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NOTES & COMMENTS

SEC ENFORCEMENT ACTIONS TO ENJOIN VIOLATIONS OF SECTION 10(b) AND RULE 10b-5: THE SCIENTER QUESTION

Prior to the Supreme Court’s decision in Ernst & Ernst v. Hochfelder,1 the degree of culpability required to establish a violation of section 10(b)2 and rule 10b-53 in a Securities and Exchange Commission injunctive action was almost uniformly established to be negligence, or the lack of due diligence.4 In Hochfelder the Court held that a private cause of action for civil money damages will not lie under section 10(b) and rule 10b-5 in the absence of an allegation of “scienter,”5 which the Court defined as “a mental state embracing intent to deceive, manipulate, or defraud.”6 Although Hochfelder resolved the degree of culpability in private damage actions so as to require scienter,7 the

6. Id. (footnote omitted). For further interpretive definitions of the term “scienter,” see notes 7 & 23 infra.
7. For the pre-Hochfelder confusion concerning the standard of culpability to be applied for civil liability under § 10(b) and rule 10b-5, see Ernst & Ernst v. Hochfelder, 425 U.S. 185, 193 n.12 (1976). The Court in Hochfelder, however, did not conclusively define the parameters of the elusive term “scienter,” but it clearly stated its unwillingness “to extend the scope of the statute to negligent conduct.” Id. at 214 (footnote omitted). While the Court left open the question whether in some circumstances reckless behavior is sufficient for civil liability under § 10(b) and rule 10b-5, it recognized that “[i]n certain areas of the law recklessness is considered to be a form of intentional conduct for purposes of imposing liability for some act.” Id. at 193 n.12.

For a recent case dealing with this issue, see McLean v. Alexander, 420 F. Supp. 1057 (D. Del. 1976). In McLean the plaintiff had purchased a small closely-held corporation partly in reliance upon an opinion audit of the defendant-accountant and had, as a result, incurred a substantial loss. The district court found that the accountant’s conduct constituted “far more than mere negligence, but [fell] short of a preconceived actual intent to defraud.” Id. at 1080. As such, the court held that the defendant’s negligent misrepresentations exposed him to liability under § 10(b) and rule 10b-5. The McLean court, however,

831
Court expressly declined to decide whether scienter is required in Commission injunctive proceedings for alleged violations of section 10(b) and rule 10b-5.  

Three weeks after the decision in Hochfelder, the Office of the General Counsel of the SEC issued a memorandum to its staff attorneys which conceded: "The Hochfelder decision clearly will have an impact upon pending and future Commission injunctive actions." The impact of Hochfelder upon Commission enforcement actions cannot now be doubted, although its ramifications may not yet be predicted conclusively. This article will explore, therefore, the likely effects of Hochfelder upon Commission enforcement actions.

regarded Hochfelder as not "in any way dispositive of the issue" of whether recklessness would suffice in a private cause of action for damages under § 10(b) and rule 10b-5. Id. Inasmuch as "the Supreme Court ... explicitly left undefined the parameters of scienter," the court held that "the law of the Circuit Court controls." Id. at 1080-81. Thus, the court in McLean noted that no controversy existed among the circuits as to whether "some degree of scienter, short of actual intent to deceive, was sufficient upon which to predicate liability." Id. at 1081. The court found that those circuits which prior to Hochfelder required some form of scienter have not "rejected any one degree of scienter as insufficient in private damage actions." Id. In finding that recklessness is a form of scienter, the court stated:

There is little reason to distinguish between knowing misbehavior under Section 10(b) and Rule 10b-5. In practice, one who recklessly makes a statement inherently possesses some knowledge of its falsity. The common law, precedent in other fields, and the legislative history of 10(b) all buttress the viewpoint that 10b-5 liability ought to attach upon a showing of recklessness.  

Id. at 1084 (footnotes omitted). See also Sundstrand Corp. v. Sun Chemical Corp., Fed. Sec. L. Rep. (CCH) ¶ 95,887 at 91,255 (7th Cir. Feb. 23, 1977). For a further discussion of the issue of scienter, see note 23 infra.

8. Ernst & Ernst v. Hochfelder, 425 U.S. 185, 193 n.12 (1976). The Court noted: "Since this case concerns an action for damages we . . . need not consider the question whether scienter is a necessary element in an action for injunctive relief under § 10(b) and Rule 10b-5. Cf. SEC v. Capital Gains Research Bureau, Inc., 375 U.S. 180 (1963)."


10. Id. at F-1 (footnote omitted).

11. See SEC v. American Realty Trust, Fed. Sec. L. Rep. (CCH) ¶ 95,913 at 91,423 (E.D. Va. Feb. 24, 1977); SEC v. Bausch & Lomb, Inc., 420 F. Supp. 1226 (S.D.N.Y. 1976). Harvey Pitt, the SEC’s General Counsel, has noted that although Hochfelder’s effects are not fully known yet, the issue of scienter is now being raised in every case the Commission brings. SEC. REG. & L. REP. (BNA) A-11 (Mar. 23, 1977). But see Comments of Irwin Borowski, Associate Director of the Enforcement Division of the SEC, PLI Conference (Mar. 1977), quoted in SEC. REG. & L. REP. (BNA) A-7 (Mar. 9, 1977): "No actions have been brought because of Hochfelder. I can’t think of a case we’ve brought on which Hochfelder has had significant impact.”

enforcement proceedings to enjoin violations of section 10(b) of the Securities Exchange Act of 1934, and rule 10b-5 promulgated thereunder.

The Nature of the Remedy

Pursuant to specific statutory enactments by Congress, the Securities and Exchange Commission is responsible for the enforcement of the various federal securities laws administered by the Commission. These laws include both the securities statutes enacted by Congress, and the rules and regulations promulgated pursuant to such statutes. The particular statutory provisions which provide for the enforcement of these laws enable the Commission, in its discretion, to seek injunctive relief whenever it appears that any person "is engaged or is about to engage" in any act or practice which would constitute a violation of the federal

\[13. \text{Section 10(b) and rule 10b-5, the broad antifraud provisions of the 1934 Act, play a critical role in the protection of investors in the securities markets. The Preamble to the Securities Exchange Act of 1934 provides that it is: "An Act to provide for the regulation of securities exchanges . . . to prevent inequitable and unfair practices on such exchanges . . . ." Securities Exchange Act of 1934, } \S \text{ 2, 15 U.S.C. } \S \text{ 78(b) (1970) provides: "[T]ransactions in securities as commonly conducted upon securities exchanges . . . are affected with a national public interest which makes it necessary to provide for regulation and control of such transactions . . . and to insure the maintenance of fair and honest markets in such transactions." Securities Exchange Act of 1934 } \S \text{ 10(b), 15 U.S.C. } \S \text{ 78(b) (1970), provides that it shall be unlawful:}

(b) To use or employ, in connection with the purchase or sale of any security registered on a national securities exchange or any security not so registered, any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors.

Pursuant to this congressional mandate to proscribe fraudulent and deceptive devices, the Commission promulgated rule 10b-5 which provides:

It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce, or of the mails, or of any national securities exchange,

(a) to employ any device, scheme, or artifice to defraud,

(b) to make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or

(c) to engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person,

in connection with the purchase or sale of any security.

securities laws. Section 21(d), the enforcement provision of the Securities Exchange Act of 1934, provides:

Whenever it shall appear to the Commission that any person is engaged or is about to engage in acts or practices constituting a violation of any provision of this chapter, the rules or regulations thereunder, it may in its discretion bring an action in the proper district court of the United States to enjoin such acts or practices, and upon a proper showing a permanent or temporary injunction or restraining order shall be granted.

The statute does not expressly require proof of a past violation of the securities laws for an injunction to issue. However, past violative conduct is generally sought to be proven in order to establish the existence of a "reasonable likelihood" that a


17. Id.

18. In United States v. W.T. Grant Co., 345 U.S. 629, 633 (1953), the Supreme Court stated that in deciding whether injunctive relief is appropriate, "[t]he necessary determination is that there exists some cognizable danger of recurrent violation, something more than the mere possibility which serves to keep the case alive." Courts have traditionally applied the "reasonable likelihood" standard in determining the necessity for injunctive relief. See, e.g., SEC v. Manor Nursing Centers, Inc., 458 F.2d 1082, 1100 (2d Cir. 1972) ("The critical question for a district court in deciding whether to issue a permanent injunction in view of past violations is whether there is a reasonable likelihood that the wrong will be repeated."); SEC v. Keller Corp., 323 F.2d 397, 402 (7th Cir. 1963); SEC v. Culpepper, 270 F.2d 241, 249 (2d Cir. 1969) ("The critical question for the court in cases such as this is whether there is a reasonable expectation that the defendants will thwart the policy of the Act by engaging in activities proscribed thereby."); SEC v. M.A. Lundy Assoc., 362 F. Supp. 226, 232 (D.R.I. 1973) ("The test to be applied is whether a defendant's past conduct indicates, under all circumstances, that there is a reasonable likelihood of further violations in the future unless restrained by the Court."); SEC v. Bennett & Co., 207 F. Supp. 919, 923 (D.N.J. 1962) ("Once the Court determines that [the SEC] has presented a sufficient prima facie showing that defendants' past conduct constitutes a violation of the Act, another test must be applied, and that is, whether or not such past conduct indicates a reasonable likelihood of further violations in the future."). Although in SEC v. Bangor Punta Corp., 331 F. Supp. 1154, 1163 (S.D.N.Y. 1971), aff'd in part, rev'd in part sub nom. Chris Craft Indus., Inc. v. Piper Aircraft Corp., 480 F.2d 341 (2d Cir.), cert. denied, 414 U.S. 924 (1973), the district court stated that in order to obtain injunctive relief, the Commission must prove that the defendants had "a propensity or natural inclination to violate the securities law," the court of appeals in SEC v. Manor Nursing Centers, Inc., 458 F.2d 1082 (2d Cir. 1972), expressly repudiated that a new standard was being applied in Bangor Punta: "[W]e adhere to our well established
future violation will occur, and thus that an injunction's prophylactic sanction is warranted. That the defendant, having previously violated the law, is "reasonably likely" to violate the law in the future, therefore, is an inference which a court may choose to draw depending on the particular facts and circumstances of each case.20

rule and hold that the SEC has demonstrated the necessity for injunctive relief [when] there is a reasonable likelihood of future violations . . . . " Id. at 1101. See also Chris Craft Indus., Inc. v. Piper Aircraft Corp., 480 F.2d at 385, wherein the court noted: "It uniformly has been held that the correct standard is 'whether there is a reasonable likelihood that the wrong will be repeated.'" But see 480 F.2d at 394 (Gurfein, J., concurring): "The use of either test, if indeed they differ except in verbiage, is not the subject of immutable statutory command."; 480 F.2d at 405 (Mansfield, J., concurring & dissenting): "Although there is a slight difference between the two clauses ["reasonable likelihood" and "propensity or natural inclination"], both express substantially the fundamental condition precedent to the issuance of [an] injunction, i.e., that there must be a showing of a cognizable risk of future violation . . . ."

19. Although the Commission need not prove a past violation of the federal securities laws, past violations may give rise to an expectation of future violations. Thus, when seeking injunctive relief, the Commission will offer evidence of the defendant's allegedly illegal prior conduct as a matter of course so that the court may infer therefrom a likelihood of future violations. See, e.g., SEC v. Management Dynamics, Inc., 515 F.2d 801, 807 (2d Cir. 1975) ("[T]he commission of past illegal conduct is highly suggestive of the likelihood of future violations."); SEC v. First Am. Bank & Trust Co., 481 F.2d 673, 682 (8th Cir. 1973) ("[T]he very existence of improper conduct in the past raises an inference that such conduct will continue in the future."); SEC v. Manor Nursing Centers, Inc., 458 F.2d 1082, 1100 (2d Cir. 1972); SEC v. Keller Corp., 323 F.2d 397, 402 (7th Cir. 1963) ("[F]raudulent past conduct . . . gives rise to the inference that there was a reasonable likelihood of future violations."); SEC v. Culpepper, 270 F.2d 241, 249 (2d Cir. 1959) ("Past behavior gives indication that without injunctive measures they might again engage in such activities."); SEC v. J & B Indus., 388 F. Supp. 1082, 1084 (D. Mass. 1974) ("Fraudulent conduct committed in the past may give rise to an inference of frequent violations."); SEC v. M.A. Lundy Assocs., 362 F. Supp. 226, 232 (D.R.I. 1973) ("It is generally recognized that if a showing of a past violations gives rise to the inference that there is a reasonable likelihood of future violations.").

In 1975, the committee of conference rejected a Senate bill which amended § 21(e) of the Securities Exchange Act of 1934 (presently § 21(d)) by adding the words "has engaged," to the statutory language "is engaged or is about to engage in . . . a violation." In rejecting this amendment, the committee of conference stated in its joint explanatory statement: "The House amendment contained no similar provision. The conference substitute does not make the noted Senate proposed changes in existing law. The Senate language is dropped without prejudice, the conferees believing that existing law does not require clarification in [this respect.]" Joint Explanatory Statement of the Committee on Conference, Securities Acts Amendments of 1975, H.R. Rep. No. 94-229, 94th Cong., 1st Sess. 102 (1975)(emphasis added).

20. Factors which courts commonly consider in determining whether the defendant is "reasonably likely" to violate the law in the future include: Whether the defendant ceased or attempted to undo the effects of his unlawful activity prior to the institution of a Commission investigation or court proceedings, see, e.g., SEC v. Manor Nursing Centers, Inc., 485 F.2d 1082, 1100 (2d Cir. 1972); the character of the past violation, see, e.g., SEC v. Spectrum, Ltd., 489 F.2d 535, 542 (2d Cir. 1973) ("Nor do we suggest that the
Hochfelder: An Exercise in Statutory Construction

The plaintiffs in Ernst & Ernst v. Hochfelder were customers of a brokerage firm who had invested in a securities scheme which was ultimately revealed as fraudulent, allegedly in violation of section 10(b) and rule 10b-5. The plaintiffs alleged that the accounting firm of Ernst & Ernst aided and abetted the broker-dealer in violating section 10(b) and rule 10b-5 by negligently auditing the brokerage firm’s books and thus failing to discover certain unlawful internal practices of the brokerage firm. The Supreme Court held that a private cause of action for damages will not lie under section 10(b) and rule 10b-5 in the absence of an allegation of scienter.

From an examination of the language of section 10(b), the Court found that the use of the terms “manipulative,” “device,” and “contrivance” “make unmistakable a congressional intent to proscribe a type of conduct quite different from negligence.” In addition to noting that these terms have clear and precise meanings provided by standard dictionary definitions, the degree of scienter may not be highly relevant to a determination of whether the defendant has the propensity to commit future violations, a requisite to injunctive relief.”; whether the defendant in good faith relied on the advice of counsel, see, e.g., SEC v. Harwyn Indus. Corp., 326 F. Supp. 943, 955 (S.D.N.Y. 1971); whether the defendant had repeatedly violated the securities laws, see, e.g., SEC v. Spectrum, Ltd., 489 F.2d at 542; whether the defendant persistently maintained that his past conduct was blameless, see, e.g., SEC v. World Radio Mission, Inc., 544 F.2d 535, 541 (1st Cir. 1976); and, the trial court’s evaluation of the defendant’s sincerity in his assurances that he would not violate the securities laws again, cf. United States v. W. T. Grant Co., 345 U.S. 629, 633 (1953) (“the bona fides of the expressed intent to comply [with the antitrust laws]”). See also note 70 infra. See generally Jaeger & Yadley, Equitable Uncertainties in SEC Injunctive Actions, 24 Emory L.J. 639 (1975).

22. Id. at 190.
23. Id. at 193. For the Supreme Court’s definition of “scienter,” see text accompanying note 6 supra. For the Supreme Court’s brief discussion of the relevance of recklessness, see note 7 supra.

Professor Bromberg has suggested that “[p]robably the most important step toward clarifying the law of scienter would be to ban the word.” 2 A. BROMBERG, SECURITIES LAW § 8.4, at 503 (1971). Professor Loss has noted that scienter “has been variously defined to mean everything from knowing falsity with an implication of mens rea, through the various gradations of recklessness, down to such nonaction as is virtually equivalent to negligence or even liability without fault . . . .” 3 L. Loss, SECURITIES REGULATION 1432 (2d ed. 1961). See also Bucklo, Scienter and Rule 10b-5, 67 Nw. U.L. Rev. 562, 567-71 (1972); Epstein, The Scienter Requirement in Actions Under Rule 10b-5, 48 N.C.L. REV. 482, 483-84 (1970); Haimoff, Holmes Looks at Hochfelder & 10b-5, 32 BUS. LAW. 147 (1976); Keeton, Fraud: The Necessity for an Intent to Deceive, 5 U.C.L.A. L. Rev. 583 (1958).

25. Id. at 199 nn.20 & 21, where the Court noted:
Court considered the term "manipulative" to be "especially significant" because, as a virtual "term of art when used in connection with securities markets[, i]t connotes intentional or willful conduct designed to deceive or defraud investors by controlling or artificially affecting the price of securities."

Despite its view that the language of section 10(b) unambiguously connotes a standard of "intentional misconduct," the Court nonetheless examined the legislative history of the section. Finding little in the legislative history of the Securities Exchange Act of 1934 which bears directly on section 10(b), the Court yet noted that "[t]here is no indication . . . that § 10(b) was intended to proscribe conduct not involving scienter." The Court thus found the relevant portions of the legislative history to "support [its] conclusion that § 10(b) was addressed to practices that involve some element of scienter and cannot be read to impose liability for negligent conduct alone."

In its amicus curiae brief, the Commission argued that when Congress intended to require a showing of willful, knowing, or

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20. Webster's International Dictionary (2d ed. 1934) defines "device" as "[t]hat which is devised, or formed by design; a contrivance; an invention; project; scheme; often, a scheme to deceive; a stratagem; an artifice," and "contrivance" in pertinent part as "[a] thing contrived or used in contriving; a scheme, plan, or artifice." In turn, "contrive" in pertinent part is defined as "[t]o devise; to plan; to plot . . . [t]o fabricate . . . design; invent . . . to scheme . . . ."

21. Webster's International Dictionary, supra, defines "manipulate" as "to manage or treat artfully or fraudulently; as to manipulate accounts . . . ."

26. Id. at 199 (footnote omitted).
27. Id. at 201.
28. Id.
29. Id. at 202. The Court then quoted what it regarded as the "most relevant exposition of the provision that was to become § 10(b)." Id.
"Subsection (c) [§ 9(c) of H.R. 7852—later § 10(b)] says, "Thou shalt not devise any other cunning devices."

Of course subsection (c) is a catch-all clause to prevent manipulative devices. I do not think there is any objection to that kind of clause. The Commission should have the authority to deal with new manipulative devices."

Id. at 202-03 (quoting Hearings on H.R. 7852 and H.R. 8720 Before the House Comm. on Interstate and Foreign Commerce, 73d Cong., 2d Sess. 115 (1934) (statement of Thomas G. Corcoran)). The Court continued:
This brief explanation of § 10(b) by a spokesman for its drafters is significant. The section was described rightly as a "catch-all" clause to enable the Commission "to deal with new manipulative [or cunning] devices." It is difficult to believe that any lawyer, legislative draftsman, or legislator would use these words if the intent was to create liability for merely negligent acts or omissions.

Id. at 203 (footnote omitted).
30. Id. at 201.
purposeful conduct as the standard for liability under the securities laws, it explicitly incorporated the terms "willful," "knowing," or "purposeful" within the statutory language. The Court rejected this contention, noting that section 11 of the 1933 Act, with its "express recognition of a cause of action premised on negligent behavior . . . stands in sharp contrast to the language of § 10(b), and significantly undercuts the Commission's argument." Moreover, the Court observed that the civil remedies expressly provided for in the 1933 Act, which allow recovery for negligent conduct, are subject to substantial procedural requirements. The effectiveness of such requirements would be nullified if actions could instead be brought under section 10(b), which does not impose comparable procedural restrictions.

Relying on the administrative history of the rule, the Court also rejected the Commission's view that rule 10b-5 proscribes both intentional and negligent conduct. The Court found that history to evince the Commission's intent, at the time the rule was adopted, that it apply only to activities involving scienter. Indeed, the Court admonished that the scope of any rule promulgated by the Commission under section 10(b) "cannot exceed the power granted the Commission by Congress under [that section]."


Although the Court's decision in Hochfelder conclusively established the appropriate standard of liability for private damage actions, the Court expressly did not decide whether the same

31. Id. at 207.
34. Id. at 208-10. These procedural restrictions include the posting of bond for costs, including attorneys' fees and, in certain circumstances, an assessment of costs and a short one-year statute of limitations. See Securities Act of 1933 § 11(e), 15 U.S.C. § 77k(e) (1970); Securities Act of 1933 § 13, 15 U.S.C. § 77m (1970).
36. Id. at 212.
37. Id. at 212 & n.32. The Court noted: "There is no indication in the administrative history of the Rule that any of the subsections was intended to proscribe conduct not involving scienter." Id. at 212 n.32.
38. Id. at 214.
39. See note 7 supra. Cf. Vacca v. Intra Management Corp., 415 F. Supp. 248, 250 (E.D. Pa. 1976), (scienter required in an equitable action by buyers for rescission of sale of securities: "While the Supreme Court left open the question of whether scienter is a
standard will apply in injunctive actions.\textsuperscript{49} The Court ingeniously, however, that the language and history of section 10(b)

\textit{SEC Injunctive Actions} 839

necessary element in an action for injunctive relief under those provisions [§ 10(b) and rule 10b-5], . . . we believe that the \textit{Ernst & Ernst v. Hochfelder} holding applies equally to both equitable actions for rescission and actions at law for money damages.\textsuperscript{7} See note 7 \textit{supra}.

\textit{Id.} See note 8 \textit{supra}. While the Court expressly did not decide the appropriate standard of culpability in injunctive actions, in footnote 12 of \textit{Hochfelder}, it included a “cf.” signal to the Court’s earlier decision in \textit{SEC v. Capital Gains Research Bureau, Inc.}, 375 U.S. 180 (1963) (Investment Advisers Act of 1940 prohibits a registered investment adviser’s failure to disclose to his clients his own financial interest in his recommendations). The meaning and significance of this citation, however, has been the subject of dispute. The SEC has noted that the Supreme Court in \textit{Capital Gains} indicated that in a suit for equitable or prophylactic relief, all the elements of a suit for money damages need not be established, and that the securities laws should be interpreted flexibly so as to effectuate their remedial purpose of avoiding fraud. General Counsel Memo, \textit{supra} note 9, at F-2. Since the Court in \textit{Hochfelder} indicated that § 10(b) was addressed to practices that involve some element of scienter, the SEC believes that \textit{Capital Gains} could be used as a basis for arguing that recklessness is sufficient in Commission injunctive actions. \textit{Id.}

Interestingly, however, the courts in both \textit{SEC v. Bausch & Lomb}, Inc., 420 F. Supp. 1228 (S.D.N.Y. 1976), and \textit{SEC v. American Realty Trust}, Feb. Sec. L. Rep. (CCH) ¶ 98,913 at 91,423 (E.D. Va. Feb. 24, 1977), see notes 97-74 \textit{infra}, omitted mention of the \textit{Capital Gains} decision and cite thereto by the \textit{Hochfelder} Court, apparently having discounted its relevance in a Commission action to enjoin violations of § 10(b) and rule 10b-5.

The Supreme Court’s discussion in \textit{Santa Fe Indus., Inc. v. Green}, 97 S. Ct. 1292 (1977), of the lower court’s decision in that case, may shed further light on the relevance of the \textit{Hochfelder} citation to \textit{Capital Gains}. The Court in \textit{Santa Fe} reversed the Second Circuit, holding that the Circuit Court’s reliance upon cases which dealt with other than the Securities Act of 1933, and the Securities Exchange Act of 1934, was misplaced, stating: “The court below construed the term ‘fraud’ in Rule 10b-5 by adventuring to the use of the term in several of this Court’s decisions in contexts other than the 1934 Act and the related Securities Act of 1933 . . . .” \textit{Santa Fe Indus., Inc. v. Green}, 97 S. Ct. at 1299. The Supreme Court explicitly mentioned the lower court’s reliance upon \textit{Capital Gains}, and while it recognized that \textit{Capital Gains} did involve a federal securities statute, the Court explained that its holding there was “premised on its recognition that Congress intended the Investment Advisers Act to establish [specific] standards for investment advisers.” 97 S. Ct. at 1299 n.11. The Court therefore indicated:

\textit{Ernst & Ernst} makes clear that in deciding whether a complaint states a cause of action for “fraud” under Rule 10b-5, “we turn first to the language of § 10(b), for [t]he starting point in every case involving construction of a statute is the language itself.”

97 S. Ct. at 1299-1300. The Court continued: “The language of § 10(b) gives no indication that Congress meant to prohibit any conduct not involving manipulation or deception.” \textit{Id.} at 1300. Inasmuch as the Court specifically defined the meaning of the terms “manipulation” and “deception,” see note 25 \textit{supra} and accompanying text, and thus found scienter to be required within the meaning of the statute, application of the \textit{Capital Gains} decision to a § 10(b) and rule 10b-5 action would indeed seem to “add a gloss to the operative language of the statute quite different from its commonly accepted meaning.” \textit{Santa Fe Indus., Inc. v. Green}, 97 S. Ct. at 1300 (quoting \textit{Ernst & Ernst v. Hochfelder}, 425 U.S. 185 (1976)).
were dispositive as to the appropriate standard of liability for private damage actions. Thus, even though the question was seemingly left open, the Court’s construction of the language and history of section 10(b) and rule 10b-5 would appear to compel a requirement of scienter in Commission enforcement proceedings as well. Indeed, the dissent noted that the degree of culpability necessary to establish a violation of section 10(b) and rule 10b-5 should not depend upon the plaintiff’s identity,41 and perceived “no real distinction”42 between private damage actions maintained under section 10(b) and Commission injunctive actions. This argument is in fact the Commission’s own, having stated in its Hochfelder amicus curiae brief that the determination of whether particular conduct violates section 10(b) and rule 10b-5 should not depend upon the identity of the plaintiff.43 Thus, the dissent’s reasoning compels the result that if scienter is the appropriate standard of liability in a private damage action under section 10(b) and rule 10b-5, scienter must also be required when the Commission sues for injunctive relief under that statute and rule.

Although the policy considerations present in Commission injunctive actions may differ from those present in private actions for damages under section 10(b) and rule 10b-5,44 the majority in Hochfelder noted that inasmuch as the language and history of section 10(b) were dispositive as to a requirement of scienter, “there is no occasion to examine the additional considerations of ‘policy.’ ”45 In Commission injunctive actions subsequent to Hochfelder, some courts have nevertheless examined the policy considerations urged by the Commission, and thus found negligence to suffice for a section 10(b) and rule 10b-5 violation.46 Yet, some post-Hochfelder decisions have held that considerations of policy will not prevail over the language of the statute so as to warrant a standard of less than scienter in Commission injunctive actions.47

42. Id.
44. See notes 124-126 infra and accompanying text.
**Scienter Required**

Prior to *Hochfelder*, only the Sixth Circuit expressly applied a standard higher than negligence in Commission injunctive actions. SEC v. *Coffey* was an enforcement action to enjoin certain corporate officials from violating sections 17(a)(1) and 17(a)(3) of the Securities Act of 1933, section 10(b) of the Securities Exchange Act of 1934, and rules 10b-5(1) and 10b-5(3) thereunder. The court of appeals reversed the district court’s order enjoining the defendants on the grounds that the Commission failed to show that the defendants had acted in “wilful or reckless disregard for the truth.” The court in *Coffey* adopted the Second Circuit’s reasoning, enunciated in *Lanza v. Drexel & Co.*, that the language of section 10(b), particularly the use of the words “manipulative” and “deceptive,” “negate[s] liability for a mere negligent omission or misrepresentation.” Although *Lanza* was a private damage action, the Sixth Circuit in *Coffey* held that the reasoning of *Lanza* must prevail in determining the standard of liability to be applied in Commission injunctive proceedings. The precept that the language of section 10(b) is controlling, regardless of whether a private party or the Commission sues, appeared in the dissent in *Hochfelder*, has since been followed, and will likely be crucial in the determination of future litigations.


50. 15 U.S.C. § 77q(a)(1) (1970), which provides: (a) It shall be unlawful for any person in the offer or sale of any securities by the use of any means or instruments of transportation or communication in interstate commerce or by the use of the mails, directly or indirectly—(1) to employ any device, scheme, or artifice to defraud . . .

51. 15 U.S.C. § 77q(a)(3) (1970). This section provides that it shall be unlawful “to engage in any transaction, practice, or course of business which operates or would operate as a fraud or deceit upon the purchaser.”


53. 479 F.2d 1277, 1305-06 (2d Cir. 1973) (en banc).

54. Id. at 1305.


58. General Counsel Memo, supra note 9, at F-1.
Since the decision in Hochfelder, a conflict persists concerning the standard of liability to be applied in Commission enforcement proceedings. In a case of first impression in the Southern District of New York, Judge Ward held that the Hochfelder decision “must be read to impose a scienter requirement” in Commission injunctive actions. This holding directly conflicts with prior cases in the Second Circuit which had consistently applied a negligence standard in Commission enforcement proceedings.

In SEC v. Bausch & Lomb, Inc., the Commission brought an injunctive action against Bausch & Lomb, Inc., and its board chairman, Daniel G. Schuman. Schuman had “leaked” non-public corporate information concerning Bausch & Lomb’s earnings estimates to a securities analyst. The court denied the injunction and dismissed the action because the Commission had failed to prove that there was a reasonable likelihood that Mr. Schuman would violate the securities laws in the future. The court also found that Mr. Schuman had not acted with scienter in leaking the information, and thus that he had not committed a past violation of the securities laws; Judge Ward relied upon the Supreme Court’s holding in Hochfelder, stating:

Argument drawing upon the words of § 10(b) and the history, legislative and administrative, of both § 10(b) and Rule 10b-5 applies equally to private suits and actions brought by the Commission.

A careful analysis of Hochfelder has convinced this Court that the distinction is no longer to be drawn and that the identical standard under § 10(b) and Rule 10b-5 must be applied whether the plaintiff is the SEC or a private litigant.

64. Id. at 1237-38.
65. Id. at 1241.
The court found that there was substantial evidence of Schuman's lack of scienter, including: the absence of trading by him; securities analysts' publications expressing the view that Bausch & Lomb was not an open-mouthed concern; an analyst's testimony that the "slip" of inside information was uncharacteristic and inadvertent; and, particularly, that shortly after the leak, Schuman placed a telephone call to the *Wall Street Journal* to "go public" with the information, a call which the court viewed as having been made with a haste belying any intent to deceive, manipulate, or defraud.\(^7\)

Inasmuch as Schuman was found to have acted without scienter, the court held that a past violation of section 10(b) and rule 10b-5 had not been established. However, the court in *Bausch & Lomb* recognized that the ultimate issue in such an injunctive action was not whether Schuman had violated the securities laws, but whether there was a "reasonable likelihood" that Schuman would violate the securities laws in the future.\(^6\)

In considering the "totality of circumstances," the court found Schuman's leak to be an "isolated occurrence."\(^7\) The court, therefore, concluded that there was no reasonable likelihood that Schuman would violate the securities laws in the future, and it denied injunctive relief to the Commission.

