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Recent Cases

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RECENT CASES

Conflict of Laws—Torts—Lex Loci Delicti Is Proper Law When Parties Are Domiciled in Different Jurisdictions Unless Displacing That Law Advances Forum State's Suhstantive Law Purposes Without Impeding Interstate Relations or Predictability of Result

Plaintiff, an Ontario domiciliary, brought an action in New York for the wrongful death of her husband, also a domiciliary of Ontario, who was killed in a collision in that province[1] while a passenger in an automobile driven by defendant's[2] intestate, a New York domiciliary.[3] Defendant pleaded as an affirmative defense the Ontario guest statute,[4] which restricts a guest's recovery to damages for injuries sustained only as a result of his host's gross negligence. Plaintiff argued that because it conflictcd with the policy of the New York guest statute,[5] the Ontario statute was inapplicable, and moved to dismiss the defense. The Special Term of the Supreme Court denied plaintiff's motion,[6] and the Appellate Division reversed.[7] On appeal to the New York Court of Appeals, *held*, reversed. When a tort action involves parties domiciled in different jurisdictions, the law of the place of the tort controls unless displacement of that rule would advance the substantive law purposes of the forum state without impeding the multistate process or producing liti-

1. Kuehner, the driver and a resident of Buffalo, drove his car from that city to Fort Erie in Ontario where he picked up the decedent. Their proposed trip was to take them to Long Beach in Ontario and back again to Fort Erie. On the way to Long Beach, however, in the town of Shirkston, the automobile was struck by a train and both occupants of the car were instantly killed.

2. Two defendants were named in the suit. One was the administratrix of the driver's estate, the other was the owner of the train involved, Canadian National Railway Company. Since only the former brought appeal to the instant court, this comment eliminates the latter from discussion.

3. The driver was a permanent resident of New York, and his automobile was registered and insured there.

4. ONTARIO REV. STAT. ch. 202, § 132(3) (1970), provides that "the owner or driver of a motor vehicle . . . is not liable for any loss or damage resulting from bodily injury to, or the death of any person being carried in . . . the motor vehicle, except where such loss or damage was caused or contributed to by the gross negligence of the driver of the motor vehicle."

5. *See* N.Y. VEH. & TRAF. LAW § 388 (McKinney 1970): "Every owner of a vehicle used or operated in this state shall be liable . . . for death or injuries to person[s] . . . resulting from negligence in the use or operation of such vehicle. . . ."

6. Neumeier v. Kuehner, 63 Misc. 2d 766, 313 N.Y.S.2d 468 (Sup. Ct. 1970).

7. Neumeier v. Kuehner, 37 App. Div. 2d 70, 322 N.Y.S.2d 867 (1971).

gants' uncertainty. *Neumeier v. Kuehner*, 31 N.Y.2d 121, 286 N.E.2d 454, 335 N.Y.S.2d 64 (1972).

The traditional rule for resolving conflict of laws problems in the context of tort litigation is that the law of the place of the wrong—lex loci delicti[8]—determines the substantive rights and liabilities of the parties involved. The rule prevailed in most jurisdictions[9] with the attendant virtues of ease of application and predictability of result.[10] Despite these strengths, however, the mechanistic application of the rule has been criticized considerably during the past 40 years[11] for frequently requiring the application of the substantive law of a jurisdiction having no connection with the case, other than the fortuitous occurrence of the tort within its borders, and consequently having no interest in the outcome of the litigation. Moreover, laws often have been applied under the rule without regard for the substantive policies they were designed to implement. Thus, many courts have tailored numerous exceptions to the lex loci rule[12] or have abandoned it altogether in search for more flexible approaches that would effectuate better the policy needs of those jurisdictions whose interests were involved, without sacrificing the virtues of predictability and simple application inherent in the traditional rule.[13]

8. The rule had its foundation in the "vested rights doctrine," which provided that the rights of a person vested at the time of the tort and followed the person into whatever jurisdiction the action was brought. Such rights could not be cancelled without the person's consent. *See* 3 J. BEALE, CONFLICT OF LAWS § 73, at 1967-69 (1935); R. LEFLAR, AMERICAN CONFLICTS LAW § 90, at 205-06 (rev. ed. 1968). The lex loci rule was adopted by the original *Restatement*. *See* RESTATEMENT OF CONFLICT OF LAWS § 384 (1934).

9. *See, e.g.*, Slater v. Mexican Nat'l R.R., 194 U.S. 120 (1904) (Holmes, J.); Hall v. Hamel, 244 Mass. 464, 138 N.E. 925 (1923); Kaufman v. American Youth Hostels, Inc., 5 N.Y.2d 1016, 158 N.E.2d 128, 185 N.Y.S.2d 268 (1959); Kaset v. Freedman, 22 Tenn. App. 213, 120 S.W.2d 977 (1938).

