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# Legislation and Administration: Aid to Dependant Children -- Police Power -- State Statute Denies Further Aid to Child While Mother Continues in Immoral Relationships

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# LEGISLATION AND ADMINISTRATION

AID TO DEPENDENT CHILDREN — POLICE POWER — STATE STATUTE DENIES FURTHER AID TO CHILD WHILE MOTHER CONTINUES IN IMMORAL RELATIONSHIPS — Many states have expressed concern about aid to illegitimate children, especially to those born while the mother is receiving state assistance for other children. The opinion that aid to dependent children (A.D.C.) is in this situation subsidizing immorality and in effect granting a bounty for illegitimate children has become widespread. The drain on state treasuries for A.D.C., coupled with the general increase in state expenditures, has precipitated state action. Louisiana, after enacting one plan to remove A.D.C. from certain illegitimates,[1] put into effect, on July 7, 1960, the following provision:

> Any other provisions of this Section to the contrary notwithstanding, no assistance shall be granted to a child living with its [sic] mother, if the mother has had an illegitimate child after receiving assistance from the department of public welfare, unless and until proof satisfactory to the parish board of public welfare has been presented showing that the mother has ceased illicit relationships and is maintaining a suitable home for the children.[2]

The probable purpose of this provision was the elimination of financial benefits to mothers of illegitimate children. But, under the statute, it is the child, whether legitimate or illegitimate, who will be penalized by the loss of aid. The validity and wisdom of such a provision is questionable.

Each state has made some provision for the care of needy children. The federal government has agreed to support these plans under the terms of Title IV of the Social Security Act.[3] This support is only given to states whose plans have been approved by the Secretary of Health, Education and Welfare. The department has stated that it will not approve the Louisiana provision, and threatens to order the state to show cause[4] why federal funds should not be cut off.[5]

To end federal aid, the Secretary must find that the plan or its administration imposes a residence requirement prohibited by section 602(b) of Title 42,[6] or that there has been a failure to comply substantially with a provision of section 602(a) of Title 42. Because no residential requirement is included in the Louisiana provision, the only ground upon which the Secretary may suspend federal money is a deviation from the terms of section 602(a), a provision which the Louisiana legislature has apparently fully satisfied.[7]

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1 LA. REV. STAT. § 46:233(c) (Supp. 1960):

> In no instance shall assistance be granted to an illegitimate child if the mother of the illegitimate child in question is the mother of two or more illegitimate children unless it should be determined that the conception and birth of such child was due to extenuating circumstances over which the mother had no control. This provision is not intended to preclude an illegitimate child from receiving assistance if the child is already receiving assistance prior to the effective date of this Act, or if the child is the first or second illegitimate child born to the mother of the child in question. Until such time as the immediately foregoing provision is approved for federal participation by the Secretary of Health, Education and Welfare Department, the provision shall not be effective.

2 LA. REV. STAT. § 46:233(d) (Supp. 1960).

3 70 Stat. 848 (1956), 42 U.S.C. §§ 601-06 (1959).

4 See 106 CONG. REC. A41918 (daily ed. June 9, 1960), remarks of Rep. Everett to the effect that the Department has never approved a state plan of this nature.

5 67 Stat. 631 (1953), 42 U.S.C. § 604 (1959).

6 ASCH, SOCIAL SECURITY AND RELATED WELFARE PROGRAMS 84 (rev. ed. 1957).

7 67 Stat. 631 (1953), 42 U.S.C. § 602(a) (1959). This paragraph provides that a state plan for A.D.C. must provide that: it be in effect in all political subdivisions of the state; it be supported financially by the state; a single agency be set up to administer or

It may be argued that the effect of Louisiana's provision is contrary to the purpose of the federal grant.[8] But Congress has neither included standards for eligibility in section 602, nor provided for the imposition of standards by the Department of Health, Education and Welfare, as a prerequisite to federal aid. Therefore, it will be presumed that Congress left such decision-making to the sound discretion of the state legislatures.[9]

Although the *mother's* argument that the provision is contrary to the purpose of the grant will not lie with the Secretary of Health, Education and Welfare, the dependent child could prevail on an analogous basis.

The child's argument might be based on a denial of equal protection because of an unreasonable classification made by the Louisiana legislature. The Louisiana Bill of Rights does not contain an "equal protection" clause, but its "due process" clause[10] has been held to safeguard the rights guaranteed under the "equal protection" clause of the Fourteenth Amendment.[11] The constitutionality of the A.D.C. provision could, therefore, be successfully challenged under both the state and the federal constitutions.

It has often been held that pensions, compensation allowances, and privileges are gratuities given by the state or federal government, and that no "vested" right is created in the person benefited.[12] The grant may be withdrawn or redistributed at any time without subjecting the legislature to further payments. A.D.C. has also been included in this category as a gift from the state upon terms and conditions approved by the legislature.[13] "The theory of the American political system is that the citizen supports the State not the reverse." [14]

Cases challenging legislation as violative of the equal protection clause do not depend on whether the right is vested or not. When a state has used public funds

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supervise administration of the plan; opportunity be given anyone denied aid for a hearing before the agency; methods of administration be used as the Secretary of Health, Education and Welfare shall direct; the agency make reports as required by the Secretary; the agency take into consideration other income and resources in determining need of the child; safeguards against disclosure of information about applicants be available; anyone desiring A.D.C. may apply; notice to law enforcement agencies of parental desertion shall immediately issue; no aid shall go to one receiving old age pensions; and, a description of other services of the State, if any, designed to maintain and strengthen family life be available to the public. See also DEPT. OF HEALTH, EDUCATION AND WELFARE, PUBLIC ASSISTANCE UNDER THE SOCIAL SECURITY ACT 18-20 (1957).

8 70 Stat. 848 (1956), 42 U.S.C. § 601 (1959); DEPT. OF HEALTH, EDUCATION AND WELFARE, *op. cit. supra* note 7, at 4:

> The purpose of the program [A.D.C.] is to enable needy children who are deprived of parental support or care to have the economic support and services they need for health and development, to assure for them an opportunity to grow up in their own family setting, to receive an education that will help them to realize their capacities, and to share in neighborhood and community living. In these ways the program supports and strengthens family life.

9 DEPT. OF HEALTH, EDUCATION AND WELFARE, *op. cit. supra* note 7, at 18-19:

> The purpose of the State's plan is to establish . . . a mutual understanding as to the legal and administrative conditions of the State's operation and the criteria governing its decisions: . . . (4) to provide a basis on which the State can proceed with its operation with security that grants will continue so long as operation is in substantial compliance with provisions required by the Act to be included in the plan; (5) to enable States to develop individual plans which include the required provisions to secure Federal aid, but are suited to diverse conditions and resources in each State and to the stage of development of their public welfare program.

10 LA. CONST. art. 1, § 2.

11 Simmons v. City of Shreveport, 221 La. 902, 60 So. 2d 867 (1952).

12 See *e.g.*, Lynch v. United States, 292 U.S. 571, 577 (1934); United States v. Tiller, 107 U.S. 64 (1882).

13 Ambrose v. State Dept. of Public Health and Welfare, 319 S.W.2d 271, 274 (Mo. 1958).

14 Newland v. Child, 73 Ida. 530, 254 P.2d 1066, 1070 (1953).

to provide service which it was under no legal obligation to provide, it has been held to have created a "personal" right which must be made available to all.[15] This personal right has not been limited to cases involving racial discrimination. In *Collins v. State Bd. of Social Welfare*,[16] the court held that, although the child's right to A.D.C. was purely statutory, because there was no common law or constitutional duty resting on the state, a beneficiary of the plan could still challenge the constitutionality of a provision reducing his assistance. The court said:

> It is a right which may be extended, diminished, conditioned or abrogated by the legislature and one who asserts rights to assistance thereunder must comply with all reasonable and non-discriminatory conditions therein imposed. . . . "but if it fails to include and affect alike all persons of the same class, and extends immunities or privileges to one portion and denies them to others of like kind, by unreasonable or arbitrary sub-classification, it comes within the constitutional prohibition against class legislation." [17]

Where unusual discrimination is involved, as is herein contended, the court should carefully determine whether it is obnoxious to the equal protection clause.[18] If a deliberately invidious discrimination is found to have been created by the provision, then the court should find a denial of constitutional right.[19] Equal protection depends on whether the legislature has made a classification reasonably related to the purposes of the act in which it is found.[20]

The purpose of A.D.C. is to help needy children achieve normal home lives. It aims at encouraging personal parental care of the child, and maintaining and strengthening the family relationship.[21] *Crowley v. Bressler*[22] expresses this concept:

> [C]hild welfare legislation . . . was enacted primarily for the purpose of retaining home conditions and home atmosphere for dependent children. The ideal sought was to keep and preserve the social, the spiritual and physical gains for children as obtained by them from their parents. The interest of the child has been paramount. . . . Regard must be had for the mental, physical and moral welfare of the child.
>
> The spirit of such legislation is . . . to preserve the independence and morale of the child by keeping him in as nearly a normal family environment as possible.