Thus, in Commission proceedings to enjoin violations of section 10(b) and rule 10b-5, unlike private actions for damages, the Commission generally attempts to establish both the occurrence of past illegal conduct, and that such past violations raise an inference that there is a reasonable likelihood of a future violation. Without this proof of a likely future violation, there is, in effect, nothing to enjoin.

In a recent decision, *SEC v. American Realty Trust*,\(^7\) the

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68. *Id.* at 1242.
69. *Id.* at 1244.
70. *See SEC v. Management Dynamics, Inc.*, 515 F.2d 801 (2d Cir. 1975). Referring to Commission injunctive actions and the determination of whether the defendant is "reasonably likely" to violate the law in the future, the court stated: "Whether the inference that the defendant is likely to repeat the wrong is properly drawn . . . depends on the totality of circumstances, and factors suggesting that the infraction might not have been an isolated occurrence are always relevant." *Id.* at 807.
71. *Fed. Sec. L. Rep. (CCH)* § 95,913 at 91,423 (E.D. Va. Feb. 24, 1977). The court also held that scienter is a necessary element in Commission actions to enjoin violations of § 17(a), the antifraud provision of the Securities Act of 1933. The court based its interpretation of § 17(a) upon the language of that section, which it found identical to that of § 10(b). The court also found the purposes of the two sections to be similar, although the court did acknowledge that § 10(b) was "necessarily broader in scope." *Id.* at 91,440.
Hofstra Law Review

District Court for the Eastern District of Virginia also held that scienter is required in an SEC enforcement action to enjoin violations of section 10(b) and rule 10b-5. In American Realty, as in Bausch & Lomb, the court found that the defendants had not violated the alleged antifraud provisions, inasmuch as they had not acted with the requisite scienter. The court in American Realty, in relying upon the Supreme Court’s interpretation of the language and history of section 10(b) and thus finding scienter to be required in Commission injunctive actions, stated: “If the language and history of 10(b) is dispositive as to a scienter requirement in private actions, it must also be so for SEC enforcement actions, since such suits are creatures of statutes . . . .”72 As in Bausch & Lomb, the court in American Realty found that since no violations had occurred, there was no reasonable likelihood of future violations. Thus, the Commission’s request for injunctive relief was again denied.

It has been suggested that if scienter is required, the Commission will have to sustain a greater burden of proof in injunctive actions than will the private litigant seeking damages.73 The Commission, according to this view, will seek to prove not only past improper conduct, but a reasonable likelihood of future violations as well; the private litigant need prove only a past violation. Thus, Bausch & Lomb and American Realty arguably represent a new restraint on the Commission’s enforcement powers. Actually, the Commission will have, in most cases, a burden of proof equal to that of the private litigant, regardless of whether scienter or negligence is adopted as the standard for establishing a past violation. If scienter is required to establish a violation in enforcement proceedings, then the Commission’s burden of proof will be greatest in establishing the past improper conduct. However, even if a showing of negligence is deemed sufficient to establish the past violation, the negligence establishing that past violation may be insufficient to support a finding that future violations are likely.74 Consequently, in those cases where there is no

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72. Id. at 91,440.
74. An injunction is designed to deter, not to punish. Hecht Co. v. Bowles, 321 U.S.
likelihood of future violations, an injunction will be denied.

The Commission has taken the firm stance, nonetheless, that although Hochfelder's "full impact and meaning . . . is not clear," the standard of scienter which was required there should

321, 329 (1944). Thus, the Supreme Court has held that a court, in exercising its discretion, may deny an injunction even if a violation is found. Id. at 328-29.

The situation which had occurred in SEC v. Bausch & Lomb, Inc., 420 F. Supp. 1226 (S.D.N.Y. 1976), is illustrative. The court there noted that Schuman's "conduct might justify a finding of negligence," id. at 1242 n.4, although it certainly would not merit a finding of recklessness or an intent to deceive, defraud, or manipulate. Id. at 1244. If negligence rather than scienter were deemed sufficient to establish a violation of § 10(b), however, the result in Bausch & Lomb would have been the same: "[E]ven had a violation been established, the record before the Court does not warrant the grant of this extraordinary remedy." Id.

The cases are numerous in which a past violation was established, yet a reasonable likelihood of future violations was not found. Probably, it is the nature of negligence itself, by definition an inadvertence, which may lead a court to conclude that there is nothing to enjoin, for there is no reasonable likelihood of future violations. See, e.g., SEC v. Manor Nursing Centers, Inc., 458 F.2d 1082 (2d Cir. 1972).

In Manor Nursing Centers the Commission sought injunctions against alleged violators of § 10(b) and rule 10b-5. The district court found that all the defendants had violated the alleged securities provisions. Nonetheless, injunctions were not issued against those defendants whom the court found to be merely negligent. Rather, injunctions were issued against the defendants who had not acted in good faith: "With the exception of defendants Samuel Feinberg, Suzanne Marnane and Gladys Halford [the negligent violators who were not enjoined], the defendants' violations were willful, blatant, and often completely outrageous." SEC v. Manor Nursing Centers, Inc., 340 F. Supp. 913, 936 (S.D.N.Y. 1971), aff'd, 458 F.2d 1082, 1097 (2d Cir. 1972). See also SEC v. Texas Gulf Sulphur, 312 F. Supp. 77 (S.D.N.Y. 1970), rev'd in part on other grounds, 446 F.2d 1301 (2d Cir.), cert. denied, 404 U.S. 1005 (1971).

In Texas Gulf Sulphur the district court on remand found that the framers of a press release "did not exercise due diligence in its issuance [and thus] violated Section 10(b) and Rule 10b-5." 312 F Supp. at 86. Yet, the court denied injunctive relief, stating: "The issuance of an injunction is inappropriate absent a showing of lack of good faith. . . . On the record here, there is no 'proper showing' that there is any reasonable likelihood of future violations by TGS of Section 10(b) and Rule 10b-5." Id. at 88.

Thus, it has been noted that

some courts, although applying a standard of negligence to determine culpability [and hence the past violation], have seemingly engrafted a standard of willfulness as a requirement for issuance of the injunction. . . . [N]oxious and deliberate illegal behavior has a persuasive effect on a court faced with a Commission prayer for injunctive relief, while good faith on the part of the defendant often tilts the equities in favor of denying the injunction.

Jaeger & Yadley, supra note 20, at 645, 647. The authors note, however:

It is also true . . . that a showing of negligence by itself can be sufficient to establish both a violation of the law and the equity for injunctive relief. Indeed, it would be anomalous to require a higher standard to sustain a finding of [a] likelihood of future violations than that which is required to establish the underlying violation itself.

Id. at 647-48.

75. General Counsel Memo, supra note 9, at F-1.
not apply in Commission enforcement proceedings. Despite the
Supreme Court’s extensive reliance upon the language and his-
tory of section 10(b) in requiring scienter in private damage ac-
tions, the Commission, “although . . . confident that
[Hochfelder] is not going to be of help to any of us in the foresee-
able future,” has argued vigorously that the scienter standard
is inappropriate in Commission enforcement proceedings where
“differing policies and purposes” prevail.76

Negligence Will Suffice

In SEC v. World Radio Mission, Inc.,78 the Court of Appeals
for the First Circuit enjoined a religious organization and its
leader from violating section 17(a) of the Securities Act of 1933,
section 10(b) of the Securities Exchange Act of 1934, and rule
10b-5. The court held that the defendant’s intent is irrelevant in
Commission injunctive actions.79 The defendant, World Radio
Mission, which was engaged in evangelical activities, had solic-
ited funds through investment plans. It had, however, failed to
disclose to investors its true financial condition.80 The district
court held that the Commission “made a prima facie showing of
a violation of the federal security [sic] laws and the likelihood
that future violations will occur,” but, in light of certain equitable
considerations, the court refused to issue an injunction.81 The
First Circuit reversed, stating: “From the standpoint of an SEC
injunction against violations which the court finds are likely to
persist, a defendant’s state of mind is irrelevant. . . . [G]ood
faith, however much it may be a defense to a private suit for past
actions . . . should make no difference.”82 The circuit court relied

76. Id.
77. Id. at F-2.
78. 544 F.2d 535 (1st Cir. 1976).
79. Id. at 540.
80. Id. at 539. The Mission solicited investors but did not disclose its substantial and
increasing operating deficit. In effect, it was “borrowing money fast enough to pay off
[its] matured indebtedness.” Id. at 540.
81. Id. at 537.
82. Id. A district court has broad discretion to issue an injunction, and, in reaching
its determination, it may take into account relevant equitable considerations. Hecht Co.
v. Bowles, 321 U.S. 321, 328-31 (1944). The Court of Appeals for the First Circuit recog-
nized the district court’s broad discretionary powers in matters of preliminary relief, yet
reversed, noting, “[i]n this case its equitable balance was weighted by serious misconcep-
83. SEC v. World Radio Mission, Inc., 544 F.2d 535, 540 (1st Cir. 1976) (citation
omitted).
upon the premise that an injunction is designed to protect the public against future conduct, not to punish a state of mind. In light of the district court’s finding that future violations were likely to occur, the circuit court issued the injunction.

The defendants had argued that in light of Hochfelder, the substantive standards of section 10(b) are unaffected by the identity of the plaintiff, or the type of relief sought. The defendants maintained that they had not acted with intent to deceive, the standard mandated by the Supreme Court in Hochfelder. The court’s response to this argument was that, even assuming that the defendants’ religious motives and purposes were beyond reproach, the defendants had evinced an intent to deceive by stating to prospective investors something “that is expected to be relied on, that is not believed to be true, or, if strictly true, is hoped will be understood in an untruthful sense.” The court thus indicated that the defendants had acted with “intent to deceive” as required by Hochfelder. The court, however, did not “pursue this line of inquiry” inasmuch as it held that a defendant’s state of mind is irrelevant in Commission injunctive proceedings.

A defendant’s state of mind and good faith, however, will

84. Id. at 541. See note 74 supra.
87. Id.
88. SEC v. World Radio Mission, Inc., 544 F.2d 535, 540 (1st Cir. 1976). In their Loan Plan Prospectus, the defendants, in answer to skeptical investors, pose the question: “How can we possibly pay such interest and still have funds to help the ministry?” Id. (quoting World Radio Mission, Inc., Loan Plan Prospectus). The defendants answer:

“World Radio Mission owns a modern, well-equipped publishing company . . . . We can produce literature in this plant that generates revenue enough to pay investors and still have enough left over to be able to provide ton upon ton of free Gospel literature!”

“For example: Suppose we publish a piece of literature that costs us about 15 cents to produce in massive quantities. That same piece of literature sells retail for $1.25. You can readily see how we can generate income for our ministry from our printing plant!”

Id. The court in World Radio Mission indicated that the above, although a hypothetical, conveyed the message that the defendants were in fact making substantial profits, even though the printing plant had netted a revenue of less than $5,000 each year. Id. at 540 n.9.

89. Id. at 540. See also SEC v. Van Horn, 371 F.2d 181, 186 (7th Cir. 1966) wherein the court held that the defendant’s state of mind is irrelevant to the question of whether injunctive relief is appropriate.
necessarily be relevant to determining whether future violations are likely and thus, whether an injunction is warranted.⁹⁰ If an individual has acted in good faith, and his prior misconduct is no more than inadvertent or negligent, there is no reasonable likelihood of a future violation. If there is no intent to deceive, defraud, or manipulate, then an administrative warning by the Commission will suffice to alert the individual to the impropriety of his conduct. Should the disfavored conduct persist, the Commission may then justifiably initiate an action to enjoin. At that point, however, proof of the individual's bad faith, or at least, recklessness, will be provided by his failure to heed the Commission's prior warning.⁹¹ Future violations will thus appear to be "reasonably likely," absent an injunction. In such cases, proof of a past violation may be established even if the scienter standard applies, because the defendant knew or should have known, in light of the Commission's initial warning, that his course of conduct was arguably violative of the federal securities laws. Similarly, the ongoing infraction raises an inference that future violations will occur.⁹²

Although the court in World Radio Mission expressly discounted as irrelevant the defendant's state of mind, it noted that the defendants, "while indicating that they would suspend offering their notes, have since apparently engaged in activities that would be hard to distinguish."³⁸³ Additionally, the defendants in World Radio Mission had received notice from the Commission staff that "the legality of WRM's method of raising funds from the public by sales of securities was questionable."³⁸⁴ The defen-

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⁹⁰. See, e.g., SEC v. National Student Marketing Corp., 360 F. Supp. 284, 298 (D.D.C. 1973). The court there noted: "The motive, intent and state of mind of the movants are highly relevant to the Court's determination of the appropriateness of injunctive relief. Well pleaded allegations which support a showing of knowledge and willfulness could provide a basis for the issuance of an injunction . . . ."

⁹¹. While Hochfelder left unanswered the issues of whether recklessness satisfies a scienter requirement, and whether scienter is to be applied in Commission enforcement proceedings, the Commission believes that it "could make a strong argument that a showing of recklessness would be sufficient in Commission injunctive actions." General Counsel Memo, supra note 9, at F-2. For a well-reasoned argument, see id. See also note 7 supra.

⁹². This situation is to be distinguished from that in SEC v. Bausch & Lomb, Inc., 420 F. Supp. 1226 (S.D.N.Y. 1976), in which the court noted that the leak was an isolated occurrence and where, soon after the leak, procedures to avoid future such occurrences had been adopted. Id. at 1244-45.


dants nevertheless “continued to offer and sell investment opportunities in WRM even after the Commission advised them that their activities violated the federal securities laws . . . .”95 The repetition of the particular conduct warned against belies mere negligence and raises the spectre of evil intent, which may at least have colored the court’s opinion.96 The court purported to apply the pre-Hochfelder negligence standard of the Second Circuit;97 however, even if the court had applied the scienter standard to the facts of this case, the defendant would likely have been enjoined.

The Commission’s General Counsel Memo to its staff attorneys effectively anticipated a loophole which the court in World Radio Mission was able to utilize.98 The memo recommended,

whenever possible, that the staff include allegations of violations of statutory provisions and rules in addition to Section 10(b) and Rule 10b-5 allegations, and particularly Section 17(a) of the Securities Act, which may not be subject to the “scienter” requirements of Section 10(b). Thus, if a court interprets Hochfelder in a manner hostile to the Commission, allegations of other statutory violations will still provide the court with an alternate basis upon which to find a violation and to issue an injunction.99

95. Id. at 20. Even when violations of the federal securities laws have ceased, injunctive relief may nevertheless be appropriate. In United States v. W.T. Grant Co., 345 U.S. 629, 632-33 (1953), the Court acknowledged that the cessation of illegal activities does not in itself render an injunctive action moot, for “the court’s power to grant injunctive relief survives discontinuance of the illegal conduct.” Id. at 633. Similarly, in SEC v. Culpepper, 270 F.2d 241 (2d Cir. 1959), the court stated:

“[O]rdinarily, it is no sufficient answer to a motion for an injunction that the improper conduct repeated in the past has been discontinued when action to impose legal restraints is known or thought to be in the offing . . . . for the likelihood of a resumption of the acts is a continuing menace.” (Emphasis supplied.)

Id. at 249 (quoting SEC v. Torr, 87 F.2d 446, 449 (2d Cir. 1937)). See also SEC v. Management Dynamics, Inc., 515 F.2d 801, 807 (2d Cir. 1975); SEC v. Manor Nursing Centers, Inc., 458 F.2d 1082, 1101 (2d Cir. 1972).

96. Indeed, the court indicated in dicta that the defendants had acted with “intent to deceive.” See note 88 supra and accompanying text.

97. See Second Circuit cases cited at note 62 supra.

98. General Counsel Memo, supra note 9, at F-3.

99. Id. The court in SEC v. American Realty Trust, Fed. Sec. L. Rep. (CCH) ¶ 95,913 at 91,440 (E.D. Va. Feb. 24, 1977), however, extended the Hochfelder scienter requirement to enforcement actions to enjoin violations of § 17(a) of the Securities Act of 1933. See note 71 supra. To the extent that the reasoning of American Realty is followed, the Commission will have lost the “alternate basis” which § 17(a) might have provided for avoiding the scienter requirement.
Using this approach, the court in *World Radio Mission* avoided the problematic issue which the decision in *Hochfelder* presented: whether scienter is now also to be required in Commission enforcement proceedings. The court noted: "[S]trictly speaking, since this action is founded on both section 17(a) and Rule 10b-5, we need not decide what result would obtain in an SEC injunction action based solely on section 10(b) and Rule 10b-5."1

In light of *World Radio Mission* and the Second Circuit decision in *SEC v. Universal Major Industries Corp.*,101 it appears that the Commission may, to some degree, be able to avoid the *Hochfelder* scienter requirement in proceedings to enjoin fraudulent activities. In *Universal Major Industries* the Commission sought injunctions against appellant and seven other defendants.102 All defendants, with the exception of the appellant, had consented to the entry of injunctions against them.103 The court of appeals affirmed the district court's order enjoining appellant, an attorney who was found to have aided and abetted his client in selling unregistered stock in violation of section 5 of the Securities Act of 1933.104

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100. SEC v. World Radio Mission, Inc., 544 F.2d 535, 541 n.10 (1st Cir. 1976). The court also indicated that it considered it "implausible to suppose that Congress intended to provide a mechanism for the SEC to protect the public from the injurious schemes of those of evil intent and yet leave the public prey to the same conduct perpetrated by the careless or reckless." *Id*. This effect-oriented approach was urged by the Commission in *Hochfelder*. The Court readily disposed of this argument, however, stating:

> [T]he commission cites the overall congressional purpose in the 1933 and 1934 Acts to protect investors against false and deceptive practices that might injure them... The Commission then reasons that since the "effect" upon investors of given conduct is the same regardless of whether the conduct is negligent or intentional, Congress must have intended to bar all such practices and not just those done knowingly or intentionally. The logic of this effect-oriented approach would impose liability for wholly faultless conduct where such conduct results in harm to investors, a result the Commission would be unlikely to support. But apart from where its logic might lead, the Commission would add a gloss to the operative language of the statute quite different from its commonly accepted meaning.


101. 546 F.2d 1044 (2d Cir. 1976).

102. *Id.* at 1045.

103. *Id.* Settlements in the form of consent decrees are an important part of the SEC's current enforcement program due to the Commission's lack of funds to pursue each staff allegation of wrongdoing. In a consent decree, the defendant consents to the Commission's findings of illegal conduct without admitting or denying guilt. "Voluntary compliance and ethical sensitivity are clearly basic in the securities sphere." Address by William J. Casey, then SEC Chairman, to the Enforcement Conference at the New York Law Journal (Sept. 1972), *quoted in J. Wiesen, Regulating Transactions in Securities* 33 (1975).

104. 15 U.S.C. § 77e (1970) provides:
Relying on Hochfelder, the appellant in Universal Major Industries argued that no liability should attach for aiding and abetting a section 5 violation. Further, he argued that even if liability may be found in such circumstances, scienter, rather than mere negligence, must now be proven. The court held, however, that Hochfelder does not alter the effect of section 5, which, by its terms, provides for the imposition of secondary liability. The court cited several pre-Hochfelder Second Circuit cases which support the proposition that injunctive relief is appropriate against aiders and abettors of section 5 violations. The court noted that in these section 5 cases, "we also made it clear that in SEC proceedings seeking equitable relief, a cause of action may be predicated upon negligence alone, and scienter is not required." While these cases hold that proof of negligence is sufficient in the context of Commission enforcement proceedings seeking equitable or prophylactic relief, they do not rely solely upon violations of section 10(b) and rule 10b-5 as the basis for granting injunctive relief. SEC v. Management Dynamics, Inc., SEC v. Spectrum, Ltd., and SEC v. North American Research & Development Corp. also included allegations of violations of section 5 of the 1933 Act. The rule that a Commission injunctive action may be predicated upon negligence alone may indeed be unaffected by Hochfelder if violations of sections other than section 10(b) and rule 10b-5 are also proven. This is precisely the position which the Commission is now urging and which the First Circuit adopted in World Radio Mission. In

(a) Unless a registration statement is in effect as to a security, it shall be unlawful for any person, directly or indirectly

(1) to make use of any means or instruments of transportation or communication in interstate commerce or of the mails to sell such security through the use or medium of any prospectus or otherwise; or

(2) to carry or cause to be carried through the mails or in interstate commerce, by any means or instruments of transportation, any such security for the purpose of sale or for delivery after sale.

106. Id. For the text of § 5, see note 104 supra.
109. 515 F.2d 801 (2d Cir. 1975).
110. 489 F.2d 535 (2d Cir. 1973).
111. 424 F.2d 63 (2d Cir. 1970).
112. See text accompanying notes 98 & 99 supra.
113. 544 F.2d 636 (1st Cir. 1976). See text accompanying notes 98-100 supra.
the appellant was not even alleged to have violated section 10(b) and rule 10b-5; the sole issue was whether the appellant had violated section 5 of the 1933 Act. Moreover, the Second Circuit in *Universal Major Industries* hedged the issue of whether scienter was required, stating:

> [O]ur decision need not rest on our rejection of appellant’s negligence-scienter argument, because the District Court found that appellant in some circumstances knew and in other circumstances had reason to know that his client was engaged in illegal transactions with the aid of appellant’s letters and that appellant’s acts were performed with knowledge or reckless disregard to the truth. This, we have held, is sufficient to establish scienter.

Thus, in *Universal Major Industries*, as in *World Radio Mission*, the court expressly rejected a standard of scienter, yet in dicta, found scienter or an intent to deceive to be present.

In *SEC v. Geotek*, the Commission initiated enforcement proceedings to enjoin the defendants from violating section 17(a) of the 1933 Act, sections 13(a), 15(d), 10(b) of the 1934 Act, and rule 10b-5. The Northern District of California explicitly noted the uncertainty concerning the standard of culpability in Commission enforcement actions under section 10(b) and rule 10b-5. The court recognized, however, that section 17(a), although substantially similar to Section 10(b)/10b-5, does not contain the specific language of Section 10(b) relied upon in *Hochfelder* to require proof of “scienter” in private 10(b)/10b-5 actions and was not specifically discussed by the Supreme Court in *Hochfelder*. Nor did the Supreme Court indicate in

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114. 546 F.2d 1044 (2d Cir. 1976).
115. *See* notes 18 & 19 *supra* and accompanying text.
116. *SEC v. Universal Major Indus., Corp.*, 546 F.2d 1044, 1047 (2d Cir. 1976). *See also* SEC v. *Galaxy Foods, Inc.*, 417 F. Supp. 1225, 1245-46 (E.D.N.Y. 1976), wherein the defendants were found to have violated various provisions of the federal securities laws, including § 10(b) and rule 10b-5, and an injunction was issued. The court there stated: “While negligence alone suffices as a standard for liability in enforcement proceedings . . . the misrepresentations and omissions found here were made or withheld either with actual knowledge or with reckless disregard for the truth.” Thus, although a negligence standard was enunciated in *Galaxy Foods*, the defendants were, in fact, found not to have been merely negligent.
Hochfelder whether "scienter" is a required element of proof in an SEC enforcement action brought for violations of Sections 13(a) and 15(d) of the 1934 Act.¹²²

Thus, the court found negligence to be sufficient, avoiding once again a more direct confrontation with the unresolved issue at hand.¹²³ Therefore, courts in future cases in which the Commission relies solely upon violations of section 10(b) and rule 10b-5 will be set to the task of deciding whether the scienter requirement of Hochfelder applies in Commission enforcement proceedings as well.

The Commission has consistently urged that courts distinguish between private actions which seek money damages to redress victims for past violations and Commission actions which seek to prevent future violations to protect the investing public.¹²⁴ It is the Commission's position that in view of the different policies and purposes underlying Commission actions, a lesser showing of culpability is required in Commission actions than in private actions. To support this proposition, the Commission relies upon Second Circuit pre-Hochfelder cases which make this distinction, arguing that those cases are "still good law."¹²⁵ The

¹²² Id. But see note 71 supra.
¹²⁴ General Counsel Memo, supra note 9, at F-2.

In SEC v. Management Dynamics, Inc., 515 F.2d 801 (2d Cir. 1975), the court refuted the defendants' contention that irreparable injury or the inadequacy of other remedies must be proven by the Commission before injunctive relief is warranted:

The [defendants'] crucial error on this score is their assumption that SEC enforcement actions are governed by criteria identical to those which apply in private injunction suits. Unlike private actions, which are rooted wholly in the equity jurisdiction of the federal court, SEC suits for injunctions are 'creatures of statute.'

[T]he SEC appears in these proceedings not as an ordinary litigant, but as a statutory guardian charged with safeguarding the public interest in enforcing the securities laws. Hence, by making the showing required by statute that the defendant "is engaged or about to engage" in illegal acts, the commission is seeking to protect the public interest, and "the standards of the public interest not the requirements of private litigation measure the propriety and need for injunctive relief."

Id. at 808 (quoting Hecht Co. v. Bowles, 321 U.S. 321, 331 (1944)).

The above-quoted passage, however, referred solely to the issue of a showing of irreparable injury, a showing that the court maintained must be made in private injunction
Hochfelder majority, however, refused to consider policy arguments, finding the words in the statute and rule unambiguous and dispositive. Moreover, although the Commission seeks to protect the public interest, it may not exceed its delegated authority under section 10(b). If greater protection is needed for the investing public, then, as the dissent in Hochfelder indicated, it "rests with Congress to rephrase and to re-enact." 2

In SEC v. Spectrum, Ltd., 489 F.2d 535 (2d Cir. 1973), the court applied a negligence standard, noting that the Second Circuit has "repeatedly held negligence to be sufficient in the context of enforcement proceedings seeking equitable or prophylactic relief." Id. at 541. The court continued: "[I]n a proceeding by the SEC seeking prophylactic relief, we would be undermining [the protection of investors] by an overly fine appraisal of conduct which contributes to its circumvention." Id. at n.12.

This analysis, however, is the kind of "effect analysis" which the Supreme Court rejected in Hochfelder. See note 100 supra. Indeed, the investing public would be afforded the greatest protection if the strictest standard of culpability were applied in actions under § 10(b) and rule 10b-5. Nonetheless, as the Supreme Court has indicated, it is the language of the statute which mandates a standard of scienter. This is precisely why the Supreme Court deemed policy considerations irrelevant in Hochfelder, 425 U.S. 185, 214 n.33 (1976). See text accompanying note 45 supra.

The court in SEC v. Texas Gulf Sulphur Co., 401 F.2d 833 (2d Cir. 1968)(en banc), cert. denied, 394 U.S. 976 (1969), also premised its negligence standard upon policy considerations, stating:

In an enforcement proceeding for equitable or prophylactic relief, the common law standard of deceptive conduct has been modified in the interests of broader protection for the investing public . . . for policy reasons which seem perfectly consistent with the broad Congressional design.

Absent any clear indication of a legislative intention to require a showing of specific fraudulent intent . . . the securities laws should be interpreted as an expansion of the common law both to effectuate the broad remedial design of Congress . . . and to insure uniformity of enforcement . . . Moreover . . . the implementation of a standard of conduct that encompasses negligence . . . comports with the administrative and the legislative purposes underlying the Rule. . . . This requirement, whether it be termed lack of diligence, constructive fraud, or unreasonable or negligent conduct, remains implicit in this standard, a standard that promotes the deterrence objective of the Rule.

Id. at 854-55 (emphasis added)(footnotes & citations omitted).

Much of the foregoing passage appears to have been overridden by the Supreme Court's decision in Hochfelder. The "effect analysis" which focuses on greater protection for the investing public was expressly rejected in Hochfelder. See note 100 supra. The Court in Hochfelder construed both the language and history of § 10(b) to require a showing of scienter. Likewise the Court indicated that the scope of rule 10b-5 may not be broadened beyond the authority delegated to the Commission by Congress.

In sum, the policy considerations which these cases advocate may no longer be "good law" as the Commission urges, in light of Hochfelder.

126. Ernst & Ernst v. Hochfelder, 425 U.S. 185, 218 (1976) (Blackmun, J., dissenting). The General Counsel of the SEC, Harvey Pitt, has recently indicated that the Commission will await the outcome of several cases concerning the scienter issue as applied to enforcement suits before seeking remedial legislation to overrule Hochfelder.
An alternate argument which the Commission has proposed to avoid the scienter requirement of *Hochfelder* is that according to statutory authorization in section 21(d), a past violation need not be established to warrant an injunction. Thus, if scienter were required, and the defendant were found to be merely negligent, no violation of section 10(b) would be presented. Nonetheless, the Commission argues, an inference might be drawn that a future violation is likely. But in such cases, the Commission need not formally invoke court proceedings to prevent the reoccurrence of merely negligent behavior. The Commission may invoke its administrative proceedings to inform the negligent party of the impropriety of his conduct. If the party persists in its course of conduct, the Commission may then justifiably seek an injunction. At that point, the defendant will no longer be able, in light of the Commission's notice, to claim that he was merely negligent.

**Conclusion**

The Supreme Court in *Ernst & Ernst v. Hochfelder* expressly left undecided whether scienter must be proven in Commission enforcement proceedings to enjoin violations of section 10(b) and rule 10b-5. With regard to private damage actions, however, the Court found the language and history of section 10(b) to compel proof of scienter. Lower federal court decisions subsequent to *Hochfelder* have not uniformly imposed a requirement of scienter in Commission actions to obtain injunctive relief. At least one court, in applying a standard of less than scienter, has found *Hochfelder* irrelevant to Commission enforcement proceedings. In contrast, the *Hochfelder* holding has been ex-
tended by other courts, and a scienter requirement has been imposed. However this issue is ultimately resolved, a defendant's state of mind will clearly be relevant in determining the likelihood of future violations of the securities laws and, therefore, whether injunctive relief is warranted. Because of the crucial nature of the injunctive remedy to the SEC's enforcement powers, and the obvious need for a uniform construction and administration of the federal securities laws, a resolution by the Supreme Court of this controversy is desirable and awaited.