10. Under this rule, the court merely needs to determine the situs of the wrong and apply the law of that jurisdiction. As a result, forum shopping by the parties is eliminated.

11. *See, e.g.*, Cavers, *A Critique of the Choice-of-Law Problem*, 47 HARV. L. REV. 173 (1933); Cheatham, *American Theories of Conflict of Laws: Their Role and Utility*, 58 HARV. L. REV. 361 (1945); Currie, *Survival of Actions: Adjudication Versus Automation in the Conflict of Laws*, 10 STAN. L. REV. 205 (1958). The vested rights doctrine has been rejected by several of the leading scholars in conflict of laws. *See, e.g.*, R. LEFLAR, *supra* note 8, at 206; Cavers, *supra*; Cheatham, *supra*.

12. *See, e.g.*, Huntington v. Attrill, 146 U.S. 657 (1892) (penal law exception); Sampson v. Chanell, 110 F.2d 754 (1st Cir.), *cert. denied*, 310 U.S. 650 (1940) (exception based on substance-procedure distinction); Noe v. United States Fidelity & Guar. Co., 406 S.W.2d 666 (Mo. 1966) (substance-procedure distinction); Loucks v. Standard Oil Co., 224 N.Y. 99, 120 N.E. 198 (1918) (public policy exception).

13. *See, e.g.*, Grant v. McAuliffe, 41 Cal. 2d 859, 264 P.2d 944 (1953); Kilberg v. Northeast Airlines, 9 N.Y.2d 34, 172 N.E.2d 526, 211 N.Y.S.2d 133 (1961); Haumschild v. Continental Cas. Co., 7 Wis. 2d 130, 95 N.W.2d 814 (1959). The lex loci rule has been rejected under certain conditions in at least 16 other jurisdictions. *See, e.g.*, Reich v. Purcell, 67 Cal. 2d 551, 432 P.2d 727, 63 Cal. Rptr. 31 (1967); Griffith v. United Air Lines, Inc., 416 Pa. 1, 203 A.2d 796 (1964);

Significant advances in the judicial quest for a more equitable conflicts system have been made by the New York courts. In the 1963 case of *Babcock v. Jackson*,[14] the New York Court of Appeals formulated a new "grouping-of-contacts" or "center-of-gravity" approach to replace the older rule.[15] In *Babcock*, which involved an action between two New York domiciliaries for injuries sustained in a one-car accident in Ontario, the court rejected the lex loci rule and defendant was unsuccessful in interposing the Ontario guest statute[16] as a defense. The court designed a test that accords controlling effect to the law of that jurisdiction which, because of its relationship with the occurrence or parties involved, has the greatest concern with the particular issues raised in the litigation. Fundamental to the *Babcock* approach is a three-step analysis, which demands isolation of the issue, identification of the policies underlying the conflicting laws, and examination of the jurisdictions' contacts with the parties.[17] Applying this formula, the *Babcock* court determined that the Ontario statute was designed to protect Ontario insurance companies from fraudulent claims by guest-passengers and collusion between guests and drivers,[18] whereas thc New York law was enacted to compensate innocent victims of automobile accidents.[19] Rec-

Wilcox v. Wilcox, 26 Wis. 2d 617, 133 N.W.2d 408 (1965). Several jurisdictions, however, continue to follow the rule. *See, e.g.*, Friday v. Smoot, 211 A.2d 594 (Del. 1965).

14. 12 N.Y.2d 473, 191 N.E.2d 279, 240 N.Y.S.2d 743 (1963). In Auten v. Auten, 308 N.Y. 155, 124 N.E.2d 99 (1954), a case laying the groundwork for *Babcock*, the court had discarded the lex loci rule in the contracts area and replaced it with the "most significant contacts" or "center-of-gravity" rule.

15. Under this test, the court looks to the law of the place which has the most significant relationship or the dominant contacts with the issue raised in litigation. The test was adopted by the new *Restatement*. *See* RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 145 (1971), providing application of the "law of the state which, with respect to that issue, has the most significant relationship to the occurrence and the parties. . . ." For cases following the *Restatement (Second)* rule see *id.* at 426-29. For criticism of this test and the *Restatement (Second)* rule see Currie, *Comments on Jackson v. Babcock, A Recent Development in Conflict of Laws*, 63 COLUM. L. REV. 1233 (1963); Ehrenzweig, *The "Most Significant Relationship" in the Conflicts Law of Torts*, 28 LAW & CONTEMP. PROB. 700 (1963); Comment, *The Second Conflicts Restatement of Torts: A Caveat*, 51 CALIF. L. REV. 762 (1963).

16. ONTARIO REV. STAT. ch. 172, § 105 (2) (1960), *as amended* ONTARIO REV. STAT. ch. 202, § 132(3) (1970), provided a complete bar to recovery by a guest-passenger unless injured in a public transportation vehicle.

