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Antitrust—Horizontal Territorial Restraint—Allocation of Territories Among Members of Cooperative Purchasing Association Is Per Se Violative of Section 1 of the Sherman Act

The United States brought suit to enjoin the activities of defendant, a cooperative buying association of small and medium-sized regional supermarket chains,[1] as unlawful under section 1 of the Sherman Act.[2] Defendant obtained merchandise under private label so that member chains, which were allocated exclusive territories[3] in which to sell the association's brands, could compete with national and regional chains possessing sufficient economic power to finance their own private label programs.[4] The government contended that the horizontal restraints[5]

1. "Topco is a cooperative association of approximately 25 small and medium-sized regional supermarket chains which operate stores in some 33 states. Each of the member-chains operates independently; there is no pooling of earnings, profits, capital, management or advertising resources. No grocery business is conducted under the Topco name. Its basic function is to serve as a purchasing agent for its members. In this capacity, it procures and distributes to the members more than 1,000 different food and related nonfood items, most of which are distributed under brand names owned by Topco. The association itself does not own any manufacturing, processing, or warehousing facilities, and the items which it procures for members are usually shipped directly from the packer or manufacturer to the members. Payment is made either to Topco or directly to the manufacturer at a cost that is virtually the same for the members as for Topco itself." 405 U.S. 596, 598 (1972) (footnotes omitted). The members owned the stock, chose the directors, and completely controlled the operations of Topco.

2. 15 U.S.C. § 1 (1970): "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal . . . ."

3. When applying for membership, a chain must designate which one of 3 categories of territorial licenses it desires: (1) an *exclusive* territory—one in which the member chain has the exclusive right to sell Topco brand products; (2) a *nonexclusive* territory—one in which a member is licensed to sell all Topco brand products, but not to the exclusion of others who may be licensed to sell in the same territory; or (3) a *coextensive* territory—one in which 2 or more members may sell Topco products to the exclusion of all others. Members must be approved first by the board of directors, and thereafter by an affirmative vote of the members. The procedure provides, in essence, that members have a veto of sorts over potential competition in their territorial areas.

4. "A successful private label program requires substantial sales volumes in each product category to justify the heavy costs of development of the product under private label . . . . The only way that chains the size of Topco members can obtain volumes necessary to achieve effective and economically feasible private label competition with the larger chains is to become affiliated with a buying organization." United States v. Topco Associates, 319 F. Supp. 1031, 1036 (N.D. Ill. 1970).

5. Horizontal restraints involve agreements between persons at the same level of distribution,

entailed by the exclusive assignments of territories were per se violative of section 1 of the Act. Adopting defendant's position that the territorial provisions were not inherently unreasonable and had no substantial adverse effect on competition, the district court applied the "rule of reason" and held that the provisions were ancillary and subordinate to the fulfillment of the legitimate, procompetitive purpose of the Topco cooperative, reasonable, and in the public interest.[6] On appeal to the United States Supreme Court, *held,* reversed. An agreement between competitors at the same level of the market structure to allocate territories in order to minimize competition constitutes a per se violation of section 1 of the Sherman Act. *United States v. Topco Associates,* 405 U.S. 596 (1972).

The Sherman Act was adopted during an era of trusts and business combinations which were designed to secure control of the market by suppression of competition in the distribution of goods and services.[7] The legislative history of the Act emphatically supports the conclusion that its purpose was to prevent restraints of trade that had detrimental effects on business competition.[8] Congress did not intend, however, for the Act to prohibit all contracts and combinations in restraint of trade;[9] rather, the Act's framers meant to combat only combinations that serve no socially useful purpose.[10] Thus the Supreme Court early developed[11]

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most commonly between firms in direct competition with each other. Vertical restraints involve agreements between persons at different levels of distribution, as between a manufacturer and a wholesaler or retailer, or between a wholesaler and a retailer.

6. The district court noted that Topco served "a legitimate procompetitive purpose by (1) providing its members with commonly procured products to offer the consumer another choice of high quality, low price, private-label merchandise; (2) enhancing the ability of its members to compete more effectively in their respective markets against the stronger national and large regional chains; (3) enabling its members to exist as independently owned and operated businesses; and (4) benefiting the small manufacturers and processors which are the principal sources of private-label products." 319 F. Supp. 1031, 1038 (N.D. Ill. 1970).

7. *See* United States v. E.I. Du Pont de Nemours & Co., 351 U.S. 377, 386 (1956); United States v. South-Eastern Underwriters Ass'n, 322 U.S. 533, 553-59 (1944); Apex Hosiery Co. v. Leader, 310 U.S. 469, 492-93 (1940).

8. Apex Hosiery Co. v. Leader, 310 U.S. 469, 493 n.15 (1940). *See* 19 CONG. REC. 6041 (1888) (resolution offered by Senator Sherman); 21 CONG. REC. 2457 (1889) (Senator Sherman asserted that the bill prevented only business combinations made with a view to prevent competition.); *id.* at 2471 (Senator Allison spoke of combinations "to limit production" for the purpose of "destroying competition.").

9. Senator Sherman admitted that many combinations were desirable and that they had been an important factor in the rapid growth of the nation. 21 CONG. REC. 2457 (1890).

10. *Id. See also* United States v. Joint Traffic Ass'n, 171 U.S. 505 (1898); *Hearings on S. Res. 98 Before the Senate Committee on Interstate Commerce,* 62d Cong., 1st Sess. 1550, 2430 (1912) (statements made by members of the Senate Judiciary Committee that had rewritten Senator Sherman's original bill). Senator Teller commented that "a trust may not always be an evil. A trust for certain purposes, which may mean simply a combination of capital, may be a valuable thing to the community and the country." 21 CONG. REC. 2471 (1890).

11. *See* Addyston Pipe & Steel Co. v. United States, 175 U.S. 211 (1899); United States v.

the "rule of reason" test, which was clearly enunciated for the first time in *Standard Oil Co. v. United States.*[12] Pursuant to this rule, statutory references to "restraints of trade" are interpreted to encompass only *unreasonable* restraints.[13] In determining the reasonableness of a particular restraint, the courts consider the facts peculiar to the business in which the restraint operates, the business conditions before and after the restraint was imposed, the nature of the restraint and its effects, and the history of the restraint and the reasons for its adoption.[14] In addition to the rule of reason, however, the Court has recognized certain restraints as per se violative of the Sherman Act;[15] once such a restraint has been shown to exist, the defendant is precluded from introducing evidence to justify his practices or explain their overall effect.[16] Included among these restraints generally characterized as illegal per se are: price-fixing,[17] tying arrangements,[18] boycotts,[19] reciprocal dealing,[20] and monopolistic conduct that is intended to or results in foreclosing com-

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Joint Traffic Ass'n, 171 U.S. 505 (1898); United States v. Trans-Missouri Freight Ass'n, 166 U.S. 290 (1897).

12. 221 U.S. 1, 66 (1911). Chief Justice White stated the rule as: "[I]n every case where it is claimed that an act or acts are in violation of the statute the rule of reason, in the light of the principles of law and the public policy which the act embodies, must be applied." *Id.*

13. *Id.*

14. Chicago Bd. of Trade v. United States, 246 U.S. 231, 238 (1918).

15. Mr. Justice Black explained the usefulness of the per se rule in terms of "certainty." "[T]here are certain agreements or practices which because of their pernicious effect on competition and lack of any redeeming virtue are conclusively presumed to be unreasonable and therefore illegal without elaborate inquiry as to the precise harm they have caused or the business excuse for their use. This principle of *per se* unreasonableness not only makes the type of restraints which are proscribed by the Sherman Act more certain to the benefit of every one concerned, but it also avoids the necessity for an incredibly complicated and prolonged economic investigation into the entire history of the industry involved, as well as related industries, in an effort to determine at large whether a particular restraint has been unreasonable—an inquiry so often wholly fruitless when undertaken." Northern Pac. Ry. v. United States, 356 U.S. 1, 5 (1958).

16. Oppenheim, *Federal Antitrust Legislation: Guideposts to a Revised National Antitrust Policy*, 50 MICH. L. REV. 1139, 1150 (1952). *See* A. NEALE, THE ANTITRUST LAWS OF THE UNITED STATES OF AMERICA 27 (2d ed. 1970).

17. *See* United States v. General Motors Corp., 384 U.S. 127, 148 (1966); Simpson v. Union Oil Co., 377 U.S. 13, 17 (1964); United States v. Parke, Davis & Co., 362 U.S. 29, 47 (1960); United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 221 (1940); United States v. Trenton Potteries Co., 273 U.S. 392, 397-98 (1927).

18. *See* United States v. Lowe's Inc., 371 U.S. 38, 44-45 (1962); Northern Pac. Ry. v. United States, 356 U.S. 1, 5-8 (1958); International Salt Co. v. United States, 332 U.S. 392, 394-96 (1947).

19. *See* Radiant Burners, Inc. v. Peoples Gas Light & Coke Co., 364 U.S. 656, 659 (1961), *rev'g mem.*, 273 F.2d 196 (7th Cir. 1959); Klor's, Inc. v. Broadway-Hale Stores, Inc., 359 U.S. 207, 212-13 (1959); Fashion Originators' Guild of America v. FTC, 312 U.S. 457, 467 (1941).

20. *See* FTC v. Consolidated Foods Corp., 380 U.S. 592, 594 (1965); United States v. Griffith Co., 334 U.S. 100 (1948); *cf.* United States v. General Dynamics Corp., 258 F. Supp. 36, 66 (S.D.N.Y. 1966).

petitors from a substantial market.[21] Although horizontal territorial limitations often have been regarded as unlawful per se,[22] the Supreme Court has never been called upon to determine the validity of a horizontal territorial restraint standing by itself;[23] the decisions commonly have involved restraints that were accompanied by activities which had previously been recognized as illegal per se.[24] In *United States v. Sealy, Inc.*,[25] the Court, after finding horizontal territorial restraints[26] in an arrangement through which a manufacturing corporation assigned its shareholder/dealers exclusive sales territories,[27] held the horizontal limitations[28] illegal per se as part of an aggregation of restraints that included unlawful price-fixing.[29] Although the courts generally follow the per se doctrine, exceptions have been made when a strict application of

21. *See* United States v. Griffith Co., 334 U.S. 100, 105-06 (1948); American Tobacco Co. v. United States, 328 U.S. 781, 808-15 (1946); Swift & Co. v. United States, 196 U.S. 375, 395-96 (1905); United States v. Aluminum Co. of America, 148 F.2d 416, 431-32 (2d Cir. 1945); United States v. United Shoe Mach. Corp., 110 F. Supp. 295, 341-46 (D. Mass. 1953), *aff'd mem.*, 347 U.S. 521 (1954).

22. *E.g.*, White Motor Co. v. United States, 372 U.S. 253, 263 (1963). Vertical restraints are treated by the courts in the opposite manner. Since the lawfulness of the restraint depends on the circumstances, the "rule of reason" is applied. *Id.*

23. In United States v. Arnold, Schwinn & Co., 388 U.S. 365 (1967), although the district court held that certain agreements providing exclusive territories were horizontal in nature and thus per se violations of the Act, 237 F. Supp. 323, 342-43 (N.D. Ill. 1965), no appeal was taken from that part of the decision and the Supreme Court did not deal with the per se issue. The Court proceeded under the rule of reason and found the restraints to be vertical, not horizontal.

24. *See* Serta Associates, Inc. v. United States, 393 U.S. 534 (1969), *aff'g* 296 F. Supp. 1121, 1128 (N.D. Ill. 1968) (exclusive territorial allocations by licensor of bedding products to its licensees was per se violation along with conspiracy to fix prices); United States v. Sealy, Inc., 388 U.S. 350 (1967) (territorial restraints were a part of the unlawful price-fixing and policing activities by licensor of bedding trademarks); Timken Roller Bearing Co. v. United States, 341 U.S. 593 (1951) (price-fixing and allocations of territories among American, French, and British producers of roller bearings); Addyston Pipe & Steel Co. v. United States, 175 U.S. 211 (1899) (price-fixing and market division among manufacturers supplying two-thirds of the steel pipe in the United States). *See also* Northern Pac. Ry. v. United States, 356 U.S. 1 (1958).

25. 388 U.S. 350 (1967).

26. *Id.* at 352.

27. "Sealy agreed with each licensee not to license any other person to manufacture or sell in the designated area; and the licensee agreed not to manufacture or sell 'Sealy products' outside the designated area. A manufacturer could make and sell his private label product anywhere he might choose."

. . . .

"There are about 30 Sealy 'licensees.' They own substantially all of its stock. Sealy's bylaws provide that each director must be a stockholder or a stockholder-licensee's nominee. Sealy's business is managed and controlled by its board of directors. . . . Control does not reside in the licensees only as a matter of form. It is exercised by them in the day-to-day business of the company including the grant, assignment, reassignment, and termination of exclusive territorial licenses." *Id.* at 352-53 [footnotes omitted].

28. Mr. Justice Harlan, in his dissent, expressed his belief that the restraints were vertical, not horizontal. *Id.* at 358.

29. *Id.* at 356.

the doctrine would result in an obvious injustice.[30]

In the instant case, the Supreme Court initially reviewed defendant's operating scheme[31] and found a definite practice of allocating merchandising territories among the member grocery chains. Although noting that the lower court found defendant's practices actually to be procompetitive, the Court stated that the reasonableness of business relationships could not be considered when those relationships encompass practices that have been recognized as per se violative of the Sherman Act.[32] Moreover, the Court stressed the compelling need for continued application of the per se rules to promote expediency and certainty in the resolution of antitrust claims.[33] Comparing the Topco organization with the Corporate structure in *United States v. Sealy, Inc.*,[34] the Court found similar modes of operation. The Court then stated that horizontal territorial restraints of trade had been established by precedent as per se violations of the Act, and therefore held that the practice of allocating territories between competitors at the same level of the markct structure, even when unaccompanied by any attempt at price-fixing or other prohibited conduct, was a per se violation of section 1 of the Sherman Act. Mr. Justice Blackmun concurred, stressing that any relief from a blanket application of the per se rule must be through legislation.[35] The Chief Justice, dissenting, agreed with the district court that Topco's practices constituted a reasonable restraint that had an overall effect of fostering competition. Further, the dissent argued

30. "Any judicially, as opposed to legislatively, declared *per se* rule is not conclusively binding on this court as to any set of facts not basically the same as those in tbe cases in which the rule was applied. . . . Therefore, while the *per se* rule should be followed in almost all cases, the court must always be conscious of the fact that a case might arise in which tbe facts indicate that an injustice would be done by blindly accepting the *per se* rule." United States v. Jerrold Electronics Corp., 187 F. Supp. 545, 556 (E.D. Pa. 1960). *See* National Ass'n of Window Glass Mfrs. v. United States, 263 U.S. 403 (1923) (division of labor union among territories permissible as measure to save failing industry); Denison Mattress Factory v. Spring-Air Co., 308 F.2d 403, 408-10 (5th Cir. 1962) (division of territory permissible when real purpose is to limit and protect trademark); United States v. E.I. Du Pont de Nemours & Co., 118 F. Supp. 41, 218-22 (D. Del. 1953), *aff'd*, 351 U.S. 377 (1956) (territorial restriction of trade secrets permitted as ancillary restraint useful in opening new business); United States v. National Football League, 116 F. Supp. 319 (E.D. Pa. 1953) (elimination of competition between television broadcast and home games was reasonable restraint). *See also* United States v. Columbia Steel Co., 334 U.S. 446 (1947).

31. *See* notes 1 & 3 *supra.*

32. *See* notes 15 & 16 *supra* and accompanying text.

33. *See* note 15 *supra.*

34. 388 U.S. 350 (1967). *See* note 27 *supra.*

35. Mr. Justice Blackmun commented that "[t]he bigs, therefore, should find it easier to get bigger and, as a consequence, reality seems at odds with the public interest. The *per se* rule, however, now appears to be so firmly established by the Court that, at this late date, I could not oppose it." 405 U.S. 596, 612 (1972).

that the Court was by no means compelled to apply a per se rule because previous cases had not established horizontal territorial restraints alone as per se violative of the Act,[36] and concluded that the majority was, in effect, creating a new per se rule.[37]

The instant decision's characterization of horizontal territorial restraints as per se violations of section 1 of the Sherman Act frustrates the basic procompetitive policies behind the Act—the very policies that it purports to implement. When a horizontal restraint alone was presented to the Court for the first time, automatic application of the per se rule precluded any examination of the industry affected by the horizontal restraint and thereby prevented all consideration of the economic realities of the situation. The most serious effects of this approach will indubitably be borne by the small businessman. Often, the only effective manner for small companies to offset the tremendous economic advantage of larger corporations is through some form of cooperative effort. The instant decision, however, by characterizing efforts of small businessmen to compete more effectively through horizontal combination as per se violative of section 1, increases the advantage held by those who control a major portion of the market.[38] Only by forming a buying organization could the retail chains in *Topco* produce sufficient capital to justify a private label program.[39] Further, as was found by the district court, many of the members who provided that capital would not have joined Topco without provisions for the exclusive use of the private labels in their marketing areas.[40] Thus without the buying organization and its territorial limitations, competition between Topco brands and the private labels of large chains could not exist. Precluded from recognizing this fact by the application of the per se rule, the Court prohibited the restraints, and, in doing so, actually frustrated competition.[41] Although this ruling could have been anticipated in light of past Court decisions,[42] its validity must be questioned further when the history of horizontal territorial restrains and the per se rule are examined. On all

36. *See* cases cited notes 23-25 *supra.*

37. Mr. Chief Justice Burger, in his dissent, expressed his concern that the Court was not fulfilling the role assigned to it under the Act when it failed to weigh the impact of Topco's practices on competition. The Chief Justice does not believe that the Court should abdicate its role by formulation of per se rules "with no justification other than the enhancement of predictability and the reduction of judicial investigation." 405 U.S. 596, 613 (1972).

38. Mr. Justice Blackmun pointed out this problem in his concurring opinion. *See* note 35 *supra.*

39. *See* note 4 *supra.*

40. 319 F. Supp. 1031, 1036 (1970).

41. Mr. Justice Blackmun, concurring, noted that the decision seems "at odds with the public interest." *See* note 35 *supra.*

42. *See* cases cited notes 23-25 *supra.*

previous occasions when the Court has condemned arrangements involving horizontal restraints as per se violative, some form of traditionally illegal activity has also been involved.[43] In each of these cases, the Court found that the horizontal territorial restraints were unreasonable as parts of more complex arrangements and could not completely be divorced from the other illegal activities.[44] Since those business relationships would have been unlawful on the strength of the other per se violations, there is no need to read any of the prior cases as depending upon classification of the horizontal restraints as per se violative. By focusing upon the close involvement with recognized illegal activities in those prior cases, the instant Court could have reconciled precedent and still have applied the rule of reason test to the isolated horizontal territorial limitations.[45] Moreover, the majority in *Topco* attempted to justify its decision on the theory that the per se rule provides a necessary level of certainty to businessmen and that courts are limited in their ability to examine difficult economic problems often presented by antitrust cases. That complicated business problems require much from the court in both time and analysis is beyond doubt; however, the values of certainty and judicial expediency seem greatly diminished when the result is as clearly unjust as it was in the instant decision. Nevertheless, when the policy behind the Act conflicts with the need for expediency and certainty, the cases generally agree[46] that the latter will prevail. Any relief from the effects of overly broad applications of the per se rule, then, must come through legislation.

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43. *Id.*

44. *Topco* may also be distinguished from *Sealy*, the case upon which the majority most strongly relied, by the nature of the restraint. Whereas a Topco member could sell to anyone who came into its exclusive territory, Sealy was more restrictive in that its members could only sell to purchasers who were permanently located within the limited area. In time, of course, this distinction becomes superficial as customers become accustomed to buying in one particular location rather than traveling to other areas to buy their goods.

45. "It is argued, for example, that a number of small grocers might allocate territory among themselves on an exclusive basis as incident to the use of a common name and common advertisements, and that this sort of venture should be welcomed in the interests of competition, and should not be condemned as *per se* unlawful. But condemnation of appellee's [Sealy] territorial arrangements certainly does not require us to go so far as to condemn that quite different situation. . . ." United States v. Sealy, Inc., 388 U.S. 350, 357 (1967) (dictum).

46. *See generally* cases cited notes 23-25 *supra*. *See also* cases cited notes 17-21 *supra*.

Antitrust—Robinson-Patman Price Discrimination Act—Complaint Charging That Profits Derived from Interstate Sales Were Used To Underwrite Allegedly Discriminatory Intrastate Price-Cntting Practices States a Cause of Action Under Section 2(a)

Plaintiff, operator of an independent gas station located in Dallas County, Texas, brought suit for damages under the Robinson-Patman Price Discrimination Act,[1] alleging that defendant oil companies' price-cutting tactics in gasoline sales near plaintiff's station violated section 2(a) of the Act.[2] Since the gasoline sold by defendants was produced at refineries within Texas and was not transported across state lines, and since no allegedly discriminatory sales were made in interstate commerce, defendants maintained that the sales in question did not come within the scope of the "commerce" requirement of section 2(a).[3] Plaintiff contended that defendants' discriminatory price-cutting activities in the Dallas County area did involve interstate commerce because defendants had used the profits derived from their interstate operations to subsidize local sales of gasoline at substantially reduced prices. Rejecting plaintiff's argument,[4] the district court granted defendants' mo-

1. Robinson-Patman Act § 2(a), 15 U.S.C. § 13(a) (1970), *formerly* ch. 323, § 2, 38 Stat. 730 (1914).

2. Shell Oil Company, American Oil Company, and Sooner Oil Company—American's local wholesale dealer—were joined as defendants. A Shell station and an American station were located within half a mile of plaintiff's station in Dallas County, Texas. In June, 1970, these 2 stations reduced their retail prices to 25.9¢ and 26.9¢ per gallon, respectively. Other Shell and American stations in the Dallas area were selling gasoline for 28.9¢ per gallon. Plaintiff maintained that he was unable to meet these reduced retail prices and, therefore, was forced to close his station.

3. To establish a prima facie violation of § 2(a), the complainant must prove that there was: (1) a seller; (2) making sales; (3) in interstate commerce; (4) to 2 or more different purchasers; (5) of commodities; (6) of like grade and quality; (7) at a price difference; (8) that produces a competitive injury. Blackford, *A Survey of Section 2(a) of the Robinson-Patman Act*, 41 NOTRE DAME LAW. 285, 287 (1966). The "commerce" element of a § 2(a) violation is a jurisdictional requirement. *See* F. ROWE, PRICE DISCRIMINATION UNDER THE ROBINSON-PATMAN ACT 36 (1962). Defendants' contention that the "commerce" requirement is not satisfied in the instant case is supported by the view of many commentators that the basic jurisdictional question is whether one of the sales involved in price discrimination practices crossed a state boundary. *See, e.g.*, P. AREEDA, ANTITRUST ANALYSIS 649 (1967); Blackford, *supra*, at 290.

4. In addition to the jurisdictional issue, a procedural question was raised. Upon the filing of motions for summary judgment by defendants, plaintiff filed a timely response, but he neglected to accompany his answer with affidavits. The district court granted the motions for summary judgment before plaintiff had been afforded an opportunity to utilize discovery devices to obtain jurisdictional facts from data within defendants' possession on the ground that under FED. R. CIV. P. 56(f) a party must oppose motions for summary judgment by affidavit. On appeal, the court held that plaintiff's failure to comply with the tcchnical requirements of Rule 56(f) was an insufficient basis for granting defendants' motions prior to the termination of discovery.

tions for summary judgment.[5] On appeal to the United States Court of Appeals for the Fifth Circuit, *held,* reversed. A complaint states a cause of action under section 2(a) of the Robinson-Patman Price Discrimination Act when it charges that profits derived from interstate sales were employed to underwrite allegedly discriminatory intrastate price-cutting practices. *Littlejohn v. Shell Oil Co.,* 456 F.2d 225 (5th Cir. 1972).

