RECENT CASES

ADMINISTRATIVE LAW—Notice Requirement of Administrative Procedure Act Section 4 Applies to Antidumping Proceedings

After an investigation conducted pursuant to the Antidumping Act of 1921,[1] the Acting Secretary of the Treasury determined that hardboard from Sweden had been imported into the United States and sold at less than its fair market value and that the other statutory preconditions [2] to a finding of dumping had been satisfied. During the investigation which led to this finding, Treasury Department officials had received analytical data from Swedish hardboard suppliers and similar information from the domestic industry; the Department had also consulted with the Swedish Embassy as well as with plaintiff and other importers. However, no notice of the investigation was published in the *Federal Register* prior to the announcement of the finding of dumping, nor did that announcement state that the giving of notice would have been impractical, unnecessary, or contrary to the public interest.[3] Plaintiff importer, against whom a special dumping duty had been levied,[4] contended that inasmuch as the finding of dumping was rulemaking within the purview of the Administrative Procedure Act,[5] the investigation should have been conducted in accordance with the procedures there specified, and that failure to observe the APA's requirement of public notice invalidated the Treasury Department's finding. The Customs Court, reversing the trial court's determination that the APA was not applicable to dumping proceedings, held, first, that the Treasury Department is an agency when conducting dumping proceedings and subject to the APA; second, that a finding of dumping is rulemaking which demands prior public notice; and third, that nonpublication of notice vitiated the finding. *Elof Hansson, Inc. v. United States,* 178 F. Supp. 922 (C.C.P.A. 1959).

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1 Antidumping Act, 1921, ch. 14, § 201, 42 Stat. 11 (now Act of Sept. 1, 1954, 68 Stat. 1138, as amended, 19 U.S.C. § 160 (1958)). The pertinent sections of the statute were amended in 1954 after the instant case arose but before decision.

2 "Dumping" refers to the determination that a domestic industry is being or is likely to be injured by reason of the importation of goods which have been or are being sold at less than their fair value. See Antidumping Act, 1921, § 201 (a), 42 Stat. 11, as amended, 19 U.S.C. § 160 (a) (1958).

3 Administrative Procedure Act § 4(a), 60 Stat. 239 (1946), 5 U.S.C. § 1003(a) (1958): "General notice of proposed rule making shall be published in the Federal Register (unless all persons subject thereto are named and either personally served or otherwise have actual notice thereof in accordance with law). . . . Except where notice or hearing is required by statute, this subsection shall not apply . . . in any situation in which the agency for good cause finds . . . that notice and public procedure thereon are inpracticable, unnecessary, or contrary to the public interest."

4 Pursuant to Antidumping Act, 1921, ch. 14, § 202, 42 Stat. 11.

5 Administrative Procedure Act §§ 1-11, 60 Stat. 237 (1946), as amended, 5 U.S.C. §§ 1001-11 (1958), 50 U.S.C. App. § 1900 (1958), 5 U.S.C. § 1105 (Supp. 1959).

Under the APA, agencies proposing to conduct rulemaking proceedings are required to give public notice,[6] and section 4(b) provides that the agency "shall afford interested persons an opportunity to participate in the rule making. . . ." The purpose of this section is to enable those who must live with the proposed rule to present data and opinion as to its content [7]—the result being, hopefully, a rule grounded in the best informed judgment available. Cabinet officers acting pursuant to congressional directives have been held to be performing in an administrative capacity,[8] and compliance with the procedural safeguards, including notice, embodied in the authorizing statutes has been held prerequisite to valid action by such officers.[9] The only provision as to notice contained in the authorizing statute involved in the instant case is that after investigation the Secretary "shall make such finding public to the extent he deems necessary. . . ." [10] Prior to the APA, it had been held that one who had participated in hearings upon a proposed rule could not later invoke a lack of required public notice to invalidate that rule.[11] But under the APA—at least where criminal sanctions are involved—absence of published notice of rulemaking proceedings or of the resulting rule may mean invalidation even when the objecting party has had actual notice of the proposed rulemaking.[12]

[6] Administrative Procedure Act § 4(a), 60 Stat. 239 (1946), 5 U.S.C. § 1003(a) (1958). See note 3 *supra*.

[7] See ATTORNEY GENERAL'S MANUAL ON THE ADMINISTRATIVE PROCEDURE ACT 26 (1947).

[8] Currin v. Wallace, 306 U.S. 1, 18 (1939) (secretary of agriculture); United States v. Grimaud, 220 U.S. 506, 521 (1911) (secretary of agriculture); Oceanic Steam Nav. Co. v. Stranahan, 214 U.S. 320, 335 (1909) (secretary of commerce); Union Bridge Co. v. United States, 204 U.S. 364 (1907) (secretary of war); Buttfield v. Stranahan, 192 U.S. 470 (1904) (secretary of the treasury). These cases dealt with the power of Congress to delegate authority to these officers.

[9] United States v. Rock Royal Co-op., Inc., 307 U.S. 533, 576 (1939); Union Bridge Co. v. United States, *supra* note 8; *cf.* Hotch v. United States, 212 F.2d 280, 283-84 (9th Cir. 1954). For purposes similar to those of the Antidumping Act, Congress has delegated to the President power to regulate tariffs. See J. W. Hampton, Jr. & Co. v. United States, 276 U.S. 394 (1928). Here again the validity of the regulations promulgated under the delegated power has been measured in terms of compliance with the authorizing legislation. See Star-Kist Foods, Inc. v. United States, 275 F.2d 472, 481-82 (C.C.P.A. 1959); William A. Foster & Co. v. United States, 20 C.C.P.A. (Customs) 15, 22 (1932) ("when he acts, he must act within the limits defined by the law"). See also Carl Zeiss, Inc. v. United States, 23 C.C.P.A. (Customs) 7, 76 F.2d 412 (1935).

[10] Antidumping Act, 1921, ch. 14, § 201(a), 42 Stat. 11.

[11] Quaker Oats Co. v. Federal Sec. Adm'r, 129 F.2d 76 (7th Cir.), *rev'd on other grounds*, 318 U.S. 218 (1942). And under the Administrative Procedure Act, it has been said that "wherever it appears that the absence of notice has resulted in prejudice to a complaining party the action of the administrative agency will be set aside. . . . But no prejudice is shown where . . . the party complaining had actual notice of and participated in the administrative proceedings and he will not be heard to complain of the failure to give formal notice." Florida Citrus Comm'n v. United States, 144 F. Supp. 517, 521 (N.D. Fla. 1956), *aff'd per curiam*, 352 U.S. 1021 (1957).

[12] Hotch v. United States, 212 F.2d 280 (9th Cir. 1954); *cf.* Pinkett v. United States, 105 F. Supp. 67, 70 (D. Md. 1952), where parties who were not served with formal notice but who nevertheless had attended an ICC hearing on the issuance of a certificate of public convenience and necessity successfully enjoined the issuance of the certificate on the grounds that "parties that might be affected by the issuance of the proposed certificate had no notice of the application." Compare United States v. Morton Salt Co., 338 U.S. 632 (1950); Owensboro On The Air, Inc. v. United States, 262 F.2d 702, 708-09 (D.C. Cir. 1958), *cert. denied*, 360 U.S. 911 (1959) (sufficiency of published notice).

Having concluded that the Secretary of the Treasury had acted in an administrative capacity and that his finding of dumping—with its consequent tariff increase—was rulemaking,[13] the court in the instant case reasoned that lack of notice required reversal because "all members of the general public who have imported or may import hardboard from Sweden or are or may be domestic manufacturers thereof" [14] were affected by the rule. Despite representation of these groups in the Treasury's investigation, the court felt that the interests of those who might have wished to present their views but were unable to do so because of non-notification of the proceedings were significant enough to require reversal. But the question which the court failed to meet directly—a question emphasized by section 10(e) of the APA calling for due regard to the rule of prejudicial error [15]—was whether *this* plaintiff should be able to invalidate the rule after its promulgation even though he had been consulted and been allowed to submit correspondence and documents during the investigation? [16] Or, more generically, did or could the party appealing the irregularity have raised his objection in time for cure during the rulemaking proceedings?

In *United States v. L. A. Tucker Truck Lines, Inc.*,[17] the Supreme Court considered whether the defective appointment of an agency examiner was sufficient cause to invalidate an order issued upon his recommendation. Objection to the irregularity of the examiner's appointment was not raised until the proceedings had reached the district court upon a petition to set aside the order. Noting that if the agency had overruled an objection to the examiner's competency made during the hearing the order would have been invalid, the Court held that, since the objection was not raised until appeal, the defect was "not one which deprives the Commission of power or jurisdiction, so that even in the absence of timely objection its order should be set aside as a nullity." [18]

The opinion in the instant case fails not only to allude to timeliness of objection but also to mention, even in passing, when objection was first

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[13] Both conclusions implement the apparent purpose of the APA. See H.R. REP. No. 1980, 79th Cong., 2d Sess. 17 (1946): "In the 'rule making' (that is, 'legislative') function it provides that with certain exceptions agencies must publish notice and at least permit interested parties to submit their views in writing for agency consideration before the issuance of general regulations (sec. 4)"; Schwartz, *The Administrative Procedure Act in Operation*, 20 N.Y.U.L. REV. 1173, 1174 (1954): "It appears clearly to have been the intent of the draftsmen of the APA to have that statute apply uniformly, insofar as it was possible, to the entire administrative process." See also ATTORNEY GENERAL'S MANUAL ON THE ADMINISTRATIVE PROCEDURE ACT 26 (1947).

[14] Instant case at 930.

[15] The court reasoned that § 10(e) was not meant to abrogate the express requirement of notice of § 4. As far as questions of notice are concerned, however, this interpretation seems to give no effect whatsoever to the provisions of § 10(e). *But see* United States *ex rel.* Lindenau v. Watkins, 73 F. Supp. 216 (S.D.N.Y.), *rev'd on other grounds sub nom.* United States *ex rel.* Paetau v. Watkins, 164 F.2d 457 (2d Cir. 1947). The vulnerability of the court's easy dismissal of § 10(e) increases in the context of the issue of seasonable objection. See notes 17-23 *infra* and accompanying text.

[16] See instant case at 924.

[17] 344 U.S. 33 (1952).

[18] *Id.* at 38.

made. If the importer had objected during the Treasury's investigation, reversal would be in order as the best way to insure that the objecting party receives whatever representative assistance might be gained from those not notified, and would also serve to deter an agency's deliberate flaunt or mistaken avoidance of APA safeguards.[19] However, if the importer failed to object to the irregularity at the agency level, *Tucker Truck* calls for a denial of relief upon appeal.[20] The importer received actual notice of and did in fact participate in the investigation. The court assumed that his interests were not prejudiced by the failure to publish notice.[21] If there were an unrepresented interest whose data and views might have strengthened the importer's case, it is likely that he would have been aware of this and would have demanded that notice be given. But in any event the court's concern for vaguely defined, unrepresented interests is premature, for the policy of APA section 4 would not permit application of the rule to one who was unable to present his views because of a lack of published notice.[22] By focusing upon these hypothetical interests and ordering reversal to afford them unnecessary protection, the court enabled what might have been mere dilatory tactics of the importer to upset rulemaking proceedings which had evidently been fair to him. The decision is in accord with *Tucker Truck* only if the importer had in fact seasonably objected during the agency proceedings, for as the Court said in that case: "Simple fairness to those who are engaged in the tasks of administration, and to litigants, requires as a general rule that courts should not topple over administrative decisions unless the administrative body not only has erred but has erred against objection made at the time appropriate under its practice." [23]

EMINENT DOMAIN—Compensation for Impairment of Access in Conversion of Highways to Limited Access

Defendants owned a motel, abutting a state highway and consisting of three duplex units and the owners' residence. The state highway commission, intending to convert the highway to a limited-access facility, condemned part of defendants' land, including the residence and one of the duplex units. The state's plans contemplated the construction of a frontage road that would give defendants access to the new highway at points 170 feet west and approximately one mile east of their remaining property. The trial court assessed an award which included severance damages to the remain-

[19] See Note, 6 Stan. L. Rev. 693, 700-07 (1954).

