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SEC AND OTHER PERMANENT INJUNCTIONS—STANDARDS FOR THEIR IMPOSITION, MODIFICATION, AND DISSOLUTION

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The enforcement of federal statutes, particularly the securities laws,1 often requires appropriate federal agencies or departments to procure permanent injunctions against violators.2

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2 Indeed, the Securities and Exchange Commission's authority to seek injunctive relief is its exclusive civil judicial remedy under the securities laws. See 15 U.S.C. § 78u(d)(e) (1976). In recent years, the Commission has successfully obtained far-reaching orders of ancillary or other equitable relief to accompany injunctions.

"Violator" is used as a term of art. In the majority of injunctive decrees issued under the federal securities laws, the defendant, without admitting or denying the allegations contained in the Commission's complaint, consents to the entry of judgment. See generally Pitt & Markham, SEC Injunctive Actions, 6 Rev. Sec. Reg. 955 (1973).

This Article will discuss the modification or dissolution of permanent injunctions. The standards, policies, and effects of preliminary injunctions are somewhat different. See generally Chromalloy Am. Corp. v. Sun Chem. Corp., 611 F.2d 240, 244 (8th Cir. 1979) (private party seeking preliminary injunction must show substantial likelihood of success on merits and irreparable injury if injunctive relief not issued); Sonesta Int'l Hotels Corp. v. Wellington Assocs., 483 F.2d 247, 250 (2d Cir. 1973) (preliminary injunction in private suit should issue upon clear showing of either likely success on merits and possible irreparable harm, or sufficiently serious questions pertaining to merits which are fair ground for litigation and balance of hardships weighing heavily toward party requesting preliminary relief); SEC v. Toth, No. CA 79-4758 (D. La. Jan. 22, 1980) (SEC must establish strong prima facie case and reasonable expectation that illegal conduct would continue in absence of injunctive relief. Accord, SEC v. Big D. Oil & Gas Co., 434 F. Supp. 589 (N.D. Tex. 1977); SEC v. Scott, Gorman Muns., Inc., 407 F. Supp. 1383 (S.D.N.Y. 1975). See also Camenisch v. University of Tex., 616 F.2d 127, 130 (5th Cir. 1980); Aleknagik Natives Ltd. v. Andrus,
Such injunctions, which are generally imposed as equitable measures to prevent future violations, may cause inconvenience and hardship to the subject parties. To alleviate these consequences, many of which are of a collateral nature, a violator may seek to have the injunction dissolved or modified.

The standards a court should apply when considering whether to grant relief from an injunction are of paramount importance. Although an injunction may have the effect of stigmatizing the subject party, the government has a countervailing interest in deterring future violations by the threat of criminal contempt. Far from being punitive, according to the government, the injunction merely requires that the law be obeyed.

The central purpose of this Article is to examine the circumstances under which injunctions obtained by the Securities and Exchange Commission (SEC) and other government entities should be susceptible to dissolution or modification. Although the thrust of the Article is directed toward injunctions procured by government entities, much of the discussion is pertinent to privately obtained injunctions as well. For background reasons and to buttress the principal focus of the Article, standards for the imposition of SEC and other government permanent injunctions will be discussed from a general perspective. Thereafter, the Article will focus on dissolution and modification issues.

I
GOVERNMENT INJUNCTIONS—AN OVERVIEW

Government injunctions, like those procured by private parties, are designed to afford preventative relief only, and not to

Fed. R. Serv. 2d 796 (9th Cir. April 17, 1980); Anaheim v. Kleppe, 590 F.2d 285, 288 n.4 (9th Cir. 1978); Canal Auth. v. Callaway, 489 F.2d 567, 572-73 (5th Cir. 1974).


7 See note 4 supra.


9 See SEC v. Thermodynamics, Inc. 464 F.2d 457, 461 (10th Cir. 1972).
redress past injuries. Under traditional notions of equity, an injunction could issue only upon a showing that the complainant would suffer irreparable injury absent such relief, that he was without an adequate remedy at law, and that injunctive relief was necessary to prevent future violations actually threatened. Courts continue to apply these historical equitable concepts today. In Rondeau v. Mosinee Paper Corp., the Supreme Court held that an aggrieved party must show irreparable harm as an indispensable prerequisite to the granting of permanent injunctive relief based on Section 13(d) of the Securities Exchange Act. In so ruling, the Court upheld the trial court’s exercise of sound judicial discretion to deny the requested relief, implicitly adhering to a prior Supreme Court decision that held that “[a]n appeal to the equity jurisdiction conferred on federal district courts is an appeal to the sound discretion which guides the determinations of courts of equity.”

Irrespective of these principles, it is clear that government injunctive actions authorized by statute are not subject to such prerequisites as a showing of irreparable injury or the absence of an adequate remedy at law. Nevertheless, the Supreme Court has made it patently clear that such actions are governed by the historic injunctive process, which is “designed to deter, not to

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11 See 1 J. High, TREATISE ON THE LAW OF INJUNCTIONS 36 (4th ed. 1905): “An injunction, being the ‘strong arm of equity,’ should never be granted except in a clear case of irreparable injury....”
12 See, e.g., Stewart Dry Goods Co. v. Lewis, 287 U.S. 9, 11 (1932) (existence of remedy at law does not preclude injunctive relief unless such remedy is certain, reasonably prompt and efficacious.).
14 422 U.S. 49 (1975).
15 Id. at 61. In brief, § 13(d) of the Exchange Act, as amended by the Williams Act, requires that any person who becomes the beneficial owner of more than five percent of an equity security of a class covered by the section shall make timely disclosure of certain information. 15 U.S.C. § 78m(d) (1976).
18 See note 1 supra.
punish." To ensure that this process is not abused, the critical determinant, as noted by the Court, "is that there exists some cognizable danger of recurrent violation...." That the defendant has abandoned his unlawful activities, when cessation stems from anticipating the filing of a lawsuit, however, is insufficient to deny the government the relief it seeks. The proper yardstick in these cases is that the public interest, rather than the interests of the private litigant, is paramount in determining the propriety and need for injunctive relief.

These equitable principles, with the above caveats, apply to government injunctive actions authorized by statute. In *Hecht Co. v. Bowles*, the Supreme Court considered whether the language of section 205(a) of the Emergency Price Control Act mandated or merely permitted an injunction to issue once the Administrator made a showing that the defendant violated or was about to violate the Act or the regulations promulgated thereunder. The nature of the Hecht Company's conduct highlighted the need for the application of equitable principles: the company offered itself as a laboratory in which the Administrator could experiment with any regulation that might be prescribed, expended significant efforts to comply with the Act, and implemented measures to correct violations once they were discovered. The district court therefore concluded that the Hecht Company's noncompliance had been involuntary and that an injunction would serve no useful purpose. Although not addressing whether the trial judge abused his discretion, the Court adhered to the traditions of equity as a flexible instrument to adjust and reconcile fairly between the public and private litigant's needs as well as between the

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21 *United States v. W.T. Grant Co.*, 345 U.S. 629, 633 (1953). Under the federal securities laws, the *W.T. Grant* standard is rephrased so that courts inquire whether there is a reasonable likelihood of future violations by the defendant. This subject is discussed in greater depth at notes 32-38 and accompanying text *infra*. See also *Aaron v. SEC*, 100 S. Ct. 1945, 1958 (1980) ("the Commission must establish a sufficient evidentiary predicate to show that such future violation may occur.").
23 321 U.S. at 331. Courts have applied this principle with regularity in cases brought by the SEC seeking injunctive relief. See notes 60-67 and accompanying text *infra*.
25 The statute provided that upon a proper showing, an injunction, restraining order, or other order *shall* be granted. Pub. L. No. 77-421, 56 Stat. 23 (repealed 1956).
claims of competing private parties. Applying these equitable concepts in conjunction with the language and legislative history of section 205(a), the Court concluded that the issuance of an injunction under the statute was not mandatory. Rather, such relief should be ordered only in comport with the traditions of equity practice.

The Hecht decision may stand for the proposition that the nature of the defendant's conduct, even though he cannot assure that his violative actions will cease, may nevertheless indicate that the issuance of an injunction would serve no useful public in-

27 Id. at 329-32. See Mitchell v. Robert DeMario Jewelry, Inc., 361 U.S. 288 (1960); Porter v. Warner Holding Co., 328 U.S. 395 (1946). Porter was a proceeding to enjoin the charging of excessive rents and also seeking to obtain restitution of illegally collected rents under § 205(a) of the Emergency Price Control Act of 1942. The Court stated:

Thus the Administrator invoked the jurisdiction of the District Court to enjoin acts and practices made illegal by the Act and to enforce compliance with the Act. Such a jurisdiction is an equitable one. Unless otherwise provided by statute, all the inherent equitable powers of the District Court are available for the proper and complete exercise of that jurisdiction. And since the public interest is involved in a proceeding of this nature, those equitable powers assume an even broader and more flexible character than when only a private controversy is at stake.... [T]he court may go beyond the matters immediately underlying its equitable jurisdiction.... and give whatever other relief may be necessary under the circumstances....

Moreover, the comprehensiveness of this equitable jurisdiction is not to be denied or limited in the absence of a clear and valid legislative command. Unless a statute in so many words, or by a necessary and inescapable inference, restricts the court’s jurisdiction in equity, the full scope of that jurisdiction is to be recognized and applied. “The great principles of equity, securing complete justice, should not be yielded to light inferences, or doubtful constructions.”


Mitchell was an action by the Secretary of Labor under §§ 15 and 17 of the Fair Labor Standards Act. In ordering an injunction, the district court declined to grant reimbursement of lost wages. The court of appeals held that the district court lacked jurisdiction to order such relief. Refusing to distinguish Porter either because that case dealt with a wartime statute or because the statute, by its terms, contained the phrase “or other order,” the Mitchell Court enunciated the following broad principle:

When Congress entrusts to an equity court the enforcement of prohibitions contained in a regulatory enactment, it must be taken to have acted cognizant of the historic power of equity to provide complete relief in light of the statutory purposes. As this Court long ago recognized, “there is inherent in the Courts of Equity a jurisdiction to... give effect to the policy of the legislature.”


interest. Under such circumstances, an injunction's imposition and resultant hardships on the subject party appear inequitable. In assessing the need for a government sought injunction, however, Hecht also makes clear that although courts should recognize that traditional equitable principles apply, the necessities of the public interest are paramount. Subsequent Supreme Court and lower court decisions have reaffirmed the equitable principles enunciated in Hecht.

II
SEC INJUNCTIONS


In recent years, the SEC has sought, and successfully obtained, ancillary or other equitable relief against an enjoined party. Examples of such relief include disgorgement, appointment of a receiver, appointment of independent members of the board of directors, and appointment of a special counsel. See, e.g., SEC v. Manor Nursing Centers, Inc., 458 F.2d 1082 (2d Cir. 1972) (disgorgement); SEC v. Fifth Ave. Coach Lines, Inc. 289 F. Supp. 3 (S.D.N.Y. 1968), aff'd, 435 F.2d 510 (2d Cir. 1971) (receiver); SEC v. Coastal States Gas Corp., SEC Lit. Rel. No. 6054 (S.D. Tex. Sept. 12, 1973) (independent members of board of directors). See generally Farrand, Ancillary Remedies in SEC Civil Enforcement Suits, 89 Harv. L. Rev. 1779 (1976); Mathews, Liability of Lawyers Under the Federal Securities Laws, 30 Bus. Law. 105 (1975). As recently stated by the Ninth Circuit:

29 "For the standards of the public interest, not the requirements of private litigation, measure the propriety and need for injunctive relief in these cases." 321 U.S. at 331. Thus, while traditional equitable principles should apply to government injunctive actions authorized by statute, these principles are "conditioned by the necessities of the public interest which Congress has sought to protect." Id. at 330.
Rather, the test applied in practically all federal courts is whether there is a reasonable likelihood that the defendant, if not enjoined, will again engage in the violative conduct. In identifying the relevant factors that demonstrate "a reasonable likelihood of future violations," the Second Circuit has pointed to "the de-

The federal courts have inherent equitable authority to issue a variety of "ancillary relief" measures in actions brought by the SEC to enforce the federal securities laws. This circuit has repeatedly approved imposition of a receivership in appropriate circumstances. The power of a district court to impose a receivership or grant other forms of ancillary relief does not in the first instance depend on a statutory grant of power from the securities laws. Rather, the authority derives from inherent power of a court of equity to fashion effective relief.

SEC v. Wencke, 622 F.2d 1363, 1369 (9th Cir. 1980) (footnotes omitted).

If a court refuses to grant injunctive relief, it may nevertheless grant other equitable relief. See, e.g., SEC v. Commonwealth Chem. Sec., Inc., 574 F.2d 90, 102-03 (2d Cir. 1978); Chris-Craft Indus., Inc. v. Piper Aircraft Corp., 480 F.2d 341, 390-91 (2d Cir. 1972), cert. denied, 414 U.S. 910 (1973). As stated by the Second Circuit in Chris-Craft:

The SEC has no express statutory authority to seek rescission, restitution, or other forms of equitable monetary relief. The Commission, however, may institute an action for injunctive relief and, once the equity jurisdiction of the district court has been properly invoked, the court has power to grant all equitable relief necessary under the circumstances.


In SEC v. Bangor Punta Corp. 331 F. Supp. 1154, 1163 (S.D.N.Y. 1971), the district court's inquiry for whether an injunction should issue was whether the defendants were shown to have "a propensity or natural inclination to violate the securities law." This standard was specifically disapproved by the Second Circuit in SEC v. Manor Nursing Centers, Inc., 458 F.2d 1082, 1101 (2d Cir. 1972) ("we adhere to our well established rule and hold that the SEC has demonstrated the necessity for injunctive relief since there is a reasonable likelihood of future violations on the part of appellants.").


An issue that has recently surfaced in many recent SEC administrative actions is whether courts should apply the "clear and convincing" standard of proof or the "preponderance of evidence" standard. In Collins Sec. Corp. v. SEC, 562 F.2d 810, 824-27 (D.C. Cir. 1977), the court applied the clear and convincing standard in a broker-dealer case where the possible sanction was deprivation of defendant's livelihood. On the other hand, courts have used the preponderance of evidence standard in cases where relief would not result in deprivation of livelihood. SEC v. Savoy Indus., 587 F.2d 1149, 1168-69 (D.C. Cir. 1978), cert. denied, 440 U.S. 913 (1979). See generally Gruenbaum & Steinberg, Accountants' Liability and Responsibility: Securities, Criminal and Common Law, 13 Loy. L.A.L. Rev. 247 (1980).
gree of scienter involved, the sincerity of defendant’s assurances against future violations, the isolated or recurrent nature of the infraction, defendant’s recognition of the wrongful nature of his conduct, and the likelihood, because of defendant’s professional occupation, that future violations might occur.”

Other courts have also deemed relevant the gravity of the offense committed, the time elapsed between the violation and the court’s decision, whether the defendant, in good faith, relied on advice of counsel, and the adverse effect an injunction would have on the defendant.

The Supreme Court’s recent decision in Aaron v. Securities and Exchange Commission casts light on this issue. There, the Court held that the SEC must prove scienter in civil enforcement actions to enjoin violations of section 10(b) of the Securities Ex-

The Fifth Circuit refused to follow Collins in Steadman v. SEC, 608 F.2d 1126 (5th Cir. 1979). There, the court allowed the SEC to apply the preponderance of evidence standard in a proceeding where the sanction was permanent disbarment. Id. at 1137-41. Presumably to reconcile this conflict in the circuits, the Supreme Court has granted certiorari in Steadman. See 100 S. Ct. 1849 (1980). See also Decker v. SEC, [Current] FED. SEC. L. REP. ¶ 97,614 (10th Cir. Aug. 18, 1980); Whitney v. SEC, 604 F.2d 676, 681 (D.C. Cir. 1979); Gruenbaum & Steinberg, supra, at 284-85; Mathews, Litigation and Settlement of SEC Administrative Enforcement Proceedings, 29 CATH. U.L. REV. 215, 232-38 (1980).


These were not mere ‘technical’ violations of regulatory legislation, but continual and extensive violations of provisions which lie at the very heart of a remedial statute.”

SEC v. Advance Growth Capital Corp., 470 F.2d 40, 53-54 (7th Cir. 1972). See SEC v. Manor Nursing Centers, Inc. 458 F.2d 1082, 1102 (2d Cir. 1972) (“in view of the ‘blatant’ nature of the violations found by the district court to have been committed by [the defendants] and in view of their professional occupations which place them in positions where they could misappropriate public investor funds in other offerings, the district court’s decision to enjoin them from further violations was not an unreasonable one.”). See generally, Harkleroad, Requirements for Injunctive Actions Under the Federal Securities Laws, 2 J. CORP. LAW 481 (1977).

SEC v. Monarch Fund, 608 F.2d 938, 943 (2d Cir. 1979) (judgment entered in district court more than seven years after alleged violations); SEC v. National Student Marketing Corp., 457 F. Supp. 682, 716 (D.D.C. 1978) (“in the six years since the filing of the action, [the Commission] had made no attempt to obtain interlocutory injunctive relief against the defendants. Such inaction argues strongly against the need for injunctive relief.”).

See, e.g., SEC v. Lum’s, Inc., 365 F. Supp. 1046, 1066 (S.D.N.Y. 1973) (“acting on the advice of counsel is a factor to consider in granting or withholding an injunction”).

See, e.g., SEC v. Manor Nursing Centers, Inc., 458 F.2d 1082, 1102 (2d Cir. 1972) (“the adverse effect of an injunction upon defendants is a factor to be considered by the district court in exercising its discretion”).

100 S. Ct. 1945 (1980).
change Act,\textsuperscript{40} Rule 10b-5 promulgated thereunder,\textsuperscript{41} and section 17(a)(1) of the Securities Act,\textsuperscript{42} but need not prove scienter under section 17(a)(2) or 17(a)(3). The Court noted that under section 17(a)(2) and 17(a)(3), "the degree of intentional wrongdoing evident in a defendant's past conduct" is an important factor in determining whether the Commission has "establish[ed] a sufficient evidentiary predicate to show that such future violation may occur."\textsuperscript{44} The presence or lack of scienter is "one of the aggravating or mitigating factors to be taken into account" in a court's exercise of its equitable jurisdiction.\textsuperscript{45} In a concurring opinion, Chief Justice Burger deviated from the majority's rationale, asserting that the SEC "will almost always" be required to show that the

\textsuperscript{40} Id. at 1952-55. Section 10(b) provides:

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

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

\textsuperscript{15} U.S.C. § 78j(b) (1976).

\textsuperscript{41} 100 S. Ct. at 1952-55. Rule 10b-5 provides:

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

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

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

(c) To engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person, in connection with the purchase or sale of any security.

\textsuperscript{17} C.F.R. § 240.10b-5 (1980).

\textsuperscript{42} 100 S. Ct. at 1955. Section 17(a) provides:

It shall be unlawful for any person in the offer or sale of any securities by the use of any means or instruments of transportation or communications in interstate commerce or by the use of the mails, directly or indirectly—

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

(2) to obtain money or property by means of any untrue statement of a material fact or any omission to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or

(3) to engage in any transaction, practice, or course of business which operates or would operate as a fraud or deceit upon the purchaser.

\textsuperscript{15} U.S.C. § 77q(a) (1976).

\textsuperscript{43} 100 S. Ct. at 1955-57.

\textsuperscript{44} Id. at 1955-57.

\textsuperscript{45} Id.
defendant's past conduct was more culpable than negligence. The Chief Justice concluded that "[a]n injunction is a drastic remedy, not a mild prophylactic, and should not be obtained against one acting in good faith."  

Some commentators contend that the Aaron Court's language, even apart from the Chief Justice's concurring opinion, could require the SEC to prove scienter in order to make a "proper showing" for procuring injunctive relief under any section of the securities acts. This may overstate Aaron's implications. It is arguable that the majority merely stated that the presence of scienter is an important factor for a court to weigh in determining whether to grant the Commission's request for injunctive relief.

The absence of scienter may not preclude the granting of such relief where the applicable statutory provision requires only negligent culpability. Indeed, where a defendant has committed prior violations, where his carelessness is egregious, where public investors have been severely injured, or where the defendant's occupation increases the probability of future violations, a court considering the totality of the circumstances may order injunctive relief.

Although the above factors are important in determining whether an injunction should issue, the primary purpose of injunctive relief under the federal securities laws is to deter future violative conduct, not to punish the violator. As Judge Friendly

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46 Id. at 1959 (Burger, C.J., concurring).
47 Id.
49 See 100 S. Ct. at 1958.
50 See SEC v. Murphy, [Current] Fed. Sec. L. Rep. (CCH) ¶ 97,588 (9th Cir. July 23, 1980); note 66 and accompanying text infra. Although concluding that the defendant "had at the least, acted recklessly in violating the registration provisions," id. at 97,587, the Ninth Circuit's language supports the proposition that negligent conduct may be actionable:

In the present proceeding, the totality of the circumstances strongly suggests the need for an injunction. Murphy stated that he took all precautions he thought reasonable to keep from violating the registration requirements. Nevertheless, the court found that he did violate them. The fact that he violated the requirements once when he did not intend to do so is sufficient to justify the conclusion that he might do so again, even if the court believed he was sincere in his protestations to the contrary. Moreover, his continued insistence that he has done nothing wrong indicates that he may commit similar errors in the future, particularly since he has not expressed an intention to cease dealing in limited partnerships.

Id. at 98,128 (footnote omitted).
51 Thus, the equitable principles of Hecht Co. v. Bowles, 321 U.S. 321 (1944), have been universally applied in SEC injunctive actions. See, e.g., Aaron v. SEC, 100 S. Ct. 1945,
has noted, an injunction can have severe collateral consequences.\textsuperscript{32} For example, an injunction can serve as the basis for suspending or revoking a broker-dealer's registration, or constitute grounds for prohibiting any person from associating with a broker-dealer.\textsuperscript{33} Similarly, an injunction disqualifies the subject party from serving as a director, officer, or employee of a registered investment company.\textsuperscript{54} It can constitute a basis for barring an attorney, accountant, or other professional from practicing before the SEC.\textsuperscript{55} Additionally, a Regulation A exemption may be

\textsuperscript{32} SEC v. Commonwealth Chem. Sec., Inc., 574 F.2d 90 (2d Cir. 1978):

It is fair to say that the current judicial attitude toward the issuance of injunctions on the basis of past violations at the SEC's request has become more circumspect than in earlier days. Experience has shown that an injunction, while not always a "drastic remedy"... often is much more than [a] "mild prophylactic"...


\textsuperscript{55} SEC Rule 2(e)(3)(i), 17 C.F.R. § 201.2(e)(3)(i) (1979). Rule 2(e)(1) provides that the SEC may deny the privilege of practicing before it to any person who is adjudged by the Commission after notice and hearing:

(i) not to possess the requisite qualifications to represent others; or
(ii) to be lacking in character or integrity or to have engaged in unethical or improper professional conduct; or
(iii) to have willfully violated or willfully aided and abetted the violation of any provision of the federal securities laws ... or the rules and regulations thereunder.