Responding to widespread territorial price discrimination by large firms and the destructive effect of such practices upon competition, Congress enacted the Clayton Act in 1914.[6] The primary purpose of the Act was to restrain territorial price discrimination in the line of commerce in which rival sellers competed.[7] To accomplish this goal, section 2 of the Act provided that no one engaged in commerce may discriminate in the prices of commodities sold to different purchasers when such discrimination results in injury to the competitive process as a whole by lessening competition substantially or by tending to create a monopoly in any line of commerce, unless the discriminatory practice was undertaken in good faith to meet competition.[8] It quickly was apparent, however, that notwithstanding the Clayton Act, large corporations, particularly the oil and tobacco trusts, successfully could maintain their dominion over a portion of interstate commerce[9] by reducing prices only in the communities in which their rivals were engaged in business[10] and by offsetting the resulting losses by drawing on profits from other interstate operations. Although it had been anticipated that the Clayton Act would remedy this problem,[11] its "good faith" standard virtually nulli-

5. Littlejohn v. Shell Oil Co., 326 F. Supp. 45, 48 (N.D. Tex. 1971).

6. Clayton Act, 15 U.S.C. §§ 12-27, 44 (1970).

7. The line of commerce affected is referred to as the "primary line." The classic case of a primary line injury involves territorial price discrimination by a large interstate seller who is competing with local sellers in a submarket in which only the local sellers dispose of a substantial portion of their output. The discriminator's reduced prices are sometimes below cost, which suggests that his local business is being subsidized by his interstate operations. This results in either severe injury to or the elimination of the local, small competitor's business. Murray, *Injury to Competition Under the Robinson-Patman Act: Futility Revisited,* 29 U. PITT. L. REV. 623, 628 (1968).

8. Clayton Act § 2, ch. 323, § 2, 38 Stat. 730 (1914), *as amended,* 15 U.S.C. § 13(a) (1970).

9. H.R. REP. NO. 627, 63d Cong., 2d Sess. 8 (1914).

10. These "predatory" pricing tactics involve practices that are designed to destroy competition in the long run, but that do not serve a company's short-term interests. Note, *Unlawful Primary Line Price Discriminations: Predatory Intent and Competitive Injury,* 68 COLUM. L. REV. 137, 141 (1968). In recent years, the Supreme Court has indicated that evidence of a specific predatory intent need not be shown to warrant a finding that § 2(a) of the Robinson-Patman Act has been violated. *See* Utah Pie Co. v. Continental Baking Co., 386 U.S. 685, 702 (1967); FTC v. Anheuser-Busch, Inc., 363 U.S. 536, 546 (1960).

11. Clayton Act § 2, ch. 323, § 2, 38 Stat. 730 (1914), *as amended,* 15 U.S.C. § 13(a) (1970); *see* F. ROWE, *supra* note 3, at 6.

fied the provisions in the Act that were directed against price discrimination.[12] As a result, Congress in 1934 requested the Federal Trade Commission (FTC) to investigate price discrimination practices and to assess the effectiveness of the restraints that the Clayton Act placed upon them. The final report of the FTC pointed out the detrimental effect on competition of discriminatory pricing practices in the growing chain-store industries and recommended elimination of the good faith provision of section 2 of the Clayton Act.[13] Congress responded to the FTC recommendations in 1936 with the enactment of the Robinson-Patman Price Discrimination Act.[14] In section 2(a) of the Act, Congress eliminated the good faith provision of the Clayton Act and provided that discrimination in the prices of commodities is unlawful not only when it results in injury to the entire competitive process[15] but also when such discrimination tends "to injure, destroy, or prevent competition with *any person* who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them . . . ."[16] For price discrimination activity to constitute a violation of the Robinson-Patman Act, however, the jurisdictional requirement that one "of the purchases involved in such discrimination [be] in commerce"[17] must be satisfied.[18] The leading case interpreting the scope of the "commerce" jurisdictional requirement of section 2(a) is *Moore v. Mead's Fine Bread Co.*[19] In that case, petitioner, an intrastate bakery business operating in New Mexico, alleged that respondent, part of a large interstate bakery business whose sales in the locality were made from a New Mexico plant,

12. *See* FEDERAL TRADE COMM'N FINAL REPORT ON THE CHAIN STORE INVESTIGATION, S. Doc. No. 4, 74th Cong., 1st Sess. 90 (1934).

13. *Id.* at 96-97.

14. Robinson-Patman Act, 15 U.S.C. §§ 13, 13a-c, 21a (1970). The Act is the primary statutory prohibition against price discrimination in the sale of like commodities by sellers engaged in interstate commerce. *See* Blackford, *supra* note 3, at 285.

15. Note, *supra* note 10, at 139.

16. Robinson-Patman Act § 2(a), 15 U.S.C. § 13(a) (1970) (emphasis added). Although § 2(a) was designed to preserve competition on the buyer's level—the secondary line—its coverage is more extensive. The primary line—seller's level—and the tertiary line—consumer's level—also are incorporated into the act. This distinction, however, has been relatively insignificant in price discrimination cases. *See, e.g.,* Blackford, *supra* note 3, at 296.

17. Robinson-Patman Act § 2(a), 15 U.S.C. § 13(a) (1970).

18. It is appropriate to note that the "commerce" requirement under the Robinson-Patman Act is distinct from the jurisdictional requirement under the Sherman Antitrust Act and the Clayton Act. Under Sherman and Clayton the transaction only must affect interstate commerce. *See* Blackford, *supra* note 3, at 290.

19. 348 U.S. 115 (1954). Earlier litigation involving the "commerce" requirement never considered the issue whether the "underwriting" of intrastate price wars with profits derived from interstate operations came within the scope of § 2(a) prohibitions. The cases generally held that the discriminatory transactions actually must be in interstate commerce in order to satisfy the jurisdictional requirement. *See, e.g.,* Lewis v. Shell Oil Co., 50 F. Supp. 547, 549 (N.D. Ill. 1943).

had violated section 2(a) of the Robinson-Patman Act by engaging in discriminatory intrastate price-cutting practices. Even though an alternative ground was available, since some sales of the commodities in question had been made across state lines into Texas,[20] the Supreme Court held that the intrastate price-cutting activities came within the scope of the "commerce" requirement of section 2(a) because the profits made by respondent in its interstate activities were used to underwrite the losses incurred through the implementation of its local price-cutting campaign.[21] Speaking for the majority, Justice Douglas emphasized that the profits respondent derived from its interstate business constituted the means that enabled it to pursue its discrminatory practices on an intrastate level. Justice Douglas concluded, therefore, that it was appropriate to apply federal law to prevent the destruction of local merchants through price-cutting tactics practiced by a large interstate enterprise.[22] In spite of the Court's broad interpretation of section 2(a), the circuit courts generally have required that one of the alleged discriminatory sales involved be made across state lines. The Sixth,[23] Seventh,[24] and Tenth[25] Circuits expressly have held that jurisdiction under section 2(a) exists only if at least one of the alleged discriminatory sales has occurred in interstate commerce, regardless of whether the alleged discriminator is engaged in interstate commerce and uses profits derived from its

20. Wholesale prices of goods from the New Mexico plant were reduced only in the area of competition with petitioner, but goods that were delivered from the plant across the state line into Texas were not reduced in price.

21. 348 U.S. at 119.

22. *Id.*

23. Willard Dairy Corp. v. National Dairy Prods. Corp., 309 F.2d 943, 946 (6th Cir. 1962), *cert. denied*, 373 U.S. 934 (1963). Petitioner operated a local business in Ohio. Respondent was incorporated outside Ohio and its principal place of business also was located outside the state. The alleged discriminatory sales, however, involved goods produced by respondent's plant located within the borders of the state.

Justice Black lodged a strong dissent to the Supreme Court's refusal to grant certiorari. He characterized the decision below as irreconcilable with *Moore* and asserted that the Robinson-Patman Act was aimed at preventing the destruction of local competition by interstate corporations with great economic resources. 373 U.S. 934, 935-36 (1963), *denying cert. to* 309 F.2d 943 (6th Cir. 1962).

24. Central Ice Cream Co. v. Golden Rod Ice Cream Co., 287 F.2d 265, 267 (7th Cir.), *cert. denied*, 368 U.S. 829 (1961) (price differentials of commodities produced and sold within the borders of a single state by an interstate organization are not prohibited by the Robinson-Patman Act). The Seventh Circuit refused to modify its posture in Borden Co. v. FTC, 339 F.2d 953 (7th Cir. 1964). The FTC had brought charges against Borden for local price discrimination involving a factual situation similar to the situation in *Willard Dairy*. *See* note 23 *supra*. Commissioner Dixon had stated: "Since it is impossible to divorce The Borden Co. and its products, if The Borden Co. is in commerce, so must be all its products." 339 F.2d at 955. The court's holding, however, was based on the reasoning of another Commissioner.

25. Food Basket, Inc. v. Albertson's, Inc., 383 F.2d 785, 787 (10th Cir. 1967) (one of the discriminatory sales must be made in commerce).

interstate operations to subsidize his intrastate price warfare. These decisions have adopted the position that the Supreme Court's broad interpretation of the jurisdictional requirement of section 2(a) was merely dictum because of the presence in *Moore* of some discriminatory sales across state lines. Past decisions in the Fifth Circuit have approached the section 2(a) jurisdictional issue in similar fashion.[26] Although in one case brought under section 2(d)[27] of the Robinson-Patman Act the court intimated that the power to regulate interstate commerce includes the power to prevent interstate business from being used as an instrumentality to injure intrastate business,[28] the Fifth Circuit's holdings have conditioned the existence of jurisdiction under section 2(a) upon at least one discriminatory sale across state lines.[29] Moreover, in *Cliff Food Stores, Inc. v. Kroger, Inc.*,[30] the court explicitly rejected the broad jurisdictional standard that was adopted by the Supreme Court in *Moore* for section 2(a) violations and distinguished that case on the ground that in *Moore* some of the interstate operator's alleged discriminatory sales actually were made across state lines.

In the instant case, the Fifth Circuit adopted the jurisdictional standard for section 2(a) suits that was promulgated by the Supreme Court in *Moore*. Although the court recognized that other circuits had designated as mere dictum the jurisdictional standard enunciated in *Moore* and had held that an interstate discriminatory sale is an essential prerequisite to the existence of jurisdiction under section 2(a),[31] it proceeded to distinguish prior Fifth Circuit cases that had dealt with the jurisdictional scope of section 2(a) on the ground that those decisions either had involved defendants who were not "sellers" within the scope of section 2(a)[32] or had involved retail pricing policies that are not subject to the same jurisdictional requirements that govern the whole-

26. *See, e.g.*, Walker Oil Co. v. Hudson Oil Co., 414 F.2d 588 (5th Cir. 1969), *cert. denied*, 396 U.S. 1042 (1970); Hiram Walker, Inc. v. A & S Tropical, Inc., 407 F.2d 4 (5th Cir.), *cert. denied*, 396 U.S. 901 (1969).

27. Robinson-Patman Act § 2(d), 15 U.S.C. § 13(d) (1970).

28. Shreveport Macaroni Mfg. Co. v. FTC, 321 F.2d 404, 409 (5th Cir. 1963). *See also* Jones v. Metzger Dairies, Inc., 334 F.2d 919 (5th Cir. 1964). Although the court refused to grant subject-matter jurisdiction in *Jones*, its language seems to indicate that *Moore* would control if interstate commerce were used to create a monopoly to destroy local competition. *Id.* at 923.

29. *See, e.g.*, Hiram Walker, Inc. v. A & S Tropical, Inc., 407 F.2d 4 (5th Cir. 1969). One appellant was an interstate distiller. It did not make sales directly to appellee retailer, but rather promoted sales through a wholesaler who was located within the borders of appellee's home state. *Id.*

30. 417 F.2d 203 (5th Cir. 1969).

31. *See* Food Basket, Inc. v. Albertson's, Inc., 383 F.2d 785 (10th Cir. 1967); Willard Dairy Corp. v. National Dairy Prods. Corp., 309 F.2d 943 (6th Cir. 1962), *cert. denied*, 373 U.S. 934 (1963); Central Ice Cream Co. v. Golden Rod Ice Cream Co., 287 F.2d 265 (7th Cir.), *cert. denied*, 368 U.S. 829 (1961).

32. *See* Hiram Walker, Inc. v. A & S Tropical, Inc., 407 F.2d 4 (5th Cir. 1969).

sale pricing policies presented in the instant case.[33] Establishing to its satisfaction that the issue in the instant case was one of first impression in the Fifth Circuit, the court concluded that, since the Supreme Court never had repudiated the jurisdictional standard propounded in *Moore*, the *Moore* jurisdictional standard should be regarded as controlling authority. A dissenting judge vigorously asserted that in *Cliff Food Stores* the instant court specifically had rejected the *Moore* position that jurisdiction exists under section 2(a) when the intrastate price-cutting is financed by profits derived from multi-state operations.[34] The dissent contended that the majority, in fact, was overruling the prior decision in *Cliff Food Stores* and that such action should be taken only in an en banc proceeding.

The instant decision is the first federal court of appeals case which has followed the Supreme Court's ruling in *Moore* that a complaint states a cause of action under section 2(a) when it alleges that profits earned through interstate activities have been used to underwrite the losses of local discriminatory price-cutting campaigns[35] and, as such, the decision represents a significant departure from the decisions of other circuits.[36] The conclusion of the majority that the jurisdictional standard announced in *Moore* was not reduced to the status of dictum simply because the alleged violator had made some discriminatory sales

33. The majority argued that in the *Walker Oil Co.* and *Cliff Food Stores* decisions the alleged discriminatory sales involved commodities that had "come to rest" and had lost their interstate character.

34. 456 F.2d at 230 (Coleman, J., dissenting). The dissent adopted the position, which had prevailed in other circuits, that *Moore's* jurisdictional standard was merely dictum since there had been an alleged discriminatory sale made across state lines in that case.

35. One commentator, citing *Moore* and *Shreveport Macaroni*, suggests that the commerce requirement will be circumvented if the price discrimination is "predatory" or "territorial" in nature. He concludes that this is a misconception of the scope of the Robinson-Patman Act, arguing that "the character of commerce should not be altered by the character of the price discrimination." Blackford, *supra* note 3, at 292.

By refusing to limit the coverage of the Robinson-Patman Act to situations in which there is at least one discriminatory sale across state lines, the Fifth Circuit is, in effect, adopting a standard that, in a limited manner, provides broad jurisdictional coverage similar to that which exists under the "effect on commerce" standard that the courts have placed upon the interstate commerce requirement of the Sherman Antitrust Act, 15 U.S.C. § 1 (1970). *See* Blackford, *supra* note 3, at 290. Most commentators believe that the Robinson-Patman Act's interstate commerce requirement should not be construed as broadly as the Sherman Antitrust Act's jurisdictional requirement. *See, e.g.*, P. AREEDA, *supra* note 3, at 79. Areeda suggests that the legislative history of the Robinson-Patman Act indicates that a broad commerce requirement standard is inappropriate. He notes that the Senate-House Conference inserted a clause in the House bill that contained the "effect on commerce" standard, but this provision was not included in the final draft. H.R. REP. No. 2951, 74th Cong., 2d Sess. 6 (1936).

36. *See* cases cited note 31 *supra*.

across state lines is justified.[37] The *Moore* opinion emphasized that the profits the price discriminator derived from its interstate business constituted the means that enabled it to pursue its discriminatory practices on an intrastate level. The Court clearly did not base its finding of jurisdiction on the mere existence of sales across state lines.[38] Moreover, the Robinson-Patman Act was passed for the express purpose of providing protection to local merchants from the discriminatory pricing policies of major national business concerns. The jurisdictional standard adopted by the instant court is a necessary means for adequately implementing that protective policy; otherwise, large national firms financed from interstate profits might employ discriminatory pricing tactics with impunity, as long as they could confine their predatory practices to a single state at a time. Under such circumstances, the protection afforded local merchants by the Act would be largely illusory. Despite the soundness of its policy analysis, however, the reasoning of the majority in deciding to adopt the *Moore* jurisdictional standard is not entirely persuasive. Although the Supreme Court has cautioned that no inferences are to be drawn from a denial of certiorari, the Court's continued refusal to hear cases in which the circuit courts have apparently ignored the interpretation placed upon the section 2(a) commerce requirement by the majority in *Moore*[39] may lend some support to the dissent's contention that *Moore* should not be controlling in the instant decision.[40] Furthermore, the majority's attempt to distinguish prior Fifth Circuit decisions interpreting the commerce requirement on the basis that those cases involved retail price discrimination rather than wholesale price discrimination is without substance. The Act is aimed at preventing powerful interstate operations from increasing their market dominance through price-cutting tactics. Market dominance can be achieved by retail price-cutting as well as by wholesale price-cutting;[41] it makes little sense to apply the Act to one and not the other, since both directly violate its basic policy. By raising this dubious distinction rather than forthrightly basing its decision on sound policy considerations, the instant court severely undercut the persuasiveness of its opinion. There-

37. *See* Willard Dairy Corp. v. National Dairy Prods. Corp., 373 U.S. 934, 935 (1963), *denying cert. to* 309 F.2d 943 (6th Cir. 1962) (Black, J., dissenting).

38. Justice Douglas remarked, "The victim to be sure, is only a local merchant; and no interstate transactions are used to destroy him." 348 U.S. at 119.

39. The circuit court decisions that departed from the *Moore* standard all held that jurisdiction does not exist under § 2(a) in the absence of a sale across state lines.

40. *See, e.g.*, Willard Dairy Corp. v. National Dairy Prods. Corp., 309 F.2d 943 (6th Cir. 1962), *cert. denied*, 373 U.S. 934 (1963); Central Ice Cream Co. v. Golden Rod Ice Cream Co., 287 F.2d 265 (7th Cir.), *cert. denied*, 368 U.S. 829 (1961).

41. *Cf.* note 16 *supra*.

fore, the Fifth Circuit's attempt to revive the *Moore* jurisdictional standard probably will have little impact upon the other circuits, because courts that have not accepted previous policy arguments are not likely to be persuaded by a technical distinction that is a far less compelling basis for reconsideration in determining the scope of section 2(a) jurisdiction.[42]

Bankruptcy—Corporate Reorganization—Trustee in Reorganization Lacks Standing To Sue Indenture Trustee on Behalf of Debenture Holders

Appellant reorganization trustee brought suit on behalf of the debtor's debenture holders[1] against the indenture trustee[2] for allegedly failing to enforce the debtor's compliance with the minimum asset-liability ratio prescribed in the indenture agreement.[3] Appellee moved

42. *See, e.g.*, Food Basket, Inc. v. Albertson's, Inc., 383 F.2d 785 (10th Cir. 1967) (court rejected argument that a wholesale-retail price distinction might he determinative in finding jurisdiction under § 2(a)).

1. Three private actions by debenture holders are presently pending against the indenture trustee. Caplin v. Marine Midland Grace Trust Co., 406 U.S. 416, 432 n.21 (1972). Ray v. Marine Midland Grace Trust Co., No. 2159-1967 (Sup. Ct. N.Y. County) is a class action alleging a violation of the trust indenture. Lewis v. Marine Midland Grace Trust Co., Civil No. 68-1764 (S.D. N.Y., amended complaint filed Dec., 1969), is an action for violation of the Securities Exchange Act of 1934, § 10(b), 15 U.S.C. § 78j(b) (1970). Brief for Petitioner at 21 n.9, Brief for Respondent app. A-6 to -20, Caplin v. Marine Midland Grace Trust Co., 406 U.S. 416 (1972). All 3 private suits were commenced after Marine challenged the reorganization trustee's standing. Reply Brief for Petitioner at 8, Caplin v. Marine Midland Grace Trust Co., 406 U.S. 416 (1972).

2. The term "debtor" is defined in 11 U.S.C. § 506(5) (1970) as a "corporation by or against which a petition has been filed under [Chapter X, the corporate reorganization provisions of the Chandler Act, 11 U.S.C. §§ 501 *et seq.* (1970)]." A "debenture" is a "security for a loan of money issued by a public company, usually creating a charge on the whole or a part of the company's stock and property . . . ." BLACK'S LAW DICTIONARY 489 (rev. 4th ed. 1968). 11 U.S.C. § 506(8) (1970) defines "indenture trustee" as a "trustee under a mortgage, deed of trust, or indenture, pursuant to which there are securities outstanding, other than voting-trust certificates, constituting claims against a debtor or claims secured by a lien upon any of its property . . . ." An indenture trustee is liable only for the performance of such duties as are specifically set out in an indenture. Trust Indenture Act of 1939, § 315(a)(1), 15 U.S.C. § 77*ooo*(a)(1) (1970).

3. "The hreach concerns mainly . . . Section 3.6 of the Indenture. Webb & Knapp [the debtor] there covenanted that so long as any of the debentures remained outstanding, it would not incur or assume indebtedness resulting from horrowings or from the purchase of real property or interests in real property on which it would be personally liable, or to purchase any real property, or interests in real property, unless on the basis of computations . . . its 'consolidated tangible assets' would equal 200% of certain liabilities. . . . The Company was required to file a certificate of compliance annually with Marine. In addition to such certificates Marine requested . . . and received separate officers' certificates stating specifically that Webb & Knapp was not in violation of § 3.6. In accordance with § 315 of the Trust Indenture Act of 1939, 15 U.S.C. § 77*ooo* (1970),

to dismiss for lack of standing, arguing that actions by the reorganization trustee are restricted to the recovery of the debtor's property,[4] and that appellee's failure to enforce the agreement did not constitute such property. Appellant[5] contended that Chapter X of the Chandler Act of 1938[6] impliedly authorizes suits pursuant to the formation of a fair and equitable reorganization plan[7] and, further, because of the reorganization trustee's special investigative powers, he is the party best qualified to discover and prosecute claims against an indenture trustee. The district court granted the motion to dismiss and the court of appeals affirmed.[8] On writ of certiorari from the United States Supreme Court, *held*, affirmed. A bankruptcy reorganization trustee does not have standing to sue an indenture trustee on behalf of the debtor's debenture holders for the trustee's failure to enforce its indenture agreement with the debtor. *Caplin v. Marine Midland Grace Trust Co.*, 406 U.S. 416 (1972).

Bankruptcy, which involves complete liquidation of assets and dislocation of personnel, was the only proceeding historically available to a business unable to meet its financial obligations. To diminish the economically disruptive effect of applying the drastic remedy of bankruptcy liquidation to every situation in which a company's liabilities exceeded its assets, the courts evolved a limited system of equity receiverships for the purpose of reorganizing insolvent companies while continuing their operations. This judicially developed equity receiver system relied heavily on voluntary investor protection committees to undertake the intermediate management and eventual rehabilitation of insolvent corporations. The Great Depression, with its increase in bankruptcies

§ 10.1 of the Indenture required Marine to examine all reports furnished to it but authorized it, in the absence of bad faith, to rely upon certificates or opinions conforming to the requirements of the Indenture. The Chapter X Trustee claims that although the reports for 1959-63 showed asset-liability ratios ranging from a high of 258.30 in 1961 to a low of 200.56 in 1963, Marine should have known that the appraised values were inflated." Caplin v. Marine Midland Grace Trust Co., 439 F.2d 118, 119 n.1 (2d Cir. 1971). The reorganization trustee seeks to recover from the indenture trustee the balance due on the debenture issue less any recovery from the debtor's estate.

4. "[A] reorganization proceeding can rightfully affect only the actual property of the debtor and claims thereon." 6 W. COLLIER, BANKRUPTCY ¶ 3.05 at 448 (14th ed. 1971).

5. The SEC supported the reorganization trustee's contention throughout the litigation. The agency was an "unnamed respondent" before the court, having intervened shortly after the instigation of the reorganization process. *See* 11 U.S.C. § 608 (1970).

6. 11 U.S.C. §§ 501-676 (1970).

7. 11 U.S.C. § 616 (1970).