[20] See Adams v. Witmer, 271 F.2d 29 (9th Cir. 1958); Elbow Lake Co-op. Grain Co. v. Commodity Credit Corp., 144 F. Supp. 54 (D. Minn. 1956), *aff'd*, 251 F.2d 633 (8th Cir. 1958); Monumental Motor Tours, Inc. v. United States, 110 F. Supp. 929 (D. Md. 1953); *cf.* Federal Power Comm'n v. Colorado Interstate Gas Co., 348 U.S. 492 (1955).

[21] Instant case at 930.

[22] Hotch v. United States, 212 F.2d 280 (9th Cir. 1954).

[23] 344 U.S. at 37.

ing land based wholly on evidence of defendants' impaired access. The Supreme Court of Arizona affirmed, holding that access to the highway by an abutting property owner is an easement, that such a property right differs in kind from that of the general public, and that its substantial impairment is an exercise of eminent domain for which compensation must be paid. Frontage roads and alternate means of ingress and egress may be considered in mitigation of damages but do not relieve the state of its obligation to compensate for the impairment of access. *State ex rel. Morrisson v. Thelberg,* 87 Ariz. 318, 350 P.2d 988 (1960).

In an analogous factual situation, defendants were the owner and corporate lessee of property abutting a state highway. The lessee constructed and operated a gas station which was connected to the highway by driveways. The state highway commission, pursuant to a plan to convert the highway to a limited-access freeway, condemned a strip of land which included the driveways for use as a frontage or access road running parallel to the new highway. The trial court had awarded damages to both the lessor and the lessee based in part upon the diversion of traffic away from the premises, and the highway commission admitted on appeal that, because the nearest access to the new highway would be more than one mile away, defendant corporation's business would be virtually eliminated. The Supreme Court of Arkansas modified the judgment and reduced the award to cover only the value of the land actually taken, holding that as long as alternate access is available, there is no damage to the property right of ingress and egress, and that since there is no property right in the traffic in front of one's premises, damage resulting from the diversion of such traffic—a valid exercise of the state's police power—is noncompensable.[1] *State Highway Comm'n v. Bingham,* 333 S.W.2d 728 (Ark. 1960).

These cases reflect the two lines of reasoning available to courts in treating the question of compensation for impairment of access when an existing highway is changed to a limited-access freeway. It has been held in somewhat similar cases that the rerouting of traffic in the interest of public safety is a valid exercise of the police power of the state and that, therefore, compensation need not be paid for "mere circuity of travel" or "diversion of traffic" resulting from that power's exercise.[2] But where

1 A possible factual distinction between the two cases arises in that the motel owner lost 50% of his physical improvements while the gas station owners retained theirs substantially intact. The Arizona court emphasized that the highest and best use of the motel land was reduced to low class residential. But the factual distinction is one without legal significance: all eminent domain valuations are based on present or highest and best use and, when the gas station's business was virtually eliminated, that property's highest and best use was also reduced.

2 *Circuity of travel*: Warren v. State Highway Comm'n, 250 Iowa 473, 93 N.W.2d 60 (1958) (highway closing); State Highway Comm'n v. Smith, 248 Iowa 869, 82 N.W.2d 755 (1957) (no left turn); Jones Beach Blvd. Estate v. Moses, 268 N.Y. 362, 197 N.E. 313 (1935) (prohibition of left turn required five-mile circuitous route); Lindley v. Turnpike Authority, 262 P.2d 159 (Okla. 1953) (highway closing). *Diversion of traffic*: Department of Pub. Works v. Ayon, 352 P.2d 519 (Cal. 1960)

a highway is converted to limited access, the weight of authority holds that an abutting owner's right of direct ingress and egress is an easement and, as such, is compensable when taken or substantially impaired through that conversion.[3] Implementing this second theory are the doctrines that in all cases of partial taking, a state must compensate not only for the land actually taken but also for severance damages to the land remaining in the owner's possession,[4] and that severance damages are to be assessed in terms of before-and-after market value.[5]

(median strip); People v. Sayig, 101 Cal. App. 2d 890, 226 P.2d 702 (Dist. Ct. App. 1951) (median strip); State Highway Comm'n v. Smith, *supra*; Langley Shopping Center, Inc. v. State Roads Comm'n, 213 Md. 230, 131 A.2d 690 (1957) (median strip); State v. Peterson, 134 Mont. 52, 328 P.2d 617 (1958) (new highway); State *ex rel.* Merritt v. Linzell, 163 Ohio St. 97, 126 N.E.2d 53 (1955) (relocation of highway). "Circuity of travel" and "diversion of traffic" mean essentially the same thing in cases of impaired access: a forced change in route between highway and property. The difference between them is one of usage: diversion—implying access from highway to property—is likely to be used in commercial settings, while circuity—looking from property to highway—is employed in residential contexts. Diversion of traffic used in its more generic sense includes any change in traffic flow on a given highway, not necessarily connected with impairment of access, as when a highway is vacated, a median strip erected, or turns prohibited.

[3] People v. Ricciardi, 23 Cal. 2d 390, 144 P.2d 799 (1943); State *ex rel.* Rich v. Fonburg, 80 Idaho 269, 328 P.2d 60 (1958); Department of Pub. Works & Bldgs. v. Wolf, 414 Ill. 386, 111 N.E.2d 322 (1953); Smith v. State Highway Comm'n, 185 Kan. 445, 346 P.2d 259 (1959); Nichols v. Commonwealth, 331 Mass. 581, 121 N.E.2d 56 (1954); Carney v. State Highway Comm'n, 233 Miss. 598, 103 So. 2d 413 (1958); McMoran v. State, 345 P.2d 598 (Wash. 1959). Since the decision in Sauer v. New York, 206 U.S. 536 (1906), it has generally been stated that an abutter does not have an easement of access at every point along his property, but a right of reasonable access or access suited to the use to which the owner is putting his land. This rule delimits the access to which an abutter is entitled and allows state regulation of the number of points of access from a given piece of land.

[4] Severance damages are given in one of three ways: as a separate award for damages to the remaining property, in the computation of the value of the land taken which is judged in reference to the previous whole, or by using the general formula of value before less value after taking which reflects severance damages in the after-value. 1 ORGEL, VALUATION UNDER EMINENT DOMAIN §§ 48-53 (1953). In cases of impairment of abutters' access rights through conversion to a limited-access highway, there will almost always be a question of severance damages because additional land must be taken for use as access roads, existing rights of way rarely being of sufficient width. This is especially true in cases of highway conversion under the Federal Aid Highway Act, where a width sufficient to meet the approval of the Secretary of Commerce is required. 72 Stat. 894 (1958), 23 U.S.C. § 109(b) (1958). Where no land is taken, state constitutional distinctions arise. When the state constitution requires compensation only for taking of property, damage to land when no land is taken has been termed "consequential," 2 NICHOLS, EMINENT DOMAIN § 6.4432 (1950), and in the absence of a specific statute authorizing payment of such damages, compensation is generally denied. *Id.* at § 6.4432[1]. Where the constitutional provision is for taking or damaging, damages have been awarded. *Id.* at § 6.4432[2]. In "taking-only" states, the question arises whether the taking of access alone is sufficient to require payment for severance. *Compare* McGarrity v. Commonwealth, 311 Pa. 436, 166 Atl. 895 (1933), *appeal dismissed for want of a substantial federal question*, 292 U.S. 19 (1934) (per curiam), *with* Mueller v. New Jersey Highway Authority, 59 N.J. Super. 583, 158 A.2d 343 (App. Div. 1960).

[5] The formal definition of market value varies among jurisdictions, but the general rule is that it is the price a purchaser willing but not forced to buy will pay a seller willing but not forced to sell. 1 ORGEL, VALUATION UNDER EMINENT DOMAIN § 20 (1953). This value is established through expert testimony ordinarily based on one of three methods: market data (comparable sales, etc.), capitalization of income, or reproduction costs adjusted for depreciation. Note, *Valuation in California Condemnation Cases*, 12 STAN. L. REV. 766 (1960).

In the gas station case, the Arkansas court viewed the state action as a dual exercise of police power and eminent domain—the latter in taking the land, the former in rerouting traffic. As no compensation need be paid for detriment resulting from this legitimate exercise of the police power and as alternate access was provided, compensation for impairment of access was denied. But this conclusion rests principally on a facile labeling of the state action, ignores the economic fact of defendants' loss, and does not consider damage done to the remaining land by reason of the severance.[6] In the motel case, the Arizona court granted severance damages, computing them on a before-and-after market value basis, and thereby compensating for diversion of traffic.[7] The conceptual difference between the two lines of reasoning derives from their definition of access. If access be considered merely a license from the state that an owner may leave his property and go elsewhere through the use of state highways, the reasoning in the gas station case seems apt. If it be the right of an abutting owner to be reached by the outside world (a specific easement in a particular highway whereby a commercial value accrues to the land), the motel case analysis seems correct. Equally weighty policy considerations support each theory,[8] but with few exceptions[9] the courts have reached the motel case result.[10]

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[6] Another Arkansas case, decided the same day, shows a different approach. In State Highway Comm'n v. Union Planters Nat'l Bank, 333 S.W.2d 904 (Ark. 1960), the state highway commission had previously condemned a right of way bisecting defendant's farm for use as a conventional four-lane highway and now sought to condemn the underlying fee to convert the highway to limited access. It was admitted that the fee underlying the existing easement was of only nominal value, but the trial court awarded defendant $75,000 compensation in that he could no longer cross the highway within the confines of his property but was forced to travel one-half mile north or south on access roads, thereby rendering operation of his farm as a single unit impracticable. The Commission appealed, arguing that the loss was not compensable, as it was the result of the exercise of state police power, and that any compensation due had been paid in severance damages at the time of the original taking of the right of way. The court rejected these contentions and affirmed. As the dissent points out, the reasoning of this case is difficult to reconcile with *Bingham*, despite the factual distinction that the property owner had land abutting both sides of the highway. *Id.* at 915. This decision views the state action as exclusively eminent domain and specifically refuses to reach the question of whether the same result could be reached through exercise of state police power. *Id.* at 909.

[7] Where market value is used to measure compensation for access impairment, it includes the commercial worth of the traffic and thus compensates for its diversion.

[8] On the one side, the need for highway improvement is of growing national concern and the addition of expenses which will not advance present improvement programs, such as paying an abutter's business loss, could render such programs prohibitively expensive. It is also argued that the commercial investor takes a calculated risk and has no right to expect the constant maintenance of the status quo. He is, or will be, on constructive notice of the state's right to condemn direct access without compensation and his purchase price should reflect this risk. Conversely, it is said that the abutting property owner has paid for his right of access in his purchase and has relied on it in improving his property. To take such rights without compensation may needlessly depress the value of commercial property and impede its development. It is an economic fact that an abutter often loses not only his future profit potential, but most of his capital investment made in reliance on the preservation of his easement. The taking of one property right without compensation, or the elimination of one property right through redefinition, could be a dangerous inroad into the preservation of property rights in general.

[9] Muse v. Mississippi, 233 Miss. 694, 103 So. 2d 839 (1958); State v. Fox, 53 Wash. 2d 216, 332 P.2d 943 (1958).

[10] See cases cited note 3 *supra*.

The presently developed polar answers to the compensation problem do not bar a third, middle-ground resolution of the competing demands of constitutional requirements and economical highway construction. Such a middle-ground resolution is based on the premise that the abutter has, in addition to a license to use the state highways which he shares with the general public, a license of direct access to the highway on which he is located. The nature of the direct access license can be changed when the abutter relies on it. When a licensee alters his position in reliance upon an oral or implied license, it becomes irrevocable and its continuance will be enforced in equity.[11] Such an interest is in fact an easement,[12] and easements are compensable in eminent domain proceedings.[13] The nature of such an easement does not demand that compensation for its taking be based on diversion of traffic away from the dominant tenement; rather it demands only compensation based on that which created the easement[14]—the re-

[11] Miller v. Lawlor, 245 Iowa 1144, 66 N.W.2d 267 (1954) (oral agreement not to obstruct view enforced when relied on); McCoy v. Hoffman, 295 S.W.2d 560 (Ky. 1956) (access to highway over promisor's land enforced against subsequent purchaser); Magnuson v. Coburn, 154 Neb. 24, 46 N.W.2d 775 (1951) (highway access relied on for motel business enforced against subsequent purchaser); Smallwood v. Diz, 245 S.W.2d 439, 440 (Ky. 1952) (dictum); 3 POWELL, REAL PROPERTY § 429, at 521 (1952); 5 RESTATEMENT, PROPERTY §§ 519(4), 524 (1944). The theory has been criticized in CLARK, COVENANTS AND INTERESTS RUNNING WITH LAND 61-62 (2d ed. 1947), as an estoppel which penalizes the licensor for the very reason for which he gave the license—so that the licensee might rely on it. It might further be argued that the doctrine of governmental immunity from estoppel would thwart the use of this theory in condemnation proceedings. But governmental immunity arises chiefly in cases of unauthorized assurances on which reliance is placed. Berger, *Estoppel Against the Government*, 21 U. CHI. L. REV. 680 (1954). In the instant context, the assurance arises from the state's holding of the roads in trust for public use. Sauer v. New York, 206 U.S. 536, 554 (1906) (dictum).