In the words of the Supreme Court of Iowa, the subject of the classification made by the legislature in providing A.D.C. is the needy child in a certain environment, the home:

> We think it clear that under the provisions of said Chapter the classification adopted by the legislature is the *needy* child which is diversified from all needy children by limiting it to the needy child who is residing in the home of a relative. It is a proper and reasonable classification.[23]

The statute herein considered makes a further classification. It stops payments for needy older children when the mother bears an illegitimate child while receiving A.D.C. payments. This subclassification in no way implements the purposes of the program. On the contrary, it ignores the ideals and spirit of child welfare legislation, which is designed to assist needy children. The child whose mother has borne an illegitimate child is more needy than ever. Such legislation may well

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15 Brown v. Bd. of Education of Topeka, 347 U.S. 483 (1954); Beal v. Holcome, 193 F.2d 384 (5th Cir. 1952), *cert. denied*, 347 U.S. 974 (1954); Holmes v. City of Atlanta, 124 F. Supp. 290 (N.D. Ga. 1954), *aff'd* 223 F.2d 93, *modified* 350 U.S. 879 (1955).

16 248 Ia. 369, 81 N.W.2d 4 (1957).

17 *Id.* at 7-8.

18 Louisville Gas Co. v. Coleman, 277 U.S. 32, 37-38 (1928).

19 Skinner v. Oklahoma, 316 U.S. 535, 541 (1942).

20 Morey v. Doud, 354 U.S. 457, 465 (1957); Goesaert v. Cleary, 335 U.S. 464, 466-67 (1948); Howlett v. Social Security Commission, 347 Mo. 784, 793, 149 S.W.2d 806, 812 (1941): In an old age assistance benefits case, the court said: "[A]s long as the principle of classification is a reasonable one, the legislature may deny them to one class while granting them to another. . . ."

21 *Supra*, note 8.

22 41 N.Y.S. 2d 441, 445 (1943).

23 Collins v. State Bd. of Social Welfare, 81 N.W.2d 8 (1957).

result in the deterioration of family spirit, increased physical needs and creeping feelings of inferiority and insecurity in the child.[24]

That the primary concern of child welfare legislation is the child himself, and not the accidental conditions of his birth—or the birth of his brothers and sisters —is further demonstrated by cases arising under old age pension laws.[25] The attitude towards benefit payments is expressed in dicta from *Wilkie v. O'Connor*:[26]

> Another of appellant's arguments is entirely fallacious. In his brief he says that to a man who has "lived a good life for sixty-five years . . . this old age assistance statute should be viewed in the light of a reward." There is nothing in the record to show that appellant has lived a "good life." In any case his old age pension is not given as a reward, it is given to satisfy a human need regardless of the kind of life the man has lived. . . .

In the pension cases, as in this situation, the purpose of the legislation is to provide for a needy person in a certain environment. The child, legitimate or illegitimate, and regardless of his mother's sexual activity, remains a needy person. So long as he remains needy and is living with his mother, he is within the class sought to be provided for by A.D.C. His status as a needy human being demands first consideration; his legitimacy — or the legitimacy of his brothers and sisters — has no reasonable relationship to this need for material support.

The real purpose of *this* provision, like that in *Collins v. State Bd. of Social Welfare*,[27] is economic. But *Collins* holds that the saving of state funds is no justification for distinguishing between members of a class, each of whom is the object of a particular legislative investment. Nor will it be sufficient for the state to say that every evil need not be reached by social legislation[28] to make a classification reasonable. While this is true as a broad proposition, it is likewise true that a law must reach all those within the class which the purpose of the law indicates.

A court, after carefully considering the provision, and then comparing the effect of the statute with the aims of A.D.C., should find that eliminating aid to innocent children is neither reasonable nor prudent.

A recent study by the Social Security Administration supports this conclusion.[29] The Administration's findings rebutted the presumption that federal-state aid to dependent children increased illegitimacy. The report stated that only 13 per cent of the illegitimate children in the United States are on A.D.C. rolls (the other 87 per cent are supported by parents, adoptive parents or relatives). The average length of time that aid was received was two and a half years. Only 20 per cent of the aid was going to unwed mothers and more than 15 per cent of these were working full or part time. "In view of these facts," the report noted, "it would be surprising if the motivating factor in repeated pregnancies out of wedlock were the mother's desire to increase her assistance payments to cover part of the basic cost of rearing another child." [30]

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24 Brown v. Bd. of Education of Topeka, 347 U.S. 483, 494 (1954): "To separate [Negro children] from others of similar age and qualifications solely because of their race generates a feeling of inferiority to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone."

25 See, *e.g.*, Milwaukee County v. City of Green Bay, 249 Wis. 90, 23 N.W.2d 487 (1946), where an indigent was awarded payments although his sons were required by law to support him and were able, if not willing, to do so; Los Angeles County v. La Fuente, 129 P.2d 378 (Cal. 1942), *cert. denied*, 317 U.S. 698 (1942), *rehearings denied*, 318 U.S. 798, 318 U.S. 800, 318 U.S. 802, 319 U.S. 778, 319 U.S. 783 (1943), where aid was granted a mother who had declined an offer of assistance from her daughter. The emphasis in such cases is placed most heavily upon the necessity that the indigent have support. The method is a secondary consideration.

26 261 App. Div. 373, 25 N.Y.S.2d 617, 619-20 (1941).

27 81 N.W.2d 4, 9 (Iowa 1957).

28 Dimke v. Finke, 209 Minn. 29, 34, 295 N.W. 75, 79 (1940).

29 N.Y. Times, Aug. 3, 1960, p. 30, col. 1.

30 *Ibid.* Listed as causes for the rise in the illegitimate birth rate were parents' lack of integration into generally accepted American culture; more tolerant attitudes toward illicit sex relations; changes in patterns of family life, including "going steady" at an early age; improved

Admittedly, the financing of state-wide A.D.C., even with federal support, is so large that abuses must be kept at a minimum. There are alternatives other than the one chosen by Louisiana. Probably the most progressive of these has been taken recently in Tennessee, where a provision similar to Louisiana's had been vetoed.[31]

When the parent or parents in Tennessee have failed to provide a stable moral home life for a child who is receiving assistance, the Department of Public Welfare has a legal responsibility to protect the child through the juvenile courts.[32] Welfare workers are to exhaust every resource in attempting to correct home life; but if all else fails, they are to initiate action which will result in removal of the child to a foster home or institution.[33] When a child is removed, of course, assistance ends.[34] Having an illegitimate child while receiving assistance payments is prima facie evidence of failure to provide a stable moral environment.[35] It should be noted that this plan has been approved by the federal Department of Health, Education and Welfare.[36]

The Tennessee plan may fail, however, if the welfare worker does not use the available remedies to their best advantage. In the past, the welfare workers' reluctance to institute proceedings against offenders has been severely criticized.[37] Prompt and thorough action is essential if unstable homes are not to multiply illegitimacy. But action under the Tennessee statute has the virtue of attempting to minimize abuses of the program without penalizing the child beyond withdrawing him from a home which, under the statutory presumption, is not a fit place for him.

The solution to the problem may not be widely effected in the near future. Using the Tennessee plan, however, and strengthening it with criminal statutes punishing parental neglect of financial responsibility, sexual promiscuity and prostitution,[38] should clear up many immediate problems. Future study and education will be necessary to continue any present advances. Whatever the steps taken by state legislatures, punishment should be imposed on erring parents, not on children whose only fault is that they are the victims of circumstance.

