure Act [19] would include all boards.

The definition of "rule" is taken from the Massachusetts APA[20] with only stylistic changes. Many state administrative procedure acts exclude from the definition of "rule" rules relating to the use of public works, not including streets and highways, when the substance of such rules is indicated to the public by signs or signals. Such a provision is made optional in this act. Its inclusion in state administrative procedure acts is explicable by the existence of other statutes which specify the pro-

17. *Supra* note 14.
18. *Supra* note 16.
19. *Supra* note 13.
20. *Id.* §§ 1(5) (a)-(e) (1961).

cedure for the adoption of rules relating to public works. The choice not to adopt the provision might be based upon the degree of concern which residents of a community have demonstrated in the past over the installation or removal of traffic signs or signals. It is often true that the safety of their children, the success of their businesses, or the character of their neighborhoods may be directly involved. State rules regarding turnpikes, public works, etc., are not likely to have this kind of impact.

PART II. RULE-MAKING

SECTIONS 201 AND 202. *Rule-making.*

Sections 201 and 202 are closely patterned upon the Massachusetts APA.[21] Section 201 provides for procedure when a hearing is required by some statute or ordinance, and, at the option of the legislature adopting this act, it may also provide for the adoption or amendment of a rule the violation of which is punishable by fine or imprisonment. All other cases of rule-making are subject to section 202, which provides that a board *may* limit its rule-making procedure to the consideration of written or oral presentations.

In both sections provisions are made for notice of rule-making as law may require, or in newspapers and publications when there are no legal requirements, or to interested persons or groups who file a request with a board, renewable annually, to receive notice. The content of the notice is specified in detail.

Subsection (b) of section 201 states that the hearing before the board does not have to comply with the procedure established for individualized action.

Section 202 of the act differs from section 3 of the Massachusetts APA in not providing that a board may dispense with the requirements of notice and opportunity to present views when such requirements are found to be unnecessary or contrary to the public interest. The draftsmen feel that there is a danger of abuse of such a provision at the local level, where the persons affected by a rule may be few in number, and relatively weak politically; at the state or federal level, the persons affected by a rule are likely to be many in number and powerful.

21. *Id.* §§ 2, 3.

SECTION 203. *Petitions.*

Section 203 is taken from the Massachusetts APA and the New York Law Revision Commission draft. A board must prescribe procedures for the adoption, amendment, or repeal of a rule. The petitioner must be notified within 60 days of the action the board has taken, and if rule-making procedures are initiated they must comply with the requirements of either section 201 or 202, depending upon the character of the proposed rule.

SECTION 204. *Publication.*

Section 204 (a) provides that a rule is not effective until a certified copy is filed with the [town executive-secretary]. In comparison with other APA's, section 204(b) simplifies the storage and publication requirements in view of the relatively smaller number of rules to be filed and the limited resources and personnel available at the local level.

SECTION 205. *Declaratory judgments.*

This section is taken from the Model State APA.[22] However, the second sentence of the Model Act has been recast to provide that "declaratory judgment may not be rendered unless the petitioner has first requested the board to pass upon the validity of the rule in question." The draftsmen feel that the potential for reducing the number of suits in court outweighs the delay and wasted effort which may result on occasion. Moreover, boards at the local level may be unaware that the rules which they attempt to make or enforce are invalid. This is especially a problem at this level, since at the state or federal level boards are more likely to have the benefit of adequate legal counsel.

SECTION 206. *Declaratory orders.*

Section 206 is taken from the Model State APA. On the petition of an interested person a board may issue a declaratory order. If issued after argument and stated to be binding, it is binding between the board and the petitioner on the state of facts alleged unless it is altered or set aside by a court. The order is subject to review as provided in section 308 of this Act. Each

22. *Supra* note 12.

board shall prescribe by rule the form for such petitions and the procedure for their submission, consideration, and disposition.