17 C.F.R. § 201.2(e)(1) (1980). Recently, the Commission has been criticized by some commentators and lawyers of converting, without legislative authorization, the rule from one exercising disciplinary authority over the incompetent, dishonest or unethical practitioner into one utilized to regulate the professions that practice before the Commission. The Second Circuit recently rejected this line of reasoning:

To summarize: we reject appellants' assertion that the Commission acted without authority in promulgating Rule 2(e). Although there is no express statutory provision authorizing the Commission to discipline professionals appearing before it, Rule 2(e), promulgated pursuant to its statutory rulemaking authority, represents an attempt by the Commission to protect the integrity of its own processes. It provides the Commission with the means to ensure that those professionals, on whom the Commission relies heavily in the performance
unavailable to an enjoined issuer of securities.\textsuperscript{56} Finally, the Commission frequently requires that an injunction be disclosed in certain filings, reports, statements, or other information sent to shareholders and investors.\textsuperscript{57} Largely because of these consequences, the courts have required the SEC "to go beyond the mere

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of its statutory duties, perform their tasks diligently and with a reasonable degree of competence.
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\textsuperscript{56} Rule 252(c)(4) of Regulation A, 17 C.F.R. § 201.2(e)(3)(i) (1969). The Commission has proposed for comment amendments to Rules 242 and 252 under § 3(b) of the securities Act. SEC Rel. No. 33-6214 (June 19, 1980), 20 SEC Docket 390 (July 1, 1980). The proposed amendments provide that such disqualifications, which now last indefinitely, would terminate automatically after five years. The Commission stated:

\begin{quote}
Rule 252 provides that a Regulation A exemption from registration for small public offerings of an issuer's securities shall not be available if the issuer or any person in a specified relationship with the issuer is subject to one of the disqualifications described in the rule [e.g., "a permanent injunction proscribing any conduct or practice involving the purchase or sale of any security or arising out of conduct as an underwriter, broker, dealer, or investment advisor."]]. The Commission solicits comments on amendments to the rule which would make disqualifications which now last indefinitely terminate automatically after five years.
\end{quote}

20 SEC Docket at 390.


In Release No. 5758 the Commission ... proposed substantive amendments to provide additional information about litigation in which officers and directors had been involved. . . . The substantive proposals would require information about injunctions prohibiting directors and officers from engaging in any type of business including: (i) injunctions prohibiting specified persons from engaging in any type of business practice; (ii) injunctions prohibiting specified persons from future violations of federal or state securities laws; and (iii) civil actions in which specified persons were found to have violated any federal or state securities laws. The Commission also proposed amendments to require disclosure of not only court order, judgment or decree enjoining such persons from acting in certain capacities (e.g., as an investment advisor, or as an underwriter) but also to require disclosure of any such order, judgement, or decree restricting such activities.

15 SEC Docket at 433. In addition, registered broker-dealers and investment advisers must disclose injunctions against them in certain materials filed with the Commission and self-regulatory organizations. See Mathews, \textit{SEC Civil Injunctive Actions}, 5 Rev. SEC. Req. 969, 971 (1972).

These are merely some of the collateral consequences flowing from an injunction. See Comment, \textit{Injunctive Relief in SEC Civil Actions: The Scope of Judicial Discretion}, 10 Colum. J.L. Soc. Prof. 328, 340-42 (1974); Note, \textit{The Scienter Requirement in SEC Injunctive Enforcement of Section 10(b) after Ernst & Ernst v. Hochfelder}, 77 Colum. L. Rev. 419, 442-43 (1977).
facts of past violations and demonstrate a realistic likelihood of recurrence." Employing this standard, courts have concluded in a number of recent cases that the SEC has not made a sufficient showing and have denied the Commission's request for injunctive relief.

Notwithstanding the adverse effects an injunction may have on a defendant, a critical inquiry is whether the SEC's request for such relief serves the public interest. The Second Circuit and other courts have recognized that "the public interest, when in conflict with [the] private interest, is paramount." To ensure that the interests of the public are adequately protected, the courts should not impose an undue burden on the Commission to show a reasonable likelihood of recurrent violations. Courts should scrutinize a defendant's assertion that he has abandoned his unlawful conduct, has changed professions, or had acted unwittingly. Moreover, once the Commission shows that the defendant intentionally or recklessly violated the securities laws, an inference should arise that there is a cognizable danger of fu-

58 SEC v. Commonwealth Chem. Sec., Inc., 574 F.2d 90, 100 (2d Cir. 1978). Indeed, some courts have used even stronger language. In an earlier case, the Second Circuit stated that "the Commission cannot obtain relief without positive proof of a reasonable likelihood that past wrongdoing will recur." SEC v. Bausch & Lomb, Inc., 565 F.2d 8, 18 (2nd Cir. 1977). And, in SEC v. Blatt, 583 F.2d 1325, 1334 (5th Cir. 1978), the Fifth Circuit stated that the SEC must "go beyond the mere fact of past violations" and "offer positive proof of the likelihood that the wrongdoing will recur." But see note 32 supra.


SEC v. Culpepper, 270 F.2d 241, 250 (2d Cir. 1959); see SEC v. Advance Growth Capital Corp., 470 F.2d 40, 53 (7th Cir. 1972); SEC v. Manor Nursing Centers, Inc., 458 F.2d 1082, 1102 (2d Cir. 1972). See also Steadman v. SEC, 603 F.2d 1126, 1139 (5th Cir. 1979), cert. granted, 100 S. Ct. 1849 (1980).

ture repetition.\textsuperscript{64} Similarly, even if the defendant's conduct is negligent, such as under section 17(a) (2) or 17(a) (3) of the Securities Act,\textsuperscript{65} an inference arguably should arise when, for example, the violations are of a recurrent nature or the defendant's professional occupation suggests the likelihood of future violations.\textsuperscript{66} Of course, the defendant should have the opportunity to rebut this inference by pointing to such factors as remedial steps taken to correct the deficiency, the isolated or technical nature of the violation, good faith reliance on legal counsel, or acknowledgment of wrongdoing coupled with assurances against future violations.\textsuperscript{67}

When a court issues a permanent injunction, the defendant is forever prohibited from engaging in the proscribed activities. A knowing violation of the court's decree can result in a conviction

\textsuperscript{64} "It is well established that the commission of past fraudulent conduct gives rise to an inference that continued violations may be expected in the future." SEC v. Aaron, 605 F.2d 612, 624 (2nd Cir. 1979), vacated, 100 S. Ct. 1945 (1980). "Improper past conduct . . . gives rise to the inference that there is a reasonable likelihood of future violations." SEC v. Advance Growth Capital Corp., 470 F.2d 40, 53 (7th Cir. 1972) (quoting SEC v. Keller Corp., 323 F.2d 397, 402 (7th Cir. 1963)). See SEC v. Koracorp Indus., Inc. 572 F.2d 692, 698 (9th Cir. 1978); SEC v. Cohn, 216 F. Supp. 636, 639 (D.N.J. 1963).\textsuperscript{65} See notes 45-50 and accompanying text supra.


[While the commission of past illegal conduct on the part of [the defendant] is highly suggestive of the likelihood of future violations . . ., the inference that he is likely to repeat the wrong in the future depends upon the totality of the circumstances . . . and factors suggesting that the infraction might not have been an isolated occurrence are always relevant.]

\textit{Id.} at 316. See note 50 supra.

A question left open by Aaron is whether recklessness constitutes scienter. The courts generally have held that reckless conduct is actionable under § 10(b). \textit{E.g.,} Healey v. Catalyst Recovery of Pa., Inc., 616 F.2d 641, 649 (3d Cir. 1980); Mansbach v. Prescott, Ball & Turben, 598 F.2d 1017, 1023-25 (7th Cir. 1979); Nelson v. Serwold, 576 F.2d 1332, 1337 (9th Cir.) cert. denied, 439 U.S. 970 (1978); Rolf v. Blyth, Eastman Dillon & Co., 570 F.2d 38, 44 (2d Cir.), cert. denied, 439 U.S. 1039 (1978). The meaning of "recklessness" however, has deeply divided the courts. For an analysis of the different approaches to defining "recklessness," see Steinberg & Gruenbaum, \textit{Variations of "Recklessness" after Hochfelder and Aaron}, 8 Sec. Reg. L.J. 179 (1980).\textsuperscript{67} See, \textit{e.g.,} SEC v. Blatt, 583 F.2d 1325, 1334-35 (5th Cir. 1978); SEC v. Commonwealth Chem. Sec. Inc., 574 F.2d 90, 100-01 (2d Cir. 1978); SEC v. Manor Nursing Centers, Inc., 458 F.2d 1082, 1101-02 (2d Cir. 1972).
for criminal contempt. Because the collateral consequences of an injunction can be grave, the enjoined party, after a period of time, may seek to have the injunction dissolved or modified.

III
MODIFYING OR DISSOLVING PERMANENT INJUNCTIONS—AN OVERVIEW

The Supreme Court’s seminal opinion in United States v. Swift & Co. provides the guidelines for determining whether a court will modify or dissolve a permanent injunction. The protracted nature of that litigation, however, has provided lower courts with a basis for distinguishing Swift’s stringent holding. In Swift the

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68 In United States v. Custer Channel Wing Corp., 376 F.2d 675 (4th Cir. 1967), the court stated:

The appellants had already breached the law and had been enjoined not to do so again; yet they knowingly repeated the selfsame forbidden acts. It is not consonant with reason, in these circumstances, to demand a more explicit demonstration of an evil mind in order to sustain the conviction for criminal contempt.


For cases on civil contempt, see, e.g., Penfield Co. v. SEC, 330 U.S. 585 (1947); SEC v. Radio Hill Mines Co., [1973 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 93,785 (S.D.N.Y.), aff'd, 479 F.2d 4 (2d Cir. 1973). In Penfield, the Court distinguished between civil and criminal contempt:

It is the nature of the relief asked that is determinative of the nature of the proceeding. ... This was not a proceeding in which the United States was a party and in which it was seeking to vindicate the public interest.... The contempt proceedings were instituted as a part of the proceedings in which the Commission sought enforcement of a subpoena. The relief which the Commission sought was production of the documents; and the only sanction asked was a penalty designed to compel their production. Where a fine or imprisonment imposed on the contemnor is “intended to be remedial by coercing the defendant to do what he had refused to do,” ... the remedy is one for civil contempt.... Then “the punishment is wholly remedial, serves only the purposes of the complainant, and is not intended as a deterrent to offenses against the public.” ... One who is fined, unless by a day certain he produces the books, has it in his power to avoid any penalty. And those who are imprisoned until they obey the order, “carry the keys of their prison in their own pockets.” ... Fine and imprisonment are then employed not to vindicate the public interest but as coercive sanctions to compel the contemnor to do what the law made it his duty to do.

330 U.S. at 590 (citations omitted).

69 See notes 52-57 and accompanying text supra.

70 286 U.S. 106 (1932).

71 See, e.g., SEC v. Blazon Corp., 609 F.2d 960 (9th Cir. 1979); SEC v. Warren, 583 F.2d 115, 120 (3rd Cir. 1978); King-Seeley Thermos Co. v. Aladdin Indus., Inc., 418 F.2d 31, 34-36 (2d Cir. 1969).
Justice Department brought an action against five leading meat-packers alleging violations of the Sherman Antitrust Act arising from an unlawful monopoly of a large portion of the nation's food supply. In February 1920, the defendants consented to an injunction prohibiting them from monopolization and engaging in any combination in restraint of trade. In addition, the decree enjoined the defendants from selling certain food products.\(^7\)

Shortly thereafter, two of the defendants sought to invalidate the consent decree, claiming that the injunction interfered with contractual obligations. The Supreme Court, however, upheld the decree "in the face of a vigorous assault."\(^73\)

Meanwhile, a lower court had suspended the injunction at the request of a party who had previously contracted with one defendant to purchase large quantities of canned fruit. In May 1929, the Supreme Court restored the injunction and "swept [the final] obstacle [to the enforcement of the decree] aside," nearly a decade after it was entered.\(^74\)

Against this litigious background, in April 1930, certain of the defendants sought judicial relief to modify the consent decree in order to adapt its restraints "to the needs of a new day."\(^75\) Justice Cardozo, writing for the Court, rejected the defendants' plea. Although the Court acknowledged the inherent power of a court of equity to modify an injunction in light of changed circumstances, whether entered after litigation or by consent,\(^76\) it enunciated the following limiting principles:

\(^{72}\) 286 U.S. at 111.

\(^{73}\) Id. at 112. See Swift & Co. v. United States, 276 U.S. 311 (1928).

\(^{74}\) 286 U.S. at 112. See United States v. California Canneries, 279 U.S. 553 (1929).

\(^{75}\) 286 U.S. at 113. Justice Cardozo observed:

> The defendants and their allies had thus been thwarted in the attempt to invalidate the decree as of the date of its entry, and again the expectation would have been reasonable that there would be acquiescence in its restraints. Once more the expectation was belied by the event. The defendants, or some of them, discovered as they thought that during the years that had intervened between the entry of the decree and its final confirmation, conditions in the packing industry and in the sale of groceries and other foods had been transformed so completely that the restraints of the injunction, however appropriate and just in February, 1920, were now useless and oppressive.

\(^{76}\) Id. at 112-13. The Supreme Court subsequently reaffirmed the power of a court of equity to modify or dissolve a permanent injunction. See System Fed'n v. Wright, 365 U.S. 642, 650-51 (1961). See also Elgin Nat'l Watch Co. v. Barrett, 213 F.2d 776, 780 (5th Cir. 1954); Bigelow v. Balaban & Katz Corp., 199 F.2d 794, 796-97 (7th Cir. 1952); Hygrade Food Prods. Corp. v. United States, 160 F.2d 816, 819 (8th Cir. 1947); Coca-Cola Co. v. Standard Bottling Co., 138 F.2d 788, 789-90 (10th Cir. 1943).
There is need to keep in mind steadily the limits of inquiry proper to the case before us. We are not framing a decree. We are asking ourselves whether anything has happened that will justify us now in changing a decree. The injunction, whether right or wrong, is not subject to impeachment in its application to the conditions that existed at its making. We are not at liberty to reverse under the guise of readjusting. Life is never static, and the passing of a decade has brought changes to the grocery business as it has to every other. The inquiry for us is whether the changes are so important that dangers, once substantial, have become attenuated to a shadow. No doubt the defendants will be better off if the injunction is relaxed, but they are not suffering hardship so extreme and unexpected as to justify us in saying that they are the victims of oppression. Nothing less than a clear showing of grievous wrong evoked by new and unforeseen conditions should lead us to change what was decreed after years of litigation with the consent of all concerned.\textsuperscript{77}

Although Justice Cardozo's restrictive language in \textit{Swift} is the majority rule today,\textsuperscript{78} courts have considered at least five other standards.\textsuperscript{79} The leading modern case adhering to the Court's

\textsuperscript{77} 286 U.S. at 119. At another point in the opinion, however, the Court employed far less restrictive language:

\textit{We are not doubtful of the power of a court of equity to modify an injunction in adaptation to changed conditions though it was entered by consent.\ldots\ If the reservation [of that power] had been omitted, power there still would be by force of principles inherent in the jurisdiction of the chancery. A continuing decree of injunction directed to events to come is subject always to adaptation as events may shape the need.\ldots\ The distinction is between restraints that give protection to rights fully accrued upon facts so nearly permanent as to be substantially impervious to change, and those that involve the supervision of changing conduct or conditions and are thus provisional and tentative.\ldots\ The result is all one whether the decree has been entered after litigation or by consent.\ldots\ In either event, a court does not abdicate its power to revoke or modify its mandate if satisfied that what it has been doing has been turned through changing circumstances into an instrument of wrong.\ldots\ The consent is to be read as directed toward events as they then were. It was not an abandonment of the right to exact revision in the future, if revision should become necessary in adaptation to events to be.}

\textit{Id.} at 114-15 (citations omitted).

\textsuperscript{78} See, e.g., \textit{Safe Flight Instrument Corp. v. United Control Corp.}, 576 F.2d 1340, 1343 (9th Cir. 1978); \textit{Boughner v. Secretary of Health, Educ. and Welfare}, 572 F.2d 976, 978 (3d Cir. 1978); \textit{Flavor Corp. v. Harnischfeger Corp.}, 242 F.2d 712, 713 (7th Cir. 1957); \textit{United States v. City of Milwaukee}, 441 F. Supp. 1377, 1380 (E.D. Wis. 1977). The discussion in this portion of the Article applies to injunctions procured by the government and by private entities or persons.

\textsuperscript{79} See notes 166-71 and accompanying text infra.
standard in *Swift* is *Humble Oil & Refining Co. v. American Oil Co.*, written by Justice Blackmun when he was a federal appellate judge. In *Humble Oil*, three oil companies sought to modify an injunctive decree that restrained them from using certain marks and names in connection with their gasoline and oil business operations in certain midwestern states. 

The plaintiffs argued that the proper legal standard applicable to a request for modification is whether, under the facts as they are shown to exist today, the court would have issued the original injunction. In other words, the plaintiffs contended that they were entitled to modification because the original injunction, based on an entirely different set of facts than then existed, could not have properly been issued under the present facts.

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81 Id. at 804-05. In *Humble Oil*, as in other modern cases where a party seeks to modify or dissolve a permanent injunction, relief was sought under Rule 60(b) of the Federal Rules of Civil Procedure. The Rule provides:

> On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: . . . (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment.


82 405 F.2d at 811-14. An important issue is to what extent the applicable facts or law must subsequently change to support a motion for modification. The Eighth Circuit has stated:

> While a decree may not normally be changed in the interests of the defendants if the purposes of the litigation as incorporated in the decree have not been fully achieved, unforeseen hardships to the defendants may be considered, especially where there are (1) changes in operative facts, (2) changes in the relevant decisional law, and (3) changes in any applicable statutory law.

Relying on *Swift*, the Eighth Circuit unequivocally rejected the plaintiffs' standard. Implying that the invocation of such a standard would, in essence, impeach the issuance of the injunction, the court instead framed the question in terms of the propriety of withdrawing or modifying injunctive relief that had been previously granted. Accordingly, Justice Blackmun employed the *Swift* rationale, thereby refusing to distinguish *Swift* on the basis of the litigious and protracted nature of that proceeding. The court gleaned from *Swift* the following factors:

(1) [T]hat, where modification and amendment of an existing decree is under consideration, there are "limits of inquiry" for the decree court and for the reviewing court; (2) that the inquiry is "whether the changes are so important that dangers, once substantial, have become attenuated to a shadow"; (3) that the movants must be "suffering hardship so extreme and unexpected" as to be regarded as "victims of oppression"; and (4) that there must be "[n]othing less than a clear showing of grievous wrong evoked by new and unforeseen conditions."

Placed in other words, this means for us that modification is only cautiously to be granted; that some change is not enough; that the dangers which the decree was meant to foreclose must almost have disappeared; that hardship and oppression, extreme and unexpected, are significant; and that the movants' task is to provide close to an unanswerable case. To repeat: caution, substantial change, unforeseenness, oppressive hardship, and a clear showing are the requirements.

Looking at subsequent Supreme Court decisions that have interpreted *Swift*, Justice Blackmun, while observing that these decisions continue to recognize an equity tribunal's power to dissolve or modify an injunctive decree, nevertheless asserted that they did not retreat from *Swift*’s strict standards. Applying these stan-

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83 Justice Blackmun stated:

We feel that [plaintiffs' assertions], standing alone, are not consistent with the language and with what we regard as the requirements of *Swift*. As Mr. Justice Cardozo said in *Swift*, 286 U.S. at 119, 52 S. Ct. at 464, "We are not framing a decree." We are confronted here not with a question of the granting of injunctive relief but with the question of the withdrawal or modification of injunctive relief granted in the past. It is in the latter situation—the one which confronts us—where the Cardozo precepts are the operating guidelines.

405 F.2d at 814.

84 Id. at 813.


86 405 F.2d at 813.
dards to the facts before it, the Eighth Circuit held that the plaintifs failed to show the substantial change, unforeseenness, and oppressive hardship necessary for modification of the injunction.\(^8\)

Swift's stringent guidelines have been applied by numerous courts in a variety of contexts.\(^8\) For example, in Mayberry v. Maroney,\(^8\) the Third Circuit adopted Swift's restrictive language in denying the State of Pennsylvania's motion for modification of a previous consent order that enjoined the state from confining inmates in a basement facility at a state penitentiary.\(^9\) In Ridley v. Phillips Petroleum Co.,\(^9\) the Tenth Circuit, relying specifically on both Swift and Humble Oil, denied the oil company's motion to dissolve an injunction that restrained it from disconnecting a gas line that was connected to an irrigation waterwell.\(^9\) In De Filippis v. United States,\(^9\) the Seventh Circuit refused to modify an injunction enjoining the Marine Corps from prohibiting the use of short hair wigs at the Corps' summer training camp.\(^9\) Quoting Swift, the court stated that a motion for modification does not permit relitigation of issues that were resolved by the previous judgment.\(^9\) In denying the government's motion, the court con-

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\(^8\) Id. at 818-21.

\(^8\) See cases cited in note 78 supra.

\(^8\) 558 F.2d 1159 (3d Cir. 1977).

\(^9\) In stringently applying the Swift standard, the Third Circuit stated: "We think a healthy respect for the finality of judgments demands no less." Id. at 1163. In a decision rendered a year later, however, the court declined to apply the rigors of Swift and affirmed the district court's dissolution of a permanent injunction. See SEC v. Warren, 583 F.2d 115, 118-22 (3d Cir. 1978).

\(^9\) 427 F.2d 19 (10th Cir. 1970).

\(^9\) Id. at 22-23. The court noted:

These two cited cases hold that where a modification of an injunctive decree is sought the court should determine "whether the changes are so important that dangers, once substantial, have become attenuated to a shadow," and it must be shown that the moving party is exposed to severe hardships of extreme and unexpected nature. Thus the requested change should be approached with caution and a strong showing is required of new conditions and circumstances making the original injunction oppressive.

\(^9\) Id. at 22.

\(^9\) 567 F.2d 341 (7th Cir. 1977).

\(^9\) Id. at 344.

\(^9\) Id. at 343-44. See Elgin Nat'l Watch Co. v. Barrett, 213 F.2d 776,780 (5th Cir. 1954) ("rule 60(b) . . . was not intended as, and it is not, a substitute for a direct appeal from an erroneous judgment.").
cluded that "[a]bsent a clear showing of grievous wrong, judgments will not, and cannot be opened." 6

A minority of courts, however, has refused to follow Swift's stringent requirements. These courts argue that subsequent Supreme Court decisions attribute Swift's reasoning to the protracted nature of that litigation. 7 According to this view, the Supreme Court's decision in United States v. United Shoe Machinery Corp., 8 represents a significant departure from Swift's restrictive standards. In United Shoe, the government sought to modify an earlier judgment to impose more onerous limitations on the enjoined party. The earlier judgment held that the defendant had violated the Sherman Antitrust Act by monopolizing the manufacture of shoe machinery. The government originally requested the court to break up the defendant into three separate shoe machinery manufacturing companies. The district court instead chose to impose a number of restrictions and conditions that were designed "to recreate a competitive market." 9 The decree also provided that ten years thereafter, either party could petition the court for modification. 10 When the specified date arrived, the government reported to the court that United Shoe continued to dominate the shoe machinery market and requested that the company be restructured to constitute two competing corporations. The district court denied the government's motion, holding that under Swift, its power to modify an original decree was confined to cases involving "(1) a clear showing of (2) grievous wrong (3) evoked by new and unforeseen conditions." 11

6 567 F.2d at 344. Judge Pell, in a dissenting opinion, distinguished Swift. He asserted that a subsequent change in law rendered the continued application of the injunction inequitable. Id. at 344-45.