*Anthony T. Bruno*

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CONSTITUTIONAL LAW — POLITICAL PARTIES — STATE STATUTE REQUIRING THAT CANDIDATES BE MEMBERS OF TWO YEARS' STANDING IN THEIR PARTIES IS A VALID EXERCISE OF THE POLICE POWER — E. J. Crowells, a prospective candidate to office in the state of Florida, challenged the validity of a provision of the Florida Primary Election Law[1] requiring every candidate for nomination to any office to take and subscribe in writing to an oath or affirmation stating that he had not registered

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health conditions, including fewer miscarriages and stillbirths. The conclusion was that a broader program of prevention and correction was needed, that termination of A.D.C. payments was no solution. See, generally, BURNS, SOCIAL SECURITY AND PUBLIC POLICY 86-89 (1956).

31 106 CONG. REC. A4919 (daily ed. June 9, 1960).

32 TENN. REV. STAT. 37:242-744 (Supp. 1960).

33 106 CONG. REC. A4959-60 (daily ed. June 13, 1960), from editorial of the Nashville Banner, published April 21, 1960, read into Record by Rep. Robert A. Everett of Tennessee.

34 *Ibid.*

35 106 CONG. REC. A4919 (daily ed. June 9, 1960), letter from Mrs. C. Frank Scott, Commissioner of Tennessee's Department of Public Welfare, read into the Record, with favorable comment by Rep. Everett.

36 106 CONG. REC. A4919 (daily ed. June 9, 1960), remarks of Rep. Everett.

37 106 CONG. REC. 7017 (daily ed. April 7, 1960), letter from Judge Virgil Langtry to Senator Styles Bridges of New Hampshire, attacking the policies of welfare workers in Portland, Oregon.

38 See *e.g.*, N.J. REV. STAT. § § 2A:88-1, 110-1, 133-1.

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1 FLA. STAT. ANN. § 99.021 (1960).

as a member of any other political party during the two years immediately preceding the date of such oath. From an adverse decree of the Circuit Court, Broward County, the prospective candidate appealed to the Supreme Court of Florida. *Held*: affirmed. The requirement of two years' registration within the party as a condition precedent to becoming a candidate of that party is a reasonable regulation and does not contravene any requirements of the federal or state constitutions; it contributes directly to the maintenance of party loyalty and the perpetuation of American political life. *Crowells v. Petersen,* 118 So. 2d 539 (Fla. 1960).

The immediate issue in this case is whether a state statute, which requires every candidate for nomination to any office to take a party loyalty oath, is valid in light of the federal constitution; more broadly, the case raises a question as to whether perpetuation of the American party system is a legitimate end for the exercise of state legislative power.

*Suffrage*

That a state has the power to affix reasonable regulations concerning the qualifications of candidates is uniformly accepted as being in accord with the Constitution of the United States.[2] This power flows from the right of states to regulate suffrage and to determine the class of inhabitants who may vote,[3] subject to the federal constitutional guarantees as to race, color, and previous condition of servitude.[4] Each state may define the right to vote in its own constitution or empower its legislature to do so.[5] The right of suffrage is not a natural right of the citizen,[6] but a franchise dependent upon law, by which it must be conferred to permit its exercise.[7] The states have derivative power to initiate reasonable regulations concerning the nomination of party candidates for office,[8] through the state legislatures or state constitutions, and, unless primary election laws contravene federal constitutional provisions, they will be controlling on all political parties and candidates.[9]

*Police power*

Political parties were not, it would seem, contemplated by the original drafters of the Constitution. But so potent have they become in determining the administration of government that they are now regarded as inseparable from, if not essential to, a republican form of government.[10] A proper administration of the affairs of a sovereign state vitally affects the welfare of its citizens, and parties have a crucial effect on administration. Where a matter of such importance is at stake, the state has the ability, under the police power vested in its legislature, to make reasonable regulations for the nomination of candidates.[11]

While the states have the power to enact primary election laws, they must be reasonable regulations.[12] In *Crowells,* the court held that the requirement of the party loyalty oath under the existing statute was a reasonable legislative regulation, an attitude which has been accepted by numerous courts.[13]

Some question has been raised as to the violation of the secret ballot which such a fealty test causes by allowing the voting record of an individual to become public knowledge. It has been well settled, however, that such a test in no manner

2 *E.g.,* State v. Felton, 77 Ohio St. 554, 84 N.E. 85 (1908).
3 United States v. Cruikshank, 92 U.S. 542 (1875).
4 Meyers v. Anderson, 238 U.S. 368 (1915).
5 Kineen v. Wells, 144 Mass. 497, 11 N.E. 916 (1887).
6 United States v. Cruikshank, 92 U.S. 542 (1875).
7 Scown v. Czarnecki, 264 Ill. 305, 106 N.E. 276 (1914).
8 Mairs v. Peters, 52 So. 2d 793 (Fla. 1951).
9 *Id.* at 794.
10 See Crowells v. Petersen, 118 So. 2d 539 (Fla. 1960).
11 Ladd v. Holmes, 40 Ore. 167, 66 Pac. 714 (1901).
12 Mairs v. Peters, 52 So. 2d 793 (Fla. 1951).
13 *E.g.,* Mairs v. Peters, *supra* note 12, and cases cited therein.

violates statutory provisions for the secrecy of the ballot, for "it is the secrecy of the ballot which the law protects and not secrecy as to the political party with which the voters intend to act." [14] The authorities hold that participation by an individual in a primary election, either as a voter or as a candidate, is entirely voluntary on his part; by entering the primary, he voluntarily subjects himself to the party's reasonable rules and regulations.[15]

Political parties — associations of voters believing in certain principles of government — are formed to urge the adoption and execution of such principles in governmental affairs through officers of like beliefs. For many years they were unrestrained, and as a consequence, evils arose which called for legislative action. These evils, to be considered later, included non-partisan participation in partisan proceedings and the influence exerted by party bosses on candidates. While political parties are still voluntary organizations, they are recognized as acting for the public interest, a circumstance which subjects them to reasonable regulations.[16] The rationale for decisions supporting primary election laws is that a man has a constitutional right to be a partisan; but he has no constitutional right as a nonpartisan to the benefits of partisanship. Such laws are deemed necessary to preserve the exclusive organization of political parties.

The fealty test was adopted from voluntary rules of political parties. It was enacted into law to enable parties to protect themselves from outside influences.[17] Primary election laws are not designed to protect a nonpartisan's rights to participate in nominations. The statutes aim to preserve the integrity and usefulness of political parties by giving to each adherent thereof a free and equal voice in the selection of candidates and the determination of party principles and policies. This cannot be accomplished without excluding those who adhere to other parties or to no party.[18] As the court in *Crowells* states: "Reasonable restrictions on party candidates by the state contribute directly to the maintenance of party loyalty and a perpetuation of the party system."

It was not the purpose of the fealty test in *Crowells* to indirectly destroy political organizations. However, such destruction would be the logical result if political parties and the states could not, by some test of affiliation, exclude their opponents from participation.

A further purpose of the primary election laws was to remove candidates from the influences of political bosses. This is accomplished either by a provision in the laws for direct nomination of candidates by the party members, or by their ratification of candidates selected at representative conventions.[19]

The importance of political parties in America was considered by Alexis De Tocqueville, who viewed the then existing political parties with an unfriendly eye because of their passions and prejudices. He stated that:

> Parties are a necessary evil in free governments. . . . At certain periods a nation may be oppressed by such insupportable evils as to conceive the design of effecting a total change in its political constitutions; at other times the mischief lies still deeper, and the existence of society itself is endangered. Such are the times of great revolutions and of great parties. . . . The political parties which I style great are those which cling to principles more than to consequences; to general and not to special cases; to ideas and not to men.[20]

Another distinguished foreign critic, Lord Bryce, viewing our political organization in more recent times, said:

> In America the great moving forces are the parties. The spirit and force of party has in America been an essential to the action of the machinery of

14 Lett v. Dennis, 221 Ala. 432, 129 So. 33, 34 (1930).
15 State v. Michel, 121 La. 374, 46 So. 430 (1908).
16 Bailey v. Van Pelt, 78 Fla. 337, 82 So. 789 (1919).
17 Kelso v. Cook, 184 Ind. 173, 110 N.W. 987 (1916).
18 *Ibid.*
19 Riter v. Douglas, 32 Nev. 400, 109 Pac. 444 (1919).
20 De Tocqueville, Democracy in America 187 (1837).