[12] The difference between an irrevocable license and an easement is one of semantics, since the privileges of both are the same. 3 POWELL, REAL PROPERTY § 429, at 521, 524 n.27 (1952). The right of an abutter to access to the highway has been termed an easement appurtenant to his land. Historically, this was warranted since the abutter had built the road, or later, had been assessed for its construction. Modern courts have explained the existence of the easement as a natural right of ownership. See People *ex rel.* Dept. of Pub. Works v. Russell, 48 Cal. 2d 189, 195, 309 P.2d 10, 14 (1957); Wenton v. Commonwealth, 335 Mass. 78, 80, 138 N.E.2d 609, 611 (1956); McMoran v. State, 345 P.2d 598, 599 (Wash. 1959). Or they have simply stated that an abutter's right has always been an easement.

[13] A somewhat analogous result has been reached regarding an abutter's right to compensation in change-of-grade cases in Ohio. When an abutter has reasonable grounds to believe that the grade of the road is established and relies on this by improving his property, compensation for his damage from subsequent changes must be paid by the state. Compensation is based on the market value of the land before and after the grade change. State *ex rel.* McKay v. Kauer, 156 Ohio St. 347, 102 N.E.2d 703 (1951); Schimmelmann v. Lake Shore & M.S. Ry, 83 Ohio St. 356, 94 N.E. 840 (1911); Crawford v. Village of Delaware, 7 Ohio St. 459 (1857); State *ex rel.* Schiederer v. Preston, 166 N.E.2d 748, 751 (Ohio 1960) (dictum).

[14] The measure of damages when an easement is taken is not the market value of the right taken, but the damage to the dominant tenement attributable to the taking of the easement and to the prospective use which the taker will make of it. 1 ORGEL, VALUATION UNDER EMINENT DOMAIN § 111, at 476 n.36 (1953). In the case of an easement created by reliance, the damage to the dominant tenement attributable to its loss is the amount of that reliance. The use of another measure would lead to speculative figures, especially in the case of unimproved land. In the case of State *ex rel.* Morrison v. Wall, 87 Ariz. 327, 350 P.2d 993 (1960), compensation was

liance of the abutter on his direct access license.[15] An abutter's reliance is his capital investment in improvements to his land made with a view toward continued direct access. In zoning—the only other exercise of state police power to regulate land use—it has been held that a purchaser may not rely on a prospective land use; [16] thus, the purchase price of the land itself need not be considered a part of the abutter's reliance.[17] The amount of the award should be computed by deducting the present market or salvage value of the improvements from the depreciated capital investment in improvements, weighted for inflation [18]—or, in other words, from the reproduction cost of the improvements less their present depreciation.[19] Thus, consonant with constitutional requirements,[20] compensation would be paid for the property right taken and the costs of such compensation made commensurate with that right.[21]

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awarded and affirmed for the impairment of access rights from unimproved land to the highway. The computation of such an award seems necessarily speculative. In its zeal to protect property rights, the court compensated for one that did not in fact exist, as there had been no reliance by the abutter on his right of direct access.

15 Note that this formulation of the compensation base will not include the value of traffic to the premises, inasmuch as the abutter relied not on traffic being there but on traffic being able to be there—that is, his right of direct ingress and egress. And note also that it draws the line of compensable injury at abutters since only they ever had a direct access license on which to rely.

16 Such regulation has been found to be a valid exercise of state police power which does not require compensation even though the individual loss may be great. *E.g.*, Village of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926) (value of unimproved land reduced from $10,000 an acre to $2,500 an acre as a result of residential zoning); Hadacheck v. Sebastian, 239 U.S. 394 (1915) (brickyard potentially worth $800,000 zoned residential reducing its value to $60,000).

17 The return of an owner's capital investment in improvements is an increasingly popular method of elimination of nonconforming uses in zoning. Referred to generally as elimination through amortization, the system consists of setting a reasonable life for existing improvements that do not conform to zoning regulations and requiring that they be eliminated within that specified period. 2 Rathkopf, The Law of Zoning and Planning 80-88 (3d ed. 1957); Note, 102 U. Pa. L. Rev. 91 (1953); 1951 Wis. L. Rev. 685 (1951). This procedure has been approved by the courts so long as the allotted life is reasonable. State *ex rel.* Dema Realty Co. v. Jacoby, 168 La. 752, 123 So. 314 (1929); State *ex rel.* Dema Realty Co. v. McDonald, 168 La. 172, 121 So. 613, *cert. denied*, 280 U.S. 556 (1929); Grant v. Mayor & City Council, 212 Md. 301, 129 A.2d 363 (1956); Harbison v. City of Buffalo, 4 N.Y.2d 553, 152 N.E.2d 42, 176 N.Y.S.2d 598 (1958); Town of Somers v. Camarco, 308 N.Y. 537, 127 N.E.2d 327 (1955) (found unreasonable). *Contra*, City of Akron v. Chapman, 160 Ohio St. 382, 116 N.E.2d 697 (1953). The system actually allows the owner to recoup his investment in improvements made in reliance on the status quo, then eliminates his use without compensation for his land or for the damage done to it by the limitation of its use.

18 Other severance damages not attributable to the loss of access such as physical repairs and fencing, might be included in the value of the land taken, or in the after-taking market value, depending on the formula used by the state. See note 4 *supra*. If not so included, there should be a separate award for these damages.

19 This figure is a familiar one in the computation of insurance for income and commercial properties, 3 Richards, The Law of Insurance § 502 (5th ed. 1952), and returns to the investor the current worth of his investment.

20 All state constitutions, with the exception of North Carolina and New Hampshire, provide that just compensation or its equivalent shall be paid for the exercise of eminent domain. In North Carolina and New Hampshire the same requirement has been established by case law. 1 Orgel, Valuation Under Eminent Domain § 1, at 5 & n.5 (1953). The two newest states have similar constitutional provisions. Alaska Const. art. I, § 18; Hawaii Const. art. I, § 18.

21 The cost of paying just compensation for access easements seems to have influenced the Arkansas court in its denial of recovery for impairment of access in

ESTATE TAXATION—Stock Dividend Declared During Alternate Valuation Period Held Includable in Gross Estate

Petitioner, executor of decedent's estate, had elected under the optional valuation provision of the Internal Revenue Code of 1939[1] to determine the value of the gross estate for federal estate tax purposes as of one year after the death of the decedent rather than as of the date of death. During the intervening year, the Sun Oil Company, in which decedent had owned some 10,000 shares of common stock, declared and issued a true stock dividend at the rate of eight shares of common stock on each hundred of common held.[2] The executor excluded these shares from the valuation of the gross estate. The Commissioner of Internal Revenue determined a deficiency in the amount of the tax due on the market value of the dividend shares. The Court of Appeals for the Third Circuit, affirming the Tax Court's decision[3] upholding the Commissioner's determination, held that the shares were properly included in the gross estate. *Schlosser v. Commissioner*, 277 F.2d 268 (3d Cir.), *petition for cert. filed*, 28 U.S.L. WEEK 3379 (U.S. June 22, 1960) (No. 1025, 1959 Term; renumbered No. 165, 1960 Term).

The court's holding was grounded in what it saw as a logical extension of *Eisner v. Macomber*,[4] where the Supreme Court held that stock dividends are not income within the meaning of the sixteenth amendment. The Court's reasoning was that a stock dividend effects no change in the stockholder's proportionate interest in the corporation and, therefore, he receives no immediately realized pecuniary benefit from it. In a later case,[5] however, the Court said that the Treasury Department and Congress had interpreted its decision in *Eisner v. Macomber* too broadly and that the holding should be limited to situations in which the proportionate interest

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the gas station case. There it was said, "for us to hold that such a loss is compensable would amount to erecting an almost intolerable barrier in the way of further construction of super-highways." 333 S.W.2d at 734. Payment for access rights based on the amount of the reliance that created them would preserve constitutionally protected property and at the same time render this preservation less intolerable. See note 8 *supra*.

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1 Int. Rev. Code of 1939, ch. 3, § 811(j), 53 Stat. 122 (now INT. REV. CODE OF 1954, § 2032(a)(2)).

2 The financing of the dividend was accomplished within the corporate structure by transferring $65 per share from the earned surplus account to permanent capitalization. An examination of the Tax Court's findings of fact would indicate that the source of these funds was current earnings. See Estate of John Schlosser, 32 T.C. 262 (1959). But the court of appeals' opinion indicates that current earnings were insufficient to cover both the stock dividend and also a cash dividend declared during the same year, and that some accumulated surplus was used for this purpose. See Schlosser v. Commissioner, 277 F.2d 268, 269 (3d Cir.), *petition for cert. filed*, 28 U.S.L. WEEK 3379 (U.S. June 22, 1960) (No. 1025, 1959 Term; renumbered No. 165, 1960 Term). While in this case this factual dispute was immaterial to the holding, under another analysis it would become crucial. See notes 14 and 15 *infra* and accompanying text.

3 Estate of John Schlosser, 32 T.C. 262 (1959).

4 252 U.S. 189 (1920).

5 Koshland v. Helvering, 298 U.S. 441 (1936).

of the stockholder remains unchanged.[6] In 1943 the Treasury directed a frontal attack on *Eisner v. Macomber*, presenting the Court with an identical factual situation in *Helvering v. Griffiths*.[7] A majority of the Court, by some agile judicial footwork, turned the issue from one of constitutionality to one of statutory construction, reasoning that since *Eisner v. Macomber* was law when the Internal Revenue Code of 1939 was enacted,[8] Congress intended to tax stock dividends only to the limits of constitutionality as they were then thought to exist—that is, as stated by *Eisner v. Macomber*. In this manner the constitutional attack was blunted before reaching its objective—the overturning of the *Macomber* doctrine. Therefore, while there is doubt that *Macomber* persists as constitutional doctrine,[9] it is clear that *Griffiths* perpetuated the proportionate interest rule as a statutory mandate of the 1939 Code. The court of appeals' reliance upon this income tax doctrine is understandable in view of the paucity of legal guideposts in the corresponding area of estate taxation, where only two relevant cases appear. One is *Maass v. Higgins*,[10] in which the Supreme Court held that rents, interest, and cash dividends earned by the property of the estate during the alternate valuation period are to be excluded from the valuation of the gross estate. In the other, *McGehee v. Commissioner*,[11] the Fifth Circuit held that stock dividends declared out of current earnings on shares of stock transferred in contemplation of death are not properly included in the valuation of the gross estate.[12] The court there found the doctrine of *Eisner v. Macomber* unpersuasive[13] and chose to apply the so-called

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6 Note, however, that the general rule that taxability under the sixteenth amendment is contingent upon a change in the shareholder's proportionate interest in the corporation does not mean that all dividends declared in stock different in kind from that held will be so taxable. *Compare* Helvering v. Sprouse, 318 U.S. 604 (1943) (nonvoting common on both voting and nonvoting common), *and* Strassburger v. Commissioner, 318 U.S. 604 (1943) (nonvoting preferred on common held by corporation's single stockholder) (decided together with *Sprouse*), *with* Helvering v. Gowran, 302 U.S. 238, 241 (1937) (preferred on common) (dictum), *and* Koshland v. Helvering, 298 U.S. 441, 446 (1936) (common on nonvoting preferred) (dictum). *Compare* Helvering v. Sprouse, *supra, and* Strassburger v. Commissioner, *supra, with* Eisner v. Macomber, 252 U.S. 189 (1920).