PART III. INDIVIDUALIZED ACTION

The procedure outlined here has been designed to provide the maximum protection to the individual with a minimum of wasteful formalities. The avoidance of the latter was thought particularly important because such red tape (1) consumes time, (2) demeans the official body forced to employ it, and (3) once again places the individual at a disadvantage in his encounter with municipal authority.

The basic structure of this part has been generally explored in the Introduction.

SECTION 301. *Preliminary order.*

It goes without saying that a request for action from an affected person is any action-triggering event, including an application for some sort of permission, or a request for a revocation proceeding. The board need not take any action in other cases, but of course it may do so. A "preliminary investigation" includes, for example, research into the applicable rules, regulations, ordinances, and statutes, into an application if there has been one, records on file with the agency, police records, and the personal experience of board members or their staff.

Following this the board should make a preliminary judgement as to what action is desirable. This together with the applicable rules etc., or references thereto, and a summary of the operative findings of fact will then be prepared.

SECTION 302. *Notice.*

If the decision is not to take any action and there is no adversely affected party then the decision *may* be filed and that is the end of it. This might be done where, for example, the board, one of its members or staff, or an unaffected citizen has suggested the revocation of a license and the decision is against such revocation. In such a case, or any other where the decision favored the affected party, the board may publish its decision so that the public will have a chance to informally express its disapproval or seek

to persuade the board to order a hearing as authorized by section 304.

In all other cases, the preliminary order is to be mailed to all affected parties with notification that it will be final after 30 days. If nothing else happens the order will become final at the end of that time.

SECTION 303. *Requesting a hearing.*

The affected person will either (1) agree with the order and take no action, or (2) disagree with the findings of fact, (3) disagree with the sufficiency of the findings to justify the order under the rules etc., or (4) dispute the wisdom of the rule applied. Section 303 provides that the party may request a hearing or a change in the rule and that in doing the former it will be necessary for him to indicate to what he objects. By this method the burden of securing a hearing is put upon the private person, ensuring that there will not be one unless there is genuine disagreement, and a real reason for granting an opportunity to be heard. To strengthen this desire to have hearings only when disagreement is bona fide, section 304 includes authority for the board to deny a hearing if the request is made in bad faith. It is the draftsmen's belief that such a provision is necessary if the scheme is to work and the system is not to degenerate into a meaningless hearing in every case. Another and more troublesome result would occur if hearings become automatic, so that the board considers the preliminary order merely a formality and routinely finds against the applicant, expecting to change its position, if necessary, after the automatic hearing. Although these considerations fully justify the power granted to deny a hearing, such discretion must be exercised carefully if it is not to subvert the system.

SECTION 304. *Hearing; notice.*

Section 304 (a) provides that "the board shall order the type of hearing appropriate for the determination of the controversy." If the request is for a change in the rules themselves then the "type" is the rule-making hearing provided in part II. Only if the objection is to the findings of fact will it be appropriate to have a trial-type hearing governed by the rules of evidence

provided by section 306. While such a hearing gives the individual the best chance to present his view of the facts and to question that of the board, it is the most costly and time consuming, and not very helpful if there is general agreement on the facts. Therefore, if the affected person agrees that the findings of fact are accurate but believes that they do not or should not support the preliminary order or that the board lacks the authority to issue such an order, a trial-type procedure would be wasteful and formalistic. An appropriate hearing then would consist of an exchange of arguments between a representative of the board and the affected party or his counsel. Flexibility should be left with the local boards as to how best to present the argument in opposition to the affected party. However, the argument must be made apparent if the affected party is to have a chance to answer it. An exchange of briefs and oral argument is suggested by section 304(b) but certainly there are other possibilities which will, on occasion, be more appropriate.

It should be noted that the last sentence of section 304(a) requires the board to notify other affected parties of the hearings and the issues being raised, insofar as they may be determined at that stage.

SECTION 305. *Record.*

This section requires little explanation. While it appears quite important that a record be made of a hearing so that judicial review will not have to be de novo review it also seems appropriate to keep costs as low as possible. As a result transcription will not be required. Since tape recording is increasingly easy and reliable the draftsmen think that it might be particularly appropriate for this type of proceeding, and the authority for its use should be express.