8 391 U.S. 244 (1968).

9 Id. at 246.

10 Id. The decree issued by the district court provided:

On [January 1, 1965] both parties shall report to this Court the effect of this decree, and may then petition for its modification, in view of its effect in establishing workable competition. If either party takes advantage of this paragraph by filing a petition, each such petition shall be accompanied by affidavits setting forth the then structure of the shoe machinery market and defendant's power within that market.


The Supreme Court reversed, stating that the district court had misconceived the decision in *Swift*. The Court reviewed the *Swift* defendants' numerous unsuccessful attempts to vacate the decree that preceded the petition for modification. The *United Shoe* Court then observed that *Swift*’s restrictive language "must, of course, be read in light of this context" and concluded that "*Swift* teaches that a decree may be changed upon an appropriate showing, and it holds that it may not be changed in the interests of the defendants if the purposes of the litigation as incorporated in the decree ... have not been fully achieved." Unlike *Swift*, where the defendants had sought relief to escape the decree's adverse effects, the government in *United Shoe* sought modification to accomplish the purposes of the original decree. Accordingly, the Court instructed the lower tribunal that, if the decree had not accomplished its principal purposes, the time had come to order other, and if appropriate, more definitive, means to effectuate these purposes.

The Supreme Court's decision in *System Federation v. Wright* lends additional support to the minority view. There, the Court held that the trial court abused its discretion in denying modification of an injunction, entered pursuant to a consent decree, where a subsequent change in federal law expressly made lawful the activity prohibited by the decree. The Court relied heavily on *Swift* to reaffirm a number of principles: that a court of equity has power to modify an injunction in light of changed circumstances; that in seeking modification, a party cannot impeach the integrity of the original decree; that the identical standards for modification apply whether the injunction was entered prior to the expiration of the ten-year period because a court of equity has inherent power to modify an injunctive decree. See note 77 supra. Accord, *System Fed’n v. Wright*, 364 U.S. 642, 647 (1961). See also 391 U.S. at 251.

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102 391 U.S. at 248.
103 Id. (emphasis in original). The government in *United Shoe* could have sought modification prior to the expiration of the ten-year period because a court of equity has inherent power to modify an injunctive decree. See note 77 supra. Accord, *System Fed’n v. Wright*, 364 U.S. 642, 647 (1961). See also 391 U.S. at 251.
104 391 U.S. at 249-52.
106 Id. at 643-52. In *System Federation* nonunion railroad employees sued the railroad and a number of unions for damages. The plaintiffs invoked § 2 of the Railway Labor Act, ch. 347, 44 Stat. 577 (1926) (current version at 45 U.S.C. § 152 (1976)), which at the time of suit prohibited carriers from coercing employees to join or not to join any labor organization. The parties settled the suit, and as part of the settlement, the defendants were enjoined from discriminating against the plaintiffs' class on the basis of their nonunion status. Thereafter, Congress amended the Railway Labor Act to allow contracts mandating a union shop under certain circumstances. Based on this change in law, the petitioner labor union sought to dissolve the injunction pursuant to Fed. R. Civ. P. 60(b).
by consent or after litigation; and that firmness and stability require courts to exercise sparingly the power to modify an injunctive decree. Of particular significance to courts seeking to distinguish *Swift* is the *System Federation* Court's recognition that:

> [A] sound judicial discretion may call for the modification of the terms of an injunctive decree if the circumstances, whether of law or fact, obtaining at the time of its issuance have changed, or new ones have since arisen. The source of the power to modify is of course the fact that an injunction often requires continuing supervision by the issuing court... \(^{107}\)

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107 364 U.S. at 647-48, 650-51. The Court also relied on Pennsylvania v. Wheeling & Belmont Bridge Co., 59 U.S. (18 How.) 421 (1855), which concerned the effect of a subsequent congressional enactment on an outstanding injunction. The Court dissolved the injunction because the congressional enactment rendered it unenforceable. *Id.* at 430-32. The *System Federation* Court remarked that the principles of *Wheeling Bridge* were followed in lower federal and state courts. 364 U.S. at 650 n.6. See McGrath v. Potash, 199 F.2d 166, 167 (D.C. Cir. 1952); Coca-Cola Co. v. Standard Bottling Co., 138 F.2d 788, 790 (10th Cir. 1943); Western Union Tel. Co. v. International Bhd., 133 F.2d 955, 958 (7th Cir. 1943); Santa Rita Oil & Gas Co. v. State Bd. of Equalization, 112 Mont. 359, 367-70, 116 P.2d 1012, 1016-18 (1941); Ladner v. Siegel, 298 Pa. 487, 500, 148 A. 699, 703 (1930).

108 364 U.S. at 647. The Court also stated:

> Firmness and stability must no doubt be attributed to continuing injunctive relief based on adjudicated facts and law, and neither the plaintiff nor the court should be subjected to the unnecessary burden or re-establishing what has once been decided. Nevertheless the court cannot be required to disregard significant changes in law or facts if it is “satisfied that what it has been doing has been turned through changing circumstances into an instrument of wrong.”... A balance must thus be struck between the policies of *res judicata* and the right of the court to apply modified measures to changed circumstances. *Id.* at 647-48 (quoting *United States v. Swift & Co.*, 286 U.S. at 114-15). The *System Federation* Court also commented that the limits of lower court discretion are usually far clearer to an appellate court when the new circumstances involve a change in law rather than in facts. 364 U.S. at 648. Also of possible significance is the *System Federation* Court's omission to quote *Swift's* most stringent language. It is plausible that this omission was intentional.

In a more recent case, *Pasadena City Bd. of Educ. v. Spangler*, 427 U.S. 424 (1976), the Court, quoting the above broad language of the *System Federation* Court, stated that ambiguity in the subject provision of the decree combined with a change in applicable law compelled modification of the decree. *Id.* at 436-38 (quoting 364 U.S. at 647). Dissenting, Justice Marshall applied the strict *Swift* principles and concluded that the district court was correct in denying modification. *Id.* at 444. See also *Columbia Artists Mgmt. Inc. v. United States*, 381 U.S. 348, 352 (1965) (dissenting opinion) (dissenters contended that the Court summarily affirmed the lower court's modification of a consent decree where no changed circumstances were claimed).

An issue that may arise either in ordering an injunction or in a motion for modification under *Fed. R. Civ. P. 65(d)* is whether the decree's terms are adequately specific. *Fed. R. Civ. P. 65(d)* provides that “every order granting an injunction and every restraining order shall... be specific in terms; shall describe in reasonable detail, and not by reference to the complaint or other document, the act or acts sought to be restrained...”. 427 U.S. at 439. With respect to this provision, the *Spangler* Court stated: “because of the rightly
A minority of lower courts has concluded that the decisions in *United Shoe* and *System Federation* have relaxed the stringent *Swift* standards. Two leading federal appellate court decisions distinguished *Swift* and permitted modification or dissolution of an injunction. In *King-Seeley Thermos Co. v. Aladdin Industries, Inc.*, the Second Circuit reversed the district court's denial of a motion to modify an injunction issued in a trademark case. In *Securities and Exchange Commission v. Warren*, the Third Circuit upheld the district court's dissolution of a permanent injunction that had been entered by consent.

In *King-Seeley*, Judge Friendly, writing for the court, commented that the district judge, in denying the motion for modification, gave *Swift* a rigidity that the Supreme Court had not intended. Citing the *United Shoe* Court's assertion that Justice Cardozo's language must be read in light of *Swift*'s protracted context, the Second Circuit stated that the case at bar, unlike *Swift*, involved no such conflict. Noting that changes in fact or law provide the strongest reasons for modifying an injunction, the court held that modification or dissolution also is appropriate "where a better appreciation of the facts in light of experience indicates that the decree is not properly adapted to accomplishing its purposes." The court commented that the Eighth Circuit's serious view courts have traditionally taken of violations of injunctive orders, and because of the severity of punishment which may be imposed for such violation, such orders must in compliance with Rule 65 be specific and reasonably detailed." *Id.* See *SEC v. Keller Corp.*, 323 F.2d 397, 402 (7th Cir. 1963); United States v. Sherwood, 175 F. Supp. 480, 482 (S.D.N.Y. 1959). *See generally Schmidt v. Lessard,* 414 U.S. 473 (1974) (per curiam).

*Id.* at 34.

*Id.* 583 F.2d 115 (3d Cir. 1978). For a discussion of *Warren*, see notes 155-65 and accompanying text *infra*.

*Id.* 583 F.2d at 118-22. Although the Third Circuit in *Warren* did not explicitly distinguish *Swift*, its reasoning and reliance on *United Shoe* and *King-Seeley* leads to that conclusion.

Judge Friendly stated:

> Although we admire our brother Anderson's effort to achieve precision, we think he gave the *Swift* decision a rigidity the Court did not intend. The defendants who there sought modification of a consent decree had been obliged by the very nature of the case to stake their claim on drastic changes in conditions and, as pointed out in *United Shoe*, the language "to the effect that 'nothing less than a clear showing of grievous wrong evoked by new and unforeseen conditions should lead us to change'... the decree, must, of course, be read in light of this context." *Id.*

*Id.* 418 F.2d at 34 (quoting 391 U.S. at 248) (citations omitted).

*Id.* 418 F.2d at 35. See *Tobin v. Alma Mills,* 192 F.2d 133 (4th Cir. 1951) (upholding dissolution of injunction upon a showing that enjoined company had in good faith complied with its terms for over ten years), *cert. denied,* 343 U.S. 933 (1952). The *Tobin* court stated:
opinion in *Humble Oil* imposed too severe a requirement for modifying or dissolving an injunction.\(^{115}\) In affirming the court's power to alter an injunction even in the absence of changed circumstances, Judge Friendly cautioned, however, that this power should be exercised sparingly.\(^{116}\)

The *King-Seeley* decision is the first explicit judicial deviation from *Swift*'s stringent standards.\(^{117}\) The Second Circuit has subsequently reaffirmed this departure from *Swift*.\(^{118}\) In addition, the Third Circuit, relying heavily on *King-Seeley*, has likewise abandoned *Swift*'s strict requirements.\(^{119}\) Although these developments are interesting in themselves, cases involving the federal securities laws, largely because of the SEC's dependence on injunctive relief, lend themselves to motions by enjoined parties to modify or dissolve previously issued injunctions.\(^{120}\) For this reason, and also because such motions may affect the ability of the SEC to administer the federal securities laws, the following discussion will focus on the modification or dissolution issue in the context of SEC injunctive decrees.

IV

**MODIFYING OR DISSOLVING SEC INJUNCTIONS**

Because of the severe collateral consequences that may accompany an SEC injunction,\(^{121}\) a number of courts have recog-

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\(^{115}\) 418 F.2d at 38n.2. For a discussion of *Humble Oil*, see notes 80-87 and accompanying text *supra*.

\(^{116}\) 418 F.2d at 35.


\(^{118}\) Chance v. Board of Examiners, 561 F.2d 1079, 1086 (2d Cir. 1977) (following *King-Seeley* but concluding "some form of hearing is generally required to make so vital a determination").

\(^{119}\) SEC v. Warren, 583 F.2d 115, 118-22 (3d Cir. 1978); *see* notes 134-44 and accompanying text *infra*.

\(^{120}\) *See generally* notes 29-49 and accompanying text *supra*.

\(^{121}\) *See* notes 52-57 and accompanying text *supra*. 
nized that the remedy is more than a mild prophylactic.\textsuperscript{122} In order to obtain injunctive relief, the SEC must show a reasonable likelihood that the defendant, absent such relief, will again engage in the violative conduct.\textsuperscript{123} Even where the SEC makes the necessary showing, some courts have hesitated to order an unconditional permanent injunction. The conditions that courts have attached to the imposition of an injunction include automatic dissolution after a fixed number of years,\textsuperscript{124} suspension after the defendant fulfills certain requirements,\textsuperscript{125} and permitting a petition for dissolution after a fixed period of time on a lesser showing than that required by \textit{Swift}.\textsuperscript{126} Although the SEC, at times, has agreed to certain of these limitations pursuant to the consent process,\textsuperscript{127} the Commission's position appears to be that upon making a proper showing, it is entitled as a matter of statutory right to the ordering of a permanent injunction.\textsuperscript{128}

The Ninth Circuit's recent decision in \textit{Securities and Exchange Commission v. Blazon Corp.}\textsuperscript{129} illustrates some of the issues that may

\textsuperscript{122} See, e.g., Aaron v. SEC, 100 S. Ct. 1945, 1954 (1980) (Burger, C.J., concurring); SEC v. Commonwealth Chem. Sec., Inc., 574 F.2d 90, 99 (2d Cir. 1978) (Friendly, J.) ("Experience has shown that an injunction, while not always a 'drastic remedy' ... often is much more than [a] 'mild prophylactic'... ").

\textsuperscript{123} See notes 30-32 and accompanying text supra.


\textsuperscript{125} See SEC v. Associated Minerals, Inc., No. 77-0986 (E.D. Mich. 1979), cross appeals pending, Nos. 79-1449, 79-1450 (6th Cir. 1980) (court order provided for automatic dissolution of injunction entered upon repayment to investors of portion of investment funds converted by defendants).

\textsuperscript{126} See SEC v. Starr Broadcasting Group, Inc., No. 79-0357 (D.D.C. Feb. 7, 1979), SEC Lit. Rel. 8667. The order provided for dissolution upon petition if the enjoined party demonstrated compliance with the law—a standard far more relaxed than in \textit{Swift}. Thus, the decree allowed defendants to petition the court "to modify or terminate their disqualifications as officer, directors or general counsel or in-house counsel of public corporations provided they can establish to the satisfaction of the court and the Commission that they are able to discharge the responsibilities of persons occupying such positions under the federal securities laws. . . . "). In addition, courts have issued decrees allowing future petitions for dissolution without articulating the criteria for modification. See SEC v. Blazon Corp., 609 F.2d 960 (9th Cir. 1979) (district court order provided that defendants could move for dissolution of injunction after expiration of 18 months).


\textsuperscript{128} See Brief of the Securities and Exchange Commission at 10, SEC v. Associated Minerals, Inc., Nos. 79-1449, 79-1450 (6th Cir.1980) ("By providing in the statutes for Commission enforcement by injunction, Congress plainly intended that after having found that the Commission has made a 'proper showing,' the court is to shift to the defendants the burden of policing their conduct under the \textit{in terrorem} threat of contempt proceedings.").

The SEC has, at times, agreed with the defendant that the injunction should be dissolved. See, e.g., SEC v. John Cummmins Pharmaceutical Co., No. 71-H-69 (S.D. Tex. March 7, 1979); SEC Lit. Rel. 8685.

\textsuperscript{129} 609 F.2d 960 (9th Cir. 1979).
arise when a lower court orders injunctive relief with certain limitations attached. The trial court’s order provided that the defendants could move for dissolution of the injunction after eighteen months if they demonstrated compliance with its terms. Notwithstanding such compliance, the order further provided that the injunction would continue in effect if the SEC showed that the public interest so required.\textsuperscript{130} Clearly, this Order altered the \textit{Swift} standards, even as arguably modified by \textit{United Shoe} and \textit{System Federation}. These cases require the moving party to bear the burden of satisfying the court that the injunction should be modified or dissolved. Yet, under the district court’s order in \textit{Blazon}, if an enjoined party showed mere compliance with the decree, the SEC would be required to prove that continued enforcement would be in the public interest.\textsuperscript{131}

On appeal, the SEC argued that the district court’s fashioning of the dissolution provision was beyond its judicial power and constituted an abuse of discretion.\textsuperscript{132} The Ninth Circuit, relying on \textit{Hecht Co. v. Bowles},\textsuperscript{133} observed that a trial court has wide discretion in framing an injunction based on traditional principles of equity.\textsuperscript{134} Moreover, the court did not agree with the SEC’s characterization of the injunction as a “limited” one. As perceived by the Ninth Circuit, the provision did not automatically terminate the injunction after eighteen months; rather it merely provided the defendants with a right to seek review after the period expired.\textsuperscript{135} However, the court did not address the SEC’s central argument—that the trial court misapplied the \textit{Swift} standards:

\begin{itemize}
\item \textsuperscript{130} \textit{Id.} at 966. The pertinent provision of the district court’s order provided:
   \begin{quote}
   It is hereby further ordered that the defendants may move for dissolution of this injunction at any time following eighteen (18) months from the date of entry of this order provided that in support of such a motion defendants demonstrate compliance with the terms of the injunction and, provided further, that, notwithstanding such a showing by the defendants, the injunction shall continue in full force and effect if the plaintiff Securities and Exchange Commission demonstrates that the public interest so requires.
   \end{quote}
\item \textsuperscript{131} Indeed, the district court’s formulation in \textit{Blazon} appears to be even more expansive than those decisions that have relaxed the \textit{Swift} standard. \textit{See note 76 supra.}
\item \textsuperscript{132} 609 F.2d at 966.
\item \textsuperscript{133} \textit{See the discussion of Hecht} at notes 24-29 and accompanying text \textit{supra.}
\item \textsuperscript{134} 609 F.2d at 966-67. The Ninth Circuit remarked that it had repeatedly applied the equitable principles of \textit{Hecht} in SEC enforcement proceedings. \textit{See, e.g.}, SEC v. Arthur Young & Co., 590 F.2d 785 (9th Cir. 1979); SEC v. Koracorp Indus., Inc., 575 F.2d 692 (9th Cir.), \textit{cert. denied}, 439 U.S. 953 (1978); SEC v. United Financial Group, Inc. 474 F.2d 354 (9th Cir. 1973).
\item \textsuperscript{135} 609 F.2d at 967-68. It is clear that even absent this 18-month proviso, the defendants could move for dissolution under traditional notions of equity. \textit{See note 82 supra.}
\end{itemize}
The Commission correctly argues that the standards for modification of a permanent, unconditional injunction are strict. United States v. Swift & Co., 1932, 268 U.S. 106... We do not now decide whether the review provision in the injunction was intended to change the otherwise strict standards for modification of an injunction or, if so, whether such action was within the discretion of the trial judge. Neither of these questions will be before us until the time, if ever, when the injunction is actually modified or dissolved.136

Although the Ninth Circuit declined to determine the appropriate standards under which an SEC injunction can be dissolved or modified, a number of other courts have confronted this question. As with the dissolution of injunctions in general, the majority of courts appear to adhere to the stringent Swift standards in this particularized area as well.137 The minority view, basically composed of the Third Circuit's opinion in Securities and Exchange Commission v. Warren,138 distinguishes Swift by pointing to subsequent Supreme Court decisions and also by relying on the Second Circuit's reasoning in King-Seeley.139

The Seventh Circuit's decision in Securities and Exchange Commission v. Advance Growth Capital Corp.,140 represents the majority viewpoint. In that case, the defendants sought dissolution of an injunction prohibiting future violations of the Investment Company Act on the grounds that they had complied with its terms, that the company had continued to prosper, that they had suffered embarrassment in their business relations due to the injunction, and that the injunction had prevented them from serving as officers and directors of the company.141 Relying on Swift, the Seventh Circuit held that these effects did not constitute the "'grievous wrong evoked by new and unforeseen conditions,'"

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136 609 F.2d at 968.
139 See notes 105-112 and accompanying text supra; notes 145-52 and accompanying text infra.
140 539 F.2d 649 (7th Cir. 1976).
141 539 F.2d at 651-52. Section 9(a)(2) of the Investment Company Act disqualifies the enjoined party from serving as a director, officer, or employee of a registered investment company. The Commission may waive this qualification. See note 38 and accompanying text supra.
that Swift envisioned. Likewise, in Securities and Exchange Commission v. Jan-Dal Oil & Gas, Inc., the Tenth Circuit reversed a district court's order dissolving an eight-month old permanent injunction which prohibited the defendants from further violations of the registration provisions of the Securities Act. The defendants asserted that they had complied with the law and that the injunction was a continuing embarrassment in their business associations. The court, however, citing Swift, United Shoe, and its decision in Ridley, concluded that these circumstances were "not enough" to justify dissolution of the injunction.

A later Tenth Circuit case, Securities and Exchange Commission v. Thermodynamics, Inc., affirmed the district court's denial of a motion to vacate the injunction, but deviated somewhat from the Swift standards. The enjoined party pointed to his good reputation in the community, the embarrassment caused by the injunction, and the detrimental effects that the injunction had on his business relations as grounds for dissolution. He stressed, for example, that the injunction prevented him from securing a line of credit from a local bank, precluded him from being considered for a directorship of a company with which he transacted business, and disqualified him from making a Regulation A offering of stock in his own corporation. The court, in recognizing that the Swift standards present a difficult obstacle, concluded that a motion to vacate an injunction must be premised on substantial change in either the law or facts. In discussing what constituted "substantial change," however, the court departed from the strict limitations of Swift:

[I]n instances where the defendant concerned is an individual, and where the alleged violation leading to the injunction was an incident of limited scope or duration, the passage of a substantial period of time with full compliance and with no other violations may be regarded as a significant factor showing a

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143 433 F.2d 304 (10th Cir. 1970).
144 Id. at 304-05.
145 For a discussion of Ridley, see note 81 and accompanying text supra.
146 464 F.2d at 457 (10th Cir. 1972), cert. denied, 410 U.S. 927 (1973).
149 464 F.2d at 460.
"change" for these purposes. In reality this is about all an individual can show under these circumstances.\textsuperscript{150}

The minority view's departure from the stringent \textit{Swift} standards is also evidenced by a recent district court decision, \textit{Securities and Exchange Commission v. Bausch & Lomb, Inc.}\textsuperscript{151} Although denying the defendants' motion to dissolve the injunction, the court opined that Judge Friendly's flexible approach in \textit{King-Seeley} appeared to represent the better view.\textsuperscript{152} There, the defendants, who had consented to a permanent injunction, moved for dissolution when their codefendants had not been enjoined after a non-jury trial.\textsuperscript{153} The court denied the motion, finding that it had not adjudicated the movants' liability in the trial of the non-settling defendants and that the injunction was neither oppressive nor burdensome.\textsuperscript{154}

The most significant recent decision in the area of dissolution or modification of SEC permanent injunctions is \textit{Securities and Exchange Commission v. Warren}.\textsuperscript{155} In \textit{Warren}, the defendant was enjoined pursuant to a consent decree from future violations of the margin requirements of the Securities Exchange Act and Regulation \textit{U} promulgated thereunder.\textsuperscript{156} He moved for dissolution on

\begin{enumerate}
\item \textit{Id.} at 461. \textit{See} Tobin v. Alma Mills, 192 F.2d at 136; note 95 supra.
\item In \textit{Thermodynamics}, the Tenth Circuit raised but did not address the propriety of administrative agencies procuring injunctions to permit future agency enforcement through contempt proceedings. The court stated:
\begin{quote}
There is a difference of opinion as to whether as a general proposition injunctions to 'obey the law' should be issued in order that enforcement by administrative agencies may be sought by contempt rather than by the statutory route. The standards for a change in any injunction are difficult to meet, and in some instances this may lead to problems.
\end{quote}
\item 464 F.2d at 461. Other courts have also raised this concern. \textit{See} Tobin v. Alma Mills, 192 F.2d at 136 ("This sort of government by injunction should not be unduly extended"); SEC v. Warren, 76 F.R.D. at 412 ("We are well aware that there is a difference of opinion on the issuance of injunctions to 'obey the law' so that enforcement by administrative agencies may be sought by contempt rather than by the statutory route.")
\item 12 F.R.D. 50 (S.D.N.Y. 1979).
\item \textit{Id.} at 52.
\item \textit{Id.} at 51.
\item \textit{Id.} at 53. The court pointed out that when the defendants elected to settle, they knew that the SEC might not prevail on the merits:
\begin{quote}
Wisely or unwisely, they submitted to these restraints upon the exercise of powers that would normally be theirs. They chose to renounce what they might otherwise have claimed, and the decree of a court confirmed the renunciation and placed it beyond recall.
\end{quote}
\item \textit{Id.} (quoting \textit{United States v. Swift & Co.}, 286 U.S. at 119).
\item 583 F.2d at 116 nn.1 & 2.
\end{enumerate}
the grounds that the conduct involved an isolated, technical violation involving no intent to defraud, the loans were repaid within six months, he settled while under intense personal and family pressures, the danger of recurrence was minimal, because of the injunction's undesirable taint, he felt compelled to resign directorships from a number of corporate boards and to forego various investment opportunities, and the promulgation of Regulation X was sufficient to protect the investing public from future violations. Distinguishing Swift and citing the principles of King-Seeley, the district court in Warren exercised its "inherent equitable power to weigh the severity of the alleged danger which the injunction was designed to eliminate against the continuing necessity for the injunction and the hardship brought by its prospective application." Weighing these factors, the court granted the motion to dissolve the injunction.