7 318 U.S. 371 (1943). The factual situation involved the declaration of a stock dividend to be paid in common stock by a corporation having only that type of stock.

8 See Int. Rev. Code of 1939, ch. 1, § 22(a), 53 Stat. 9; Int. Rev. Code of 1939, ch. 1, § 115(a), 53 Stat. 46.

9 See, *e.g.*, Lowndes, *The Taxation of Stock Dividends and Stock Rights*, 96 U. PA. L. REV. 147 (1947); Rottschaeffer, *Present Taxable Status of Stock Dividends in Federal Law* (pts. 1-2), 28 MINN. L. REV. 106, 163 (1944).

10 312 U.S. 443 (1941), *reversing* Saks v. Higgins, 111 F.2d 78 (2d Cir. 1940).

11 260 F.2d 818 (5th Cir. 1958), *reversing* Estate of Delia McGehee, 28 T.C. 412 (1957).

12 *McGehee* is analogous to the instant case. Under the Int. Rev. Code of 1939, ch. 3, § 811(c), 53 Stat. 121, gifts made in contemplation of death are valued in the gross estate. The time of valuation, however, is not the date of the gift, but the date of death (or the alternate valuation date, if chosen). Stock dividends declared between the date of the gift and the date of the valuation are therefore similar to those declared during the one-year alternate valuation period. The present code contains a similar provision. INT. REV. CODE OF 1954, § 2035(a).

13 McGehee v. Commissioner, 260 F.2d 818, 820 (5th Cir. 1958).

"tracing" principle which seeks to determine, by looking to the source of the funds underlying the stock dividend, whether the dividend represents a capitalization of income earned before or after decedent's death.[14] If the income was earned after the death, the value of the new stock is not includable in the valuation of the estate on the theory that the decedent had no interest in profits earned after his death.[15]

The court in the instant case chose to transplant the *Macomber* analysis from income taxation to estate taxation, rather than to extend the *Maass* holding to cover stock dividends or to adopt the *McGehee* tracing approach. This course is consistent with the approach, if not the conclusion, of the Supreme Court in *Maass.* The Court there first determined that rents, interest, and cash dividends from the property of the estate were income and taxable as such. As a consequence, the Court reasoned, the same receipts cannot be properly called capital assets for estate tax purposes inasmuch as "while the Constitution does not forbid double taxation, the intent to impose it upon a given receipt is not to be presumed." [16] The Court thereby achieved a harmonious interrelationship between income and estate taxes, preventing double taxation on the one hand and tax avoidance on the other. In essence, this is precisely the result obtained by the Third Circuit in *Schlosser.* The court examined the stock dividend to determine its taxability as income and found it not taxable under *Macomber.* This being so, it found the dividend to be a capital asset of the estate and properly includable in the valuation of the gross estate. Criticism, if any, of this analysis lies in the extension of the often condemned *Macomber* doctrine.[17] The uneven treatment of individual taxpayers under the doctrine is not to be overlooked,[18] but the court's adoption of another rule of inclusion without consideration of the existing tax law might well have led

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[14] Such an approach would have made the seeming inconsistency of the Tax Court and the court of appeals as to the funds underlying the dividend in the instant case of great importance. See note 2 *supra* and note 15 *infra.*

[15] See 260 F.2d at 820. It should be noted that the converse of this position necessarily assumes some incident of estate tax significance in the corporation's accumulation of earnings during the lifetime of the stockholder. The Third Circuit, at least, finds no such incident: "Admittedly, the recent undistributed earnings of the corporation which underlay the stock dividend could be considered new property to the corporation. But unless the corporate entity be ignored, such accessions to the corporate estate benefit the stockholder only as an increase in the value of his stock." Instant case at 269.

[16] Maass v. Higgins, 312 U.S. 443, 449 (1941).

[17] See articles cited note 9 *supra.*

[18] The major criticism of *Macomber* is the uneven treatment which it fosters among taxpayers. As Professor Lowndes points out, a stockholder feels neither richer nor poorer because his proportionate interest has changed, and rightly so, because such a change is not usually reflected in a change in the market value of the stock. And it is the market, after all, to which the taxpayer has recourse if he finds it necessary to dispose of some of his holdings to pay his income taxes. It seems unjust that one taxpayer, having received an interest-changing dividend, must pay tax on it, while another, who received a dividend which did not affect his interest, need not, though the market value of the shares, which determines the amount of the tax, has been similarly affected. See Lowndes, *supra* note 9, at 154-57.

to even greater unfairness. The analysis suggested by *McGehee*, for example, while theoretically sound, could lead to such inequalities.[19]

Since the 1954 Code retains the alternate valuation provision,[20] the effect of the decision may persist under that code. The new code, however, differs from the 1939 Code[21] by eliminating the proportionate interest test for determining the taxability of stock dividends as income. Section 305 excludes from taxation as income all stock dividends except those distributed in discharge of preference dividends and those distributed in lieu of property at the election of the stockholder.[22] In applying the *Schlosser* decision as precedent under the 1954 Code, the courts must decide whether the Third Circuit's holding stands as an outright espousal of the *Macomber* doctrine as an estate tax landmark for determining whether a stock dividend is to be included in the valuation of the gross estate, or rather represents a suggested analysis to be adapted to meet the change in status of stock dividends under the income tax provisions of the 1954 Code. The former would be a retrogressive step in equitable taxation in that it would merely transplant the inequalities of *Macomber*,[23] now uprooted in the income tax field,[24] to that of estate taxation. If, however, the decision is looked upon by future courts as suggesting an analysis only, it will provide a sound and logical basis for dealing with the problem of inclusion under the present code. In the context of the 1954 Code, the *Schlosser* approach to stock dividends declared during the alternate valuation period would include in the valuation of the gross estate all stock dividends save those which are taxable as income under section 305—that is, only preference dividends and dividends elected in lieu of property distributions would be excluded.[25] This frankly pragmatic approach thus avoids the administrative problems of the proportionate interest rule[26] and the difficulties of the "tracing" prin-

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[19] The *McGehee* analysis attempts to determine the source of funds underlying the dividend. If those funds are income earned by the corporation since the decedent's death, *McGehee* requires that the dividend be excluded from the valuation of the gross estate. The case also contemplated in dictum a contrary result where dividends have been financed out of funds existing when the decedent died. While on its face this analysis seems clearly equitable, inequality appears when it is considered in conjunction with the income tax laws. For example, a stock dividend which is financed out of current earnings but which also fails to change the proportionate interest of the shareholder would not be taxed either as income or as a capital asset. On the other hand, a dividend financed out of past surplus which changes the proportionate interest of the stockholder would be taxed as both income of the estate and a capital asset of it.

[20] INT. REV. CODE OF 1954, § 2032(a)(2).

[21] "[A stock dividend] shall not be treated as a dividend to the extent that it does not constitute income to the shareholder within the meaning of the Sixteenth Amendment to the Constitution." Int. Rev. Code of 1939, ch. 1, § 115(f)(1), 53 Stat. 47.

[22] INT. REV. CODE OF 1954, § 305.

[23] See note 18 *supra*.

[24] *Compare* INT. REV. CODE OF 1954, § 305, *with* Int. Rev. Code of 1939, ch. 1, § 115(f)(1), 53 Stat. 47.

[25] The same result would follow in cases involving gifts in contemplation of death, such as McGehee v. Commissioner, 260 F.2d 818 (5th Cir. 1958). See note 12 *supra*.

[26] These problems appear to be the motivation for the change in the income tax law under the 1954 Code. See S. REP. No. 1622, 83d Cong., 2d Sess. 241 (1954). For some hypothetical situations illustrating these difficulties, see Rottschaeffer, *supra* note 9, at 120-29.

ciple advocated by *McGehee*.[27] It embodies both the spirit of the *Maass* decision, eschewing the overlapping of tax laws which leads to double taxation, and the evident concern of the court in the instant case that both income and estate taxes not be avoided. Viewed in this way, *Schlosser* presents a sturdy foundation from which to approach the same problem under the 1954 Code.

FAMILY LAW—Divorced Father May Be Compelled To Aid His Minor Child in the Custody of the Mother To Obtain a College Education

Pursuant to a divorce decree, plaintiff-wife was given custody of her teenage daughter and defendant-husband was directed to contribute $50 a month toward the child's support. Subsequently, plaintiff sought to modify the decree and increase the award so as to provide funds with which the daughter might obtain a college education. The daughter's aptitude for college was undisputed and testimony tended to establish the father's financial ability to provide for such an education and the mother's relative inability in this respect.[1] The chancellor increased the original award to $90 a month; the Supreme Court of Mississippi affirmed, holding that under the circumstances it was the duty of the father to provide funds for the education of his minor child. *Pass v. Pass,* 118 So. 2d 769 (Miss. 1960).

Courts are divergent in their holdings as to whether a divorced father will be compelled to provide funds for the college education of his children.[2]

27 For a frank acknowledgement by a court of its inability to deal with a problem requiring a similar analysis, see Cunningham Estate, 395 Pa. 1, 149 A.2d 72 (1959), dealing with the century-old Pennsylvania rule of apportionment, first enunciated in Earp's Appeal, 28 Pa. 368 (1857).

1 Plaintiff's testimony as to the defendant's financial ability tended to establish that defendant owned a farm capable of producing $12,000 in income yearly; in contradiction, defendant testified that he was heavily in debt and unable to increase the original award. There is no recitation of the chancellor's reasons for deciding that plaintiff was financially unable to send her daughter to college. See Pass v. Pass, 118 So. 2d 769, 770-71 (Miss. 1960).

2 Cases that have included college education as an element under a divorce decree are: Maitzen v. Maitzen, 24 Ill. App. 2d 32, 163 N.E.2d 840 (1960); Refer v. Refer, 102 Mont. 121, 56 P.2d 750 (1936); Payette v. Payette, 85 N.H. 297, 157 Atl. 531 (1931); Cohen v. Cohen, 193 Misc. 106, 82 N.Y.S.2d 513 (Sup. Ct. 1948); Jackman v. Short, 165 Ore. 626, 109 P.2d 860 (1941); Esteb v. Esteb, 138 Wash. 174, 244 Pac. 264 (1926). Those which have rejected college as such an element can be distinguished by the type of decisions rendered. One group seems to imply that a college education is simply not important enough to be considered a necessary and thus includable in a support decree. "[We have] no authority to require a parent to provide funds to defray the expense of a general college education for a child." Hachat v. Hachat, 117 Ind. App. 294, 296, 71 N.E.2d 927 (1947). "A general college education, however desirable it may be, is not a necessary." Morris v. Morris, 92 Ind. App. 65, 68, 171 N.E. 386, 387 (1930). The other group emphasizes that in the proper factual circumstances the education would be included in a support order. "We do not accede to the contention that the court in any case is without power . . .

Where such a requirement has been imposed, it has been justified either through a liberal interpretation of a general welfare statute similar to the Mississippi act involved in the instant case,[3] or by labeling the education a "necessary" and invoking the common-law rule of "necessaries."[4] The Mississippi court adopted the former course and relied on two statutes, one charging the mother and father with the "care, nurture, welfare, and education" of their minor children[5] and the other authorizing the court to make orders relating to the care and maintenance of children in divorce actions.[6] The latter provision—like many state statutes pertaining to divorce, custody, and support[7]—emphasizes judicial discretion and has been variously construed so as to annul the common-law doctrine of the paramount right of the father to the custody of the children,[8] to compel a father to provide additional support funds when an unforeseen emergency arises,[9] and to emphasize the general proposition that the best interests of the child should be the prime consideration of the court.[10] The alternative analysis—that a college education is a "necessary"—reasons from the

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regardless of the relevant circumstances to require a parent to provide his child with a college or vocational education. We are not persuaded, however . . . [to do this in the present case]." Jonitz v. Jonitz, 25 N.J. Super. 544, 556-57, 96 A.2d 782, 788 (1953). "A rich man, well able to pay, might very well be held for a college education of an extended and expensive sort. However, the father in this instance is not a rich man . . . ." Golay v. Golay, 35 Wash. 2d 122, 124, 210 P.2d 1022, 1023 (1949).