SECTION 306. *Rules of evidence; official notice.*

This section is taken from the Model State APA with only stylistic modifications.

SECTION 307. *Emergency action.*

The first part of this section is intended to cover the field of

emergency actions against an individual or his interests. Clearly this could include the suspension or revocation of a license or other privilege. It is a power to be used sparingly. The fact that such action is authorized so long as a hearing is granted within [30] days is not intended to relieve officials of any common law liabilities for such action. In requiring a hearing, the draftsmen feel that in any case so serious as to call for emergency action under this subsection a hearing could not be a formality.

Subsection (b) relates to grants of permission from the town to the individual. Good examples would be temporary liquor licenses for charitable dances, or parade permits where either was, for one reason or another, applied for too late for the operation of the full individualized action proceeding. Clearly an objection would need to be in good faith if it were to destroy the possibility of obtaining the needed permission. On the other hand, there is nothing to prohibit the board from issuing the required notices and holding a hearing the following day, if that should be warranted.

SECTION 308. *Judicial review.*

In this area there is much less reason for differences between state and municipal procedure than in areas previously considered. Therefore a section is proposed which is very close to the judicial review provisions of the Model State APA. There are only two departures from that act. First, in line with the language of the rest of the act, it provides that an affected person or an interested person may seek review.

The second departure dictated by the scheme is in section 308(e) which deals with the case where no hearing was held. In such cases the court is to be supplied with the findings of fact, the order, and a list of those to whom they were sent. The only issue before the court in such cases is whether the board failed to comply with the required procedure. If so, the case is to be remanded to the board for further proceedings. If not, the order must be affirmed. This scheme underlines the importance placed upon the discretion of the board and the impossibility of having courts replace a board at the municipal level.

A State Statute to Provide For A Common Day of Rest

This Bureau draft has as its dominant focus the public interest in providing a common day of rest. Several provisions preserve the rights of Sabbatarians, and other, enumerated exemptions suggest goods and services whose sale on such a day of rest is necessary to maintain the public health and safety.

SECTION 1. *Title.*

This Act shall be known, and may be cited, as the Common Day of Rest Act.

SECTION 2. *Purpose.*

The purpose of this statute is to establish a common day of rest by means of the general cessation of work, which will create an atmosphere of repose and tranquillity in which individuals can relax and families, friends, and relatives can gather together for social occasions and recreation.

SECTION 3. [*Alternative A.*] *Prohibition of Sunday business and labor.*

It shall be unlawful on Sunday for any person, firm, or corporation:

(a) to engage in or conduct business or labor for profit in the usual manner and location, or to operate a place of business open to the public;

(b) to cause, direct, or authorize any employee or agent to engage in or conduct business or labor for profit in the usual manner and location, or to operate a place of business open to the public.

SECTION 3. [*Alternative B.*] *Saturday-Sunday closing option.*

It shall be unlawful for any person, firm, or corporation on both of any successive Saturday and Sunday:

(a) to engage in or conduct business or labor for profit in the usual manner and location, or to operate a place of business open to the public;

(b) to cause, direct, or authorize any employee or agent to engage in or conduct business or labor for profit in the usual manner and location, or to operate a place of business open to the public.

SECTION 4. *Exemptions.*

Nothing in section 3 of this Act shall apply to:

(a) Any person who in good faith observes a day other than Sunday as the Sabbath, if he:

(1) refrains from engaging in or conducting business or labor for profit and closes his place of business to the public on that day; and

(2) does not conduct his business on the common day of rest in such a way as to create noise which materially disturbs others who are observing that day; and

(3) has filed notice of such belief and practice with [designate official with whom notice is to be filed].

Note: Section 4(a) should be omitted if alternative B of Section 3 is adopted.