Nancy B. McAllister

STATE TAKEOVER STATUTES VERSUS CONGRESSIONAL INTENT: PREEMPTING THE MAZE

I. INTRODUCTION

One's view of an unfriendly cash tender offer, the device by which one attempts to gain immediate control of a corporation,\(^1\) depends upon one's position. To the corporation making the offer, it is a useful, efficient tool, beneficial not only to the buyer, but to shareholders tendering shares as well. The arbitrageur\(^2\) would heartily agree, as it is his stock-in-trade. But to the management of the corporation whose stock is sought, it must seem a ruthless invasion from which the shareholders will suffer.\(^3\)

Many managements seeking to resist takeover attempts have a relatively new weapon at their disposal: the state takeover statute. This article will examine the advisability of eliminating that weapon. Its purpose is not to examine whether these laws are desirable for what they seek to accomplish, but rather to demonstrate that they are contrary to the intentions of Congress in passing the 1933 Securities Act,\(^4\) the 1934 Securities Exchange Act,\(^5\) and the Williams Act.\(^6\)

II. BATTLE BY TENDER OFFER

The unfriendly cash tender offer often creates dramatic episodes which engender strife and conflict. Description cannot be rendered in neutral terms. The corporation making the offer considers itself merely an "offeror"; management of the target corpo-

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2. In tender offer context, professional arbitrageurs often make substantial open-market purchases of the target's shares at prices somewhere between the market price of the target's shares prior to the offer and the tender price, for the purpose of subsequently tendering such shares at a profit. The price which arbitrageurs will pay for such shares will be determined by their evaluation of the risk that tendered shares will not be accepted.
3. Management anticipates suffering for itself as well, but this is never stated by incumbent management resisting a takeover bid.
ration deems it a "raider." The company being sought is dubbed the "target," and a target often receives shattering blows. Sometimes "target" company inadequately serves, and it may better be described as the "victim." Incumbent management becomes entrenched, presumably readying itself for the onslaught. It frantically seeks time to devise its battle plan so that it may defend itself.9

The terms used to describe unfriendly tender offers may conote violent personal attack or even full-scale warfare. In such a war, battle lines are clearly defined. On one side stands the offeror, on the other, target's management. The shareholders wander somewhere between in no man's land. Each side wields a powerful arsenal. The offeror has size and money and thus the ability to entice shareholders with a premium above the market value of the stock. Targets have made increasing use of the newest, and perhaps most powerful, addition to their arsenal.

Only a cynic would suggest that the sole purpose of every state takeover law is to provide a protective environment for incumbent management. The twenty-three8 state legislatures that

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8. ARANOW & EINHORN, supra note 2, at 1.

http://scholarlycommons.law.hofstra.edu/hlr/vol5/iss4/3
passed these laws generally posit shareholders' interests as the underlying goal. But unlike blue sky laws, which operate only when a buyer is physically located within a state,\footnote{See generally L. Loss & E. Cawt, Blue Sky Law (1958).} state takeover laws affect the rights of shareholders and prospective shareholders living far beyond the borders of a particular state. A shareholder living in Arizona, which has no takeover statute, might not want the protection afforded him by the state of Ohio, whose law claims a broad jurisdictional basis.\footnote{See Haw. Rev. Stat. § 417E-3(g) (Supp. 1975); Ind. Code Ann. § 23-2-3-2(f) (Burns Supp. 1976).} Such laws have the inevitable effect of shielding incumbent management. The laws differ substantially from state to state and conflict where jurisdictions overlap, as many do.\footnote{Vaughan, State Tender Offer Regulation, 9 Rev. Sec. Reg. 969 (1976).} Several provide that the state securities commission must decide what is a “fair” offer, and may disapprove of those deemed “unfair.”\footnote{M. Lipton, Corporate Takeovers: Tender Offers & Freezeouts 2 (prepared for a symposium on takeovers at the Waldorf-Astoria, New York, Oct. 22-23, 1976) [hereinafter cited as Lipton].} The Williams Act would leave that determination to the shareholder. These laws conflict with the Williams Act and to the extent that they do should be preempted by it. Should the state statutes be found invalid where they go beyond the federal plan, naught would remain but a body of laws that mirror the federal scheme. This residue would not interfere with the purpose of the Act.

It is no accident that the number of state takeover statutes has increased from eleven\footnote{See discussion of jurisdiction in text accompanying notes 119-120 infra.} in January, 1976, to the present twenty-three. These laws have proliferated in reaction to the increase in takeovers: “Tender offers have increased from 34 in fiscal 1970 to 107 in fiscal 1975, with aggregate cash and securities offered in fiscal 1975 of over $2.6 billion.”\footnote{Vaughan, supra note 15, at 969.} Takeovers are desira-
ble to large corporations, allowing them to buy assets cheaply in an inflationary economy. Thus, takeovers enable corporations “[t]o obtain what [they] can’t otherwise obtain by negotiation—picking up bear market bargains. In a bear market the low price ratio and market prices below book value make cash tenders attractive.”

The problems created by state takeover laws will increase as the number of tender offers increases. Perhaps tender offers should be discouraged. The shareholder of a target company may be pressured into a Hobson’s choice in which he must sell his share or risk retaining less marketable stock. States may wish to provide more protection than the Williams Act affords. The fact remains, however, that Congress has found tender offers to be allowable and even desirable, and these state statutes run contrary to the congressional scheme. Congress never envisioned the dual lawsuits, proceeding concurrently in state and federal courts, which these laws encourage. It is time for Congress or the courts to put uniformity back into the law governing takeovers by eliminating these statutes.

The courts may soon have such an opportunity. Recently, Great Western United Corporation filed suit in district court in Texas, seeking to enjoin the states of Idaho, Maryland, and New York from applying their takeover statutes to Great Western United’s cash tender offer for the Sunshine Mining Company, a Washington corporation.

18. Lipton, supra note 16, at 7. See Aranow & Einhorn, supra note 2, at 2.
19. For a discussion of listing requirements, see text accompanying notes 101-104 infra. See also S. REP. No. 550, 90th Cong., 1st Sess. 2 (1967).
21. For a discussion of such a dual suit, see text accompanying notes 128-131 infra.
22. Great W. United Corp. v. Kidwell, No. CA3-77-0405 (D. Tex., filed Mar. 28, 1977). The plaintiff contends that the takeover statutes of Idaho, Maryland, and New York are unconstitutional as a burden on interstate commerce, as a violation of the supremacy clause, and as a violation of equal protection and due process constitutional guarantees. Plaintiff’s Complaint, Great W. United Corp. v. Kidwell, No. CA3-77-0405 (D. Tex., filed Mar. 28, 1977), at 2. The plaintiff maintains that the Williams Act is a “uniform national system of regulation of interstate cash tender offers,” and preempts state legislation in that area. Id. at 7.
23. The purpose of the Williams Act is to insure that public shareholders who are confronted by a cash tender offer for their stock will not be required to respond without adequate information regarding the qualifications and intentions of the offering party. By requiring disclosure of information to the target
In enacting the Williams Act, Congress has preempted the state statutes. The courts may enforce this by holding the laws invalid, preempted by federal law, in any actual controversy. State and federal laws covering identical subject matter coexist in many instances. State bank robbery laws, for example, complement federal law and aid in enforcement. As will be demonstrated, such is not the case in this area of securities regulation. Hence, preemption is the only solution.

III. THE WILLIAMS ACT

The Williams Act was enacted in response to the gradual increase in the number of tender offers, and was designed to fill investor information gaps in existing legislation. The federal tender offer statute, like the Securities Acts, is based on the concept of "disclose or abstain." It assures a target company's shareholders that all information material to determining whether to tender their stock will be provided. Standards for disclosure are embodied in the Williams Act.

The Act provides only standards for disclosure; Congress expressly rejected an alternative statute that would substantively regulate tender offers to protect companies from "raids." This bill would have required that the bidder give twenty days notice to the target corporation and the Securities and Exchange Commission of his intent to make a tender offer. The bill was never reported out of committee. Congress noted that the timing of a tender offer is often determinative of its success, and that prior notice to a target company could cause wide fluctuations in the market price of the target's stock.

Thus, Congress recognized the necessity for what has become known as the "balanced scheme," an approach to tender offers by corporations as well as to the Securities and Exchange Commission, Congress intended to do no more than give incumbent management an opportunity to express and explain its position.

24. 15 U.S.C. §§ 78m(d)-78m(e); §§ 78n(d)-78n(f) (1970).
26. 15 U.S.C. §§ 78m(d)-78m(e); §§ 78n(d)-78n(f) (1970).
30. State Takeover Statutes and the Williams Act (A Report of the Subcomm. on
that favors neither the target’s management nor the offeror. 31
Congress did not intend to eliminate takeover bids, and the drafters of the Act took “extreme care to avoid tipping the balance of regulatory burden in favor of management or in favor of the person making the takeover bid.” 32 In requiring only disclosure and rejecting further regulatory measures, Congress limited the purpose of the Act to “full and fair disclosure for the benefit of stockholders while at the same time providing the offeror and management equal opportunity to fairly present their case.” 33

The Act was designed to do no more than lay the ground rules for a fair fight between management and the offeror. 34

The Securities Exchange Act requires limited disclosure by any person acquiring “beneficial ownership” of five percent of

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31. [The primary objective of the Williams Act was to provide investor protection in takeover situations rather than regulate tender offers as an economic phenomenon, that the primary, if not the sole, means by which this objective is to be achieved is full disclosure to the shareholders of the so-called “target company”, and that the Act was intended to be administered in an evenhanded way, except to the extent necessary to accomplish the purpose of investor protection.

Hearings Before the Subcomm. on Banking, Housing and Urban Affairs, 94th Cong., 2d Sess. 94 (1976) (statement of Philip A. Loomis, Sec. & Exch. Comm’r).


34. We think it clear that the purpose of The Congress, in the enactment of the legislation in question, is to provide investors who hold equity interests in public corporations, material information with respect to the potential impact of any effort to acquire control of a company, sufficient time within which to make an unhurried investment decision as to whether to dispose of or retain their securities, and to assure fair treatment of the investors. We deem it abundantly clear that there is an obligation on persons attempting to gain control of a corporation by means of tender offers to make the required filings and disclosures.


A Schedule 13D also requires a five percent owner to disclose any additional pur-
any class of registered equity securities. The Williams Act further requires that any person or group making a tender offer which would result in ownership of more than five percent of the target must file a Schedule 13D at the same time the offer is made. Shareholders, however, are permitted a change of heart; their tendered shares are not committed indefinitely, but may be withdrawn during the first seven days of the offer or after sixty days if not yet purchased or returned. Shares tendered during the first ten days must be purchased on a pro rata basis to prevent a disorderly first-come-first-served avalanche of tendered shares. As an extra protection for early tenderers, any subsequent increase in the offered price must be paid to all tendering shareholders.

While the Williams Act provides shareholders with information regarding the offeror's proposed purchase, it also allows the target's management an opportunity to present arguments against the purchase to prospective tenderers. Thus, the mystery surrounding the offeror and the otherwise unopposed attractiveness of the premium are "the evils which the Williams Act is designed to eliminate." Failure to comply with the disclosure provisions of the Act constitutes more than a mere "technical violation"; the offender usually can expect harsh treatment by the courts. In *Cattlemen's Investment Co. v. Fears*, the defendant owned 4.86% of the plaintiff's corporation and proceeded to purchase additional

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6. Id. § 78n(d)(2) (1976).


37. Id. § 78n(d)(5).

38. Id. § 78n(d)(6).

39. Id. § 78n(d)(7).

40. The purpose of the filing and notification provisions is to give investors and stockholders the opportunity to assess the insurgents' plan before selling or buying stock in the corporation. It additionally gives them the opportunity to hear from incumbent management on the merit or lack of merit of the insurgents' proposals.


41. Id.

42. Twin Fair, Inc. v. Reger, 394 F. Supp. 156, 160 (W.D.N.Y. 1975) (good faith in failure to file is irrelevant, even though offeror is unaware of filing requirements, where actual harm occurs). *Cf.* Rondeau v. Mosinee Paper Corp., 422 U.S. 49, 57-62 (1975) (if offeror acts in good faith and files when he becomes aware of an obligation to do so, and there has been no irreparable harm, issuance of an injunction is not warranted).

stock, thus increasing his holdings in excess of 5%. While the defendant was not engaged in a formal tender offer, the court decided that his conduct constituted a tender offer within the meaning of the Act. The court then enjoined the defendant from voting all stock purchased after he was required to file. The Williams Act should not be taken lightly by those acquiring large blocks of shares in publicly held corporations.

Federal courts generally agree that the shareholder is the primary intended recipient of the protections offered by the Williams Act. That the purpose of the Act is to protect investors is underscored by many decisions employing the "reasonable investor" standard to determine whether there has been sufficient disclosure. "The applicable test for whether a misrepresentation is material is whether a reasonable investor might have considered information to be important in deciding to accept a tender offer." The standard deals not with the magnitude of any misrepresentation; rather it demands that shareholders be given all

44. Id. at 1250.
45. Id. at 1252.

Some courts have stated that the Act covers all shareholders of the target company, even those who do not plan to tender their stock. "[I]t must always be remembered that the protections of the Williams Act extend to all shareholders of the target company—both those who intend to divest themselves of ownership and those who do not. Both groups must be assured full, fair and adequate disclosure . . . ." Commonwealth Oil Ref. Co. v. Tesoro Petroleum Corp., 394 F. Supp. 267, 273 (S.D.N.Y. 1975). Other courts have taken a broader view of the disclosure requirements of the Williams Act, interpreting the provisions as a protection for investors in general, as a means of providing an environment in which investments may be made knowledgeably with the confidence that full disclosure of all pertinent information has been made. Mosinee Paper Corp. v. Rondeau, 500 F.2d 1011, 1015-16 (7th Cir. 1974), rev'd, 422 U.S. 49 (1975); Smallwood v. Pearl Brewing Co., 489 F.2d 579, 597 (5th Cir.), cert. denied, 419 U.S. 873 (1974); Bath Indus., Inc. v. Canada Dev. Corp., 366 F. Supp. 374, 420 (S.D. Tex. 1973). Thus, the Williams Act operates as a vehicle for promoting investor trust in the integrity of securities markets.

information they might consider material. Some courts have identified the “reasonable prototype investor” as the chief object of Williams Act protection. No court has interpreted the Act to exist mainly for the benefit of incumbent management. Yet incumbent management, not the shareholder, is the principal beneficiary of the protections offered by the various state laws.

Some decisions have specifically excluded certain classes from the protections offered by the Williams Act. In Klaus v. Hi-Shear Corporation, the court noted that the Act “was designed to protect cash tender offerees, not offerors.” In H.K. Porter Co. v. Nicholson File Co., the court held that the Act also covered shareholders of the offeror corporation in situations where mis-statements by the target’s management resulted in an unsuccessful offer. In such a situation, the offeror has standing to sue. Another decision held that the purpose of the Act is to protect the offeror, the target corporation, and the target’s shareholders, “who must determine whether or not to tender their shares pursuant to the offer.”

If the Act did, indeed, emerge as a result of Congress’s efforts “to protect investors from unscrupulous corporate raiders,”

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Other courts have adopted a more exacting standard of materiality, but still focus on the shareholder as the principal beneficiary of the Williams Act. This second test deems any misstatement or omission “material” if a stockholder who tendered his shares would not have done so absent the alleged violation. Electronic Specialty Corp. v. International Controls Corp. 409 F.2d 937, 948 (2d Cir. 1969); Symington Wayne Corp. v. Dresser Indus., Inc., 383 F.2d 840, 843 (2d Cir. 1967); Spielman v. General Host Corp., 402 F. Supp. 190, 194 (S.D.N.Y. 1975). The decisions typically assert that “materiality” is not merely an abstract notion, but must take into account “all the circumstances surrounding the transaction.”

This test requires that the shareholder would not have sold his shares had he known more, while the first test examines only whether information that the stockholder should have known was withheld.

51. 528 F.2d 225 (9th Cir. 1975).
52. Id. at 232 (citing Rondeau v. Mosinee Paper Corp., 422 U.S. 49 (1975)).
54. “Congress did not intend to favor either the offeror or the target corporation by passage of the Williams Act. Defendant would have the Act read to favor the target corporation.” H.K. Porter Co. v. Nicholson File Co., 353 F. Supp. 153, 164 (D. R.I.), aff’d, 482 F.2d 421 (1st Cir. 1973).
56. “It is clear that the immediate purpose of the Williams Act was to protect investors from unscrupulous corporate raiders who could force shareholders into making a hasty, uninformed decision to sell by offering to buy a portion of the target corporation’s
management of target corporations have not remained immune from the Act's sanctions for making misleading statements. Many courts have held that the Act applies also to misrepresentations made by the target's management.57

Hence, the balanced scheme embodied in the Williams Act exists for the protection of shareholders, whether shareholders of the target company, the offeror, or the investment community in general. The Act was not conceived to be, and does not operate as, a protection for incumbent management. In *Scott v. Multi-Amp Corp.*,58 the court held that even though the acquiring group gained control of the corporation with the knowledge and cooperation of existing management, and though the transaction was preceded by wide publicity, the acquiror was still required to file a Schedule 13D.59 Incumbent management was fully informed and even participated in the takeover; the defendant was nevertheless required to file for the benefit of the shareholders. To underscore this point, one court stated: "The history of the Act . . . clearly reveals that §13(d) was not enacted to provide protection for management against raiders, as there is substantial disagreement as to whether tender offers and stock acquisitions in pursuit of control constitute a desirable and healthy aspect of stockholder democracy."60

The Act, as interpreted by numerous federal courts,61 was written and enacted with the shareholder's protection in mind, and was not meant to obstruct legitimate takeover bids.62 Congress and the federal courts apparently decided to sanction the use of tender offers as a lawful economic device by which one corporation can gain control of another. The ultimate decision

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59. *Id.* at 54.
61. See *generally* cases cited in note 48 supra.
62. Congress did not intend "to impose an unrealistic requirement of laboratory conditions that might make the new statute a potent tool for incumbent management to protect its own interests against the desires and welfare of the stockholders." Electronic Specialty Corp. v. International Controls Corp., 409 F.2d 937, 948 (2d Cir. 1969). *Accord*, Missouri-Portland Cement Co. v. H.K. Porter Co., 535 F.2d 886, 897 (8th Cir. 1976).
whether to tender their shares is left to the stockholders. The Williams Act is designed to furnish shareholders information necessary to decide whether an offer is fair and adequate.

The state statutes, under the guise of protecting stockholder interests, permit the infusion of matters irrelevant to the shareholder into the tender offer process. Many statutes undercut the sovereignty of the shareholder over his own shares by deciding for him what constitutes a fair offer. Many tender offers involve premiums of twenty to fifty percent above current market value, yet a shareholder seeking to tender his shares may be required to wait for the approval of the state securities commission. Likewise, an offeror who has gone to great expense to make an offer, willfully incurring any risks involved, must await this same approval. The determination by a state securities commission may involve a nationally traded security owned by shareholders in all respects alien to that state. To contend that these statutes avoid conflict with and merely supplement the Williams Act is to misread the legislative history and the court decisions dealing with that legislation.

IV. STATE TAKEOVER STATUTES

While state legislators pontificate about investor protection, the financial news media have announced that state takeover laws are designed primarily to obstruct takeovers. Few state legislators have displayed the candor of those in New York, where "even the legislation's creators, concede that it would reduce the number of tender offers and make New York State a more attractive home for companies afraid of a buy-out bid." Thus, while many states create the subterfuge of "investor protection," the

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63. See text accompanying notes 133-139 infra.
64. See text accompanying notes 122-124 infra.
65. Most tender offers involve premiums 20% above current market value. See Hayes & Taussig, supra note 17, at 139-40. Troubh, Purchased Affection: A Primer on Cash Tender Offers, 54 HAV. BUS. REV. 79, 82-83 (1976).
66. See text accompanying notes 122-124 infra.
67. The New York Times reported: "Governor Carey signed a bill yesterday that would impose procedural restrictions on the growing number of unfriendly tender offers—the gambit employed by acquisition-minded companies to buy out shareholders of other corporations." N.Y. Times, July 30, 1976, § D, at 3, col. 3.
Again from the Times: "States are moving with increasing frequency to impose procedural restrictions on unfriendly tender offers, that is, the practice by acquisition-minded companies of buying out shareholders of other corporations." N.Y. Times, July 6, 1976, at 41, col. 7. See Vaughan, supra note 15, at 969.
68. N.Y. Times, July 30, 1976, § D, at 3, col. 3.
real import of these acts is lost on no one except perhaps the shareholder.

The following sections demonstrate some of the many ways in which the state statutes conflict with the Williams Act. While not exhaustive, these sections describe the most formidable challenges to the federal plan posed by the state statutes.

A. Percentage of Ownership

The Williams Act requires disclosure to be made when an offeror makes an offer that would result in his ownership of five percent or more of any class of securities in a corporation. The state statutes are actuated by varying percentages of ownership. The Wisconsin statute, for example, comes into play before any offer that would result in at least five percent ownership; Colorado's statute is triggered by an offer that would result in at least ten percent ownership; the Kansas statute requires twenty percent.

B. Filing in Advance

Unlike the Williams Act, all state statutes require a statement to be filed with the state securities commissions and the target companies, and require the terms of the offer to be announced publicly before the offer can become effective. These requirements interfere with the delicate timing and the element of surprise necessary to make a tender offer successful. Preregistration requirements range from ten days to sixty days. Most statutes render the offer effective a specified number of days after filing. This is meaningless, however, as it applies only if the offer

73. E.g., even the Delaware law, which is viewed as the mildest of all state takeover statutes, requires notification of the state securities commission and the target 20 days prior to the offer. Del. Code, tit. 8, § 209(a)(1) (Supp. 1976).
74. One of the most damaging effects of prefiling is that it eliminates the essential element of surprise. Yet this crucial element is permissible under the federal scheme. The Williams Act does not require prefiling in any form. It is clear that Congress did not consider prefiling as a protection to be afforded shareholders, but rather viewed it as an undesirable burden on the offeror that would "tip the balance" in favor of incumbent management. S. Rep. No. 550, 90th Cong., 1st Sess. 3 (1967). See H.R. Rep. No. 1711, 90th Cong., 2d Sess. 4 (1968).
is uncontested. Since many tender offers are contested, the date of filing is only the beginning of a long administrative process.

Most states require a filing fee to be paid by the offeror. While relatively insignificant, this represents only the first of a long list of expenses exacted by these statutes. Louisiana and Tennessee charge $100 for the “services” of their securities commissions; Connecticut charges $250. New York reserves the right to charge up to $2,500 for filing. Many states require an additional sum of equal amount to be paid by the target upon application for a hearing.

C. Length of Offer and Withdrawal Rights

Under the Williams Act, an offer must be open for a minimum of seven days if it seeks all the stock of the target company. Several state laws lengthen this minimum time the offer must remain open. Alaska demands that the offer be open from twenty-one to thirty-five days, while Massachusetts law requires that the offer remain open for sixty days.

The Williams Act provides for withdrawal rights during the first seven days of the offer and after sixty days. Idaho, Minnesota, and Wisconsin have retained this scheme. Other states have imposed considerable variations. Colorado permits withdrawal during the first fifteen days and after thirty-five days;

77. In Louisiana, the offer is effective 20 days after filing, but may be accelerated “if the target company agrees . . . .” Louisiana Business Take-Over Offers Act, ch. 15, [1976] 1A BLUE SKY L. REP. (CCH) ¶ 17,231, at 17,232 (to be codified in LA. REV. STAT. ANN. § 51:1501(E) (West)) (effective June 28, 1976). If the purpose of the law is to give shareholders ample time to make a decision, it is questionable why the state allows management to agree to such an acceleration.


79. The justification for the charge is of little comfort to the offeror, who is told that the fee is exacted “to recover the costs of administering this article.” Id.


81. The offer is effective 20 days after filing, but may be accelerated “if the target company agrees . . . .” Louisiana Business Take-Over Offers Act, ch. 15, [1976] 1A BLUE SKY L. REP. (CCH) ¶ 17,231, at 17,232 (to be codified in LA. REV. STAT. ANN. § 51:1501(E) (West)) (effective June 28, 1976).


86. Idaho Code § 30-1506(2) (Supp. 1976); MINN. STAT. ANN. § 80B.06 Subd. 2 (Supp. 1977); Wis. STAT. ANN. § 552.11(2) (West 1976).

87. COLO. REV. STAT. § 11-51.5-103(c) (Supp. 1975).
Alaska, Virginia, and Nevada require withdrawal rights to be given within the first twenty-one days of the offer.\textsuperscript{88} Massachusetts and Hawaii allow withdrawal any time up to five days prior to the termination of the offer;\textsuperscript{89} Kentucky and Indiana allow withdrawal up to three days prior to termination.\textsuperscript{90}

D. Disclosure Provisions

All states' statutes require at least those items included in the Schedule 13D to be disclosed,\textsuperscript{91} but most require substantially more. Virginia's statute, typical of many states, requires:

—Description of each class of the offeror's capital stock and of its long-term debt;
—Financial statements for the current period and for the three most recent annual accounting periods;
—Description of the location and general character of the principal physical properties of the offeror and its subsidiaries;
—Description of pending legal proceedings to which the offeror or any of its subsidiaries is subject;
—Description of the business done and projected by the offeror and its subsidiaries, including business done over the past five years;
—Names of all directors and executive officers with biographical summaries of each for the past five years;
—Any proposed material transactions or any occurring in the past three years between the offeror or its subsidiaries and its directors or executive officers.\textsuperscript{92}

Many states include a variety of additional disclosure requirements. Pennsylvania, for example, requires a history of the

\textsuperscript{88} Alaska Takeover Bid Disclosure Act, ch. 129, [1976] 1 BLUE SKY L. REP. (CCH) ¶ 1937, at 1938 (to be codified in ALASKA STAT. § 45.47.020(2)) (effective June 8, 1976); VA. Code § 13.1-530(b) (1973); REV. REV. STAT. § 78.3772.2 (1973).
\textsuperscript{89} MASS. GEN. LAWS ANN. ch. 110C, § 7 (West Supp. 1976); HAW. REV. STAT. § 417E-2(2) (Supp. 1975). Thus, in Massachusetts, where the offer must be left open a minimum of 60 days, the offeror may find he has failed 55 days after the offer, even if the offer is uncontested. He may pay all expenses necessary to a tender offer, only to find the shares withdrawn near the termination date.
\textsuperscript{90} Louisiana Business Take-Over Offers Act, [1976] 1A BLUE SKY L. REP. (CCH) ¶ 17,231, at 17,234 (to be codified in LA. REV. STAT. ANN. § 51:1504(A) (West)) (effective June 28, 1976); IND. CODE ANN. § 23-2-3-5(a) (Burns Supp. 1976).
\textsuperscript{91} Some states follow the Schedule 13D format very closely. See, e.g., DEL. CODE tit. 8, § 203(a)(1) (Supp. 1976); WIS. STAT. ANN. § 552.03 (West 1976). Others simply require a Schedule 13D, or allow the 13D as a substitute for their own requirements under the statute. See, e.g., COLO. REV. STAT. § 11.51.5-104(2) (Supp. 1975); S.D. COMPILED LAWS ANN. § 47-32-6 (Supp. 1975).
\textsuperscript{92} VA. CODE § 13.1-531(b)(vii) (1973).
offeror's employer-employee relations during the past five years, including strikes and unfair labor practices found by the National Labor Relations Board. In addition to the multitudinous requirements of the state statutes, New York, like many other states, reserves the right to request “[s]uch data and further documents . . . and information as may be required by the attorney general.”

One disturbing problem with these extensive state requirements is that this information carries virtually no import for the tendering shareholder. The basic premise of all these laws is that they were enacted for the investors' protection. Yet any benefit from the additional disclosure required by state statutes accrues only to the states themselves. While the investor is concerned with the potential profitability of his shares, many of the statutes require disclosure of items irrelevant to that interest. Instead they stress items regarding the effects on local economies that the proposed takeovers might produce. A state might be interested in the financial integrity of the offeror or the background of its directors if that offeror is about to take over a local corporation. This interest manifests the state's concern with protecting its citizenry. The state would even be interested in how the offeror has dealt with labor in the past, a concern demonstrated by the Pennsylvania law. But many of these laws are misrepresented behind the facade of shareholder protection. The shareholder's concerns include the price he is offered for his stock and its potential for profit should he decide to retain it. The financial integrity of the offeror has already been demonstrated to tendering shareholders by the offer itself. Thus, the state laws conflict with the Williams Act on the most basic level, concerning the very purpose for which the laws regulating takeovers were passed. Shareholder protection is the primary purpose behind the federal law; protection of incumbent management is the primary purpose behind the state laws.

95. This information would only be of major importance to a shareholder if he were to receive stock of the offeror in exchange for his shares. In such a case, he would be interested in many aspects of the corporation whose stock he was to receive. But the type of disclosure required by the state statutes appears irrelevant to a cash tender offer.
96. Possibly, state legislatures created this not-so-subtle subterfuge because they hoped to minimize interstate commerce problems in the courts with statutes appearing irrelevant.
E. Amount of Shares

Ohio, under “emergency rules” since repealed, permitted no offer for less than all outstanding common shares of the target.\textsuperscript{97} Hawaii still prohibits offers for “less than all shares of a class.”\textsuperscript{98}

For an acquiring corporation to gain “absolute” control of a target, it must accumulate more than fifty percent of all voting stock or other securities convertible to voting stock.\textsuperscript{99} Effective or working control might be attained by accumulating as little as twenty percent of the target’s securities where the stock is widely held.\textsuperscript{100} Nevertheless, provisions such as Hawaii’s render takeover impossible where the offeror seeks to acquire less stock than the statute permits. This problem has not yet surfaced, but the difficulties posed by these requirements remain.

The states contend that these statutes protect shareholders with stock remaining where the offeror buys less than all shares tendered. Such shareholders might have their securities delisted if the number of shares remaining no longer satisfies listing requirements.\textsuperscript{101} Thus, a shareholder whose stock was not purchased by the offeror retains a less marketable security.

A requirement such as Hawaii’s may wholly prevent an offer that might otherwise have been made. A shareholder in Washington, which has no takeover statute, standing to make a financial gain upon tender of his shares, might be prevented from doing so if one such statute discourages an offer concerning his stock. While Hawaii claims to protect his interests, he may want no such protection.

F. Administrative Hearings

Delaware’s law truly aims at assuring investor protection, requiring only that twenty days’ advance notice be given to the target and that the offer be left open for twenty days. That law makes no provision for administrative hearings of any kind.\textsuperscript{102} In
New York, however, the attorney-general is empowered to call a hearing at his discretion. Some states empower the securities commission to hold a hearing, but only at the request of the target and then only if the commissioner deems it necessary. The most popular approach allows the commissioner to call a hearing at his discretion, but makes a hearing mandatory at the target’s request.

The time limits for hearings vary widely among the states. Connecticut, Minnesota, and South Dakota require a hearing within twenty days after filing. New York and Ohio require a hearing, if necessary, any time within forty days of filing. Massachusetts allows up to sixty days.

Time limits for adjudications by the commissions vary as well. The Ohio statute requires a decision within sixty days of filing, while Massachusetts may take up to ninety days to decide whether the offer shall become effective. Conflicts with the federal law are obvious here. Provisions for such hearings prior to "permission" to make an offer are not contemplated by the Williams Act.