> government as steam is to a locomotive engine; or to vary the simile, party association and organization are to the organs of government almost what the motor nerves are to the muscles, sinews, and bones of the human body. Political parties transmit the motive power. They determine the directions in which the organs act. A description of them is therefore a necessary complement to an account of the Constitution and government, for it is into the hands of parties that the working of the government has fallen. Their ingenuity, stimulated by incessant rivalry, has turned many provisions of the Constitution to unforeseen ones, and given to the legal institutions of the country no small part of their present color.[21]

It is not to be expected that all the hopes of the founders of the American Constitution would be fulfilled. They do not seem to have been prepared for the rapid development of political parties, nor the thorough organization which the American parties soon provided for themselves. The *Crowells* court in considering the validity of the party loyalty oath, and primary election laws in general, seems to emphasize protecting the American party system. The inference is that future courts will continue to protect this system and uphold primary election laws.

That the party system in America is vital is unquestioned. Parties are essential to the effective operation of government. Regulations of parties by the states is founded on the police power and the derivative power possessed over suffrage. The regulations, to be valid, must not conflict with federal or state constitutions. They must be reasonable. The plaintiff in *Crowells,* therefore, was not denied a constitutional right. The inference is that his political rights were preserved by perpetuating the party system through primary election laws.

*Robert W. Cox*

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LABOR LAW — ARBITRATION — SCOPE OF REVIEW IN JUDICIAL ENFORCEMENT OF PROMISES TO ARBITRATE IN COLLECTIVE BARGAINING AGREEMENTS — Three recent decisions of the Supreme Court of the United States have clarified somewhat the scope of review permitted a district court on petitions to specifically enforce arbitration agreements or awards.

In *United Steelworkers of America v. American Manufacturing Co.,*[1] the union petitioned the district court to compel arbitration of a grievance concerning the reinstatement of a union member. Two weeks before applying for reinstatement with the company the worker was awarded a workmen's compensation payment, part of which was for a permanent disability. It was the union's position that the worker was physically able to return to work, that he was entitled to reinstatement under the seniority provisions of the contract and that the claim was arbitrable under the broad language of the arbitration clause in the collective bargaining agreement. The Court of Appeals for the Sixth Circuit held that the claim was not arbitrable. Considering the heavy physical character of the work, it found the union's claim that the member was now physically able to work to be "frivolous, patently baseless." [2] The Supreme Court *reversed.*

In *United Steelworkers v. Warrior and Gulf Navigation Co.,*[3] the union petitioned the district court to compel arbitration of a dispute concerning the subcontracting of maintenance work by the company. The union claimed that this practice constituted a partial lockout, in violation of the prohibition of lockouts in the collective bargaining agreement. The company claimed that this dispute was not arbitrable under an arbitration clause which excluded "matters which are strictly a function of management." It presented evidence showing that the subject of sub-contracting was considered a function of management by the negotia-

21 1 BRYCE, AMERICAN COMMONWEALTH 636.

1 363 U.S. 564 (1960).
2 264 F.2d 624 (6th Cir. 1959).
3 363 U.S. 574 (1960).

tors who wrote the contract. The Court of Appeals for the Fifth Circuit held that the dispute was not arbitrable.[4] Again the Supreme Court *reversed.*

In *United Steelworkers of America v. Enterprise Wheel and Car Corp.*,[5] the union petitioned the court to enforce an arbitration award granting reinstatement and back pay to certain union members discharged by the company for conducting an allegedly illegal walkout. The arbitrator granted back pay from the time of discharge to the date of reinstatement, although the collective bargaining agreement had expired. The Court of Appeals for the Fourth Circuit held that the award could only be enforced up to the termination date of the contract.[6] The Supreme Court *reversed,* holding that the arbitrator had authority under the contract to fashion the remedy given.

Congress, in Section 301 of the Labor Management Relations Act,[7] and the Supreme Court, in its *Lincoln Mills*[8] decision, assigned to the federal courts the task of interpreting arbitration promises in collective bargaining agreements. Few standards were given to federal judges to help them fashion, by "judicial inventiveness" a national labor law. Section 301 provided no standards.[9] The Court in *Lincoln Mills* revealed that the sources of the new law were to be the policy of the national labor law, the other sections of the Act, the "penumbra of express statutory mandates," and state law insofar as it was consistent with federal policy.[10] It is not surprising that federal judges, unaccustomed as most of them were with "judicial inventiveness," relied heavily upon the common law.

At common law, while arbitration agreements were viewed as legal contracts, no practical remedy was given for their enforcement. The only remedy available for the breach of an executory arbitration contract was an action at law for damages. The damages in such a case were limited to the cost, if any, which the injured party incurred in preparing his case for arbitration. Specific performance was universally denied.[11]

Arbitration awards, on the other hand, are enforceable at common law.[12] They are in theory subject to a very limited review by the enforcing court. They are not to be set aside except for fraud, corruption, or mistake so gross as to amount to fraud.[13] It is recognized that arbitrators are not usually lawyers and they have no obligation to apply the law.[14] Courts, however, while stating that the general principle is non-interference in the arbitration process, frequently set aside awards upon a finding that the arbitrator has gone beyond the issues submitted to him,[15] or has not decided all that was submitted to him.[16]

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4 269 F.2d 633 (5th Cir. 1959).
5 363 U.S. 593 (1960).
6 269 F.2d 327 (4th Cir. 1959).
7 Labor Management Relations Act. § 301, 61 Stat. 156, 29 U.S.C. § 185 (1958).
8 Textile Workers v. Lincoln Mills, 353 U.S. 448 (1956).
9 See dissenting opinion, *id.* at 460-546.
10 *Id.* at 457. For an illustration of the possibility of varied decisions under such standards see Refinery Employees v. Continental Oil Co., 160 F. Supp. 723 (W. D. La. 1958), where the district judge quite logically came to different conclusions than the Supreme Court in the instant cases.
11 McCullough v. Clinch-Mitchell Constr. Co., 71 F.2d 17, 22 (8th Cir. 1934), *cert. denied,* 293 U.S. 582 (1934) (dictum); WILLISTON, CONTRACTS § 1919 (rev. ed. 1938); RESTATEMENT, CONTRACTS § 550 (1932).
12 Marchant v. Mead-Morrison Mfg. Co., 252 N.Y. 284, 169 N.E. 386 (1929); Burchell v. March, 58 U.S. (17 How.) 344 (1855).
13 Marchant v. Mead-Morrison Mfg. Co., *supra* note 12; Continental Milling & Feed Co. v. Doughnut Corp., 186 Md. 169, 48 A.2d 447 (1946); Motor Haulage Co. v. Teamsters Union, 272 App. Div. 382, 71 N.Y.S.2d 352 (1947).
14 J. F. Fitzgerald Constr. Co. v. Southbridge Water Supply Co., 304 Mass. 130, 23 N.E.2d 165 (1939); King v. Falls of Neuse Mfg. Co., 79 N.C. 360 (1878).
15 Continental Milling & Feed Co. v. Doughnut Corp., 186 Md. 169, 48 A.2d 447 (1946); Fernandez & Hnos. v. Rickert Rice Mills Inc., 119 F.2d 809 (1st Cir. 1941); Marchant v. Mead-Morrison Mfg. Co., 252 N.Y. 284, 169 N.E. 386 (1929).
16 Boot Mills v. Bd. of Conciliation & Arbitration, 311 Mass. 223, 40 N.E.2d 870 (1942).