(b) Any business which conducts operations through a single corporation, if substantially all the stock of such corporation is owned by persons who, in good faith, observe a day other than Sunday as the Sabbath and who regularly work primarily at the place of business of the corporation, and if the corporation:

(1) refrains from engaging in or conducting business for profit and closes its place of business to the public on that day;

(2) does not conduct business on the common day of rest in such a way as to create noise which materially disturbs others who are observing that day;

(3) operates no more than three places of business; and

(4) has filed notice of such practice with [designate official with whom notice is to be filed]. *Provided,* however, that this exemption shall also be available where the dominant persons in the business own part, but not substantially all, of the stock of the corporation, if they and the corporation otherwise meet the requirements for this exemption, and if they and their relatives own substantially all of the stock of the corporation.

Note: Section 4(b) should be omitted if alternative B of Section 3 is adopted.

(c) Any person, non-profit organization, or non-profit corporation that engages in or conducts business or labor, or keeps open its place of business to the public, if the activities of the enterprise are conducted solely for charitable or religious purposes.

(d) Any federal, state, municipal, or local governmental department or agency, or its employees, acting in an official capacity.

(e) Any person, firm, or corporation performing acts necessary for the public safety, health, or good order.

(f) The sale of any of the following items of personal property: [Herein list classes of items exempted. The following is a possible sample list.]

(1) drugs, medical and surgical supplies, or any object purchased on the written prescription of a licensed medical practitioner for the treatment of a patient;

(2) ice, ice cream, confectionery, and beverages;

(3) food prepared for consumption on or off the premises where sold;

(4) newspapers and magazines;

(5) dairy products;

(6) perishable fruits and vegetables;

(7) gasoline, fuel additives, lubricants, and anti-freeze;

(8) tires;

(9) repair or replacement parts and equipment necessary to, and safety devices intended for, safe and efficient operation of land vehicles, boats, and aircraft;

(10) emergency plumbing, heating, cooling, and electrical repair and replacement parts and equipment;

(11) cooking, heating, and lighting fuel;

(12) infant supplies;

(13) tobacco products;

(14) bakery products.

(g) The operation of any of the following businesses (which need not be restricted to the sale of the items listed in section 4(f)): [Herein list classes of businesses exempted. The following is a possible list.]

(1) restaurants, cafeterias, or other prepared food service organizations;

(2) hotels, motels, and other lodging facilities;

(3) hospitals and nursing homes;

(4) dispensaries of drugs and medicines;

(5) ambulance and burial services;

(6) generation and distribution of electric power;

(7) distribution of gas, oil, and other fuels;

(8) telephone, telegraph, and messenger services;

(9) heating, refrigeration, and cooling services;

(10) railroad, bus, trolley, subway, taxi, and limousine services;

(11) water, air, and land transportation services and attendant facilities;

(12) cold storage warehousing;

(13) ice manufacturing and distribution;

(14) minimal maintenance of equipment and machinery;

(15) plant and industrial protection services;

(16) industries where continuous processing or manufacturing is required by the very nature of the process involved;

(17) newspaper publication and distribution;
(18) radio and television broadcasting;
(19) motion picture, theatrical, and musical performances;
(20) automobile service stations;
(21) athletic and sporting events;
(22) parks, beaches, and recreational facilities;
(23) scenic, historic, and tourist attractions;
(24) amusement centers, fairs, zoos, and museums;
(25) libraries;
(26) educational lectures, forums, and exhibits;
(27) service organizations (USO, YMCA, etc.).

SECTION 5. *Injunctive relief.*

The Attorney General, a district attorney, a mayor, or a city manager [add any other apppropriate official] may petition a court of competent jurisdiction to enjoin any violation of this Act.

SECTION 6. *Penalties.*

Any person, firm, or corporation that violates the provisions of this Act is guilty of a misdemeanor. Each day on which this Act is violated shall constitute one offense. The first offense shall be punished by a fine of $100, the second offense by a fine of $500, and the third and each subsequent offense by a fine of $500, and an additional fine on the third and each subsequent offense of $500 for each employee caused, directed, or authorized to work in violation of this Act. *Provided,* however, that nothing contained herein shall be construed to permit any fine upon any employee or agent who has been caused or directed by his employer to violate the provisions of this Act.