8. 439 F.2d 118 (2d Cir. 1971). "The Court of Appeals heard the case *en banc* after a panel of three judges determined that it was inclined to overrule the case on which the District Court had placed almost exclusive reliance." Caplin v. Marine Midland Grace Trust Co., 406 U.S. 416, 417 n.1 (1972). The district court opinion was not reported.

and other economically disruptive effects, crystallized the need for a more effective system of corporate reorganization. Thus, in 1934 Congress enacted emergency legislation[9] to supplement the old equity receiver system and to provide greater protection for the creditors of insolvent corporations.[10] At the same time, Congress directed the newly created Securities and Exchange Commission to study the operation of the protective committees which then afforded the primary means of corporate reorganization.[11] The SEC investigation focused on a major flaw in the equity receiver system—that the debtor corporation was always permitted to remain in possession of its assets; thus debtors were not prevented from transfering company property and depleting the corporate estate to defeat the claims of investors. Management of the reorganization generally had been sought by competing protective committees, which were often under the control of the debtor corporation's management or large investors; small investors had little opportunity to participate in the reorganization and consequently their interests were ignored.[12] In reaction to the SEC investigative report, Congress attacked this lack of investor protection by enacting Chapter X of the Bankruptcy Act of 1938,[13] which established greater judicial control over corporate reorganization by providing, *inter alia,* for an independent trustee with power to act as a qualified representative of investors[14] and authorizing the creation of a special reorganization court vested with the responsibility of developing a fair and equitable reorganization plan.[15] Recognizing that the success of its reorganization legislation depended upon this court's having expertise as well as power, Congress furnished the reorganization trustee with a staff of administrative specialists and authorized the active participation of the Securities and Exchange Commission in the reorganization proceedings.[16] The Commission's role has been selective and advisory in nature,[17] focusing on

9. Congress, prompted by the continuing economic depression, approved the Act of June 7, 1934, ch. 424, § 77B, 48 Stat. 912.

10. *See* Chandler, *The Revised Bankruptcy Act of 1938,* 24 A.B.A.J. 880, 881-82 (1938).

11. 15 U.S.C. § 78d (1970).

12. *See generally* SEC, REPORT ON THE STUDY AND INVESTIGATION OF THE WORK, ACTIVITIES, PERSONNEL, AND FUNCTIONS OF PROTECTIVE AND REORGANIZATION COMMITTEES, pt. I, at 388-478 (1940).

13. 11 U.S.C. §§ 501-676 (1970).

14. *See* H.R. REP. NO. 1409, 75th Cong., 1st Sess. 43-45 (1937); *Hearings on H.R. 6963 Before a Subcomm. of the House Comm. on the Judiciary,* 75th Cong., 1st Sess. 143 (1937).

15. *See* 11 U.S.C. §§ 574, 612 (1970).

16. *See* 11 U.S.C. § 608 (1970); note 5 *supra.*

17. The Commission has established a policy of requesting participation in Chapter X proceedings only when a public interest is involved. Roughly, proceedings are deemed to involve a public interest if publicly held securities in the amount of $250,000 or more are involved. 2 L. Loss, SECURITIES REGULATION 757 (2d ed. 1961).

the interests of security holders who otherwise might not have been effectively represented;[18] its approval of a reorganization plan as "fair, equitable, and feasible" has become in practice a prerequisite to obtaining court approval of the plan.[19] Because of its origins in the equity receivership system, the plan has traditionally been regarded as relating only to the property of the debtor,[20] including the settlement of any claim against the debtor's estate.[21] Since the plan affects the property of the debtor, and since the reorganization court, primarily through the reorganization trustee, must develop and implement the plan, the Act vested the trustee with title and authorized him to recover all the property of the debtor.[22] Addressing the issue whether these recovery powers of the reorganization trustee authorize the initiation of actions on behalf of debenture holders for an indenture trustee's failure to enforce his indenture with the debtor, the courts have followed two somewhat conflicting theories to determine what constitutes the requisite property interest,[23] one based upon traditional property concepts, and one based upon considerations of policy. Prior to the enactment of the corporate reorganization provisions of Chapter X, the courts generally held that the claims of debenture holders against an indenture trustee were personal to the debenture holders and thus were not the property of the debtor.[24] This line of thought, finding support in the drafter's use of traditional property terminology, continued after the passage of the Act and has served as the basis for classifying the actions that a reorganization trustee is permitted to bring against the indenture trustee. Under this analysis, the holding of an actual fund is sufficient property to authorize a reorganization trustee's suit, but the possession of a covenant that the indenture trustee failed to enforce is not.[25] Using this analysis in *Clarke v. Chase National Bank,*[26] the Second Circuit held that the failure of an indenture trustee to enforce its agreement with the debtor did not give rise to a sufficient property interest of the debtor to enable the reorganization trustee to bring suit against the indenture

18. 37 SEC ANN. REP. 177 (1971).

19. *See* Note, *The Role of the SEC in Corporate Reorganizations Under the Bankruptcy Act,* 1958 U. ILL. L.F. 631, 637.

20. *See* 11 U.S.C. § 616(2) (1970).

21. *Id.* § 616(13).

22. *In re* Bogena & Williams, 76 F.2d 950 (7th Cir. 1935).

23. *See generally* 38 BROOKLYN L. REV. 943, 957 (1972).

24. *E.g., In re* Nine N. Church St., Inc., 82 F.2d 186 (2d Cir. 1936); *cf. In re* 1775 Broadway Corp., 79 F.2d 108 (2d Cir. 1935).

25. *See* President & Directors of Manhattan Co. v. Kelby, 147 F.2d 465 (2d Cir. 1944), *cert. denied,* 324 U.S. 866 (1945).

26. 137 F.2d 797 (2d Cir. 1943).

trustee on behalf of debenture holders. *Clarke* involved a corporation that had executed an indenture in which it covenanted not to mortgage or pledge any of its property without first securing the debentures and not to consolidate, merge or convey a substantial portion of its property without causing its successor to execute a supplemental indenture securing the observance of all the covenants and conditions of the original indenture.[27] The corporation subsequently merged and incurred liabilities without executing the required supplemental indenture, and the indenture trustee failed to enforce the covenant. The Second Circuit reasoned that claims for breach of covenant did not constitute property of the debtor and thus would not affect the reorganization plan.[28] Judge Learned Hand dissented, rejecting this literal property approach as violative of the investor protection policy which underscored the Bankruptcy Act.[29] A later Second Circuit case, *Prudence-Bonds Corp. v. State Street Trust Co.*,[30] seemingly ignored *Clarke* and, relying on the broad reorganization power afforded by Chapter X, allowed a suit by a reorganized company on behalf of its debenture holders.[31] In *Prudence-Bonds* the debtor corporation had deposited three mortgages, under which it was mortgagee, with the indenture trustee to secure a bond issue. Additionally, the corporation guaranteed that if any of the mortgagors should default, the company would pay the principal of the defaulted mortgage. One of the mortgages did fail and the indenture trustee did not compel the company to pay the principal. Five years later, after the debtor corporation had undergone reorganization, the new company brought an action on behalf of bond holders against the indenture trustee for the trustee's failure to enforce the old corporation's guaranty. Permitting the reorganized company as successor in right to the reorganization trustee[32] to bring the suit, the court found that the Chapter X provisions governing the implementation of the reorganization plan clearly evidenced the broad powers to be afforded the reorganization court.[33] Noting the case as one of first impression,[34] the court held that the reorganized company did have standing to sue on behalf of bond holders for the indenture trustee's failure to enforce the secondary guaranty[35] of the old corporation. Judge Learned Hand authored

27. *Id.* at 798.
28. *Id.* at 800.
29. *Id.* at 802.
30. 202 F.2d 555 (2d Cir. 1953).
31. *Id.* at 560.
32. *Id.* at 558.
33. *Id.* at 560.
34. *Id.*
35. *Id.* at 558.

the *Prudence-Bonds* opinion, leading to much speculation that this latter case overruled the *Clarke* decision sub silentio.[36] However, since *Clarke* was not expressly overruled, the question whether the reorganization trustee has standing to sue an indenture trustee on behalf of debenture holders for failure to enforce a covenant in the indenture agreement remained unanswered.

In the instant case, the Supreme Court initially examined the various sections of Chapter X and found no provision that expressly authorized the reorganization trustee to bring the instant action. The Court then proceeded to examine several sections of the statute that specifically refer to the power of the reorganization trustee in relation to the property of the debtor,[37] and concluded that the trustee's power rests exclusively on a finding of a property interest. Distinguishing *Clarke* from *Prudence-Bonds* on the ground that failure to enforce the secondary guaranty in *Prudence-Bonds* diminished the debtor's estate while failure to enforce the agreement in *Clarke* did not reduce the estate,[38] the Court adopted the Second Circuit's position in *Clarke* and determined that an indenture trustee's failure to enforce a covenant with the debtor does not constitute the requisite property interest. Moreover, the Court reasoned that since the debenture holders may only recover from the indenture trustee the amount that they are unable to recover from the debtor, the damages to which they are entitled cannot be ascertained until the reorganization proceeding has progressed to the point at which the amount of this loss can be reasonably approximated.[39] The Court also expressed concern that a judgment for the

36. Brief for Petitioner at 24-25, Caplin v. Marine Midland Grace Trust Co., 406 U.S. 416 (1972).

37. The Court specifically examined §§ 567 and 587 of the Bankruptcy Act: "The trustee upon his appointment and qualification . . . (1) shall, if the judge shall so direct . . . investigate the acts, conduct, property, liabilities, and financial condition of the debtor, the operation of its business and the desirability of the continuance thereof, and any other matters relevant to the proceeding or to the formulation of a plan, and report thereon to the judge; (2) may, if the judge shall so direct, examine the directors and officers of the debtor and any other witnesses concerning the foregoing matters or any of them; (3) shall report to the judge any facts ascertained by him pertaining to fraud, misconduct, mismanagement and irregularities, and to *any causes of action available to the estate* . . . ." 11 U.S.C. § 567 (1970) (emphasis added). "Where not inconsistent with the provisions of this chapter, a trustee, upon his appointment and qualification, shall be vested with the same rights, be subject to the same duties, and exercise the same powers as a trustee appointed under section 72 of this title, and, if authorized by the judge, shall have and may exercise such additional rights and powers as a receiver in equity would have if appointed by a court of the United States for the *property of the debtor.*" 11 U.S.C. § 587 (1970) (emphasis added).

38. This was the reasoning developed in the court of appeals opinion, Caplin v. Midland Marine Grace Trust Co., 439 F.2d 118, 122 (1971). The instant Court specifically relied on the lower court's rationale to distinguish *Clarke* from *Prudence-Bonds.* 406 U.S. at 421-22 n.13.

39. 406 U.S. at 431.

reorganization trustee would not be res judicata against the debenture holders, and would thus subject the indenture trustee to the threat of a duplicity of suits, and potential multiple liability.[40] Furthermore, the Court rejected appellant's proposition that the trustee in reorganization occupies the best position for maintaining an action against the indenture trustee, pointing to the availability of a class action on behalf of the debenture holders pursuant to Federal Rule 23 (b)(3), and emphasizing that the managers of such an action could have available whatever information has been obtained by the reorganization trustee.[41] Therefore, the Court held that the reorganization trustee lacked the standing to maintain the instant action. Mr. Justice Douglas[42] dissented, contending that the majority "misunderstood" the reorganization trustee's role in the formulation of the reorganization plan.[43] He reasoned that, because a reorganization court cannot reasonably determine whether a proposed plan is fair and equitable to all creditors[44] until it can determine how much the debenture holders will recover from the indenture trustee, the authorization for the reorganization plan necessarily includes authorization for the reorganization trustee to sue on behalf of the holders of the debtor's debentures.

The instant Court, by adopting the literal property approach, failed to give effect to the broad policy underlying Chapter X of the Bankruptcy Act. Through the enactment of Chapter X, Congress intended to protect small investors,[45] and implemented this intent by vesting the reorganization trustee with sufficient "power and responsibility" to as-

40. The Court found little merit in petitioner's argument that it would be unlikely that duplicate suits would be brought since the debenture holders could reasonably expect the trustee would prosecute vigorously the claims of all investors. The Court also discussed the court of appeals finding [439 F.2d at 122] that subrogation would nullify any advantage in giving appellant standing to sue. The dissenters responded that "[i]t is not imaginable that any court would ever hold that an indenture trustee, found culpably responsible for the default on debentures, would be subrogated with funds which otherwise would go to innocent creditors . . . . A person 'who invokes the doctrine of subrogation must come with clean hands.' " 406 U.S. at 440 (Douglas, J., dissenting). The majority did not regard the subrogation argument as essential to its reasoning. *Id.* at 430-31.

41. *Id.* at 433-34.

42. Before his elevation to the Supreme Court, Mr. Justice Douglas headed the SEC Protective Study Committee that eventually produced the SEC Report, *supra* note 12. In 1936 Mr. Douglas became SEC Commissioner and in 1937 he became Chairman of the SEC. He has displayed particular interest in the rehabilitation provisions of the Bankruptcy Act. Hopkiek, *William O. Douglas—His Work in Policing Bankruptcy Proceedings,* 18 VAND. L. REV. 663 (1965). *See also* Countryman, *Justice Douglas: Expositor of the Bankruptcy Law,* 16 U.C.L.A.L. REV. 773 (1969).

43. 406 U.S. at 435.

44. *See* 11 U.S.C. §§ 567, 569 (1970).

45. *See* SEC v. American Trailer Rentals Co., 379 U.S. 594, 617-18 (1965).

sure adequate protection of investors in reorganization proceedings.[46] Moreover, reorganization proceedings were designed to be broad in scope, to involve more than the mere liquidation of assets provided in an ordinary bankruptcy proceeding;[47] they encompass the rehabilitation of corporations and affect the rights and interests of many members of the general public.[48] The Court, however, failed to give effect to this broad congressional design[49] by choosing to adhere to a literal interpretation of specific statutory provisions using traditional property analysis. This analysis results in the restriction of the powers of the reorganization trustee to actions related to the debtor's property; yet it seems apparent that some actions not directly related to the property of the debtor may be essential to the development of a fair and equitable reorganization plan. Although the instant decision therefore does not advance congressional policy, it does find some support in considerations of practicability. Allowance of a suit by the reorganization trustee may raise questions about the res judicata effect of such a suit. Debenture holders, under the Bankruptcy Act, are not bound by a judgment obtained by the reorganization trustee, and they are not parties to the trustee's suit. Courts thus might hesitate to bar a debenture holder's separate cause of action, especially when settlements have been made for less than the full value of the debenture issue. The Court's suggestions of other practical problems, however, require further examination. Pointing to three pending actions by the debenture holders against the indenture trustee,[50] the Court contended that permitting the instant suit would result in a multiplicity of litigation. The Court failed to mention, however, that all three suits were filed *after* the standing of the reorganization trustee was challenged.[51] Had there been no challenge, there might well have been no duplication of litigation. The granting of standing could therefore have had the practical effect of *reducing* litigation, since all debenture holders would have known that the reorganization trustee is statutorily charged with the protection of their interests; moreover, in such a situation their need to initiate independent actions would

46. *Hearings on H.R. 6439 Before a Subcomm. of the House Comm. on the Judiciary*, 75th Cong., 1st Sess. 163-64 (1937).

47. *In re* Pittsburgh Terminal Coal Corp., 183 F.2d 520 (3d Cir. 1950); *see* 15 W. FLETCHER, PRIVATE CORPORATIONS § 7358.23 (perm. ed. rev. repl. 1967).

48. *See* Message to Congress from President Herbert Hoover, Feb. 29, 1932, S. Doc. No. 65, 72d Cong., 1st Sess. xi to xii (1932), *quoted in* 1 W. COLLIER, BANKRUPTCY ¶ 0.06 at 14-15 (14th ed. 1971).

49. Prudence-Bonds Corp. v. State St. Trust Co., 202 F.2d 555 (2d Cir. 1953).

50. Note 1 *supra*.

51. Reply Brief for Petitioner at 8, Caplin v. Marine Midland Grace Trust Co., 406 U.S. 416 (1972).

be greatly diminished.[52] The Court's argument that standing should be denied because damages to the debenture holders cannot be determined until there has been a reasonable approximation of how much the debenture holders will recover from the debtor's estate is evasive; no one, debenture holders included, can recover until damages can be reasonably determined. Additionally, this argument appears to be based on the idea that damages can be determined only after a reorganization trustee has completed the reorganization. Although exact damages may not be determinable until after the frequently long and difficult reorganization process, a reasonable approximation of the debenture holder's recovery can be made at an early stage of the reorganization, making a suit by the reorganization trustee not only possible, but conveniently within the trustee's regular course of business. Perhaps sensing the weakness of its arguments concerning damages and multiplicity of litigation, the Court next offered its suggestion of alternative debenture holder relief through an action under Federal Rule 23(b)(3). Certainly a class action, if it is always available,[53] would eliminate the res judicata problem and allow a unified presentation of all the debenture holders' claims. And since an active exchange of information is encouraged between the reorganization trustee and the managers of the class suit, the class action managers may well be in as good a position as the trustee to prosecute the suit. Thus, the Court has delineated a procedural alternative that would greatly diminish the res judicata problem indicated earlier. Nevertheless, the Court has overlooked a number of other considerations that support the practicability of allowing the reorganization trustee to maintain the instant action. The reorganization trustee is still in the better, and certainly the more convenient, position to prosecute a suit. The trustee has the expert assistance of the SEC;[54] the debenture holders do not. The trustee, because of his special investigative powers, is also in the better position to discover whatever claims may exist against the indenture trustee.[55] Furthermore, the kind of reorganization program necessary to implement the policies of the Act requires a focal point for all claims affecting the reorganization; allowing the reorganization trustee to represent debenture holders has the practical effect of giving the indenture trustee someone he could go to if he wants to negotiate a settlement.[56] In light of the instant decision, the indenture trustee now

52. Note 40 *supra.*

53. *Contra,* Snyder v. Harris, 394 U.S. 332 (1969); Elkind v. Chase Nat'l Bank, 259 App. Div. 661, 20 N.Y.S.2d 213, *aff'd,* 284 N.Y. 726, 31 N.E.2d 198 (1940).

54. *See* 379 U.S. at 604.

55. 406 U.S. at 427.

56. *In re* Continental Vending Mach. Corp., No. 63-B-663 (E.D.N.Y., reorganization petition filed July 12, 1963); *see* SEC, 36TH ANNUAL REPORT 187 (1970).

may feel compelled to wait until a debenture holder has gone through the costly and time-consuming process of initiating a class action before he attempts to settle. Additionally, there is a definite possibility that the class action may fail to meet the criteria set out in Federal Rule 23(b)(3).[57] The practical effect of the disallowance of a class action would be that many small investors, faced with the expense and inconvenience of having to bring an individual suit, will simply not recover against the indenture trustee. When the res judicata problems that constitute the only serious practical difficulty in granting standing to the reorganization trustee are weighed against the likelihood of no recovery by small investors inherent in denying standing, it seems clear that the reorganization trustee should be allowed to sue on behalf of debenture holders. The instant decision, therefore, is neither an implementation of congressional policy nor a result demanded by practicality; it is merely a literal interpretation of selected portions of Chapter X of the Bankruptcy Act. Perhaps Mr. Justice Douglas was correct in asserting that the majority misunderstood the role of the reorganization trustee in implementing the policy of investor protection. Such confusion would be understandable in light of the repeated references to the debtor's "property" in Chapter X—references undoubtedly prompted by the fact that reorganization proceedings originated in traditional equity receiverships. In view of the instant decision, it is submitted that Congress should clarify the unfortunate property language in Chapter X if it is to provide finally the investor protection the Act was intended to secure.[58]

Constitutional Law—Commerce Clause—Exactions on Airport Users by Local Governments Measured by Number of Enplaning Passengers Are Constitutionally Valid

Plaintiff airlines[1] brought an action to enjoin enforcement of a local ordinance that levied a service charge on enplaning commercial air passengers, asserting that the levy constituted an unconstitutional bur-

57. Brief for Petitioner at 21 n.9, Caplin v. Marine Midland Grace Trust Co., 406 U.S. 416 (1972).

58. Note, *Chapter X Trustee Standing to Sue an Indenture Trustee: Should Congress Reverse Caplin?*, 47 N.Y.U.L. REV. 259 (1972).

1. Delta Airlines, Inc., Eastern Airlines, and Allegheny Airlines, Inc. are commercial air carriers that provide scheduled interstate service to and from Dress Memorial Airport, Evansville, Indiana.

den on interstate commerce in violation of the commerce clause.[2] Defendant airport authority contended that because the ordinance established a service tax that was directly related to the use of airport facilities and was designed to offset the costs of providing them, the tax was constitutionally valid. The superior court granted the injunction, and the Supreme Court of Indiana affirmed.[3] On certiorari to the United States Supreme Court, *held,* reversed.[4] A service charge that does not discriminate against interstate commerce, and that reasonably approximates both the use made of facilities and the cost of their maintenance to the taxing authority, does not violate the commerce clause of the federal constitution. *Evansville-Vanderburgh Airport Authority District v. Delta Airlines, Inc.,* 405 U.S. 707 (1972).

Challenges to state taxes[5] affecting interstate travelers have relied primarily on four major constitutional provisions—the privileges and immunities,[6] due process,[7] and equal protection[8] clauses of the four-

2. Evansville-Vanderburgh Airport Authority Dist., Ind., Ordinance 33, Feb. 26, 1968. The classification "enplaning commercial air passengers" does not include active members of the Armed Forces, deplaning commercial passengers, or those passengers making "intermediate or temporary" stopovers. *Id.* § 4.

3. Evansville-Vanderburgh Airport Authority Dist. v. Delta Airlines, Inc., 265 N.E.2d 27 (Ind. 1970).

4. Decided with the instant case was *Northeast Airlines, Inc. v. New Hampshire Aeronautics Comm'n,* in which plaintiff airlines brought an action for declaratory judgment challenging the constitutionality of a New Hampshire statute that imposed a service fee on commercial airline users of New Hampshire public airports. The charge was measured by the number of enplaning passengers and aircraft gross weight. Plaintiffs argued that the charge was an unconstitutional burden on the right to travel interstate, an impermissible burden on interstate commerce, and violative of the equal protection clause of the fourteenth amendment because it arbitrarily discriminated among users of the airport facilities. The Supreme Court of New Hampshire issued a declaratory judgment in favor of defendant aeronautics commission, upholding the tax. 111 N.H. 5, 273 A.2d 676 (1971). Because the charge was levied on the carrier rather than the passenger, the court perceived no invasion of the right to travel; the court viewed the charge as a reasonable fee for the use of facilities rather than as a state tax burdening interstate commerce. Furthermore, the court decided that the classifications of airport users for tax purposes were reasonable rather than arbitrary. On appeal to the United States Supreme Court, *held,* affirmed.

5. Throughout this comment the term "state taxes" will be used to mean "state and local taxes," since the states authorize local taxation.

6. The privileges and immunities clause declares: "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States." U.S. CONST. amend. XIV, § 2. The argument has been made that the right to travel is a "privilege" or "immunity" of national citizenship that is protected against state interference by the fourteenth amendment. Crandall v. Nevada, 73 U.S. (6 Wall.) 35 (1867). The right to travel is clearly a protected privilege. Dunn v. Blumstein, 405 U.S. 330, 338 (1972) (length of residence requirement for voting invalid as burden on right to travel). The privilege is not, however, absolutely immune from state action. Hendrick v. Maryland, 235 U.S. 610, 624 (1914) (tax on out-of-state highway user held valid). The Supreme Court has been reluctant to create "constitutional refuges for a host of rights traditionally subject to regulation." Bell v. Maryland, 378 U.S. 226, 250 (1964) (Douglas, J., concurring); Colgate v. Harvey, 296 U.S. 404, 405 (1935) (limited fourteenth amendment restraints

teenth amendment and the commerce clause of Article I.[9] Use of the first three constitutional theories generally has been unsuccessful in taxpayer challenges to charges for the use of state-provided facilities.[10] The argument most often asserted in opposition to state "user taxes" is that they impose unreasonable burdens on interstate commerce in violation of the commerce clause,[11] which grants to Congress the power to regulate commerce among the states.[12] Courts have interpreted the clause as prohibiting direct state taxation[13] of interstate commerce, even when Congress has shown no intent to regulate the particular activity taxed.[14] Moreover, this restrictive construction of state power

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on state action because of apprehension for the independence of local governments). The Court has generally allowed the states to tax travellers when the state provides a valuable service or facility. Hendrick v. Maryland, 235 U.S. 610 (1914).