Arbitration statutes have abolished the common law in almost all states. These statutes in general provide for specific enforcement of executory arbitration agreements, stays of legal actions brought in violation of arbitration agreements, and summary proceedings for the enforcement of arbitration awards.[17] However, many of these statutes specifically exclude, or have been judicially construed to exclude, collective bargaining agreements. The result is that collective bargaining arbitration agreements are enforceable in only a minority of the states.[18]

The harmful effect of the common law has been not so much the specific rules but a judicial attitude born out of decisions dealing with contracts quite different from collective bargaining agreements. Courts have generally, in recent times at any rate, approved of arbitration as a quick, inexpensive way of settling disputes.[19] But, while arbitration is a good thing for those who choose that method of settling disputes, it would be unconscionable to force that method upon a litigant and thereby deprive him of the protection of the courts.[20] This consideration has given rise to the rule that an arbitrator has authority to decide only those issues that are clearly and unmistakably submitted to him in the arbitration agreement.[21]

Another rule restraining arbitrators was developed by the New York courts in dealing with petitions for specific enforcement of arbitration agreements under the New York statute.[22] The *Cutler-Hammer* or "plain meaning" doctrine is that "the mere assertion by a party of a meaning which is clearly contrary to the plain meaning of the words cannot make an arbitrable issue." [23] The rule has the apparent advantage of common sense, and seems to be an application of the maxim: Equity will not force a party to do a useless act. The rule, however, violates the intention of the parties when contracts call for arbitration of all disputes and make no distinction between serious and frivolous disputes. The rule encourages judicial intervention. It is the judge who must determine what claims are frivolous. The court must interpret contracts whose terms clearly provide that interpretation is assigned to an arbitrator.

These doctrines, while rarely expressly advocated[24] by federal courts in dealing with cases brought under Section 301, appear to have been followed in varying degrees. There is a tendency among some federal judges to strictly construe arbitration agreements, limiting the arbitrator's authority to the specific language of

17 See Cox, *Current Problems in the Law of Grievance Arbitration,* 30 ROCKY MT. L. REV. 247, 250 (1958); see also Federal Arbitration Act, 43 Stat. 883 (1925), 9 U.S.C. § 1-14 (1958).

18 CCH LAB. L. REP., *Union Contracts Arbitration* ¶ 57,034, lists the states which give effect to arbitration agreements in labor contracts: California, Colorado, Connecticut, Florida, Louisiana, Maine, Massachusetts, Minnesota, New Hampshire, New Jersey, New York, North Carolina, Ohio, Pennsylvania, Rhode Island, Washington, and Wyoming. However, see Volunteer Electric Co. v. Gann, 41 CCH Lab. Cas. 16,537 (Ct. App. Tenn. 1960), and Local 774 v. Cessna Aircraft Co., 186 Kan. 569, 352 P.2d 420 (1960) holding that arbitration agreements are enforceable under § 301 in the state courts.

19 As early as 1855 it was said by the United States Supreme Court in Burchell v. March, 58 U.S. (17 How.) 344, 349: "Arbitrators are judges chosen by the parties to decide matters submitted to them, finally and without appeal. As a mode of settling disputes it should receive every encouragement from courts of equity."

20 Fernandez & Hnos. v. Rickert Rice Mills Inc., 119 F.2d 809, 815 (1st Cir. 1941); Continental Milling & Feed Co. v. Doughnut Corp., 186 Md. 169, 48 A.2d 447 (1946).

21 Continental Milling & Feed Co. v. Doughnut Corp., *supra* note 20; see *In re* Kelly, 240 N.Y. 74, 147 N.E. 363 (1925) where it is said, at 364: "The contract, however, must be to arbitrate the precise matter as to which arbitration is sought."

22 N.Y. CIV. PRAC. ACT § 1448 - 1469 (1955).

23 International Ass'n of Machinists v. Cutler-Hammer Inc., 271 App. Div. 917, 67 N.Y.S.2d 317, 318, *aff'd* 297 N.Y. 519, 74 N.E.2d 464 (1947); in accord, Standard Oil Dev. Co. Employees' Union v. Esso Research & Engineering Co., 38 N.J. Super., 106, 118 A.2d 70, *aff'd on rehearing,* 38 N.J. Super. 293, 118 A.2d 712 (1955).

24 But see Refinery Employees v. Continental Oil Co., 160 F. Supp. 723 (W.D. La. 1958) where the dominant consideration was determined to be not forcing a party into arbitration of an issue that he had not voluntarily consented to arbitrate.

the contract.[25] In other cases, matters have been excluded from arbitration by broad construction of exclusionary provisions in the contract.[26] In many Section 301 controversies, judges, by looking into the merits of the cases, have in effect followed the approach of the *Cutler-Hammer* doctrine.[27]

It is true that a court must to some extent interpret the contracts brought before it.[28] While it might be better policy for the arbitrator to be the sole judge of arbitrability,[29] since arbitration is based on a consensual relation, the issue must ultimately be for the court. A party is only bound to arbitrate because he has promised to do so; the court must determine if the promise has been made.[30]

But in interpreting collective bargaining agreements, a different approach must be taken than in the interpretation of the usual business contracts.[31] There must be a unique judicial approach, because the collective bargaining agreement is a unique species of contract.

One of the reasons expressed for construing arbitration agreements strictly against arbitration is that arbitration deprives the party of the established court procedures and trial by jury. It is rightly said that this right should not be taken away by implication.[32] But in a labor dispute the alternative to arbitration is not a trial; it is a strike. It is not a jury, but human suffering and economic waste. The reasons of policy weigh heavily for arbitration.

Labor contracts should be interpreted liberally because the parties intend them to be liberally construed. They are, unlike the business contract, made to cover more than a single transaction. They are made between parties who are interdependent. The employer-employee relationship existed prior to the labor agreement; it is a matter of survival to both management and labor that the relationship continue to exist. Both parties are under enormous pressure to come to some

25 See Independent Petroleum Workers v. Standard Oil Co., 275 F.2d 706 (7th Cir. 1960); Employees Ass'n v. Procter & Gamble, 172 F. Supp. 210 (D. Kan. 1959); Kroger Co. v. Local 347, Meat Cutters, 41 L.R.R.M. 2545 (S.D.W. Va. 1958); for cases limiting arbitrator's power to fashion remedies to the language of the contract see Lodge 12, District 37, Int'l Ass'n of Machinists v. Cameron Iron Works, 183 F. Supp. 144, 148, (S.D. Tex. 1960); Refinery Employees' Union v. Continental Oil Co., 268 F.2d 447 (5th Cir.) *cert. denied,* 316 U.S. 896 (1959).

26 Local 149, American Fed'n of Fed. Engineers v. General Electric Co., 250 F.2d 922 (1st Cir. 1957), *cert. denied,* 356 U.S. 938 (1958); United Steelworkers v. Warrior & Gulf Nav. Co., 269 F.2d 633 (5th Cir. 1959).

27 See Sunnyvale Westinghouse Salaried Employees Ass'n v. Westinghouse Electric Corp., 175 F. Supp. 685 (W.D. Pa. 1959), *aff'd per curiam,* 276 F.2d 927 (3d Cir. 1960); Local 201 v. General Electric Co., 262 F.2d 265 (1st Cir. 1959); Local 386, Dairy Workers Union v. Grand Rapids Milk Division, 160 F. Supp. 34 (W.D. Mich. 1958).

28 This problem was recognized and discussed in two cases. In Engineers' Ass'n v. Sperry Gyroscope Co., 251 F.2d 133, 137 (2d Cir. 1957), the court resolved the problem by demanding a lesser quantum of proof than would be required by the court if it were to adjudicate the issue fully. In New Bedford Defense Prod. Div. v. Local 1113, 258 F.2d 522, 526 (1st Cir. 1958), the court resolved the problem by saying: "In this respect we think that the jurisdiction of the arbitrator, whose judgment is involved in the collective bargaining agreement instead of that of the court, is similar to a court's jurisdiction. If the subject matter of a claim is within the court's jurisdiction, the court does not lose its jurisdiction because of the fact that the proper disposition of the claim may be crystal-clear under the law. Indeed, if, in the present case, the grievance in question is confined to an arbitrator by the collective bargaining agreement, the court, in a § 301 proceeding, has no business to concern itself with a preliminary question whether the answer to the grievance on its merits may or may not be entirely clear under the language of the agreement."

29 See Gregory, *The Law of the Collective Agreement,* 57 MICH. L. REV. 635, 648 (1959).

30 Brass & Copper Workers Union v. American Brass Co., 272 F.2d 849 (7th Cir. 1959); Newspaper Guild v. Boston Herald-Traveler Corp., 233 F.2d 102 (1st Cir. 1956); Local 149, American Federation of Eng'rs v. General Electric Co., 250 F.2d 922 (1st Cir. 1957), *cert. denied,* 356 U.S. 938 (1958).

31 See Cox, *Current Problems in the Law of Grievance Arbitration,* 30 ROCKY MT. L. REV. 247, 262-265 (1958); Shulman, *Reason, Contract, and Law in Labor Relations,* 68 HARV. L. REV. 999, 1003-1005 (1955).