MEMORANDUM

I.

Sunday closing legislation has a long history in the United States. Undoubtedly, the original Sunday closing laws were motivated by religious forces, but this legislation has undergone extensive changes and today has several secular purposes. The Supreme Court held in *McGowan v. Maryland*[1] that the Maryland Sunday

1. 366 U.S. 420 (1961).

Closing Law was not a "law respecting an establishment of religion," pointing to the secular purposes of the statute.

Many of the Sunday closing laws now in effect are old, vague, and difficult to interpret; in fact at least three such statutes have been held to be unconstitutionally vague by state courts.[2] This would seem to indicate some need for new legislation.

II.

SECTION 1. *Title.*

The act is entitled the Common Day of Rest Act rather than the Sunday Closing Act to emphasize its secular character. Moreover, if alternative B of section 3 is adopted, embodying a Saturday-Sunday option, the act obviously could not appropriately be known as a Sunday Closing Act.

SECTION 2. *Purpose.*

This section spells out the secular purposes of the act. The purposes are those referred to by the Supreme Court as legitimate.[3]

SECTION 3. *Alternative A. Prohibition of Sunday business or labor.*

This section contains the basic prohibition of the statute. It prohibits engaging in or conducting business or labor, the operation of a place of business open to the public, and the direction by an employer to an employee to do either of these. The sale of goods is not expressly prohibited, but would violate the statute whenever such activity was, in effect, "engaging in" or "conducting business"; however, if a man gave his neighbor an extra pound of coffee, and was compensated for it, the "sale" would not violate the statute.

The phrase "in the usual manner and location" was inserted to remove from the prohibition of the statute the teacher, lawyer,

2. State v. Hill, 189 Kan. 403, 369 P.2d 365 (1962); Harvey v. Priest, 366 S.W.2d 324 (Super. Ct. Mo. 1963); G.I. Surplus Store, Inc. v. Hunter, 257 N.C. 206, 125 S.E.2d 764 (1962).

3. McGowan v. Maryland, *supra* note 1, at 451.

accountant, etc. who brings his paperwork home and works on it on Sunday. This sort of activity should not be prohibited because it may frequently be necessary and it in no way interferes with the common day of rest. Even if the lawyer or accountant found it necessary to work in his office on Sunday, he would probably not violate the statute, if, for example, the office was closed to the public and the staff was not present, since he would not be engaging in business or labor in the usual manner, though he would be in the usual location.

The phrase "for profit" was included to remove from the prohibition of the statute a man who, for example, mows his lawn or makes alterations on his house on Sunday. Normally such a man would not be engaging in labor in the usual manner and location. However, he might be if he was in the business of mowing lawns or of making alterations on houses, especially if he was working not on his own property but on that of a friend or relative. Under this statute his labor would not be unlawful if it were not done for profit. However, it should be clear that a business cannot be conducted as usual on Sunday merely because it is losing money. As with all statutes, the act must be construed and applied in light of its purposes.

SECTION 3. *Alternative B. Saturday-Sunday closing option.*

This alternative version of the basic prohibition section is identical to alternative A, except that instead of requiring businesses to close on Sunday, it permits them to close on either Saturday or Sunday. Thus it is really an alternative to the Sabbatarian exemption contained in section 4(a); the need for some special provision for the Sabbatarian will be considered in connection with the latter section. The option provision is presented as an alternative to section 3 because if the option course is chosen, the basic prohibition of the statute is essentially different from what it would be if the flat Sunday prohibition, either with or without a Sabbatarian exemption, were adopted.

III.