7. The due process clause denies the states the right to "deprive any person of life, liberty, or property, without due process of law . . . ." U.S. CONST. amend. XIV, § 1. The right to travel is an element of the liberty thus protected. Kent v. Dulles, 357 U.S. 116, 125-26 (1958) (due process requirements must be observed before denial of passport). To satisfy the requirements of due process a state tax must be related to benefits that the state provides. Wisconsin v. J.C. Penney Co., 311 U.S. 435, 444 (1940). The test has seldom been used to oppose taxes designed to compensate the state for valuable services; the commerce clause "benefits conferred" test is quite similar and has seen more use. *See* notes 9-16 *infra* and accompanying text.

8. The equal protection clause declares that "no State shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV, § 1. When citizens are classified and treated differently on the basis of the classification, some paying more and some less, the equal protection clause has been invoked to require that "the distinctions . . . have 'some relevance to the purpose for which the classification is made.'" Rinaldi v. Yeager, 384 U.S. 305, 309 (1966).

9. U.S. CONST. art. I, § 8. A state may tax interstate commerce only to the extent of its fair share of the cost of state-provided facilities or protection. National Bellas Hess, Inc. v. Department of Revenue, 387 U.S. 753 (1967).

10. The leading right-to-travel case involved a state tax levied when no public facilities were involved. Crandall v. Nevada, 73 U.S. (6 Wall.) 35 (1867). Cases that could have generated substantive due process difficulties were decided instead on commerce clause grounds. McCarroll v. Dixie Greyhound Lines, Inc., 309 U.S. 176 (1940); Ingels v. Morf, 300 U.S. 290 (1937) (tax invalid as excessive in relation to regulatory expenses). The equal protection requirements have been incorporated into the 3 commerce clause criteria set forth by the Court in Capitol Greyhound Lines v. Brice, 339 U.S. 542 (1950).

11. *See, e.g.*, Clark v. Poor, 274 U.S. 554 (1927).

12. The Constitution grants to Congress the power "[t]o regulate Commerce . . . among the several States . . . ." U.S. CONST. art. I, § 8, cl. 3.

13. "Taxation" is a form of the "regulation" granted to Congress and denied to the states by the commerce clause. Leloup v. Port of Mobile, 127 U.S. 640, 648 (1888).

14. Chief Justice Marshall played an important role in defining the scope of the commerce clause and its prohibitions. In Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1 (1824), he accorded broad scope to the power of Congress over interstate commerce and firmly established the supremacy of Congress over the states in that area. In Brown v. Maryland, 25 U.S. (12 Wheat.) 419 (1827), he committed the Court to a view of the commerce clause that precluded any state taxation of interstate commerce. Marshall did recognize certain exceptions. He realized that there are matters of primarily local concern, the regulation of which by the states would affect interstate commerce, and he left the regulation of such matters to the states. Willson v. Black-Bird Creek Marsh Co.,

to tax interstate commerce has prevailed even when intrastate commerce has been subjected to an equal tax burden.[15] Nevertheless, the commerce clause has not operated as a shelter to which those engaged in interstate commerce may invariably resort to avoid state interference and thereby obtain a competitive advantage over their intrastate rivals; in the context of state highway tolls, the initial presumption that direct taxes on interstate commerce are invalid has been readily overcome by a showing that the tax is compensatory in nature.[16] For example, in *Hendrick v. Maryland*[17] the Court upheld a tax on out-of-state highway users, concluding that once a state provides valuable facilities, it may justifiably exact reasonable compensation for their use. In response to the *Hendrick* holding, most states have enacted highway user taxes,[18] which have long represented the primary exception to the constitutional proscription against state excise taxes that directly affect interstate commerce.[19] The states, however, have not been granted an unrestricted authority to tax the use of their highways. All highway use tax schemes must comply with a three-part constitutional standard prescribed by the Court. The first part of the standard, as summarized in *Capitol Greyhound Lines v. Brice*,[20] is the requirement that any user tax must be applied without discrimination to both interstate and intrastate commerce. Secondly, the amount of revenue collected must not exceed an amount that constitutes fair compensation for expenditures made by the state. Thus, in *Ingels v. Morf*,[21] the Court invalidated a fifteen-dollar

27 U.S. (2 Pet.) 245 (1829). Marshall's views were clarified as well as modified by subsequent Courts. In Cooley v. Board of Wardens, 53 U.S. (12 How.) 299 (1851), the Court divided possible subjects of regulation into 2 classes: (1) those that are national in character and require uniform rules of regulation, and (2) those local in character that are adapted to local treatment. As to national matters, Congress' power to regulate was exclusive; over local matters, the states could enact regulatory laws as long as Congress had not acted. *See generally* P. HARTMAN, STATE TAXATION OF INTERSTATE COMMERCE 21-46 (1953).

15. *See, e.g.*, Freeman v. Hewit, 329 U.S. 249, 252 (1946) (invalidated the Indiana Gross Income Tax Act of 1933 as a direct burden on interstate commerce).

16. Taxes that have not been shown to be compensatory in nature have been invalidated. Interstate Transit, Inc. v. Lindsey, 283 U.S. 183 (1931); Sprout v. City of South Bend, 277 U.S. 163 (1928) (neither statute included a legislative indication that the funds were intended to compensate for road use).

17. 235 U.S. 610 (1914).

18. Forty-eight states have highway user taxes. For a summary of highway tax cases decided by the Supreme Court prior to 1950 see Capitol Greyhound Lines v. Brice, 339 U.S. 542, 561 (1950) (Frankfurter, J., dissenting).

19. The only other taxes that have been challenged and upheld on the same reasoning as highway taxes have been fees for the use of municipal river wharves. HARTMAN, *supra* note 14, at 128; *e.g.*, Packet Co. v. Keokuk, 95 U.S. 80 (1877).

20. 339 U.S. 542 (1950).

21. 300 U.S. 290 (1937).

California tax on vehicles traveling in "caravans"[22] on the ground that the income from the tax greatly exceeded the increased police and regulatory costs entailed by the caravans.[23] Finally, the tax must be based on some reasonable approximation of the use made of the state-provided facilities. The final standard has been difficult to apply; although it was characterized as a separate test in *Capitol Greyhound,* the Court appeared to merge consideration of it into the second standard—fair compensation to the state. *Capitol Greyhound* upheld a highway use tax measured by the fair market value of motor vehicles travelling interstate. Although the prescribed rate obviously was not related to the amount of road use, the tax was held to be valid on the ground that the exactions did not exceed the value of the benefits provided by the taxing state.[24] As a result of *Capitol Greyhound* and subsequent decisions[25] the tax formula itself has become much less important than the actual revenue-producing effect of its application, and, as a practical matter, the states have been afforded considerable discretion to determine the measure of road use taxes. The principles relied upon to sustain highway taxes seldom have been employed to support taxation of interstate users of other facilities;[26] extension of the principles to airport user taxes has encountered a mixed reaction. Some legislatures and courts have viewed enplanement fees as similar to highway taxes and, accordingly, have scrutinized them pursuant to the *Capitol Greyhound* tests,[27] but a number of courts have chosen not to rely on the commerce clause at all, invalidating airport user taxes as infringements of the constitutionally protected right to travel. In *Northwest Airlines, Inc. v. Joint*

22. A long procession of used cars being driven to their eventual place of sale constitutes a "caravan." Most of the automobiles are linked together in pairs to save gas, but all single cars travelling with the caravan are taxed as well, on the theory that long caravans create traffic hazards and therefore necessitate increased police regulation. 300 U.S. at 293, 296.

23. *Compare* Ingels v. Morf, 300 U.S. 290 (1937) ($15 California caravan fee excessive for added police and regulatory expenses) *with* Morf v. Bingaman, 298 U.S. 407 (1936) ($7.50 New Mexico caravan fee was a fair compensation tax).

24. 339 U.S. at 546-47.

25. *See* Evansville-Vanderburgh Airport Authority Dist. v. Delta Airlines, Inc., 405 U.S. 707, 715 (1972); Capitol Greyhound Lines v. Brice, 339 U.S. 542, 551 (1950) (Frankfurter, J., dissenting).

26. *See* note 20 *supra.*

27. The lower courts in the instant case employed the highway tax criteria to test the validity of airport taxes. Evansville-Vanderburgh Airport Authority Dist. v. Delta Airlines, Inc., 265 N.E.2d 27 (Ind. 1970); Northeast Airlines, Inc. v. New Hampshire Aeronautics Comm'n, 111 N.H. 5, 273 A.2d 676 (1971); Opinion of the Justices, 102 N.H. 73, 150 A.2d 522 (1959). Various agencies or municipalities in California, Hawaii, North Carolina and Washington have considered airport service charges but have declined to proceed after receiving opinions from the various attorneys general of those states that the charges would be unconstitutional. 36 J. AIR L. & COM. 788, 788 n.5 (1970).

City-County Airport Board,[28] for example, the Montana Supreme Court interpreted two United States Supreme Court decisions, *Crandall v. Nevada*[29] and *Edwards v. California*,[30] as holding that states have no power to tax or regulate any person's departure from or entry into a state. The Montana court adopted the Court's reasoning in *Crandall* that travel among the states is vital to the federal system and that uncontrolled state taxation could prevent or seriously impede that traffic.[31]

In the instant case, the Supreme Court determined initially that the right-to-travel argument was inapposite[32] and then analogized the airport tax to a highway user tax. The Court explained that the right-to-travel cases had involved state-imposed burdens on interstate travel; because facilities provided at public expense facilitate rather than hinder the right to travel, the Court reasoned that a charge to help defray the cost of the facilities is not a "burden" in the constitutional sense. Moreover, the Court recognized as settled the *Hendrick* doctrine that states may constitutionally tax interstate users of state-provided facilities to defray construction and maintenance costs. The Court then concluded that the requirements set forth in *Capitol Greyhound* for sustaining the validity of a highway use tax are applicable to airport enplanement fees. Subjecting the airport tax to the *Capitol Greyhound* tests, the Court found that no proof had been offered to show discrimination against interstate commerce under the statute, which subjected both inter- and intrastate passengers to the same charge;[33] that the exemptions[34]

28. 154 Mont. 352, 463 P.2d 470 (1970).

29. 73 U.S. (6 Wall.) 35 (1867) (Nevada tax on rail passengers departing the state held invalid).

30. 314 U.S. 160 (1941) (unconstitutional to restrict entry of indigents into California).

31. In Allegheny Airlines, Inc. v. Sills, 110 N.J. Super. 54, 264 A.2d 268 (1970), the court accepted verbatim the Montana court's *Northwest Airlines* reasoning in striking down a similar statute. The statute, which divided the tax revenue between 2 New Jersey cities neither of which was involved in operating the airport or providing any real services to passengers, would no doubt have been void under any rationale.

32. The Court distinguished Crandall v. Nevada, 73 U.S. (6 Wall.) 35 (1867). The Nevada tax in *Crandall* was charged without regard to whether the state provided any facilities for the passengers taxed, but the taxes in the instant case were designed to make travellers bear their share of the cost of public facilities. The Court considered inapplicable the principle of Shapiro v. Thompson, 394 U.S. 618 (1969), that burdens on the right to travel are valid only if they serve a compelling state interest. When a state provides facilities to aid interstate travel, a charge to help pay for the facilities is not a burden "in the constitutional sense." 405 U.S. at 714.

33. There was no showing of any difference between the 2 kinds of passengers that would make the application of a like charge to both classes discriminatory against one. The burden of proving discrimination was on the plaintiffs. *Cf.* Nippert v. City of Richmond, 327 U.S. 416 (1946).

34. *See* note 2 *supra*. Others exempted by one or both of the statutes in question are passengers on noncommercial flights, some commercial passengers on light aircraft, and all nonpassenger airport users.

made by the tax statute were not "wholly irrational"[35] and the charge was sufficiently related to airport use; and that plaintiff had not satisfactorily shown the exaction to be excessive in relation to past and present airport costs.[36] Noting finally that the challenged statute did not conflict with congressional initiatives in the area of air travel regulation,[37] the Supreme Court found that the tax imposed was a valid charge under the commerce clause for the use of state-supported airport facilities.[38]

The instant decision is a well-reasoned extension of highway use tax concepts into a new context; there is no significant difference, for taxation purposes, between state roads and public airports. The Court's decision, however, fails to define a limit beyond which the *Capitol Greyhound* reasoning will be held not to apply. Relying upon the tests adopted by the Court in the instant case, a state could validly tax interstate travellers for engaging in a wide variety of activities that hitherto have been prohibited as unreasonable burdens on interstate commerce and on the right of citizens to travel freely from state to state.[39] The Court's failure to delineate practical boundaries not only perpetuates uncertainty about the situations in which the user-tax rationale, as opposed to traditional commerce clause analysis, will apply; it also permits speculation whether the exception to traditional commerce clause theory forged to accommodate highway use taxes may become the rule. Whatever may be the ultimate effect of the instant case on constitutional theory, it seems clear that its immediate effect will be

35. 405 U.S. at 719.

36. The Court indicated that Evansville-Vanderburgh Airport Authority had lost nearly $500,000 in the 4 years 1965-68. The airlines had not shown that a $1 enplaning fee would do more than offset past and current deficits. The Court noted that the New Hampshire appellants had likewise failed to submit proof of excessiveness and, relying on their earlier decision in Aero Mayflower Transit Co. v. Board of R.R. Comm'rs, 332 U.S. 495 (1947), the Court also termed "immaterial" the airlines' argument that the tax law was invalid because it allocated only 50% of its revenue specifically to aeronautical uses. 405 U.S. at 720.

37. The Court felt that Congress had encouraged user charges in its Airport and Airway Development Act of 1970, 49 U.S.C. §§ 1701-42. Governmental approval of an airport development project was there conditioned on the airport operator's maintaining "a fee and rental structure . . . which will make the airport as self-sustaining as possible . . . taking into account such factors as the volume of traffic and economy of collection." *Id.* at § 1718(8).

38. Justice Douglas, in a short dissent, approved the *Crandall* argument that the right to travel was a "privilege or immunity" that should not be abridged in any way. 405 U.S. at 722-26. He failed to deal with the majority's contention that *Crandall* was not on point and that interstate commerce has long been required to pay for the use of state-provided facilities and protection.

39. A state might, for example, tax the user of a sidewalk, or it might tax nature enthusiasts for using trails in wilderness areas protected by the state's forest service. Carried to an extreme, the Court's *Evansville* rationale might be stretched to legitimate a "user" tax on all interstate travellers who breathe air within the taxing state. Would such a tax be valid merely because the state describes it as compensatory for the expense of maintaining pollution control equipment and an environmental protection agency?

the prompt adoption of some form of user fee by most public airports.[40] The immediate significance of the instant decision therefore lies in the guidelines it prescribes for the legislative bodies that design those fees.[41] By approving the terms of the fee provisions in the instant case under the *Capitol Greyhound* tests, the Court has impliedly assured draftsmen that the use of similar language will ensure the validity of future statutes. This aspect of the instant decision presents difficulties of its own. For example, the Court does not adequately define its use of the word "costs." By assuming that past deficits are a part of the costs that present airport users can be expected to pay,[42] a state could arguably recover from present passengers all the money spent on construction and maintenance over the years, less the amount already recovered from general airport revenue.[43] In the case of an old and expensive airport the potential tax burden could be enormous,[44] and the Court should make it clear whether that burden can be placed on today's air passenger by a taxing state. The Court's decision is subject to further criticism for its characterization of enplanement as a reasonable measure of airport use. Neither enplaning passengers nor aircraft gross weight[45] is a very

40. States are generally quick to utilize new revenue sources. The general sales and use taxes first made their appearance in the 1930's. In 1969 they were responsible for about 1/3 of all state and local tax revenues and were in force in 42 states and in many municipalities. J. HELLERSTEIN, STATE AND LOCAL TAXATION 3, 13 (1969); *cf.* Roesken, *Doing Business in Other States*, 38 TAXES 769, 777 (1960). A New York investment company, on the other hand, has predicted that state and local budgets will show their first surpluses since the late 1940's during 1972 and 1973. This may permit the states to cut back on new taxes. In fact a sampling of 14 state legislatures indicates that only $875,000,000 in new or higher taxes have been enacted to date in 1972. This figure represents a significant drop from 1971's record-breaking $5,030,000,000 in increased levies. Wall Street J., Sept. 20, 1972, at 1, col. 5. This may reflect a reluctance to increase or add taxes in an election year, and the drop in new taxes may not affect charges for the use of public facilities. *See* note 50 *infra.*

41. To be valid a tax must profess a compensatory purpose and satisfy the *Capitol Greyhound* tests. *See* notes 33-36 *supra* and accompanying text.

42. 405 U.S. at 720.

43. The Court was not entirely clear in its definition of what would constitute an excessive tax. It stated that the tax would be sustained "so long as the funds received by the local authorities *under the statute* are not shown to exceed their airport costs . . . ." 405 U.S. at 720 (emphasis added). A reasonable interpretation of this formulation would be: General Airport Revenue + Tax Revenue = Total Airport Costs. The language can also be interpreted, however, to support this formula: Tax Revenue = Total Airport Costs. Potentially, the second formula permits a much larger airport service charge.

44. Financial problems are acute at both large and small airports nationwide. Contemporary and projected aircraft will require increased investment in airport facilities. BUSINESS WEEK, Sept. 30, 1972, at 45-46. The financial problems reflect a faulty airport fee system according to one authority. Levine, *Landing Fees and the Airport Congestion*, 12 J. LAW & ECON. 79 (1969). Thus, present day passengers could ultimately be required to pay for the organizational errors of a past generation of administrators.

45. The New Hampshire statute varied the service charge with the weight of the airplane. N.H. REV. STAT. ANN. §§ 422.43-.45 (Supp. 1971).

accurate measure of wear on airport runways and other facilities.[46] This acceptance of imprecisely worded provisions suggests the Court's apparent willingness to approve any arguably reasonable state measure. The Court's reluctance to subject tax measures to careful scrutiny[47] is understandable; judicial control of state taxation is imprecise at best, and necessarily must be confined within narrow limits.[48] Congress is much better equipped to assess the feasibility of alternative tax measures.[49] Until Congress accepts this responsibility, however, the instant decision will remain significant, because it offers an example of statutory draftsmanship that will aid state legislators who have been eagerly searching for the magic words necessary to make airports pay for themselves.[50]

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46. Professor Levine severely criticizes airports for failing to maximize rental fees and terminal charges. He asserts that airports seldom take account of the most important factors in assessing landing fees and user charges—wear and tear on facilities. Because of its more elaborate landing gear, a Boeing 747 places less strain on a runway in landing than a 727 that weighs only a third as much. Levine recommends landing fees based on wheel and landing gear arrangements rather than on gross aircraft weight. This system would have the added benefit of encouraging less destructive aircraft design. Levine, *supra* note 44, at 94-95. Professor Ross Eckert advocates higher landing fees reflected by increased ticket prices at peak travel times. This would lead to more efficient use of crowded airports by persuading more people to travel at hours when the airports are now hardly used at all. BUSINESS WEEK, Sept. 30, 1972, at 45-46.

47. "At least so long as the toll is based on some fair approximation of use or privilege for use . . . it will pass constitutional muster, even though some other formula might reflect more exactly the relative use of the state facilities by individual users." 405 U.S. at 716-17. The Court only required that statutory exemptions not be "wholly irrational." *Id.* at 722.

48. "Judicial control of national commerce—unlike legislative regulations—must from inherent limitations of the judicial process treat the subject by the hit-and-miss method of deciding single local controversies upon evidence and information limited by the narrow rules of litigation. Spasmodic and unrelated instances of litigation cannot afford that full protection for interstate commerce intended by the Constitution." McCarroll v. Dixie Greyhound Lines, Inc., 309 U.S. 176, 188-89 (1940) (Black, J., dissenting).

49. "Congress alone can provide for a full and thorough canvassing of the . . . intricate factors which compose the problem of the taxing freedom of the states and the needed limits on such taxing power. Congressional committees can make studies and give the claims of the individual States adequate hearing before the ultimate formulation of policy is made by the representatives of all the States. . . . Congress alone can formulate policies founded upon economic realities . . . ." Northwestern States Portland Cement Co. v. Minnesota, 358 U.S. 450, 476-77 (1959) (Frankfurter, J., dissenting); *accord,* McCarroll v. Dixie Greyhound Lines, Inc., 309 U.S. 176, 189 (1940) (Black, J., dissenting); *cf.* South Carolina Highway Dep't v. Barnwell Bros., Inc., 303 U.S. 177, 189-90 (1938).

50. Congress has made one unsuccessful attempt to control state taxation of airport users. The Airport Development Acceleration Act of 1972 contained a provision which forbade state and local governments from levying enplanement taxes on airline passengers or taxes on the gross receipts from the sale of air transportation. S. 3755, 92d Cong., 2d Sess. (1972). The Act was passed by Congress on October 13, 1972 and sent to the President for his signature. President Nixon vetoed the Act on October 27, 1972 because he felt the appropriations for airport security and improvement contained in the bill would have sabotaged his economic program. In the wake of Nixon's veto, airports in Jackson, Miss., Rochester, N.Y., Des Moines, Iowa, and Roanoke, Va. began to enforce $1 enplanement fees they had already enacted. Jack Corbett, vice president

Constitutional Law—Right to Speedy Trial—State-Imposed Five-Year Delay Does Not Abridge Right to Speedy Trial When Accused Has Not Asserted His Right and No Prejudice Is Shown

Petitioner sought habeas corpus relief in federal district court, claiming that his murder conviction[1] was invalid because he had been denied his sixth amendment right to a speedy trial.[2] More than five years had elapsed between petitioner's indictment and the commencement of his trial.[3] This delay was attributable to the illness of a key witness[4] and to the prosecution's decision to gain a tactical advantage in petitioner's trial by first obtaining a conviction against petitioner's alleged accomplice[5] in order to use the accomplice's testimony against petitioner. The Commonwealth claimed that petitioner waived his right to a speedy trial because he did not object to the delay until over three years after his indictment[6] and did not formally assert denial of the constitutional right until the trial began. The United States District Court for the Western District of Kentucky denied relief without a hearing. The Court of Appeals for the Sixth Circuit affirmed,[7] holding that petitioner had waived his right to object to any delay prior to his first motion to dismiss,[8] that the subsequent delay was not excessive, and that petitioner

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for Federal affairs of the Airport Operators Council International, claimed that "the chances are excellent that the Congress will re-enact the prohibition on head taxes next March 1." N.Y. Times, Nov. 2, 1972, at 44, col. 1. Regardless of congressional action on airport taxes, the reasoning of the instant Court can have broad application to other public facilities.

1. Petitioner's conviction and life sentence for the murder of 2 persons had been upheld by the Kentucky Court of Appeals. Barker v. Commonwealth, 385 S.W.2d 671 (Ky. 1964).

2. "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial . . . ." U.S. CONST. amend. VI.

3. Petitioner was indicted on September 15, 1958. The accomplice, Silas Manning, also was indicted at that time. Petitioner's trial commenced on October 9, 1963.

4. The illness of this witness, the former sheriff and chief investigating officer in the case, accounted for only the last 7 months of the 5-year delay.

5. Although the Commonwealth believed that its case against petitioner's accomplice was stronger than its case against petitioner, 6 trials, consuming more than 4 years, were required in order to obtain a conviction against the accomplice.

6. Of the 16 continuances sought by and granted the prosecution, petitioner only objected to 3 of the requests: the 12th (February 1962), the 15th (March 1963), and the 16th (June 1963). Petitioner, released on bond in June 1959, spent only 10 months of the postindictment delay in jail.

7. Barker v. Wingo, 442 F.2d 1141 (6th Cir. 1971).

8. The court mistakenly believed that petitioner's first motion to dismiss occurred on February 12, 1963, rather than, as respondent conceded, on February 12, 1962. Barker v. Wingo, 407 U.S. 514, 518-19 (1972).

had not shown resulting prejudice.[9] On writ of certiorari from the United States Supreme Court, *held,* affirmed. An otherwise unjustified five-year delay does not constitute a denial of the right to a speedy trial when the defendant has failed to seek a speedy trial and has not shown resulting prejudice. *Barker v. Wingo,* 407 U.S. 514 (1972).