157 76 F.R.D. at 408-12. See also 583 F.2d at 116-18, 121-22. In 1970, Congress added § 7(f) to the Exchange Act, 15 U.S.C. § 78g(f). The following year the Federal Reserve Board promulgated Regulation X, 12 C.F.R. § 224. These provisions make it unlawful for a borrower knowingly to obtain credit in violation of the margin requirements.


"[T]he continued need for the decree and the hardship suffered by the defendants are neither alternative standards for modification, either of which will suffice, as the defendants submit, or cumulative prerequisites, both of which must be established, as the government claims. They are rather correlative elements of a single standard. As need is diminished, a lesser showing of hardship will tip the scales in favor of modification, and as the defendants' suffering increases, their burden of showing decreased need is correspondingly lightened."

189 F. Supp. at 905.

159 76 F.R.D. at 407-08, 411-13. See also SEC v. Wong, 369 F. Supp. 646 (D.P.R. 1974), where the district court relieved the defendant of an undertaking not to serve as an officer, director or member of an advisory board of any registered broker-dealer or investment company. In so holding, the court cited neither Swift nor any other Supreme Court decisions. The court stated:

"In exercising its discretion, the Court is moved by the fact that Mr. Gomez has complied with the undertaking since November 30, 1967, for more than six years, and that he does not intend to engage in the area of securities business. The Court is further moved by its conclusion, reached from the testimony of Mr. Gomez, that the continued existence of the undertaking affects the development of his business affairs in which he is presently engaged and greatly affects his psychological well-being.

Guided by equitable considerations and the principles similar to the ones who govern dissolution of injunctions, the Court concludes that more than six years of obedience to the undertaking is a reasonable limit to its terms and that there are no convincing reasons to extend the terms of the undertaking further.

Id. at 647-48, citing Tobin v. Alma Mills, 192 F.2d 133 (4th Cir. 1951), cert. denied, 343 U.S. 983 (1952).
On appeal, the Third Circuit affirmed on substantially the same reasoning. The SEC argued that the district judge exceeded his authority by reviewing the facts underlying the consent decree. Although it noted that the trial court would have abused its discretion had it impeached the validity of the decree, the Third Circuit observed that the court had properly received evidence regarding the nature and background of the loan transaction for the sole purpose of evaluating the scope and character of the violation to determine the necessity of continuing the injunction. The court also concluded that the stringent Swift standards must be viewed in light of the "unique" facts of that case and the subsequent decisions in United Shoe and King Seeley.

Thus, the court distinguished Swift on the grounds that the case before it did not resemble the outrageous conduct enjoined there, that the injunction applied to a single individual and did not involve an important public or national interest, and that, unlike Swift, the purpose of the injunction had apparently been achieved. Based on these factors, in conjunction with the injunction's severe collateral consequences, the Third Circuit held that the district court did not abuse its discretion in ordering the dissolution of the injunction. The court nevertheless acknowledged the central importance of injunctions to the enforcement of the securities laws, concluding that "they are not to be lightly vacated."

The foregoing discussion illustrates that the viability of the stringent Swift standards is open to debate. If courts should apply Swift only in cases involving extreme, litigious conduct, are the alternative approaches thus far adopted by certain courts appropriate? If not, what standards should apply? The final section of the Article will consider this troublesome and controversial issue.

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160 See 583 F.2d at 118-22.
161 Id. at 118 n.5.
162 Id. at 119.
163 Id. at 119-20. For a discussion of these cases, see notes 98-104, 113-19 and accompanying text supra.
164 583 F.2d at 120-21.
165 Id. at 122. A party may have to disclose that he was enjoined even after the injunction has been dissolved. Id. at 122 n.10. Under rules recently adopted by the SEC, it appears that disclosure of a dissolved injunction must be made if the injunction was entered within five years of filing. Registrants, however, would be allowed to explain any mitigating circumstances. See SEC Rel. Nos. 33-5949, 34-15006, 35-20643, IC-10342 (Sept. 30, 1978); note 57 supra.
Reflections on Modification and Dissolution of SEC and Other Permanent Injunctions

The preceding discussion has shown that in spite of the continued vitality of Swift, courts have employed at least five different standards to determine whether to modify or dissolve permanent injunctions. First, Swift itself requires a clear showing that the dangers that gave rise to the decree have ceased and that the movants have suffered grievous wrong from unforeseen changed conditions. Second, the decisions in United Shoe and System Federation have encouraged courts to recognize a change in law or fact as sufficient equitable basis for modification or dissolution. Third, Judge Friendly’s opinion in King-Seeley held that although a change of fact or law provides the clearest basis for relief, “a better appreciation of the facts in light of experience” may indicate that “the decree is not properly adapted to accomplishing its purposes,” and therefore should be altered. Fourth, the trial court in Warren balanced “the alleged danger the injunction was designed to eliminate against the continuing necessity for an injunction and the hardship brought by its prospective application.” Finally, the district court’s order in Blazon implies that dissolution after a fixed period of time is appropriate if the enjoined party complies with the decree’s terms unless the applicable government entity satisfies the court that the public interest requires the continued protection of the injunction.

A. Policies Underlying Modification or Dissolution of Injunctive Decrees

Although Swift remains the majority view, the emerging minority may represent an attempt to reconcile general equitable

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169 418 F.2d at 35.


171 609 F.2d 960, 966-68 (9th Cir. 1979). For a discussion of Blazon, see notes 129-36 and accompanying text supra.

172 See notes 58-75 and accompanying text supra.
principles with the nearly impossible burden imposed in Swift. Arguably, however, such departure from Supreme Court precedent should warrant swift and certain reversal by a reviewing tribunal. A methodology designed to harmonize these opposing principles must account for the policies connected with the modification or dissolution issue.

The traditional role of injunctive relief is an appropriate analytical starting point. Although the term "permanent injunction" arguably connotes a static decree, thereby "lasting or intended to last indefinitely," such orders are by nature continuing. In Swift, Justice Cardozo stated: "A continuing decree of injunction directed to events to come is subject always to adaptation as events may shape the need." The Bill of Review in equity, which was available only after issuance of a final order, is analogous. Courts granted the Bill when "a change in law or circumstances . . . render[ed] a decree . . . no longer appropriate or proper." Thus, there is ample historical precedent for review of permanent injunctions, but the guidelines are unclear.

The historic purpose of injunctive relief is to deter future violations, not to punish the violator. Accordingly, it can be argued that an injunction that has fulfilled its objective of deter-

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173 Blazon represents the most extreme deviation from Supreme Court authority. The district court's opinion is the first decision that would impose a burden on the successful litigant to justify the continuation of the decree. See notes 109-16 and accompanying text supra. See also SEC v. Wong, 369 F. Supp. 646, 647-48 (D.P.R. 1974).


175 286 U.S. at 114.

176 See 7 Moore's Federal Practice ¶ 60.15[1] (2d ed. 1979). The Bill of Review is rooted in the first Ordinance of Lord Chancellor Bacon, which provided:

No decree shall be reversed, altered, or explained, being once under the great seal, but upon bill of review; and no bill of review shall be admitted, except it contain either error in law, appearing in the body of the decree, without further examination of matters in fact, or some new matter which hath risen in time after the decree, and not any new proof which might have been used when the decree was made. Nevertheless, upon new proof that is come to light after the decree made, and could not possibly have been used at the time when the decree passed, a bill of review may be grounded by the special license of the court, and not otherwise.

Id. at ¶ 60.15[1] (citing 2 Street, Equity Practice 1256 (1909)). The 1946 revision of Rule 60(b) of the Federal Rules of Civil Procedure abolished the Bill of Review. Id. at ¶ 60.15[8].

177 Id. at 60.15[4] (citing International Ry. v. Davidson, 65 F. Supp. 58 (W.D.N.Y. 1945)).

ring the enjoined party should be dissolved upon an appropriate motion. The problem, of course, is to ascertain when an injunction ceases as a preventative measure and becomes solely punitive. In making this determination, the courts have made clear that with respect to injunctions procured by government entities, the public interest, when in conflict with the private, prevails.\footnote{See note 43 supra.}

Perhaps this approach represents a shorthand method of conveying that any doubts regarding dissolution should be resolved in favor of the decree's continued effect. Such an approach may be viewed as somewhat punitive and thereby inconsistent with historic equitable principles, but nevertheless arguably justified. Accordingly, the answer as to when a decree becomes excessively punitive rather than preventative is by no means clear. In short, it may well depend on the circumstances of the particular case and the extent to which a public or other countervailing interest is invoked.

Although "public or other countervailing interest" is an ambiguous concept, it can often be identified by reference to the nature of the parties and violations addressed in the decree. Modification or dissolution would evidently be precluded, for example, for injunctions against recidivist securities law violators, injunctions necessary for enforcement of the federal antitrust laws within the setting of major industries, and injunctions in private suits that are necessary to protect clearly recognizable personal interests, such as property interests in trademark infringement suits. The latter example, although not constituting a "public interest" per se, should be viewed as worthy of protection.

As another caveat, where the enjoined party seeks to dissolve or modify the terms of an injunction, the strength of the public or other countervailing interest involved should play a pivotal role in ascertaining the extent of the burden to be placed on the movant. For example, the burden should be greater when the movant seeks to dissolve or modify an injunctive decree that is designed to recreate a competitive market in a major industry than when a particular individual is enjoined from engaging in certain conduct. Although the latter decree may be designed to protect the public from the proscribed conduct and to promote the public policies embodied in the particular statute, its impact is considerably less than a decree that may affect thousands or millions of people and society's economic stability.
In view of the above considerations, the strict requirements established in the factual setting of Swift appear consistent with general equitable principles. The movants' protracted attempts to evade the provisions of the consent decree indicated substantial risk of future violations. The public interest in enforcement of the antitrust laws in this important industry further suggests that the Court properly imposed a rigorous standard.

The nature of the public interest, however, is arguably unrelated to the historic equitable deterrence rationale. This argument is flawed for two reasons. First, although individual deterrence is of primary importance, the public interest in general societal deterrence is also relevant. The stability of a permanent injunctive decree may serve a public purpose by deterring others from violating the law. While such decrees surely do not deter all potential violators, the attendant publicity and collateral consequences have the effect of deterring many who might otherwise engage in the proscribed conduct. Second, constant litigation of dissolution petitions conflicts with the traditional interest in finality and will undoubtedly increase court congestion.

This latter problem arises particularly when Congress has granted regulatory agencies authority to seek injunctions. Congress could not have intended that agencies constantly litigate modification or dissolution suits. Otherwise, these agencies would have time and resources to do little else. For example, the

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180 See generally van den Haag, Punitive Sentences, 7 Hofstra L. Rev. 123, 124 (1978) ("no legal threat, no matter how great the danger it produced, can deter everybody").


182 One area where this issue has arisen is the statutory time limits imposed by the Freedom of Information Act, 5 U.S.C. § 552(a)(6)(A). See, e.g., Exner v. FBI, 542 F.2d 1121 (9th Cir. 1976); Open America v. Watergate Special Prosecution Force, 547 F.2d 605 (D.C. Cir. 1976); Cleaver v. Kelly, 415 F. Supp. 174 (D.D.C. 1976). Despite an agency's due diligence and its employment of all appropriate and available personnel, the sheer volume of requests may render the agency incapable of complying with the statutory time periods.

The more logical approach... is to recognize that an agency has important functions assigned to it other than the processing of informational requests. In the case of the FBI, it is uncontroversible that this agency has vital law enforcement duties to perform. To interpret the existence of exceptional circumstances to signify the deployment of all personnel to complete the review and deliberation process within statutory time limits would leave the FBI with time to do little else. Under such a construction, the FBI would be incapable of performing its law enforcement obligations in a satisfactory manner.
SEC's "hard pressed" staff,\textsuperscript{183} reputed to be the most capable agency in the federal government,\textsuperscript{184} simply does not have the resources to litigate a large number of modification or dissolution cases. Indeed, largely because of lack of time and resources, the SEC settles approximately ninety percent of its cases pursuant to the consent process.\textsuperscript{185}

It would be more efficient to consider the length of the injunction during the consent negotiation process. Currently, private parties may choose the consent route to negotiate the least onerous charges, to negotiate an injunction against the corpora-


\textsuperscript{184} Senator Proxmire, Chairman of the Senate Banking Committee, recently called the SEC "the finest agency in Washington. It has absolute integrity." "SEC Nominee Tells Senate He Would Quit Law Firm," Washington Star, April 2, 1980, at F7.

\textsuperscript{185} Interview with SEC Commissioner Irving Pollack, 484 Sec. REG. & L. REP. (BNA) AA-4 (Jan. 3, 1979). Regarding the SEC's lack of resources and the increased number of securities law violators, Professor Hazen has stated:

The SEC's record reveals that, notwithstanding vigilant Commission activity, the number of violations continues to rise. Staffing limitations have, or soon will, prevent the SEC from being able to keep up with violators. One solution might be to increase the enforcement staff of an already highly staffed agency. In a time of concern over governmental spending and expansion, however, this does not appear to be the optimal solution. Another approach might be to shift much of the enforcement power to the private sector by expanding the scope of private remedies. This too is unlikely to be an available solution as the Supreme Court seems to be moving in the opposite direction, and limiting private remedies in the securities area. A viable variation might be to increase the efficacy of private enforcement with the use of SEC ancillary relief or by increasing the collateral estoppel effect of SEC injunctive actions. A final alternative, advocated here, is to expand the scope of SEC administrative sanctions, thereby increasing effective enforcement while reducing costs.

\textsuperscript{31} Hazel, supra note 31, at 443-44.

In regard to consent decrees in general, SEC Director of Enforcement Stanley Sporkin argues:

I submit that the consent decree process has vindicated the rights of the public in a most direct, efficient and effective way. Where we find that a publicly held company is controlled by persons or entities who are defrauding the public or misusing corporate assets, we have attempted through the consent decree to correct the abuses while preserving the corporate form and maintaining the company's business. In various consent decrees, the Commission has consistently attempted to provide relief that is not only necessary to prevent the recurrence of the problem, but also, by utilizing the full equitable powers of the court and the administrative process, to assure that all necessary corrective actions has been provided for and implemented.

tion without specifically including named individuals, or to avoid certain collateral effects of an injunction.\textsuperscript{186} There is no reason why the duration of the injunction cannot also be considered in the negotiation process. If the SEC refuses to negotiate that issue, the private party is free to litigate or to consent to a permanent injunction.\textsuperscript{187}

\textsuperscript{186} See generally Rowe, \textit{Settlement of an SEC Enforcement Action}, \textit{SEC Reg.} (P-H) \# 1121, at 1200.103 (Jan. 2, 1980). Generally, private parties may wish to settle an SEC enforcement action to avoid litigation expenses, consuming time demands of businessmen and professionals, adverse publicity, the effects of collateral estoppel, disclosure of confidential or other sensitive information, to facilitate SEC review concerning proposed business transactions, assist defense of a criminal action, and lessen the impact of the SEC action regarding potential actions by other regulatory agencies. \textit{Id.} at 1200.97.

In Parklane Hosiery v. Shore, 439 U.S. 322 (1979), the Supreme Court upheld the offensive use of collateral estoppel occurring "when the plaintiff seeks to foreclose the defendant from litigating an issue the defendant has previously litigated unsuccessfully in an action with another party." \textit{Id.} at 326 n.4. Eschewing blanket rules, the Court preferred an approach that grants trial courts broad discretion in deciding when to allow the offensive use of collateral estoppel. \textit{Id.} at 331-33.

The Court's decision in \textit{Parklane Hosiery} has broad ramifications in securities litigation. Although the offensive use of collateral estoppel will prove valuable to private plaintiffs, the fear of such use of collateral estoppel may induce a number of defendants to consent to an SEC injunction or administrative sanction rather than risk litigating. One commentator observes:

Although the Court was unwilling to sanction offensive use of collateral estoppel without reservation, its decision will have enormous practical effects on securities litigation. Broad application of collateral estoppel is particularly appropriate in securities cases. Courts have long recognized that private damage suits provide an essential supplement to SEC enforcement actions. Permitting private plaintiffs to rely on determinations obtained by the SEC will significantly lighten their task and increase the deterrent effect of both public and private penalties. Furthermore, securities litigation is often protracted; any time saved by applying collateral estoppel should prove welcome.

Unfortunately, \textit{Parklane Hosiery} may also vest the SEC with power to coerce non-culpable defendants into settling enforcement actions. Such defendants may fear the preclusive effects flowing from an unfavorable first judgment and the SEC may succeed in establishing securities violations where private litigants would fail. A defendant may rationally agree to the entry of a consent decree against him in the enforcement action, regardless of the merits of the action, in order to force private plaintiffs to prove independently the elements of their damage claim. This consequence of \textit{Parklane Hosiery} is not limited to SEC actions; the decision probably will enhance the ability of most agencies armed with prosecutorial powers to force both culpable and non-culpable defendants to capitulate.

\textsuperscript{187} See generally Rowe, \textit{supra} note 186, at 1200.103-04 ("SEC will not ordinarily negotiate such a [time] limit upon injunctions.").
B. *Other Relevant Factors in the Modification or Dissolution Determination*

1. *Nature of the Proceeding*

Because a party enters into an SEC or other consent decree with knowledge of most of the collateral consequences, it may be inequitable to allow modification or dissolution without showing a subsequent change of fact or law. Mere passage of time during which the enjoined party complies with the law should not be sufficient, unless that party demonstrates grievous harm. In sum, because parties who consent to these injunctions are forewarned of the collateral effects and nevertheless agree to enter into such decrees, and because the applicable law enforcement regulatory agencies do not have the time or resources to litigate modification or dissolution cases, courts should be most selective in granting such motions.\(^{188}\)

In other proceedings, there may be a basis for modification or dissolution of a permanent injunction due to the passage of time, absent a strong public or other interest to the contrary. Because of changing conditions, a decree may fail to effectuate its purposes.\(^{189}\) Equity should not saddle a party with the burdens of an injunction that does not function as intended, provided there are no public or other countervailing considerations. On the other hand, if the injunction has not achieved its objectives and the public interest necessitates that this interest be fulfilled, a court should have discretion to modify the decree to impose more onerous requirements. In *United Shoe*, the Supreme Court made clear that a district court has such discretion.\(^{190}\)

2. *Existence of Adverse Collateral Consequences*

Modification or dissolution may also be proper when the enjoined individual or corporation has complied with the terms of the decree for a number of years and has suffered severe adverse collateral consequences. Viewed another way, compliance with the injunction may constitute sufficient change in the facts to warrant

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\(^{188}\) This proposition may be viewed as conflicting with the Court's language in *Swift* that motions for modification or dissolution should be viewed as "all one whether the decree has been entered after litigation or by consent." 286 U.S. at 114. For the reasons herein provided, however, there exists an arguably sound basis for distinction.

\(^{189}\) *See generally* King-Seeley Thermos Co. v. Alladin Indus., Inc., 418 F.2d 31, 34-35 (2d Cir. 1969).

modification or dissolution. What should the movant be required to show? First, because the injunction merely requires the party to comply with the law, compliance, without more, should not constitute sufficient grounds for modification. Compliance is precisely what the law requires. Otherwise, no permanent injunction would be "permanent"; the decree need only be obeyed for a period of time before the movant could successfully petition for dissolution. Second, the collateral consequences visited upon the enjoined party must be more than merely some loss of reputation or business opportunity. Rather, movants must show grievous loss that renders the continued application of the injunction inequitable, such as loss of opportunity to earn a livelihood in a chosen field or substantial loss of business opportunity. Third, even if the movant satisfies the above two conditions, he must demonstrate to the court that he has been rehabilitated—that there is no longer a risk he will engage in future violations of the law.

3. Rehabilitation

This latter point raises the issue of whether rehabilitation, in part shown by compliance with the decree over a period of time, is a sufficient change of fact to justify dissolution or modification. Ignoring the movant's rehabilitation conflicts with the decree's purpose of deterrence rather than punishment. Because mere compliance with the decree does not adequately prove rehabilitation, courts should look to the underlying circumstances present both before and after issuance of the injunction, and the public or other countervailing interest evoked in the decree's continued application.