SECTION 4(a). *The Sabbatarian exemption.*

Subsection (a) exempts from the prohibition of the act any person who in good faith observes a day other than Sunday as the Sabbath if he closes his business on that day and conducts his business on Sunday in such a way as not to disturb the common day of rest. In *Braunfeld v. Brown*[4] and *Gallagher v. Crown Kosher Super Market*,[5] the Supreme Court held that Sunday closing laws were constitutional even if they did not exempt persons (such as Orthodox Jews and Seventh Day Adventists) whose religious beliefs required them to abstain from business on another day. But it was pointed out that of the thirty-four states having Sunday closing laws, twenty-one then had such an exemption, and even the majority conceded that the exemption "may well be the wiser solution to the problem."[6] And in *Sherbert v. Verner*[7] the Court held that a state could not deny unemployment compensation to a person who could not obtain a job because she refused to work on Saturday in defiance of her religious convictions. Although the majority attempted to distinguish *Braunfeld* the dissenters felt it had been undercut, and they may well be correct.[8] Should the majority come to agree, they might overrule *Braunfeld* and require an exemption. This possibility in itself might well be considered sufficient to warrant a Sabbatarian exemption. Moreover, the exemption does seem to be the wiser, fairer, and more just solution to the problem. The operation of a small group of businesses on Sunday in the manner required by the statute does little to interfere with the secular purposes of the act. Apparently, at least some state legislatures have taken this view since four of the Sunday closing laws enacted since the *Braunfeld* decision have contained either an exemption for Sabbatarians or a Saturday-Sunday closing option.[9]

Section 4(a) grants the exemption to "any person who in good faith observes a day other than Sunday as the Sabbath" on certain conditions. The test of observance rather than belief was adopted in order to avoid creating an issue which would be

4. 366 U.S. 599 (1961).
5. 366 U.S. 617 (1961).
6. Braunfeld v. Brown, *supra* note 4, at 608.
7. 374 U.S. 398 (1963).
8. Barron, *Sunday in North America*, 77 HARV. L. REV. 42, 52-53 (1965).
9. See Me. Rev. Stat. Ann. tit. 17, §§3201-09 (1964); Mass. Gen. Laws Ann. ch. 136 (Supp. 1964); Mich. Stat. Ann. §18.857 (Supp. 1963); Tex. Penal Code Ann. art. 286a (Supp 1965).

difficult for a court to handle and to prevent an inquiry into belief in every case.[10] For example, where an individual in fact observes a Sabbath other than Sunday not only by closing his business, but also in the manner customary for those of his particular religious sect, there seems to be no need to raise the question of whether he "believes" that day to be a holy one, whether he "believes" he is required not to work on that day, etc. Similarly the test of good faith is one with which courts frequently deal, and it is less likely to cause problems than a test of "conscientious observance." The phrase "as the Sabbath" makes clear that this is a religious exemption from a secular statute; a man cannot claim the exemption on the ground that a day other than Sunday is his day of rest unless he observes that day "as the Sabbath."

The Sabbatarian exemption contained in section 4(a) is subject to three conditions. One who claims it must completely refrain from engaging in or conducting business or labor for profit on the day he observes as the Sabbath; if he engages in any business or labor for profit on that day, even though not in the usual manner or location, he forfeits the exemption and may not engage in business or labor on Sunday. He must also conduct his Sunday business quietly, so as not to disturb the common day of rest; the interest of the Sabbatarian in conducting a business which requires the use of a piledriver or pneumatic drill is subordinated to the interest of society in maintaining a common day of rest and tranquility.[11] Finally the Sabbatarian must notify some proper official of his intention to close his business on another day and remain open on Sunday. The purpose of this provision is to facilitate administration and enforcement of the statute.[12]

Section 4(b) complements section 4 (a) by providing a similar Sabbatarian exemption for incorporated businesses. Absent such a provision it is possible that all the persons working for a corporation could claim the exemption of subsection (a) while the corporation, not being exempt, would violate the act and could be enjoined and fined.

10. See opinion of Mr. Justice Frankfurter, McGowan v. Maryland, *supra* note 1, at 516.
11. *Id.* at 515.
12. *Id.* at 516.