G. Jurisdiction

The diversity of methods that states employ to assert jurisdiction over target corporations leads to a situation in which several states may assert jurisdiction over the same transaction. A few states claim jurisdiction only if the target is incorporated

110. MASS. GEN LAWS ANN. ch. 110C, § 6 (West Supp. 1976). The maximum time limits would make tender offers impossible as a practical matter when hearings are ordered in Massachusetts. Should the commissioner order a hearing, an adjudication does not have to be handed down for 90 days. Id. § 6. The offer then becomes effective and must remain open for 60 days. Id. § 7. But shareholders may withdraw up to five days before the offer terminates. Id. It may thus take up to 145 days from the date of filing for the offeror to discover whether his takeover attempt has succeeded.
Some states require the target to be incorporated in and doing business in the state. Others widen their protection to cover all corporations incorporated in or having their principal place of business within the state. Some require the target to be incorporated in or to have both principal place of business and "substantial assets" in the state.

Other states have broadened the jurisdictional reach of their statutes by creating three distinct categories. These states claim jurisdiction over any offer involving a target incorporated in the state, or having its principal place of business there, or having "substantial assets" located there. Louisiana has its own variation, asserting jurisdiction over any corporation "organized under the laws of this state, or having its principal place of business, or a substantial portion of the fair value of its total assets or more than fifty percent of its employees in this state . . . and has aggregate assets of at least fifty million dollars . . . ."

There are severe interpretational problems with any jurisdiction clause that goes beyond mere incorporation. Particularly troublesome is the "substantial assets" foothold. It is unclear whether this means a small or large plant or whether it refers to one or several retail outlets. While all state tender offer statutes contain a "definitions" section, no state legislature has attempted to elucidate the meaning of these provisions. Through this unexplained and rather arbitrary scheme the states assert jurisdiction over tender offers potentially affecting shareholders nationwide. Indeed, these statutes claim jurisdiction over transactions where neither buyer nor seller is located within the state. A fairly large target or one with diverse properties thus

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117. An example of a state's jurisdictional claim under "substantial assets" was the attempted takeover of the Otis Elevator Company by the United Technologies Corp. See Otis Elevator Co. v. United Technologies Corp., 405 F. Supp. 960 (S.D.N.Y. 1976).
118. State Takeover Statutes, supra note 30, at 189.
may fall within the jurisdiction of several states, all of which seek to apply their statutes and to stifle takeover attempts.119

Where the laws of numerous states apply to the same subject matter, forum shopping inevitably results. This has already occurred in at least one case. Sabine Royalty was incorporated in Texas, a state with no takeover law.120 In 1976 it entered into an unsuccessful takeover arrangement with another corporation. Sabine, fearing a takeover attempt by a disfavored raider, then “merged” with a subsidiary it had created in Louisiana. Sabine thus invoked the protections offered by the Louisiana statute. While the shareholders overwhelmingly approved the action in a proxy vote, they might have voted otherwise had they been offered a healthy premium for their stock. For a target to insulate itself from the threat of a takeover by artificially invoking the jurisdiction of a foreign state is clearly to abuse these laws. It runs against the grain of the Williams Act, which was enacted not to obstruct takeover bids, but merely to provide shareholders with adequate information.

H. Standards for Adjudication

Once a hearing is deemed necessary by the appropriate state official, or in many states if the target simply requests one, the state securities commission must meet to determine whether the offeror has complied with the statute. As with other sections of the state takeover acts, the precise standards which the commission employs to determine compliance vary from state to state. The statutes least offensive to the Williams Act empower the commissions only to evaluate the adequacy of disclosure made by the offeror.121 Other states look to the adequacy of disclosure and whether the offer was made to all shareholders on equal terms.122 Some states, however, purportedly seek to offer the shareholder more “protection” by evaluating the substantive merits of the offer itself. In these states the commissions rule whether the offer

119. This presents a possible defense for managements seeking to resist takeover bids. A corporation can increase its protection by taking any action that would qualify it for jurisdiction under a number of state statutes.


is “unfair, unjust or inequitable”\textsuperscript{123} to the shareholder.

Here, additional undefined terms even more problematic than “substantial assets” arise. The commission’s interpretation of their meanings may be determinative of whether an offer is successful. For a state securities commission to presume to evaluate the “fairness” of an offer is absurd. The commissions have no guidelines by which to evaluate the fairness of an offer. Moreover, unless the commission is comprised of investment experts, it is ill-equipped to make such a determination for the shareholder. Even if the commission includes such experts, it will fail to make a detached investment decision because it will consider matters irrelevant to sound shareholders’ decisions. While claiming to decide whether the offer is fair from an investment standpoint, the commission will really measure the impact a takeover might have on the local economy. The commission is in a better position to counsel the state than it is to counsel the shareholders, as it purports to do.

An offeree, whether well-versed in or ignorant of the ways of business and finance, should be permitted himself to decide whether to tender. The shareholder knows the price he paid for his shares. Presumably, he can ascertain the present value of those shares. The Williams Act leaves the decision to him; the share is the stockholder’s property to retain or to sell as he wishes, on whatever terms he deems advantageous. The state laws employing the “fairness” standard take that decision away from him.\textsuperscript{124} He can, of course, retain the stock, but he will be able to tender it only if the offer is certified to be “fair” and becomes effective. That these statutes supplant the good (or bad) sense of the shareholder further conflicts with the federal scheme. The Williams Act attempts to provide vital information to the shareholder to facilitate an independent decision; many of the state statutes take this decision away from him.


\textsuperscript{124} In contrast, the SEC has resisted the power to evaluate the merits of any bid. “We [the SEC] do not wish to have responsibility with respect to the terms of the offer or to affect them in any way.” Hearings on S. 510 Before the Subcomm. on Securities of the Senate Comm. on Banking Currency, 90th Cong., 1st Sess. 63 (1967).
I. Favoring the Target's Management

Serious conflict with the Williams Act can be detected by examining the advance notice requirements, longer time periods, and administrative clearances mandated by the state statutes. Further, the delays resulting from these acts favor incumbent management by giving it additional time within which to mount an attack on the soundness of the offer. But mere delay is only one of the advantages conferred upon management. The management of the target company need not meet the same standards of disclosure as the offeror. Provisions for review of the management's counter-solicitation materials are rare. By imposing this double standard, the statutes upset the "balanced scheme" envisioned by the drafters of the Williams Act.

* * *

The existence of state takeover statutes allows and even encourages the initiation of contemporaneous lawsuits in state and federal courts. This wasteful, costly process exacts a high price from the offeror, but in management's view, bestows protection well worth the cost.

Such a dual suit resulted from the takeover bid for the Copperweld Corporation, an Ohio-based manufacturer of specialty metal products. The offeror there was Imetal, a French holding company controlled by the Rothschild family. Copperweld had been among thirty-nine corporations under consideration by Imetal in a year-long search for an appropriate American target. Imetal announced its bid on September 4, 1975, and Copperweld's management lost no time in launching its attack.

In anticipation of Imetal's offer, Copperweld ran a full-page advertisement in The Wall Street Journal, urging its shareholders

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125. See text accompanying notes 69-124 supra. See generally State Takeover Statutes, supra note 30.
126. Moylan, supra note 28, at 701.
127. While subjecting the offeror to heavy restrictions, management is left essentially free and unrestricted. Few states require administrative review of the management's soliciting material. None requires management to advise the offeror of its position before taking one. Despite their avowed purpose of requiring . . . fair, full, and effective disclosure, only a handful of the statutes even require the target to mail the offeror's soliciting material or to furnish a stockholder list.

Id.

to retain their shares.\textsuperscript{129} It sought and attained a temporary restraining order in a Pennsylvania federal district court enjoining Imetal from proceeding with its offer for ten days.\textsuperscript{130} Thereafter followed a barrage of letters from Copperweld's management to its shareholders.\textsuperscript{131} Copperweld took several more full-page advertisements urging shareholders to retain their shares.\textsuperscript{132}

Copperweld stock had been selling at approximately thirty-four dollars per share when the offer was first made. Immediately thereafter the New York Stock Exchange suspended trading in Copperweld shares. Trading reopened after several days, and the price shot up to forty-two dollars. Imetal's offer was $42.50.

Seeking a permanent injunction, Copperweld alleged insider trading resulting in violation of antitrust and federal securities laws.\textsuperscript{133} Ultimately, Copperweld lost on the merits. The district court found none of the alleged violations,\textsuperscript{134} and the Third Circuit Court of Appeals denied any further motion for an injunction.\textsuperscript{135} The actions in federal court, however, had successfully stalled the offer for nearly two months.

Copperweld was by no means finished in its attempt to resist Imetal's takeover bid. While its action in federal court was still pending, the Ohio Division of Securities issued a cease and desist order barring any further solicitation by Imetal until the commission could evaluate whether any violation of the Ohio act had

\textsuperscript{129} The advertisement thus advised:

\begin{itemize}
  \item The offer is substantially below the true value of your shares.
  \item The tender offer is a taxable transaction. Therefore, you may incur a substantial tax liability.
  \item Your company has never been stronger financially and its product lines are healthy and growing.
  \item Copperweld had record sales and earnings for the first six months of 1975, despite the recession.
  \item Your dividends have increased five times in the last four years, and a further dividend increase will be recommended again in October.
  \item Dividends have been paid every year for the past 40 years.
  \item Court action is planned by Copperweld to protect its security holders.
\end{itemize}

\textsuperscript{130} Wall St. J., Sept. 4, 1975, at 17.
\textsuperscript{131} Wall St. J., Sept. 8, 1975, at 13, col. 1.
\textsuperscript{132} Letters were sent September 3, September 5, October 23, November 7, and November 21 (letters on file at the office of the Hofstra Law Review).
\textsuperscript{133} Wall St. J., Sept. 8, 1975, at 19. Another advertisement followed the next day.
\textsuperscript{135} Id. at 608.
Several days later, the Ohio Court of Common Pleas issued its own temporary restraining order on motion by the Division. Indeed, the government of Ohio had already resolved to "support the efforts of Copperweld's management and the company's work force to continue operations under American ownership." What had been Copperweld's cause of action in the federal courts was now initiated by the State of Ohio in its own courts. Copperweld had alleged antitrust and securities law violations in federal court. Ohio based its cause of action on Imetal's failure publicly to announce the terms of the bid twenty days prior to its effective date, and their failure to file with the Ohio Division of Securities, both of which were in violation of Ohio's statute.

Imetal and the State of Ohio finally entered into a consent decree to settle the matter. The corporation revised its offer to reflect a recent dividend paid, so shareholders would receive substantially the same amount as originally offered. Two-thirds of the common stock was then tendered to and purchased by Imetal.

In state court, Imetal had argued that the Ohio statute was preempted by the Williams Act and was unconstitutional on other grounds. Neither that court nor any other ever reached the merits of that argument. While most of the delay there was caused by Copperweld's federal court action, a similar delay could have been procured solely by the state. Such a delay inevitably favors the target. None of the voluminous materials sent by Copperweld to its shareholders was reviewable in advance by the securities commission. Had Imetal complied with the statute, all of its solicitation material would have been subject to prepublication review and would have been sent to the target as well. Copperweld would have had the opportunity to formulate

136. The order was issued a little more than a week after the offer was made. Division order, State of Ohio Div. of Sec., Sept. 12, 1975 (a copy of the order is on file at the office of the Hofstra Law Review).
137. The order was issued September 17, 1975 (Dow-Jones report on file at the office of the Hofstra Law Review).
138. Answer of Defendant to Plaintiffs' First Amended Complaint, State v. Imetal, No. 75CV-09-3868 (C.P. Franklin County, Oct. 9, 1975), at 6.
141. Supplementary Answer of Defendant to Plaintiffs' First Amended Complaint at 1-2, State v. Imetal, No. 75CV-09-3868 (C.P. Franklin County Oct. 9, 1975).
responses to Imetal’s arguments before the public saw any of Imetal’s materials.

It is not surprising that the Ohio law is weighted heavily in favor of management: It was passed with the encouragement of an Ohio corporation. While the statute mimics the Williams Act disclosure requirements, full compliance with the Ohio statute makes takeovers nearly impossible.

Ohio’s preference for incumbent management over raiders was also manifest in the attempted takeover of Youngstown Steel Door Co., an Ohio corporation, by Thrall Car Manufacturing Co., a Chicago-based company. After delaying the offer a full two months beyond the earliest effective date under federal law, the Ohio Securities Division issued its order, “which approved substantially all of the findings of fact and conclusions of law of its Hearing Examiner who, in turn, had adopted the same almost verbatim from the proposals submitted by Steel Door’s management.”

It has been argued that state takeover laws are a “boon” to shareholders. Adherents to this position point out that whenever these laws are involved, the shareholder ultimately receives a higher price for his shares than he would have received under the original offer. This occurs when either the offeror raises the premium or a competitive offeror has been able to bid because of the delay. This argument is fallacious because the “chilling effect” of these laws discourages potential offers. While the shareholder might be offered a higher price in some cases, the very existence of these laws may prevent many offers from ever being made. Moreover, to contend that these laws benefit shareholders is to defend the statutes for the wrong reason. The benefit to

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143. Careful analysis of this Act would suggest that it is “special interest” legislation sailing under different colors, weighted obviously to protect incumbent management from attack. This is accomplished largely under the fiction of requiring fair disclosure to shareholders. The disclosure method, however, is of such a nature, and procedures are so designed that they accomplish a substantive result not encompassed in the expressed purpose of the legislation—the discouragement, nay, the prohibition in effect of tender offers. Disclosure is not the real aim. The real aim is the protection of incumbent management from intruders.

145. Lipton, supra note 16, at 94.
147. Id.
shareholders in isolated cases is far exceeded by the cost of tender offers in general. This benefit accrues through the interference with and obstruction of a legitimate economic transaction sanctioned by Congress. Benign effects of bad laws cannot justify statutes designed to thwart congressional intent.

There have been increasing indications of shareholder dissatisfaction with management attempts to resist takeover bids. Shareholders have initiated class action suits against management that have rejected, out-of-hand, offers fifty percent above the market price of the shares,148 where the offeror attempted a “friendly” takeover. In some cases the offer had not even been passed along to shareholders. Perhaps similar dissatisfaction with the state statutes will emerge as investors become aware that the state laws do not benefit shareholders; but rather work to their detriment.

One further problem with these statutes goes beyond the constitutional difficulties of extraterritoriality and preemption. These state takeover statutes reflect the dangerous philosophy that a state can legislatively solve any perceived problem, regardless of the solution’s effect on interests outside the state. Utah recently expanded its takeover statute in response to a perceived threat. The Utah statute previously covered only targets incorporated or with a principal place of business in that state.149 It has now been amended to protect companies with assets of more than $12.5 million or more than 500 employees in that state.150 According to one legislator in Utah, the action was taken to protect a company with large holdings in the state from being taken over by “Arab oil interests.”151 The bill, approved unanimously in both houses of the Utah Legislature within twenty-four hours of its proposal,152 was clearly a case of special interest legislation.

As it stands now, nothing prevents any state, with or without a takeover statute, from changing, amending, or enacting laws tailored to any unforeseen exigency. While speedy legislative action might be appropriate for purely intrastate problems, the capacity for instant legislation in an area with such widespread

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151. Id.
152. Id.
ramifications threatens shareholders nationally. Should a rumor involving a Utah target with only 400 employees circulate, presumably the legislature will have ready an appropriate amendment.

It has been suggested that the effect of the state statutes might be blunted by curing the defects in the Williams Act that led to the enactment of these statutes. Proposals include:

- Providing a minimum time, perhaps twenty to thirty days, that the offer must remain open;
- Giving management more of a chance to resist the offer or to seek a better deal for the shareholders;
- Amending the Act so purchases cannot be made until the expiration of a stated minimum period;
- Extending the initial time during which offerees may withdraw tendered shares.153

If Congress deems it necessary to provide investors with additional protection, perhaps these proposals are sound. But it would be poor policy to incorporate them into the Act merely to conform to the state laws. Moreover, the states would remain free to amend their acts to once again circumvent any changes made in the federal scheme.

Congress made its purpose clear in passing the Williams Act. State takeover laws are meant not to complement the Act in achieving that end, but rather to serve a different end which conflicts with the federal scheme. In short, these laws exist and operate in spite of the federal law. In an area which sorely needs uniformity, the federal scheme must prevail. The state laws should be eliminated.

V. PREEMPTION

A number of arguments have been advanced in support of prohibiting state legislation in the takeover area. The state laws arguably present a burden on interstate commerce.154 They may also violate the due process and equal protection clauses of the Constitution. The scope of this discussion shall be limited to

153. State Takeover Statutes, supra note 30, at 194.
154. See generally Note, Commerce Clause Limitations on State Regulation of Tender Offers, 47 S. Cal. L. Rev. 1133 (1974). The note also provides an early but interesting analysis of the preemption question. At the time the note was written, only five states had passed takeover statutes, and virtually no judicial background had yet become available. The note relies largely on the Supreme Court test in Pennsylvania v. Nelson, 350 U.S. 497, 504 (1956), one of several standards the Court uses to determine whether state laws are preempted by federal statutes.
demonstrating that the state takeover statutes are preempted by the Williams Act and for that reason must fall. Article VI, clause 2, of the United States Constitution, commonly referred to as the Supremacy Clause, provides: “This Constitution, and the laws of the United States which shall be made in pursuance thereof... shall be the Supreme Law of the Land; and the Judges in every State shall be bound thereby, anything in the... Laws of any State to the Contrary notwithstanding.” The state statutes heretofore described violate the Supremacy Clause of the Constitution. They conflict radically with existing federal legislation and work only to render the Williams Act ineffective. Under the Supremacy Clause, the state acts must give way.

It may be argued that Congress expressly refused to preempt state securities regulations in section 28(a) of the Securities Exchange Act, where it is stated: “Nothing in this chapter shall affect the jurisdiction of the securities commission (or any agency or officer performing like functions) of any state over any security or any person insofar as it does not conflict with the provisions of this chapter or the rules and regulations thereunder.”

It may also be argued, however, that this section does not apply to provisions added to the Securities Exchange Act by the Williams Act, “since state takeover acts do not involve the state securities commissioners’ exercise of the sort of jurisdiction contemplated by Section 28...” Half a century ago, Congress might not have foreseen the maze of laws created by state takeover statutes. But Congress did not intend to relinquish its right to preempt inconsistent laws in the securities field where a situation requiring prevalence of the federal law arose. Section 28(a) does not necessarily exclude preemption by Congress.

Resolution of the issue is further complicated by the manner in which the state laws are drafted. Each state has been careful to include all the disclosure provisions of the Williams Act within its statute. Compliance with the state law requires disclosure at least adequate to satisfy the Williams Act. But an offeror who


158. State Takeover Statutes, supra note 30, at 191.

complies with only the federal act inevitably violates the state law or several state laws that apply to the bid.

If Congress does not expressly void the state statutes by amending the Williams Act, resolution will be left to the courts. There are practical considerations, however, that make this difficult. While the preemption issue has been raised in the complaints and answers of the parties in several unfriendly takeover battles, settlement always precedes court resolution. For purposes of judicial resolution, tender offers are ended, one way or another, in too short a time. "There are, of course, substantial economic interests at stake, but it is at best doubtful that any offeror has the interest to spend the time and money necessary to pursue a test case simply to resolve the issue." At this time, there are no reported decisions either striking or upholding the state laws.

The Supreme Court has held that states have the right to pass regulations in the securities field. But it does not follow that state takeover statutes are not preempted by federal statutes found to be in direct conflict with them. In many cases in which Congress has not preempted an entire field, specific state legislation has been invalidated where it interfered with congressional purpose. "[T]he law of the State, though enacted in the exercise of powers not controverted, must yield" when incompatible with federal legislation.

Should a case arise in which the validity of a state takeover statute is questioned, the state will argue that the statute constitutes mere regulation of an internal affair; the laws protect local companies employing citizens of the state, and such regulation is within the reserved powers of the state. That this exercise of power over intrastate concerns incurs inevitable interstate

existence of a constitutional conflict: seeking out a conflict between state and federal regulations where none clearly exists is enjoined.

161. State Takeover Statutes, supra note 30, at 192.
162. See Paris Adult Theatre I v. Slayton, 413 U.S. 49, 62 (1973) (state and federal governments may pass laws in areas including securities regulation even if those laws have the collateral effect of impinging on constitutionally-guaranteed rights); Merrick v. N.W. Halsey & Co., 242 U.S. 568 (1917); Hall v. Geiger Jones Co. 242 U.S. 539 (1917); Green v. Weis, Volsin, Cannon, Inc., 479 F.2d 462, 466 (7th Cir. 1973).
consequences is irrefutable. Yet even if the statute regulates activities that are basically local in nature, preemption cannot be ruled out. The Supreme Court has stated:

While the general right of the states to regulate their strictly domestic affairs is fundamental in our constitutional system and vital to the integrity and permanence of that system, that right must always be exerted in subordination to the granted or enumerated powers of the General Government, and not in hostility to the rights secured by the Supreme Law of the Land.\(^\text{164}\)

Even statutes governing “local concerns” of major importance to the state are subject to preemption. Essentiality as a justification of state laws which conflict with federal law has been deemed inadequate by the Court, which has not hesitated to “reject it as a guide in the field . . . involved.”\(^\text{165}\) One prerequisite for preemption, however, is that the state law must be in clear, direct, and positive conflict with the congressional legislation.\(^\text{166}\) The effect of the state laws in this area does not merely conflict; rather, the laws serve to render the Williams Act impotent. They far exceed its scope and might eventually prohibit the very situations to which the Act applies. Such emasculation of federal law has never been permitted by the Court.\(^\text{167}\)

As indicated, one way to avoid constitutional conflict is to modify the Williams Act to approximate more closely the type of regulatory schemes enacted by the states. But any changes made in the Act should cure its deficiencies, not palliatively mask them. The Court has expressly rejected the notion that the fed-

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\(^{166}\) The relative importance to the state of its own law is not material when there is a conflict with a valid federal law, for the Framers of the Constitution provided that the federal law must prevail. Article 6, clause 2. This principle was made clear by Chief Justice Marshall when he stated for the Court that any state law, however clearly within a state’s acknowledged power, which interferes with or is contrary to federal law, must yield.


\(^{168}\) See Federation of Labor v. McAdory, 325 U.S. 450, 467 (1945).


eral government must conform to the state view in areas of conflict; rather, it is the states that must conform where laws collide.168

Securities regulation is appropriate subject matter for primary federal control where securities are traded nationally. Any decision by a state securities commission as to whether a bid for nationally traded securities may become effective affects shareholders across the country. The Court has held that the federal government may exercise exclusive control over areas of importance to the nation as a whole, even where the power of the state has not been expressly prohibited.169 "The Court's determination that Congress alone may legislate over matters which are necessarily national in import reflects the basic principle of federalism."170 Such matters include those which affect the states generally, and not those peculiarly confined within the boundaries of a single state. In those areas federal law must supersede state law regulating the identical subject matter.171

The Court has demonstrated a reluctance to strike down state laws where state power has not been expressly prohibited, unless those laws touch an area of national concern. In Florida Lime & Avocado Growers v. Paul,172 California, through its Agricultural Code, rejected Florida avocado shipments which did not satisfy the state ripeness test, even though they met federal requirements.173 The avocado growers argued that the California law violated the Supremacy Clause and therefore denied them equal protection.174 The Court found, however, that the readying

168. "It is of the very essence of supremacy to remove all obstacles to its actions within its own sphere, and so to modify every power vested in subordinate governments, as to exempt its own operations from their own influence." Public Utilities Comm. v. United States, 335 U.S. 534, 544 (1958) (quoting Chief Justice Marshall in McCulloch v. Maryland, 17 U.S. (4 Wheat) 316, 427 (1819)).

169. The States may exercise concurrent or independent power in all cases but three:
1. Where the power is lodged exclusively in the Federal Constitution.
2. Where it is given to the United States and prohibited to the States.
3. Where, from the nature and subjects of the power, it must necessarily be exercised by the National Government exclusively.


173. Id.

174. Id. at 134-35.
of foodstuffs for market "has always been deemed a matter of peculiarly local concern." The Court continued: "Thus the revealed congressional design was apparently to do no more than to invite farmers and growers to get together, under the auspices of the Department of Agriculture, to work out local harvesting, packing and processing programs and thereby relieve temporarily depressed marketing conditions."

Only a staunch defender of state takeover statutes would argue that the Williams Act constitutes merely an "invitation" for the federal government and each state to "get together" under the auspices of the SEC to promulgate an irregular, patchwork amalgam of diverse and confusing standards by which to control as integral a part of interstate commerce as securities trading.

The Court has not been reluctant to preempt state laws that severely interfere with matters national in character. In City of Burbank v. Lockheed Air Terminal, the local city council sought to enforce an ordinance prohibiting jet aircraft from taking off at the Hollywood-Burbank airport during certain hours of the night. In view of the action taken by the federal government in the form of the Federal Aviation Act of 1958 and the Noise Control Act of 1972, the Court held that enforcement of the ordinance "is totally inconsistent with the objectives of the federal statutory and regulatory scheme." While there was no express preemption provision in the federal acts, the Court held the ordinance to be preempted, given "the pervasive nature of the scheme of federal regulation of aircraft noise . . . ." The Securities Act

175. Id. at 144.
176. Id. at 150. The Court has recently held, however, that a California law requiring more stringent food weight-labeling standards than those required by the federal Wholesome Meat Act, the Fair Packaging and Labeling Act, and the Food, Drug and Cosmetic Act, was constitutionally invalid. The Court held that the California law was preempted by the federal regulations. Jones v. Rath Packing Co., 97 S. Ct. 1305 (1977).
178. Id. at 625.
179. Id. at 627-28 (citing Lockheed Air Terminal v. City of Burbank, 318 F. Supp. 914 (C.D. Cal. 1970)).
180. Id. at 633.

And where the federal government, in the exercise of superior authority in this field, has enacted a complete scheme of regulation and has therein provided a standard . . . states cannot, inconsistently with the purpose of Congress, conflict or interfere with, curtail or complement, the federal laws, or enforce additional or auxiliary regulations.

of 1933, the Securities Exchange Act of 1934, and the Williams Act present a similarly pervasive scheme, leaving no room for laws that severely interfere with their purpose.

Such areas of national concern demand a uniform law to replace the multitude of contradictory provisions presented in state statutes. The need for a uniform system is another basis for justifying preemption. In *Cooley v. Board of Wardens*, the Court stated: "Whatever subjects of this power are in their nature national, or admit only of one system, or plan of regulation, may justly be said to be of such a nature as to require exclusive legislation by Congress." The problems raised by laws that conflict not only with the federal regulation, but with each other as well, underscore the need for preemption. "A multiplicity of tribunals and a diversity of procedures are quite as apt to produce incompatible or conflicting adjudications as are different rules of substantive law."

Should the states forfeit their charade and admit that the premise of their takeover laws is protection of local businesses, the laws will nevertheless interfere with the purpose behind the Williams Act. This suffices to declare the state statutes invalid. The Court has emphatically rejected the notions that a state law may interfere with a federal law if the avowed purposes of the laws differ, and the state legislature did not intend to frustrate the federal act when it enacted its statute.

"Deciding whether a state statute is in conflict with a federal statute and hence invalid under the Supremacy Clause is essentially a two-step process of first ascertaining the construction of the two statutes and then determining the constitutional question whether they are in conflict." The Court must first determine the purposes of both laws, but must also look to the practical

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181. 53 U.S. 299 (1851).
182. *Id.* at 319.
184. See discussion in text accompanying notes 95-96 supra.
186. *Id.* at 652.

Apart from the fact that it is at odds with the approach taken in nearly all our Supremacy Clause cases, such a doctrine would enable state legislatures to nullify nearly all unwanted federal legislation by simply publishing a legislative committee report articulating some state interest or policy—other than frustration of the federal objective—that would be tangentially furthered by the proposed state law.

*Id.* at 644.
effects of the statutes beyond the stated purposes. The true test for preemption ultimately depends upon whether the state regulation "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress."187 The Supreme Court has clearly articulated the purpose of the Williams Act: dissemination of material information. In <cite>Rondeau v. Mosinee Paper Corp.</cite>, the Court stated that aside from disclosure, the Act was intended to give management "no more" than a chance to explain its position to shareholders.188 "The Congress expressly disclaimed an intention to provide a weapon for management to discourage takeover bids or prevent large accumulations of stock which would create the potential for such attempts."189

In <cite>Rondeau</cite> the Court also noted that management cannot hide behind the rights of shareholders guaranteed by the Act, but must instead establish its own cause of action: The Act was not designed for management's protection.190 To permit management to invoke the shareholders' rights as a shield without establishing its own cause for relief would be inconsistent with the legislative scheme191 and unnecessary for the protection of investors. The Court rejected management's claim that the "public interest" should be taken into account when considering its implied right of action because, the target argued, management was in the "best position" to insure compliance with the Williams Act.192

The Court thus applied the Williams Act in practical terms,193 beyond its bare provisions, to effect the "balanced scheme" Congress sought. Just as the Court looks to the effect of the federal legislation, it examines the results of the application of a conflicting state law, whether "the state policy may produce a result inconsistent with the objective of the federal statute."194 State takeover statutes satisfy at least this test, for no matter

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188. <cite>Rondeau v. Mosinee Paper Corp.</cite>, 422 U.S. 49, 58 (1975) (citations omitted).
189. Id.
190. Id.
191. Id.
192. Id. at 62.
193. In discussing the Securities Act of 1933 and the Securities and Exchange Act of 1934, the Court has said: "Because securities transactions are economic in character, Congress intended application of these statutes to turn on the economic realities underlying the transaction . . . ." <cite>United Housing Foundation v. Forman</cite>, 421 U.S. 837 (1975).
194. <cite>Rice v. Santa Fe Elevator Corp.</cite>, 331 U.S. 218, 230 (1947).
what their avowed purpose, the result they produce runs contrary to the Williams Act's sole objective of disclosure.

It may be argued that these laws do no more than supplement the federal scheme. The Court has upheld state laws that were truly supplemental in nature, where there was evidence that the state and federal regulations could coexist "without impairing federal superintendence of the field." Where an inevitable collision of the effects of state and federal laws occurs, however, the state law must be stricken. Here the laws clearly collide; although an offeror satisfies the federal disclosure standards, he must do far more to comply with the state acts. This defeats the congressional desire to avoid interference with legitimate tender offers. "When Congress has taken the particular subject matter in hand coincidence is as ineffective as opposition, and a state law is not to be declared a help because it attempts to go farther than Congress has seen fit to go." From congressional debate preceding enactment of the Williams Act, it is clear that Congress intended the Act to be not a mere minimum standard subject to supplemental action by the states, but rather the sole standard by which tender offers are to be regulated. In such a case the state statute is superseded "regardless of whether it purports to supplement the federal law." It does not matter that the federal law has less stringent requirements than the state statutes: "The test . . . is whether the matter on which the State asserts the right to act is in any way regulated by the Federal Act. If it is, the federal scheme prevails though it is a more modest, less pervasive regulatory plan than that of the State." To conclude that the Williams Act provides no more than a minimum standard for disclosure, and that the states may pass laws exceeding that minimum standard, would mean that the Act serves only to protect shareholders in states that have not yet passed tender offer statutes. Congress had no such inconsequential purpose in mind.