The fundamental importance of timeliness in the administration of justice is deeply embedded in American legal history;[10] the right to a speedy trial is expressed in the sixth amendment of the United States Constitution, which the Supreme Court in *Klopfer v. North Carolina* held applicable to the states through the fourteenth amendment.[11] The nature of the right to a speedy trial, however, is quite different from that of other sixth amendment rights,[12] because of the wider range of interests protected by the speedy trial guarantee. In addition to protecting the accused from excessive pretrial confinement, anxiety accompanying public accusation, and deterioration of defense evidence, the guarantee also protects societal interests by deterring crime through the swift administration of justice,[13] preserving prosecution evidence, and curtailing crime by those persons released on bond. Nevertheless, the Supreme Court has not defined the scope of this fundamental right to a speedy trial or specified criteria for determining when it has been denied.[14] Therefore, the scope of the right has been delineated primarily by lower federal courts and by state statutes and courts.[15] In considering whether there has been a denial of the right to a speedy trial, most[16] state[17] and federal[18] courts traditionally have applied the "demand"

9. 442 F.2d at 1143.

10. *See* Klopfer v. North Carolina, 386 U.S. 213, 223-24 (1967) (delineating the history of the right to a speedy trial from the Magna Carta to the passage of the sixth amendment).

11. 386 U.S. 213, 223 (1967).

12. For example, the right to counsel and the right to a trial by jury. U.S. CONST. amend. VI.

13. It has been suggested that the punishment follow the offense as soon as possible, making the sanction more certain and, therfore, more effective. J. BENTHAM, THE THEORY OF LEGISLATION 326 (C. Ogden ed. 1931).

14. On the infrequent occasions when the Supreme Court has discussed the right to a speedy trial, the Court has declared: that the right is a relative one that is consistent with delays, Beavers v. Haubert, 198 U.S. 77 (1905); that purposeful or oppressive delays might constitute a denial of the right, Pollard v. United States, 352 U.S. 354 (1957); that the right is an important constitutional safeguard against undue and oppressive incarceration prior to trial and impairment of the accused's ability to defend himself, United States v. Ewell, 383 U.S. 116 (1966); and that the right attaches only after a person has been "accused" of a crime, United States v. Marion, 404 U.S. 307 (1971).

15. *See generally* Note, *The Impact of Speedy Trial Provisions: A Tentative Appraisal,* 8 COLUM. J.L. & SOC. PROB. 356, 360-61 (1972).

16. *See generally* Note, *The Right to a Speedy Trial,* 57 COLUM. L. REV. 846 (1957).

17. *Id. See also* Annot., 129 A.L.R. 572 (1940); Annot., 57 A.L.R.2d 302 (1958).

18. *See* Barker v. Wingo, 407 U.S. 514, 524-25 nn.22 & 23 (1972) (delineating the positions

doctrine. This doctrine states that, unless the accused demands to be tried or objects to postponement,[19] he is deemed to have waived his right to a speedy trial.[20] The doctrine rests on the assumption that delay benefits the accused by either forestalling punishment or permitting additional time to prepare a defense.[21] Thus, its supporters assert that, in the absence of a limiting rule, many defendants would welcome delay in order later to seek a dismissal for denial of the right to a speedy trial,[22] while defendants actually prejudiced will be likely to make the required demand in any event.[23] In addition to utilizing the demand-waiver doctrine, courts also have focused on the issues of prejudice and the length and cause of delay. A majority of courts have determined that if a denial of the right to a speedy trial is to be found, the accused must bear the burden of proving that the delay prejudiced his defense.[24] General allegations of faded memories and time-deteriorated evidence are insufficient; the accused must allege and prove specific and actual prejudice.[25] The length of the delay is tied closely to the issue of prejudice; the longer the delay, the less demanding will be the show of prejudice required.[26] If it is shown that the defendant himself caused the delay, however, no showing of prejudice will command dismissal.[27] Delays attributable to the prosecution are evaluated according to the reason for the delay.[28] If

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of the various circuits on the issue of the demand-waiver doctrine).

19. Courts adhering to the demand-waiver doctrine have been strict in holding that anything less than a formal request in court is insufficient to meet the demand requirement. *See e.g.*, United States v. Lustman, 258 F.2d 475 (2d Cir.), *cert. denied*, 358 U.S. 880 (1958) (request addressed to prosecutor inadequate demand, as prosecutor is not affirmatively charged with preserving the rights of the accused).

20. Some excuses for failure to demand a speedy trial may be permitted. *E.g.*, United States v. Hill, 310 F.2d 601 (4th Cir. 1962) (accused ignorant of the pending charge); United States v. Chase, 135 F. Supp. 230 (N.D. Ill. 1955) (accused in jail on another charge and powerless to make such demand); United States v. Provoo, 17 F.R.D. 183 (D. Md.), *aff'd mem.*, 350 U.S. 857 (1955) (accused arraigned and tried in the wrong district so that demand would have been to no avail).

21. *See* 61 J. CRIM. L.C. & P.S. 352, 360-61 (1970). *Contra*, Dickey v. Florida, 398 U.S. 30, 49 (1969)(Brennan, J., concurring).

22. *See* Hedgepath v. United States, 364 F.2d 684, 688 (D.C. Cir. 1966).

23. *See* 61 J. CRIM. L.C. & P.S. 352, 360-61 (1970).

24. 44 TEMP. L.Q. 310, 311 (1971). *But see* United States v. Provoo, 17 F.R.D. 183, 203 (D. Md. 1955)(dictum) (court indicates prejudice may be presumed from the long delay). It has been suggested that there are 3 alternatives in allocation of the burden of proof on the issue of prejudice: place the burden on the defendant; create a rebuttable presumption of prejudice which the State may overcome; and create a conclusive presumption when there is unreasonable delay. 44 TEMP. L.Q. 310, 315 (1971).

25. United States v. Ewell, 383 U.S. 116, 122 (1966). *But see* United States v. Mann, 291 F. Supp. 268, 270-73 (S.D.N.Y. 1968). *See generally* Note, *The Right to a Speedy Trial*, 20 STAN. L. REV. 476, 493 & n.129 (1968).

26. Note, *The Lagging Right to a Speedy Trial*, 51 VA. L. REV. 1587, 1590-91 (1965).

27. Dickey v. Florida, 398 U.S. 30, 39, 47, 51 (1970) (Brennan, J., concurring).

28. Note, *supra* note 16, at 855-58. The trend appears to be toward favoring the claims of

the prosecution's objective was to harass or oppress the defendant, or if the delay was caused by a deliberate attempt to gain a tactical advantage, the court may find prejudice to the defendant and a consequent denial of his constitutional right. On the other hand, if the delay results from understaffing of the district attorney's office or from court congestion, a constitutional violation is much less likely to be found.[29] The demand doctrine and attendant court resolutions of the issues of prejudice and reason for delay have been subject to severe criticism. Critics argue that the demand doctrine's conclusive presumption of waiver of a constitutional right is not only factually unsound,[30] but also contrary to Supreme Court guidelines on waiver of constitutional rights.[31] They further criticize the doctrine for misallocating the burden of ensuring a speedy trial, arguing that because the State initiates the action and largely controls its prosecution the State should bear the burden of seeking a speedy trial. Critics of the requirement that prejudice be proved argue that no other constitutional safeguard is available only upon a showing of actual prejudice[32] and that such a showing often is impossible because of the difficulty in proving failing memory,[33] forgotten events,[34] or past mental or emotional states.[35] Additionally, opponents of the doctrine assert that its focus on the demand and prejudice issues detracts from a more appropriate concern about the reasons for the delay.[36] A fixed-time approach has been proposed[37] as an alternative criterion for determining when the defendant has been denied the right to a speedy trial. The fixed-time rule would require that the accused be brought to trial within a specified period of time, and failure

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the accused relative to those of the government. *See* Bynum v. United States, 408 F.2d 1207 (D.C. Cir. 1968), *cert. denied*, 394 U.S. 935 (1969).

29. Many courts have indicated that delay caused by court congestion will weigh against the sixth amendment claim of the accused. Comment, *Speedy Trial and the Second Circuit Rules Regarding Prompt Disposition of Criminal Cases*, 71 COLUM. L. REV. 1059, 1069-70 & n.86 (1971).

30. Note, *supra* note 26, at 1609.

31. Cohen, *Speedy Trial for Convicts: A Reexamination of the Demand Rule*, 3 VAL. U.L. REV. 197, 201-02 (1969). *See* United States v. Mann, 291 F. Supp. 268, 274 (S.D.N.Y. 1968).

32. Dickey v. Florida, 398 U.S. 30, 39, 54 (1970) (Brennan, J., concurring). It is argued further that to require proof of prejudice will merge the right to speedy trial with due process requirements, leading to confusion in the courts. Note, *supra* note 25, at 494-95.

33. *See* Ross v. United States, 349 F.2d 210, 215 (D.C. Cir. 1965).

34. *See* Dickey v. Florida, 398 U.S. at 53.

35. *See* Williams v. United States, 250 F.2d 19, 23 (D.C. Cir. 1957).

36. Note, *supra* note 25, at 497.

37. Pursuant to its supervisory powers, the Second Circuit formulated its RULES REGARDING PROMPT DISPOSITION OF CRIMINAL CASES, 28 U.S.C.A. (Supp. App. at 42) (1972). These rules parallel the recommendations of the American Bar Association in A.B.A. PROJECT ON MINIMUM STANDARDS FOR CRIMINAL JUSTICE, STANDARDS RELATING TO SPEEDY TRIAL (Approved Draft 1968). *See* Comment, note 29 *supra*. *See also* Note, *supra* note 15, at 356.

to do so would raise a presumption that the delay is a violation per se of the right to a speedy trial. The State could rebut this presumption only by showing lack of prejudice to the accused and good cause for the delay. This approach represents an attempt to inject greater certainty into judicial evaluation of the speedy-trial right, thereby increasing its reliability as a safeguard to a degree commensurate with other constitutional rights. The Supreme Court has not discussed the merits of the demand-waiver doctrine or the fixed-time approach, nor has the Court specified any criteria for evaluating the right to a speedy trial.

In the instant case, the Court recognized the uniqueness of the right to a speedy trial, attributing its special nature to societal concerns,[38] advantages afforded the accused by a delay,[39] the uncertain scope of the right, and the severity of the remedy of dismissal.[40] Evaluating the two approaches for gauging a denial of the right to a speedy trial, the Court found both methods too rigid. Although it recognized that the fixed-time approach simplifies the judicial task of determining when the right has been denied, the Court found no constitutional basis for the judicial legislation it considered to be involved in the process of thus quantifying a constitutional right. The demand-waiver doctrine also was rejected as inconsistent with earlier Court pronouncements concerning the presumption of waiver of a constitutional right from silence or inaction;[41] moreover, the assumptions underlying the doctrine were questionable. To avoid the rigidity of fixed rules and provide for judicial discretion on a case-by-case basis, the Court adopted a balancing approach calling for the weighing of four factors: the length of the delay, the reason for the delay, defendant's assertion of his right, and prejudice to defendant.[42] Although it declared that no one factor is necessary or sufficient for finding a denial of the right to a speedy trial, the Court noted that substantial weight would be given defendant's failure to assert his right.[43] Applying this balancing test to the instant fact situation,

38. The specific societal concerns enumerated included: reduced charges resulting from plea bargaining and overloaded dockets; additional crimes committed by those released on bond; interference with the object of rehabilitation; temptation to jump bail as the period of bail time increases; the cost of pretrial confinement; and loss of wages, perhaps requiring societal support of the family in the interim. 407 U.S. at 519-21.

39. For example, the accused may benefit by postponed punishment, or by absence or forgetfulness of prosecution witnesses. 407 U.S. at 521.

40. The severity argument assumes that dismissal is the only remedy open to the courts. *But see* United States v. Strunk, 467 F.2d 969 (7th Cir. 1972), *cert. granted*, 41 U.S.L.W. 3376 (Jan. 9, 1973).

41. The Court cited Carnley v. Cochran, 369 U.S. 506 (1962) (waiver requires an understanding and voluntary relinquishment of the right).

42. This test had been proposed and applied prior to the instant case but had not been adopted by the Supreme Court. *See, e.g.*, United States v. Simmons, 338 F.2d 804 (2d Cir. 1964).

43. Assertion of the right apparently is not to be accorded the same weight as a failure to

the Court found the five-year delay excessive and lacking sufficient justification. The Court found no serious prejudice resulting from the delay, however, because there was no loss of witnesses, no substantial problem of failing memories, and because petitioner spent only ten months in jail. Noting that petitioner, though presented with ample opportunity, failed to assert his right, the Court found that petitioner did not want a speedy trial. The Court concluded that the lack of prejudice to defendant, combined with his desire for the delay, outweighed the excessive and unjustified delay.

The primary significance of the instant decision is that for the first time the Supreme Court has set forth criteria by which a denial of the right to a speedy trial may be determined. The opinion is also significant because of the questions that it leaves unanswered. Although it apparently rejected the demand-waiver doctrine, the Court's inclusion of "defendant's assertion of his right"[44] as a factor to be considered seems to retain, despite the additional judicial discretion required in weighing this factor, many of the infirmities of the demand-waiver doctrine criticized by the Court. The probable impact on the lower courts of the inclusion and substantial weighting of this factor is unclear; such weighting may cause courts simply to disguise, by use of balancing language, continued application of the demand-waiver doctrine.[45] Another area of controversy that the Court left unsettled concerns allocation of the burden of proof in showing prejudice. The Court's finding of no prejudice indicates that the Court assumed that the burden of showing prejudice rests with the accused. Because no other constitutional safeguard of an accused's rights depends upon a showing of prejudice,[48] and because, as the Court

assert the right, however, because the Court indicated that the judge, in his discretion will determine the weight of a purely pro forma objection. 407 U.S. at 529.

44. The Court failed to specify what constitutes an "assertion" of defendant's right, although it would appear that, in view of the disfavor the Court has indicated toward rigidity, any assertion sufficient to put the court on notice will satisfy the requirement.

45. *But see* United States v. Hanna, 347 F. Supp. 1010 (D. Del. 1972). In *Hanna*, the district court found that, although defendant did not demand a speedy trial or show prejudice from an 11-month delay, the government's reason—to coerce defendant to testify in a wholly unrelated case—was not legitimate. The court may have circumvented the consequences of defendant's failure to assert the right by employing one of the exceptions to the doctrine, namely, that defendant was ignorant of the pending charges. The court reasoned that because defendant did cooperate with the government, he had no reason to expect that the government would prosecute him.

46. *See* materials cited note 31 *supra*.

47. It should be noted that the burden of showing an absence of prejudice, if it were placed on the prosecution, would be equally as difficult as the burden presently placed on the defendant; however, in cases involving asserted denial of other rights, the prosecution has had the opportunity to show harmless error.

recognized, it is very difficult to prove prejudice,[47] it seems clear that this issue will come before the Court again. Another undecided issue stems from the Court's automatic assumption that the only remedy for the denial of the right to a speedy trial is complete dismissal. Such a rigid assumption appears inconsistent with the Court's overall objective of providing flexible guidelines for determining when the defendant has been denied a speedy trial. For example, when an admittedly excessive delay results in a relatively slight degree of prejudice, and when the accused has been incarcerated for much or all of the time preceding the trial, there appears to be no reason why the Court should not consider either reducing the sentence or crediting such "dead" time against the sentence.[48] Finally, the extent to which a delay may be justified remains uncertain. It should be apparent that a long delay resulting from an understaffed district attorney's office or from court congestion can be equally as damaging as a delay deliberately caused to harass the defendant. To the extent that courts find a denial of the right to a speedy trial despite such "valid" reasons, perhaps legislatures will respond, either by providing sufficient funds to staff the courts and district attorneys' offices properly, or by streamlining the entire judicial process.

Constitutional Law—Search and Seizure—Electronic Eavesdropping Procedures Authorized by Title III of the Omnibus Crime Control and Safe Streets Act of 1968 Violate the Fourth Amendment

Defendants were indicted for violating a federal statute prohibiting the interstate use of telephone facilities for the purpose of engaging in the business of bookmaking and gambling.[1] Prior to trial, the Government notified defendants that it intended to introduce into evidence recordings of conversations made over defendant Whitaker's telephone and intercepted pursuant to procedures authorized by Title III of the Omnibus Crime Control and Safe Streets Act of 1968.[2] Defendants filed

48. *See* United States v. Strunk, 467 F.2d 969 (7th Cir. 1972), *cert. granted*, 41 U.S.L.W. 3376 (Jan. 9, 1973).

1. 18 U.S.C. § 1952 (1970). Defendant Whitaker and 6 other defendants were also charged with conspiracy to use telephone facilities for illegal purposes, 18 U.S.C. § 371 (1970), as well as aiding and abetting the commission of other crimes against the United States, 18 U.S.C. § 2 (1970).

2. 18 U.S.C. §§ 2510-20 (1970) [hereinafter referred to as Title III]. The procedural requirements for interception of wire or oral communications are delineated in § 2518 of Title III.

motions to suppress the wiretap evidence, asserting that Title III is unconstitutional on its face. Defendants contended that Title III's provisions pertaining to the duration of eavesdrops, the discretion given to executing officers, and the notice given to persons whose communications have been intercepted fail to meet fourth amendment requirements.[3] The Government, however, contended that Title III effectively incorporates the constitutional requirements enunciated in recent Supreme Court decisions.[4] The United States District Court for the Eastern District of Pennsylvania, *held,* motions to suppress granted. Title III of the Omnibus Crime Control and Safe Streets Act of 1968 authorizes unreasonable searches and seizures in violation of the fourth amendment and is therefore unconstitutional on its face. *United States v. Whitaker,* 343 F. Supp. 358 (E.D. Pa. 1972).

Technological advances during the 1920's produced new and more effective means of surreptitiously intercepting wire and oral communications. Increasing use of these techniques by law enforcement officials has engendered constitutional challenges to governmental interception of private communications. In the first such case to reach the United States Supreme Court, *Olmstead v. United States,*[5] the Court found that fourth amendment protections do not extend to wiretapping because wiretapping does not constitute a search and seizure within the meaning of that amendment. Subsequent Supreme Court decisions, however, apparently have reversed *Olmstead* sub silentio,[6] and in one recent decision the Court expressly recognized that fourth amendment protections extend to overheard verbal statements as well as to seizure

3. In support of their motions to suppress, defendants also contended that Title III violated the first and fifth amendments. Defendants further contended that the government had failed to comply with the provisions of § 2516 of Title III, which sets forth the requirements for authorization of the application for a court-ordered electronic eavesdrop. Defendants also contended that the government had not complied with the probable cause requirements of Title III, nor had it established that other investigative procedures would be ineffective, as is required by Title III. For a discussion of the court's resolution of these issues see note 25 *infra.*

4. See notes 10-14 *infra* and accompanying text.

5. 277 U.S. 438 (1928). The majority concluded that words and conversations could not be seized within the meaning of the fourth amendment and further concluded that a physical trespass upon one's premises must occur before there is a fourth amendment violation. The dissenting opinion of Justice Brandeis asserted that the fourth amendment protects the right of men to be free from "every unjustifiable intrusion by the Government upon the privacy of the individual, whatever the means employed . . . ." *Id.* at 478.

6. *See* Katz v. United States, 389 U.S. 347 (1967) (holding that the reach of the fourth amendment does not turn upon the presence or absence of a physical intrusion); Berger v. New York, 388 U.S. 41 (1967) (holding that the use of electronic devices to capture conversations is a "search" within the meaning of the fourth amendment); Silverman v. United States, 365 U.S. 505 (1961) (holding that the extension of fourth amendment safeguards to the recording of oral statements does not depend upon the existence of a technical trespass).

of papers and effects.[7] Thus judicial inquiries no longer address the basic existence of constitutional limitations on electronic eavesdropping, but rather concern themselves with defining the circumstances under which such eavesdropping is constitutionally permissible. In *Osborn v. United States*,[8] the Court upheld the introduction into evidence of a tape recording obtained by hiding a device on the person of a consenting participant. Noting that the device was used only after prior justification had been established before a magistrate, and then only under precise and discriminate circumstances, the Court concluded that the procedure met the requirements of the fourth amendment.[9] The Supreme Court commented further on the fourth amendment restrictions on electronic eavesdropping in *Berger v. New York*.[10] In that case, the Court invalidated a New York electronic eavesdropping statute as effectively authorizing invasions of the home by general warrant contrary to fourth amendment requirements.[11] The Court specifically indicated that the New York statute was constitutionally deficient for its failure to require a showing of probable cause, a particularized description of the property to be seized, a definite limitation on the time in which the search could be made, notice to the defendant in the absence of exigent circumstances, and a follow-up report to the magistrate specifying the items seized.[12] Although many law enforcement officials and legislators predicted that compliance with the requirements enunciated in *Berger* would be impossible in the context of electronic eavesdropping, the Court's subsequent decision in *Katz v. United States*[13] indicated that electronic eavesdropping would be permitted, but only when the procedure was narrowly circumscribed and duly authorized by a magistrate.[14] In drafting new legislation to regulate electronic eavesdropping, Congress attempted to incorporate the constitutional requirements enunci-

7. Wong Sun v. United States, 371 U.S. 471, 485 (1963).

8. 385 U.S. 323 (1966).

9. *Id.* at 329-31.

10. 388 U.S. 41 (1967).

11. *Id.* at 64.

12. *Id.* at 58-60. Commentators have summarized the *Berger* requirements in several different forms. *See, e.g.*, Dash, *Katz—Variations on a Theme by Berger*, 17 CATH. U.L. REV. 296, 309-10 (1968); Schwartz, *Electronic Eavesdropping—What the Supreme Court Did Not Do*, 4 CRIM. L. BULL. 83 (1968); Note, *Constitutional Law: The Validity of Eavesdropping Under the Fourth Amendment*, 51 MARQ. L. REV. 96, 100-01 (1967).

13. 389 U.S. 347 (1967). The *Katz* decision also expressly rejected the *Olmstead* "trespass" theory and concluded that the reach of the fourth amendment "cannot turn upon the presence or absence of a physical intrusion into any given enclosure." *Id.* at 353.

14. *Id.* at 354. The eavesdrop in *Katz*, however, was declared unconstitutional because of the agents' failure to obtain antecedent judicial authorization. For a discussion of the factual settings of *Berger* and *Katz* see Dash, *supra* note 12, at 308.

ated in *Berger* and *Katz*.[15] These efforts culminated with the adoption of Title III of the Omnibus Crime Control and Safe Streets Act of 1968.[16] Title III requires that the application for an order authorizing electronic eavesdropping must be made to a judge of competent jurisdiction,[17] and that the application must contain a full and complete statement of the facts, including descriptions of the person, place, and type of communication to be subjected to surveillance.[18] Once the judge determines that there is probable cause for the interception,[19] he may then authorize electronic eavesdropping. The authorization order must specify the type of communication sought to be intercepted and the person and place to be subjected to the eavesdrop. The statute, however, authorizes the judge to leave the matter of determining whether the surveillance shall be terminated immediately after the described communication is first intercepted to the discretion of the executing officer.[20] Title III also permits around-the-clock electronic eavesdropping for up to 30 days upon a single showing of probable cause, and provides liberal provisions for extensions of this period.[21] In several recent cases, defendants whose communications have been intercepted pursuant to Title III have challenged its constitutional validity, contending that the statutory standards do not meet the requirements set forth in *Berger* and

15. S. REP. No. 1097, 90th Cong., 2d Sess. 107 (1968).

16. 18 U.S.C. §§ 2510-20 (1970).

17. 18 U.S.C. § 2518(1) (1970). Other provisions of Title III, however, permit electronic eavesdropping without antecedent judicial authorization in cases of emergency and national security. 18 U.S.C. § 2511(3) (1970). For a critical opinion of the national security provision see Note, *Eavesdropping at the Government's Discretion—First Amendment Implications of the National Security Eavesdropping Power*, 56 CORNELL L. REV. 161 (1970).

18. The application must specifically include: "(i) details as to the particular offense that has been, is being, or is about to be committed, (ii) a particular description of the nature and location of the facilities from which or the place where the communication is to be intercepted, (iii) a particular description of the type of communications sought to be intercepted, (iv) the identity of the person, if known, committing the offense and whose communications are to be intercepted." 18 U.S.C. § 2518(1)(b) (1970).

19. 18 U.S.C. § 2518(3)(a)-(d) (1970).