Although the decree is clearly not subject to impeachment, the conditions surrounding its issuance should be relevant in de-

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191 See generally note 117 supra.
192 On this subject see the discussion of the district court's order in Blazon, supra note 129. See notes 29-36, 171, 173 and accompanying text supra.
193 See notes 58-75, 117, 119-26 and accompanying text supra.
195 The courts have not directly raised the subject of rehabilitation. One of the few courts that has indirectly discussed this issue was the Third Circuit in Warren: "Approximately ten years have elapsed since Warren, Jr., committed the violation. Almost five years have elapsed since the consent decree was entered. During this entire period there has been no evidence of any recurrence of any violation." 583 F.2d at 122.
196 See generally cases cited in note 194 supra.
terminating the extent to which the movant must demonstrate rehabilitation to alleviate concerns about future violations. For example, the burden placed upon a party who intentionally violated the law and deliberately inflicted harm on investors should be greater than that upon one who negligently omitted material information from a proxy statement submitted to shareholders.\textsuperscript{198} Although both were properly enjoined and the effect on investors may have been equally detrimental, the latter did not intend to defraud investors. Accordingly, proof by the negligent wrongdoer that it has consulted with expert counsel in subsequent proxy solicitations, that it has engaged in a number of solicitations without violating the decree, and that no SEC or other actions have been brought should support a finding of rehabilitation. Further, any SEC action, including a private investigation and perhaps even an informal staff inquiry,\textsuperscript{199} should be relevant to negate a showing of rehabilitation. Such investigations arguably cast a measure of doubt on the legality of the enjoined party's conduct and suggest that the injunction may still be in the public interest.\textsuperscript{200}


\textsuperscript{200} The Supreme Court has compared an agency inquiry to that of a grand jury which can investigate merely on suspicion that a law has been violated without establishing probable cause. United States v. Morton Salt, 338 U.S. 632, 642-43 (1950). Accord, United States v. Lieberman, 608 F.2d 889, 897-98 (1st Cir. 1979), cert. denied, 444 U.S. 1019; SEC v.
The burden placed on an intentional violator to show rehabilitation should be even greater. The public interest in such circumstances requires that courts grant dissolution only after the movant submits positive proof of rehabilitation. To satisfy this burden, the enjoined party must demonstrate that his conduct has been that of a model citizen or that subsequent circumstances render it practically impossible for him to violate the decree.  

4. Status and Identity of Movant

Should the law provide one standard for an aider and abettor seeking modification or dissolution of a permanent injunction and another for a principal? Generally, the answer should be clearly in the negative. There can be little question that the culpability and danger of recidivism can be as great for an aider and abettor as for a principal. Rather, courts should make an ad hoc determination based on the type of conduct that the original decree sought to enjoin and the subsequent steps taken by the aider and abettor to rehabilitate himself.

In determining whether to lift a permanent injunction, some courts arguably have shown more leniency toward individuals than toward corporations or other entities. Such preferential treatment is unjustified. Although the presence of severe collateral consequences should affect a court’s decision, such consequences are not confined to individuals. An outstanding injunction may cripple the successful underwriting of a new stock issue that the enjoined corporation may need desperately to raise new capital. In addition, a permanent injunction against a small-
city brokerage firm can cause substantial financial hardship. Perhaps more than large city firms, a local brokerage firm can have its reputation severely damaged by an outstanding injunction.²⁰³

5. Societal Deterrence and the Public Interest

The foregoing discussion is subject to two caveats that merit repetition. First, deterring individuals is not the sole objective of an injunctive decree. Societal deterrence is important as well.²⁰⁶ Second, the public or other countervailing interests—particularly if the injunction is procured by a government entity—are paramount.²⁰⁷ Courts should recognize that Congress could not have intended to subject regulatory agencies with insufficient staff and strained resources to frequently litigate petitions seeking modification or dissolution of decrees.²⁰⁸

6. Change of Law

A subsequent change of law can also serve as a basis for modifying or dissolving a permanent injunction.²⁰⁹ The above principles that limit a court's discretion to order modification or dissolution are equally applicable in this area. Generally, for a change in law to serve as a basis for modification or dissolution, the prior judgment must have served as a necessary element of the decree, thereby giving rise to the right of action or a successful defense.²¹⁰ It is clear, however, that it is not sufficient that

²⁰⁵ See generally Tobin v. Alma Mills, 192 F.2d 133, 137 (4th Cir. 1951); "It is little short of absurd to contend that [the Swift] decision requires that the consent decrees that the various administrative agencies have been obtaining should be extended in perpetuo against people who have been obeying the law over long periods and show no intention of doing otherwise."

²⁰⁶ See notes 180-81 and accompanying text supra.

²⁰⁷ See generally notes 60-68 supra.

²⁰⁸ See notes 182-86 and accompanying text supra.


²¹⁰ Coalition of Black Leadership v. Cianci, 570 F.2d 12, 16 (1st Cir. 1978); De Filippis v. United States, 567 F.2d 341, 343 n.4 (7th Cir. 1977); Lubber v. Selective Serv. Sys. Local Bd. 27, 453 F.2d 645, 650 (1st Cir. 1972).
the prior judgment provided only precedent for the entry of the court's original decree.\textsuperscript{211} The crucial factor is the closeness of the nexus between the reasons for the entry of the court's decree and the particular rationale that was directly overruled.

Applying this criterion requires consideration of equitable principles. For example, it is unjust to bind a party to an injunction based directly on an interpretation of law that was subsequently overruled by a Supreme Court or other controlling court decision.\textsuperscript{212} On the other hand, although courts should apply equitable concepts to relieve an enjoined party from the decree where there has been a change of law, such relief should be granted only when the court's order was clearly based on a pronouncement of law that was directly overruled. Otherwise, any subsequent change of law, even if used only as precedent in the court's order, could open the floodgates for petitions seeking modification or dissolution. In addition to further congesting the courts, such petitions, when a government entity is a party, might severely hamper that entity's resources.\textsuperscript{213}

C. Propriety of Limited Decrees

Whether decrees ordered for a fixed period of time are appropriate is subject to debate. While such decrees may be proper when they are the result of the consent negotiation process,\textsuperscript{214} different equitable and policy considerations arguably arise in a litigation context. Under the federal securities laws, the SEC is entitled, consistent with Hecht's equitable principles, as a matter of statutory right to the entry of a permanent injunction "upon a proper showing."\textsuperscript{215} Once the SEC satisfies this standard, a court's imposition of a less stringent decree may exceed its authority and thereby may constitute an unwarranted exercise of judicial activism.\textsuperscript{216} In cases where the complainant satisfies its burden

\textsuperscript{211} See note 188 supra.
\textsuperscript{212} See Theriault v. Smith, 523 F.2d 601, 602 (1st Cir. 1975).
\textsuperscript{213} See notes 182-87 and accompanying text supra.
\textsuperscript{214} See notes 182-87 and accompanying text supra.
\textsuperscript{216} Conversely, as implicitly acknowledged by the Court in Aaron, the SEC's failure to make a "proper showing" precludes the imposition of injunctive relief. Note, however, that in such circumstances the SEC may obtain other equitable relief, such as disgorgement. See note 29 supra. Moreover, Hecht's equitable principles apply. See note 217 infra.

This Article does not advocate either judicial activism or restraint. Nevertheless, when the language and meaning of a statute are clear, the judiciary, absent questions of constitu-
and no statutory mandate requires the imposition of a permanent injunction, such a decree arguably still should be ordered absent compelling circumstances.\textsuperscript{217} In this context, as long as the standards employed for modification or dissolution are not unduly rigorous, the movant may satisfactorily petition for relief from the decree. The standards recommended in this Article seek to obtain this balance. Permanently enjoining the violator once the complainant satisfies its burden serves the relevant private and public interests. If the decree becomes unduly punitive, the enjoined party can successfully obtain modification or dissolution under the standards proposed herein.\textsuperscript{218}

D. The Proposed Standard

Neither the Swift test nor the other formulations promulgated by the lower courts\textsuperscript{219} is necessarily the appropriate standard to be applied in modification or dissolution suits. Rather, courts should engage in an \textit{ad hoc} balancing test, considering such factors as (1) subsequent change of fact or law, (2) the extent of adverse, unforeseen collateral consequences, (3) whether the injunction has fulfilled its objectives, (4) whether the individual deterrent effect of the injunction has ceased, (5) the decree's effect on societal deterrence, (6) whether a government entity is a party to the litigation and the adverse effect that granting of the motion would have on the entity's resources and (7) the extent and nature of the public or other countervailing interest involved. This list of considerations is not exhaustive, but should serve as a fairly comprehensive benchmark for assessing motions for modification or dissolution. Although the formulation may resemble a balancing

\textsuperscript{217} Such compelling circumstances might include, for example, that regardless of the violator's good faith, future violations nevertheless will occur, and that the ordering of an injunction would serve no beneficial public interest. The facts in \textit{Hecht Co. v. Bowles} resembled this characterization. See 321 U.S. at 324-26; notes 23-28 and accompanying text supra.

\textsuperscript{218} For the reasons provided herein, injunctions ordered for a fixed period of time or ordering the parties to appear before the court at some future date are ordinarily measures that misallocate the proper burdens, provided the complainant has satisfied the requisite standards. It bears emphasis that the enjoined party under traditional principles of equity can move for dissolution or modification. If the decree's continuance serves no legitimate need, the court may order appropriate relief.

\textsuperscript{219} For a description of the various standards, see notes 145-52 and accompanying text supra.
test, such a characterization may be misleading. The importance of each factor may change from case to case, depending on the totality of the circumstances. Further, if the factors are to be weighed, they should not be weighed equally.\textsuperscript{220} For example, when a party seeks modification or dissolution of an injunction that was obtained by a government entity, the public interest criteria should be of paramount importance.\textsuperscript{221} In such a case, dissolution or modification may still be granted—but only if the public interest is relatively minute or, in the alternative, if the other variables clearly are predominant.

This standard would undoubtedly vest wide discretion in the trial court. Such discretion, however, is wholly consistent with equity jurisdiction.\textsuperscript{222} The proposal's greatest deficiency is its lack of a uniform standard, which invites \textit{ad hoc} variations and disparate rationales among the courts. The proposal does have a common thread, however, that would link all such cases involving

\textsuperscript{220} Both congressional legislation and Supreme Court precedent support the establishment of a balancing standard in appropriate situations. For example, under the Speedy Trial Act, Congress directed that in determining whether a dismissal should be with or without prejudice, a court must consider, among others, the following four factors: (1) the seriousness of the offense, (2) the facts and circumstances which led to the dismissal, (3) the impact of a reprosecution on the administration of the Act, and (4) the impact of a reprosecution on the administration of justice. 18 U.S.C. § 3162(a)(1)(2). See Steinberg, \textit{Dismissal With or Without Prejudice Under the Speedy Trial Act: A Proposed Interpretation}, 68 J. CRIM. L. & C. 1 (1977).

In Cort v. Ash, 422 U.S. 66 (1975), the Court established a four-prong test to determine whether to imply a private cause of action under a federal statute:

- First, is the plaintiff "one of the class for whose \textit{especial} benefit the statute was enacted."—that is, does the statute create a federal right in favor of the plaintiff?
- Second, is there any indication of legislative intent, explicit or implicit, either to create such a remedy or to deny one?
- Third, is it consistent with the underlying purposes of the legislative scheme to imply such a remedy for the plaintiff? And finally, is the cause of action one traditionally relegated to state law, in an area basically the concern of the States, so that it would be inappropriate to infer a cause of action based solely on federal law?


\textsuperscript{221} See notes 43-48 supra. But see United States v. Swift & Co., 189 F. Supp. 885, 905 (N.D. Ill. 1960), \textit{aff'd per curiam}, 367 U.S. 909 (1961) ("Protection for the public is therefore to be achieved so far as possible without visiting unnecessary hardship upon the defendants").

modification or dissolution: the above factors would be relevant in each court's determination and some factors, such as the public interest, would be more important than others.

This proposal comports with the traditional function of equity jurisdiction. Courts having jurisdiction of suits in equity should not be confined to fixed rules or formulations. Rather, they should be flexible to meet the various exigencies as they arise on a case by case basis. The formulation proposed should provide courts of equity adequate guidance, yet afford them sufficient power "to do equity" and to order whatever "relief may be necessary under the circumstances."

CONCLUSION

This Article has scrutinized the guidelines used in the ordering of injunctive relief and the various standards employed by the courts to review motions for modification or dissolution of permanent injunctions. Although much of the discussion has centered on the modification or dissolution issue in the context of injunctions procured by government entities, particularly the SEC, many of the principles set forth apply to privately obtained injunctions as well.

Although the Swift test is the majority view today, a number of courts have deviated from this standard. Close analysis reveals that courts should employ neither the Swift test nor any other of the standards thus far adopted. Rather, courts should take an approach that resembles an ad hoc balancing test, taking into account a number of factors. The scope of this Article was not only to propose such a standard but also to analyze the numerous criteria formulated by the courts and to scrutinize their underpinnings. Hopefully, regardless of whether tribunals adopt the proposed standard, this analysis of the various decisions and their rationales will prove beneficial to courts, practitioners, and scholars in deciphering this important and controversial area of equity jurisdiction.

223 See generally note 195 supra.
SOLIDARITY FOREVER—OR HARDLY EVER: UNION DISCIPLINE, TAFT-HARTLEY, AND THE RIGHT OF UNION MEMBERS TO RESIGN*

William B. Gould†

American labor law embraces an abiding tension between maintaining workers' collective interests in solidarity through labor unions and protecting the worker's ability to dissent from the majoritarian decisions of unions that affect significant individual rights. These competing interests are at the core of the historical debate concerning union security arrangements negotiated in collective bargaining agreements that compel membership in a union as a condition of employment. More recently, these interests have been the focal point of another labor policy debate—the union's authority to discipline members whose conduct compromises the solidarity interests of other members.

Litigation in this area has expanded geometrically in the past twenty years, producing concern and consternation among many militant, progressive, and other liberal trade unionists. These individuals, along with other union, civic, and political leaders, view

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† Professor of Law, Stanford Law School. Secretary, Labor and Employment Law Section, American Bar Association. B.A. 1958, University of Rhode Island; LL.B. 1961, Cornell Law School; Graduate Study, 1962-63, London School of Economics. Copyright ©1980 by William B. Gould. While I take full responsibility for any deficiencies in this Article, I wish to express gratitude for a number of useful discussions on this subject to Cornelius Peck, Professor of Law, University of Washington Law School (Visiting Professor of Law, Stanford Law School), and to Julius Reich, Los Angeles, California, member of the California bar. I am also grateful for research assistance provided by Todd Brower, Stanford Law School '80, and Deborah Roth, Stanford Law School '81.


3 See note 27 infra.
with alarm a perceived decline in the American labor movement brought about by the threat to the voluntary support of rank and file workers who form the heart and strength of trade unions. This Article analyzes the tension between a union's right to discipline its members and the member's concomitant right to avoid discipline by resigning from the union. The Supreme Court has not adequately addressed this issue, leaving the lower courts and the National Labor Relations Board (NLRB) to forge ahead relatively unguided in these troublesome waters.

A trade union should lawfully be able to restrict a member's right to resign. Many union constitutions and bylaws, however, fail to accommodate the union's interest in restricting the right to resign with the union member's legitimate interest in refraining from collective activity. This Article suggests that these interests could be balanced by union constitutions that freely allow members to resign until ten or fifteen days after contract negotiations begin. Unions should not be allowed to discipline members for their post-resignation conduct unless those unions provide mid-strike democratic ballot box procedures for challenging union decisions. In addition, many of the problems caused by member resignations and post-resignation discipline could be avoided if unions fully informed their members that union membership is never required under any collective bargaining contract if the worker satisfies the same financial obligations that regular union members must meet. If the unions shirk this responsibility, the Board should establish an educational program to fill this gap.


Many trade unionists strongly oppose fining members and are embarrassed by the notion that union officers should be compelled to impose monetary sanctions on members who must support themselves and their families.

5 In an article published several years after NLRB v. Allis-Chalmers Mfg. Co., 388 U.S. 175 (1967), I asserted that the Board should strictly scrutinize union discipline: "The Board [should] not... abdicate its responsibility to limit discipline which is offensive to public policy where penalties are involved." Gould, Some Limitations Upon Union Discipline Under the National Labor Relations Act: The Radiations of Allis-Chalmers, 1970 Duke L.J. 1067, 1137. Subsequent events and a re-analysis of the union's interest in restricting member resignations in certain circumstances have instigated a moderate retraction of my earlier opinions.
A. Section 8(b)(1)(A): A Limit on Union Autonomy

In the United States, a labor organization acts as the exclusive bargaining representative empowered to negotiate an employment contract covering all workers, union and nonunion, within an appropriate bargaining unit. Congress purposefully designed the National Labor Relations Act (NLRA) to promote union autonomy by creating this exclusive status and by pro-

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6 The term “labor organization” means any organization of any kind, or any agency or employee representation committee or plan, in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work. National Labor Relations Act of 1935, § 2(5), 29 U.S.C § 152(5) (1976).


8 The employer may be obligated to bargain on a plant, company, or multi-employer basis. “The Board shall decide in each case whether, in order to assure to employees the fullest freedom in exercising the rights guaranteed by this Act, the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof.” National Labor Relations Act of 1935, § 9(b), 29 U.S.C. § 159(b) (1976).

9 Industrial strife which interferes with the normal flow of commerce and with the full production of articles and commodities for commerce, can be avoided or substantially minimized if employers, employees, and labor organizations each recognize under law one another's legitimate rights in their relations with each other, and above all recognize under law that neither party has any right in its relations with any other to engage in acts or practices which jeopardize the public health, safety, or interest.

10 It is the purpose and policy of this chapter, in order to promote the full flow of commerce, to prescribe the legitimate rights of both employees and employers in their relations affecting commerce, to provide orderly and peaceful procedures for preventing the interference by either with the legitimate rights of the other, to protect the rights of individual employees in their relations with labor organizations whose activities affect commerce, to define and proscribe practices on the part of labor and management which affect commerce and are inimical to the general welfare, and to protect the rights of the public in connection with labor disputes affecting commerce. National Labor Relations Act of 1935, § 1(b), 29 U.S.C. § 141(b) (1976).
hibiting employers from "interfer[ing], restrain[ing], or coerc[ing]" employees in the exercise of their right to form and join, or refrain from forming and joining, labor unions. This well-established principle of exclusivity imposes an obligation on the union to represent all workers within the unit fairly and to deal with them in good faith. Congress and the courts have imposed several other significant limits on union autonomy that reflect the inherent conflict between the rights of an individual and the interests of the union.

The 1947 Taft-Hartley amendments to the NLRA proscribed the closed shop by prohibiting collective bargaining contracts that require all job applicants to belong to a union as a prerequisite for employment eligibility. These amendments did not, however, ban "union shop" contracts, which require new employees to become union members thirty days or more after they accept employment. In addition, state "right to work" laws, which prohibit union security clauses requiring union membership as a condition of employment, are not preempted by the NLRA.

The Supreme Court's decision in _NLRB v. General Motors Corp._, which held that under the Taft-Hartley amendments an employee was a "member" of a union if he paid union dues and initiation

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15 Section 8(a)(3) of the National Labor Relations Act of 1935, 29 U.S.C. § 158(a)(3) (1976), provides in part:  
   "Nothing in this subchapter, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in [section 8(a) of the Act] as an unfair labor practice) to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment or the effective date of such agreement, whichever is the later."  
16 Section 14(b) of the National Labor Relations Act of 1935, added by the Labor Management Relations (Taft-Hartley) Act of 1947, authorizes states to enact right to work laws that prohibit collective bargaining agreements from "requiring membership in a labor organization as a condition of employment in any State." 29 U.S.C. § 164(b) (1976).  
fees, further restricted union autonomy. The NLRA does not require actual membership in the union. Thus, contracts requiring union shops today effectively require only "agency shops," a phrase from the labor lexicon used to refer to contract clauses that explicitly require the employee to meet only the financial responsibilities, but not the membership obligations, of union membership.

Section 8(b)(1)(A) of the NLRA, added to the Act by the Taft-Hartley amendments, is another major limitation on union authority. By prohibiting unions from "restrain[ing] or coerc[ing]...employees in the exercise of the rights guaranteed in section [7 of the NLRA]," section 8(b)(1)(A) mandates that unions—as well as employers—must respect the individual worker's right to join or refrain from joining labor unions. Congress partially preserved internal union autonomy, however, with a proviso to section 8(b)(1)(A) exempting union "rules with respect

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18 Id. at 741-44.
19 [N]o employer shall justify any discrimination against an employee for non-membership in a labor organization ... if he has reasonable grounds for believing that membership was denied or terminated for reasons other than the failure of the employee to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership.
22 Id. Section 7 of the National Labor Relations Act of 1935, 29 U.S.C. § 157 (1976), provides:

Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 158(a)(3) of this title.

The Supreme Court explained the purpose for this provision as follows:

Section 7 affirmatively guarantees employees the most basic rights of industrial self-determination, "the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection," as well as the right to refrain from these activities. These are, for the most part, collective rights, rights to act in concert with one's fellow employees: they are protected not for their own sake but as an instrument of the national labor policy of minimizing industrial strife "by encouraging the practice and procedure of collective bargaining."

to the acquisition or retention of membership" from the restriction against union restraint and coercion of employees.\textsuperscript{23} Until 1967, courts and the Board interpreted this proviso to allow any internal union discipline that did not affect a worker's employment status;\textsuperscript{24} external sanctions imposed by employers because of an employee's union or nonunion activities, on the other hand, were outlawed by this proviso. The Supreme Court modified this relatively simple dichotomy in 1967 when it recognized that fines, expulsion, or other sanctions imposed by a union may affect the worker's pay envelope more than discipline imposed by the employer.\textsuperscript{25} In so doing, it created a new standard from which the fallout has not yet settled.\textsuperscript{26}

B. NLRB v. Allis-Chalmers Manufacturing Co.

In \textit{NLRB v. Allis-Chalmers Manufacturing Co.},\textsuperscript{27} two UAW locals initiated internal proceedings against union members who had crossed picket lines during a valid economic strike.\textsuperscript{28} Local

\textsuperscript{23} The proviso states: "[T]his paragraph [section 8(b)(1)] shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein..." 29 U.S.C. § 158(b)(1)(A) (1976).


\textsuperscript{25} See text accompanying notes 137-40 infra.


\textsuperscript{27} 388 U.S. 175 (1967).

\textsuperscript{28} An economic strike is a protected activity under the NLRA. Although economic strikers may not be dismissed or disciplined by an employer, they may be permanently replaced. 29 U.S.C. § 163 (1976); see NLRB v. Mackay Radio & Tel. Co., 304 U.S. 333 (1938); Gould, \textit{The Status of Unauthorized and "Wildcat" Strikes Under the National Labor Relations Act, 52 Cornell L. Rev.} 672, 675-80 (1967).
trial committees found the members guilty of "conduct unbecoming a Union member," and assessed fines against them. After one of the union locals obtained a state court judgment against a member who had refused to pay a fine, the company filed an unfair labor practice charge with the Board alleging that the local unions' disciplinary actions violated section 8(b)(1)(A) of the Act. The Board dismissed the charge on the ground that the proviso to section 8(b)(1)(A) exempted all internal union discipline from unfair labor practice liability. The Seventh Circuit reversed the Board, holding that in spite of the proviso, section 8(b)(1)(A) unambiguously prohibits union discipline that restrains or coerces employees who exercise their right to refrain from union activities.