3 Miss. Code Ann. § 399 (1956). Maitzen v. Maitzen, 24 Ill. App. 2d 32, 36, 163 N.E.2d 840, 842 (1960), interpreted the words "make such order touching . . . "care, custody and support of the children . . . as, from the circumstances of the parties and the nature of the case, shall be fit, reasonable and just. . . .," Ill. Rev. Stat. ch. 40, § 19 (1959), to permit funds for a college education to be included in the order. Luques v. Luques, 127 Me. 356, 358, 143 Atl. 263, 264 (1928), interpreted "care, custody, and the support of any minor children," Me. Laws 1901, ch. 151, at 167, to include funds for a musical education; Stoner v. Weiss, 96 Okla. 285, 286, 222 Pac. 547, 548 (1924), construed "custody, support, and education of the minor children," Okla. Stat. Ann. tit. 12, § 1277 (Supp. 1956), so as to include funds for a child's future education. Jackman v. Short, 165 Ore. 626, 638, 109 P.2d 860, 865 (1941), interpreted "care and custody of the minor children and/or education thereof," Ore. Laws 1921, ch. 114, at 225, to include funds for college. Present compulsory school attendance laws—expressed in terms of age or completion of some minimum amount of education—do not require a college education. See, *e.g.*, Ariz. Rev. Stat. Ann. § 15-321 (1956) (8 to 16 or completion of prescribed grammar school courses); Pa. Stat. Ann. tit. 24, § 13-1326 (1950) (8 to 17 or completion of accredited senior high school).

4 See notes 11-16 *infra* and accompanying text.

5 Miss. Code Ann. § 399 (1956).

6 Miss. Code Ann. § 2743 (1956).

7 *E.g.*, Fla. Stat. Ann. § 65.14 (1943); Okla. Stat. Ann. tit. 12, § 1277 (Supp. 1959); Wis. Stat. Ann. § 247.24 (Supp. 1960).

8 Cocke v. Hannum, 39 Miss. 423 (1860) (interpreting a substantially identical statute).

9 Castleberry v. Castleberry, 214 Miss. 94, 58 So. 2d 67 (1952) (son seriously injured playing football; daughter injured in automobile collision).

10 See Earwood v. Cowart, 232 Miss. 760, 765, 100 So. 2d 601, 603 (1958); Haynie v. Hudgins, 122 Miss. 838, 857, 85 So. 99, 103 (1920); Duncan v. Duncan, 119 Miss. 271, 279, 80 So. 697, 701 (1918).

common-law rule that a father is liable for necessaries furnished his child [11] even if the father is divorced and whether or not he has custody of the child.[12] Courts seeking to classify college education as a necessary have relied on the traditional relativity of the term, pointing out that it includes in its scope not only physical essentials such as food and clothing but also the conventional necessaries of others in the same circumstances as the infant in question.[13] In determining whether a college education is a necessary in any particular case, courts have been especially concerned with the financial circumstances of the divorced parents and the aptitude of the child.[14] While this judicial refinement of the necessary doctrine is illustrative of the manner in which courts can remold an old concept to fit new situations,[15] it should be noted that the doctrine may also be used to avoid consideration of the underlying merits of the individual case.[16]

The humanitarian desire to help children obtain that which they would have received were it not for their parents' marital failure [17] is apparent in recent legislation and decisions. Decrees of support have been held to survive the death of the parent,[18] the age to which support may be required

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[11] *Compare* Middlebury College v. Chandler, 16 Vt. 683 (1844), *with* Luques v. Luques, 127 Me. 356, 143 Atl. 263 (1928), *and* Esteb v. Esteb, 138 Wash. 174, 244 Pac. 264 (1926). See generally 4 VERNIER, AMERICAN FAMILY LAWS § 234, at 56-57, 63 (1936).

[12] Alvey v. Hartwig, 106 Md. 254, 67 Atl. 132 (1907); Spencer v. Spencer, 97 Minn. 56, 105 N.W. 483 (1906); 2 SCHOULER, MARRIAGE, DIVORCE, SEPARATION AND DOMESTIC RELATIONS § 1912 (6th ed. 1921).

[13] See Jackman v. Short, 165 Ore. 626, 109 P.2d 860 (1941), 20 ORE L. REV. 377 (1941); Esteb v. Esteb, 138 Wash. 174, 244 Pac. 264 (1926), 21 ILL. L. REV. 409 (1926).

[14] See cases cited note 13 *supra*. Compare note 22 *infra*.

[15] Esteb v. Esteb, 138 Wash. 174, 244 Pac. 264 (1926), illustrates this remolding and broadening process. There, the court found that the father was able to pay for a college education, that the child displayed a particular aptitude for teaching, and that the child's employment in another field was unlikely because of poor health. Thus the court was confronted with a situation in which college appeared almost essential if the child was ever to gain financial independence. The funds required for college were granted, the court using a "necessary" analysis to reach this result. See also Calogeras v. Calogeras, 10 Ohio Op. 2d 441, 163 N.E.2d 713 (Juv. Ct. 1959), 35 NOTRE DAME LAW. 573 (1960).

[16] See Morris v. Morris, 92 Ind. App. 65, 171 N.E. 386 (1930); Hachat v. Hachat, 117 Ind. App. 294, 71 N.E.2d 927 (1947) (citing and relying on *Morris* without further discussion); *cf.* Commonwealth v. Wingert, 173 Pa. Super. 613, 98 A.2d 203 (1953).

[17] "When we turn to divorced parents . . . society can not count on normal protection for the child . . . ." Maitzen v. Maitzen, 24 Ill. App. 2d 32, 38, 163 N.E.2d 840, 843 (1960). "The purpose of this provision [divorce statute] . . . should be held to be to provide for minor children who are deprived of the care and training that naturally flow from a united home . . . ." Luques v. Luques, 127 Me. 356, 359, 143 Atl. 263, 265 (1928). "Parents, when deprived of the custody of their children, very often refuse to do for such children what natural instinct would ordinarily prompt them to do." Esteb v. Esteb, 138 Wash. 174, 184, 244 Pac. 264, 167 (1926). *Cf.* 2 NELSON, DIVORCE AND ANNULMENT § 15.63, at 276 (2d ed. 1945); WEISSMAN, GUARDIANSHIP FOR CHILDREN 9-11 (1949).

[18] Taylor v. George, 34 Cal. 2d 552, 212 P.2d 505 (1949); Garber v. Robitshek, 226 Minn. 398, 401, 33 N.W.2d 30, 33 (1948) (dictum); 26 TEMP. L.Q. 202 (1952).

has been raised,[19] and a divorced father has even been compelled to provide funds for the college education of his disabled adult child.[20] In the same vein, the role of a college education in the development of a child's full potentialities cannot be seriously doubted. But to recognize the general desirability of a college education is not to say that funds for such an education should be included in every support order. In each particular case, the court must look first to the child's aptitude;[21] and, if the child is otherwise suited for college, it must then determine the proper amount of contribution.[22] Here, however, a possibility of abuse exists. Certainly support decrees should not become vehicles for imposing—under the guise of child welfare—punitive damages for the "crime" of divorce.[23] Too often divorce indicates to many people that the father must be at fault and that any suffering should be borne by him.[24] Nor should a father be burdened beyond his financial capacity.[25] The possibilities of help from the other parent, of scholarship aid, and of part-time employment should all be considered in determining how much additional aid, if any, is needed. The court must balance the earning capacity of the child against that of the

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19 Maitzen v. Maitzen, 24 Ill. App. 2d 32, 163 N.E.2d 840 (1960) (divorce court jurisdiction not limited to minor children); TEX. REV. CIV. STAT. art. 4639a (Supp. 1960) (raising jurisdictional age limit of divorce courts from 16 to 18).

20 Strom v. Strom, 13 Ill. App. 2d 354, 142 N.E.2d 172 (1957).

21 Courts considering whether to require a parent to provide funds for a college education have almost always discussed the child's aptitude. See, *e.g.*, Maitzen v. Maitzen, 24 Ill. App. 2d 32, 163 N.E.2d 840 (1960); Jackman v. Short, 165 Ore. 626, 109 P.2d 860 (1941); Esteb v. Esteb, 138 Wash. 174, 244 Pac. 264 (1926); 20 ORE. L. REV. 377, 383 (1941). A certain minimum amount of ability must be present before higher education is appropriate for a given individual, but this requisite aptitude should not be confused with an aptitude indicating a superior ability in relation to the average college student. Such a higher standard of ability would deprive many able students of financial aid.

22 Note that this analysis treats separately the desirability and feasibility of a college education, first deciding the question of desirability solely on the basis of the child's aptitude and then considering feasibility in terms of ability to pay. On the other hand, the necessary analysis—by looking to what is happening to children in families of similar financial circumstances—amalgamates both ability to pay and aptitude into a single issue of desirability. This distinction in analysis may become important in at least two cases. First, where a child is found to be extremely gifted, the strength of this aptitude factor may increase the court's willingness to find that the father is able to pay for a college education; should the same situation be considered using a necessary analysis, the fact that only a few children similarly situate are attending college may prove persuasive. And second, should a child be found to be a borderline college admission case, this factor may outweigh even a proven financial ability and be decisive that the child should not be sent to college; but under the necessary analysis, if other wealthy children of mediocre intelligence are attending college, the child of divorced parents would also receive a higher education.

23 Although it could be argued that in cases where the father is at fault there might be a place for "punitive damages," it seems rather poor policy to make this a meaningful distinction. Certainly it is irrelevant to the desirability of sending a particular child to college and it seems ludicrous to send one child to college because the father was at fault, but to deny higher education to another because the fault, if any, was in the other spouse.

24 See generally Venters, *Evils of Alimony*, 36 LAW NOTES 29 (1932).

25 Golay v. Golay, 35 Wash. 2d 122, 210 P.2d 1022 (1949) (order granting modification reversed as excessive); see 2 NELSON, DIVORCE AND ANNULMENT § 14.34, at 43-44 (2d ed. 1945).

parent to determine how the financial burden of college should be allocated.[26] The ultimate guard against abuse, however, is the availability of the amending process whereby the court can reexamine the constantly changing circumstances of the parties in question.[27]

LABOR MANAGEMENT RELATIONS—NLRB MAY NOT EQUATE PARTIAL STRIKE TO HARASS EMPLOYER WITH FAILURE TO BARGAIN IN GOOD FAITH

Upon termination of a collective-bargaining agreement, respondent insurance agents' union commenced certain harassing tactics designed to induce the Prudential Insurance Company to accede to demands for a new contract. These tactics included refusing to solicit new business, refusing to comply with company reporting procedures when the writing of new business was later resumed, refusing to participate in company sales promotion, reporting late to district offices and refusing to perform customary duties while there, being purposely absent from special business conferences arranged by the company, picketing and distributing leaflets, and soliciting policyholders' signatures on petitions for presentation to the company. Acting on Prudential's charge, the National Labor Relations Board found that, in spite of negotiating at the bargaining table with apparent desire to reach agreement on a contract, the union violated its obligation to bargain in good faith under section 8(b)(3) of the Labor Management Relations Act[1] by engaging in these harassing tactics.[2] The Court of Appeals for the District of Columbia, in a per curiam opinion,[3] refused to enforce the Board's order to cease and desist, citing a similar refusal in an earlier case.[4] The Supreme Court affirmed, asserting that the Board's attempt thus to regulate the use of economic weapons in the collective-bargaining process

[26] The health, sex, age, and intelligence of the child would all be relevant to the determination of how much the child might be expected to earn while attending college.

[27] *E.g.*, MISS. CODE ANN. § 2743 (1956) provides that "the court may afterwards, on petition, change the decree, and make from time to time such new decrees as the case may require." See NELSON, *op. cit. supra* note 17, § 15.65. See also 2 VERNIER, AMERICAN FAMILY LAWS § 106, at 274-76 (1932).

[1] Labor Management Relations Act (Taft-Hartley Act) § 8(b)(3), 61 Stat. 140 (1947), 29 U.S.C. § 158 (1958).

[2] Insurance Agents' Int'l Union, 119 N.L.R.B. 768 (1957).

[3] Insurance Agents' Int'l Union v. NLRB, 260 F.2d 736 (D.C. Cir. 1958).