The Supreme Court has instructed that "[i]f Congress is authorized to act in a field, it should manifest its intentions clearly. It will not be presumed that a federal statute was in-

196. Id. at 143.
198. See notes 32 & 124 supra.
tended to supersede the exercise of the power of the state unless there is a clear manifestation of intention to do so.201 Some justices have interpreted this to mean that the federal law must contain a specific preemption provision to prevail over the state statute.202 But the absence of such a provision does not preclude preemption.203 “It long has been the rule that exclusion of state action may be implied from the nature of the legislation and the subject matter although express declaration of such result is wanting.”204 A strict, doctrinal approach requiring a specific clause misses the point of the policy behind preemption. A state law is preempted because of the type of legislation on both state and federal levels and the subject matter involved. Thus, the Court looks to the statutes and the effects they seek to achieve. One basis for deciding whether federal law will preempt is the uniformity of regulation preemption will provide. The Court asks not only whether Congress intended to exercise exclusive control, but also whether preemption would achieve a desirable, beneficial result. The Court has numerous grounds upon which to hold that the federal statute preempts the twenty-three state laws, even in the absence of a specific provision in the Williams Act.

VI. CONCLUSION

Growing corporate conglomerates “swallowing up” the winnowing number of smaller companies legitimately concerns the states. Perhaps Congress will take action to reverse this trend, but the need to do so is not a subject within the scope of this article. For now, it is a question left to social scientists and economists. For the present, Congress has expressly sanctioned the use of takeovers as a legitimate economic device. The twenty-three state statutes presently in effect attempt to contravene congressional purposes, and therefore must yield to the federal scheme. Immediate prospects for preemption by congressional action are not bright. There is no concentrated movement toward preemption in Congress, and the states discourage any such drive.205

The long road to the Supreme Court, which ultimately must decide whether the continued existence of state takeover statutes is permissible, will be an arduous one. It will take an offeror with a substantial interest in acquiring a target to endure a lawsuit that will lead to final resolution of this problem. But such resolution is inevitable. Given the growing number of tender offers under present economic conditions, the increasing number of state laws, and the initial signs that states are willing to extend the jurisdictions of their laws to fit particular situations, a Supreme Court determination may not be far. As the Court has previously stated: "This Court, in the exercise of its judicial function, must take the comprehensive and valid federal legislation as enacted and declare invalid state regulation which impinges on that legislation."  

Steven M. Cohen

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CHALLENGES TO PREEMPLOYMENT TESTS
AFTER WASHINGTON v. DAVIS

Employees who wish to challenge the use of a preemployment screening test on the ground that it discriminates against them on the basis of race have available various constitutional and statutory remedies. State employees have a constitutional claim under the equal protection clause of the fourteenth amendment, which proscribes state racial discrimination. Federal employees can assert a violation of their rights under the due process clause of the fifth amendment which has been interpreted to contain an equal protection element. To effectuate these constitutional guarantees, Congress has provided a cause of action in 42 U.S.C. § 1981. Title VII of the Civil Rights Act of 1964 affords additional statutory protection against employment discrimination.

Initially, public employers at the state, federal, and local levels could not be sued under Title VII, and public employees attacking the use of employment tests were limited to a

1. This comment will discuss written examinations which purport to measure general intellectual ability or the specific abilities necessary for successful performance of a particular job.
2. The fourteenth amendment provides in part: "[N]or shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV.
4. The fifth amendment provides in part: "[N]o person shall . . . be deprived of life, liberty, or property, without due process of law . . . ." U.S. Const. amend. V.
6. 42 U.S.C. § 1981 (1970). The statute was originally based on the thirteenth amendment and passed as part of the Civil Rights Act of 1866. It was reenacted after ratification of the fourteenth amendment. The statute currently provides:
   All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.
7. Title VII provides in part:
   Notwithstanding any other provision of this subchapter, it shall not be an unlawful employment practice for an employer . . . to give and to act upon the results of any professionally developed ability test provided that such test, its administration or action upon the results is not designed, intended or used to discriminate because of race, color, religion, sex or national origin.
constitutional attack or a suit under section 1981. Two developments altered this situation. In 1972 amendments to Title VII extended protection to public employees. Four years later, in Brown v. General Services Administration, the Supreme Court held that Congress intended Title VII to be the sole cause of action for federal employees; the Court thus eliminated the possibility of suit under section 1981.

Although both public and private employees may now sue under Title VII, it is nonetheless important to consider the proof necessary to challenge successfully an employment test on equal protection grounds. Title VII does not bar plaintiffs from asserting constitutional as well as statutory grounds for relief. Because Title VII limits monetary relief to two years back pay, plaintiffs seeking unlimited back pay and punitive or compensatory damages would benefit by including constitutional claims. Moreover, there may be plaintiffs who wish to allege constitutional claims to avoid the elaborate procedures required to bring a Title VII suit. Finally, an equal protection claim provides the only basis for relief available to employees not subject to Title VII.

The different causes of action available and the distinctions

9. See Washington v. Davis, 426 U.S. 229, 238 n.10 (1976), for a discussion of the inapplicability of Title VII to government employees at the time plaintiffs' suit was filed.
15. See 42 U.S.C. § 2000e-5 (1970 & Supp. V 1975). These procedures include filing a charge with the Equal Employment Opportunity Commission (EEOC) within 90 days of the alleged violation. If the alleged discrimination took place in a state having its own fair employment laws, the EEOC must wait 60 days after the filing of a charge under state law before acting on the complaint. Otherwise the Commission investigates the charges, determines if there is reasonable cause to support them and attempts to resolve the dispute among the parties. If the Commission's efforts at mediation fail, the complainant may file suit in federal district court within 30 days. See generally Note; Federal Employment Discrimination: Scope of Inquiry and the Class Action Under Title VII, 22 U.C.L.A. L. Rev. 1288 (1975).
16. 42 U.S.C. § 2000e(b) (Supp. V 1975) defines employer for the purposes of Title VII as a "person engaged in an industry affecting commerce who has fifteen or more employees . . . ." Therefore, employees in small businesses are not covered by Title VII.
between claims by private and public employees have caused judicial controversy centering around two issues: the proof sufficient to establish a prima facie case of discrimination\textsuperscript{17} and the proof necessary for an employer to justify the use of a screening test.\textsuperscript{18} Perhaps the greatest difficulty facing the courts has been whether, in the area of employment testing, the standards for deciding statutory and constitutional claims of discrimination should be the same.

**The Prima Facie Case**

In *Washington v. Davis*,\textsuperscript{19} the Supreme Court established that the evidence required for a prima facie case of a constitutional claim of discrimination resulting from the use of an employment test differs from the proof required for a statutory claim. In a seven to two decision\textsuperscript{20} the Court held that a disproportionate impact on racial groups does not suffice to prove a constitutional claim of racial discrimination; proof of discriminatory purpose is required.\textsuperscript{21}

Prior to *Washington*, lower courts\textsuperscript{22} deciding constitutional challenges to employment tests were greatly influenced by the Supreme Court's decision in a landmark Title VII case, *Griggs v. Duke Power Co.*\textsuperscript{23} In *Griggs* the Court considered whether an employer could make successful performance on aptitude tests a prerequisite to employment despite the discriminatory effect of the tests. The court of appeals\textsuperscript{24} had held that Title VII per-


\textsuperscript{19} 426 U.S. 229 (1976).

\textsuperscript{20} Justice White wrote the Court's opinion, in which Chief Justice Burger, and Justices Blackmun, Powell, and Rehnquist joined. Washington v. Davis, 426 U.S. 229 (1976). Justice Stewart joined in Parts I and II of the opinion. *Id.* at 252. Justice Stevens filed a concurring opinion. *Id.* Justice Brennan, joined by Justice Marshall, wrote a dissenting opinion. *Id.* at 256.

\textsuperscript{21} *Id.* at 239.

\textsuperscript{22} See note 29 infra.

\textsuperscript{23} 401 U.S. 424 (1971).

mitted such tests absent a discriminatory purpose. The Supreme Court reversed and enunciated a standard for Title VII cases which focused on the effect of testing procedures rather than on the employer’s intent. The Court found that Congress intended Title VII to remove barriers which have operated to the advantage of whites. The Court further declared that good intent, or a lack of discriminatory intent, does not redeem employment practices which have a discriminatory effect and which do not measure job capability.

Griggs established that in a Title VII action proof of discriminatory impact, without proof of discriminatory purpose, constitutes a prima facie claim of discrimination. The burden of proof then shifts to the employer to show a “demonstrable relationship” between the test and job performance. Following Griggs, many courts of appeals held that in equal protection claims, a marked statistical disparity in the pass/fail rates for blacks and whites taking a qualifying examination established a prima facie case of racial discrimination.

In Castro v. Beecher, Spanish-surnamed and black plaintiffs claimed that the city of Boston’s use of a written examination in hiring police officers discriminated against them in violation of their rights under 42 U.S.C. § 1981. Evidence showed that only twenty-five percent of the black applicants and ten percent of the Spanish-surnamed applicants passed the civil service examination whereas sixty-five percent of all others passed. The court held that this constituted a prima facie showing of racially discriminatory impact which shifted the burden of proof

26. Id. at 429-30.
27. Id. at 432.
28. Id. at 436.
30. 459 F.2d 725 (1st Cir. 1972).
31. Id. at 728.
32. Id. at 735.
to the defendant civil service commission to justify use of the test.\textsuperscript{33}

In \textit{Chance v. Board of Examiners},\textsuperscript{34} the Second Circuit held that a prima facie case of discrimination had been established by statistics showing that white candidates for supervisory teaching positions in New York City had one-and-one-half times the pass rate of their black and Puerto Rican counterparts on a variety of exams.\textsuperscript{35} Considering whether the district court had applied the proper constitutional standards in reaching this conclusion, the court of appeals stated:

Concededly, this case does not involve intentionally discriminatory legislation . . . or even a neutral legislative scheme applied in an intentionally discriminatory manner . . . . Nonetheless, we do not believe that the protection afforded racial minorities by the fourteenth amendment is exhausted by those two possibilities. As already indicated, the district court found that the Board's examinations have a significant and substantial impact on black and Puerto Rican applicants. That harsh racial impact, even if unintended, amounts to an invidious \textit{de facto} classification that cannot be ignored . . . .\textsuperscript{36}

Other cases in the courts of appeals have also explicitly rejected the idea that proof of discriminatory intent is a prerequisite to a successful equal protection claim. In \textit{Boston Chapter NAACP, Inc. v. Beecher},\textsuperscript{37} Spanish-surnamed and black plaintiffs challenged the use of a hiring examination by the Massachusetts fire departments. The Court of Appeals for the First Circuit determined:

That Massachusetts did not intentionally discriminate is immaterial . . . . Equitable relief under the Civil Rights Act and the Fourteenth Amendment requires no proof of malice or "fault" . . . . The question is whether the test denied applicants equal protection of the laws by creating "built-in headwinds" for those who, although qualified to perform the job, cannot pass the test.\textsuperscript{38}

Because Title VII does not require proof of discriminatory

\textsuperscript{33} \textit{Id.} at 737.
\textsuperscript{34} 458 F.2d 1167 (2d Cir. 1972).
\textsuperscript{35} \textit{Id.} at 1171.
\textsuperscript{36} \textit{Id.} at 1175 (citations omitted).
\textsuperscript{37} 504 F.2d 1017 (1st Cir. 1974), \textit{cert. denied}, 421 U.S. 910 (1975).
\textsuperscript{38} \textit{Id.} at 1021.
intent, at least one court specifically stated that it would have been anomalous to allow a public employer, at that time not subject to Title VII, to escape the standards the Act imposed on private employers’ use of employment tests.\textsuperscript{39} Despite the strong endorsement in the lower federal courts for the principle that Title VII and constitutional standards were identical,\textsuperscript{40} the Supreme Court explicitly rejected this position in \textit{Washington v. Davis.}\textsuperscript{41}

\textbf{WASHINGTON V. DAVIS}

In \textit{Washington v. Davis}, unsuccessful black applicants to the Washington, D.C., police department alleged that the department’s use of an employment qualification test discriminated against them in violation of the fifth amendment, 42 U.S.C. § 1981,\textsuperscript{42} and a District of Columbia Code provision.\textsuperscript{43} Plaintiffs first argued that the fifty-seven percent failure rate of black applicants, as compared with the thirteen percent rate of whites, demonstrated a racially disproportionate impact.\textsuperscript{44} Defendants then attempted to prove that the test bore a demonstrable relationship to successful performance as a policeman by introducing evidence of a validity study which they claimed showed that test scores accurately predicted performance in recruit school.\textsuperscript{45} Considering only the constitutional claim, the district court concluded that the test did not discriminate and was related to job performance. The court thus granted summary judgment for the defendants.\textsuperscript{46}

\begin{itemize}
  \item \textsuperscript{39} Chance v. Board of Examiners, 458 F.2d 1167, 1176-77 (2d Cir. 1972).
  \item \textsuperscript{40} See note 29 \textit{supra.} District court decisions endorsing this principle include: Arn-

  \item \textsuperscript{41} 426 U.S. 229, 244-45 (1976). The Court expressed its disagreement with 16 cases in the lower courts which held that proof of discriminatory purpose is unnecessary in an equal protection claim. The list included nine cases in which plaintiffs had challenged employment screening tests. \textit{Id. at} 244-45 n.12.
  \item \textsuperscript{42} 42 U.S.C. § 1981 (1970). For the text of the statute, see note 6 \textit{supra.}
  \item \textsuperscript{43} D.C. Code § 1-320 (1973). The provision provides:

\textit{In any program of recruitment or hiring of individuals to fill positions in the government of the District of Columbia, no officer or employee of the government of the District of Columbia shall exclude or give preference to the residents of the District of Columbia or any State of the United States on the basis of residence, religion, race, color or natural origin.}
  \item \textsuperscript{44} For a full description of plaintiffs’ statistical proof, which is not contained in the district court opinion, see Davis v. Washington, 512 F.2d 956, 958-59 (D.C. Cir. 1975).
  \item \textsuperscript{45} \textit{Id. at} 961-62.
\end{itemize}
The court of appeals reversed, holding that Griggs provided the applicable legal standard. Applying Griggs, the court held that the employer's lack of discriminatory intent was irrelevant, and the failure rates alone established a denial of equal protection.

With respect to the defendants' argument, the court held that a correlation between test scores and training school performance did not meet the Griggs standard, absent proof of a correlation between training school performance and job performance.

Although the issue on summary judgment was the validity of the constitutional claim, the court of appeals applied Title VII standards in reaching its decision. On certiorari to the Supreme Court, the parties argued the case as if Title VII standards controlled. The Court stated, however: "[W]e have never held that the constitutional standard for adjudicating claims of invidious racial discrimination is identical to the standards applicable under Title VII, and we decline to do so today." In a review of its prior decisions in equal protection cases, the Supreme Court emphasized that those decisions had always required proof of discriminatory purpose.

Among its prior decisions, the Court cited Strauder v. West Virginia, which had held that a West Virginia law totally excluding blacks from juries denied equal protection. In Strauder the effect of the official practice was so clear-cut that it showed invidious racial discrimination. The Court also referred to Akins v. Texas, in which petitioner had unsuccessfully argued that the purposeful limitation of the number of blacks serving on grand juries violated his constitutional rights. In Akins the Court had stated:

[T]he mere fact of inequality in the number selected does not in itself show discrimination. A purpose to discriminate must be present which may be proven by systematic exclusion of eligible jurymen of the prescribed race or by unequal application of the law to such an extent as to show intentional discrimination.

48. Id. at 960.
49. Id. at 964-65.
51. Id. at 239.
52. Id.
53. 100 U.S. 303 (1879).
54. 325 U.S. 398 (1945).
55. Id. at 403-04.
The opinion next examined *Wright v. Rockefeller*, 56 a case involving an equal protection challenge to a New York congressional apportionment statute. The Court in *Wright* affirmed a district court finding that although appellants alleged the intentional creation by statute of one racially exclusive district, they failed to prove that the statute was adopted with racial considerations in mind. 57

*Keyes v. School District No. 1*, 58 a school desegregation case emphasizing the requirement of intent for a finding of de jure segregation, was cited by the Court to demonstrate that in yet another context the cases have... adhered to the basic equal protection principle that the invidious quality of a law claimed to be racially discriminatory must ultimately be traced to a racially discriminatory purpose. That there are both predominantly black and predominantly white schools in a community is not alone violative of the Equal Protection Clause. 59

The Court conceded in *Washington* that some cases indicated that effect rather than purposeful discrimination was the touchstone of an equal protection challenge. Such decisions, however, were distinguished. First, the Court recognized that language in its decision in *Palmer v. Thompson* 60 warned against deciding equal protection cases on the basis of legislative purpose or motivation. But, the *Washington* Court insisted, "[w]hatever dicta the opinion may contain," 61 the *Palmer* case did not involve government action with neutral purpose and disproportionate racial effect and could not be used to support respondent’s argument. 62 Second, the majority held that *Wright v. Council of the City of Emporia* 63 did not change the requirement of purposeful

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57. Justices Douglas and Goldberg dissented from the holding that the evidence did not establish a prima facie case of legislative intent to draw congressional district lines on the basis of race. Id. at 59, 67.
60. 403 U.S. 217 (1971). In *Palmer* plaintiffs had argued that the city council of Jackson, Mississippi, had closed the city pools to avoid desegregation. Both the court of appeals and the Supreme Court affirmed the lower court finding that there was no denial of equal protection.
61. 426 U.S. 229, 243 (1976). The *Palmer* Court had stated: "But no case in this Court has held that a legislative act may violate equal protection solely because of the motivations of the men who voted for it." 403 U.S. 217, 224 (1971).
discrimination. In Wright Emporia officials attempted to establish a separate city school system after desegregation had been ordered for the county. The Supreme Court enjoined creation of the separate school system, stating that "[t]he existence of a permissible purpose cannot sustain an action that has an impermissible effect." The Washington majority reasoned, however, that the establishment of the separate school system would have interfered with an outstanding desegregation order thus making unnecessary proof of an independent constitutional violation.

After Washington an employee alleging a constitutional claim of employment discrimination must prove purposeful discrimination on the part of his employer; however, the decision offers little guidance to a plaintiff who seeks to prove discriminatory intent. The opinion suggests only that in extreme situations, such as the total exclusion of blacks from juries in Strauder v. West Virginia, discriminatory impact will suffice as proof of discriminatory purpose. Generally, substantial statistical disparities are rejected as proof of a prima facie case.

Underlying this analysis is a belief that it is possible to draw a clear distinction between purpose and effect. However, as Justice Stevens pointed out in his concurring opinion,

the line between discriminatory purpose and discriminatory impact is not nearly as bright, and perhaps not quite as critical, as the reader of the Court's opinion might assume. I agree, of course, that a constitutional issue does not arise every time some disproportionate impact is shown. On the other hand, when the

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64. Id. at 462. However, the Court also stated: "[O]ur holding today does not rest upon a conclusion that the disparity in racial balance between the city and county schools resulting from separate systems would, absent any other considerations, be unacceptable." Id. at 470.
66. Id. at 245.
67. 100 U.S. 303 (1879).
68. Other decisions in which the Court inferred purposeful discrimination from a racially exclusive effect are Alexander v. Louisiana, 405 U.S. 625 (1972) (of those selected to serve on grand juries only 5% were black although 21% of the local population was black); Gomillion v. Lightfoot, 364 U.S. 339 (1960) (all but four or five of Tuskegee's black voters would have been excluded by the redefinition of Tuskegee's boundaries while no whites would have been affected); Smith v. Texas, 311 U.S. 128 (1940) (out of 384 persons serving as grand jurors only 5 were black); Yick Wo v. Hopkins, 118 U.S. 356 (1886) (more than 150 Chinese were arrested under a law prohibiting the operation of a laundry in a wooden building while about 80 non-Chinese owning wooden laundries were not prosecuted).
disproportion is . . . dramatic . . . it really does not matter whether the standard is phrased in terms of purpose or effect.\textsuperscript{70}

The holding in \textit{Washington} limited the relief available to plaintiffs bringing a constitutional claim. An employee who must prove an employer's discriminatory purpose faces tremendous hurdles.\textsuperscript{71} Without describing the kind of proof which demonstrates purposeful discrimination, the opinion rejected statistical proof as sufficient to establish a prima facie case.\textsuperscript{72} The decision left open the question of what weight, if any, such evidence should receive. It is possible that in future constitutional attacks on employment tests the Court will apply the reasoning it formulated in \textit{Village of Arlington Heights v. Metropolitan Housing Development Corp.}\textsuperscript{73} In \textit{Arlington Heights} the Court rejected petitioners' claim that denial of the rezoning of village property was purposeful discrimination and thus a violation of their equal protection rights.\textsuperscript{74} The opinion referred to three sources which might provide evidence of discriminatory purpose: the historical background of the challenged action, the specific sequence of events leading to it, and the legislative history of the act.\textsuperscript{75}

The \textit{Washington} Court hesitated to extend the Title VII disproportionate effect rule into the equal protection area. In part, the Court feared that in the equal protection context the result "would be far reaching and would raise serious questions about, and perhaps invalidate, a whole range of tax, welfare, public service, regulatory, and licensing statutes that may be more burdensome to the poor and to the average black than to the more affluent white."\textsuperscript{76} The opinion stated that Congress intended Title VII standards to be rigorous in order to make the Act an effective remedy for discrimination.\textsuperscript{77} This implies that in an equal protection case there will be a heavier burden on the plaintiff to prove discrimination in employment testing. Furthermore,

\textsuperscript{70} Id. at 254 (citations omitted).
\textsuperscript{73} 97 S. Ct. 555 (1977).
\textsuperscript{74} Id. at 566.
\textsuperscript{75} Id. at 564-65.
\textsuperscript{77} Id. at 247-48.
the Court emphasized that any lessening of that burden by extending the disproportionate impact rule into the equal protection area should come from Congress, not the courts.  

THE EMPLOYER'S BURDEN OF PROOF

The federal courts have attempted to determine what standard of proof should govern an employer's rebuttal of a prima facie case of discrimination. Much confusion has resulted from the difference between the analysis used in deciding equal protection cases and that used in Title VII cases. Moreover, the review process in Title VII cases provides for a "more probing judicial review of, and less deference to, the seemingly reasonable acts of administrators and executives than is appropriate under the Constitution . . . ." This suggests that in equal protection cases the burden of proof on the employer is not as heavy as in Title VII cases.

*Griggs* provided the standard for Title VII cases. In *Griggs* the Court announced that if a plaintiff proves that an employment test has a disproportionate racial effect, the employer must demonstrate that the test has "a manifest relation to the employment in question." The Court in *Griggs* did not consider the extent to which a test must be job-related or the standards to be used in this determination. Four years later the Supreme Court in *Albemarle Paper Co. v. Moody* emphasized the importance of the standards promulgated under Title VII and outlined in the Equal Employment Opportunity Commission Guidelines on Employee Selection Procedures. Although the Guidelines are not administrative regulations promulgated in compliance with formal procedures, the Court used the Guidelines as the appropriate standard and found that "[m]easured against the Guidelines, Albemarle's [the employer's] validation study is

78. Id. at 248.
79. See note 18 supra.
82. Id. at 432.
83. Job-relatedness refers to the accuracy with which a preemployment test selects job applicants who have the essential abilities for successful performance of a particular job. For a discussion of job-relatedness, see *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 426-27, 430-31 (1975).
84. Id. at 405.
materially defective in several respects. . . ." 87

The Guidelines require the employer to validate any test which has a disproportionate impact on any group protected by Title VII. 88 Validation is shown by "empirical data demonstrating that the test is predictive of or significantly correlated with important elements of work behavior which comprise or are relevant to the job or jobs for which candidates are being evaluated." 89 In addition, the employer must demonstrate that it has no alternative means of selecting employees. 90

The Guidelines’ standards for validation are based on the Standards for Educational and Psychological Tests and Manuals published by the American Psychological Association. 91 The Guidelines mention three types of validation. 92 Criterion validation is assessed by comparing test scores with scores on an independent measure of job success. 93 Two other types of validation are content and construct validation. Content validation is established if a test accurately measures the skills necessary for successful job performance. 94 For example, a typing test has high content validity for selecting secretaries. Construct validation is established if a test measures the traits or intellectual abilities thought to be necessary for successful job performance. 95 Because content and construct validity do not involve the comparison of test scores with any actual measure of job success, it is questionable whether either accurately predicts job performance. 96 The Guidelines require an employer using these two types of validation to gather "sufficient information from job analyses to demonstrate the relevance of the content . . . or the construct." 97 Thus an employer who uses content or construct validation to

87. Id. at 431.
88. 29 C.F.R. § 1607.3 (1975) provides in part: "The use of any test which adversely affects hiring . . . of classes protected by Title VII constitutes discrimination unless: (a) the test has been validated and evidences a high degree of utility . . . ."
89. 29 C.F.R. § 1607.4(c) (1975).
90. Id. § 1607.3 (1975).
91. AMERICAN PSYCHOLOGICAL ASS'N, STANDARDS FOR EDUC. & PSYCHOLOGICAL TESTS & MANUALS (1966) [hereinafter cited as AMERICAN PSYCHOLOGICAL ASS'N STANDARDS].
92. The Guidelines provide a summary description of the types of validation they recommend. Because the American Psychological Association manual is more detailed, it is referred to for purposes of this discussion.
93. See AMERICAN PSYCHOLOGICAL ASS'N STANDARDS, supra note 91, at 13.
94. Id. at 12-13.
95. Id. at 13.
96. Id. at 12-24.
97. 29 C.F.R. § 1607.5(a) (1975).
prove job-relatedness must provide evidence of a relationship between the trait or skill the test measures and job success.

In *Albemarle Paper Co. v. Moody*, the Supreme Court termed the Guidelines "'entitled to great deference.'" To effectuate Title VII's objective and to end discriminatory employment practices, the lower courts should adhere to the Guidelines' strict requirements. The use of these Guidelines in equal protection cases raises many questions, however, and much confusion has resulted when the courts have grafted the Guidelines onto the traditional equal protection analysis.

The equal protection clause requires that legislative classifications further legislative ends. The dominant mode of equal protection analysis, described as a two-tiered system, requires either a minimal or a strict standard of review. If the classification has been recognized as (1) suspect or (2) affecting a fundamental right, the courts must apply the stricter standard of review. In all other cases, the courts require only that the legislation bear a rational relationship to its stated objective. This standard is usually very deferential to the challenged legislation; sometimes, however, the courts have applied a less deferential rational relationship test.

Race has been found a suspect classification and cases of alleged racial discrimination require the stricter standard of review. In these cases the courts have applied a strict scrutiny test.

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98. 422 U.S. 405 (1975).
100. See, e.g., Douglas v. Houston, 512 F.2d 976, 984 (D.C. Cir. 1975); Boston Chapter NAACP, Inc. v. Beecher, 504 F.2d 1017, 1019 (1st Cir. 1974), cert. denied, 421 U.S. 910 (1975); Walston v. County School Bd., 492 F.2d 919, 924 (4th Cir. 1974); Chance v. Board of Examiners, 458 F.2d 1167, 1176 (2d Cir. 1972).
requiring the demonstration of a compelling justification for the official action and a showing that the official purpose is advanced by the least restrictive means.\textsuperscript{109} If the strict scrutiny test were satisfied, theoretically the racial classification could continue. Under the strict scrutiny test, however, racial classifications are nearly always struck down.\textsuperscript{110} Therefore, once a public employee has demonstrated that his employer has purposefully discriminated against him on the basis of race, the court will apply strict scrutiny and prohibit continued use of the test.

Courts faced with equal protection challenges to employment tests have grappled with the problem of selecting an appropriate standard of review for determining whether use of an employment test is justified.\textsuperscript{111} Although before Washington the courts held that disproportionate impact sufficed as proof of a prima facie claim of discrimination,\textsuperscript{112} they were unwilling to apply the strict scrutiny test which is triggered by a showing of purposeful racial discrimination. Instead, several courts applied a "heavy burden" test,\textsuperscript{113} which appeared to be somewhere between the extremely deferential rational relationship standard and the nearly always fatal strict scrutiny.

In Castro v. Beecher,\textsuperscript{114} the Court of Appeals for the First Circuit rejected plaintiffs' argument that strict scrutiny applied. The court refused to require an employer to demonstrate that selecting employees by written examination was the only available means of making hiring decisions.\textsuperscript{115} The court also rejected the rational relationship test, reasoning that the employer who uses a test with a racially disproportionate impact must meet a stricter standard and demonstrate that the test "substantially relate[s]" to job performance.\textsuperscript{116} The court relied on Griggs as the source of the appropriate standards to measure a "substantial relationship" between the employment test and job perform-

\textsuperscript{109} Loving v. Virginia, 388 U.S. 1, 11 (1967).
\textsuperscript{110} The one case to uphold a racial classification under strict scrutiny is Korematsu v. United States, 323 U.S. 214 (1944).
\textsuperscript{111} See note 100 supra.
\textsuperscript{112} See note 29 supra.
\textsuperscript{113} Bridgeport Guardians, Inc. v. Members of Bridgeport Civil Serv. Comm'n, 482 F.2d 1333 (2d Cir. 1973), cert. denied, 421 U.S. 991 (1975); Castro v. Beecher, 459 F.2d 725 (1st Cir. 1972); Chance v. Board of Examiners, 458 F.2d 1167 (2d Cir. 1972). See Fowler v. Schwarzwalder, 351 F. Supp. 721 (D. Minn. 1972), in which the standard was articulated as "a high degree of utility." Id. at 725.
\textsuperscript{114} 459 F.2d 725 (1st Cir. 1972).
\textsuperscript{115} Id. at 733.
\textsuperscript{116} Id. at 732.
ance. Because the employer had failed to perform the validation studies required under those standards, the lower court order to develop a nondiscriminatory and job predictive test was affirmed.

In a Second Circuit decision, *Chance v. Board of Examiners*, the court of appeals described the employer's burden of justification as "heavy" but insisted that the compelling state interest test had not been applied. The court held that under the rational relationship test, the standards for employment test validation had not been met. In a later Second Circuit decision, *Bridgeport Guardians, Inc. v. Members of Bridgeport Civil Service Commission*, the court again adopted the "heavy burden" test. Citing a prior Supreme Court Title VII case as authority for using this test, the court stated, "In view of the substantial authority for this test, we see no advantage in an agonizing semantic discussion as to whether it is within or without the parameters of the 'rational basis' test employed in distinguishable situations.