20. The order approving the interception of any wire or oral communication must specify: "(a) the identity of the person, if known, whose communications are to be intercepted; (b) the nature and location of the communications facilities as to which, or the place where, authority to intercept is granted; (c) a particular description of the type of communication sought to be intercepted, and a statement of the particular offense to which it relates; (d) the identity of the agency authorized to intercept the communications, and the person authorizing the application; and (e) the period of time during which such interception is authorized, *including a statement as to whether or not the interception shall automatically terminate when the described communication has been first obtained.*" 18 U.S.C. § 2518(4)(a)-(e) (1970) (emphasis added).

21. 18 U.S.C. § 2518(5) (1970). For an article highly critical of this provision see Clark, *Wiretapping and the Constitution*, 5 CALIF. W.L. REV. 1 (1968). For a discussion of the dubious constitutionality of these provisions and Title III generally see Schwartz, *The Legitimation of Electronic Eavesdropping: The Politics of "Law and Order"*, 67 MICH. L. REV. 455 (1969).

Katz. The courts, however, have held unanimously that the provisions of Title III do not violate the Constitution.[22] Most notable among the decisions is *United States v. Cox*,[23] a Tenth Circuit case in which the court upheld the use at trial of unanticipated information obtained incident to a warrant describing other subject matter. Despite the court's conclusion that specific antecedent judicial authorization seems to be required in light of *Berger, Katz,* and *Osborn,* it permitted the use of evidence that was subjected only to subsequent judicial scrutiny. Measuring fourth amendment requirements against the inherent nature of electronic eavesdropping, the court reasoned that Congress had dealt with the problem "about as well as could have been expected."[24]

In the instant case, the court initially observed that Title III conveys a surface impression of compliance with fourth amendment requirements, but recognized that a closer scrutiny would be required before a conclusive determination of the Act's constitutionality could be made.[25] Focusing first on the duration of the searches authorized by the

22. United States v. Cox, 449 F.2d 679 (10th Cir. 1971), *cert. denied*, 406 U.S. 934 (1972); United States v. Focarile, 340 F. Supp. 1033 (D. Md. 1972) (Title III provisions do not authorize general warrants nor permit unreasonable searches and therefore do not violate the fourth amendment); United States v. LaGorga, 336 F. Supp. 190 (W.D. Pa. 1971) (constitutionality of Title III is prima facie established in view of the legislative history of congressional reliance upon Supreme Court guideposts); United States v. King, 335 F. Supp. 523 (S.D. Cal. 1971) (provisions of § 2518 meet the requirements of specificity, narrowness, particularity, and judicial supervision set out in recent Supreme Court decisions and therefore comply with the mandates of the fourth amendment); United States v. Lawson, 334 F. Supp. 612 (E.D. Pa. 1971) (provisions of Title III are sufficiently circumscribed to protect the rights guaranteed by the fourth amendment); United States v. Becker, 334 F. Supp. 546 (S.D.N.Y. 1971) (Title III is not unconstitutional on its face as applied under the first, fourth, and fifth amendments in view of recent Supreme Court decisions and legislative deference to them); United States v. Perillo, 333 F. Supp. 914 (D. Del. 1971) (Title III's authorization of wiretaps lasting 30 days on a single showing of probable cause does not render the statute unconstitutional); United States v. Leta, 332 F. Supp. 1357 (M.D. Pa. 1971) (§ 2518 complies with the fourth amendment requirement that a search warrant particularly describe the things to be seized); United States v. Scott, 331 F. Supp. 233 (D.D.C. 1971) (provisions of Title III adequately provide for the constitutional requirements of particularity and judicial supervision as enunciated in *Berger* and *Katz*); United States v. Cantor, 328 F. Supp. 561 (E.D. Pa. 1971) (provisions of Title III are sufficiently circumscribed to protect the rights of an individual as guaranteed by the fourth amendment); United States v. Sklaroff, 323 F. Supp. 296 (S.D. Fla. 1971) (probable cause requirements incorporated into provisions of Title III are sufficient to establish the constitutionality of the statute under the fourth amendment); United States v. Escandar, 319 F. Supp. 295 (S.D. Fla. 1970), *rev'd on other ground sub nom.* United States v. Robinson, ___ F.2d ___ (5th Cir. 1972) (provisions of Title III do not violate an individual's right against self-incrimination, his right against unreasonable searches and seizures, nor his right to free speech).

23. 449 F.2d 679 (10th Cir. 1971).

24. *Id.* at 685-87.

25. The court rejected defendants' contentions that the Government had failed to comply with Title III regulations, holding that the memorandum personally initialed by the Attorney General was sufficient authorization to meet the requirements of § 2516(1). The court found that

statute the court found that, although the maximum time period for which a particular search warrant could remain operative was shorter than that authorized by the invalidated statute in *Berger*,[26] the statute still enabled governmental investigators to conduct electronic intrusions that are sufficiently long and continuous to violate the *Katz* requirements of precise, carefully circumscribed limits on eavesdropping. Thus the court concluded that this durational aspect alone was sufficient to render Title III unconstitutional. Secondly, the court considered the broad discretionary powers afforded executing officers under Title III.[27] Noting specifically that in some instances the statute vested in these officers authority to determine the circumstances under which the eavesdropping would be terminated,[28] the court found that the Act failed to require the specificity in stating the objectives of the eavesdrop needed to satisfy the particularity requirement of the fourth amendment. Thirdly, the court considered Title III's failure to require that post-search notice be given to all persons whose communications have been intercepted.[29] The court acknowledged that post-search notice is a novel doctrine, but nevertheless found it to be mandated by the fourth amendment's prohibition against unreasonable searches and seizures, on the theory that, without such notice, persons whose communications have been intercepted pursuant to the statute might never learn of the search, and hence would be unable to challenge the accuracy of the recordings thus obtained or the legality of their subsequent use. The court therefore concluded that Title III failed on its face to comply with the dictates of the fourth amendment.

The instant decision, although a departure from the decisions of other courts that have been called upon to determine the constitution-

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the agent's affidavit in support of the application of the wiretap order was sufficient to establish probable cause for issuance of the order, and further found that the Government had fulfilled its burden under § 2518(1)(c) of showing in its application that other investigative procedures reasonably appeared unlikely to succeed. Since the court found that Title III violates the fourth amendment, it did not consider defendants' first and fifth amendment contentions.

26. The New York statute invalidated in *Berger* permitted electronic eavesdrops of up to 60 days upon only one showing of probable cause, as compared to a 30-day limit in Title III. *See* 18 U.S.C. § 2518(5) (1970).

27. *See* 18 U.S.C. § 2518(4)(e), (5) (1970). *See also* 18 U.S.C. § 2517(1)-(2) (1970).

28. For example, unless the judge otherwise specifies under § 2518(4)(e), the executing officer may continue to eavesdrop even after he has intercepted communications described in the search warrant. It is, in effect, left to the discretion of the executing officer to determine when he has obtained enough details so that he must stop the interception because the authorized objective has been attained. *See* note 20 *supra*.

29. Under § 2518(9), persons who are not named in the eavesdrop order have no right to notice unless the contents of the conversation are to be disclosed in a judicial proceeding. Under § 2518(8)(d), notice to the persons named in the order can be indefinitely postponed on an ex parte showing of good cause to a judge of competent jurisdiction.

ality of Title III,[30] is a logical application of previously recognized fourth amendment concepts. The ready acquiescence of other courts to congressional interpretations of the *Berger* and *Katz* standards indicates the failure of these courts to compare carefully Title III's provisions with recent mandates of the Supreme Court. Although the provisions of Title III initially appear to circumscribe precisely and restrictively the duration of searches and the discretion afforded executing officers, a more careful analysis renders this impression illusory. Title III's authorization of the interception of an individual's oral or wire communications for 30 consecutive days seems as violative of the individual's right to be free from unreasonable searches and seizures as was the 60-day authorization overturned in *Berger*; the reduced time permitted under Title III does not significantly alter the nature or effect of the uninvited governmental intrusion. In addition, Title III's requirements of prior judicial authorization have little meaning when the judge may leave to the discretion of the executing officer the determination whether or not the surveillance is to be terminated immediately upon interception of the described communication. This latitude eliminates effective and impartial judicial supervision, and allows eavesdropping to proceed without the protective measures mandated in *Berger, Katz,* and *Osborn.* Moreover, the critical factor in the Supreme Court's decision in *Berger* was the pervasive, unsupervised, and general nature of the searches authorized under the New York statute;[31] Title III authorizes searches of the same nature, and thus its invalidation is logically supported by *Berger* and other recent Supreme Court pronouncements defining fourth amendment requirements. Although post-search notice has not been explicitly required by the Supreme Court,[32] the instant court's invalidation of Title III for its failure to require that post-search notice be afforded all persons whose communications have been intercepted is supported by the policies of the fourth amendment.[33] As the instant

30. *See* note 22 *supra.* These courts appear to have reached their conclusion by observing that Congress stated its intention to draft legislation incorporating the *Berger* and *Katz* requirements, that Congress made a good faith effort to do so, and that therefore the constitutionality of Title III was prima facie established. *See, e.g.,* United States v. LaGorga, 336 F. Supp. 190, 192 (W.D. Pa. 1971).

31. *See* Berger v. New York, 388 U.S. 41, 59-60 (1967).

32. The Court in *Berger* did explicitly mention, however, the lack of notice provided by the statute, and at least implied that some form of notice is required in respect to investigatory electronic eavesdrops. 388 U.S. at 60. In discussing the implications of the Court's reference to the absence of notice in *Berger,* one commentator has suggested that, regardless of the constitutional basis of the Court's criticism, notice given after the eavesdrop probably would be sufficient. 81 HARV. L. REV. 186, 190 (1967). *See also* Note, *Wiretapping and Electronic Surveillance—Title III of the Crime Control Act of 1968,* 23 RUTGERS L. REV. 319 (1969).

33. For a suggested model electronic eavesdropping act which requires post-search notice

court indicated,[34] persons who are not notified of an electronic eavesdrop otherwise will be unaware of the interception, and will thus be unable to challenge the accuracy of the recordings or the legality of the subsequent use of the information thereby obtained. Furthermore, a comprehensive notice requirement would serve as a restraint upon overly zealous investigating agents,[35] and could also aid in increasing the public's confidence and willingness to speak freely. While post-search notice of electronic eavesdropping seems clearly desirable as a matter of social policy, the courts have never before found it to be constitutionally required by the fourth amendment. In the case of a traditional search and seizure, there is no need for a constitutionally required post-search notice because the individual who is the subject of the search normally has notice of it—either from his presence at the time of the search or from the condition of his property afterwards. The subject of a traditional search is thus able to protect his rights and to challenge the legality of the government's action without being given formal post-search notice. Since this clearly is not the situation in electronic eavesdropping,[36] new measures are needed to assure the protection of basic rights guaranteed under the fourth amendment.[37] The instant court's post-search notice doctrine appears well suited to achieve this goal. Should the instant decision prevail, new federal legislation will be needed to provide a more precise and restricted framework for governmental eavesdropping. Enactment of this type of legislation will require law enforcement officials to investigate more thoroughly through traditional means in order to obtain information of the specificity required by the fourth amendment to justify the issuance of an eavesdrop order. Thus, despite the popularly held conception that electronic eavesdropping is an indispensable tool in the fight against crime, further restriction of electronic eavesdropping could result in improved performance by law enforcement officials, because they will have to be

on the basis of social policy considerations see Blakey & Hancock, *A Proposed Electronic Surveillance Control Act*, 43 NOTRE DAME LAW. 657 (1968).

34. 343 F. Supp. at 369.

35. Under § 2520 of Title III, an executing officer can be the subject of a civil suit brought as a result of illegal use of wiretap information. 18 U.S.C. § 2520 (1970). If a person whose communication is intercepted is never apprised of the fact, he obviously will be unable to protect his rights through a civil suit.

36. *See* 388 U.S. at 60.

37. Just as the traditional concept of fourth amendment search and seizure grew to include electronic eavesdropping, the procedural safeguards necessary to protect individuals from unreasonable searches and seizures must also change to meet the needs of today's technological society. For the classic statement in defense of a flexible Constitution whose provisions are to be interpreted to meet the changing requirements of the times to preserve the spirit of the Constitution and not just the letter see McCulloch v. Maryland, 17 U.S. (4 Wheat.) 315 (1819).

more diligent in the conduct of traditional investigations, instead of relying upon anticipated windfalls from electronic eavesdropping activities. Most importantly, limitation of electronic eavesdropping activities through the standards enunciated in *Berger, Katz,* and *Osborn* should help to reduce public fear of pervasive governmental surveillance and hopefully will generate renewed public confidence in a free society in which the government's power to intercept secretly the private communications of its citizens is severely restricted and closely supervised by an impartial judiciary.

Constitutional Law—Voting—Cancellation of Registration for Failure To Vote Violates Voter Qualification Provisiou of State Coustitutiou

Plaintiff voter organizations[1] brought a class action against the Secretary of State of Michigan, seeking to have the Michigan statute that permitted cancellation of registration for nonvoting[2] declared unconstitutional. Plaintiffs contended that cancellation of registration for failing to vote over a two-year period[3] violates the due process and equal protection clauses of the United States[4] and Michigan[5] Constitu-

1. Plaintiffs included the Michigan State UAW Community Action Program Council (CAP), the Michigan State Conference of NAACP Branches, the Michigan State AFL-CIO, and the Michigan Democratic Party.

2. MICH. STAT. ANN. § 6.1509 (1972) provides: "During the month of December in each year, the clerk shall examine the registration records and shall suspend the registration for all electors who have not voted, continued their registration, reinstated their registration, or recorded a change of address on their registration within a period of 2 years. Each such elector shall be sent a notice through the mails substantially as follows:

. . . .

After the expiration of 30 days, the clerk shall cancel the registrations of all electors thus notified who have not applied for continuations. . . . Any elector whose registration has been cancelled may have his registration reinstated under the same qualifications required at the time of the initial registration. . . ."

3. The other actions specified in the statute are not significant to the disposition of the case and hence will not be discussed herein.

4. "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV, § 1.

5. "No person shall be denied the equal protection of the laws; nor shall any person be denied the enjoyment of his civil or political rights or be discriminated against in the exercise thereof because of religion, race, color or national origin. The legislature shall implement this section by appropriate legislation." MICH. CONST. art. I, § 2.

tions, as well as the voter qualification provision of the Michigan Constitution.[6] Defendant maintained that the statute was necessary to effect the legitimate state aims of preventing voter fraud and promoting the general integrity of the state electoral system. The Michigan Court of Appeals dismissed the complaint for lack of merit. On appeal to the Michigan Supreme Court, *held,* reversed. When no compelling state interest is shown, cancellation of registration for a two-year failure to vote is violative of the state constitutional voter qualification provision. *Michigan State UAW Community Action Program Council v. Austin,* 198 N.W.2d 385 (Mich. 1972).

Forty-nine states[7] maintain some form of voter registration system; statutes in 37 states provide for cancellation of the registration of any person who fails to vote during a specified period.[8] Despite the prevalence of cancellation provisions, the validity of these statutes has rarely been tested.[9] Although there is no explicit federal constitutional guarantee of universal suffrage,[10] the Supreme Court has held on many occasions that the right to vote is fundamental and of utmost importance to the preservation of a democratic society.[11] Although the right to vote is

6. "Every citizen of the United States who has attained the age of 21 years [changed to 18 years under 26th Amendment to United States Constitution], who has resided in this state six months [this type of provision invalidated in Dunn v. Blumstein, 405 U.S. 330 (1972)], and who meets the requirements of local residence provided by law, shall be an elector and qualified to vote in any election except as otherwise provided in this constitution. The legislature shall define residence for voting purposes." MICH. CONST. art. II, § 1.

7. North Dakota is the single exception.

8. *E.g.,* GA. CODE ANN. § 34-620 (1970); TENN. CODE ANN. § 2-303 (1971); W. VA. CODE ANN. § 3-2-3 (1971).

9. Simms v. County Court of Kanawha County, 134 W. Va. 867, 61 S.E.2d 849 (1950), involved a challenge to a West Virginia statute whereby registration could be cancelled for a 3-year failure to vote. Plaintiff argued that the law violated the state constitution by disqualifying a citizen from the right to vote. The court upheld the statute, however, stating that it was a reasonable provision to prevent voter fraud. In State *ex rel.* Bartlett v. Schneider, 27 Ohio Op. 474 (C.P., Franklin County 1944), plaintiff was involuntarily absent from his residence during the prescribed re-registration period due to military service. As a result, he could not vote; his prior registration was cancelled for failure to vote for 2 years in accordance with the applicable Ohio statute. The court ordered plaintiff's registration reinstated, basing its decision on Ohio's re-enactment of the Soldiers and Sailors Civil Relief Act. The constitutionality of the cancellation provision was not in issue. These 2 cases are the only direct challenges to cancellation-for-nonvoting statutes.

10. *E.g.,* Pope v. Williams, 193 U.S. 621, 632-33 (1904) (right to vote granted by state law and not by federal constitution); Minor v. Happersett, 88 U.S. (21 Wall.) 162, 177 (1875) (though federal constitution confers citizenship it does not confer right of suffrage); Fontham v. McKeithen, 336 F. Supp. 153, 155 (E.D. La. 1971) (no inherent right to vote derived from United States citizenship; right granted by state law).

11. In a case involving a state poll tax, the Court stated: "[T]he right to vote is too precious, too fundamental to be so burdened . . . ." Harper v. Virginia Bd. of Elections, 383 U.S. 663, 670 (1966); "The right to vote . . . is of the essence of a democratic society . . . ." Reynolds v. Sims, 377 U.S. 533, 555 (1964).

established by the states,[12] the Supreme Court's proscription against state restrictions on the exercise of the right that violate the equal protection clause of the fourteenth amendment[13] has limited this state power. Two tests have been employed by the courts to determine whether state laws are violative of the equal protection clause. The "rational relation" test validates a discriminatory statute if it is rationally related to the accomplishment of a legitimate state interest.[14] When the rational basis test is applied, the burden is on the challenger to rebut the presumption of the law's constitutionality.[15] The test has been employed most often in the context of challenges to economic legislation,[16] but it also has been applied in voting rights cases.[17] Under the second, more exacting standard—the "compelling state interest" test—a discriminatory statute is violative of the equal protection clause unless its existence is necessary to effectuate a compelling state interest.[18] The test places the burden on the state to prove both the importance of the interest and the necessity of the statute.[19] Courts have used the compel-

12. Pope v. Williams, 193 U.S. 621, 632-33 (1904) (right to vote granted by state law and not by federal constitution); Fontham v. McKeithen, 336 F. Supp. 153, 155 (E.D. La. 1971) (no inherent right to vote derived from United States citizenship; right granted by state law).

13. *E.g.*, Dunn v. Blumstein, 405 U.S. 330 (1972) (striking down state durational residency requirement for voting); Williams v. Rhodes, 393 U.S. 23 (1968) (striking down state law requiring new party to obtain signatures of 15% of the total voters in previous gubernatorial election in order to be placed on the ballot); Harper v. Virginia Bd. of Elections, 383 U.S. 663 (1966) (striking down state poll tax).

14. *See, e.g.*, McGowan v. Maryland, 366 U.S. 420, 425-29 (1961) (statute prohibiting sale of certain items on Sunday upheld as rationally related to state's objective of preserving Sunday as day of rest); Allied Stores, Inc. v. Bowers, 358 U.S. 522, 528-29 (1959) (tax law exemption for goods owned by nonresident of state but merely stored within state upheld as reasonably related to state's interest in encouraging new industry to locate within its borders).

15. *See Developments in the Law—Equal Protection*, 82 HARV. L. REV. 1065, 1077-87 (1969).

16. *See id.*

17. *E.g.*, Pope v. Williams, 193 U.S. 621 (1904); Drueding v. Devlin, 234 F. Supp. 721 (D. Md. 1964), *aff'd per curiam*, 380 U.S. 125 (1965).

18. *See* Cipriano v. City of Houma, 395 U.S. 701, 704 (1969) (state law granting right to vote in limited purpose election to some qualified voters but denying right to other qualified voters must be necessary to promote compelling state interest); Williams v. Rhodes, 393 U.S. 23, 31 (1968) (state limitation of right to free association for political purposes can be justified only by compelling state interest in regulating subject within state's constitutional power of regulation). *See generally Developments in the Law—Equal Protection, supra* note 15, at 1087-1103. If it can be shown that the state's objective can be achieved by other, less drastic means, then the discriminatory statute will not be considered necessary to further the state interest and will not be upheld. Dunn v. Blumstein, 405 U.S. 330, 352 (1972) (state's desire that only residents of that state vote can be accomplished by requiring registrant's proof of bona fide residence within state, without also requiring one-year duration of residence); *cf.* Kramer v. Union Free School Dist. No. 15, 395 U.S. 621, 632 (1969) (state law denying right to vote in school board election to certain classes of otherwise qualified voters too broad to accomplish state's interest in having only those "primarily interested" in school administration vote in such elections).

19. *See* Dunn v. Blumstein, 405 U.S. 330, 343 (1972).

ling interest standard to invalidate state statutes that established classifications based on a "suspect" criterion, such as race[20] or wealth,[21] and statutes that infringed upon a fundamental right, such as the right of procreation[22] or the right to travel.[23] Although voting rights cases traditionally have been decided under the rational relation test, several Supreme Court decisions since 1965[24] have suggested that any impairment of the right to vote should be judged by the compelling state interest test. Voter registration, however, has received less attention in the courts than other aspects of voting rights, primarily because registration has not been considered a "qualification" of the right to vote to the same extent that age and residency requirements have been.[25] Registration usually has been viewed as an administrative procedure that serves merely to ascertain which of a state's citizens possess the requisite qualifications. The generally recognized purposes of registration are preservation of the integrity of the electoral process through prevention of fraud[26] and maintenance of an interested electorate.[27] Registration is designed to prevent fraud[28] by allowing the state to maintain accurate records to ensure that only those qualified to vote actually cast ballots.[29]

20. *E.g.*, McLaughlin v. Florida, 379 U.S. 184, 192 (1964) (state law proscribed cohabitation only if interracial couple involved); Korematsu v. United States, 323 U.S. 214, 216 (1944) (wartime order excluded only persons of Japanese descent from certain areas).

21. Harper v. Virginia Bd. of Elections, 383 U.S. 663 (1966); United States v. Texas, 252 F. Supp. 234 (W.D. Tex.), *aff'd*, 384 U.S. 155 (1966).

22. Skinner v. Oklahoma *ex rel.* Williamson, 316 U.S. 535, 541 (1942) (state law required sterilization of "habitual criminals," but exempted certain offenses from terms of statute).

23. Shapiro v. Thompson, 394 U.S. 618, 634 (1969) (state law denied welfare benefits to residents of less than one year, but not to residents living in state more than one year).

24. Dunn v. Blumstein, 405 U.S. 330 (1972) (durational residency requirement); City of Phoenix v. Kolodziejski, 399 U.S. 204 (1970) (requirement of payment of property taxes); Evans v. Cornman, 398 U.S. 419 (1970) (statute denied vote to residents of federal enclave); Kramer v. Union Free School Dist. No. 15, 395 U.S. 621 (1969) (required children in school or ownership or lease of taxable property to vote in school district elections); Williams v. Rhodes, 393 U.S. 23 (1968) (statute favoring established political parties in placing names on ballot); Harper v. Virginia Bd. of Elections, 383 U.S. 663 (1966) (requirement of payment of poll tax); Carrington v. Rash, 380 U.S. 89 (1965) (statute denied vote to military personnel moving into state).

25. "Registration requirements, then, are not 'qualifications' in themselves since they do not relate to the intelligent exercise of the franchise." Doty, *The Texas Voter Registration Law and the Due Process Clause*, 7 HOUS. L. REV. 163, 192 (1969).

26. Simms v. County Court of Kanawha County, 134 W. Va. 867, 871, 61 S.E.2d 849, 851 (1950); *see* Note, *Election Laws as Legal Roadblocks to Voting*, 55 IOWA L. REV. 616, 639 (1970).

27. *See* Note, *supra* note 26, at 645.

28. The voting fraud dangers are that persons who are not actually qualified might vote and that persons might vote more than once in the same election. *See* Dunn v. Blumstein, 405 U.S. 330, 345 (1972).