32 See cases cited *supra* note 20.

agreement. They are not two businessmen, each of whom can find another party to deal with if he is not able to negotiate terms to their satisfaction. In collective bargaining agreements some terms are purposely kept vague in order to arrive at an agreement. These terms may have one meaning to one party, another meaning to the other. It is assumed that the meaning will be worked out later.[33]

By necessity labor contracts must be incomplete. They are meant to govern the day-to-day relationships of sometimes thousands of men; it is impossible for the parties to spell out in detail all that is involved in this relationship. The best that can be done is to provide an outline with the details to be supplied later, as specific situations arise. In this sense, a collective bargaining agreement is more like a charter or a constitution than an ordinary contract. It must be interpreted more by the "common law of the shop" than by the "plain meaning rule." The man interpreting the agreement should, therefore, be familiar with the particular industry and the labor conditions involved. He must fill in the gap in the agreement and develop rules and remedies for situations unforeseen by the negotiators. The labor arbitrator seems better qualified for this sort of task than a judge is.

The Supreme Court in the instant cases had before it three typical situations which, in the view of some authorities, judges consistently mishandle. They represented a judicial attitude the Court itself wished to correct. In *American Manufacturing Co.*, the Sixth Circuit expressed a view very similar, if not identical, to the *Cutler-Hammer* doctrine.[34] In the other cases, the Fifth Circuit gave a broad interpretation to the exclusionary clause in the collective bargaining agreement before it,[35] and the Fourth Circuit limited the arbitrator's development of remedies to the court's interpretation of the contract.[36]

Reversing all three cases, the Court held:[37]

(1) The arbitrability of disputes in collective bargaining agreements is for the court to determine.[38]
(2) The interpretation of the contract is for the arbitrator.[39]
(3) The federal courts are directed by Congress to give "full play" to the means chosen by parties for the settlement of disputes.[40]
(4) The function of the court is limited to determining whether the claim asserted to be arbitrable is on its face governed by the contract when the parties have submitted all questions of contract interpretation to the arbitrator.[41]
(5) A dispute over the interpretation of a contract with a broad arbitration clause is arbitrable unless:
    a) There is an express provision excluding the matter sought to be arbitrated, or,
    b) The most forceful evidence is presented to show that the matter sought to be arbitrated was intended to be excluded under a vague exclusionary clause.[42]

More important than the precise holdings of the cases is the "finding of fact" made by the Court,[43] which emphasizes the differences between collective bargain-

33 See Cox, *Reflections Upon Labor Arbitration*, 72 HARV. L. REV. 1486, 1490 (1959).
34 264 F.2d 624, 627 (6th Cir. 1959).
35 269 F.2d 633, 636 (5th Cir. 1959).
36 269 F.2d 327 (4th Cir. 1959).
37 For another analysis of the Warrior & Gulf opinion see IUOE, Local 725 v. Standard Oil Co., 41 CCH Lab. Cas. ¶ 16,544 (D.N.D. 1960).
38 United Steelworkers v. Warrior & Gulf Co., 363 U.S. 574, 582 (1960).
39 United Steelworkers v. Enterprise Wheel & Car Corp., 363 U.S. 593, 599 (1960).
40 United Steelworkers v. American Mfg. Co., 363 U.S. 564, 566.
41 *Id.* at 567-68.
42 United Steelworkers v. Warrior & Gulf Nav. Co., 363 U.S. 574, 584-85.
43 The Court therefore avoids the prescriptions of inflexible rules for the enforcement of arbitration promises. Guidance is given by identifying the various considerations which a court should take into account when con-

ing agreements and ordinary commercial contracts. The Court recognized that the alternative to arbitration is economic warfare. It recognized also the incompleteness of labor contracts,[44] and the role of the arbitrator[45] in meeting situations unthought of at the time of negotiation.[46] It recognized, finally, the expertise of the arbitrator and the need for him to be allowed to function without court interference.[47]

These factors are, in some respects, the rule of the cases; the Court advised lower courts to consider these things in determining the arbitrability of future collective bargaining contracts.[48]

Because the opinion of the Court departs from established contract principles, it has already been criticized as another example of judicial activism.[49] These criticisms are valid only if they are directed principally at the parent of the present cases, *Lincoln Mills*.[50] There the Court favored the enforcement of arbitration agreements as a concomitant of the established national policy of industrial peace through collective bargaining,[51] and the decisions in last summer's cases follow almost necessarily from that commitment. While there remain many unsolved problems in this area,[52] these decisions have contributed substantially to a substantive meaning for "judicial inventiveness."

*Roderick A. Mette*

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PUBLIC RECORDS — NEWSPAPER'S RIGHT TO INSPECT THE RECORDS OF A PUBLIC AUTHORITY — PETITION FOR WRIT OF MANDAMUS TO INSPECT FILES OF TRIBOROUGH BRIDGE AND TUNNEL AUTHORITY DENIED — Petitioner, the *New York Post*, sought a writ of mandamus opening the files of the Triborough Bridge and Tunnel Authority in order that the petitioner could inspect certain records. Petitioner claimed that the records were public records and that it was entitled by statute to inspect them; that there was no reasonable ground for refusing the request; and that the refusal by the officers of the Triborough Bridge and Tunnel Authority to allow inspection violated petitioner's constitutional right of free speech. Respondent contended that there were no legal grounds for granting petitioner's request,

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struing a particular clause—considerations of the milieu in which the clause is negotiated and of the national policy. Brennan, J., concurring, United Steelworkers v. American Mfg. Co., 363 U.S. 564 at 570.

44 United Steelworkers v. Warrior & Gulf Nav. Co., 363 U.S. 574, 578 (1960).

45 *Id.* at 578-801.

46 *Id.* at 581.

47 *Id.* at 581-82.

48 See United Steelworkers v. American Mfg. Co., 363 U.S. 564 at 567.

> In our role of developing a meaningful body of law to govern the interpretation and enforcement of collective bargaining agreements, we think special heed should be given to the context in which collective bargaining agreements are negotiated and the purpose which they are intended to serve.

49 See concurring opinion of Hale, J. in Volunteer Electric Co-op v. Gann, 41 CCH Lab. Cas. ¶ 16,537 (Tenn. 1960):

> The holdings requiring compulsory arbitration even in frivolous cases are blows at the independence of the judiciary, a further evisceration of the Tenth Amendment and another long step down the road to state socialism, so roundly condemned by critics of the 'Warren Supreme Court'. . . .
>
> I wish it were different, but the U.S. Supreme Court has obtained complete mastery over its coeval branches of government and has adopted the principle of the French Kings, some of whom went to the guillotine, "le roi le veut" (the King wills it).

50 Textile Workers v. Lincoln Mills, 353 U.S. 448 (1956).

51 See NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 45 (1937).

52 See Maryland Tel. Union v. Chesapeake & Potomac Co., 41 CCH Lab. Cas. ¶ 16,543 (D. Md. 1960), where the court was unable to determine from an examination of the *Warrior & Gulf* opinion what effect prior negotiation of the issue in dispute should have had on the determination of its arbitrability.

either by statute, common law, or constitutional law. *Held,* the Authority is a separate legal entity, independent of the state, city, or county, and its records are not subject to inspection as "public records." *New York Post Corp. v. Moses,* 204 N.Y.S.2d 44 (Sup. Ct. N.Y. County 1960).

The Triborough Bridge and Tunnel Authority is a body established by act of the New York legislature[1] to build and operate certain facilities for the City of New York. Among the projects under the Authority's management are the Triborough Bridge, the Bronx-Whitestone Bridge, the Queens-Midtown Tunnel, the Brooklyn Battery Tunnel, the Battery Parking Garage, and the New York Coliseum. The Authority receives no tax money but is financed through bond issues and operational revenues. The Authority consists of three members, appointed by the Mayor of New York City. These board members are forbidden to receive compensation for their services, and are removable from office by the Mayor for inefficiency, neglect of duty, or misconduct. The Authority has full jurisdiction over its projects and is directed to charge tolls and collect revenues for the benefit of its bondholders. The Authority is to remain in existence until such time as its indebtedness is satisfied, at which time all of its rights and properties pass to the city.[2]

The *New York Post,* charging the Authority with disregard of the public interest in its operations, sought to examine its files. To one untrained in the law, the Triborough Bridge and Tunnel Authority would undoubtedly be identified with the city government. It was created to manage the construction and operation of city facilities. An authority carrying on this function would appear to be an agency of the government, coequal with other departments of the municipality. As such it should be subject to the same duties and controls as the ordinary governmental agencies — particularly so when the question is public surveillance of its operations.