In an equal protection case under 42 U.S.C. § 1981, a Minnesota district court considered whether the showing that an employment test examined the knowledge, abilities, and skills demanded of a firefighter sufficed to show job-relatedness. The court cited *Griggs* as affording "an appropriately strong analogy to the issues raised under the Constitution and 42 U.S.C. §§ 1981, 1983," and mentioned the EEOC Guidelines as embodying principles which have received wide judicial recognition as appropriate standards in the field of employment testing. The court found that the employer had not complied with the Guidelines' requirements, because he failed to make a proper job analysis which would show a relationship between the test content and the desired job capabilities. Thus, the court decided that the
employer had not adequately rebutted the prima facie case of discrimination.

In Washington, the Supreme Court concluded that the respondents had failed to prove a constitutional claim of discrimination.128 Theoretically, the Court should not have reached the issue of the employer's burden of proof. The Supreme Court noted that the only issue properly before the Court was the constitutional claim,129 but nonetheless, it decided that on the statutory claim under section 1-320 of the District of Columbia Code,130 the petitioners showed sufficient job-relatedness to justify continued use of the test.131 The majority held that under the governing standards of proof, similar to those under Title VII,132 a correlation between performance on an employment test and success in a training program validated the test.133

The dissent by Justice Brennan,134 joined by Justice Marshall, stated that resolution of the constitutional issue in favor of the petitioners precluded decision on the statutory claim.135 On the latter issue, Justice Brennan would have affirmed the court of appeals' finding that training school validation failed to meet the applicable statutory standards.136

Although Title VII standards did not apply in Washington,137 the Court characterized the D.C. Code standards as similar to those under the Act. This suggests that the Court viewed training school validation as sufficient for Title VII cases. Under the EEOC Guidelines, however, a validation study comparing test scores with skills or general traits, rather than with actual job success, must be accompanied by job analyses.138 Such analyses

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129. Id. at 236. In the district court both parties had filed motions for summary judgment on the constitutional claim of discrimination in the use of the employment screening test. The court held that the test was nondiscriminatory and related to the requirements of the police training program and granted defendants' motion. Davis v. Washington, 348 F. Supp. 15, 17-18 (D.D.C. 1972). The court of appeals reversed, holding that the employment test was invalid because of its racially discriminatory impact in light of which defendants had failed to establish the test's validity. Davis v. Washington, 512 F.2d 956, 958 (D.C. Cir. 1975).
132. Id. at 249.
133. Id. at 250-51.
134. Id. at 256.
135. Id. at 257 (Brennan, J., dissenting).
136. Id.
137. Id. at 236.
138. 29 C.F.R. § 1607.5(a) (1975).
show the relationship between the trait or skill measured and job performance. The employer in *Washington* had not introduced evidence of job analyses. Thus, the Court’s holding may lessen the burden of proof on an employer in a Title VII case. In *Griggs* and *Albemarle Paper* the Court emphasized the importance of the EEOC Guidelines’ standards for employment test validation. The Guidelines and the lower federal courts have favored direct evidence of a relationship between a test and the skills required for a particular job. It is difficult to understand, in light of the foregoing, why the Supreme Court determined that under a statute similar to Title VII training school validation sufficed. If *Washington* is used to reduce the employer’s burden of proof, the remedial nature of Title VII could be seriously impaired.

**AFTER WASHINGTON V. DAVIS**

The decision in *Washington* mandates that courts differentiate between constitutional and Title VII claims of discrimination. Title VII focuses on the effect of the employer’s action; discriminatory purpose need not be proved. Under a constitutional claim the plaintiff must prove discriminatory intent in order to obtain judicial review of the use of an employment test. Because of the difficulty in proving intent, few litigants will prevail on constitutional claims of discrimination in the use of employment tests.

Furthermore, the holding in *Washington* undermines the emphasis in *Griggs* and *Albemarle* on enforcing Title VII standards. The Court stated that the *Griggs* and *Albemarle* deci-

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139. See text accompanying notes 93-96 *supra.*
141. 29 C.F.R. § 1607.5(a) (1975). See text accompanying note 97 *supra.*
143. The Court in *Washington* discussed the employer’s burden of proof in light of the statutory claims brought by respondents. Thus, the decision did not consider the appropriate burden of justification for an employer when the employee brings a constitutional claim. However, a finding of purposeful racial discrimination should result in the application of strict scrutiny. Under this test, preemployment examinations, like almost all other official actions resulting in racial classifications, would be prohibited.
145. Id. at 246-47.
146. Id. at 245.
sions did not foreclose the possibility that training school validation may suffice to show job-relatedness. However, Washington contradicts the principle, espoused in the two Title VII decisions, that validation studies must show a relationship between the skills or abilities measured and actual job performance. Justice Brennan's dissent in Washington points out:

Where employers try to validate written qualification tests by proving a correlation with written examinations in a training course, there is a substantial danger that people who have good verbal skills will achieve high scores on both tests due to verbal ability, rather than "job-specific ability." As a result, employers could validate any entrance examination that measures only verbal ability by giving another written test that measures verbal ability at the end of a training course. Any contention that the resulting correlation between examination scores would be evidence that the initial test is "job related" is plainly erroneous.

Because Washington v. Davis was based on a statute with standards "similar to those obtaining under Title VII," it is unclear whether the Court views training school validation as sufficient proof of job-relatedness under Title VII. The conclusion that training school validation meets these standards must be rejected for Title VII cases. Otherwise, it will be far too easy for employers to show job-relatedness. If this happens, the decision in Washington v. Davis will have the two-fold effect of blocking relief for discrimination in the use of employment tests on both constitutional and statutory grounds.

Julie D. Fay

151. Id. at 249.
TITLE VII AND THE SABBATH OBSERVER*

On November 2, 1976, the United States Supreme Court decided Parker Seal Co. v. Cummins.1 The Court affirmed without opinion the application of Title VII2 requiring an employer, in the absence of undue hardship, to make reasonable accommodation for the religious requirements of his employees. This decision represents the culmination of many years of litigation involving the employment problems of Sabbath observers.3

The purpose of this comment is to clarify the nature and extent of the protection provided the Sabbath observer by Title VII. This will involve an examination of, first, the protection provided under the statutory scheme of Title VII and the regulatory scheme of the Equal Employment-Opportunity Commission (EEOC),4 second, the judicial interpretations of Title VII and EEOC protection, and third, the constitutionality of Title VII and EEOC regulations.

I. TITLE VII AND EEOC TREATMENT OF DISCRIMINATION AGAINST THE SABBATH OBSERVER

Title VII of the Civil Rights Act of 1964 provides, inter alia, for relief against religious discrimination in employment. Prior to its amendment in 1972, the Act stated in part: “It shall be an unlawful employment practice for an employer—(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual’s . . . religion . . . .”5

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* The author wishes to thank Aaron Ben-Merre for his helpful suggestions in the preparation of this comment.

1. 97 S. Ct. 342 (1976), aff’g mem. by an equally divided Court, Cummins v. Parker Seal Co., 516 F.2d 544 (6th Cir. 1975).
3. Saturday is regarded as the Sabbath by certain religious groups such as Jews, Seventh Day Adventists and members of the Worldwide Church of God. According to the tenets of their faiths, Sabbath is a day of rest upon which no work may be performed. This belief is based on a Biblical passage which states: “Six days shalt thou labour, and do all thy work; but the seventh day is a Sabbath unto the Lord thy God, in it thou shalt not do any manner of work . . . .” Exodus 20:9, 10.
The language of this prohibition may have been adequate to protect victims and potential victims of blatant religious discrimination, but it was uncertain whether Title VII would protect a person who had been discriminated against, less directly, as a result of individual acts of religious observance. As long as an employer promulgated a company rule requiring all employees and prospective employees to be available for work on Saturday, a job might be denied to an otherwise qualified Sabbath observer without violating Title VII.

In order to remedy this situation, the EEOC in 1967 promulgated regulation 1605.1. This regulation defines the duties imposed upon the employer by Title VII, reducing the statutory requirement to a two-part test. The employer must (1) make reasonable accommodations to the religious needs of employees, unless, (2) such accommodations would cause undue hardship on the conduct of the employer's business. Thus, an employer could be held liable for discrimination even if his company rule applied uniformly to all employees. While a company rule might apply equally to all employees, it might not have an equal impact on them. To avoid discriminating, the employer would henceforth be required to make reasonable accommodations to the religious needs of his employees.

The EEOC, however, recognized the need of an employer to carry on his business profitably. Therefore, even if the employer makes no accommodation whatsoever, he is not culpable if making such accommodation would cause him undue hardship. Thus, the EEOC has invoked a balancing test to define religious discrimination under Title VII. First, the inquiry focuses on whether an encroachment upon an employee's religious observance has been caused by an employer's rule. If such a restriction can be demonstrated, the employer must then make "reasonable accommodations" to the employee's religious needs. If the employer cannot show that he has made reasonable accommodations

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6. 29 C.F.R. § 1605.1(b)(1976). The pertinent part of the regulation states:
The Commission believes that the duty not to discriminate on religious grounds . . . includes an obligation on the part of the employer to make reasonable accommodations to the religious needs of employees and prospective employees where such accommodations can be made without undue hardship on the conduct of the employer's business. Such undue hardship, for example, may exist where the employee's needed work cannot be performed by another employee of substantially similar qualifications during the period of absence of the Sabbath observer. (Emphasis added).
to the needs of the Sabbath-observing employee, then the employer bears the burden of proving that such accommodation would place an "undue hardship" on his business.

This balancing approach is similar to the approach adopted by the Supreme Court in *Sherbert v. Verner.* In *Sherbert* an administrative rule required that applicants for unemployment benefits be available for Saturday work. Although the rule applied equally to everyone in the state, the Supreme Court found that it discriminated against the appellant, a Seventh Day Adventist. The Court, therefore, held that the state had to make a reasonable accommodation to the religious needs of the appellant by exempting her from Saturday work. Like the EEOC's later ruling, the Court found religious discrimination because of the rule's unequal impact on the appellant's religious observance.

The court concluded in *Sherbert* that a compelling state interest was necessary to justify application of the Saturday work rule without exception: "'Only the gravest abuses, endangering paramount interests, give occasion for permissible limitation.'" This parallels the EEOC approach, which only exempts the employer from accommodation when it is clear that such accommodation would cause undue hardship on the business of the employer. Mere inconvenience will not suffice. Thus, the EEOC had substantial precedent to support its definition of religious discrimination in regulation 1605.1. Courts generally followed

7. The EEOC places the burden of proving undue hardship upon the employer: "Because of the particularly sensitive nature of discharging or refusing to hire an employee or applicant on account of his religious beliefs, the employer has the burden of proving that an undue hardship renders the required accommodations to the religious needs of the employee unreasonable."

29 C.F.R. § 1605.1(c) (1976).
9. Id. at 404.
10. Id. at 410.
11. Id. at 404. See Dewey v. Reynolds Metal Co., 300 F. Supp. 709, 713 (W.D. Mich. 1969), where the analogy between *Sherbert* and 29 C.F.R. § 1605.1 was drawn. See also Braunfeld v. Brown, 366 U.S. 599 (1961), where the Court stated: "If the purpose or effect of a law is to impede the observance of one or all religions . . . that law is constitutionally invalid even though the burden may be characterized as being only indirect." Id. at 607 (emphasis added).
this regulation as a valid expression of the congressional will in enacting that part of Title VII that deals with religious discrimination.\(^5\)

To eliminate any doubt as to the effect that should be given to EEOC regulation 1605.1, in 1972 the Congress added section 701(j) to Title VII: "The term 'religion' includes all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that he is unable to reasonably accommodate to an employee's or prospective employee's religious observance or practice without undue hardship on the conduct of the employer's business."\(^6\)

Commenting on regulation 1605.1 and the Memphis Publishing Co., 521 F.2d 512 (6th Cir. 1975), rehearing denied, 525 F.2d 986 (6th Cir. 1976), petition for cert. filed, 97 S. Ct. 394 (1976). Appellant Reid, a Seventh Day Adventist, was refused a job as a copywriter on appellee's newspaper. Subsequent to this refusal, appellant obtained a job elsewhere at a higher salary than he would have made as copywriter on appellee's paper. Appellant then sued for damages caused by appellee's refusal to hire him. It is clear that the court of appeals considered appellant's favorable job position when it held in favor of appellee and refused to apply 29 C.F.R. § 1605.1. The court stated:

Apparently no hardship was imposed on Reid because in July, 1970, long before the first trial, he accepted other employment at a higher salary, and which employment apparently did not require him to work on Saturday. He is no longer interested in working for Press Scimitar. All he wants now are damages, plus attorney's fees.

\(^{16}\) Id. at 517. For a further discussion of Reid, see Comment, Sabbath Observer Discrimination, 22 N.Y.L. Sch. L. Rev. 143, 148-51 (1976). The same court applied 29 C.F.R. § 1605.1 in Draper v. United States Pipe & Foundry Co., 527 F.2d 515 (6th Cir. 1975); Cummins v. Parker Seal Co., 516 F.2d 544 (6th Cir. 1975), aff'd mem. by an equally divided Court, 97 S. Ct. 342 (1976); Reid v. Memphis Publishing Co., 468 F.2d 346 (6th Cir. 1972)(at a time when the court was unaware of plaintiff Reid's new position).

15. This is in accord with the general principle enunciated by the Supreme Court in Udall v. Tallman, 380 U.S. 1 (1965):

When faced with a problem of statutory construction, this Court shows great deference to the interpretation given the statute by the officers or agency charged with its administration. "To sustain the Commission's application of this statutory term, we need not find that its construction is the only reasonable one, or even that it is the result we would have reached had the question arisen in the first instance in judicial proceedings."

\(^{16}\) Id. at 16 (quoting Unemployment Comm'n v. Aragon, 329 U.S. 143, 153 (1946)).

In a specific reference to an EEOC regulation, the Supreme Court in Griggs v. Duke Power Co., 401 U.S. 424 stated:

The Equal Employment Opportunity Commission, having enforcement responsibility, has issued guidelines interpreting § 703(h) to permit only the use of job-related tests. The administrative interpretation of the Act by the enforcing agency is entitled to great deference. . . . Since the Act and its legislative history support the Commission's construction, this affords good reason to treat the guidelines as expressing the will of Congress.

\(^{16}\) Id. at 433.

addition of section 701(j) to Title VII, the United States Court of Appeals for the Fifth Circuit stated: “We are satisfied that the guidelines in effect at the time of [appellant's] discharge were valid, as being a proper interpretation of the statute, and as validated by the subsequent legislative recognition of that fact.”

Therefore, regulation 1605.1 appears to be a valid interpretation by the EEOC of the congressional will in enacting the Civil Rights Act of 1964. Section 701(j) of the 1972 amendment provided an after-the-fact legislative recognition of the validity of the EEOC approach.

II. REASONABLE ACCOMMODATION AND UNDUE HARDSHIP

After the promulgation of regulation 1605.1, courts faced the tasks of applying the reasonable accommodation standard and of determining what situations placed undue hardship on an employer's business. The courts have shown much sensitivity to the particular facts and circumstances of each case.8

United States v. City of Albuquerque8 is illustrative. That case involved a Seventh Day Adventist fireman whose religion prohibited work from sundown Friday to sundown Saturday. As a result of a rotating shift system used by the fire department, his work shifts occasionally conflicted with his Sabbath observance. However, department regulations could have provided the employee with a solution had he sought one. The district fire chief had visited the employee at his home to suggest alternative means of dealing with the problem, such as shift trading,20 un-

by an equally divided Court, 402 U.S. 689 (1971). Largely because of a desire to eradicate this doubt, Congress included § 701(j) in the 1972 amendment. 118 Cong. Rec. 1861-62 (1972). In Dewey the court of appeals held 29 C.F.R. § 1605.1 inapplicable both because the regulation had not yet been promulgated by the EEOC at the time the circumstances of the case arose, and because petitioner had exhausted his course of action by electing arbitration. 429 F.2d at 330-32. Subsequently, the court of appeals denied a petition for rehearing, holding that § 1605.1 did not reflect the legislative intent of Congress and therefore constituted an improper interpretation of religious discrimination. Id. at 335.


18. This is in accord with the approach of the EEOC. See 29 C.F.R. § 1605.1(d)(1976).


20. Shift trading involves an agreement between two individuals of the same rank to work each other's regularly scheduled shift on specified dates. Id. at 776.
scheduled vacation, and leave without pay. However, the employee did not pursue any of these possible solutions to the conflict. Instead, he insisted upon a firm commitment from the fire department that he would not be required to work the Friday night shift or the Saturday day shift.

In deciding for the defendant, the court considered several factors. First, the fire department attempted to make reasonable accommodations by allowing shift trading, unscheduled vacation time and leaves without pay. Second, the department had to protect lives and property. To accommodate the employee beyond what had already been suggested would have caused undue hardship to the department. Finally, the employee was uncooperative. He should not have rejected outright the alternatives suggested by the department.

The court’s determination of “reasonable accommodation” in Albuquerque was strongly influenced by the particular facts of the case. Perhaps the court would have required greater evidence of undue hardship on the employer had the employee been more cooperative. The key factors in Albuquerque were the nature of the employment and the employee’s intransigence.

In Hardison v. TWA, Inc., plaintiff Hardison was employed as a store clerk at Kansas City International Airport. The store’s department at the airport operated twenty-four hours per day, seven days per week. After working at the airport for approximately one year, Hardison became interested in the Worldwide Church of God. He discussed with his manager the possibility of joining this church and the effect it would have on his availability for work on the Sabbath. In an effort to avoid potential conflict, Hardison transferred to a night shift. Several months later, when a daytime clerical position became available in another section of the airport, Hardison applied for and obtained that position. He stated that the daytime shift would be more desirable due to his recent marriage.

21. Accrued vacation time could have been applied toward those days when the employee’s work schedule conflicted with the Sabbath. Id. at 775-76.
22. Requests for leave without pay were routinely granted to employees except in emergency situations. Id. at 776.
23. Id. at 771, 773-74.
24. Id. at 774.
25. 527 F.2d 33 (8th Cir. 1975), petition for cert. filed, 97 S. Ct. 381 (1976).
26. The tenets of this religion prohibit work from sundown on Friday through sundown on Saturday. Id. at 36.
27. Id.
Each of the store clerk sections maintained a separate seniority list. Thus, although Hardison held a relatively lengthy tenure in his former section, he was second lowest in seniority in the new section. As a result, his freedom to select his work schedule was diminished considerably.

Soon after Hardison obtained his new position, the clerk with lowest seniority took a vacation. Plaintiff, in conformance with the union contract and because he was second lowest on the list, was called upon to substitute for the vacationing employee on a schedule which included Friday and Saturday work. Following a meeting with union officials over the seniority rules, plaintiff agreed to transfer to the “twilight shift,” which alleviated the Saturday work conflict. A few weeks later, however, while still replacing the vacationing employee, Hardison left work early on a Friday to observe the Sabbath. He was subsequently discharged.

In deciding for the plaintiff, the court noted that the employer had reasonable alternatives to accommodate Hardison, but that the defendant employer did not pursue them. The employer could have offered any of the following solutions: (1) Within the framework of the collective bargaining agreement, the employer could have allowed the plaintiff to work a four-day week during the period that he substituted for the other employee; (2) Within the framework of the collective bargaining agreement, TWA could have filled plaintiff’s Sabbath shift with other available personnel. This could easily have been accomplished by assignment of a worker from a pool of two hundred qualified employees; (3) The employer might have attempted or encouraged although the company conceded that a supervisor could have replaced Hardison for the fifth workday, or that another worker could have been transferred on a temporary basis, TWA indicated that such alternatives might have caused other shop functions to suffer. TWA contended that this alternative would also have imposed undue hardship. The court rejected this argument because the company failed to prove that a short week for one individual during a temporary period of another’s vacation would cause undue hardship and not merely inconvenience its operations. The employer might have experienced business inconvenience, but not undue hardship. The court also noted that TWA never considered whether the aforementioned
a trade-off between plaintiff and another employee, either for an entirely different shift or for the Sabbath portion of the shift. Under these circumstances, where the employer failed to offer any such methods of reasonable accommodation, the court found the employer guilty of religious discrimination and thus held for the plaintiff.

Interestingly, TWA’s defense was similar to that of the defendant in Albuquerque. TWA alleged that it was excused from making efforts at reasonable accommodation because of plaintiff’s own lack of cooperation in transferring from a position with seniority and protection against Sabbath day assignments to a position in a new section without such seniority and protection. Rejecting that argument, the court held that limiting the right to transfer to a more favorable position, as a condition of accommodation, would in itself constitute discrimination on the basis of religion.

The Hardison court concluded that before an employer may assert a defense of noncooperation, the employer must first establish that it has tendered an accommodation which the employee has refused to consider. Because TWA had not tendered any reasonable accommodation, it could not plead the employee’s noncooperation as a defense.

In situations where the employer offers to accommodate the Sabbath-observing employee by transferring him to a different position, the courts have again shown much fact sensitivity. Johnson v. United States Postal Service involved a postal service station with few employees, all of whom were required to work on Saturday. The Sabbath observing employee was a part-time clerk with a flexible schedule. The court found that it would be a reasonable accommodation to offer him “as many Saturdays off as possible—or—in the alternative to recommend [him] for a transfer to [a] larger Post Office.”

accommodation was reasonable. Accordingly, the burden of proving undue hardship was strictly imposed upon TWA. Id. at 41.

33. Id. at 40-41.
34. Id. at 39.
35. Id.
36. Id.
37. Id.
38. Id.
39. 497 F.2d 128 (5th Cir. 1974).
40. Id. at 130.
Draper v. United States Pipe & Foundry Co.\(^4\) involved a skilled electrical employee. The employer offered to transfer the Sabbath observer to production line work where the employee's electrical skills would not be used, and the employee was threatened with a reduction in wages. This was not considered a reasonable accommodation. The employer should at least have attempted to adjust shift schedules before considering a transfer from specialized to less skilled work.\(^4\)

Situations where fellow employees have complained about the accommodations made to the Sabbath observer have also been considered in a fact sensitive manner. Generally, employee morale problems must be serious and the complaints of fellow workers must be chronic to justify nonaccommodation because of undue hardship. As the court of appeals indicated in Cummins v. Parker Seal Co.,\(^3\) the harmful effect of fellow worker complaints must yield in the face of the greater harm to the applicant in denying employment because of religious observance.\(^1\) Only when the employer can make a persuasive showing that employee discontent will produce "chaotic personnel problems"\(^5\) will such a defense to nonaccommodation be permitted.

III. THE CONSTITUTIONALITY OF THE REASONABLE ACCOMMODATION RULE

Some courts\(^6\) have suggested that the reasonable accommodation rule might constitute an establishment of religion in viola-
tion of the first amendment to the Constitution.\textsuperscript{47} Most courts, however, have rejected this view.\textsuperscript{48}

In \textit{Cummins v. Parker Seal Co.},\textsuperscript{49} the first amendment issues regarding the reasonable accommodation rule were extensively discussed. Appellant Cummins had been employed for over ten years at the Parker Seal Company. When Cummins became a member of the Worldwide Church of God, he informed the plant manager that he could not work on Saturday because of religious observance. The manager acquiesced to his employee's request.\textsuperscript{50} Several months later Cummins was informed by a new plant manager that the no-Saturday schedule would remain acceptable "as long as it don't cause any problems."\textsuperscript{51} Subsequently, the manager advised Cummins that a fellow employee had complained about his no-Saturday schedule and that Cummins therefore would be required to work on Saturday as a condition of his continued employment. For religious reasons, the appellant refused to comply with this demand and was subsequently fired.

In deciding for the appellant, the United States Court of Appeals for the Sixth Circuit stated that mild and infrequent complaints by fellow employees do not constitute undue hardship upon the employer's business.\textsuperscript{52} Furthermore, the employer made no attempt to alleviate fellow employee dissension, although there had been ample opportunity to do so.\textsuperscript{53} The \textit{Cummins} court

\begin{footnotesize}
\textsuperscript{47} The first amendment states in part: "Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof . . . ." U.S. Const. amend. I.


\textsuperscript{49} 516 F.2d 444 (6th Cir. 1975), \textit{aff'd mem. by an equally divided Court}, 97 S. Ct. 342 (1976).

\textsuperscript{50} \textit{Id.} at 548. During certain busy periods when the company was open on Saturday, the stock supervisors substituted for Cummins. In return, Cummins made himself available to replace the stock supervisors "at any other time other than . . . Sabbath or an annual holy day." \textit{Id.}

\textsuperscript{51} \textit{Id.} Testimony was introduced to show that the efficiency and safety of the employee's department did not suffer when the stock preparation supervisors substituted for Cummins. The prior plant manager testified: "/[It]'s always been kind of a set up down through the years that if the Banbury Supervisor was not there the Stock Prep. Supervisor covered both sides of it.'" He further testified that problems with production were "'nothing related to [appellant's] situation.'" \textit{Id.}

\textsuperscript{52} \textit{Id.} at 550. See notes 43-45 \textit{supra} and accompanying text.

\textsuperscript{53} The court noted that Parker Seal Co. might have asked Cummins to work extra
therefore found that the employer had not fulfilled its Title VII duty to make reasonable accommodations to the religious needs of its employees.

The court then discussed Parker Seal's contention that the reasonable accommodation rule was unconstitutional as an establishment of religion. The court rejected this argument, relying upon the tripartite "establishment" test set forth in Committee for Public Education v. Nyquist. This test established standards that a statute must meet in order to be nonviolative of the constitutional ban against establishment of religion: (1) Purpose Standard—The statute "must reflect a clearly secular legislative purpose," (2) Effect Standard—The statute "must have a primary effect that neither advances nor inhibits religion," and (3) Entanglement Standard—The statute "must avoid excessive government entanglement with religion."

The purpose standard is satisfied with respect to the reasonable accommodation rule because, like Title VII as a whole, the rule's primary purpose is secular. The rule was intended to prevent discrimination in employment and to assure that employees are judged by their employers on the basis of merit and not on the basis of nonemployment-related criteria, for example, religious observance.

hours on weekdays or on Sundays to make up the time lost during the Sabbath period. Cummins v. Parker Seal Co., 516 F.2d 544, 550 (6th Cir. 1975). Furthermore, the employer could have reduced appellant's salary commensurate with a shorter work week. Id. As another possibility, the employer might have taken specific measures to assure that Cummins substituted for his colleagues on an equitably scheduled basis, rather than leaving the arrangements to individual co-worker demands. Id. 54. According to Parker Seal Co., the reasonable accommodation rule could require an employer to excuse an employee from Saturday work in order to attend church while an atheist employee who wanted to use a Saturday for leisure activities would have no similar rights under the Civil Rights Act. Thus, the accommodation rule was alleged to constitute a government-mandated preference for religion impermissible under the first amendment. Id. at 551. For a discussion of the purposes underlying the establishment clause, see Engel v. Vitale, 370 U.S. 421 (1962).


57. Id.

58. Id.


Senator Randolph of West Virginia, who proposed the amendment that became 42 U.S.C. § 2000e(j) (1972), stated his purpose as follows:

MR. RANDOLPH: Mr. President, freedom from religious discrimination has been considered by most Americans from the days of the Founding Fathers as one of the fundamental rights of the people of the United States. Yet our courts
The second, or effect standard, is also satisfied because "the primary effect of [the reasonable accommodation rule] is to inhibit discrimination, not to advance religion." The accommodation rule does not mandate financial support of any kind. The rule simply prevents employers from imposing uniform work rules which appear neutral on their face but which have the effect of discriminating against Sabbath observing employees. The primary effect of reasonable accommodation is the elimination of employment discrimination, not the establishment of religion.

Finally, the entanglement standard is satisfied because "[f]or the most part, the EEOC and the courts will have to determine simply whether the employer has made a reasonable accommodation and whether an undue hardship will result. [The] resolution [of these issues] certainly does not necessitate any government entanglement with religion." Having determined that the reasonable accommodation rule met all three standards of the Nyquist test, the majority in Cummins concluded that it was constitutional. The establishment clause was not violated.

In Jordan v. North Carolina National Bank, a federal district court reached the same conclusion as the Court in Cummins, although it employed a somewhat different analysis. Rather than rely on the tripartite test, the court cited Sherbert v. Verner and Wisconsin v. Yoder to conclude that the establishment clause had not been violated.

In Sherbert the United States Supreme Court required an accommodation by the state to the religious beliefs of a Seventh Day Adventist. Writing for the majority, Justice Brennan observed:

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In holding as we do, plainly we are not fostering the "establishment" of the Seventh-day Adventist religion.  

[T]he extension of unemployment benefits to Sabbatarians in common with Sunday worshippers reflects nothing more than the governmental obligation of neutrality in the face of religious differences, and does not represent that involvement of religious with secular institutions ...  

Yoder involved members of the Amish faith who, for religious reasons, refused to send their children to an approved school after the children had graduated eighth grade. This refusal violated Wisconsin's compulsory education law. The Supreme Court held that the free exercise clause of the first amendment requires Wisconsin to accommodate the sincere religious belief of the Amish by exempting them from the compulsory education law. Writing for the majority, Chief Justice Burger noted that such an exemption did not violate the establishment clause:

The purpose and effect of such an exemption are not to support, favor, advance, or assist the Amish, but to allow their centuries-old religious society, here long before the advent of any compulsory education, to survive free from the heavy impediment compliance with the Wisconsin compulsory-education law would impose. 

The court in Jordan concluded that the reasonable accommodation rule is similar to the accommodations granted by the Supreme Court in Sherbert and Yoder. The reasonable accommodation rule, requiring exemptions from work rules which operate as impediments to employees' religious observance, does nothing more than facilitate the free exercise of employees' religion. It is therefore constitutionally permissible.

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2000e(j) and its predecessor EEOC Regulation 1605.1(b) are, by their very terms, designed to encourage and protect individual religious freedom. No religion receives monetary benefits; no religion is singled out for special treatment. The statute requires accommodation to religious freedom in a practical framework.
Id. at 180.
70. Legislative exemptions for religious worshippers support the Jordan analysis and are consistently upheld. An exemption for the use of sacramental wine was contained in the National Prohibition Act of 1919, 41 Stat. 305, 308 and was held constitutional in People v. Marquis, 291 Ill. 121, 125 N.E. 757 (1919). The current federal tax laws exempt
The fundamental difference between the *Cummins* and *Jordan* approaches lies in the way each court perceived the consequences of reasonable accommodation. The court in *Cummins* perceived exemptions from uniform work rules as a form of benefit to religion. The tripartite test was therefore invoked to determine the constitutionality of such exemptions. The court in *Jordan*, however, perceived such exemptions as “aiding” religion only in the sense that impediments to observance were removed and the free exercise of religion was facilitated. The court apparently considered the tripartite test unnecessary to a determination of the accommodation rule’s constitutionality.