[4] Textile Workers Union v. NLRB, 227 F.2d 409 (D.C. Cir. 1955), *cert. denied*, 352 U.S. 864 (1956) (Personal Products Case). This was the first attempt by the Board to rule that partial strike tactics could be prohibited. In UAW v. Wisconsin Employment Relations Bd., 336 U.S. 245 (1949) (Briggs-Stratton Case), the Court held that a state court could enjoin activity similar to that engaged in by the union in the instant case. Under the then existing doctrine of preemption the implication of the case was that the NLRB could neither prohibit nor protect the activity in question, an implication which the Court in the instant case refused to weigh in reference to this decision. Instant case at 493 n.23.

is contrary to the act's spirit of reliance on "free" collective bargaining. *NLRB v. Insurance Agents' Int'l Union, AFL-CIO*, 361 U.S. 477 (1960).

Prohibitions under the Labor Management Relations Act—that is, activities in which employers and unions may not engage—are set out in general terms in section 8,[5] leaving for the Board the determination whether, in particular cases, the act has been violated. Section 8(a)(5) requires that the employer bargain collectively with the representative of his employees; section 8(b)(3) places a reciprocal obligation on unions. "To bargain collectively" is defined by section 8(d) as "the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment . . . ."[6] There appears to be no clear standard in the section itself for determining when good faith bargaining is taking place, and the usual attempt to formulate the concept concludes by describing its opposite, "bad faith," as a desire not to reach agreement.[7] The case law, however, does not strictly adhere to a standard which can be so characterized.[8] Whether or not Congress envisaged precision in the language of the section, the Board has in reality exercised a wide discretion in its application,[9] and has come to rely on "per se" rules equating certain activities with a failure to bargain in good faith. Thus, refusal to enter into agreements on grounds that they do not contain certain proposals when the proposals are not mandatory subjects of bargain ing,[10] refusal to put a contract in writing,[11] unilaterally increasing employee pay while negotiations for a new contract are in progress,[12] and

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[5] 61 Stat. 140 (1947), 29 U.S.C. § 158 (1958).

[6] *Ibid.*

[7] NLRB v. Reed & Prince Mfg. Co., 205 F.2d 131, 134 (1st Cir.), *cert. denied*, 346 U.S. 887 (1953); Cox, *The Duty To Bargain in Good Faith*, 71 HARV. L. REV. 1401, 1417 (1958).

[8] See NLRB v. F. W. Woolworth Co., 352 U.S. 938 (per curiam), *reversing* 235 F.2d 319 (9th Cir. 1956); NLRB v. Truitt Mfg. Co., 351 U.S. 149 (1956); Cox, *supra* note 7, at 1432-33.

[9] Mr. Justice Brennan's opinion traces the history and development of this section. For a more complete treatment, see Cox, *supra* note 7; Feinsinger, *The National Labor Relations Act and Collective Bargaining*, 57 MICH. L. REV. 807 (1959); Smith, *The Evolution of the "Duty to Bargain" Concept in American Law*, 39 MICH. L. REV. 1065 (1941). These writers apparently agree that whatever meaning "good faith bargaining" has, that meaning has been acquired through a case-by-case method and not from the very broad statutory language. But how far the Board should be allowed to interfere in the collective bargaining process is still a subject of controversy. There seems little doubt that the Board can make rules under the provisions of the Labor Management Relations Act since § 6, 61 Stat. 452 (1947), 29 U.S.C. § 156 (1958), states: "the 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 this subchapter." *Cf.* DAVIS, ADMINISTRATIVE LAW TEXT § 15.04, at 276-77 (2d ed. 1959). The question really becomes one as to what rules are necessary to carry out the purposes of the act.

[10] NLRB v. Wooster Div. of Borg-Warner Corp., 356 U.S. 342 (1958).

[11] H. J. Heinz Co. v. NLRB, 311 U.S. 514 (1941).

[12] NLRB v. Crompton-Highland Mills, Inc., 337 U.S. 217 (1949).

withholding information deemed desirable in the bargaining process [13] have become per se indicative of failure to bargain in good faith. Other Board decisions subject to characterization as per se rules have been held unauthorized by the Labor Management Relations Act on the theory that the Board must consider each case on its own merits in finding bad faith.[14]

While section 8 enables the Board to prohibit certain employee activities, section 7 lays down in general terms employee activities which the Board may protect from employer reprisals.[15] Guidelines for the Board's case-by-case implementation of section 7 are provided by sections 13 and 501(2). Section 13 provides that "nothing in this subchapter, except as specifically provided for herein, shall be construed so as either to interfere with or impede or diminish in any way the right to strike, or to affect the limitations or qualifications, on that right." [16] "Strike" in turn is defined by section 501(2) as any "concerted stoppage of work . . . and any concerted slowdown or other concerted interruption of operations by employees." [17] No other provision of the act tends to clarify the definition of slowdowns or to remove them from protection.[18] While the language of these sections would seem to give very broad protection to concerted activity, that protection has been somewhat restricted by judicial interpretation. Thus, employees who engage in a sitdown strike,[19] whose activity is unlawful under another statute,[20] or who strike in breach of contract [21] are not engaging in protected activity and may be discharged. Courts of appeals,[22] and in recent years the NLRB,[23] have consistently held that activities similar to the tactics in the instant case are not protected from employer countermeasures.

In light of the Board ruling and the disposition by the circuit court, the precise issue decided by the Court in the instant case is not entirely

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[13] NLRB v. F. W. Woolworth Co., 352 U.S. 938 (1956) (per curiam), *reversing* 235 F.2d 319 (9th Cir. 1956); NLRB v. Truitt Mfg. Co., 351 U.S. 149 (1956).

[14] NLRB v. American Nat'l Ins. Co., 343 U.S. 395 (1952); *cf.* Universal Camera Corp. v. NLRB, 340 U.S. 474 (1951).

[15] Labor Management Relations Act § 7, 61 Stat. 140 (1947), 29 U.S.C. § 157 (1958): "Employees shall have the right . . . to engage in . . . concerted activities for the purpose of collective bargaining or other mutual aid or protection. . . ."

[16] 61 Stat. 151 (1947), 29 U.S.C. § 163 (1958).

[17] 61 Stat. 161 (1947), 29 U.S.C. § 142 (1958).

[18] One type of activity that might be considered a form of slowdown or partial strike, the "hot cargo" contract, has been outlawed by § 8(e) of the 1959 amendments to the act. 73 Stat. 525 (1959), 29 U.S.C. § 158 (Supp. 1959). See Mittenthal, *Partial Strikes and National Labor Policy*, 54 MICH. L. REV. 71, 78-79 (1955).

[19] NLRB v. Fansteel Metallurgical Corp., 306 U.S. 240 (1939).

[20] Southern S.S. Co. v. NLRB, 316 U.S. 31 (1942).

[21] NLRB v. Sands Mfg. Co., 306 U.S. 332 (1939).

[22] Home Beneficial Life Ins. Co. v. NLRB, 159 F.2d 280 (4th Cir.), *cert. denied*, 332 U.S. 758 (1947); NLRB v. Indiana Desk Co., 149 F.2d 987 (7th Cir. 1945); NLRB v. Draper Corp., 145 F.2d 199 (4th Cir. 1944); NLRB v. Condenser Corp., 128 F.2d 67 (3d Cir. 1942); C. G. Conn, Ltd. v. NLRB, 108 F.2d 390 (7th Cir. 1939).

[23] Honolulu Rapid Transit Co., 110 N.L.R.B. 1806 (1954); Pacific Tel. & Tel. Co., 107 N.L.R.B. 1547 (1954); Phelps Dodge Copper Prods. Corp., 101 N.L.R.B. 360 (1952).

clear. The Board's refusal even to consider evidence of the union's desire to reach agreement [24] or to evaluate the actual effect on the parties of the particular harassing tactics in question supports the inference that it was attempting to promulgate a per se rule of law equating partial strikes with failure to bargain in good faith. If the Court is holding merely that the Board cannot arrogate to itself under section 8(b)(3) the broad power categorically to prohibit partial strikes,[25] the decision finds adequate foundation in the broad purposes of the Labor Management Relations Act.[26] While the Court has tolerated some interference in the collective bargaining process by way of Board "per se" rules [27]—interference not entirely supportable by the "bad faith" finding [28]—a Board per se rule in the instant case would go considerably further in interfering in the process, through control of economic weapons, than has previously been sanctioned. Support for the Court's result can also be found in two sections of the act, 13 and 501(2),[29] which the majority declined to consider. Inasmuch as it is arguable that the union's activity in the instant case may be protected from employer countermeasures under these apparent caveats to section 7,[30] it seems clear that the activity cannot be categorically prohibited.

[24] The Board stated: "[T]he fact that the Respondent continued to confer with the Company and was desirous of concluding an agreement does not *alone* establish that it fulfilled its obligation to bargain in good faith . . . ." 119 N.L.R.B. at 771.

[25] There is some evidence in the opinion that this is all the Court intends to do. The Court says: "the only apparent basis for the conclusion that the union was only going through the 'motions' of bargaining is the Board's own postulate that the tactics in question were inconsistent with the statutorily required norm of collective bargaining, and the Board's opinion, and its context, reveal that this was all that it meant." Instant case at 482-83 n.5. And again: "we think the Board's resolution of the issues here amounted not to a resolution of interests which the Act had left to it for case-by-case adjudication, but a movement into a new area of regulation which Congress had not committed to it." Instant case at 499.

[26] Justice Brennan's opinion for the Court does not rest its holding on any specific language of the act. After tracing the history and evolution of § 8(b)(3) and its counterparts, and recognizing that tensions exist between the principle of "free bargaining" and "good faith bargaining," the opinion concludes that the act does not authorize such a sweeping interference with a union's right to exert economic pressure as the Board attempted. The Court said: "And if the Board could regulate the choice of economic weapons that may be used as part of collective bargaining, it would be in a position to exercise considerable influence upon the substantive terms on which the parties contract." Instant case at 490. This, the Court concludes, would be inimical to the purposes of the act.

[27] See notes 10-13 *supra* and accompanying text.

[28] See notes 8, 13 *supra* and accompanying text.

[29] 61 Stat. 151, 161 (1947), 29 U.S.C. §§ 142, 163 (1958). There is language in the *Briggs-Stratton Case*, 336 U.S. at 258-63, see note 4 *supra*, to the effect that § 501(2) applies only to "strike" as used in § 8(b)(4) of the 1947 amendments to the act. Justice Brennan apparently accepts this view, instant case at 493 n.23, and it seems plausible in terms of the spirit of the 1947 amendments. On the other hand, Justice Frankfurter disagrees with this interpretation of *Briggs-Stratton*, believing that the issue was not settled by that case. Instant case at 510-11 n.6 (separate opinion). Justice Frankfurter further says: "Nor is it valid to assume that all conduct loosely described as a 'slowdown' has the same legal significance . . . ." Instant case at 512 n.8 (separate opinion).

[30] The Court specifically left open the question of protection under §§ 7, 13 and 501(2). Instant case at 492-94 nn.22-23.

In a separate opinion, Mr. Justice Frankfurter, joined by Mr. Justice Harlan and Mr. Justice Whittaker, indicated his belief that the Court has gone further than merely striking down a per se rule and has held that a partial strike may not even be evidence of bad faith bargaining. Justification for this inference can be found in some of the Court's language,[31] in the circuit court holding which the Court affirmed,[32] and in the Board opinion.[33] But the Court's circumspection in narrowing its holding in other respects—notably its avoidance of the protection problem under sections 7, 13, and 501(2),[34] and of the problems of state jurisdiction raised by *UAW v. Wisconsin Employment Relations Bd.*[35]—indicates that it has done no more than rule that the Board may not promulgate a per se rule categorically prohibiting the union's use of the partial strike as an economic weapon. Nonetheless, the separate opinion is interesting and instructive as a guide to the law's development in this area. Reasoning that the Board can draw the conclusion of bad faith only from all of the circumstances surrounding the union activity, these Justices would allow the Board to consider a partial strike as one link in a chain of evidence supporting a bad faith finding.[36] Neither the Labor Management Relations Act nor any prior Supreme Court decision has dealt with the problem of strikes, or partial strikes, as evidence of bad faith. The separate opinion's approach to the problem on a conceptual "evidence" level would not directly conflict with existing law, although, inasmuch as it envisages a greater role on the part of the Board in settling differences between labor and management, it might entail some revision of traditional understanding of the act. Mr. Justice Frankfurter defends this greater interference by conceiving the ultimate purpose of the act to be withdrawal from reliance on pure economic force in the collective bargaining process.[37]

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31 "The reason why the ordinary economic strike is not evidence of a failure to bargain in good faith is . . . [because] there is simply no inconsistency between the application of economic pressure and good-faith collective bargaining." Instant case at 494-95, quoted in concurring opinion at 504. Furthermore, the Court adopts the Board's statement of the issue: "'The issue here . . . comes down to whether the Board is authorized under the Act to hold that such tactics . . . support a finding of a failure to bargain in good faith as required by Section 8(b)(3).'" Instant case at 483.