A closely divided Supreme Court reversed. The majority concluded it was "highly unrealistic" that the statutory language "precisely" proscribed this union discipline. The majority examined the proviso's legislative history, finding that the

\[
\text{Integral to this federal labor policy has been the power in the chosen union to protect against erosion its status under that policy through reasonable discipline of members who violate}
\]

\[\text{[n]ational labor policy has been built on the premise that by pooling their economic strength and acting through a labor organization freely chosen by the majority, the employees of an appropriate unit have the most effective means of bargaining for improvements in wages, hours, and working conditions. . . .}\]

\[\text{...}\]

\[\text{388 U.S. at 177.}\]
\[\text{Id. The Wisconsin Supreme Court's decision affirming the trial court's finding that it was not unlawful for the union to collect these fines by suits in state courts is reported in Local 248, UAW v. Natzke, 36 Wis. 2d 237, 153 N.W.2d 602 (1967).}\]
\[\text{Justice White filed a concurring opinion expressing his "doubt . . . about the implications of some of [the] generalized statements" in the majority opinion. 388 U.S. at 199. He reasoned that logic compelled the Court to uphold the discipline because the Court had previously upheld more severe discipline (i.e., expulsion from the union) imposed on other strikebreakers. Moreover, he qualified the majority opinion:}\]

\[\text{I do not mean to indicate, and I do not read the majority opinion otherwise, that every conceivable internal union rule which impinges upon the § 7 rights of union members is valid and enforceable by expulsion and court action. There may well be some internal union rules which on their face are wholly invalid and unenforceable.}\]

\[\text{388 U.S. at 198.}\]
\[\text{Id. at 179.}\]
rules and regulations governing membership. That power is particularly vital when the members engage in strikes. The economic strike against the employer is the ultimate weapon in labor's arsenal for achieving agreement upon its terms. . . . Provisions in union constitutions and bylaws for fines and expulsion of recalcitrants, including strikebreakers, are therefore commonplace and were commonplace at the time of the Taft-Hartley amendments.\textsuperscript{35}

The Court advanced two important arguments to support its conclusion that the unions' sanctions did not violate section 8(b)(1)(A). First, the Court reasoned that the failure to acknowledge a union's right to fine its members under the NLRA would encourage unions to expel or exclude workers from the union as alternative forms of discipline. Because the expulsion remedy could be utilized by only strong unions that can afford to lose members, this approach would penalize weak unions.\textsuperscript{36} Second, the Court observed that the union security clause in the collective bargaining agreement between the company and the two local unions did not compel full union membership; an employee was required to become a member only "to the extent of paying his monthly dues."\textsuperscript{37} Consequently, because the employees had become full union members voluntarily, they knowingly assumed all membership obligations—including subjection to union discipline. The Court argued that

the relevant inquiry here is not what motivated a member's full membership but whether the Taft-Hartley amendments prohibited disciplinary measures against a full member who crossed his union's picket line. . . . Whether those prohibitions would apply if the locals had imposed fines on members whose membership was in fact limited to the obligation of paying monthly dues is a question not before us. . . .\textsuperscript{38}

\textsuperscript{35} Id. at 180, 181-82 (footnotes omitted).
\textsuperscript{36} Id. at 183.
\textsuperscript{37} Id. at 196.
\textsuperscript{38} Id. at 196-97. The Court also relied on two other arguments to support its holding that the union discipline did not violate § 8(b)(1)(A). First, the Court noted that a contrary interpretation of § 8(b)(1)(A), stripping unions of their ability to fine members for strike-breaking, would imply that the Labor-Management Reporting and Disclosure (Landrum-Griffin) Act of 1959, 29 U.S.C. §§ 401-531 (1976), which had apparently established the first explicit set of procedural and substantive protections for union members vis-a-vis their unions, was actually preceded by an even more comprehensive, albeit implicit, code regulating internal union affairs. 388 U.S. at 181, 183. Second, the Court referred to the legislative history of § 8(b)(1)(A) and noted that Congress specifically disavowed any intent
Although the Allis-Chalmers decision appeared to strengthen the union's right to discipline its members, under section 8(b)(1)(A)'s proviso, it also raised many questions concerning union discipline imposed upon employees who are not members. The remaining sections of this Article examine the ramifications of Allis-Chalmers upon discipline of nonmembers and former union members.

II

CLARIFYING THE RELATIONSHIP BETWEEN UNION DISCIPLINE AND UNION MEMBERSHIP

The Allis-Chalmers Court indicated that it may regard the degree of union membership significant in determining the extent of a union's disciplinary authority. Although the Court did not explicitly address this question, it implied that a worker whose union "membership" was limited to paying dues and initiation fees should be less vulnerable to sanctions than a "full" union member. The issues that arise more frequently, however, con-
cern the validity of post-resignation union discipline and union restrictions on the right to resign.

A. Discipline of Former Union Members

The clearest case for invalidating union sanctions would arise when a worker resigns his union membership before violating a union rule. In *Scofield v. NLRB*, 41 the Supreme Court held that union fines imposed on members who had exceeded production quotas in violation of a legitimate union rule were valid under the proviso to section 8(b)(1)(A). 42 Justice White, writing for the majority, observed:

> [Section] 8(b)(1) leaves a union free to enforce a properly adopted rule which reflects a legitimate union interest, impairs no policy Congress has imbedded in the labor laws, and is reasonably enforced against union members who are free to leave the union and escape the rule. 43

The Court squarely addressed the question of whether the ability to resign union membership was a precondition for valid union discipline in *NLRB v. Granite State Joint Board, Textile Workers*. 44 An eight member majority held in *Granite State* that a union had violated section 8(b)(1)(A) by fining workers for returning to work during a lawful strike after they had resigned from the union. 45 The union membership had voted to strike shortly after the expiration of the collective bargaining agreement if their demands were not met. After the strike began, the membership ratified a proposal to levy fines on any member who aided the employer during the strike. 46 Notwithstanding this warning, a number of workers resigned from the union and returned to work during the strike. 47 The union fined the strike-breaking former members and sued in state court to collect the fines.

The Court distinguished *Allis-Chalmers* on the ground that the workers disciplined in *Allis-Chalmers* "enjoyed full union membership" whereas the workers in *Granite State* had lawfully re-

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42 Id. at 428-30.
43 Id. at 430 (emphasis added).
45 Id. at 215-18.
46 NLRB v. Granite State Joint Bd., Textile Workers, Local 1029, 446 F.2d 369, 370 (1st Cir. 1971). Only one member dissented when the strike vote was taken. Id.
47 409 U.S. at 214.
signed from the union.\textsuperscript{48} Noting that section 7 of the NLRA gives the worker the "'right to refrain from any or all ' concerted ac-
tivities relat[ed] to collective bargaining,"\textsuperscript{49} the Court concluded:

[T]he power of the union over the member is certainly no
greater than the union-member contract. Where a member law-
fully resigns from a union and thereafter engages in conduct
which the union rule proscribes, the union commits an unfair
labor practice when it seeks enforcement of fines for that con-
duct. That is to say, when there is a lawful dissolution of a
union-member relation, the union has no more control over the
former member than it has over the man in the street.\textsuperscript{50}

The Court rejected the argument that the workers were properly
disciplined because they had participated in the votes approving
the strike and the strike-breaking penalties.\textsuperscript{51} Thus, the Court
confirmed in Scofield and Granite State what it had hinted in Allis-
Chalmers—that union membership is a prerequisite for valid dis-
cipline under section 8(b)(1)(A).

B. Protecting the Right to Resign

In Granite State, the Court did not rule on the validity of "a
union's constitution or bylaws [that] defin[ed] or limit[ed] the cir-
cumstances under which a member may resign from the union";\textsuperscript{52}
it held that the workers had lawfully resigned from the union be-
fore violating the union rules. The opportunity to consider this
question soon arose, however. In Booster Lodge No. 405, Machinists
v. NLRB,\textsuperscript{53} a group of workers who had crossed picket lines dur-
during a lawful strike was fined by the union under a constitutional
 provision that prohibited "members" from strikebreaking.\textsuperscript{54} Al-
though the union's constitution did not expressly prohibit or
permit members to resign, some of the fined members sent letters
of resignation to the union before returning to work and the
others sent similar letters shortly after they returned to work.\textsuperscript{55}

\textsuperscript{48} Id. at 215.
\textsuperscript{49} Id. at 216 (quoting National Labor Relations Act of 1935, § 7, 29 U.S.C. § 157
(1976)).
\textsuperscript{50} Id. at 217. See Justice Blackmun's dissenting opinion, 409 U.S. at 218, 220-21.
\textsuperscript{51} Id. at 217-18.
\textsuperscript{52} 409 U.S. at 216.
\textsuperscript{53} 412 U.S. 84 (1973) (per curiam).
\textsuperscript{54} Id. at 87.
\textsuperscript{55} Id. at 85.
In a per curiam opinion, the Court held that the union committed an unfair labor practice by seeking judicial enforcement of fines that stemmed from post-resignation activities. Although the Court left "open the question of the extent to which contractual restriction[s] could be placed] on a member's right to resign,"—as it had done in Granite State—it concluded that the fine was illegal because the union presented "no evidence that the employees here either knew of or had consented to any limitation on their right to resign." Rejecting the union's argument that the strikebreaking penalty could be enforced against a former member as part of a contract entered into before termination of membership, the Court noted:

Nothing in the record indicates that Union members were informed, prior to the bringing of the charges that were the basis of this action, that the provision was interpreted as imposing any obligation on a resignee. Thus, in order to sustain the Union's position, we would first have to find . . . that the Union constitution by implication extended its sanctions to nonmembers, and then further conclude that such sanctions were consistent with the Act. But we are no more disposed to find an implied post-resignation commitment from the strikebreaking proscription in the Union's constitution here than we were to find it from the employees' participation in the strike vote and ratification of penalties in Textile Workers [Granite State].

Thus, the Court appears to have established a new statutory "right to resign," grounded in section 8(b)(1)(A) and recognized in Scofield, Granite State, and Booster Lodge. Yet it has left undefined the scope of that right. The Granite State Court noted in dicta that members should be free to resign from the union at any time—even during a strike—in order to avoid discipline. The employees' valid resignations in both cases effectively nullified otherwise lawful union discipline. The issue raised by these decisions, then, is the extent to which a union may restrict its members' right to resign. The Board has addressed this issue in several

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56 Id. at 88.
57 Id.
58 "We do not now decide to what extent the contractual relationship between union and member may curtail the freedom to resign." 409 U.S. 212, 217 (1972).
59 412 U.S. at 88.
60 Id. at 89-90 (footnote omitted).
61 409 U.S. at 217. See text accompanying notes 91-93 infra.
cases, but it has yet to find that any union's constitutional provi-
sion restricting member resignations falls within the protective
ambit of the proviso to section 8(b)(1)(A).\textsuperscript{62} The Ninth Circuit,
on the other hand, recently upheld a provision of the Interna-
tional Association of Machinists' (Machinists) constitution restrict-
ing the right to resign.\textsuperscript{63} After reconsidering its decision on a
motion for rehearing, the court issued a second opinion remark-
ing the case to "give the Board, the expert body in the field of
labor relations, an opportunity to consider and decide" whether
the restriction was valid under section 8(b)(1)(A).\textsuperscript{64}

Three types of union constitutional restrictions on a
member's right to resign have been challenged. The Court in
Booster Lodge invalidated one potential restriction, implied from a
union constitution's silence on member resignation, when it held
that a member was free to resign from the union at any time if
the constitution did not explicitly prohibit or limit resignations.
The following subsections discuss two other types of restrictions:
absolute prohibitions on resignations and partial restrictions allow-
ing resignations during limited escape periods.

1. Absolute Prohibitions

Constitutional provisions that effectively place an absolute
prohibition on resignation present the clearest case for invalida-

by adopting rule banning resignations when strike is imminent because no evidence union
enforced rule). See also Anheuser-Busch, Inc. v. Teamsters Local 822, 584 F.2d 41 (4th Cir.
1978) (union restriction on revocation of dues checkoff authorization invalid).

\textsuperscript{63} NLRB v. Machinists Local 1327, 608 F.2d 1219, 1222 (9th Cir. 1979), denying enforcement and remanding 231 N.L.R.B. 719, 96 L.R.R.M. 1160 (1977).

\textsuperscript{64} NLRB v. Machinists Local 1327, 608 F.2d 1219, 1222 (9th Cir. 1979), denying enforcement and remanding 231 N.L.R.B. 719, 96 L.R.R.M. 1160 (1977).

At this time, the Board has yet to rule on the Dalmo Victor case after remand from the
Ninth Circuit. The Board has consolidated with Dalmo Victor an appeal from the adminis-
trative law judge's (ALJ) decision in Pattern Makers' League (Rockford-Beloit Pattern Job-
bers Ass'n), No. 33-CB-1132 (NLRB, Div. Judges, San Francisco, filed Nov. 28, 1978) (on file at the Cornell Law Review). In that case, the ALJ invalidated the Pattern Makers' League
Law 13 and ruled that it must be "expunged" from the union's league laws because it
"unequivocally prohibits resignations during the course of a strike or when a strike appears
to be imminent." Id., slip op. at 10.
tion. These provisions, which typically allow a member to resign only if he leaves the trade or industry, subject a worker to the Hobson's choice of relinquishing his livelihood or accepting union discipline. The Board has held that this method of restricting member resignations offends public policy and constitutes unlawful restraint and coercion under section 8(b)(1)(A). Absolute prohibitions on member resignations also conflict with the Board's interpretation of the NLRA that an employee's lack of union membership cannot affect his employment status under a union shop provision unless he fails to tender periodic dues and initiation fees.

2. Resignation Limited to "Escape Periods"

Union constitutions and bylaws that limit a member's ability to resign to a fixed time period present more complex issues. The Board has considered numerous challenges to the United Auto Workers' (UAW) constitution, which permits members to resign only if they send a signed, written communication by registered or certified mail to the financial secretary of the local union within ten days of the end of the union's fiscal year.

65 In Paperworkers Local 725 (Boise S. Co.), 220 N.L.R.B. 812, 90 L.R.R.M. 1558 (1975), the Board characterized the UNITED PAPERWORKERS INT'L UNION CONST. art. XI, § 7 (1972), as follows: "We note that this provision only deals with withdrawal from the union when a member is leaving the International's jurisdiction.... [W]e conclude that [under this provision, the member is] able to resign at will. . . ." 220 N.L.R.B. at 813-14, 90 L.R.R.M. at 1559.

66 See, e.g., Sales Workers Local 80 (Capitol-Husting Co.), 235 N.L.R.B. 1264, 98 L.R.R.M. 1123 (1978); Paperworkers Local 725 (Boise S. Co.), 220 N.L.R.B. 812, 90 L.R.R.M. 1358 (1975); Local 205, Lithographers Union (General Gravure Serv. Co.), 186 N.L.R.B. 454, 75 L.R.R.M. 1356 (1970); cf. NLRB v. Machinists Lodge 1871, 575 F.2d 54 (2d Cir. 1978) (union cannot fine members for resigning during strike when constitution did not explicitly restrict such resignations). See also Local 357, Teamsters v. NLRB, 365 U.S. 667 (1961) (hiring halls valid under NLRA); Radio Officers' Union v. NLRB, 347 U.S. 17 (1954) (union unlawfully caused employer not to rehire employee by refusing employee member in good standing status).


68 A member may resign or terminate his membership only if he is in good standing, is not in arrears or delinquent in the payment of any dues or other financial obligation to the International Union or to his Local Union and there are no charges filed and pending against him. Such resignation or termination shall be effective only if by written communication, signed by the member, and sent by registered or certified mail, return receipt requested, to the Financial Secretary of the Local Union within the ten (10) day period prior to the end of the fiscal year of the Local Union as fixed by this Constitution, whereupon it shall become effective sixty (60) days after the end of such fiscal year; pro-
The resignation will become effective sixty days after the close of the fiscal year. The constitution also provides that a resignation from an employee who has executed a dues check-off authorization becomes effective either upon the termination of this authorization or sixty days after the end of the fiscal year, whichever is later. 69

In UAW Local 647 (General Electric Co.), 70 the Board first ruled on the validity of a union's discipline imposed on members who failed to resign in accordance with these provisions of the UAW constitution. After the union fined two employees for crossing a picket line during a valid strike, the employees and the company filed unfair labor practice charges with the Board, claiming that the fines violated section 8(b)(1)(A). The union argued that the discipline was valid because the employees had not resigned within ten days of the end of the union's fiscal year, 71 as required by the constitution. The Board rejected the union's argued, that if the employer of such member has been authorized either by such member individually or by the Collective Bargaining Agreement between the employer and the Union to check off the membership dues of such member, then such resignation shall become effective upon the effective termination of such authorization, or upon the expiration of such sixty (60) day period, whichever is later.

United Auto Workers Union Const. art. 6, § 17 (1977).

69 Id. Unions have employed a variety of methods and procedural hurdles for employees seeking to tender an effective resignation. The Board has often invalidated the most complicated and unnecessary restrictions on tendering a valid resignation. See, e.g., Meat Cutters Local 81 (Empire Enterprises), 241 N.L.R.B. No. 125 (1979) (slip op.) (union ban of resignations when strike imminent invalid); Sheet Metal Workers Local 170 (Able Sheet Metal Prods., Inc.), 225 N.L.R.B. 1178, 93 L.R.R.M. 1071 (1976) (union cannot prohibit oral resignations that are clear and unequivocal expression of intent to resign); Bookbinders' Local 60 (Interstate Book Mfg., Inc.), 203 N.L.R.B. 732; 83 L.R.R.M. 1518 (1973) (resignations submitted orally or by registered mail valid); Communications Workers Local 6135 (Southwestern Bell Tel. Co.), 188 N.L.R.B. 971, 76 L.R.R.M. 1635 (1971) (resignations effective when union received surrendered membership cards if constitution is silent on resignation question); Electrical Workers Local 1522 (Western Elec. Co.), 180 N.L.R.B. 131, 73 L.R.R.M. 1091 (1969) (resignation effective when worker sent dues check-off deauthorization form to company and union demonstrating intent to resign); Aeronautical Indus. Dist. Lodge 751, Machinists (Boeing Co.), 173 N.L.R.B. 450, 69 L.R.R.M. 1363 (1968) (member may resign by notifying union in writing during interim period between expired and new collective bargaining contracts); Local 621, Rubber Workers (Atlantic Research Corp.), 167 N.L.R.B. 610, 66 L.R.R.M. 1109 (1967) (oral resignation effective); Oil Workers Union (United Nuclear Corp.), 148 N.L.R.B. 629, 57 L.R.R.M. 1061 (1964) (resignation effective in face of silent constitution when made either orally or by telegram prior to effective date of contract). See generally Wellington, Union Fines and Workers' Rights, 84 Yale L.J. 1022 (1976).

70 197 N.L.R.B. 608, 80 L.R.R.M. 1411 (1972).

71 Cf. NLRB v. UAW, 320 F.2d 12 (1st Cir. 1963) (union did not violate § 8(b)(1) by requesting employer discharge employees whose resignations did not comply with union constitution).
argument, analogizing the provision to an absolute prohibition on the right to resign:

[T]he provision imposes such narrow restrictions as to amount, in effect, to a denial to members of a voluntary method of severing their relationship with the Union. In short, the present provision does not make it possible for a member to avail himself of the “strategy” of leaving the Union.

We cannot view union members as being “free to leave the union” when their right to leave is as narrowly restricted as it is here. We need not pass upon the broader question of whether any provision in the union's constitution or bylaws which purports to regulate the means or timing of resignations would have to yield to the members' freedom to leave the union. It is sufficient in this case to hold that the very limited escape route contained in [the UAW's] constitution is inadequate.

The Board reconsidered the UAW constitution three years later. In *Local 1384, United Auto Workers (Ex-Cell-O Corp.)*, the union sought not to fine employees, but to secure their discharge from employment under a maintenance of membership clause contained in a collective bargaining agreement. Before May 1, the effective date of the maintenance of membership clause, a group of employees who had previously signed membership cards sent resignation letters to the union. The union argued that because the members had not resigned during the ten day escape period at the end of the fiscal year, their subsequent failure to tender dues required the employer to discharge them under the collective bargaining agreement. The Board affirmed the administrative law judge’s finding that the UAW's constitutional impediment to resignation was impermissibly broad and violated section 8(b)(1)(A).

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72 197 N.L.R.B. at 609, 80 L.R.R.M. at 1412.
74 A maintenance of membership clause in a collective bargaining agreement requires that once a worker voluntarily joins the union, he must remain a union member during the life of the agreement. *See* R. Gorman, *supra* note 20, at 642-43. An escape period is usually provided either at the expiration of the old contract or prior to the effective date of the new contract. *See* Aeronautical Indus. Dist. Lodge 751, Machinists (Boeing Co.), 173 N.L.R.B. 450, 69 L.R.R.M. 1363 (1968) (employees validly resigned membership before maintenance of membership clause became effective); *cf.* NLRB v. Allied Prod. Workers Local 444, 427 F.2d 883 (1st Cir. 1970) (union may not prohibit resignations during interim period between old and new contract when new contract does not contain security clause).
75 219 N.L.R.B. at 732-33, 90 L.R.R.M. at 1154.
76 *Id.* at 729-30, 90 L.R.R.M. at 1153-54.
view and the Board’s cross-application for enforcement, the Seventh Circuit remanded the case to the Board for reconsideration of whether the union’s restriction on the right to resign was a reasonable union rule falling within the proviso to section 8(b)(1)(A). 77

On remand, the Board considered the union’s “justifications for curtailing the employees’ statutory rights.” 78 The union conceded that the provision did, in effect, require workers to remain union members for an entire year, but claimed the limited resignation period was necessary to stabilize relations between the union and its members. 79 Because they provided the union with greater control over its members, the restrictions helped the union prevent wildcat strikes and internal union schisms. 80 This limited resignation period was also necessary, the union argued, to promote solidarity during strikes and to protect it from raiding by rival labor organizations.81 The Board rejected these arguments, concluding that the union had failed to demonstrate adequately the need for a one year waiting period before a resignation became effective.82 Although it recognized the union’s interest in maintaining solidarity during strikes, the Board concluded the union’s “limitations upon the member are broader than those which are necessary to serve the union interest because resignations are barred during nonstrike periods as well [as during strike periods].”83 In addition, the Board concluded that the resignations were valid because the union had not informed the workers that their resignations were ineffective nor even that the constitution placed any limit on their right to resign.84

The Board found support for its conclusion in dicta from the Granite State opinion:

Not only does the rule lack precise tailoring to the Union’s needs, but also gives no regard to the important considerations

79 Id.
80 Id. For an example of internal union schisms caused by a lack of solidarity, see Hershey Chocolate Corp., 121 N.L.R.B. 901, 42 L.R.R.M. 1460 (1958).
81 227 N.L.R.B. at 1050, 94 L.R.R.M. at 1151.
82 Id. at 1051, 94 L.R.R.M. at 1151-52.
83 Id.
84 Id. at 1049, 94 L.R.R.M. at 1149.
that the Supreme Court has explained may necessitate an employee's resignation during a strike:

Events occurring after the calling of a strike may have unsettling effects, leading a member who voted to strike to change his mind. The likely duration of the strike may increase the specter of hardship to his family; the ease with which the employer replaces the strikers may make the strike seem less provident.  

Unless a strike arose during the ten day period at the end of the fiscal year, a dissenting employee would never be able to resign under the UAW constitution. Thus, the Board held that the provision did not fall within the proviso to section 8(b)(1)(A) because it was not "tailored" to "reasonably accommodate between the Union's and the employees' conflicting interests." Subsequent decisions have invalidated other constitutional provisions requiring sixty days notice before a resignation became effective.