**IV. ADDITIONAL CONSIDERATIONS**

The Supreme Court recently examined whether discriminatory intent on the part of an employer must be proved for an employee to prevail in a Title VII suit. In *Griggs v. Duke Power Co.*, the employer instituted a policy requiring a high school education or the passing of a general intelligence test as a condition of employment or the passing of a general intelligence test as a condition of employment and/or transfer to certain positions. Neither standard was shown to be significantly related to successful job performance. Both requirements operated to disqualify blacks at a substantially higher rate than whites. The jobs in question were previously filled solely by white employees as part of a longstanding practice of giving preference to whites.

The Supreme Court held that the Duke Power Co. job requirements violated the Title VII prohibition against racial dis-
crimination. Although the court of appeals had found that the “diploma or test” requirement had been adopted without any “intention to discriminate against Negro employees,” the Supreme Court eliminated intent as a factor. “[G]ood intent or absence of discriminatory intent does not redeem employment procedures or testing mechanisms that operate as ‘built-in headwinds’ for minority groups and are unrelated to measuring job capability . . . . Congress directed the thrust of the Act to the consequences of employment practices, not simply the motivation.” Further, the Supreme Court determined that “[T]he touchstone is business necessity. If an employment practice which operates to exclude Negroes cannot be shown to be related to job performance, the practice is prohibited.” Thus, under the reasoning in Griggs, if an employer has a facially neutral employment policy which operates to exclude Sabbath observers de facto, the employer is in violation of Title VII. Accommodation to the religious observances of the employee is required unless the employer can show that business necessity renders such an accommodation unreasonable.

In Washington v. Davis, where the Supreme Court upheld the constitutionality of a selection test which had a disproportionate impact on racial minorities, the Court relaxed the test of

78. Id. at 431.
79. Although Griggs dealt with racial discrimination and the focus of this comment is on religious discrimination, Title VII treats them similarly. The prohibitions against both forms of discrimination are usually made in the same legislative breath. 42 U.S.C. § 2000e-2(a)(1), (a)(2), (b), (c)(1), (c)(2), (d), (h), (j) (1970 & Supp. II 1972). Further, the discussion of the business necessity test by the Court in Griggs extended to prohibited forms of discrimination other than race: “What is required by Congress is the removal of artificial, arbitrary, and unnecessary barriers to employment when the barriers operate invidiously to discriminate on the basis of racial or other impermissible classification.” Griggs v. Duke Power Co., 401 U.S. 424, 425 (1971).
80. See Claybaugh v. Pacific Nw. Bell Tel. Co., 355 F. Supp. 1 (D. Ore. 1973), where the court held that the Griggs business necessity test required reasonable accommodation to the religious needs of the Sabbath observer: “The balancing of reasonableness and hardship is what I believe Chief Justice Burger was referring to in Griggs as the ‘business necessity’ which would qualify as a legitimate reason for discharging an employee.” Id. at 6 (footnote omitted).
81. 426 U.S. 229 (1976). The challenge was brought on constitutional grounds rather than under Title VII because the respondents were federal employees and at the time their complaint was filed, federal employees were not yet covered by Title VII. In 1972, Title VII coverage was extended to government employees. The appellant’s original complaint, however, was never amended. Id. at 238.
business necessity enunciated in Griggs. The opinion indicated that discriminatory purpose is requisite to an equal protection or due process violation. The Court made clear, however, that the stricter impact standard, which eliminated the need to prove intent to discriminate, would continue to apply to Title VII actions in determining whether employment discrimination had occurred under the Act.

Recently, in General Electric Co. v. Gilbert, the Supreme Court held that an exclusion of pregnancy-related disability benefits from an employer's disability plan was not violative of the Title VII prohibition against sex discrimination. The effect of this decision on the impact approach to Title VII is yet unclear. It seems unlikely, however, that the reasonable accommodation rule, which was incorporated by amendment into Title VII, will be affected.

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82. The Court in Griggs had stated: "Congress has placed on the employer the burden of showing that any given requirement must have a manifest relationship to the employment in question." 401 U.S. 424, 432 (1971). In Washington v. Davis, 426 U.S. 229 (1976), the Court held that a selection test was validated by showing a positive relationship between the test and performance on a training course. No relationship between the test and actual job performance was required. Id. at 250-53.

84. Id. at 246-47.
85. 97 S. Ct. 401 (1976).
86. Id. at 409. The Court stated: [R]espondents have not attempted to meet the burden of demonstrating a gender-based discriminatory effect . . . . The “package” going to relevant identifiable groups we are presently concerned with—General Electric’s male and female employees—covers exactly the same categories of risk, and is facially nondiscriminatory in the sense that “[t]here is no risk from which men are protected and women are not. Likewise there is no risk from which women are protected and men are not.”

Id. (quoting Geduldig v. Aiello, 417 U.S. 484 (1973)).
87. The majority reached its holding using impact analysis and stating that the effect of the employer’s disability plan was not discriminatory. See note 86 supra. Despite this, the opinion used language which implied that the difference between the constitutional and Title VII standards of proving discrimination was being eroded. Id. at 412-13.

The language generated much confusion. Justice Brennan labeled it “fleeting dictum.” Id. at 417 n.6. Justice Blackmun disassociated himself from any inference that the Title VII impact standard was being eroded as a result of this case. Id. at 413. In contrast, Justice Stewart did “not understand the opinion to question either Griggs v. Duke Power Co. . . . or the significance generally of proving a discriminatory effect in a Title VII case.” Id. (citation omitted).

88. In General Elec. Co. v. Gilbert, 97 S. Ct. 401 (1976), the Court refused to follow an EEOC guideline, finding that it conflicted with another agency’s interpretation and that it did not reflect congressional intent. Id. at 411-12. The reasonable accommodation rule, however, reflects the will of Congress through the incorporation of § 701(j) as part of Title VII. 42 U.S.C. § 2000e(j) (Supp. II 1972). Even the language of the majority opinion
CONCLUSION

The language of Title VII, as initially enacted in 1964, did not clearly protect the Sabbath observer from infringement upon his religious observance by employers and prospective employers. To close this gap in Title VII, the EEOC promulgated regulation 1605.1. This regulation explicitly defined the Title VII proscription against religious discrimination as a duty to make reasonable accommodations to the religious needs of the employee in the absence of undue hardship to the employer. The Supreme Court decision in Sherbert supported the validity of this interpretation of religious discrimination. Legislative approval came with the 1972 amendment to the Civil Rights Act, which incorporated into Title VII the definition of religious discrimination contained in regulation 1605.1.

In interpreting “reasonable accommodation” and “undue hardship” under regulation 1605.1 and under Title VII as amended, courts have paid careful attention to the particular facts of each case. Determining the constitutionality of the reasonable accommodation rule, the courts have taken two approaches. The first views the rule as a form of benefit to religion. Thus, the tripartite Nyquist test is invoked to determine the constitutionality of such a benefit. The second approach views the reasonable accommodation rule as a mere facilitation of the right to free exercise of religion. Because the reasonable accommodation rule involves only the facilitation of free exercise rights, the Nyquist test need not be applied. The conclusion as to legality is based on the premise that, as in Sherbert and Yoder, it is constitutionally permissible to remove impediments to observance to facilitate the free exercise of religion.

The reasonable accommodation rule signaled the beginning of a new era for the religious observer in American life. It has opened up employment doors previously closed and has rendered “equal employment opportunity” a realizable goal. With the Supreme Court’s affirrnance of the accommodation rule in

seems to imply that the Court will follow the reasonable accommodation rule: “When Congress makes it unlawful for an employer to ‘discriminate . . . on the basis of . . . sex . . .’ without further explanation of its meaning, we should not readily infer that it meant something different than what the concept of discrimination has traditionally meant.” Id. at 413. Congress has unequivocally explained the meaning of religious discrimination by its incorporation of § 701(j) into Title VII.
Cummins, it appears that the civil rights of the religious observer will continue to be protected.\textsuperscript{89}

\textit{Solomon Z. Handler}

\textsuperscript{89} The most recent Supreme Court decision involving the reasonable accommodation rule constitutes a setback for the civil rights of the Sabbath observer. The Court held that an employer is excused from accommodating the religious needs of his Sabbath-observing employee when this would result in by-passing the company's seniority system. \textit{T.W.A. v. Hardison}, 45 U.S.L.W. 4672, 4676-77 (U.S. June 16, 1977) (No. 75-1126). In so holding, the Supreme Court ignored the question posed by the court of appeals:

If Saturday work inevitably falls to the employee with lowest seniority, one may well ask whether such seniority provisions would not effectively preclude TWA from ever hiring those Seventh Day Adventists, Orthodox Jews, and members of the Worldwide Church of God whose religious convictions preclude work from sundown on Friday until sundown on Saturday. It is no answer to such person, or to the statute itself, that if he compromises his religious beliefs for a time he may develop enough seniority to practice them again.

UNION TRESPASS: THE DILEMMA OF FEDERAL PREEMPTION OF STATE JURISDICTION

Prior to 1937, state law exclusively governed industrial relations.1 With the passage of the National Labor Relations Act2 (NLRA or the Act), responsibility for the regulation of industrial relations passed to the federal government. The establishment of the National Labor Relations Board (NLRB), with its grant of primary jurisdiction, has consistently been viewed by the Supreme Court as an expression of congressional intent to assure national uniformity in labor relations.3

The role left to the states in this comprehensive system of federal regulation of labor relations has been a constant source of confusion4 and litigation.5 Although it is well-established that state labor law must yield to federal law governing labor relations,6 perhaps no problems in the labor law area have engendered more litigation7 than those precipitated by state tort laws of general application.8 To date, the Supreme Court has not determined the applicability of state trespass laws to a labor dispute.9 The thrust of three recent state court opinions10 indicates that a firm decision by the Supreme Court is necessary to resolve a conflict in interpretation among the states and thereby to further the goal of national uniformity.

7. See cases cited in note 5 supra & note 74 infra.
The purpose of this comment is threefold: (1) To examine these state court cases in the context of prior Supreme Court decisions in the field of labor law preemption; (2) to illustrate the conflict and confusion that exists in this area; and (3) to suggest a proposal that will reconcile the conflicting interests and values involved in federal preemption of state trespass law.

Federal Preemption: Garmon and Its Progeny

The doctrine of federal preemption is rooted in both the commerce clause and the supremacy clause of the United States Constitution. While the Act does not explicitly state that the NLRB shall have exclusive jurisdiction over labor disputes, the Supreme Court, guided by the "presumed intent" of Congress, has concluded that the goal of a uniform national labor policy mandates that states be denied jurisdiction over activities within the jurisdiction of the NLRA. When the NLRA was first enacted, the Supreme Court was reluctant to preempt state jurisdiction over areas not expressly dealt with by Congress. By 1959, however, the Supreme Court had begun to see the failings in its ad hoc approach and recognized the need for a preemption policy which would not "sacrifice [the] important federal interests in a uniform law of labor relations centrally administered by an expert agency."

San Diego Building Trades Council v. Garmon provided the setting for the Court to cast aside its step-by-step approach in favor of a broad principle of federal preemption, giving the NLRB primary jurisdiction over all activities falling within the ambit of the Act. In Garmon the California Supreme Court had affirmed

12. "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." U.S. CONST. art. VI, cl. 2.
an injunction issued to prevent peaceful picketing by a union desiring a union shop.\textsuperscript{19} Since these activities also violated state tort law, the court awarded damages. The Supreme Court granted certiorari\textsuperscript{20} and vacated the injunction.\textsuperscript{21} On remand the California court upheld the award of damages, based upon the state's general tort provisions as well as state laws specifically dealing with labor relations.\textsuperscript{22} The Supreme Court again granted certiorari,\textsuperscript{23} and then reversed the award of damages on the basis of lack of jurisdiction.\textsuperscript{24} Opting for a principle of federally directed preemption, the Court found that "to allow the States to control activities that are potentially subject to federal regulation involves too great a danger of conflict with national labor policy."\textsuperscript{25} Mr. Justice Frankfurter enunciated the test for determining when the preemption principle applies, holding that "[w]hen an activity is arguably subject to § 7 or § 8 of the Act,[26] the States as well as the federal courts must defer to the exclusive competence of the National Labor Relations Board if the danger of state interference with national policy is to be averted."\textsuperscript{27}

Although this "landmark"\textsuperscript{28} decision never received the support of a unanimous Court,\textsuperscript{29} its principle of broad federal preemption of state jurisdiction has proven to be the cornerstone

\begin{footnotes}
\item[21] San Diego Bldg. Trades Council v. Garmon, 353 U.S. 26, 29 (1957). The vacating of the California injunction was based upon the fact that "the refusal of the National Labor Relations Board to assert jurisdiction did not leave with the States power over activities they would be preempted from asserting." San Diego Bldg. Trades Council v. Garmon, 359 U.S. 236, 238 (1959).
\item[25] Id. (footnotes omitted).
\item[26] Section 7, 29 U.S.C. § 157 (1970), grants employees the right to self-organization, to join unions, and to bargain collectively. To insure protection of these rights, §§ 8(a)-8(b), 29 U.S.C. §§ 158(a) & 158(b) (1970), list activities prohibited to employers and unions respectively.
\item[28] Id. at 250 (Harlan, J., concurring).
\end{footnotes}
of the preemption doctrine in labor relations.\textsuperscript{30} In the ensuing years, the status of the Garmon doctrine appeared to be in question;\textsuperscript{31} members of the Court called for a reexamination of Garmon\textsuperscript{32} and several exceptions were created whereby state courts were permitted to retain jurisdiction.\textsuperscript{33} In 1971, however, all doubts as to the continuing vitality of Garmon were laid to rest, at least temporarily, by the Court's decision in Amalgamated Association of Street, Electric Railway & Motor Coach Employees \textit{v.} Lockridge.\textsuperscript{34} Lockridge was an employee who brought an action against his union for reinstatement to membership and for damages resulting from an allegedly improper discharge. Finding the conduct to be arguably subject to the NLRA,\textsuperscript{35} the Supreme Court declared that since the "full range of the very substantial interests the preemption doctrine seeks to protect [were] directly implicated [in this situation],"\textsuperscript{36} there was no jurisdiction upon which the state court award of damages could be sustained.\textsuperscript{37} Mr. Justice Harlan, speaking for the majority, addressed the issue of Garmon's survival. After first discussing the rationale behind preemption and the history leading to Garmon, he concluded:

While we do not assert that the Garmon doctrine is without imperfection, we do think that it is founded on reasoned principle and that until it is altered by congressional action or by judicial insights that are born of further experience with it, a heavy burden rests upon those who would, at this late date, ask the Court to abandon Garmon and set out again in quest of a system more nearly perfect. A fair regard for considerations of

\begin{thebibliography}{9}
\bibitem{30} Come, \textit{supra} note 3, at 1435.
\bibitem{33} \textit{See} notes 39-47 \textit{infra} and accompanying text.
\bibitem{34} 403 U.S. 274 (1971).
\bibitem{35} Section 8(b)(1)(A), 29 U.S.C. § 158(b)(1)(A) (1970), makes it an unfair labor practice for a union to restrain or coerce "employees in the exercise of the rights guaranteed in [section 7]. . . ." Section 8(b)(2), 29 U.S.C. § 158(b)(2) (1970), makes it an unfair labor practice for a union to "discriminate against an employee with respect to whom membership in such organization has been denied [for some reason other than failure to pay dues]." Section 8(a)(3), 29 U.S.C. § 158(a)(3) (1970), makes it an unfair labor practice for an employer to discriminate "in regard to hire or tenure of employment . . . to encourage or discourage membership in any labor organization . . . ."
\bibitem{36} Amalgamated Ass'n of St., Elec. Ry. & Motor Coach Employees \textit{v.} Lockridge, 403 U.S. 274, 293 (1971).
\bibitem{37} \textit{Id.}"
\end{thebibliography}
stare decisis and the coordinate role of the Congress in defining
the extent to which federal legislation pre-empts state law
strongly support our conclusion that the basic tenets of Garmon
should not be disturbed.\textsuperscript{38}

**Exceptions to Garmon**

*Garmon*, it must be noted, did not totally deprive the states
of all jurisdiction over activities arguably subject to the NLRA.
While perceiving the necessary supremacy of federal law and
administration over state law, the Court in *Garmon* noted that
there are two situations in which the states will retain jurisdic-
tion:

[D]ue regard for the presuppositions of our embracing federal
system, including the principle of diffusion of power not as a
matter of doctrinaire localism but as a promoter of democracy,
has required us not to find withdrawal from the States of power
to regulate where the activity regulated was a merely peripheral
concern of the Labor Management Relations Act. Or where the
regulated conduct touched interests so deeply rooted in local
feeling and responsibility that, in the absence of compelling
congressional direction, we could not infer that Congress had
deprived the States of the power to act.\textsuperscript{39}

The first, or “peripheral concern” exception, will apply primarily
to violations of state law for which the NLRA has not provided a
remedy. In these situations state jurisdiction poses only a mini-
mal threat to national labor policy,\textsuperscript{40} and thus the ousting of state
jurisdiction is not warranted.

The principal case falling within this exception is *Linn v. United
Plant Guard Workers Local 114*,\textsuperscript{41} where the Supreme
Court decided that a state court may retain jurisdiction over an

\textsuperscript{38} Id. at 302. In a more recent decision, Lodge 76, Int’l Ass’n of Machinists v.
Wisconsin Employment Relations Comm’n, 427 U.S. 132 (1976), the Supreme Court held
a state labor board preempted from enjoining a union which was putting economic pres-
sure on an employer by refusing to work overtime. State jurisdiction was preempted
because the union’s conduct, although neither protected nor prohibited by the NLRA, was
nevertheless an activity intended to be left unrestricted by any governmental regulatory
power. Id. at 144-45. In so holding, the Court overruled a prior decision to the contrary,
UAW Local 232 v. Wisconsin Employment Relations Bd. (Briggs-Stratton), 336 U.S. 245
(1949), and again demonstrated its commitment to a broad preemption policy which alone
can effectuate a uniform system of labor relations.

\textsuperscript{39} San Diego Bldg. Trades Council v. Garmon, 359 U.S. 236, 243-44 (1959) (citations
omitted).

\textsuperscript{40} Broomfield, supra note 14, at 558.

\textsuperscript{41} 383 U.S. 53 (1966).
action for libel where the libel occurred during a union's organizational campaign. While *Linn* is an example of the Court's willingness to permit state laws of general application to be used in a labor dispute, the case should be limited to its facts and not extended to make state trespass laws applicable.\(^{42}\)

The second exception to *Garmon*, for activities “deeply rooted in local feeling and responsibility,” refers to the Court's refusal to allow federal regulation to preempt state jurisdiction over violent activities.\(^{43}\) The curtailment of violent acts has traditionally been a function of the state police power. State courts and law enforcement officials are certainly closer to the locus of the violent activity: Where ability to act quickly is essential, this power is logically deemed an exception and should not be preempted. Since the characterization of conduct as “violent” can involve “both subtle issues of judgment and the risk that the state may lay hands on conduct which the [NLRB] might find protected,”\(^{44}\) this exception has been limited to instances of actual violence or instances where such violent activity is imminent.\(^{45}\) As the Supreme Court has determined that the congressional goal in enacting the NLRA was to establish a uniform national policy of labor relations,\(^{46}\) any suggestion that mere potential violence is sufficient to allow states to retain jurisdiction should be dismissed as contrary to congressional intent.\(^{47}\)

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\(^{42}\) The tort of defamation has a significantly different role in the field of labor relations than the tort of trespass. The law of defamation will at most have a tangential effect on labor-management relations; thus it logically falls within the “peripheral concern” exception to *Garmon*. Union trespass, on the other hand, often occurs in situations involving strikes and picketing, the crucial areas in labor preemption. See *Cox*, *supra* note 6, at 1367-68. Trespass cases, therefore, do not fit within the “peripheral concern” exception to preemption.


\(^{46}\) See note 75 infra and accompanying text.

\(^{47}\) *Broomfield*, *supra* note 14, at 665. It should be noted that in addition to the above-mentioned exceptions, other situations have arisen where the Court has held that state courts may retain jurisdiction in matters involving labor relations. State courts retain jurisdiction over suits brought for the enforcement of collective bargaining agreements under § 301 of the Labor Management Relations Act (LMRA), 29 U.S.C. § 185 (1970), see *Smith v. Evening News Ass'n*, 371 U.S. 195 (1962); over damage actions by parties injured by illegal secondary boycotts under § 303(b) of the LMRA, 29 U.S.C. § 187(b) (1970), see *Local 20, Teamsters v. Lester Morton Trucking Co.*, 377 U.S. 235 (1964);
JURISDICTION OVER UNION TRESPASS: AN ISSUE UNRESOLVED

The issue whether, under the Garmon principle of preemption, state courts may retain jurisdiction over union trespass activity has never been decided by the Supreme Court. This question was expressly left open by the Court in Amalgamated Meat Cutters Local 427 v. Fairlawn Meats, Inc., where a union, attempting to gain recognition from a reluctant employer, was enjoined from picketing the employer, from trespassing on his premises, and from exerting secondary pressures on his suppliers. In vacating (for want of jurisdiction) the broad injunction issued by the Ohio court, the Supreme Court pointed out:

Whether a State may frame and enforce an injunction aimed narrowly at a trespass . . . is a question that is not here. Here the unitary judgment of the Ohio Court was based on the erroneous premise that it had power to reach the union's conduct in its entirety. Whether its conclusion as to the mere act of trespass would have been the same outside the context of petitioner's other conduct we cannot know.

Although this same trespass issue was again presented to the Court in Taggart v. Weinacker's, Inc., it was never decided; certiorari was dismissed as improvidently granted. Chief Justice Burger, in a concurring opinion, declared: "In my view any contention that the States are pre-empted [from enjoining union trespass] is without merit." The Chief Justice based his opinion on the ground that "[f]ew concepts are more 'deeply rooted' than the power of a State [through its trespass laws] to protect

and over actions against a union for breach of its duty of fair representation, see Vaca v. Sipes, 386 U.S. 171 (1967). These suits typically involve situations where Congress has affirmatively indicated that state jurisdiction should exist, or where the Court has been willing to presume that state court jurisdiction will not disserve the interests promoted by the NLRA. Amalgamated Ass'n of St., Elec. Ry. & Motor Coach Employees v. Lockridge, 403 U.S. 274, 297-98 (1971). Furthermore, it is federal law rather than state law that is applied by the states in these situations. These exceptions may have led Mr. Justice White to conclude that the "rule of uniformity [invoked by Garmon] is at best a tattered one." Id. at 318 (White, J., dissenting). However, since these exceptions involve solely the application of federal law, they are inapposite to a discussion of the application of state trespass laws in situations calling for federal preemption.

49. Id. at 25.
50. Id. at 24-25.
53. Id. at 227 (Burger, C.J., concurring).
the rights of its citizens." In a separate memorandum, Mr. Justice Harlan was in direct disagreement with the Burger opinion, finding that since the trespass activity was arguably protected by the NLRA, the states should be preempted under Garmon.

RECENT STATE COURT DECISIONS

With the issue left open by the Supreme Court, and only the differing views of two Justices as guidance, it is not surprising that the state courts have been inconsistent in deciding issues of union trespass. Three recent decisions will best illustrate the confusing and conflicting state court determinations of their own jurisdiction to enjoin union trespass.

In People v. Bush, a union was engaged in the picketing of retailers carrying goods manufactured by the wholesaler with whom they were in dispute. The New York Court of Appeals upheld a conviction for criminal trespass against the union members, notwithstanding that the peaceful union conduct was both arguably protected by the NLRA as consumer picketing and arguably prohibited as a secondary boycott. Noting the Supreme Court's refusal to decide the issue of the applicability of state trespass laws to a labor dispute in Fairlawn Meats, the New York court found that "[t]he clear import of this passage [concerning preemption of the state's broad injunction in Fairlawn Meats] is that had the [Ohio] State court ruled only on the trespassing conduct before it, the ruling would not have been pre-empted."

The court apparently decided that trespass falls into one of the exceptions to Garmon, although it discussed neither the "deeply rooted" nor the "peripheral concern" exceptions. Further, the court held that "[w]here private property is involved, union rights under section 7 are limited and must be made clear on its initiative in advance."

54. Id. at 228. For a contrary statement on the applicability of the "deeply rooted" exception to peaceful trespass, see notes 43-47 supra and accompanying text.
55. Id. at 229 (Harlan, J., separate memorandum).
56. See note 74 infra.
58. Id. at 532 n.2, 349 N.E.2d at 835 n.2, 384 N.Y.S.2d at 734 n.2.
59. See note 126 infra.
62. Id. at 538, 349 N.E.2d at 838, 384 N.Y.S.2d at 738. This in effect shifted to the union the burden of proving that the state's jurisdiction should be preempted. A reasona-
In the California case of *Sears, Roebuck & Co. v. San Diego County District Council of Carpenters*, a union had engaged in peaceful picketing following an employer's refusal to contract his work or hire directly through a union hiring hall. An order was granted enjoining the union from picketing on company property and the union appealed. Finding that the union activity was both arguably protected (as a form of mutual aid) and arguably prohibited (as recognition picketing), the California Supreme Court vacated the injunction for want of jurisdiction. Disagreeing with *Bush* and construing *Fairlawn Meats* as leaving open the question of state jurisdiction over union trespass, the court held that the "picketing activities of the Union were not disqualified for arguable protection . . . merely because they were engaged in upon Sears' private property and, being without Sears' permission or approval, were consequently of a trespassory nature." 

Recognizing *Garmon* as firm precedent, the court disposed of the trespass issue in terms of a national labor policy:

Notwithstanding the views of individual members of the high court, the fact remains that the [C]ourt itself, speaking through a majority of its members, has not to this date created a judicial exception to its *Garmon* ruling so as to except from it and thus withdraw from the exclusive jurisdiction of the Board those peaceful activities—like the activities now engaging our attention—which, although arguably subject to section 7 or section 8 of the Act are nevertheless trespassory in nature. Furthermore, we continue to believe that "[u]nlike the power to prevent violence and public disorder, the power to prohibit peaceful picketing that trespasses on the premises of employers involved in labor disputes would 'leave the States free to regulate conduct so plainly within the central aim of federal regulation . . . .'"
In *May Department Stores Co. v. Teamsters Union Local 743*, the most recent state court decision dealing with union trespass, the Supreme Court of Illinois reversed the intermediate appellate decision and affirmed the state's jurisdiction to enjoin union trespass. The activity at issue was a union's organizational campaign which took the form of solicitation of employees and distribution of union literature on a company-owned parking lot. In accord with the *Bush* decision, the Illinois Supreme Court held that, based upon Chief Justice Burger's concurrence in *Taggart v. Weinacker's, Inc.*, the application of a state's law of trespass falls within both the "peripheral concern" and "deeply rooted" exceptions to preemption. Recognizing that "an imminent threat of violence exists whenever an employer is required to resort to self-help in order to vindicate his property rights," the court held that states retained jurisdiction to enjoin union activity even though an unfair labor practice charge against the employer had been filed with the NLRB.

With state courts split on the issue of their jurisdiction over union trespass activity, the congressional goal of a uniform labor policy is being frustrated by the Supreme Court's failure to decide the applicability of state trespass laws to labor disputes.

68. 64 Ill. 2d 153, 355 N.E.2d 7 (1976).
72. Id. at 162, 355 N.E.2d at 10.
73. Id. at 165, 355 N.E.2d at 12. The court indicated that this decision did not harm the union, since the injunction merely had the effect of maintaining the status quo during the pendency of the NLRB proceeding.
74. The following cases have held that state courts retain jurisdiction over union trespass: *Taggart v. Weinacker's, Inc.*, 283 Ala. 171, 214 So. 2d 913 (1968); *Jack Loeks Enterprises v. Local 291*, 87 L.R.R.M. 3105 (Mich. Cir. Ct. 1974); *Hood v. Stafford*, 213 Tenn. 684, 378 S.W.2d 766 (1964).

Other state courts have considered their jurisdiction over union trespass preempted by federal law. See *Hudgens v. Local 315, Retail, Wholesale & Dep't Store Union*, 138 Ga. App. 329, 210 S.E.2d 821 (1974); *Inland Indus., Inc. v. Teamsters Local 541*, 68 Lab. Cas. 24,185 (Kan. 1972); *Weis Mks., Inc. v. Retail Store Employees' Local 692*, 56 Lab. Cas. 65,908 (Md. Cir. Ct. 1967); *Hennepin Broadcasting Assoc's. v. AFTRA*, 84 L.R.R.M. 2217 (Minn. Dist. Ct. 1973); *IBEW Local 903 v. Chain Lighting & Appliance Co.*, 76 Lab. Cas. 18,504 (Miss. 1975); *Freeman v. Retail Clerks Union Local 1207*, 58 Wash. 2d 426, 363 P.2d 803 (1961); *United Maintenance Co. v. Steelworkers*, 86 L.R.R.M. 2364 (W. Va. 1974); *Moreland Corp. v. Retail Store Employees Local 444*, 16 Wis. 2d 499, 114 N.W.2d 876 (1962).
PREEMPTION: THE NEED FOR UNIFORMITY

An examination of both the values served by a broad principle of preemption and the problems that may ensue from its implementation is essential to an evaluation of the competing interests present when a union engages in trespass upon an employer's private property.

The Supreme Court has inferred that the intent of Congress in the field of labor relations is to implement a uniform labor policy. In determining whether state jurisdiction should be preempted in a given situation, the threshold question will be "whether the conduct . . . the State has sought to [regulate] is, or may fairly be regarded as, federally protected activity." If the answer is in the affirmative, state jurisdiction must be preempted, for the greatest threat that Garmon guards against is a state's prohibition of activity that Congress has indicated must remain unhampered.

This fear of unwarranted state intrusion into labor disputes was expressed by the Court early in the history of labor legislation: "For a state to impinge on the area of labor combat designed to be free [from regulation] is quite as much an obstruction of federal policy as if the state were to declare picketing free for purposes or by methods which the federal Act prohibits." One aspect of preemption, therefore, is concerned with preventing state regulation in an area that Congress intended to be left unrestrained by any governmental power; this is the "arguably protected" element of the doctrine. A second strand of preemption emerges from the conviction that "a multiplicity of tribunals and a diversity of procedures are quite as apt to produce incompatible or conflicting adjudication as are different rules of substantive law." The Supreme Court, in upholding the grant

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77. Note, Labor Law: Implementation of Congressionally Declared National Labor Policy Precludes Invocation of Doctrine of Pre-emption, 1966 DUKE L.J. 1131, 1139. See also Lodge 76, Int'l Ass'n of Machinists v. Wisconsin Employment Relations Comm'n, 427 U.S. 132 (1976), where the Supreme Court held that this category of preemption "reflects the concern that one forum would enjoin what the other forum would find legal." Id. at 138.


of primary jurisdiction to the NLRB over conduct even "arguably prohibited" by the Act, has determined that Congress sought "to restructure fundamentally the processes for effectuating [the uniform labor] policy." Based on the assumption that "[c]onflict in technique can be fully as disruptive . . . as conflict in overt policy," preemption principles demand that where conduct is arguably subject to the NLRA, state courts must "defer to the exclusive competence of the National Labor Relations Board if the danger of state interference with national policy is to be averted."