The exemption for corporations is designed to exempt small businesses which are organized as corporations, to secure the benefits that form of organization affords. To insure that only small businesses are exempted, the subsection applies only to corporations which operate no more than three places of business. The requirement that the business conduct its operations through a single corporation is designed to prevent multiple incorporation which might otherwise circumvent this limitation.

A corporation can qualify for the exemption if substantially all of its stock is owned by persons who regularly work primarily in the place of business of the corporation, and who, in good faith, observe a day other than Sunday as the Sabbath. The proviso to section 4(b) is intended to cover situations where the dominant personality or personalities of a business have conveyed a large part of their interest in the corporation, for estate planning purposes or otherwise, to their relatives. These persons and the corporation must still comply, however, with the other specified requirements of section 4(b).

The requirement that the dominant persons in the business, whether or not they own substantially all of the corporation's stock, must work at the place of business of the corporation is designed to exclude from the exemption a corporation whose stockholders are, in effect, absentee owners who do not participate actively in the daily business operation of the corporation. The exemption is not to protect corporations whose stockholders happen to be Sabbatarians; it is to protect Sabbatarians whose businesses happen to be incorporated.

If the corporation qualifies, the exemption is still subject to conditions similar to those imposed in section 4(a). The corporation must refrain from conducting business on the day observed as the Sabbath, it must conduct its Sunday business quietly, and it must file a notice of its practice with an appropriate official.

The Sabbatarian exemptions of sections 4(a) and 4(b) may be compared with the alternative Saturday-Sunday option contained in section 3, alternative B. The option provision is not clearly a religious exemption, and anyone can choose to close on Saturday rather than on Sunday. There are no limitations imposed on the manner of conducting business on the common day of rest. However, the option provision would probably be easier to apply in specific cases because the issues it presents are

far more clear cut than those presented by the Sabbatarian exemption.

IV.

SECTION 4. *Other Exemptions.*

Section 4(c) exempts charitable and religious enterprises which operate on Sunday, and those who work for such enterprises. The minister who conducts religious services is exempt under this provision even though he is laboring for profit. A normal business cannot be operated on Sunday even if all or part of the profits of that day's business are donated to charity because the enterprise is not conducted solely for charitable purposes.

Section 4(d) exempts the operations of government agencies and the activities of their employees who are acting in an official capacity.

Section 4(e) exempts anyone performing acts necessary to the public health, safety, or good order. This provision is comparable to the exemption for "acts of necessity" now found in many state statutes.

Section 4(f) exempts the sale of certain specific items of personal property. The list is merely a sample and is not necessarily exhaustive. However, the items on the list are those which are considered necessary even on the common day of rest, or reasonably required to enhance the purposes of the day. If any items are added to the list they should be carefully scrutinized to make certain that they belong in this category; classification of items without reference to the purposes of the act may create equal protection problems.

Section 4(g) is similar to the previous section and exempts certain kinds of businesses. The list here is of the same character as the one in the previous section, and similar caution should be exercised in adding to it. The parenthetical phrase in this section is added to forestall any contention that these businesses may sell only the items enumerated in section 4(f). If a business is one of the types listed in section 4(g) it may remain open and may sell any item it normally carries. Note however

that section 4(f) is different: it exempts sales of items rather than businesses. A business may not sell all of the items it normally carries merely because it sells some of the items listed in 4(f).

It should also be noted that there is considerable duplication in the two lists; there are only a few items in the first list which would not ordinarily be sold primarily by businesses on the second list. The list in subsection (g) could probably suffice in itself, though the list in subsection (f) could not. However, with the clear indication that one list is not to limit the other, there would seem to be no harm in the duplication, and for the sake of completeness and clarity both should probably be adopted.

V.