New York statutory law regarding inspection of records provides, in Section 66 of the Public Officers Law:

> A person, having the custody of the records or other papers in a public office, within the state, must, upon request, and upon payment of, or offer to pay, the fees allowed by law, or, if no fees are expressly allowed by law, fees at the rate allowed to a county clerk for a similar service, diligently search the files, papers, records, and dockets in his office; and either make one or more transcripts therefrom, and certify to the correctness thereof, and to the search, or certify that a document or paper, of which the custody legally belongs to him, cannot be found.

A definition of public records is given in the Education Law of New York, Section 144:

> . . . any written or printed book or paper, or map, which is the property of the state, or of any county, city, town or village or part thereof, and in or on which any entry has been made or is required to be made by law, or which any officer or employee of the state or of a county, city, town or village has received or is required to receive for filing.

Petitioner relied, however, on the following declaration, found in Section 51, of the General Municipal Law of New York:

> . . . All books of minutes, entry or account, and the books, bills, vouchers, checks, contracts or other papers connected with or used or filed in the office of, or with any officer, board or commission acting for or on behalf of any county, town, village or municipal corporation in this state are hereby declared to be public records, and shall be open, subject to reasonable regulations to be prescribed by the officer having the custody thereof, to the inspection of any taxpayer.

In the light of these statutory provisions and because of the Authority's popular identification with the city, there would seem to be no doubt that the petitioner had a right to inspect the files of the Authority. But the Authority contended that these statutes were not applicable to it since it is not such a body as is contemplated in the statutes, but is an entity independent of the city.

1 N.Y. Pub. Auth. §§ 550-71.
2 *Id.* § 552.

The question of the Authority's status had not been previously adjudicated. But there have been decisions rendered as to the status of similar instrumentalities. The New York Housing Authority has been held, in *Ciulla v. State of New York*,[3] to be distinct from the state — the agent of neither the state nor the City of New York.

The status of another public authority was dealt with in *Bird v. New York State Thruway*.[4] There it was held that the Thruway was not an integral part of state government but had a separate existence even though performing a governmental function. The corporate entity, stated the court, had been interposed to protect the state from liability and to allow the Thruway to have freedom from restraint. Similar was the holding in *Plumbing v. New York State Thruway*[5] to the effect that, although the Thruway was an "arm of the state," it was not to be thought that it "was" the state; it enjoyed an existence separate and apart from the state even though performing a governmental function. In *Erenberg v. Brill*,[6] in a proceeding wherein a petitioner had sought to examine accident reports kept by the Thruway, the court held that, in the absence of a requirement that the Thruway keep such records, they were not public records and therefore not subject to inspection as of right. A different authority was dealt with in *Borek v. Golder*,[7] where a taxpayer brought suit against officers of the Municipal Housing Authority of Utica. The court held that the Authority was not an integral part of the city government but had, instead, an independent corporate entity; and therefore an action against the officers of the Authority to prevent waste of city funds would not lie. *In re Reynolds*[8] illustrated the same reasoning, holding that for an action to lie against officers of a city election board to prevent waste of the funds of the city, under Section 51 of the General Municipal Law, the act sought to be enjoined must in some way affect the funds or property of the municipality. The election board was held to be neither the agent nor servant of the city; it was, the court said, not acting "for or on behalf of" the city, but for the public in general. Hence it appears that the New York courts have established the principle that public authorities are separate, independent entities.[9] This principle has been applied even though it is admitted that the authority in question performs a governmental function,[10] or is "an arm of the state," [11] an instrumentality of the state or an "agency." [12] The Triborough Bridge and Tunnel Authority is similar to the agencies considered in earlier New York cases and probably deserves a similar classification.

According to the Attorney General of New York, the reason for the legislature's decision to confer this status upon public authorities was to protect the state from liability and to free the authority from restrictions otherwise applicable to governmental agencies.[13] This rationale has been quoted by the cases, with no further comment than that of the *Plumbing* opinion that "these public corporations are independent and autonomous, deliberately designed to be able to function with a

3 191 Misc. 528, 77 N.Y.S.2d 545 (1948).
4 8 App. Div. 2d 496, 188 N.Y.S.2d 788 (1959).
5 5 N.Y.2d 420, 185 N.Y.S.2d 534 (1959).
6 10 App. Div. 769, 197 N.Y.S.2d 518 (1960).
7 190 Misc. 366, 74 N.Y.S.2d 675 (1947).
8 202 N.Y. 430, 96 N.E. 87 (1911).
9 Although the status of the Triborough Bridge and Tunnel Authority is a question of statutory law, it is well to note that other states, in dealing with similar "authorities," under similar statutes, have also construed the status of these authorities as independent and autonomous. See Hope Natural Gas Co. v. West Virginia Turnpike Comm., 105 S.E.2d 630 (W. Va. 1959); Book v. State Office Building Comm., 238 Ind. 120, 149 N.E.2d 273 (1958); Opinion of the Justices, 334 Mass. 721, 136 N.E.2d 223 (1956).
10 Bird v. N.Y. State Thruway, 8 App. Div. 769, 197 N.Y.S.2d 518 (1960).
11 Easley v. N.Y. State Thruway, 1 N.Y.2d 374, 376, 153 N.Y.S.2d 28, 29 (1956).
12 Ciulla v. State of New York, 191 Misc. 528, 77 N.Y.S.2d 545 (1948). The court distinguished between an "agency" and an "agent" here. It held that "agency" is a synonym for instrumentality, while an "agent" is an "alter ego" of the state.
13 1951 Ops. Att'y Gen. 130, 132.

freedom and flexibility not permitted to an ordinary State Board, department or commission." [14] The rationale, both of the Attorney General and of the judiciary, is apparently that the independent status of public corporations is a necessity dictated by their need for freedom and flexibility in fulfilling a public duty — and not a denial that they are in fact state instrumentalities, with a governmental purpose.

This brings into focus the really central issue in the *Triborough* case: Does the fact that the public authority is a separate legal entity demand that it be treated independently in all respects? The policy considerations for conferring this independent status would not justify such a sweeping application of the idea of autonomy. The protection of the state from liability and the Authority's freedom from undue restraint would not necessitate complete separation and independence. It would be sufficient that its independence be asserted only when necessary to protect its freedom. A demand to inspect the files of the Authority threatens neither the flexibility and efficiency of the operation nor the financial security of the state. There is no blinding reason, therefore, for granting complete independence.

The answer to this question lies in the interpretation of the statute regarding inspection, Section 51 of the General Municipal Law of New York, quoted above. There exists in New York a generally recognized policy that statutes granting a right of inspection of records should be liberally construed. This policy was recognized unhesitatingly in *Sosa v. Lincoln Hospital*[15] and *Sears, Roebuck v. Hoyt.*[16] And *In re Becker,* in holding that Section 51 should be liberally construed, stated that:

> The policy of the law favors publicity. The statute we have cited (Sec. 51 of the General Municipal Law) proceeds upon the theory that there are or should be no confidential records in respect to public business.[17]

To the same effect is *Cherkis v. Impelliteri*:

> Both of these statutory provisions (Sec. 51 of General Municipal Law and Sec. 894 of the City Charter) were designed to effectuate the salutary public policy that "The doings of a municipal corporation and the doings of its officers, and the records and files in their offices must be open to the public" [citing *North v. Foley,* 238 App. Div. 731, 734, 265 N.Y.S. 780, 783, "that there are and should be no confidential records or communications with respect to public business"].[18]

Further illustration of the courts' readiness to apply this policy in favor of inspection is seen in *Walker v. Watson,*[19] where members of a citizens' budget commission sought to inspect the files of the local civil service commission. The civil service commission defended against the granting of the petition for a writ of mandamus on the grounds that it was not a city department and that the budget commission had no statutory right to examine the records, which were not, they contended, public records. The court said:

> [I]f I should conclude that what petitioner seeks is reasonable and proper and in the public interest and not prohibited by law, I think there can be no doubt of my power and duty to grant the relief requested, even if petitioner does not have specific and absolute statutory right thereto. . . .
>
> I consequently address to those broader aspects of the matter rather than to the somewhat technical questions whether respondent is or is not a "city department," within the meaning of City Charter §894 and whether the papers sought are "public records" in a strictly legal sense. . . .
>
> The statute which is now section 894 of the City Charter was passed for the purpose of preventing corruption and mismanagement in the city government, and its underlying theory is that publicity is a preventive cure for such evils [citing *Matter of Egan v. Board of Water Supply,* 748 App.