**GUARANTEED UNION ACCESS**

The NLRB's "exclusive competence" is most needed in situations where union organizers enter onto company property to solicit and where a factual determination as to the sufficiency of the union's access is required. While state trespass laws are designed to insure the ability of property owners to choose who may enter their land, an employer has no absolute right to exclude nonemployee union organizers from his property. The Supreme Court in *NLRB v. Babcock & Wilcox Co.* set out the parameters for situations where union organizers must be allowed onto an employer's property:

It is our judgment, however, that an employer may validly post his property against nonemployee distribution of union literature if reasonable efforts by the union through other available channels of communication will enable it to reach the employees with its message and if the employer's notice or order does not discriminate against the union by allowing other distribution. In these circumstances the employer may not be compelled to allow distribution . . . .

... But when the inaccessibility of employees makes ineffective the reasonable attempts by nonemployees to communicate with them through the usual channels, the right to exclude from property has been required to yield to the extent needed

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81. See id. at 490.
83. Id. at 287.
86. 351 U.S. 105 (1956).
to permit communication of information on the right to organize.\textsuperscript{87}

Since “organizational rights [guaranteed by section 7 of the NLRA\textsuperscript{88}] are not viable in a vacuum,"\textsuperscript{89} the Board is empowered to charge the employer with an unfair labor practice\textsuperscript{90} for refusing to allow union organizers onto his property when the union has no other adequate access to the employees.\textsuperscript{91} Again it must be emphasized that state courts have no role in ordering the employer to open his property to union organizers; the “determination of the proper adjustments [between property and organization rights] rests [exclusively] with the Board.”\textsuperscript{92}

**Union Trespass: The No-Man’s Land**

The essential dilemma created by a broad preemption principle arises when a union engages in trespassory activity where such conduct is not even “arguably prohibited” by the NLRA.\textsuperscript{93} Union trespass, when not occurring in conjunction with some other prescribed activities, is not an unfair labor practice. If the activity is not “arguably prohibited,” the employer is unable to petition the Board for a determination of the propriety of the union’s conduct. Since union trespass may be protected under Babcock & Wilcox,\textsuperscript{94} the only way an employer can obtain a Board ruling on whether the union trespass is in fact protected is to resort to “self-help” to expel the trespassers.\textsuperscript{95} At this point the union is

\textsuperscript{87} Id. at 112 (emphasis added).
\textsuperscript{88} Section 7, 29 U.S.C. § 157 (1970), provides, in part:

Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities . . . .

\textsuperscript{89} Central Hardware Co. v. NLRB, 407 U.S. 539, 543 (1972). For an employee to exercise his § 7 rights fully, he must have the opportunity to be contacted by both union organizers and management representatives. Republic Aviation Corp. v. NLRB, 324 U.S. 793 (1945). The employer’s ability to contact his employees is never really at issue; thus it is the ability of the union to reach employees that is the primary concern of the NLRB.

\textsuperscript{90} Section 8(a), 29 U.S.C. § 158(a) (1970), provides: “It shall be an unfair labor practice for an employer—(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in [section 7].”

\textsuperscript{91} E.g., NLRB v. S & H Grossingers, Inc., 372 F.2d 26 (2d Cir. 1967).


\textsuperscript{93} E.g., union organizers going onto an employer’s property without permission.


\textsuperscript{95} Under general tort law principles, a property owner is entitled to use the force reasonably necessary to overcome any resistance and expel a trespasser. See W. Prosser, HANDBOOK ON LAW OF TORTS ch. 4, § 21, at 114-15 (4th ed. 1971).
entitled to file an unfair labor practice charge against the employer for refusing access to his property. The ouster of state jurisdiction in this situation, certainly justifiable for furthering a uniform national labor policy, has been criticized as resulting in “complete denial of a legal or equitable remedy to some employers who by hypothesis are entitled to relief.”

The fear of “artifically creating a no-law area” led Chief Justice Burger in his concurring opinion in Taggart to conclude that state trespass laws should be an exception to the Court’s broad preemption principle. Mr. Justice Harlan, in disagreement, asserted that since the creation of the National Labor Relations Board by Congress was “to assure uniformity of application by an experienced agency,” Garmon foreclosed state action where activity is arguably protected, even if “wrongs may occasionally go partially or wholly unredressed.” The major issue in allowing states to act upon union trespass, therefore, is “whether we are prepared to undertake the risk of admitting improper state jurisdiction for the sake of preserving desirable state action.”

The present law is an intolerable collection of conflicting state court interpretations of the National Labor Relations Act. A resolution is necessary to “spell out from conflicting indications of congressional will the area in which state action is still permissible.”

PROPOSED SOLUTIONS—A CRITICAL EVALUATION

One solution that has been proposed to lift the employer out of this no-law area is for the NLRB to issue advisory opinions on whether a union’s trespassory conduct is protected. Section 6 of the NLRA provides that “[t]he Board shall have authority from time to time to make, amend, and rescind, in the manner prescribed by the Administrative Procedure Act such rules and regulations as may be necessary to carry out the provisions of [the

96. Come, supra note 3, at 1437-38.
97. Cox, supra note 6, at 1362.
99. Id. at 230 (Harlan, J., separate memorandum).
100. Id.
102. See note 74 supra.
104. See Amalgamated Ass’n of St., Elec. Ry. & Motor Coach Employees v. Lockridge, 403 U.S. 274, 328 n.6 (1971) (White, J., dissenting); Come, supra note 3, at 1445-46.
It appears that this section is sufficient authority to enable the Board to issue advisory opinions concerning whether the activity in question is protected by section 7 or prohibited by section 8. The determination would be made by the Regional Director with appeal available within ten days to the General Counsel of the Board, whose decision would be final.

The problem with this proposal, however, is the prevalence of factual disputes in cases involving a union's right of access to an employer's property. To the extent that such factual matters require a hearing, a substantial time lag will remain — despite the availability of advisory opinions — before the rights of the parties will be determined. Thus, it seems unlikely that advisory opinions would expedite Board determinations such that state jurisdiction may be invoked in sufficient time to prevent the harm that would have initially justified action by the state. Furthermore, although the proposal of NLRB advisory opinions was suggested as early as 1960, the use of the opinions in unfair labor practice proceedings is virtually nonexistent; the same appears to be true for determinations of whether activities arguably subject to the NLRA are protected.

A second proposed solution aimed at eliminating this no-law area is to allow preemption of state laws directed toward the supervision of labor relations, but to permit the states to retain the power necessary to enforce their laws of general application. Professor Archibald Cox, the major proponent of this approach, argues:

[State] laws apply to the general public or substantial segments thereof without regard to whether the individual is an employer, union, or employee concerned with unionization or a labor dispute. Neither the laws themselves nor any particular application involves weighing the special interests [unique to labor relations]. The likelihood that the collateral impact of

106. Note, State Regulation of Unprotected Union Activity: Bypassing the "Arguably Subject" Test with NLRB Advisory Opinions, 70 Yale L.J. 441, 449 (1960).
107. Id. at 450.
109. Cox, supra note 6, at 1363.
110. See Note, 70 Yale L.J., supra note 106.
112. Id.
such laws upon management or labor will upset the national balance is small enough to permit their operation unless interference with a specific federal right can be affirmatively demonstrated. It is only where the state law or rule of decision is based upon an accommodation of the special interests of employers, unions, employees, or the public in employee self-organization, collective bargaining, or labor disputes that the likelihood that its application to persons under NLRB jurisdiction will upset the balance struck by Congress is so great as to require exclusion of state law unless Congress has provided otherwise.\textsuperscript{113}

While admitting the risk is "not insubstantial"\textsuperscript{114} that a wrong decision by the state courts could result in the denial of a right which the NLRB and the federal courts would have recognized, Professor Cox counters that the cost to an employer of denying him access to any forum whatsoever "seems an extraordinarily heavy price to pay"\textsuperscript{115} in order to prevent states from intruding onto a federally protected area.

This approach of not preempting state laws of general application has gained acceptance from at least two members of the Supreme Court,\textsuperscript{116} and has provided the basis for the Illinois Supreme Court's refusal to find that its jurisdiction over union trespass was preempted.\textsuperscript{117}

The starting point for evaluation of this proposal must be Garmon itself, where Justice Frankfurter explicitly rejected this distinction:

Nor has it mattered whether the States have acted through laws of broad general application rather than laws specifically directed towards the governance of industrial relations. Regardless of the mode adopted, to allow the States to control conduct which is the subject of national regulation would create potential frustration of national purposes.\textsuperscript{118}

\begin{enumerate}
\item \textsuperscript{113} Cox, supra note 6, at 1355-56.
\item \textsuperscript{114} Id. at 1361-62.
\item \textsuperscript{115} Id. at 1362.
\item \textsuperscript{117} See May Dep't Stores v. Teamsters Local 743, 64 Ill. 2d 153, 355 N.E.2d 7 (1976).
\item \textsuperscript{118} See also Amalgamated Ass'n of St., Elec. Ry. & Motor Coach Employees v. Lockridge, 403 U.S. 274 (1971), where the Court held: "It is the conduct being regulated, not the formal description of governing legal standards, that is the proper focus of concern. Indeed, the notion that a relevant distinction exists . . . between particularized and generalized labor law was explicitly rejected in Garmon itself." Id. at 292.
\end{enumerate}
The proposed formula would "avoid the regulatory gaps and the drastic impairment of state powers which would result if all state law of general application were foreclosed whenever it impinged on labor-management relations." One must question, however, what price should be paid to avoid these gaps in regulation. State laws of general application may not have been formulated with any intent of disturbing the "delicate balance" of conflicting interests that Congress has empowered the NLRB to maintain. Nevertheless, the application of these "neutral" laws will have the same effect on a labor dispute as will the states' labor laws. There is no difference in effect between a state law which regulates a union's right to picket on an employer's property (preempted under the Cox formula) and a general state tort law against trespass which is applied to union activity upon an employer's property (not preempted under the Cox formula). The effect of allowing states to apply their general tort laws could result in state regulation of activity that is federally protected. One must then wonder whether it is alarmist to predict that states will issue injunctions against protected activity in the name of state trespass law.

THE CONTEXTS OF UNION TRESPASS

The problem of state encroachment onto federally protected or regulated activity is great; the problem of an employer left without a remedy is equally great. Yet a solution is possible which can not only reconcile these competing interests, but can also be practical enough to guide the courts in its application without requiring a case-by-case approach.

This problem of a no-law area exists solely in those situations where the employer is confronted with trespass activity by a union not representing his employees. In these situations the

119. Meltzer, supra note 43, at 47.
120. NLRB v. Truck Drivers Local 449, 353 U.S. 87, 96 (1957).
121. The problem of a no-law area does not exist in situations involving primary strikes, for "[w]hen the basic dispute is between a union and an employer, any hiatus that might exist in the jurisdictional balance that has been struck can be filled by resort to economic power." Local 100, United Ass'n of Journeymen v. Borden, 373 U.S. 690, 700 (1963) (Douglas, J. dissenting). In addition, if the primary strike is for an objective prescribed by the Act, the employer may bring a suit for damages under § 301 of the LMRA, 29 U.S.C. § 185 (1970). Since a hiatus of legal remedies was envisioned by Congress, and the employer is free to retaliate with economic force, state courts are preempted of all jurisdiction to enjoin peaceful primary strikes. Lodge 76, Int'l Ass'n of Machinists v. Wisconsin Employment Relations Comm'n, 427 U.S. 132 (1976).
employer is unable to retaliate with economic force, and the problem of a hiatus of legal remedies supposedly manifests itself. However, where the trespass occurs as part of an "arguably prohibited" activity, the employer is able to petition directly to the NLRB for a determination of the propriety of the union's conduct. In so doing, he is able to take himself out of this judicially created no-man's land and thus eliminate any need for the states to retain jurisdiction over the dispute.

Trespass, it must be noted, should not be viewed as a monolithic activity. There are a variety of purposes for which a nonrecognized union might engage in trespassory activity: to put pressure on an employer doing business with a company with which the union is in dispute; to gain recognition from a recalcitrant employer; or to distribute literature and solicit employees to join a union. When the union's conduct is regulated by the National Labor Relations Act, the essential principles of preemption would be violated if state laws—even those of general application—were applied to this conduct.

Trespass as part of a secondary boycott

Where the union's trespassory conduct may arguably constitute a secondary boycott, the application of section 8(b)(4) of the NLRA is appropriate. A state may not enjoin activity which has

122. A nonrecognized union is one which has not been recognized by the employer as the collective bargaining agent of his employees.
125. See, e.g., May Dep't Stores Co. v. Teamsters Local 743, 64 Ill. 2d 153, 355 N.E.2d 7 (1976).
126. Section 8(b), 29 U.S.C. § 158(b) (1970), provides, in pertinent part:
   (b) It shall be an unfair labor practice for a labor organization or its agents-
       (4)(i) to engage in, or to induce or encourage any individual employed by any person engaged in commerce or in an industry affecting commerce to engage in, a strike or a refusal in the course of his employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services; or (ii) to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce, where in either case an object thereof is—

   (B) forcing or requiring any person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person, or forcing or
been made an unfair labor practice under the federal statute; requiring any other employer to recognize or bargain with a labor organization as the representative of his employees unless such labor organization has been certified as the representative of such employees under the provisions of section 159 of this title [section 9]: Provided, That nothing contained in this clause (B) shall be construed to make unlawful, where not otherwise unlawful, any primary strike or primary picketing;

... Provided further, That ... nothing contained in [this] paragraph shall be construed to prohibit publicity, other than picketing, for the purpose of truthfully advising the public, including consumers and members of a labor organization, that a product or products are produced by an employer with whom the labor organization has a primary dispute and are distributed by another employer, as long as such publicity does not have an effect of inducing any individual employed by any person other than the primary employer in the course of his employment to refuse to pick up, deliver, or transport any goods, or not to perform any services, at the establishment of the employer engaged in such distribution ...

129. Section 10 (l), 29 U.S.C. § 160(l) (1970), provides, in pertinent part: Whenever it is charged that any person has engaged in an unfair labor practice within the meaning of paragraph (4)(A), (B), or (C) [of § 8(b); or § 8(e) or § 8(b)(7)] the preliminary investigation of such charge shall be made forthwith and given priority over all other cases except cases of like character in the office where it is filed or to which it is referred. [Emphasis added].
130. 29 U.S.C. § 187(b) (1970), provides, in pertinent part: "Whoever shall be injured in his business or property by reason of [sic] any violation of section 8(b)(4) may sue therefor in any district court of the United States . . . or in any other court having jurisdiction of the parties, and shall recover the damages by him sustained and the cost of the suit."
strike, was, in fact, a secondary boycott, then the regulation of this conduct was within the primary jurisdiction of the NLRB. Jurisdiction lies exclusively in the Board, for, as the Supreme Court has determined, a "[c]onflict in technique can be as fully disruptive to the system Congress erected as a conflict in overt policy."\textsuperscript{32}

In situations where the union trespass occurs as part of an alleged unfair labor practice, the employer may petition directly to the National Labor Relations Board to halt such activity.\textsuperscript{133} The preemption of state trespass laws will not result in any hiatus of remedies, as the Board, not the state courts, has jurisdiction over conduct involving violations of the National Labor Relations Act. Thus, the New York Court of Appeals' ruling in \textit{Bush} that it had jurisdiction over union trespass in the instance of an arguable secondary boycott was irrational and unnecessary, particularly where the employer had the right and the opportunity to petition the Board to restrain the union's conduct.

\textit{Trespass and Recognitional Picketing}

Union trespass may also occur when the union engages in picketing on the employer's property, either in an attempt to induce employees to join the union or for the purpose of obtaining recognition from the employer as the bargaining representative of his employees. The 1959 amendments to the NLRA placed great restrictions\textsuperscript{134} on this once "time honored trade union organizing..."
Union Trespass—Preemption

practice."\textsuperscript{135} Where the employer has not lawfully recognized another union, and where there has not been a valid election for representation within the preceding twelve months, a union, without filing for an election, may picket for recognition for a reasonable time (not to exceed thirty days).\textsuperscript{138} After this period of time such activity is considered violative of the Act. When a union engages in picketing for recognition, state courts clearly have "no jurisdiction to issue an injunction or adjudicate [the] controversy, which [lies] within the exclusive jurisdiction of the NLRB."\textsuperscript{137}

In these situations, as in trespass cases arguably involving a secondary boycott, the no-man's land really does not exist and the state courts thus have no justification for retaining jurisdiction. If the employer feels victimized by the union's picketing for recognition on his property, he may charge the union with an unfair labor practice, resulting in an expedited proceeding on the issue.\textsuperscript{136}

Confronting this situation, the California Supreme Court in \textit{Sears, Roebuck & Co. v. San Diego County District Council of Carpenters}\textsuperscript{139} was correct in refusing to enjoin as trespass arguably protected union conduct which also arguably consisted of recognitional picketing. Any legal hiatus which might exist by the preemption of state trespass law would have existed thirty days at most.\textsuperscript{140} The danger of allowing state courts to retain jurisdiction and thus possibly enjoin protected activity is so great that, in any situation arguably involving recognitional picketing, state trespass law should be preempted. The employer is always free

\footnotesize{136. See note 134 supra. In addition, the Act specifically provides that union activity aimed at recognition which takes the form of publicity picketing shall not be proscribed.}
\footnotesize{137. Local 438, Constr. & Gen. Laborers' Union v. Curry, 371 U.S. 542, 546-47 (1963).}
\footnotesize{138. See note 129 supra.}
\footnotesize{139. 17 Cal. 3d 893, 553 P.2d 603, 132 Cal. Rptr. 443 (1976), cert. granted, 97 S. Ct. 1172 (1977).}
\footnotesize{140. See id. at 905, 553 P.2d at 613, 132 Cal. Rptr. at 453.}
to file with the Board, which retains exclusive jurisdiction over the dispute, if he wishes to halt the union activities.

_Trespass by union organizers: The true no-man’s land_

Where the union trespass occurs as part of an activity arguably prohibited by the NLRA, such as secondary boycotts or recognitional picketing, the problem of a hiatus of legal remedies is nonexistent. Only when union organizers enter company property without an NLRB determination that they are entitled to do so is the employer left without a remedy. The activity is protected by section 7 only if it can be shown that the organizers had no other sufficient access to the employees.¹⁴¹ On the other hand, union trespass alone is not an unfair labor practice, and thus does not fit under the “arguably prohibited” aspect of _Garmon_.

The employer may have a qualified right to refuse union organizers entry onto his property, but he is left in a no-law area where there is no forum available to enforce this right.¹⁴² He is unable to appeal to the NLRB as there has been no violation of federal law and, as the conduct is arguably protected by federal law, state law is preempted. It is in this situation that the employer truly finds himself in a no-man’s land, forced to resort to self-help to remove the trespassers from his land and thereby subject himself to charges of violating the NLRA.¹⁴³ Allowing state laws of general application to apply to this situation does not seem to be the answer, for to do so would emasculate the _Garmon_ rule altogether.¹⁴⁴ As the goal of preemption is to keep labor disputes out of the hands of state authorities and within the exclusive jurisdiction of the NLRB, one solution may be to amend the National Labor Relations Act making it an unfair labor practice for a union organizer to trespass onto company property when other reasonable means of communication are available.¹⁴⁵

This alternative, however, is not very promising when one considers that the NLRA has been amended only twice in its forty-two years of existence. It thus appears to be “unrealistic to

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¹⁴¹. _See_ notes 85-92 _supra_ and accompanying text.
¹⁴². _See_ notes 93-96 _supra_ and accompanying text.
¹⁴³. A refusal to allow union organizers onto company property when the organizers do not have sufficient access to otherwise make contact with the employer’s workers is an unfair labor practice in violation of section 8(a)(1), 29 U.S.C. § 158(a)(1) (1970).
¹⁴⁴. _See_ notes 119-120 _supra_ and accompanying text.
look to Congress for particular changes in this branch of labor law.\textsuperscript{146}

**BALANCING THE INTERESTS—A PRACTICAL SOLUTION**

Present case law makes it an unfair labor practice for an employer to prevent union organizers from entering onto his property when the union has insufficient access to the employees. If the union does have sufficient access, as determined by the Board, union organizers may lawfully be excluded from the employer's property. The real problem arises when union organizers come onto property where the employer believes they have no right to enter. An analysis of the values to be protected in this situation may clarify the problem and aid in formulating a feasible solution. A summary of the various interests involved follows:

The employer has an interest in maintaining the sanctity of his property rights, and in having a forum to adjudicate these rights when he feels a union has unlawfully entered onto his property.

The employees have an interest in being contacted by union organizers and in fully exercising their rights to organize as guaranteed by section 7. A failure of contact by union organizers may impair the employees' abilities to make a "free and unrestrained choice"\textsuperscript{147} as contemplated by the Act.

The union has an interest in seeing that its organizational campaign is not unjustly stifled by a state court injunction. The notoriety of the labor injunction and its use against union activity is well-documented.\textsuperscript{148} The union also has an interest in having its organizers solicit employees without risking state prosecutions for criminal trespass.\textsuperscript{149}

The federal government has an interest in seeing that congressional purpose is fulfilled. To accomplish this, it is necessary to implement a uniform national labor policy, with the NLRB having exclusive jurisdiction over labor disputes and the states not regulating disputes intended to be covered by the Act.

Balancing these interests, the most equitable solution would be achieved by the promulgation of a rule by the NLRB\textsuperscript{150}

\textsuperscript{146} Cox, *supra* note 6, at 1377.
\textsuperscript{149} Gold, Union Organizational Rights and the Concept of "Quasi-Public" Property, 49 Minn. L. Rev. 505, 513 (1965). See also Broomfield, *supra* note 14, at 577.
\textsuperscript{150} For one example of the many situations where the Board has acted pursuant to
whereby union organizers would be allowed onto the nonworking areas of company property, during nonworking hours, for a period fixed by the Board (one month, for example). At the end of this period, a presumption should arise that the union has had sufficient access to enable the employees to fully exercise their section 7 rights. If the organizers remain on the company property after this specified period, or if the organizers come onto working

151. In Agricultural Labor Relations Bd. v. Superior Court, 16 Cal. 3d 392, 546 P.2d 637, 128 Cal. Rptr. 183 (1976), the California Supreme Court upheld the constitutionality of the Agricultural Labor Relations Act (ALRA) (Cal. Lab. Code §§ 1140-1146 (West 1975)). Dealing with farmworkers who are not covered by the NLRA, the California Labor Relations Board, pursuant to its rulemaking power, granted to farm labor organizers a qualified right of access to the grower’s property. Cal. Admin. Code, tit. 8, pt. II, ch. 9, §§ 20900-20901 (1975). The relevant parts of this regulation are as follows:

5. Accordingly, the Board will consider the rights of employees under Labor Code Sec. 1152 to include the right of access by union organizers to the premises of an agricultural employer for the purpose of organizing, subject to the following limitations:
   a. Organizers may enter the property of an employer for a total period of 60 minutes before the start of work and 60 minutes after the completion of work to meet and talk with employees in areas in which employees congregate before and after working.
   b. In addition, organizers may enter the employer’s property for a total period of one hour during the working day for the purpose of meeting and talking with employees during their lunch period, at such location or locations as the employees eat their lunch. If there is an established lunch break, the one-hour period shall include such lunch break. If there is no established lunch break, the one-hour period may be at any time during the working day.
   c. Access shall be limited to two organizers for each work crew on the property, provided that if there are more than 30 workers in a crew, there may be one additional organizer for every 15 additional workers.
   d. Upon request, organizers shall identify themselves by name and labor organization to the employer or his agent. Organizers shall also wear a badge or other designation of affiliation.
   e. The right of access shall not include conduct disruptive of the employer’s property or agricultural operations, including injury to crops or machinery. Speech by itself shall not be considered disruptive conduct. Disruptive conduct by particular organizers shall not be grounds for expelling organizers not engaged in such conduct, nor for preventing future access.
   f. Pending further regulation by the [Agricultural Labor Relations] Board, this regulation shall not apply after the results of an election held pursuant to this act have been certified.

Acting pursuant to its rulemaking power, the NLRB can grant to union organizers subject to the Act similar qualified rights of access.

152. See, e.g., Republic Aviation Corp. v. NLRB, 324 U.S. 793 (1945). For a discussion of the use of presumptions in cases involving the right of access, see C. Morris, The Developing Labor Law 82-86 (1971). For a collection of cases where the Board and the courts have applied these presumptions to cases involving union access, see Gould, The Question of Union Activity on Company Property, 18 Vand. L. Rev. 73, 75-76 (1964).
areas during working time, the Board will be empowered to charge the union with an unfair labor practice. Section 8(b)(1)(A) of the Act may be read to make it an unfair labor practice for union organizers to come onto company property when the union has sufficient access to reach the employees in another manner. An expedited proceeding would be made available whereby an employer charging the union organizers with this unfair labor practice would be able to petition the Board and obtain a temporary restraining order to keep the organizers off his property until the NLRB could hold a hearing on the issue.

In the typical situation, a union organizer will come onto an employer's property to solicit and distribute literature, be asked to leave, and refuse. The employer may then file a notice with the NLRB stating that a union organizer has entered onto his

153. Section 8(b), 29 U.S.C. § 158(b) (1970) provides in pertinent part: "It shall be an unfair labor practice for a labor organization or its agents—(1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in [section 7]." While it may be novel to have the Board interpret this provision to include trespass by union organizers who already have sufficient access, it is not unprecedented. In 1957 the NLRB interpreted § 8(b)(1)(A) to include union recognitional picketing as an unfair labor practice. Curtis Bros., Inc., 41 L.R.R.M. 1025 (1957). In that case it was noted that "[t]he words 'restrain and coerce' appear in both 8(a)(1) and 8(b)(1)(A). As Senator Taft stated, the Board has interpreted 8(a)(1) for years and 'all that is attempted is to apply the same provisions with exact equality to labor unions.' " Id. at 1034 (Jenkins, member, concurring) (footnote omitted). This expansive reading of § 8(b)(1)(A) was reversed by the Supreme Court in NLRB v. Drivers Local 689, 362 U.S. 274 (1960). That decision, however, does not militate against the proposal of an expansive reading of § 8(b)(1)(A) in the context of union organizer's trespassory activity for two reasons: (1) The Supreme Court's decision in Drivers Local 689 was based upon the fact that the Board's expansive reading of § 8(b)(1)(A) constituted a restriction upon the union's right to strike, specifically protected by § 13 of the Act, 29 U.S.C. § 163 (1970). See NLRB v. Drivers Local 689, 362 U.S. 274, 282 (1960). Expanding § 8(b)(1)(A) in this situation would not limit the union's right to strike, nor would it limit any other rights guaranteed by the Act. (2) By the time the Supreme Court had decided Drivers Local 689, the 1959 Amendments to the NLRA had already been passed, thus resolving the problem of a no-law area by extensively regulating recognitional picketing. The dilemma caused by union trespass on company property shows no sign of being resolved, and it is the Board's duty to reconcile the conflict between property and organizational rights. An expanded reading of § 8(b)(1)(A) in this context would merely be an instance of rulemaking power by the Board acting as an expert agency charged with administering the Act.

154. See note 129 supra.

155. Section 10(j), 29 U.S.C. § 160(j) (1970) provides, in pertinent part: The Board shall have power, upon issuance of a complaint . . . charging that any person has engaged in or is engaging in an unfair labor practice, to petition any United States district court, within any district wherein the unfair labor practice in question is alleged to have occurred or wherein such person resides or transacts business, for appropriate temporary relief or restraining order.

156. See, e.g., May Dep't Stores Co. v. Teamsters Local 743, 64 III. 2d 153, 355 N.E.2d 7 (1976).
property without permission. Pursuant to the proposed rule, the
organizer will be allowed to solicit in nonworking areas during
nonworking hours for the specified period. If after that period the
organizer remains on company property, or, if the organizer solic-
tsits in working areas, the employer may charge the union with the
expanded section 8(b)(1)(A) unfair labor practice, and obtain a
Board order restraining such activity. A hearing will then follow
to determine whether the union does, in fact, have sufficient ac-
cess to the employees.

The effect of this proposal will be to preempt all state jurisdic-
tion over union trespass. It is the Board's exclusive duty to
balance the conflict between property and organizational
rights. This rule, allowing union organizers onto company prop-
erty for a specified period, should be a helpful tool for achieving
such a balance. Furthermore, the rule would take the employer
out of the no-man's land that was thought to justify state intru-
sion into an area of federal regulation. The proposal thus accom-
modates both sides of the labor-management dispute while pre-
serving the basic tenets of Garmon. It should bring about greater
stability in the field of labor relations while, at the same time,
-preserving the delicate balance of property and organizational
rights that stands as the foundation of governmental labor policy.

CONCLUSION.

The federal goal of uniformity in labor relations has been
placed in jeopardy recently by the conflict among the states re-
specting their right to adjudicate cases of union trespass. This
conflict has resulted in a hiatus of legal remedies for the aggrieved
employer who finds himself in a "no-man's land" where neither
the state courts nor the National Labor Relations Board has juris-
diction to determine the propriety of the union's activity.

A nonrecognized union may engage in trespass for a variety
of purposes: It may picket to exert pressure on a neutral second-
ary employer; it may picket to obtain recognition; or it may solicit
employees on company property as part of an organizational cam-
paign. When union trespass is "arguably prohibited" by the
NLRA, the employer may petition directly to the National Labor
Relations Board for relief, thus taking himself out of the judicial
"no-man's land." The necessity of state jurisdiction manifests
itself only when union trespass occurs during an organizational

Union Trespass—Preemption
campaign. The solution to the employer's dilemma caused by federal labor law preemption of state trespass law can thus be resolved by initially focusing on the nature of the trespass. Congress has provided in the National Labor Relations Act that the NLRB have exclusive jurisdiction over activities covered by the Act. Picketing for recognition and picketing to exert pressure on a secondary employer are activities carefully regulated by the Act. As primary jurisdiction has been vested in the Board, the problem of a hiatus of legal remedies does not exist in these situations. If the employer files a complaint with respect to the union's picketing, the Board will conduct an expedited proceeding to determine the propriety of the conduct. State jurisdiction over union trespass in these situations should be preempted.

With respect to trespass during a union's organizational campaign—where the true "no-man's" land exists—this comment suggests that proper exercise of the Board's rulemaking power can provide for a qualified right of access for union organizers and, at the same time, preserve the employer's right of control over his property. Reciprocal unfair labor practice charges against the employer and the union can be used to enforce this qualified right of access and to guard against abuse of this privilege. This proposal will solve the problem of denying an employer a forum to adjudicate his rights, while furthering the goal of national uniformity in labor relations by preempting all state jurisdiction in cases involving union trespass.

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