SECTION 5. *Injunctive relief.*

The provision for injunctive relief in this type of statute has much to recommend it. A statute establishing a common day of rest with exemptions for specified classes of persons and businesses can hardly be as precise as one would like a statute, especially a criminal statute, to be. A scheme of injunctive relief provides a clear warning to any violator that his behavior does in fact violate the statute, and that he is not entitled to claim any of the exemptions. This warning is given when the injunction is issued and no penalty is immediately imposed. Yet the statute still has teeth, for the injunction, once issued, can be enforced under the contempt powers of a court of equity. Most people would probably comply voluntarily with the statute, and the fear of becoming involved in an injunction proceeding and of being enjoined would deter others. Individual violations of this type of statute are not very significant as long as the statute is generally observed, thus correction of the initial offense by means of an injunction against further violation rather than by means of punishment would not seem to detract from the efficacy of the statute.

The power to petition for an injunction is limited by this section to responsible officials. The purpose here is to prevent an excessive flow of unnecessary litigation and also to prevent spite

or harassment litigation. The purpose of the statute is not to protect competitors from Sunday competition but to provide a common day of rest in the public interest; public officials seem best suited to vindicate this public interest.

SECTION 6. *Criminal penalties.*

In light of what has been said about the advantages of injunctive relief, the provision for criminal sanctions has been made optional. It is hoped that the provision for injunctive relief will be sufficient to secure compliance with the statute. It is noteworthy in this connection that the public accommodations title of the Civil Rights Act of 1964 provides for enforcement only by civil actions for injunctions and not by any criminal penalties.[13] It should be easier for the state to obtain an injunction than to secure a criminal conviction because in the former situation the burden of proof is lighter and the case is tried to a judge sitting in equity. Omission of the criminal penalty provisions will avoid subjecting the statute to the burden of strict construction that a penal statute must bear; it will also avoid the problem of vagueness which the due process clause presents where a criminal statute is involved. As noted above, at least three Sunday closing laws have been declared unconstitutional because of vagueness.[14] Furthermore, since there are undoubtedly some cases in which it will not be completely clear that the statute applies, the criminal penalty may sometimes be unfair. And certainly in those unclear cases the criminal penalty is unduly harsh, since injunctive relief together with punishment for contempt will probably serve the same purpose. The principle of economy of punishment would seem to favor the omission of the criminal penalty.

However, there may be those who feel that a criminal penalty is necessary and desirable. Section 6 makes violation of the statute a misdemeanor. If the state has established a lower grade of offense, that lower grade might well be substituted for the misdemeanor. Each day on which the act is violated (rather than each separate sale of goods) is an offense. The first offense is punishable by a fine of $100, which serves some of the warning function an injunction would serve. Con-

13. P.L. 88-352, 78 Stat. 241, 42 U.S.C.A. §2000a-3 (1964).
14. See cases cited note 2 *supra*.

sideration might well be given to imposing an even smaller fine to create a less severe warning. The second offense is punishable by a fine of $500, and the third and each subsequent offense calls forth not only the same $500 fine, but also an additional fine of $500 for each employee caused or directed to work in violation of the act. It is felt that in the case of the small business with no employees the basic $500 fine is sufficient. The additional fine for each employee is aimed at the large enterprise, and makes the fine depend upon its size. This is justified because the larger enterprise probably creates a greater disturbance if it operates on the common day of rest. It is hoped that the fines in the cases of large enterprises which repeatedly violate the statute will be sufficiently large to make this conduct unprofitable and thus prevent it without resort to a prison sentence.

It should be noted that if the criminal penalties are adopted, there is still good reason to provide for injunctive relief as well, so that alternative sanctions will be available in appropriate cases. A legislature which was doubtful about the efficacy of injunctive relief alone might want to omit the criminal penalties at the outset and thus test the efficiency of injunctive relief alone; the criminal penalties can always be added later if it is felt they are needed.

Finally, it should be noted that the criminal penalties of the act may not be imposed on an employee who has been caused or directed to violate the act. This proviso should be liberally construed, for the pressures which may be brought to bear on an employee may be subtle indeed. It should be noted also that the employee who is caused or directed to violate the act is not granted an exemption under section 4. His behavior is illegal and may be enjoined, but it would doubtless be unfair to impose criminal sanctions upon him when he violates the statute through fear of losing his job.