32 The circuit court opinion in the instant case was per curiam, relying on their opinion in an earlier case. See notes 3, 4 *supra* and accompanying text. In the *Personal Products Case,* on which the circuit court relied, it was more apparent than in the instant case that the Board's finding was based on the evidence as a whole rather than on a per se rule. The circuit court said: "[N]o inference of a failure to bargain in good faith could have been drawn from a total withholding of srvices . . . . It is equally clear that no such inference can be drawn from a partial withholding of services . . . ." 227 F.2d at 410.

33 There is also some indication that the Board was treating the harrassing tactics in an evidentiary fashion. The Board's opinion states: "Contrary to the Respondent's contention, we rely on the harassing tactics solely as evidence of the Respondent's bad-faith dealings with the Company and not as independently constituting unfair labor practices." 119 N.L.R.B. at 771 n.9.

34 See note 30 *supra.*

35 336 U.S. 245 (1949). See note 4 *supra.*

36 Instant case at 504-05 (separate opinion).

37 Instant case at 507-08 (separate opinion).

The practical difference between Mr. Justice Frankfurter's view on the "evidence" problem and the position he attributes to the Court is not immediately apparent. Essentially it seems to be a difference in approach, the Frankfurter view affording a means by which the Board may expand its power in the area of partial strikes—a desirable if not inevitable result. "Partial strike" is a broad label covering a conglomeration of activities which ranges from the traditional slowdown to the refusal to cross picket lines.[38] As it would be undesirable to treat all such activities in the same manner, the Board needs wide discretion in dealing with what may be labeled "partial strikes": perhaps protecting some activities under the "concerted activities" language of section 7,[39] prohibiting others as indicative of "bad faith" under section 8(b)(3), and leaving still others to the arena of economic warfare or control by the states.[40] Proper classification requires treatment on a case-by-case basis. If Mr. Justice Frankfurter is correct in asserting that the Court held that partial strikes may never be evidence of bad faith it seems to follow that the Board could never prohibit a partial strike. The Frankfurter view, on the other hand, implies power in the Board to prohibit such tactics in some, as yet undefined, circumstances. In this respect, the Frankfurter view on the evidence issue would be preferable since it allows flexibility in treating the partial strike phenomenon. A careful reading of the Court's opinion, however, leaves doubt that it has been correctly characterized as banning Board consideration of partial strikes as evidence of failure to bargain in good faith. It appears, in fact, that the majority's disposition of the case fosters, rather than discourages, a case-by-case treatment of partial strikes in that it demands careful NLRB consideration of each case on its own merits.

RESTRAINT OF TRADE—Twenty-Year Coal Requirements Contract Held Invalid Under Clayton Act Section 3

Tampa Electric Company, a regulated private power firm, contracted with the Potter Towing Company, a Tennessee coal producer, for its total requirements of coal over a twenty-year period to fuel a new power plant then scheduled for immediate construction.[1] The contract represented the first large-scale attempt to introduce coal into the oil-dominated Florida boiler fuel market. The amount of coal to have been purchased during the first year of the contract would have equalled the current yearly requirements of all other Florida consumers combined. Both parties expended

38 See instant case at 512 n.8 (separate opinion).

39 See Mittenthal, *supra* note 18, at 97.

40 See note 4 *supra* and text accompanying notes 19-23 *supra*.

1 Relevant provisions of the contract are set out in the text of the court's opinion. Tampa Elec. Co. v. Nashville Coal Co., 276 F.2d 766, 769 (6th Cir.), *cert. granted*, 363 U.S. 836 (1960) (No. 931, 1959 Term; renumbered No. 87, 1960 Term).

large sums preparing to carry out the contract, but when the first coal was due, seller's successor in interest[2]—claiming that the contract violated section 3 of the Clayton Act[3] and thus freed seller from all obligation to perform under it—refused delivery. Buyer brought a declaratory judgment action in a federal district court seeking to have the contract declared valid and enforceable. Deciding the case upon cross-motions for summary judgment supported by undisputed affidavits, the district court ruled in favor of the defendant-seller, holding that the contract, because of its great duration and dollar volume, violated section 3 of the Clayton Act and could not be enforced.[4] The court of appeals affirmed on substantially the same grounds. *Tampa Elec. Co. v. Nashville Coal Co.*, 276 F.2d 766 (6th Cir.), *cert. granted*, 363 U.S. 836 (1960) (No. 931, 1959 Term; renumbered No. 87, 1960 Term).

The draftsmen of the Clayton Act sought to strengthen earlier antitrust legislation by specific condemnation of certain business practices thought beyond the reach of the broadly phrased Sherman Act of 1890.[5] Section 3 of the act[6] is directed against exclusive dealing contracts[7]—including "requirements" contracts, where the condition not to compete is implicit rather than express.[8] The condemnation of such contracts under section 3 would require relatively little judicial construction were it not

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[2] After the signing of the contract, the interest of the original seller passed to appellee Nashville Coal Co. and ultimately to appellee West Kentucky Coal Co. The latter company guaranteed buyer against any loss through nonperformance.

[3] 38 Stat. 731 (1914), 15 U.S.C. § 14 (1958). Seller also alleged a violation by the contract of the Sherman Act §§ 1, 2, 26 Stat. 209 (1890), as amended, 15 U.S.C. §§ 1, 2 (1958). Because of its disposition of the case under the Clayton Act, the district court did not reach the question of violation under the earlier law.

[4] Tampa Elec. Co. v. Nashville Coal Co., 168 F. Supp. 456 (M.D. Tenn. 1958), *aff'd*, 276 F.2d 766 (6th Cir.), *cert. granted*, 363 U.S. 836 (1960) (No. 931, 1959 Term; renumbered No. 87, 1960 Term).

[5] See Standard Fashion Co. v. Magrane-Houston Co., 258 U.S. 346, 355-56 (1922); H.R. Rep. No. 1168, 63d Cong., 2d Sess. 11-12 (1914).

[6] "It shall be unlawful for any person engaged in commerce, in the course of such commerce, to lease or make a sale or contract for sale of goods, wares, merchandise, machinery, supplies, or other commodities, whether patented or unpatented, for use, consumption, or resale within the United States . . . , or fix a price, charged therefor, or discount from, or rebate upon, such price, on the condition, agreement, or understanding that the lessee or purchaser thereof shall not use or deal in goods, wares, merchandise, machinery, supplies, or other commodities of a competitor or competitors of the lessor or seller, where the effect of such lease, sale, or contract for sale or such condition, agreement, or understanding may be to substantially lessen competition or tend to create a monopoly in any line of commerce." 38 Stat. 731 (1914), 15 U.S.C. § 14 (1958).

[7] H.R. Rep. No. 1168, 63d Cong., 2d Sess. 11-12 (1914).

[8] Standard Oil Co. of Cal. v. United States, 337 U.S. 293 (1949), is the leading case in which the Supreme Court passed on the validity of "requirements" contracts under § 3. The Court ignored the absence of any "condition, agreement or understanding that the . . . purchaser . . . shall not use or deal in the goods . . . of a competitor . . . ." See note 6 *supra*. The holding in the case assumed without explicitly deciding the question that the distinction between "requirements" contracts and "exclusive dealing" contracts is verbal and irrelevant. The Court averred that "it cannot be gainsaid that observance by a dealer of his requirements contract with Standard does effectively foreclose whatever opportunity there might be for competing suppliers to attract his patronage . . . ." 337 U.S. at 314.

for the final, or "qualifying," clause:[9] "It shall be unlawful . . . [to make the enumerated types of contracts] where the effect may be to substantially lessen competition or tend to create a monopoly in any line of commerce." This clause precludes per se condemnation of the enumerated contracts and appears to require courts to hear economic evidence relevant to the impact of such contracts upon competition.[10] But the Supreme Court, in *Standard Oil Co. of Cal. v. United States*,[11] held that the demands of the clause are satisfied "by proof that competition has been foreclosed in a substantial share of the line of commerce affected."[12] This test—while making unnecessary economic evidence of a given contract's effect upon competition and considering irrelevant whether that effect is beneficial or detrimental to business—does specifically call for "proof" that some foreclosure of competition has occurred in the "line of commerce affected." This proof involves a showing of relevant market—the "area of effective competition" in terms of both geography and products—[13] and

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[9] Lockhart & Sacks, *The Relevance of Economic Factors in Determining Whether Exclusive Arrangements Violate Section 3 of the Clayton Act*, 65 HARV. L. REV. 913, 915 (1952).

[10] The intent of Congress in adding this clause is far from clear. In passing the bill which later became the Clayton Act, the House refused to accept any limiting discretionary provision such as the "qualifying" clause which, it was said, would only give courts an excuse for leniency towards monopolists. Instead it passed a section which flatly prohibited the transactions enumerated in the present § 3 and provided criminal sanctions against them. See H.R. REP. No. 627, 63d Cong., 2d Sess. 2 (1914). The Senate, on the other hand, refused to adopt sanctions against any transaction except "tying" contracts. See 51 CONG. REC. 14273-76 (1914). It was thought that other offenses would better be left to the discretion of the projected Federal Trade Commission. From conference emerged the present § 3 with its ambiguous "qualifying" clause unexplained in the conference report. H.R. REP. No. 1168, 63d Cong., 2d Sess. (1914). The narrow purpose of the Clayton Act to close specific gaps in the Sherman Act is blurred by a compromise qualification which seems to revive the broad "rule of reason" adopted by the Supreme Court in first construing the 1890 law in Standard Oil Co. of N.J. v. United States, 221 U.S. 1, 63-64 (1910). For a concise summary of the entire legislative history of § 3, see Schwartz, *Potential Impairment of Competition—The Impact of Standard Oil Co. of California v. United States on the Standard of Legality Under the Clayton Act*, 98 U. PA. L. REV. 10, 21 n.40 (1949).

[11] 337 U.S. 293 (1949).

[12] *Id.* at 314.