14 185 N.Y.S.2d 534, 536 (1959).
15 190 Misc. 448, 74 N.Y.S.2d 184 (1947, *aff'd,* 273 App. Div. 852, 77 N.Y.S.2d 138 (1948).
16 202 Misc. 448, 74 N.Y.S.2d 756 (1951).
17 200 App. Div. 178, 192 N.Y.S. 754, 757 (1922).
18 124 N.Y.S.2d 805, 808 (1953), *rev'd* by the Appellate Division on another ground, 282 App. Div. 816, 124 N.Y.S.2d 816 (1953).
19 201 Misc. 556, 115 N.Y.S.2d 93 (1952), *modified,* 113 N.Y.S.2d 676 (1952).

> Div. 177, 180, 133 N.Y.S. 129, 131, *aff'd*, 205 N.Y. 147, 98 N.E. 467] and even if respondent be right in its contention that the present section is so worded that by reason of changes in the structure of the city government it does not literally apply to respondent, I do not think that is any reason for not applying the statute in a way which I think is clearly within its spirit, purpose and intent.[20]

Thus there is a guide to the interpretation of the statute pertaining to this case. If the Triborough Bridge and Tunnel Authority can be classified as an agency which acts "for or on behalf of" the City of New York it becomes unquestionably subject to the right of inspection granted by Section 51 of the General Municipal Law. The presumption is in favor of a right of inspection, should the pros and cons of the question be otherwise balanced. In the present case, the New York County Supreme Court, it seems clear, applied a narrow interpretation of Section 51, in holding that the Authority would have had to have been a strict agent of the city in order for the petition for mandamus to succeed. The court required, in the words of the *Ciulla* decision, that the Authority be an "alter ego" of the city. But, do the terms "for or on behalf of" necessarily contemplate a strict agency relationship? Unless this is clearly the meaning of the statute, a liberal construction would require that a relationship less binding than agency would suffice to bring the Triborough Authority under Section 51. It could be argued with considerable merit that the Authority acts for or on behalf of the city by its performance of functions which are usually considered governmental. Its property will revert to the city at such time as the indebtedness of the Authority is finally satisfied.[21] Section 553 of the Public Authorities Law of New York enumerates the powers of the Triborough Authority. Among these are the power "to acquire, *in the name of* the city, by purchase or condemnation, real property or rights or easements. . . ." [22] The Authority, under the same statute, has power to "sell and convey or lease in behalf of such city any real property acquired by the city at the expense of the authority." [23] The city maintains a degree of surveillance over the activities of the Authority for the obvious purpose of preventing waste of its assets through mismanagement or corruption.

However, it is not sufficient to base the conclusion that these facts satisfy the provisions of the statute on common sense arguments. Some indication must be found within the statute itself that the Authority comes within the purview of Section 51, and that its records are open to inspection as a matter of right. To do this, reference must be had to the "for or on behalf of" provision.

The word "for" must be taken to mean, in the context of this statute, an agency relationship. In *The Iristo*,[24] the Federal District Court for the Southern District of New York held that, where a charterer had signed bills of lading "for master and others," the charterer was acting as an agent; "for," the court said, generally denotes agency. A similar holding resulted in *Marlenee v. Brown*.[25] "For" in this opinion was taken to denote "as agent of." [26] Does the Triborough Authority act for the City of New York? If "for" refers to strict agency and if the holdings in *Cuilla, Bird* and *Plumbing* are conceded to be correct, the Authority probably does not act for the city.

But the remainder of the Section 51 provision, the "or on behalf of" clause, must also be considered. Some cases indicate that "for" and "on behalf of" are identical in meaning.[27] But this would render senseless the statute here under con-

20 115 N.Y.S.2d 93, 95, 96.
21 N.Y. PUB. AUTH. § 552.
22 *Id.* § 553 (4) (Emphasis added.)
23 *Id.* § 553 (4-a(b)).
24 43 F. Supp. 29 (S.D.N.Y. 1941).
25 128 P.2d 137 (Cal. 1947).
26 See also Rice v. Stove, 39 Mass. (22 Pick.) 158, 33 Am. Dec. 724 (1839); Emerson v. Providence Hat Mfg. Co., 12 Mass. 237, 7 Am. Dec. 66 (1815).
27 Hatcher v. Sietz, 87 Ga. App. 789, 75 S.E.2d 273 (1953); Donovan v. Welch, 11 N.D. 113, 90 N.W. 262 (1902).

sideration. Under such an interpretation, the meaning of Section 51 would be: "All books . . . in the office of . . . any officer, board, or commission acting *as an agent of or as an agent of* any . . . municipal corporation . . . are hereby declared to be public records. . . ." This would be patent nonsense. Obviously "on behalf of" was intended to have a meaning different from that of "for."

The statute uses the words "or on behalf of." "Or" is a disjunctive term, expressing an alternative; it is sometimes interpreted conjunctively but only when the sense and meaning of the text demand it.[28] Here, the context of the statute demands a disjunctive reading. It is significant that the legislature chose to use "and" instead of "or" in a similar passage at the opening of Section 51. There it is provided that "all officers, agents, commissioners and other persons acting, or who have acted, for *and* on behalf of any county, town, village or municipal corporation in this state . . . may be prosecuted." (Emphasis added.) The change in the choice of words here indicates that the "or" in the latter provision was intended to have a different meaning than the conjunctive "and." It was intended to express an alternative. The only reasonable explanation of the meaning of the provision pertaining to records is that the legislature did not intend that only agencies of the city should be covered by the statute, but that those instrumentalities which, though not agents, perform governmental functions for the city should also be covered. Such an interpretation is in line with the liberal construction which the New York courts have declared applicable to statutes which grant a right of inspection of public records.

It is also in line with the words of the statute, "on behalf of." While some courts have held "for" and "on behalf of" to be synonymous, others have held that "on behalf of" does not signify strict agency.[29]

*Commissioner of Internal Revenue v. Shamberg's Estate*[30] is of particular significance. The income tax regulations provided that interest from bonds issued "by or on behalf of" a state should not be included in gross income. The question in the case was whether bonds of the Port of New York Authority were issued "by or on behalf of" the state. The Court of Appeals for the Second Circuit certainly did not find the Port of New York Authority to be the "alter ego" of the state, yet it held the bonds to be tax exempt. It held that the words "or on behalf of" indicated an intention that obligations of entities other than the state itself were excluded from taxes. The test of whether an instrumentality was acting in behalf of a state was whether the activities of the body were for a public purpose. Furthermore, the court said that a ruling of the Commissioner had interpreted income from the bonds of the *Triborough Bridge Authority* to be excluded from federal income taxes.[31]

That the Authority performs a public function hardly need be argued. That the legislature chose to use broad language in Section 51 is apparent. The courts clearly favor liberal interpretation when the issue is the right to inspect records. In light of these factors, the conclusion should have been reached that the Authority was a board or commission within the meaning of Section 51 and its records subject to inspection by the petitioning newspaper.

*Arthur L. Roule, Jr.*

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28 *In re* Rice, 196 F.2d 617 (1947); Koch v. Fox, 71 App. Div. 288, 75 N.Y.S. 913 (1902).

29 Schimmel v. Mallory S.S. Co., 30 F.2d 735 (S.D.N.Y. 1928); Commissioner v. Shamberg's Estate, 144 F.2d 998 (2d Cir. 1944).

30 144 F.2d 998 (2d Cir. 1944).

31 *Id.* at 1006. See also Rev. Rul. 56-33, where bonds of the Indiana Toll Road Commission were ruled as having been issued "on behalf of" the state. The bonds of the New York State Housing Finance Agency were declared issued "on behalf of" the state in Rev. Rul. 60-248, after an extended discussion of the agency's relationship with the state.