The Granite State dicta is troublesome. The Court implied that a union can never restrict the right to resign, even during a strike. It is unclear whether the Board will give the dicta this expansive reading. The Board has, however, declined to state specifically how a union may validly restrict the time or manner of resignation. The Supreme Court has thus left two questions unanswered: the extent to which a union may restrict the right to resign and the extent to which unions may regulate post-resignation conduct.

III
DEVELOPING AN APPROPRIATE UNION PROCEDURE FOR LIMITING THE RIGHT TO RESIGN

Allis-Chalmers and its progeny clearly demonstrate the relationship now required between valid discipline and the union

85 Id. at 1051, 94 L.R.R.M. at 1151-52 (quoting Granite State, 409 U.S. at 217).
86 Id. If the employee was a union member who had authorized the checkoff of union dues, he could resign only when his checkoff revocation became effective, or 60 days after notifying the union of his wish to resign, whichever occurred later. See note 68 supra.
87 227 N.L.R.B. at 1051, 94 L.R.R.M. at 1152.
member's right to resign from the union. On the other hand, the Court also stressed in *Allis-Chalmers* that federal labor policy must protect the union's ability to maintain solidarity by permitting reasonable discipline of members who violate rules and regulations governing membership. Protecting this solidarity interest is particularly vital when the union exercises its ultimate economic weapon: the strike. Although the Court has separately acknowledged both interests—the individual's right to resign and the union's need for solidarity—it has not attempted to accommodate these interests, thus leaving the Board relatively unguided in its own balancing efforts. Moreover, a principled balancing is difficult because the dicta in *Granite State* recognizing a right to resign during strikes obviously undermines the solidarity interest of *Allis-Chalmers*.

Nonetheless, the Board struck an appropriate balance between these two interests in holding that the UAW constitution inappropriately restricted the individual employee's right to resign. Foremost among the UAW constitution's deficiencies was its extremely abbreviated time period at the end of the union's fiscal year for resignations and the substantial delay for the effective date of the resignations. Because strikes involving UAW members employed in the auto industry often occur in the autumn and not at the end of the union's fiscal year, the UAW rule completely failed to accommodate the worker's interest in resigning from the union prior to the strike. This rationale, however, does not justify extending the right to resign to periods during the strike. As the Court recognized in *Granite State*, the potential unsettling effects of a strike may induce the worker to change his mind about the union. This *Granite State* dicta is extremely misguided and inconsistent with the Court's explicit sanction of union discipline.

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80 388 U.S. at 181.
91 Events occurring after the calling of a strike may have unsettling effects, leading a member who voted to strike to change his mind. The likely duration of the strike may increase the specter of hardship to his family; the ease with which the employer replaces the strikers may make the strike seem less provident. We do not now decide to what extent the contractual relationship between union and member may curtail the freedom to resign. But where, as here, there are no restraints on the resignation of members, we conclude that the vitality of §7 requires that the member be free to refrain in November from the actions he endorsed in May and that his §7 rights are not lost by a union's plea for solidarity or by its pressures for conformity and submission to its regime.
409 U.S. at 217-18 (footnote omitted).
during a valid strike in *Allis-Chalmers*.\textsuperscript{92} Interpreting *Granite State* to prohibit unions from guarding against "fair weather" members who leave the fold during a strike would unfairly circumscribe union authority over members.\textsuperscript{93} The Board now applies the *Granite State* standard, as it must, and as a result has invalidated most union restrictions on the right to resign.

The Court should overrule its decision in *Granite State*.\textsuperscript{94} The disciplinary authority approved in *Allis-Chalmers* is most important when union members participating in a strike are likely to become strikebreakers. Although workers know that a strike may cause hardships, they generally expect to surmount these difficulties. Indeed, labor is almost always the winner in short strikes.\textsuperscript{95} Thus, workers may eagerly support work stoppages that they believe will be brief. Long strikes, on the other hand, are more likely to cause "unsettling effects" that induce the worker to leave the fold.\textsuperscript{96} This fact alone, however, does not justify allowing members to resign during the strike, even if they later become dissatisfied; majority rule is the cornerstone of labor solidarity. Notwithstanding *Granite State*, a member should generally be compelled to follow a union's decision. Justice Blackmun persuasively argued in his dissenting opinion in *Granite State* that the majority

seems to ... exalt the formality of resignation over the substance of the various interests and national labor policies that are at stake here. Union activity, by its very nature, is group activity, and is grounded on the notion that strength can be garnered from unity, solidarity, and mutual commitment. This concept is of particular force during a strike, where the individual members of the union draw strength from the commitments of fellow members, and where the activities carried on by

\textsuperscript{92} See text accompanying notes 33-38 supra.

\textsuperscript{93} The need to use discipline is greatest when the union instigates a strike. See Gould, supra note 5, at 1106-07.


\textsuperscript{96} The strike in *Granite State* was in effect for about six weeks before the workers resigned their membership and crossed the picket lines. 409 U.S. 213, 214 (1972). The workers in *Dalmo Victor* resigned from the union and crossed the picket lines approximately nine months after the strike began. NLRB v. Machinists Local 1327, 608 F.2d 1219, 1221 (9th Cir. 1979).
the union rest fundamentally on the mutual reliance that inheres in the "pact." 97

A. Creating Democratic Procedures for Mid-Strike Challenges to Union Decisions

As long as Granite State remains the law, unions desiring to prohibit resignations both before and during strikes 98 must establish procedures that not only ensure employees free choice when the strike decision is made but also accommodate Granite State's concern for post-strike reassessment of the strike decision. One way to achieve this balance would be by utilizing secret ballot box procedures both before and during the strike. Giving employees the opportunity to express their views about the desirability of a strike without fear of censure would allow all members to address those potential unsettling effects of a strike, 99 and would justify binding the member to the group decision. The secret ballot box would also accommodate the union's solidarity interests recognized by the Court in Allis-Chalmers.100

97 409 U.S. at 221.

Although he concurred in Justice Douglas' majority opinion, Chief Justice Burger expressed a similar concern in his concurring opinion:

I join the Court's opinion because for me the institutional needs of the Union important though they are, do not outweigh the rights and needs of the individual

The balance is close and difficult; unions have need for solidarity, and at no time is that need more pressing than under the stress of economic conflict. Id. at 218.

98 See, e.g., AMALGAMATED CLOTHING & TEXTILE WORKERS UNION CONST. art. IX, § 11 (1976) (prohibiting any resignation during strikes); INTERNATIONAL ASS'N OF MACHINISTS CONST. art. L, § 3 (1977) (prohibiting member who resigns after fourteenth day preceding strike from working at struck establishment).

99 Several union constitutions provide for a membership vote on continuing or terminating a strike. See, e.g., UNITED AUTO WORKERS UNION CONST. art. 50, § 5 (1977) (either International Executive Board or majority vote by local union membership may terminate strike); INTERNATIONAL ASS'N OF MACHINISTS UNIONS CONST. art. XVIII, § 4 (1977) (either Executive Council or vote by local lodge membership may terminate strike); COMMUNICATIONS WORKERS OF AMER. UNION CONST. art. XVIII, § 8(a)-(b) (1979) (either local union in accordance with local bylaws or Executive Board or Convention may terminate strike); ALUMINUM WORKERS INT'l UNION CONST. art. IX, § 2 (1975) (Although local union membership may terminate strike by majority vote, local's executive board may override decision to terminate); INTERNATIONAL BHD. OF TEAMSTERS UNION CONST. art. XII, § 1(b) (1976) (majority vote of local members may terminate strike); UNITED ASS'N OF PLUMBERS AND PIPEFITTERS UNION CONST. § 188(b) (1976) (majority vote by either Metal Trades Branch or Building and Construction Trades Branch of local union may terminate strike).

100 This approach would also comport with other provisions of the NLRA permitting employee free choice. For example, 29 U.S.C. § 159(c)(1) (1976) provides that the Board "shall [direct an election by] secret ballot . . . and certify the results thereof" when a petition for election of a bargaining unit representative has been filed. But cf. Rocket Freight
Testing employee sentiment by secret ballot is infinitely preferable to forcing the union member who wishes either to challenge the strike decision on behalf of all workers or to plead for a hardship exemption allowing him to cross union picket lines during a strike to appear before an internal union tribunal that will weigh loss of employee income against the union's solidarity interest. Employees who might disagree with a strike or the penalties for strikebreaking may be unwilling to risk the wrath of their more militant brethren by advertising their dissidence at a union-controlled hearing. Even if it is fairly staffed, the tribunal will not be particularly hospitable towards members wishing to resign.

This solution would not create insurmountable practical problems for initiating a vote on the appropriateness of the strike or the strikebreaking penalties. A union rule providing that 10% to 20% of the workers may petition for a secret ballot would not be inconsistent with Granite State. Certainly, the percentage should be considerably below the 30% showing of interest now required for employees to request a secret ballot election to rescind the authority of their bargaining representative.

The primary difficulty with this proposal is that the voting procedure would, without any specific statutory authorization, modify, and sometimes contravene, internal union policy. Na-

Lines v. NLRB, 427 F.2d 202, 204-05 (10th Cir.), cert. denied, 400 U.S. 942 (1970) (even though majority of local union members approved contract offer, international validly fined them for crossing picket lines when international rejected this offer).

See Comment, supra note 26, at 879-80.


A procedure that will effectively limit the individual employee's right to refrain must not create an insurmountable barrier to the exercise of that right. Requiring a majority vote against the previous union decision as a precondition for a mid-strike reconsideration would be unduly restrictive.

The labor "bill of rights" established by the Landrum-Griffin Act, 29 U.S.C. § 411(a)(1)-(5) (1976), guarantees union members the right of free speech in internal union affairs. See, e.g., Soto v. Masters, Mates and Pilots Union, 100 L.R.R.M. 3125, 3129 (S.D.N.Y. 1979) (right of free speech for opposing contract bargained by union not abridged by union rules of order); Lacy v. Teamsters Local 667, 99 L.R.R.M. 2403, 2405 (W.D. Tenn. 1978) (union cannot punish member who invokes right of free speech). This right of free speech, however, does not guarantee a member the right to vote for approving a contract unless the union's restrictions on voting rights are unreasonable. See, e.g.,
tional and international unions often exercise significant control over strikes at the local union level. For example, one union constitution provides that "[w]henever the International Executive Board decides that it is unwise to longer continue an existing strike, it will order the members of the local unions who have ceased to work in connection therewith to resume work and thereupon ... all assistance from this International Union shall cease." The UAW's Constitution contains a similar provision:

> Before a strike shall be called off, a special meeting of the Local Union shall be called for that purpose, and it shall require a majority vote by secret ballot of all members present to decide the question either way. Wherever the International Executive Board decides that it is unwise to longer continue an existing strike, it will order all members of Local Unions who have ceased work in connection therewith to resume work and thereupon and thereafter all assistance from the International Union shall cease.

The Board and courts should validate discipline imposed by unions with constitutional provisions that either create democratic internal union procedures for convening special union meetings to vote on the continuation of a strike or require a majority vote on strike decisions and strike sanctions. Unfortunately, these democratic ballot box guarantees are often effectively nullified by provisions that allow union executive bodies to exercise complete control over the continuation of a strike. Although a provision such as the UAW's gives members a right to limit the continuation of a strike, it empowers the international union to override the decision at the local union level. Limiting the ability to continue a strike with effective mid-strike democratic procedures complies only in part with Granite State's dicta; placing plenary veto power in international tribunals, on the other hand, is not consistent with Granite State's fear of the unsettling effects of strikes. Similarly, an administrative mechanism must be established for implementing these democratic ballot box proposals; current union procedures often provide that a certain number of union members in

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Williams v. Typographical Union, 423 F.2d 1295, 1298 (10th Cir. 1970), cert. denied, 400 U.S. 824 (1970) (union may reasonably restrict members' right to vote on wage scales); cf. Trail v. Teamsters, 542 F.2d 961 (6th Cir. 1976) (member stated cause of action against union that did not submit local rider governing wages to local membership vote).

105 INTERNATIONAL UNION, UNITED PLANT GUARD WORKERS CONST. art. XXXVII, § 5 (1975).

106 UNITED AUTO WORKERS UNION CONST. art. 50, § 5 (1977).

107 See note 91 supra.
the executive board may initiate these special meetings rather than allowing a relatively small percentage of members to petition for a meeting.\footnote{108} These procedures, however, clash with both the international union’s veto power and with the requirement under \textit{Granite State} for effective mid-strike democratic procedures because the spectre of unfavorable union control might intimidate potential dissidents. Accommodating \textit{Granite State} by utilizing the secret ballot box, therefore, will disrupt the normal course of American industrial relations.

B. An Alternative Proposal: Allowing Unions to Restrict the Right to Resign Shortly After Negotiations Commence

At the heart of the problem of creating valid union restrictions on the right to resign is the competition between the interest in labor solidarity, necessary for promoting effective collective bargaining, and the individual’s interest in refraining from union activity.\footnote{109} A framework for analyzing this conflict can be developed by examining the nature of the union-employee relationship. The \textit{Allis-Chalmers} opinion characterizes this relationship as contractual.\footnote{110} This is not, however, an entirely accurate characterization; the contract, if any, resembles a contract of adhesion.\footnote{111} The union constitution or contract is only the starting point for this analysis. The union’s solidarity interest and the employee’s right to refrain are based not on this union-employee contract but rather on the federal labor statutes. Recognizing the fundamental source of these competing interests is crucial to resolve the right to resign issue. Once the interests are recognized, they can be properly balanced. Justice Blackmun’s dissent in \textit{Granite State} is the proper starting point for this balancing. Any prohibition on the right to resign should become effective only when

\footnote{108} See text accompanying notes 105-06 \textit{supra}.  
\footnote{109} See generally Local 444, Electrical Workers (Sperry Rand Corp.), 235 N.L.R.B. 98, 98 L.R.R.M. 1526 (1978); Machinists Lodge 1871 (General Dynamics Corp.), 231 N.L.R.B. 727 (1977), enforced, 98 L.R.R.M. 2170 (2d Cir. 1978); Broadcast Employees Local 531 (Skateboard Prod., Inc.), 245 N.L.R.B. No. 77, 102 L.R.R.M. 1250 (1979).  
\footnote{110} 388 U.S. at 196. Thus, the Board will not enforce individual contracts between the employer and worker that will usurp either the collective bargaining agreement or the union member’s relation to the union. See Sheet Metal Workers Local 29 (Metal-Fab, Inc.), 222 N.L.R.B. 1156, 91 L.R.R.M. 1390 (1976).  
\footnote{111} See 6A A. \textsc{Corbin}, \textit{Contracts} § 1420, at 349 & n.74 (2d ed. 1962). See generally Gould, \textit{supra} note 26, at 1101 n.134.
the worker can make an intelligent and knowledgeable decision on whether to refrain from concerted activities.

Unions could adequately balance these interests by prohibiting resignations during the strike, but allowing members to resign before the strike becomes effective. The group decision would prevail after a cutoff date for resignations, and thereafter the member would be bound by, and subject to discipline for violating, the strike decision. Admittedly, this approach does not fully comport with Granite State's dicta, which seemingly requires the opportunity to modify the group decision during the course of the strike. Failure to fully accommodate this dicta, however, is not fatal because this dicta conflicts with the union's solidarity interests protected under federal labor policy. The legitimate interest recognized in Granite State would be partially served by this approach; it protects the individual's right to refrain, which was promoted in Granite State, because employees would be free to resign up to the point when the union's solidarity interest peaks. This approach also ensures that the worker will have the opportunity to assess both sides of the controversy before making a decision about refraining from concerted union action. The question that remains to be answered, however, is at what point may the union lawfully restrict the right to resign.

Although many union constitutions fail to address the strikebreaking and resignation issues, those that do have prohibited dissident conduct, including the right to resign, not only during the strike but also for a short period of time preceding the strike. The Board is currently considering such a provision in Machinists Local 1327 (Dalmo Victor). In most respects, these limitations successfully accommodate the union's solidarity interest with the worker's right to refrain. The union constitution crosses the border line into "coercion and restraint" only when the effective date limiting the right to resign substantially precedes a scheduled strike vote. Workers will not have the information needed to make a knowledgeable decision about resigning union membership at such an early stage in the negotiations. On the

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112 See note 91 and accompanying text supra.
113 Union constitutions do not typically allow dissidents to leave the union immediately before or during a strike. See note 98 supra.
114 See notes 123-37 and accompanying text supra.
other hand, unions should not be allowed to fix an inflexible across-the-board date for limiting the right to resign. For example, a union might prohibit resignations fifteen days before a strike becomes effective or ten or fifteen days after a strike vote is taken. Depending upon the union involved and its pattern of negotiation, a variety of dates might insure that members can make a knowledgeable decision about their continued union affiliation and the need to place economic pressure on the employer. The difficulty of establishing a fixed date in advance of a strike is undiminished by the "no contract, no work" approach of many unions. Unions that ostensibly rely on this philosophy may postpone the strike indefinitely, thereby confusing employees about the resignation cut-off date. Unions should not formulate this date far in advance of a strike, and thereby miscalculate the point at which the employee can make a reasoned decision that will bind him. The Board and courts should not allow such arbitrary dates to fall within the proviso to section 8(b)(1)(A).

Adding to the difficulty of pinpointing a date when members can make knowledgeable decisions about exercising their right to refrain is that union leaders may be tempted to publicize unreliable rhetoric that will push the bargaining parties into rigid and unworkable positions that promote industrial strife. A potential solution to this dilemma would be to allow union constitutions to prohibit resignations for a short period of time before a strike unless the worker can show that he could not knowledgeably participate in the strike decision prior to the cut-off date. Providing this "affirmative defense" to a subsequent union allegation of either improper resignation or strikebreaking would accommodate the individual interests recognized in Granite State while creating a presumption of union legitimacy.

Guaranteeing employees the ability to freely resign until shortly before the strike, on the other hand, may overcompromise the union’s interest in solidarity. In addition to his attitude toward the union, the employee bases his decision to resign on such factors as the union’s bargaining stance, the union’s willingness to strike (or the likelihood of an employer lockout), and the potential benefits or hardships that may accompany a strike, particularly a long one. Escape routes will be most utilized when there is a strong prospect of a strike, thus jeopardizing the union’s solidarity.

interest recognized in *Allis-Chalmers*. The group interest is more easily protected, irresponsible bargaining avoided, and the rank and file encouraged to challenge stale union leadership if the resignation prohibition is imposed at an early or intermediate juncture in the negotiations.

Although most contract negotiations do not produce strikes, bargaining in the private sector is induced by the union's credible threat to use its economic weaponry. Management and labor tend to negotiate seriously only after labor manifests its solidarity by demonstrating its ability to utilize economic pressure. Allowing members to resign on the eve of the contract expiration date will deprive the union of its credibility. Thus, the last date for effective resignations must be set early enough for the union to ascertain the potential effectiveness of its strike weapon but late enough to ensure that the worker can make a knowledgeable resignation decision. The Board and courts should uphold union constitutions that prohibit resignations ten to fifteen days after negotiations have commenced if those negotiations are initiated approximately sixty days before the contract expires.\(^\text{117}\) This approach not only satisfies the worker's need to know the last possible date for exercising the resignation option\(^\text{118}\) but also avoids problems that arise if the resignation date is tied to a strike date that the union leadership may postpone indefinitely. Moreover, a solution focusing on the start of the negotiation process recognizes the noncontractual nature of the union-employee relationship by setting the last date for resignations when the union's solidarity interest exceeds the individual's interest in refraining from union activity. This solidarity interest is at the heart of the federal labor statutes and federal labor policy\(^\text{119}\)—it cannot be ignored.

IV

Union Prohibitions on Post-Resignation Conduct

Even if reasonable escape periods that restrict the right to resign fifteen days after contract negotiations commence are es-


\(^{117}\) There is some experience under the NLRA with contract expiration dates. Section 8(d)(1) of the NLRA, 29 U.S.C. § 158(d)(1) (1976), provides that a party may not modify or terminate an agreement unless that party "serves a written notice upon the other party to the contract of the proposed termination or modification sixty days prior to the expiration date thereof."

\(^{118}\) See Booster Lodge 405, Machinists v. NLRB, 412 U.S. 84, 89 (1973).

\(^{119}\) See note 10 supra.
tablished, some unions may attempt to restrict resignations indirectly by threatening to discipline former members for their post-resignation conduct. A worker's post-resignation activities, however, should not be subject to union control unless it provides a method for members to challenge the union's collective decisions about the strike and strikebreaking penalties during the strike. The Granite State Court did not settle whether union control over an employee's post-resignation conduct constitutes an implicit restriction on the right to resign, even though the Court held that the post-resignation discipline at issue was unlawful.\textsuperscript{120} The Court subsequently held in Booster Lodge that the union violated section 8(b)(1)(A) by fining employees for strikebreaking after they had resigned from the union.\textsuperscript{121} The Machinists' constitution in that case, however, had no provision governing resignation rights. After the Court's decision, the Machinists union amended its constitution by adding a provision that explicitly prohibited members from strikebreaking or crossing picket lines after they resigned from the union:

Accepting employment in any capacity in an establishment where a strike or lockout exists as recognized under this Constitution, without permission [shall constitute improper conduct by a member]. Resignation shall not relieve a member of his obligation to refrain from accepting employment at the establishment for the duration of the strike or lockout or within 14 days preceding its commencement. Where observance of a primary picket line is required, resignation shall not relieve a member of his obligation to observe the primary picket line for its duration if the resignation occurs during the period that the picket line is maintained or within 14 days preceding its establishment.\textsuperscript{122}

In Machinists Local 1327 (Dalmo Victor),\textsuperscript{123} the Board held that fines imposed under this provision violated section 8(b)(1)(A).\textsuperscript{124} The union fined three workers who had apparently validly resigned from the union and returned to work during a lawful economic strike; the fines equalled the total amount of strike ben-

\textsuperscript{120} 409 U.S. at 217.
\textsuperscript{121} See text accompanying note 56 supra.
\textsuperscript{124} Id. at 720-21, 96 L.R.R.M. at 1161-62.
The Board noted that the question left unanswered in *Granite State*—the extent to which a union could restrict the right to resign—was not before it. In the majority's view, the Machinists' constitution “place[d] no clear restriction, no subtle restriction, no restriction by implication, and, in sum, no restriction whatsoever upon the employee's right to resign.” The Board's majority also rejected the dissenters' argument that the proscription against post-resignation strikebreaking was actually a valid restriction on the right to resign under the proviso to section 8(b)(1)(A). The majority only considered whether the union could control the post-resignation conduct of former members in the absence of a contractual relation. The Board concluded that this question had been clearly settled by the Court in *Granite State* and *Scofield*—union discipline of former members violated section 8(b)(1)(A).