[13] Relevant market has figured prominently in three recent Supreme Court cases. Two dealt with violations of the Sherman Act and upheld district court findings of relevant market based on extensive economic evidence. United States v. E. I. du Pont de Nemours & Co., 351 U.S. 377 (1956) (the *Cellophane Case*); International Boxing Club v. United States, 358 U.S. 242 (1959). In the third the Court ignored an extensive record dealing largely with conspiracy under the Sherman Act, reversed a district court decision for defendant based on a finding of no conspiracy, and held against defendant on the basis of stock acquisitions in violation of § 7 of the Clayton Act. A finding of relevant market was necessary to this holding, and, as the district court had not considered the issue, the Court made the finding itself. United States v. E. I. du Pont de Nemours & Co., 353 U.S. 586 (1957) (the *General Motors Case*). The *Cellophane Case* establishes a test for district courts in their finding of relevant market: "The 'market' . . . will vary with the part of commerce under consideration. The tests are constant. That market is composed of products that have reasonable interchangeability for the purpose for which they are produced—price, use and qualities considered." *Cellophane Case, supra* at 404. International Boxing Club v. United States, *supra* at 249-50, confirmed and applied the test in affirming a lower court decision. The *General Motors Case*, however, ignored the *Cellophane Case* and its test. In their desire to sunder the industrial giants Du Pont and General Motors,

of effective foreclosure of that market by the suspect contract. A finding of relevant market is, then, a precondition to a finding of violation of section 3, for substantial foreclosure under the *Standard Oil* test "can be determined only in terms of the market affected." [14]

The instant case involved a contract of substantial size and length.[15] Both the district court and the court of appeals seemed unfavorably impressed by the possible effect of such a sizable contract on a depressed coal industry in which many producers compete actively for the patronage of large power companies.[16] But size, in the context of section 3, is a relative concept: a contract is illegal only if the business volume it forecloses is substantial within the "line of commerce affected." And what line of commerce is affected is a question of fact, properly resolved at the trial level [17] by findings based on extensive economic evidence.[18] The record of the instant case, however, contains little that throws light on such line-of-commerce questions as the interchangeability of oil and coal and the

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the majority of four handled the issue of relevant market in cursory fashion: "The record shows that automotive finishes and fabrics have sufficient peculiar characteristics and uses to constitute them products sufficiently distinct from all other finishes and fabrics to make them a 'line of commerce' within the meaning of the Clayton Act." *General Motors Case, supra* at 593-94. Dissenting, Mr. Justice Burton criticized the majority's finding: "[T]here are no findings of fact dealing with the relevant market. Also, the record appears deficient on such crucial questions as the characteristics of the products, the uses to which they are put, the extent to which they are interchangeable with competitors' products, and so on. For these reasons I believe the Court in any event should remand the case to the District Court to give the District Judge, who is more familiar with the record than we can be, an opportunity to review the record . . . . By declining to remand, the Court necessitates a scrutiny here of this huge record for determination of an essentially factual question not passed on by the District Court, and not thoroughly briefed or argued by the parties." *General Motors Case, supra* at 649 n.30. The *Cellophane Case* and the *General Motors Case* stand for two divergent ways of approaching the relevant market issue: the former indicates how broad a relevant market a district court may properly find when the record contains sufficient supporting economic data, while the latter shows how narrowly a court may construe relevant market in order to further policy ends when there is little supporting evidence in the record. Thus, though reflecting divergent philosophies, the two cases are not clearly contradictory.

14 United States v. E. I. du Pont de Nemours & Co., 353 U.S. 586, 593 (1957).

15 "Using the estimated 1,000,000 tons for 1961 as the average annual purchases during the twenty year life of the contract, the total dollar pre-emption over the life of the contract at the minimum price of $6.40 per ton would amount to $128,000,000.00. This is, of course, not insignificant or insubstantial." Instant case at 772.

16 For congressional recognition of the extremely depressed condition of the bituminous coal industry and the role of electric utilities as potential new markets, see *Coal—Production and Conservation*, S. REP. No. 1494, 86th Cong., 2d Sess. (1960).

17 See International Boxing Club v. United States, 358 U.S. 242, 249-53 (1959); United States v. E. I. du Pont de Nemours & Co., 351 U.S. 377, 378-80 (1956); United States v. E. I. du Pont de Nemours & Co., 353 U.S. 586, 649 (1957) (dissent); *cf.* Reply Brief for Appellant, instant case, p. 23: "The market affected by this contract of course is not the Gannon Station. It is the entire 'area' within which there is 'effective competition' between other sellers of boiler fuel and appellees. . . . The question is one of fact: the 'relevant market' here is the boiler fuel market, and not the coal market."

18 See United States v. International Boxing Club, 150 F. Supp. 397 (S.D.N.Y. 1957), *aff'd*, 358 U.S. 242 (1959); United States v. E. I. du Pont de Nemours & Co., 118 F. Supp. 41 (D. Del. 1953), *aff'd*, 351 U.S. 377 (1956).

geographical area of effective competition.[19] The district court, in limiting the relevant market to the sales of a fungible within a single state, resolved on summary judgment a crucial fact issue which had not been adequately presented to the court. This resolution ignored both the obvious competition between coal and oil for the boiler fuel market and also the wider market for the seller's coal throughout the southeastern United States;[20] instead it was based upon two boundaries which, if not economically realistic, at least had the virtue of being so obvious as to be susceptible of judicial notice.[21] And having made its finding of relevant market, the district court went on to apply *Standard Oil's* quantitative substantiality test—the use of size alone as a criterion for satisfying the qualifying clause without recourse to evidence of actual monopolistic tendencies.[22] But while

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[19] The record contains the complaint and answer, the disputed contract *in haec verba*, and the transfer of interest to the appellee. It contains the cross motions for summary judgment. Seller's motion is supported by an affidavit and attached exhibit showing that subsequent to the breach the buyer entered a new contract for purchase of coal from a competing producer and that the new contract is subject to cancellation upon twelve months' notice or immediately if seller begins to perform under the disputed contract. Buyer's motion for summary judgment is supported by two affidavits. The first presents the background facts; attached to it is an exhibit showing that the buyer had entered negotiations with one Peabody Coal Co. for coal to be used after conversion of one of its oil burning plants. The second affidavit offers brief indication that oil prices had been reduced in response to the projected conversion from oil to coal. It also indicated that atomic power would soon be used as a fuel competing with both coal and oil. The thrust of these affidavits is to support the buyer's contention that the relevant market in this case is boiler fuels, not coal alone, and that within this larger market the disputed contract does not effectively foreclose competition. Record, *passim*.

[20] The district court (as well as the Supreme Court, in United States v. E. I. du Pont de Nemours & Co., 353 U.S. 586, 594 n.13 (1957)) cited, out of context, the following words as authority for its narrow market holding: "The phrase 'in any line of commerce' is comprehensive and means that if the forbidden effect or tendency is produced in *one* out of *all* the various lines of commerce, the words 'in *any* line of commerce' literally are satisfied." George Van Camp & Sons Co. v. American Can Co., 278 U.S. 245, 253 (1929). That case, however, dealt in no way with the problem of relevant market. Defendant can company had, by price discrimination, enabled a competitor of Van Camp to gain a dominance in the canned food industry. Can company's "line of commerce" was the sale of metal containers. It defended on the ground that the Clayton Act prohibited discrimination only in the line of commerce in which a defendant is actually engaged. In holding can company had violated § 2 of the Clayton Act, the Court said the words of the section were fulfilled "if the forbidden effect or tendency is produced in *one* out of *all* the various lines of commerce." *Id.* at 253. And the court of appeals in the instant case noted only: "It is true that coal and oil are competitive fuels. . . . But for purposes of section 3 of the Clayton Act, we believe that each is to be treated as a separate, defined subdivision of the fuel industry generally." Instant case at 772. To support this conclusion it cites only *Van Camp* and the *General Motors Case*. *Cf.* Brief for Petitioner in the Supreme Court, pp. 39-42, in which the buyer presents at that level considerable economic evidence of a broad boiler fuel market.

[21] The instant case, it must be remembered, was one upon a contract, rather than a full-scale antitrust prosecution. As is evidenced by the cross-motions for summary judgment, neither party wished to present the kind of extensive economic evidence which characterized such litigation as the *Cellophane Case*. It is hardly to be expected that here antitrust issues—even relevant market—would receive the detailed attention at the trial level which a prosecution under the antitrust laws would necessitate. See Wood, *Unenforceable Contracts and Other Consequences*, in AN ANTITRUST HANDBOOK 567 (1958).

[22] See notes 11-14 *supra* and accompanying text.

Standard Oil was good precedent for ignoring evidence of the peculiar suitability of a requirements contract to the public power industry or the beneficial effect upon competition of introducing coal into an area long dominated by oil,[23] there was no precedent for a finding of relevant market on summary judgment.[24]

The court of appeals—having before it essentially the same record as did the trial court—legitimized the district court's use of "quantitative substantiality" by interpreting *United States v. E. I. du Pont de Nemours & Co.* (the *General Motors Case*) [25] so as to permit an arbitrary finding of relevant market based essentially on judicial notice. But the finding of relevant market in the *General Motors Case* was not a central holding but only a means to a policy end under section 7 [26]—the elimination of the potential threat to competition created when one giant of industry acquires substantial stock in another.[27] The policy of section 3, evoked by the court of appeals, hardly requires the condemnation of a contract freely entered into by parties of ordinary size where that contract has not been shown

23 See Standard Oil Co. of Cal. v. United States, 337 U.S. 293, 307-12 (1949).

24 International Salt Co. v. United States, 332 U.S. 392 (1947), is the only leading case under the Clayton Act to have been decided and affirmed on summary judgment. In that case, the defendant salt company admitted the use of contracts "tying" purchases of salt to the rental of patented salt processing machines. It also admitted selling $500,000 worth of salt under these contracts. The Government then moved for summary judgment which was granted. The Supreme Court rejected arguments by the company that despite the use of the proscribed contracts, competition had not been lessened, and eliminated any factual dispute over the issue of impact on competition by holding the entire issue irrelevant. The issue of relevant market was not important in the case for two reasons. First, the geographical market was clear. Defendant was "the country's largest producer for industrial uses," *id.* at 394, and operated throughout the United States. And there was no indication of any substitute for salt as the relevant product. Second, the case dealt with "tying" contracts which "serve hardly any purpose beyond the suppression of competition." Standard Oil Co. of Cal. v. United States, 337 U.S. 293, 305-06. Use of these contracts amounted to abuse of patent, and little evidence was demanded to support a government prosecution. The willingness of the courts to hold such practices illegal without regard to economic factors is shown by the holding that $500,000 is a "substantial" volume of business without mention of market percentages. The presence of "tying" contracts and patent abuse in *International Salt* serves to distinguish that case from the instant one and explains the absence in the former of any discussion of relevant market. *Cf.* Standard Oil Co. of Cal. v. United States, *supra*, in which Mr. Justice Frankfurter disposed of contracts for tires and other commodities which comprised only 2% of the relevant market—hardly a "substantial foreclosure"—by noting "in passing that the exclusive supply provisions for tires, tubes, batteries, and other accessories which are part of some of Standard's contracts with dealers who have also agreed to purchase their requirements of petroleum products should perhaps be considered, as a matter of classification, tying rather than requirements contracts." *Id.* at 305 n.8. As such they are subject to condemnation per se without serious consideration of their relation to the relevant market.

25 353 U.S. 586 (1957). The "test" suggested in the *General Motors Case* is: "[A]utomotive finishes . . . have sufficient peculiar characteristics and uses to constitute them products sufficiently distinct from all other finishes . . . to make them a 'line of commerce' within the meaning of the Clayton Act." *Id.* at 593-94. See also note 20 *supra.*

26 Clayton Act, ch. 323, § 7, 38 Stat. 731 (1914) (now Clayton Act § 7, as amended, 64 Stat. 1125 (1950), 15 U.S.C. § 18 (1958).

27 See Schwartz, *New Approaches to the Control of Oligopoly*, 109 U. PA. L. REV. 31, 37-38 (1960).

to foreclose a substantial portion of an actual, proven market.[28] Such a realistic market was not proved and, as a result, the defendant's motion for summary judgment was prematurely sustained.[29] The effect of this premature action is virtually to eliminate from section 3 the demands of the qualifying clause. Any line of commerce can be shown to be "foreclosed in a substantial share" if the limits of the line are drawn narrowly enough. Size alone thus becomes the sole criterion for violation of the section. In fact, the district court said: "A contract to supply the total coal requirements of an operation of such magnitude for such a protracted exclusionary period clearly falls within the purview of the statute." [30] And the court of appeals confirmed: "A 'requirements' contract of some companies over a short period of time might well avoid the effect proscribed by the statute, while such a contract of large proportions and extending over a long period of years would clearly fall within the provisions of the statute." [31] The very real problem of relevant market is unjustifiably ignored, leaving the holding of violation under section 3 without necessary support.

[28] "In Standard Oil Co. of California v. United States . . . the Court held . . . that it was the purpose of Section 3 to remove a potential clog on competition wherever, were it to become actual, it would impede a substantial amount of competitive activity." Instant case at 772.

[29] *Cf.* United States v. Bethlehem Steel Corp., 157 F. Supp. 877, *subsequent findings and opinion*, 168 F. Supp. 576 (S.D.N.Y. 1958). In this case the court stated that the government's burden of proof in establishing a violation of § 7 involved a showing of both "line of commerce" and "section of the country." 157 F. Supp. at 879. The court denied the government's motion for summary judgment on the grounds that the issues involved were too complex and far reaching for summary disposition.

[30] Tampa Elec. Co. v. Nashville Coal Co., 168 F. Supp. 456, 458 (M.D. Tenn. 1958).

[31] Instant case at 771.