29. "Registration statutes prevent fraud by establishing administrative regulations for the machinery of elections while qualifications establish classes of voters." *Federal Voter Registration: A Proposal to Increase Voter Participation*, 8 COLUM. J.L. & SOC. PROB. 225, 237 (1972) [hereinafter cited as *Federal Voter Registration*].

The notion that registration promotes a more interested electorate entails the assumption that all interested voters will register and that anyone who fails to register is not interested in the outcome of elections.[30] To accomplish the purposes of preventing fraud and maintaining an interested electorate most states have adopted permanent[31] or semi-permanent[32] registration programs. Because permanent registration necessarily increases the risk of fraud, all permanent-registration states have also enacted provisions that permit them to purge the registration rolls. Typical grounds for purging an elector's name from the registration lists are change of name or residence,[33] conviction of certain crimes,[34] and failure to vote for a specified period of time.[35] Because registration has been considered an administrative procedure rather than a qualification, courts have applied the rational relation test in deciding the few previous challenges to purgation provisions.[36] In no case has a court applied the compelling state interest test to assess the constitutionality of a statute that permits cancellation of registration for nonvoting.

The instant court initially noted that because the right to vote is fundamental, the state must prove that the challenged statute is necessary to protect a compelling state interest. The court reasoned that the right to vote encompasses the corresponding right not to vote and enumerated legitimate reasons for not voting. Concluding that the instant case involved removal of otherwise qualified voters from the registration lists rather than the registration process itself, the court rejected the state's attempt to justify the statute under the state constitutional provision authorizing the establishment of a registration system.[37] Emphasizing that any impairment of the right to vote, however small, can be

30. *See id.* at 238.

31. Under a permanent registration system, once a person registers, he need not re-register, provided he continues to satisfy the state's voter qualifications. *See, e.g.*, DEL. CODE ANN. tit. 15, § 1102 (Supp. 1970); FLA. STAT. ANN. § 98.041 (1960).

32. States having semipermanent registration require voters to re-register periodically, regardless of qualifications. *See, e.g.*, S.C. CODE ANN. § 23-67 (1962) (10-year re-registration); LA. REV. STAT. ANN. § 18:165 (1969) (4-year re-registration). For a comparative discussion of registration laws of different states see Doty, *supra* note 25, at 171-75.

33. *E.g.*, WASH. REV. CODE ANN. § 29.10.050 (1965) (change of residence).

34. *E.g.*, N.J. REV. STAT. § 19:32-15 (1964) (conviction of felony); N.C. GEN. STAT. § 163-55 (1972) (conviction of crime punishable by incarceration in state prison).

35. *See* note 8 *supra.*

36. *See* note 9 *supra.*

37. MICH. CONST. art. II, § 4 provides: "The legislature shall enact laws to regulate the time, place and manner of all nominations and elections, except as otherwise provided in this constitution or in the constitution and laws of the United States. The legislature shall enact laws to preserve the purity of elections, to preserve the secrecy of the ballot, to guard against abuses of the elective franchise, and to provide for a system of voter registration and absentee voting."

justified only by a compelling state interest, the court also rejected the state's contention that the statute should be upheld because it burdened the right to vote only slightly. Although the court acknowledged the legitimate state concern for preventing voter fraud, it found that the state legislature had enacted comprehensive safeguards against voter fraud that could be interposed without disfranchising otherwise qualified voters.[38] The court concluded that the state had established neither a compelling interest nor the necessity of the statute's resulting discrimination and held that the statute violated the voter qualification provision of the Michigan Constitution.[39] The dissenting opinion argued that because the burden placed on the right to vote by the statute was too insignificant to be considered an absolute denial of the right, the compelling state interest test was inapplicable and the statute was valid on the basis of the rational relation test as a reasonable exercise of legislative power.[40]

The primary significance of the instant decision is that it represents the first application of the compelling state interest test to a state law cancelling registration for nonvoting. Because cancellation-for-nonvoting provisions previously had been upheld under the rational relation test,[41] the case, of course, raises the possibility that similar statutes currently in force in 36 other states will be challenged under the more exacting requirements of the compelling state interest test. The value of the instant case as support for such challenges is severely limited, however, by logical infirmities in the opinion. The manner in which the court employed the compelling state interest test raises two significant questions. First, it is by no means clear that such a test was appropriate, after the court had stated at the outset of its opinion that it would consider only the voter qualification provision of the state constitution.[42]

38. These provisions include authorization of the clerk to cancel a voter's registration if he determines that the voter is registered elsewhere, MICH. STAT. ANN. § 6.1505 (1972); authorization to cancel names appearing on county deceased persons lists, MICH. STAT. ANN. § 6.1510 (1972); authorization for the clerk to investigate probable fraudulent registration and to remove names improperly registered, MICH. STAT. ANN. § 6.1521 (1972); authorization for the clerk to cancel registration of any person whom he has reason to believe has moved from the municipality after the clerk mails nonforwardable notice to such person and receives no reply within 30 days, MICH. STAT. ANN. § 6.1513 (1972).

39. *See* note 6 *supra.*

40. 198 N.W.2d at 392. The dissent also argued at great length that the majority decision was politically motivated, because plaintiffs were affiliates of the Democratic Party and the majority justices were all Democratic appointees. A second dissenting opinion, 198 N.W.2d at 390, argued that the statute was a valid means not only to keep the registration rolls current but also to promote the general efficacy of the state's electoral process.

41. *See* note 9 *supra.*

42. "In view of our disposition of the case, we will deal with only one issue: whether

The compelling state interest standard developed as a means for evaluating state statutes that allegedly violate the equal protection clause of the fourteenth amendment, but the instant court employed the test to decide the case solely on state grounds without considering plaintiffs' equal protection challenge. Secondly, the compelling state interest test has been invoked by the Supreme Court to invalidate state voting laws only when the operation of the statute is tantamount to an *absolute* denial of the right to vote.[43] The Michigan statute provided for notice prior to cancellation and allowed re-registration up to 30 days before any election; it is therefore questionable that the statute amounted to an absolute denial of franchise rights. Moreover, the court's holding that the state had failed to prove the *existence* of a compelling state interest is not entirely consistent with its reasoning. The court does not seem to have seriously questioned the intensity of the state's interest in preventing voter fraud;[44] the extended discussion of the other Michigan antifraud statutes[45] seems rather to indicate that the court's real objection was that the statute was unnecessary to accomplish the legislative objective. Despite its shortcomings, however, the long-range effects of the decision may be important. Because the provisision invalidated represents the method employed by most states to purge registration lists[46] the action of the instant court, if adopted by other states, could seriously impair the effectiveness of the present system of state registration and might trigger a full-scale attack on the constitutionality of registration itself. Though the Supreme Court has not yet held explicitly that the right to vote deserves the same protective safeguards as those afforded first amendment rights, the increasingly favored treatment of the right to vote in recent cases[47] tends to support the contention of several com-

M.C.L.A. § 168.509: M.S.A. § 6.1509, violates Const. 1963, art. 2, § 1, by imposing a further qualification for voting in addition to those qualifications exclusively provided therein?" 198 N.W.2d at 387.

43. *See* cases cited note 24 *supra.* In a case involving an Illinois statute denying absentee ballot privileges to unsentenced prisoners incarcerated in their county of residence, the Court declined to apply the compelling state interest test and upheld the statute. The Court stated: "[T]here is nothing in the record to indicate that the Illinois statutory scheme has an impact on appellant's ability to exercise the fundamental right to vote. It is thus not the right to vote that is at stake here but a claimed right to receive absentee ballots. . . . [A]bsentee statutes, which are designed to make voting more available to some groups who cannot easily get to the polls, do not themselves deny appellants the exercise of the franchise. . . ." McDonald v. Board of Election Comm'rs, 394 U.S. 802, 807-08 (1969).

44. "It cannot be doubted that the [cancellation statute] does to some extent accomplish this purpose [prevention of fraud] . . . ." 198 N.W.2d at 389.

45. *See* note 38 *supra* and accompanying text.

46. Doty, *supra* note 25, at 173.

47. *See* cases cited note 24 *supra.*

mentators that such a holding is inevitable.[48] Some commentators argue that registration itself is a restriction of the right to vote, and that *any* such restriction is unconstitutional;[49] these arguments will prove more persuasive if the right to vote is accorded status equal to other fundamental rights, such as those enumerated in the first amendment.[50] The instant holding certainly adds further support to this position. The court's decision is therefore laudable for the result attained because the state should not deprive an individual of a constitutional right simply because of his lack of interest in its exercise, nor should it require him to take affirmative action to prevent deprivation of his rights. Even if registration itself survives as a valid requirement, the instant case is significant because it responds to the problem of who should bear the burden of registering qualified voters. Registration traditionally has been considered the responsibility of potential voters rather than of the government; consequently, private groups such as plaintiffs in the instant case have undertaken the burden to ensure that maximum registration is achieved. Maximum voter eligibility generally is recognized as the ideal of modern democracy,[51] but voter participation in the United States is below that of most other democratic countries.[52] Several proposals for registration reform assert that this condition results largely from administrative impediments to the right to vote inherent in the present form of state registration.[53] In the instant case, plaintiffs undertook the responsibility of re-registering voters whose names had been purged. The instant decision, by relieving private persons of the task,

48. Kirby, *The Constitutional Right to Vote,* 45 N.Y.U.L. REV. 995, 1013-14 (1970); *Federal Voter Registration, supra* note 29, at 240.

49. "Although opinions of the Supreme Court sometimes refer to the 'inalienable right' of citizens to participate in the electoral process, such a label is neither historically warranted nor constitutionally justified. So long as any limitation remains on the right to vote, it can hardly be 'inalienable' or 'natural.'" Kirby, *supra* note 48, at 1000 (footnotes omitted).

50. Critics also have attacked the validity of arguments that registration—even if restrictive—is necessary to promote the compelling state interests of preventing fraud and insuring an interested electorate. "[T]he equal protection clause requires that registration procedures be necessary to the protection of that interest [prevention of fraud]. In their present form it is questionable whether such procedures are in fact necessary." *Federal Voter Registration, supra* note 29, at 238. "The Supreme Court has on several occasions reaffirmed that a state may not dilute nor deny the right to vote to give weight to other interests. The same principle may be relied on to strike down state registration statutes premised on the belief that requiring potential voters to undergo some hardship to qualify to take part in the electoral process will guarantee an interested electorate." *Id.* (footnotes omitted).

51. Kirby, *supra* note 48, at 1014; Note, *supra* note 26, at 616.

52. REPORT OF THE PRESIDENT'S COMMISSION OF REGISTRATION AND VOTING PARTICIPATION 8 (1963).

53. *See generally* LEAGUE OF WOMEN VOTERS EDUCATION FUND, ADMINISTRATIVE OBSTACLES TO VOTING (1972); *Federal Voter Registration, supra* note 29.

may lend significant support to the proposition that the state should bear primary responsibility for ensuring maximum voter eligibility.

Nuisance—Equitable Remedies—Plaiutiff Wbo "Came to Nuisance" Granted Injuuctive Relief but Required To Compensate Defeudant for Reasouable Cost of Relocatiug or Sbutting Dowu

Plaintiff, a real estate development company, brought suit to enjoin permanently defendant's cattle feedlot operation on the ground that it constituted a public nuisance. Plaintiff contended that defendant's feedlot operation was a public nuisance under the Arizona Code[1] because flies and odors[2] from the lots subjected the residents of plaintiff's housing development to an annoying and unhealthy atmosphere, and rendered more than 1,300 of plaintiff's lots unsalable. Defendant pointed out that the surrounding area had been primarily agricultural when the feedlot operation began some three years before plaintiff purchased neighboring farmland for residential development,[3] and contended that plaintiff's knowledge of the feedlot operation at the time of purchase should bar the claim. Defendant argued further that a permanent injunction would result in irreparable economic loss for which it could obtain no adequate relief. The trial court held that defendant's feedlots were a public nuisance, issued a permanent injunction against their operation,

1. ARIZ. REV. STAT. ANN. § 36-601(A)(1) (1956) provides as follows: "The following conditions are specifically declared public nuisances dangerous to the public health:

(1) Any condition or place in populous areas which constitute a breeding place for flies, rodents, mosquitoes, and other insects which are capable of carrying and transmitting disease-causing organisms to any person or persons."

2. Testimony indicated that cattle in a commercial feedlot produce 35-40 pounds of wet manure, per head, per day; defendant was feeding 20,000 to 30,000 cattle, which therefore produced an excess of 1,000,000 pounds of wet manure per day. In spite of defendant's good feedlot management and good housekeeping practices, flies and odors were an obvious consequence of the operation.

3. The property involved was located 15 miles from the urban area of Phoenix, Arizona. There were only 4 small agricultural communities in the vicinity when defendant's predecessor established the feedlots, which are plots of land on which cattle are fattened for market. In 1959 plaintiff purchased 20,000 acres of farmland for $15,000,000 ($750 per acre)—a price much lower than that of other land near urban Phoenix. Plaintiff planned to develop a retirement community to appeal primarily to senior citizens, promising enjoyable outdoor living as part of its sales promotion. By May 1960 there were 450-500 homes completed or under construction, which were located approximately 2.5 miles from defendant's feedlots. Both businesses expanded, and, in 1967, only 1,500 feet separated the 2 enterprises.

and refused to grant defendant any relief from the economic loss that the injunction would occasion. On appeal to the Supreme Court of Arizona, *held,* affirmed in part, reversed in part. When a developer introduces to a previously nonresidential area a residential development that foreseeably will necessitate a permanent injunction prohibiting as a nuisance the operation of an existing lawful business, the developer must indemnify the subsequently enjoined business for reasonable costs of relocating or shutting down, unless the business can obtain other adequate relief. *Spur Industries Inc. v. Del E. Webb Development Co.,* 494 P.2d 700 (Ariz. 1972).

Broadly defined, a nuisance is any condition or activity that unreasonably interferes with another's enjoyment of life or property.[4] Nuisance is not a kind of tortious conduct, but rather is a designation applied to invasion of certain interests.[5] Two separate theories of nuisance have developed, based on the particular interest or right invaded rather than on the act or omission that causes the interference.[6] A private nuisance is an unreasonable interference with an individual's right to the private use and enjoyment of his land.[7] A public nuisance, on the other hand, is an unreasonable interference with a right that is enjoyed by the general public.[8] An activity may qualify under both theories, if both public and private interests are invaded simultaneously.[9] Moreover, many public nuisances are defined by statute, and liability is usually absolute if the activity comes within the terms of the statutory definition.[10] Depend-

4. Holton v. Northwestern Oil Co., 201 N.C. 744, 161 S.E. 391 (1931); *see* RESTATEMENT (SECOND) OF TORTS §§ 821B, 822 (Tent. Draft No. 17, 1971).

5. W. PROSSER, TORTS § 87, at 577 (4th ed. 1971) [hereinafter cited as PROSSER].

6. *Id.* § 86.

7. Guarina v. Bogart, 407 Pa. 307, 180 A.2d 557 (1962) (loud noise from defendant's drive-in theater in residential area was private nuisance); PROSSER, *supra* note 5, § 89, at 591. The RESTATEMENT (SECOND) OF TORTS § 822 (Tent. Draft No. 17, 1971) states that: "One is subject to liability for a private nuisance if, but only if, his conduct is a legal cause of an invasion of another's interest in the private use and enjoyment of land, and the invasion is either (a) intentional and unreasonable, or (b) unintentional and otherwise actionable under the principles controlling liability for negligent or reckless conduct, or for abnormally dangerous conditions of activities."

8. Seigle v. Bromley, 51 Colo. App. 189, 124 P. 191 (1912) (hogpen that created a public health hazard was a public nuisance); *see* RESTATEMENT (SECOND) OF TORTS § 821B(1) (Tent. Draft No. 17, 1971).

9. A party injured by activity that constitutes both a public and private nuisance is allowed to proceed on either theory or both. Bishop Processing Co. v. Davis, 213 Md. 465, 132 A.2d 445 (1957); PROSSER, *supra* note 5, § 88, at 586. In cases involving purely public nuisances, the general rule is that a private party may sue independently for relief from a public nuisance only if special injury, different from that incurred by the general public, can be shown. Taylor v. Barnes, 303 Ky. 562, 198 S.W.2d 297 (1946).

10. Pompano Horse Club v. State, 93 Fla. 415, 111 So. 801 (1927) (statute declaring any place in which games of chance were carried on to be a nuisance); *see* RESTATEMENT (SECOND) OF TORTS § 821B(2)(b) (Tent. Draft No. 17, 1971). The legislative power to declare activity a public

ing upon the interest invaded, an injured plaintiff may sue for damages or seek equitable relief by injunction.[11] When the plaintiff seeks injunctive relief to abate an alleged nuisance, most courts have resorted to the doctrine of "balancing of conveniences" to determine whether an injunction is appropriate.[12] Some of the important factors that are considered in this balancing process are the locality of the nuisance,[13] the substantiality of the right claimed by the injured plaintiff,[14] the effect that an injunction would have on the general public interest,[15] and the adequacy of plaintiff's remedy at law.[16] Another important factor is the

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nuisance is subject, however, to constitutional limitations. Ghaster Properties, Inc. v. Preston, 20 Ohio Op. 2d 51, 184 N.E.2d 552 (Ct. C.P., Allen County, 1962). In the absence of a statute, most courts use a balancing process to determine if particular activity is a nuisance. *See, e.g.*, Board of Educ. v. Alexander, 269 Ala. 79, 110 So.2d 911 (1959); Antonik v. Chamberlain, 81 Ohio App. 465, 78 N.E.2d 752 (1947). The balancing process essentially involves weighing the utility of defendant's conduct against the gravity of the harm to determine whether his conduct is unreasonable. RESTATEMENT (SECOND) OF TORTS §§ 826-28 (Tent. Draft No. 17, 1971).

11. PROSSER, *supra* note 5, § 90, at 602.

12. MacDonald v. Perry, 32 Ariz. 39, 255 P. 494 (1927) (relative rights of parties and general interest of public should be taken into account in determining whether odorous ditch is an enjoinable nuisance). The *Restatement of Torts* suggests that "relative hardship" is a better term for this test than "balancing of conveniences." RESTATEMENT OF TORTS §§ 941-42 (1939). There have been some instances in which courts have refused to apply the balancing of conveniences doctrine. Crushed Stone Co. v. Moore, 369 P.2d 811 (Okla. 1962) (when plaintiff is substantially injured and has no adequate remedy at law, injunctive relief is granted as a matter of right notwithstanding the balance of conveniences); Stuart v. Lake Washington Realty Corp., 141 W. Va. 627, 92 S.E.2d 891 (1956) (when nuisance results from wilful or wanton conduct there should be no balancing of conveniences); Jost v. Dairyland Power Cooperative, 45 Wis. 2d 164, 172 N.W.2d 647 (1969) (balancing of conveniences is not applicable in nuisance action for damages).

13. Schlotfelt v. Vinton Farmers' Supply Co., 252 Iowa 1102, 109 N.W.2d 695 (1961) (court enjoined feed-grinding and fertilizer business, finding that defendant knew of quiet residential character of neighborhood before locating the plant); Riter v. Keokuk Electro-Metals Co., 248 Iowa 710, 82 N.W.2d 151 (1957) (court refused to enjoin metal processing plant located in what had always been an industrial area).

14. Pendoley v. Ferreira, 345 Mass. 309, 187 N.E.2d 142 (1963) (court enjoined defendant's piggery when plaintiffs' only means of avoiding the nuisance was moving their residences); Barber v. School Dist., 335 S.W.2d 527 (Mo. Ct. App. 1960) (injunction denied when only nominal damage was suffered by plaintiff).

15. Pritchett v. Wade, 261 Ala. 156, 73 So. 2d 533 (1954) (iron ore mine not enjoined because it was providing a critical defense item); Koseris v. J.R. Simplot Co., 82 Idaho 263, 352 P.2d 235 (1960) (plant that employed 1,000 people and created $1,030,000 of revenue for local suppliers was too important to the public welfare to be enjoined); Board of Comm'rs v. Elm Grove Mining Co., 122 W.Va. 442, 9 S.E.2d 813 (1940) (public health is to be given great consideration in granting or refusing to grant an injunction); RESTATEMENT OF TORTS § 942 (1939).

16. McCarty v. Macy & Co., 167 Cal. App. 2d 164, 334 P.2d 156 (1959) (plaintiff required to seek damages at law when his injury was not substantial); Conner v. Smith, 433 S.W.2d 911 (Tex. Civ. App. 1968) (injunction of hide plant denied because plaintiff had adequate remedy at law for loss of property value). Courts have held that when damage is substantial, and plaintiff has no adequate remedy at law, the plaintiff is entitled to injunctive relief as a matter of right. *See, e.g.*, Crushed Stone Co. v. Moore, 369 P.2d 811 (Okla. 1962).

economic hardship that a permanent injunction would impose on the defendant balanced against the hardship that denial of an injunction would cause the plaintiff.[17] For example, the Supreme Court of Texas, in *Storey v. Central Hide & Rendering Co.*,[18] refused to enjoin the operation of defendant's rendering plant, which was causing odor and flies to invade plaintiffs' residences, because a permanent injunction would have put the rendering plant out of business, but the continuation of the plant's operation would not have destroyed plaintiffs' homes. A final factor examined by many courts in balancing the conveniences is the priority of location of the parties.[19] A minority of courts have held that a plaintiff who "comes to the nuisance" is barred from relief if he located with knowledge of the conditions upon which he later bases his complaint.[20] Thus, the Supreme Court of Kansas, in *Dill v. Excel Packing Co.*,[21] held that homeowners who located near a cattle feed lot in an agricultural area were bound to accept the agricultural pursuits carried on in the area and therefore must be prepared to live with the resulting disadvantages.[22] The prevailing rule, however, is that, in the absence of prescriptive right established by defendant, a plaintiff should not be denied relief solely because he came to the nuisance.[23] The majority of courts merely include location priority as a factor in the balancing process.[24] Although courts have recognized that changes in the character of a neighborhood may cause a lawful business to become an enjoinable nuisance,[25] it is not uncommon for courts to attempt to

17. Boomer v. Atlantic Cement Co., 26 N.Y.2d 219, 257 N.E.2d 870, 309 N.Y.S.2d 312 (1970) (court noted relative economic disparity between residential landowner and defendant concrete plant and gave defendant opportunity to avoid injunction by paying homeowner permanent damages for the full value of his land); York v. Stallings, 217 Ore. 13, 341 P.2d 529 (1959) (sawmill with assets of $680,000 not enjoined).

18. 148 Tex. 509, 226 S.W.2d 615 (1950).

19. PROSSER, *supra* note 5, § 91, at 611.

20. Dill v. Excel Packing Co., 183 Kan. 513, 331 P.2d 539 (1958) (plaintiffs who located homes next to existing feedlot barred from relief); East St. Johns Shingle Co. v. City of Portland, 195 Ore. 505, 246 P.2d 554 (1952) (plaintiffs who located homes next to city sewage disposal denied relief).

21. 183 Kan. 513, 331 P.2d 539 (1958).

22. *Id.* at 525-26, 331 P.2d at 549.

23. *See, e.g.*, Mahone v. Autry, 55 N.M. 111, 227 P.2d 623 (1951) (plaintiffs who established residence adjacent to defendant's stable were not estopped from enjoining the nuisance by defendant's priority of location).

24. Hall v. Budde, 293 Ky. 436, 169 S.W.2d 33 (Ct. App. 1943) (the fact that plaintiff moved next to an existing hog farm was merely one factor, though an important one, in determining the equities of the case); Schott v. Appleton Brewery Co., 205 S.W.2d 917 (Mo.Ct. App. 1947) (fact that defendant was operating an old and established business was an element for consideration of trier of facts).

25. Fort Smith v. Western Hide & Fur Co., 153 Ark. 99, 239 S.W. 724 (1922) (lawful

mitigate the harsh economic result of a necessary injunction.[26] Utilizing the broad powers of equity, the Supreme Court of New Hampshire, in *Webb v. Town of Rye*,[27] afforded defendant a reasonable time in which to discover suitable means of eliminating or correcting that part of its garbage business which was a nuisance before issuing a permanent injunction.[28] When flies and odors from defendant's piggery could not be eliminated, the Supreme Court of Massachusetts, in *Pendoley v. Ferreira*,[29] postponed the issuance of a permanent injunction to allow defendant a reasonable opportunity to liquidate the operation, thereby diminishing the economic hardship imposed by the injunction. Despite their recognition of the harshness of enjoining the operation of lawful businesses, courts heretofore have gone no further in affording relief from the economic losses occasioned by injunctions than granting a reasonable time for defendant to correct the condition or liquidate the operation.