A three-judge panel from the Ninth Circuit reversed the Board's order. The majority rejected as a "hypertechnical reading of the Union's constitution" the Board's argument that the provision did not restrict the right to resign:

[The constitutional provision] plainly tells its members that resignation "shall not relieve a member from his obligation to refrain from accepting employment" at the struck establishment, or from his "obligation to observe the primary picket line" dur-
ing the strike or the picketing, if the resignation occurs during that time or 14 days before. Surely that is "a restriction on a member's right to resign," Booster Lodge, supra, a "defining or limiting [of] the circumstances under which a member may resign," Granite State, supra. Apparently the Board majority would confine these phrases to provisions that expressly prohibit resignation at certain times or under certain circumstances. Such a provision would be a more drastic limitation on the member's right to resign, and thus less likely to be upheld, than the provision that is before us. In short, we conclude that this case presents the question reserved by the Court in Granite State and Booster Lodge.132

The majority agreed with the Board's dissenters that this provision was a "reasonable regulation" falling within the proviso to section 8(b)(1)(A) protecting union rules regarding "the acquisition or retention of membership."133

In a second opinion issued after a rehearing,134 the majority abandoned its holding that this constitutional provision was valid under the proviso.135 The court remanded the case to the Board so that it could first consider whether the provision was a protected union rule under section 8(b)(1)(A).136

132 Id.
133 Id. The court quoted the Fifth Circuit's decision in Local 1255, Machinists v. NLRB, 456 F.2d 1214 (1972) to support its conclusion:
"The proviso [to section 8(b)(1)(A)] makes no distinction between acts done while [someone is] a member and those done while [someone is] not a member." It is true that in [Local 1255, Machinists] the only penalty for not paying a fine for strikebreaking was expulsion, a fact upon which the court relied. But that is not a particularly effective sanction against one who has resigned. That is why we think that the sanction of a fine...is also permissible...in this case.

101 L.R.R.M. at 3098 (quoting Local 1255, Machinists v. NLRB, 456 F.2d 1214, 1217 (5th Cir. 1972)). See also NLRB v. District Lodge 99, Machinists, 489 F.2d 769 (1st Cir. 1974) (discipline for post-resignation strikebreaking, not unfair labor practice).

Judge Kennedy dissented from the panel's decision. He argued that union authority is limited by the "concept of membership." 101 L.R.R.M. at 3099. Since the members had validly resigned, the degree of membership required by Allis-Chalmers as a prerequisite for union discipline was lacking; thus, he concluded that the discipline in this case was improper; "[t]he Union's right to enforce the fines it imposes on its members is a corollary of the member's rights not only to reap the benefits of continuing union membership, but also to maintain a continuing voice in the union's courts of action." Id. at 3099-3100.

134 NLRB v. Machinists Local 1327, No. 77-3723 (9th Cir., petition for rehearing granted Oct. 9, 1979).
135 NLRB v. Machinists Local 1327, 608 F.2d 1219 (9th Cir. 1979).
136 Id. at 1222.
The majority's original view of the Board's "hypertechnical" refusal to characterize the Machinists' provision as an implicit resignation restriction was appropriate. If a member contemplating both strikebreaking and resignation is threatened with union sanctions after he resigns, it is unlikely he will utilize the resignation escape route contemplated by Granite State. This is, at the bare minimum, a "subtle restriction" on the right to resign.

Although this provision, which ostensibly controls the post-resignation conduct of workers, is a restriction on the right to resign, the question remains: is the restriction protected by the proviso to section 8(b)(1)(A)? The Ninth Circuit originally held, and the two dissenting Board members argued, that it was so protected. This conclusion, which creates a labor law minefield by approving post-resignation discipline that is tantamount to an absolute restriction on the right to resign, is the product of the Ninth Circuit's overly generalized interpretations of the proviso to section 8(b)(1)(A). The Granite State dicta, which adopts an opposite view, i.e. that a union can never control the "man on the street," also hinders a cogent analysis of this issue. The apparent superficial illogic of precluding unions from controlling non-members, implicit in these conclusions, is inconsistent with reality. Unions commonly exercise control over both members and non-members. Union membership is prerequisite for access to joint union-employer apprenticeship programs and to union administered hiring halls that operate as de facto closed shops.137 Congress enacted the proviso to allow unions to deny membership to those individuals the union deemed undesirable, e.g., Negro workers,138 thus enabling the union to control access to many employment opportunities not available to nonmembers. Without union membership, a worker may be unable to participate in

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strike and contract ratification voting. Moreover, the union may initiate an action to recover delinquent dues against a worker even after he resigns from the union. In sum, the relationship between the union and the worker is neither as simple as it was characterized in Granite State nor as contractual as viewed in Allis-Chalmers. The superficial illogic of precluding unions from controlling nonmembers is indeed erroneous.

The Board and courts should require a reasonable accommodation of the various competing interests that make up the union-employee relationship before they uphold post-resignation union discipline. The Machinists’ constitution partially accommodates the union’s interest in solidarity during strikes recognized in Allis-Chalmers, but fails to account for the individual worker’s interests in refraining from concerted activity. The worker who resigns from the union and is fined for post-resignation strikebreaking bears the burdens of union membership without any of its benefits. There is no ballot procedure available for such a worker after the strike decision is made. Granite State seems to require some form of a post-strike decision ballot procedure allowing the worker to change his mind about either the strike or the strikebreaking penalties as a prerequisite to valid post-resignation discipline. Thus, the effect of the Machinists’ constitution is to extend union control and influence over former members in a manner not contemplated by Congress when it enacted the proviso.

Because the provision of the Machinists’ constitution authorizing post-resignation discipline is overinclusive, it seriously impinges on a worker’s right to refrain in another way. A worker who starts working fourteen days before a strike cannot participate in the strike decision. The presumed rationale for this fourteen day requirement is that workers should be bound by the strike decision only after they have participated in the deliberation.


140 See Summers, Legal Limitations on Union Discipline, 64 HARV. L. REV. 1049 (1951); note 30 supra.
tions and decision. Job applicants hired shortly before the strike who are also union members do not have the freedom to refrain from any strike decision because they are bound by a decision made before they were hired.

The Machinists' constitutional provision should not be validated under the proviso to section 8(b)(1)(A). Notwithstanding the union's strong interest in unfettered control over the strike weapon, the post-resignation activities of a worker should not be subject to union control unless the union provides a method for members to challenge the strike decision during the strike. Of course, such ballot procedures may not be popular with unions because they may encroach upon the union's solidarity interest. The best approach for unions is to explicitly restrict the right to resign fifteen days after negotiations begin, rather than indirectly restrict resignations by the threat of post-resignation discipline.

V

THE RELATIONSHIP BETWEEN UNION DISCIPLINE AND UNION SECURITY

No area of labor law has created more confusion for unions, management and individual workers than the relationship between valid union discipline and union security. In Allis-Chalmers, the court emphasized the nonmandatory nature of union membership under the agency shop provision of the collective bargaining agreement involved in that case. The Court did not, however, consider the workers' motivation for becoming full-fledged union members. Most collective bargaining agreements contain union security clauses that require union membership as a condition of employment, i.e., union shop clauses. Few of these clauses explicitly refer to the Supreme Court's interpretation of the term "membership"—that membership obligations are fully satisfied if periodic dues and initiation fees are paid to the union; actual membership is not required. Many of the prob-

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141 See text accompanying notes 116-19 supra.
142 Union security clauses in collective bargaining contracts, such as an agency or union shop clause, establish the status of the union in the plant. See text accompanying notes 145-49 infra.
143 388 U.S. at 196.
lems caused by union discipline and restrictions on the right to resign would be avoided if workers were accurately informed that they can never be forced to join a union even though the collectively bargained union security clause ostensibly requires a worker to "join" the union within thirty days of his hiring. Although the union has a fiduciary obligation to inform workers of their real membership obligations, they will probably shirk this responsibility. The Board should step in to fill this educational gap to reduce the potential for future discipline and resignations.

Many union security clauses establish union shops that require each worker to join the union within thirty days after accepting the job. In *NLRB v. General Motors Corp.*, the Court clarified the meaning of the term "membership" by holding that a worker satisfies all membership obligations by paying dues and initiation fees to the union that is the bargaining representative of all workers within the unit. Although the union security clauses in some collective bargaining agreements explicitly state that union membership status is satisfied by meeting these union financial obligations, the individual worker, along with union and management representatives, is often unaware that he is not required to become a union member if he fulfills his financial obligations. This problem was compounded by the Court's statement in *Booster Lodge* that "since the collective-bargaining agreement expired prior to the times of the resignations, the maintenance-of-membership clause therein was no impediment to resigning." Although dicta, this statement suggests that actual union membership could be required under a union security clause in a collective bargaining agreement. The Court indicated that members could resign in that case without forfeiting their jobs because of nonmembership only when either the contract did not require it or when the agreement had expired. If this interpretation is correct, then *Allis-Chalmers* can no longer be interpreted to require union membership as a prerequisite for imposing union discipline because union membership would no longer be voluntary. The *Allis-Chalmers* Court based its decision upholding discipline of union members on the assumption that union membership was voluntary under the agency shop clause. The Court in *General Motors* went even further when it held that membership was not

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145 See note 13 supra.
147 412 U.S. at 88.
148 388 U.S. at 196.
required even under a union shop clause. The significance of these cases is that workers who become union members must do so with the understanding that they are bound by the union's rules. Booster Lodge's dicta, however, would overrule this important assumption. Subsequent court and Board decisions fortunately have not followed this path,149 and the Court's interpretation of the meaning of membership obligations in General Motors is still the accepted law.

Notwithstanding General Motors' apparent disposition of this question, workers, union officers and personnel directors often equate the union shop with the agency shop.150 It is highly unlikely that the workers in Allis-Chalmers or Dalmo Victor knew that the membership obligations they assumed were not required either by statute or by contract.151 The Board and courts should require, as a prerequisite for validating union discipline under the NLRA, that the union inform the worker when he begins work about the potential discipline that accompanies full-fledged union membership and the opportunity—or lack of it—to resign union membership. Unions should also be required to advise workers through the contract and the union constitution, as well as by personal communication, that their responsibility to the union encompasses nothing more than meeting the financial obligations of regular union membership. Typically, the worker knows very little about either his right to refrain or the obligations of union membership when he accepts employment in a plant covered by a union security clause. The union has a fiduciary obligation to


150 See generally Haggard, supra note 144.

151 Shortly after CTI and Dalmo Victor merged, the work force expanded to well over 400 employees all of whom had to join the union. We were never told by either the Machinists union or the company that we did not have to become full members of the union. Quite the contrary, we were told to join the union or lose our jobs.

Throughout my employment at Dalmo Victor, I was never informed that I did not have to be a full union member in order to retain my job but instead could simply pay the equivalent of dues and fees required of members. I would never have formally joined the union had I been informed of all my rights.

provide this information to the workers that it represents.\textsuperscript{152} The Court implicitly recognized this obligation in \textit{Booster Lodge}, finding that without such information, employees lacked the knowledge, consent and notice necessary for valid union discipline.\textsuperscript{153}

Unions should recognize that workers will often receive information about resigning their membership in either garbled or anti-union form.\textsuperscript{154} Unions would promote their interest in preserving solidarity by informing dissidents who are unwilling to support the union when the strike weapon is utilized of the adverse consequences of union discipline before they join the union. If the union fails to provide this information, the workers may turn to the employer. Some employers are only too pleased to volunteer this information—not only during union organizing campaigns but also during a strike or other labor dispute. Although it is unlikely that employers with established, sophisticated trade union relationships in industries such as steel, auto and rubber will utilize these tactics, other employers may rely on this type of propaganda when confronted with a long economic strike. The employer's ability in certain circumstances to pay the fines levied on dissident union members exacerbates this danger.\textsuperscript{155}

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\item Cf. Local 315, Teamsters (Rhodes & Jamieson, Ltd.), 217 N.L.R.B. 616, 617-18, 89 L.R.R.M. 1049, 1051 (1974), enforced, 545 F.2d 1173 (9th Cir. 1976) (emphasizing duty of fair representation's fiduciary nature).
\item 412 U.S. at 89.
\item An issue raised in many cases concerns the employer's confidential communications with his employees. Professor Wellington notes that if William F. Buckley, Jr., was misled about his rights as a union member, \textit{see} Evans v. American Fed. Tel. Radio Artists, 354 F. Supp. 823 (S.D.N.Y. 1973), \textit{rev'd and remanded sub nom.} Buckley v. American Fed. Tel. Radio Artists, 466 F.2d 305 (2d Cir.), \textit{cert. denied}, 419 U.S. 1093 (1974), it is likely that the average union member will be confused. Wellington, \textit{supra} note 69, at 1051-52. If the average worker, or even a sophisticated one such as Buckley, is bewildered about his rights as a union member, he also may be very susceptible to employer misstatements. \textit{See Gould, supra} note 5, at 1108. Professor Wellington believes, however, that the employer is unlikely to "risk the wrath of a firmly entrenched union by advising prospective members" that full membership is not required. Wellington, \textit{supra} note 69, at 1052 n.156.
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Knowing that he can pay the fine, the employer may advise or subtly encourage the worker to resign.\textsuperscript{156} Employers will exploit the dissent created by the union's nondisclosure. This result is undesirable under a statute designed to encourage collective bargaining.

How should unions advise prospective members about the relationship between membership status and disciplinary sanctions? Even after the Court's decision in \textit{Granite State}, most workers probably assume that they are bound by the group decision in a strike vote. Justice Blackmun argued in his dissenting opinion in \textit{Granite State} that "it seems likely that the three factors of a member's strike vote, his ratification of strikebreaking penalties, and his actual participation in the strike, would be far more reliable indicia of his obligation to the union and its members than the presence of boilerplate provisions in a union's constitution."\textsuperscript{157} The majority held, however, that workers are immune to disciplinary sanctions for strikebreaking if they resign from the union before crossing picket lines.\textsuperscript{158}

Even if Justice Blackmun's characterization of typical employee behavior is only partially correct, it is unlikely that a boilerplate union constitutional provision can adequately inform a union member about membership obligations and strikebreaking. By emphasizing that the contract failed to place any limits on the right to resign,\textsuperscript{159} the Court in \textit{Granite State} may have boosted the importance of such provisions.\textsuperscript{160} The Board, on the other hand, has concluded that a boilerplate constitutional provision is inadequate to put union members on notice of strikebreaking penalties.\textsuperscript{161} Similarly, the Board has also regarded a worker's failure

\textsuperscript{156} See Gould, \textit{supra} note 5, at 1126-27. \textit{But see} Wellington, \textit{supra} note 69, at 1052 n.156.

\textsuperscript{157} 409 U.S. at 220.

\textsuperscript{158} \textit{Id.} at 215-16.

\textsuperscript{159} \textit{Id.} at 214.


\textsuperscript{161} \textit{See}, e.g., Broadcast Employees and Technicians Local 531 (Skateboard Prod., Inc.), 245 N.L.R.B. No. 77, 102 L.R.R.M. 1250 (1979); Machinists, Lodge 1871 (General Dynamic Corp.), 231 N.L.R.B. 727, 96 L.R.R.M. 1158 (1977), \textit{enforced}, 575 F.2d 54 (2d Cir. 1978); Local 1384, UAW (Ex-Cell-O Corp.), 227 N.L.R.B. 1045, 94 L.R.R.M. 1145 (1977); \textit{accord} Booster Lodge 405, Machinists v. NLRB, 412 U.S. 84, 90-91 (Blackmun, J., concurring).
to receive a copy of the union constitution and the failure of
union pledge cards to spell out constitutional provisions governing
membership ties and the right to resign as significant in determin-
ing whether the worker was aware of his resignation rights.\textsuperscript{162}

Putting the union member on notice of a constitutional pro-
vision that clearly defines membership obligations is only half of
the battle—the other half is drafting the provision so that the
typical worker understands it. The likely result, however, is confu-
sion. If the Ninth Circuit and the Board cannot agree on an inter-
pretation of the provision in the Machinists' constitution in
\textit{Dalmo Victor}, how can workers understand a similar union provi-
sion defining union membership obligations? The Second Circuit
recently emphasized the importance of clear notice and under-
standing of the union constitution in its analysis of the same
Machinists' provision litigated in \textit{Dalmo Victor}:

\begin{quote}
The Union argues that any reasonable union member would
know that the act of resigning during a strike would injure the
Union and would call for sanctions. However ... nothing in the
Union's constitution unmistakably gave employees notice that
mid-strike resignation could result in fines. If anything, the
Union constitution implicitly recognized the right to resign
without sanction by specifically referring to a member's obliga-
tion \textit{after resigning} not to return to work during a strike. Other
provisions of the constitution, e.g., sanctions for "other conduct
unbecoming a member" of the Union, were too vague to limit
the right to resign.\textsuperscript{163}
\end{quote}

To avoid these practical difficulties unions, as part of their
fiduciary obligation, should explain orally the legal interpretation
of union security clauses requiring union membership, the rela-
tionship between union membership and union discipline, and the
clear meaning of constitutional provisions governing discipline
and circumstances where a member may resign. If unions are not
capable of explaining the rules embodied in its own constitution
and bylaws, either the leadership or the rules, or both, ought to
be discarded.

This approach, however, does have its drawbacks. Even
high-priced labor counsel may have difficulty articulating the
shifting currents of law. Every union local should certainly not be

\textsuperscript{162} Local 1384, UAW (Ex-Cell-O Corp.), 227 N.L.R.B. 1045, 1048, 94 L.R.R.M. 1145, 1149 (1977).
\textsuperscript{163} NLRB v. Machinists Lodge 1871, 575 F.2d 54, 55 (2d Cir. 1978) (per curiam).
required to retain counsel for this purpose. A substantial policing effort may be required to ensure that the union fulfills its fiduciary duty. Policing may be difficult, moreover, because unions are often uninterested in providing information about any of these subjects, even though many employees will prefer the benefits of full union membership, e.g., participation in strike and contract ratification voting, notwithstanding the union's desire to counter employer propaganda and misrepresentations on union membership in discipline. The Board is already overburdened with other administrative responsibilities to fully ensure compliance. In addition, employers working with established unions under a traditional union security clause may not be willing to risk the disruption that could result when employees are fully informed of their membership obligations. The crucial point is that unions should undertake this responsibility even though it may be contrary to their short run interests in expanding membership because union solidarity in the long run will be improved if dissidents are able to refuse union membership when they are hired. The Board and courts may be able to judicially enforce this obligation by making notice and knowledge of membership rights a prerequisite for valid union discipline. Workers in union discipline cases are often represented by their employers rather than by their own counsel. This not only signifies that the dispute between the union and the worker is actually part of the

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164 Professor Wellington's solution to the union discipline problem rests on the assumption that unions can be forced to comply with their fiduciary duty to inform workers of their right to abstain from full union membership. Wellington, supra note 69, at 1055-59. Although he recognizes that it is unlikely that "fellow workers or union officials" will fully inform workers of the true meaning of a union security clause, id. at 1058, he concludes that the Board can enforce this duty by sanctioning union discipline as a violation of § 8(b)(1)(A) when the union fails to inform the disciplined members of their right to limited membership. Id. at 1057-58. Historical evidence fails to demonstrate, however, that unfair labor practice sanctions will force unions to alter their primary conduct. Cf. Smith, Landrum-Griffin After Twenty-One Years: Mature Legislation or Childish Fantasy?, 31 LaB. L.J. 273, 277-79 (1980) (worker "bill of rights" has not prevented undemocratic union conduct).

165 For the nineteenth consecutive year, the National Labor Relations Board in fiscal 1979 was called upon to process a record number of unfair labor practice and representation election cases arising under the National Labor Relations Act.

The total was 54,907 cases of all types filed by employees, labor organizations, and business firms with the independent agency which administers the basic U.S. labor relations law. . . .

The case intake was up 3.1 percent from the preceding fiscal year.


166 Wellington, supra note 69, at 1052 n.156.
power struggle between labor and management but also explains why the voluntarism issue, i.e., the worker's knowledge of the relationship between full union membership and union discipline, is seldom raised. The voluntarism issue was raised in *Dalmo Victor* only after the Ninth Circuit remanded the case to the Board and the workers then obtained their own counsel.\(^{167}\)

Unions may more likely comply with this fiduciary obligation if the Court, through a limited reversal of *Allis-Chalmers*, ignored the distinction between limited and full members for the purpose of imposing union discipline. As an alternative, Congress could authorize union discipline imposed upon all workers who pay union dues or their equivalent under a union security clause that compels union membership when the union is involved in negotiations which may culminate in the use of economic pressure. Such congressional authorization is consistent with *Allis-Chalmers*’ approval of union discipline of union members during strikes. The *quid pro quo* for this union authority should be legislation allowing employees with both religious and nonreligious conscientious objections to pay the equivalent of union dues to another nonunion organization.\(^{168}\) Thus, if unions impose disciplinary sanctions upon limited members who have been compelled to join the union under a union security clause, nonreligious conscientious objectors should be able to opt out in the same manner as religious objectors. If unions do not desire this authority, the workers' ability to opt out can be more circumscribed. This approach not only strikes an appropriate balance between union solidarity and individual rights but also simplifies the rules regarding union discipline by eliminating both the differences between full and limited members and the need for relying on full disclosure by the unions of membership obligations.

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\(^{167}\) See note 151 supra.

Notwithstanding the union's fiduciary obligation to supply this information, the Board should also begin its own educational campaign because unions may be unable or unwilling to satisfy this need. The Board could begin by posting election notices and distributing books or pamphlets prepared for the layman that describe these rights. This approach would be consistent with the method currently utilized by the Board for providing information on other subjects. Many workers do not understand the subtle intricacies governing union discipline and union membership; the assistance provided by unions and management is fraught with conflicts and is subject to abuse by propagandization. This problem is exacerbated by the legal counsel available to workers in union discipline cases; workers are often represented by employers and their lawyers rather than by the workers' own counsel. The Board has contributed to the confusion—it should not shy away from attempting to rectify that result.

CONCLUSION

In Allis-Chalmers, a narrowly divided Court attempted to strike an appropriate balance between the union's interest in labor solidarity and the worker's right to refrain from concerted activity. That balance was subsequently upset when unions began restricting the right to resign union membership and disciplining former members for post-resignation strikebreaking. The Supreme Court failed to realign these interests in its post-Allis-Chalmers decisions; in fact, its Granite State opinion heavily tips the scale in favor of the individual worker's rights, especially during a strike. Federal labor policy, however, requires that unions be able to invoke disciplinary sanctions during strikes. Thus, unions should be allowed to prohibit resignations ten to fifteen days after full-fledged contract negotiations begin. Post-resignation discipline should not be validated unless the union establishes procedures for its members to challenge the strike decision during the course of a strike. As a prerequisite for any valid union discipline, unions

169 See NLRB, A GUIDE TO BASIC LAW AND PROCEDURES UNDER THE NATIONAL LABOR RELATIONS ACT 2-7 (1976) [hereinafter cited as GUIDE].
170 The GUIDE fails to address the relationship between union membership and discipline. It simply states that a valid union security clause may require workers to "join" a union. Id. at 2-3. Although it notes that a union commits an unfair labor practice by fining a worker for post-resignation conduct, id. at 31, the GUIDE does not advise the worker of his right to resign in spite of a union security agreement that ostensibly compels membership.
must fully inform their members about membership obligations, particularly that union membership is not required—even under a union shop clause—if the worker pays regular union dues and initiation fees. Congress enacted the federal labor statutes to protect the rights of individual workers. The vitality of those rights rests on both knowledge and solidarity. It is ironic that laws designed to protect them are now being used to exploit them. If unions are not allowed to prohibit resignations during a strike, and choose to promote solidarity by punishing members for post-resignation activities, they must establish democratic, albeit disruptive, procedures that permit workers to change their minds and return to work during a strike.