In the instant case, the court focused initially on the section of the Arizona Code that designates as a public nuisance dangerous to public health any breeding place for flies that exists in a populous area.[30] The court reasoned that since defendant's operation was located in a populous area, it constituted a public nuisance as matter of law,[31] and it must therefore be enjoined permanently. The court discussed the conflicting policies of protecting the public interest as defined by the statute, and of protecting a lawful, but offensive business from the results of a knowing and wilful encroachment by others, concluding that, when plaintiff bought its property, it had chosen to locate near the nuisance

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business located in what had been a sparsely settled part of the city became a nuisance because of the city's growth); *see* MacDonald v. Perry, 32 Ariz. 39, 255 P. 494 (1927) (what may amount to a nuisance in one set of surroundings may be proper and unobjectionable in another set of surroundings).

26. Smith v. City of Ann Arbor, 303 Mich. 476, 6 N.W.2d 752 (1942) (equity may decree injunction of certain objectionable features of a business without enjoining the entire business); Boomer v. Atlantic Cement Co., 26 N.Y.2d 219, 257 N.E.2d 870, 309 N.Y.S.2d 312 (1970) (defendant cement plant avoided injunction by paying plaintiff permanent damages).

27. 108 N.H. 147, 230 A.2d 223 (1967).

28. The court stated: "[O]nce a right to equitable relief has been established, the powers of the Trial Court are broad and the means flexible to shape and adjust the precise relief to the requirements of the particular situation." *Id.* at 153, 230 A.2d at 228.

29. 345 Mass. 309, 187 N.E.2d 142 (1963).

30. ARIZ. REV. STAT. ANN. § 36-601(a)(1) (1956). See note 1 *supra*.

31. The feedlot operation was a public nuisance because it interfered with the right of the general public to be free of noxious odors and health hazards. The court noted that defendant's business constituted a private nuisance as well, because it interfered with each resident's right to the private use and enjoyment of his land. Although the residents of the development were not parties to the instant action, the court explained that plaintiff had independent standing to sue because it had suffered special injury in the form of lost land sales.

with full knowledge that the feedlot operations existed in the vicinity, and that the developer had taken advantage of the lower land prices and the availability of large tracts of land by locating in an agricultural area. The court stated that had plaintiff been the only party injured there would be justification for denying relief because plaintiff had come to the nuisance. The court, however, recognized the injury to those who had been encouraged to purchase homes in the development and held that a proper regard for their right to a healthy, pleasant community necessitated the issuance of an injunction against the operation. The court found no wrongdoing on defendant's part; defendant and its predecessor in interest could not have known, when they located, that a new city would spring up beside their operation, creating the possibility that its business would be enjoined as a nuisance. The court reasoned that plaintiff should bear part of the responsibility for defendant's relocation because plaintiff had caused the situation that necessitated the injunction by encouraging purchases in the development. Therefore, the court ruled that the developer must indemnify the feedlot operator for a reasonable amount of the cost of moving or shutting down.[32]

The instant decision marks the first time that any court has permitted a defendant whose operations have been enjoined as a public nuisance to recover compensation from the prevailing plaintiff for the economic loss caused by the injunction.[33] Defendant's operation of the feedlots in a populous area was a public nuisance by statutory definition; the court therefore could not balance the relative hardships of the parties in deciding whether to grant injunctive relief. The court did recognize, however, that a balancing process was appropriate in shaping injunctive relief to reflect more adequately the interests of the parties and the justifications underlying their conduct.[34] The unique indemnifi-

32. The court explicitly limited this indemnification rule to situations in which a developer has, with foreseeability, brought into a previously agricultural or industrial area the population that necessitates the granting of an injunction against a lawful business. The question of what is a reasonable cost of relocating or liquidating the feedlots was remanded to the trial court for determination.

33. There have been occasional cases in which the damage caused by conduct has been apportioned between the plaintiff and defendant because both were involved in the same conduct—defendant's conduct being a nuisance because it interfered with plaintiff's enjoyment of his land. *E.g.*, Bowman v. Humphrey, 132 Iowa 234, 109 N.W. 714 (1906) (both parties polluted the same stream); *see* PROSSER, *supra* note 5, § 91, at 611-12.

34. Balancing processes are appropriate in nuisance actions because the law of nuisance rests on 2 conflicting policies—that every person has the right to use his property as he sees fit; and, that everyone is bound to use his property so as not to injure the rights or property of others. Antonik v. Chamberlain, 81 Ohio App. 465, 78 N.E.2d 752 (1947). This "weighing" to shape the injunctive relief would be the third balancing process in a nuisance case. In the absence of a statute, there is a balancing of interests to determine if there is in fact a nuisance. *See* note 10 *supra*. Once

cation rule promulgated by the court may be viewed as a logical extension of the balancing of conveniences doctrine, because it results in a remedy that accurately reflects the relative interests of the parties in the instant case. To have enjoined defendant permanently without affording some form of relief would necessarily have meant that when it chooses to locate in an unpopulated, agricultural area, a prior user must anticipate any and all potentially conflicting land uses that might be initiated by others in the immediate vicinity—a requirement that would have been quite unreasonable in the context of the instant case. Had the court in the instant case failed to indemnify defendant, plaintiff would have been relieved of any obligation to consider existing land uses when assessing locational alternatives. Thus plaintiff could have purchased the land at a relatively low price and then have realized an increase in value at no cost by prevailing in a suit to enjoin defendant's business operation as a nuisance.[35] Although the court's decision seems appropriate in the instant case, an indiscriminate application of its indemnity rule could foster an attitude among "first users" in undeveloped and sparsely populated areas that priority of location essentially guarantees them immunity from injunction unless a second user undertakes to pay the cost of relocating or shutting down the original use.[36] This attitude would provide first users whose operations are potential nuisances, such as corporate polluters, little incentive to develop effective methods by which to eliminate the socially objectionable features of land use.[37] It

a nuisance is found and an injunction is sought, a second balance is struck to determine the appropriateness of injunctive relief. *See* notes 12-24 *supra* and accompanying text. If injunctive relief is appropriate, a third balancing process would examine the interest of the parties to determine who should bear the loss resulting from the injunction.

35. If the developer, as in this case, still owns property near the enjoined business, his property value will probably increase as a result of the injunction. The developer should not be allowed to realize this windfall as a spectator to the lawsuit. The instant decision is limited to situations involving land developers, but the court does not explain the applicability of the rule in actions in which the developer is not a party. A defendant's right to indemnification in such cases should not be limited by the fact that a developer did not bring the suit. Therefore, when suit is brought by aggrieved homeowners rather than the developer in similar situations, the defendant should be permitted to implead the developer and cross claim for a reasonable amount of the cost of moving or shutting down. There might be some justification for not applying the rule to a developer who has sold all interest in the land prior to the lawsuit, because the developer would realize no gain from the injunction of defendant's business.

36. If courts fostered this attitude, "first users" would, in effect, acquire de facto zoning powers. The majority of courts, however, have not accepted this reasoning and hold that a defendant cannot require the surrounding premises to endure the nuisance. PROSSER, *supra* note 5, § 91, at 611.

37. Pollution of the environment by a business creates what are termed externalities—costs of production that are not borne by the producer, but that are imposed upon society. When a business is required to internalize these externalities—bear the costs itself—there is an economic incentive to lessen the costs. *See* Note, *Economic Incentives for Pollution Abatement: Applying Theory to Practice*, 12 ARIZ. L. REV. 511, 513-15 (1970).

can be argued, however, that broad application of the indemnification rule as promulgated by the instant court would produce a more efficient land use allocation.[38] A business seeking a new location will ultimately choose one that it believes will prove the most profitable. When the business decides to locate its operation on land that is subject to an enjoinable conflicting use on surrounding land, the costs of relocating or liquidating the existing use produce social costs that are not borne by the second user and that would not exist if another location not subject to a conflicting use were selected. To the extent that the decision in the instant case requires the second user to bear some of the social costs[39] of its locational decision in the form of indemnification of the first user for relocation expenses, the incentive for the business to base its land choice solely on considerations of private costs is minimized and locational decisions that take existing uses into account are facilitated.[40]

38. *See generally* Note, *An Economic Analysis of Land Use Conflicts*, 21 STAN. L. REV. 293 (1969).

39. The effectiveness of this decision in interjecting social costs into a second user's locational decision will depend largely on the trial court's determination of the reasonable cost of liquidating or relocating the first user. If this cost exceeds the increase in the fair market value of the land resulting from the enjoining of the first user, this indemnification rule will cause the second user to choose an alternative, nonconflicting site.

40. *See* Note, *supra* note 38, at 303-08. Assume the developer in the instant case could have located in an area having no conflicting uses in which the price of the tract of land was $500,000 greater than the price of the tract he actually acquired—a differential reflecting the existing land uses in the 2 locations. Suppose further that the reasonable cost of indemnifying defendant's move is $600,000. If the developer could make his locational choice again, he would choose the location with no existing conflicting uses. Such a choice would have given the developer a net cost saving of $100,000, and such a choice is the most economically efficient to both the developer and society. One might contend that the application of this concept to a case involving a swimming pool's locating next to a steel mill, for example, would be ludicrous. In such a case, however, there is little chance that the "balancing of conveniences" doctrine would result in an injunction enjoining operation of the steel mill to relieve the conflict. Therefore, the swimming club's locational decision would turn on its ability to coexist profitably in the vicinity of a steel mill, and no indemnifying cost factor would enter the decision.

Patent Law—Infringement of Combination Patent—A Patented Machine Whose Parts Are Prodnced in the United States Is Not "Made" Witbin the United States Within tbe Meaning of Section 271(a) of tbe Patent Act If Its Component Parts Are Exported in Unassembled Form

Appellant, Deepsouth Packing Company, sought modification[1] of an injunction preventing it from manufacturing and exporting component parts of a shrimp-cleaning device upon which appellee, the Laitram Corporation, held a combination patent.[2] Appellant contended that its manufacture of the elements of a combination patent within the United States and subsequent exportation of those parts in unassembled form was not an infringement under section 271(a) of the Patent Act,[3] because the patented invention itself was not "made" within the United States,[4] and that an injunction prohibiting such practices therefore is not authorized by the Patent Act. Appellee maintained that an apparatus is made within the United States within the meaning of section 271(a) if the component parts are manufactured in the United States and exported with the intention of having the foreign user assemble those parts into the patented object. The district court found that no enjoinable patent violation had occurred and modified the injunction.[5] The United States Court of Appeals for the Fifth Circuit reversed, applying a "substantial manufacture" test to hold that a device is considered to be "made" within the United States if its parts are produced in this country and can be transformed into the patented combination through a rela-

1. The injunction prevented Deepsouth from manufacturing and exporting the device in unassembled form. Appellant sought to modify the injunction so that it could export the machine in unassembled form.

2. A combination patent is one in which "[n]one of the parts referred to are new, and none are claimed as new; nor is any portion of the combination less than the whole claimed as new, or stated to produce any given result. The end in view is proposed to be accomplished by the union of all, arranged and combined together in the manner described. And this combination, composed of all the parts mentioned in the specification, and arranged with reference to each other, and to other parts of the [machine] in the manner therein described, is stated to be the improvement, and is the thing patented." Deepsouth Packing Co. v. Laitram Corp., 406 U.S. 518, 520-21 (1972), *citing* Prouty v. Ruggles, 41 U.S. (16 Pet.) 336, 341 (1842).

3. 35 U.S.C. § 271(a) (1970): "Except as otherwise provided in this title, whoever without authority makes, uses or sells any patented invention, within the United States during the term of the patent therefor, infringes the patent."

4. Deepsouth was barred by Laitram's patents from selling its shrimp-cleaning machines on the American market, but it sought to avoid the patents by selling the machines to foreign buyers in subassemblies that required less than one hour for installation.

5. Laitram Corp. v. Deepsouth Packing Co., 310 F. Supp. 926 (E.D. La. 1970).

tively simple assembly process.[6] On appeal to the United States Supreme Court, *held,* reversed. Under section 271(a) of the Patent Act, an invention with a combination patent whose parts are produced in the United States is not "made" within the United States if those parts are exported in unassembled form. *Deepsouth Packing Co. v. Laitram Corp.,* 406 U.S. 518 (1972).

At common law, inventors had no legal means of excluding other manufacturers from making, using, or selling their inventions.[7] In order to "promote the progress of the useful arts," the drafters of the Constitution provided Congress with the power to establish a patent system and to grant inventors the exclusive right to control the use of their discoveries for a limited period of time.[8] Congress implemented this constitutional mandate early in American jurisprudence through the passage of patent acts in 1790, 1836, and 1870.[9] Presently, the Patent Act of 1952 provides protection to patent holders from those who seek to infringe upon the rights afforded by the act.[10] The protection afforded by a patent benefits both the inventor and society because it encourages the inventor to disclose his novel idea to the public and, at the same time, protects the inventor's discovery from being stolen and capitalized upon by another. In the last 50 years, however, because of the antimonopoly philosophy expressed in antitrust legislation, the courts have reevaluated the impact of the protection provided by patent laws in general,[11] and have begun to construe strictly the scope of combination patents.[12] Because only the combination[13] itself is protected by the

6. Laitram Corp. v. Deepsouth Packing Co., 443 F.2d 936 (5th Cir. 1971).

7. Note, *The Nature of a Patent Right,* 17 COLUM. L. REV. 663 (1917).

8. U.S. CONST. art. I, § 8, provides that Congress shall have the power "[t]o promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries . . . ."

9. R. CALVERT, PATENT PRACTICE & INVENTION MANAGEMENT, 394-404 (1964).

10. 35 U.S.C. § 251 (1970).

11. *E.g.,* Morton Salt Co. v. G.S. Suppiger Co., 314 U.S. 488 (1942) (patent cannot be used to secure any monopoly beyond that contained in the patent); IBM v. United States, 298 U.S. 131 (1936) (the patent monopoly may not be used in disregard of the antitrust laws); United Shoe Mach. Corp. v. United States, 258 U.S. 451 (1922) (a patent secures the right to exclude others from making, using, or vending the thing patented without the permission of the patent holder, but it does not exempt him from regulations consistent with those rights, made by Congress in the public interest, forbidding agreements that may lessen competition or build up monopoly in interstate trade); Faber, *Contributory Infringement—A Limited Tort,* 42 CHI.-KENT L. REV. 1 (1965).

12. "For if anything is settled in the patent law, it is that the combination patent covers only the totality of the elements in the claim and that no element, separately viewed, is within the grant." Aro Mfg. Co. v. Convertible Top Replacement Co., 365 U.S. 336, 344 (1961); *accord,* Mercoid Corp. v. Minneapolis-Honeywell Regulator Co., 320 U.S. 680 (1944); Brown v. Guild, 90 U.S. (23 Wall.) 181 (1874).

13. Aro Mfg. Co. v. Convertible Top Replacement Co., 365 U.S. 336 (1961); Morton Salt Co. v. G.S. Suppiger Co., 314 U.S. 488 (1942).

patent laws, the public has the privilege of using, manufacturing, and selling the individual elements of the combination without violating the patentee's legal rights.[14] The patent holder's monopoly has been narrowed further by the liberal attitude that the courts have taken toward a patentee's competitors who export the patented invention. Although a patent holder may exclude others from making or using the patented apparatus in the domestic market, the courts have held that domestic competitors do not infringe a combination patent if they merely manufacture the component parts within the United States and ship those parts overseas before assembling them into "operable" condition.[15] This position was reached by construing very strictly the word "makes" in section 271(a) of the Patent Act.[16] The leading case interpreting this provision of the Patent Act is the Second Circuit's decision in *RCA v. Andrea.*[17] In that case, RCA had a combination patent on a type of radio receiver and Andrea began to manufacture similar radio sets for export abroad. The parts for these receivers—with the exception of vacuum tubes that were not placed in the sets prior to exportation—were manufactured and assembled by Andrea in its American plant. To make the set operable, the overseas buyer merely had to insert the vacuum tubes into the radio.[18] The court held that RCA's combination patent did not cover the manufacture and sale of separate elements of the patented apparatus that never were combined to form the invention itself and that no direct or contributory infringement could occur unless the receivers were "made" operable within the United States.[19]

14. *E.g.*, Aro Mfg. Co. v. Convertible Top Replacement Co., 365 U.S. 336 (1961).

15. Hewitt-Robins, Inc. v. Link-Belt Co., 371 F.2d 225 (7th Cir. 1966) (combination patent covers only totality of elements in claim and no element, separately viewed, is within the grant); Cold Metal Process Co. v. United Eng'r & Foundry Co., 235 F.2d 224 (3rd Cir. 1956) (in the case of a combination patent, the combination is not to be regarded as made until all its elements are completed); RCA v. Andrea, 79 F.2d 626 (2d Cir. 1935) (doctrine of contributory infringement permits elements of patented combination to be sold in the United States with intent that buyer make and use the invention abroad).

16. 35 U.S.C. § 271(a) (1970).

17. 79 F.2d 626 (2d Cir. 1935).

18. *Id.* at 627.

19. "No wrong is done the patentee until the combination is formed. His monopoly does not cover the manufacture or sale of separate elements capable of being, but never actually, associated to form the invention. Only when such association is made is there a direct infringement of his monopoly, and not even then if it is done outside the territory for which the monopoly was granted." *Id.* at 628; *see* K.W. Ignition Co. v. Temco Elec. Motor Co., 283 F. 873 (6th Cir. 1922) (defendant held liable for patent infringement for exporting patented shock absorbers wholly made and assembled in the United States); Computing Scale Co. v. Toledo Computing Scale Co., 279 F. 648 (7th Cir. 1921) (defendant not liable for exporting parts of a patented scale to Canada when parts were assembled in Canada to form the combination and sold there); Bullock Elec. & Mfg. Co. v. Westinghouse Elec. & Mfg. Co., 129 F. 105 (6th Cir. 1904) (the making and selling of a single element of a patented combination, with the purpose that such element will be exported abroad and there used in combination with other elements, is not contributory infringement).

The *Andrea* case came before the Second Circuit for a second time,[20] because of additional evidence introduced by the plaintiff. In its final disposition of this case, the court found that prior to exportation the tubes had been inserted into the radios for testing purposes and that this constituted the requisite "combination" for holding Andrea liable for patent infringement.[21] The court, however, did not overrule the position it had taken previously, but rather based its finding of infringement upon the factual distinction between nonassembly and temporary assembly for testing purposes.[22] A number of cases with similar factual situations have arisen in the Third and Seventh Circuits since the *Andrea* decision. Based upon the underlying concepts that a combination patent protects only the combination and that monopolies conferred by patents are not to be viewed with favor,[23] these circuits have followed the "final assembly test" articulated by the court in the first *Andrea* decision, and have held that no patent infringement can occur in the absence of a complete assembly of the device within the United States.[24]

In the instant decision, the Court recognized that, in enforcing the patent laws, courts must consider not only the protection of the patent holder's invention but also the preservation of competition by restricting the growth of monopoly power through the patent device.[25] In addition, the majority noted that, because the statute in question[26] clearly indicates that it is not an infringement to "make" or use a patented product outside the United States, the patentee, in order to establish a violation of the patent laws, must prove that the alleged infringer made or used

20. RCA v. Andrea, 90 F.2d 612 (2d Cir. 1937).

21. The court held that the tests were made to see if the radio receivers were marketable. Because this was a commercial use, the court stated that this violated the patent. *Id.* at 614.

22. In his dissent, Judge Swan, author of the first *Andrea* decision, states: "In holding that the sale in this country of the disassembled parts of the invention for assembly and use abroad is a direct infringement, I think we overrule our prior decision . . . ." *Id.* at 615 (Swan, J., dissenting).

23. Laitram Corp. v. Deepsouth Packing Co., 310 F. Supp. 926 (E.D. La. 1970).

24. In Hewitt-Robins, Inc. v. Link-Belt Co., 371 F.2d 225 (7th Cir. 1966), the Seventh Circuit concluded that manufacture and sale in this country of parts for a "reclaimer" device to be asesmbled outside the territorial limits of the United States do not fall within the purview of 35 U.S.C. § 271 (1970); therefore no patent infringement resulted. The court followed the rule that a combination patent covers only the totality of the elements comprising the invention and that no element, separately viewed, is within the protection of the patent. The Third Circuit in Cold Metal Process Co. v. United Eng'r & Foundry Co., 235 F.2d 224 (3d Cir. 1956), held that the monopoly of the patent extends only to the making of the patented device within the United States; therefore steel rolling mills manufactured in the United States, but shipped unassembled to foreign countries, did not constitute patent infringement.

25. *See* cases cited note 12 *supra*.

26. 35 U.S.C. § 271 (1970).

the invention within the United States.[27] Having found that the *Andrea* standard for determining when a patented apparatus is "made" within the United States represents the overwhelming weight of authority[28] and having concluded that existing patent rights should not be expanded in the absence of a clear directive to do so from Congress, the Court held that the export of a patented machine in less than fully assembled form does not infringe the combination patent. The dissent maintained that the Court had construed too narrowly the meaning of to "make" in section 271(a) and had erred in applying the *Andrea* rule, since the status of the first *Andrea* decision as controlling authority was weakened considerably by the Court's disposition of the case on rehearing. In addition, the dissent argued that the adoption of the *Andrea* standard would subvert the constitutional scheme of patent protection.[29]

Although the Court's definition of the term "made" as used in section 271(a), adequately protects the patentee when the combination is assembled completely within the United States, it affords no protection at all to the patent holder when a competitor manufactures all the elements of the combination within the United States and has them assembled abroad. Under these circumstances, the technical *Andrea* rule adopted by the Court in the instant case subverts the constitutional policy of promoting the sciences and the useful arts through affording an inventor the opportunity to control the use of his discovery for a limited period of time because it allows another producer to deprive the inventor of his right to the exclusive use of his patented product when that product is traded in the international market. By basing its decision on the premise that the patent should only protect the completed machine and not its individual unassembled elements, the Court failed to recognize that the ultimate purpose of the patent laws is to protect the inventor's unique idea and not just to control the use of the physical object that is constructed from that idea. An examination of cases that involve similar factual situations but fall under the copyright laws further indicates the inappropriateness of the Court's decision.[30] In those cases, the courts generally proceed on the assumption that the copyright laws were designed to protect the copyright owner at the expense of the infringer and do not emphasize the anticompetitive effect of those laws.[31] There does not appear to be any sound reason for drawing a

27. *See* note 3 *supra.*

28. *See* note 12 *supra.*

29. 406 U.S. at 532-34.

30. *See* Mazer v. Stein, 347 U.S. 201 (1954).

31. *E.g.*, Sheldon v. Metro-Goldwyn Pictures Corp., 309 U.S. 390 (1940) (defendant held liable for copyright infringement for making negatives of a motion picture here and exhibiting the

distinction between the property rights created under the copyright laws and those created under the patent laws. Furthermore, the property right of the patent holder should be protected by giving the word "makes" an interpretation in keeping with the ordinary meaning of the term instead of a technical construction. This result could be achieved by utilizing the "substantial manufacture" test, which would involve balancing the public's right to use the constituent parts against the patent holder's right to control the use of his invention, for determining whether a patented object was made within the United States rather than the "final assembly" test that was applied in the *Andrea* case. Although the substantial manufacture test is more subjective and, as such, more difficult to apply than the final assembly test, it would provide the patent holder with considerably more protection than the *Andrea* rule. In addition, adoption of the final assembly test by the courts would force the American patent holder to pay patent fees and to bring infringement actions in numerous foreign countries, whereas, under the substantial manufacture test, one court could make a final determination of the patentee's rights.

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positives abroad); Famous Music Corp. v. Seeco Records, Inc., 201 F. Supp. 560 (S.D.N.Y. 1961) (defendant's preparation of tapes that were sent to persons abroad to be used to manufacture phonograph records containing renditions of copyrighted musical compositions violated copyright law and involved company as joint tort-feasor in "manufacture").