17. *See* 12 N.Y.2d at 479-84, 191 N.E.2d at 282-85, 240 N.Y.S.2d at 747-51.

18. The court ostensibly reached this interpretation by relying on a student work in 1 U. TORONTO L.J. 364, 366 (1936), which asserted: "Undoubtedly the object of this provision is to prevent the fraudulent assertion of claims by passengers, in collusion with drivers, against insurance companies. . . ."

19. N.Y. VEH. & TRAF. LAW § 310 (McKinney 1970): "The legislature is concerned over the rising toll of motor vehicle accidents and the suffering and loss thereby inlicted. . . . [I]t is a matter of grave concern that motorists shall be financially able to respond in damages for their negligent acts, so that innoccnt victims of motor vehicle accidents may be recompensed. . . ."

ognizing that both litigants were New York domiciliaries and that the automobile was licensed and insured in New York, the court concluded that the policy considerations that motivated the Ontario statute would not be furthered by its application. Moreover, the court emphasized that the parties resided in New York, that the guest-host relationship had arisen there, and that the trip began and ended there, but the only contact touching Ontario was the fortuitous site of the accident.[20] Therefore, because New York had the dominant contacts and because only its policy interests were involved, the court held that the New York law should apply.[21] Despite the detail with which the court in *Babcock* set out its new choice of law analysis, the court failed to clarify whether it had based its holding on a finding that New York public policies were superior in importance to those of Ontario or that New York simply had a greater aggregation of contacts than Ontario. This uncertainty[22] was further manifested when the same court attempted to apply the *Babcock* rationale in *Dym v. Gordon*.[23] The parties in *Dym* were both New York domiciliaries involved in a guest-host relationship that arose and terminated in Colorado, the site of an automobile accident between defendant's car and another. As in *Babcock*, the car had been registered and insured in New York, and when plaintiff brought suit in New York for negligence, the defendant asserted the Colorado guest statute[24] as a defense. Unlike *Babcock*, however, the court held that the foreign statute was applicable. The majority in *Dym*[25] distinguished that case from *Babcock* on the ground that a primary purpose for Colorado's guest statute was to afford injured nonguests priority against the assets of negligent hosts.[26] The court reasoned that fulfillment of that policy

20. 12 N.Y.2d at 483, 191 N.E.2d at 284-85, 240 N.Y.S.2d at 751. The court was careful to state that if the host's negligence resulting from violation of rules of the road was at issue, the Ontario law would apply since on that issue, Ontario would have the most significant relationship.

21. *Id.* at 484-85, 191 N.E.2d at 285, 240 N.Y.S.2d at 752. For a more detailed analysis of *Babcock* see Cavers, Cheatham, Currie, Ehrenzweig, Leflar & Reese, *Comments on Babcock v. Jackson, A Recent Development in Conflict of Laws*, 63 COLUM. L. REV. 1212 (1963).

22. For a more detailed discussion of this problem see Baer, *Two Approaches to Guest Statutes in the Conflict of Laws: Mechanical Jurisprudence Versus Groping for Contacts*, 16 BUFFALO L. REV. 537, 565-66 (1967); Rosenberg, *Two Views on Kell v. Henderson: An Opinion for the New York Court of Appeals*, 67 COLUM. L. REV. 459, 461-62 (1967). *See also* Oltarsh v. Aetna Ins. Co., 15 N.Y.2d 111, 204 N.E.2d 622, 256 N.Y.S.2d 577 (1965) (court began with qualitative policy approach but then switched to quantitative contact-counting approach).

23. 16 N.Y.2d 120, 209 N.E.2d 792, 262 N.Y.S.2d 463 (1965).

24. COLO. REV. STAT. ANN. § 13-9-1 (1963) barred recovery unless there was a showing of gross negligence.

25. The majority restated the 3-step analysis which *Babcock* utilized in its dominant contacts approach. *See* 16 N.Y.2d at 124, 209 N.E.2d at 794, 262 N.Y.S.2d at 466.

26. *Id.* The court determined 2 other policies behind the guest statute to be (1) protection of

objective outweighed the importance of the New York law.[27] Although the court found that Colorado possessed the most significant contacts with the controversy, emphasing that because the parties had been dwelling in Colorado and that the guest-host relationship had arisen there the accident's occurrence there was not merely fortuitous,[28] the *Dym* court ostensibly de-emphasized the quality of Colorado's contacts with the accident, and relied more on the quantity of the contacts to justify its decision.[29] The confusion wrought by *Babcock* therefore was compounded in *Dym* and was not clarified[30] until Professor Currie's governmental interest analysis test,[31] with its emphasis on policies be-

Colorado drivers and their insurance carriers against fraudulent claims and (2) prevention of suits by ungrateful guests.

27. *See id.*

28. *Id.* at 128, 209 N.E.2d at 797, 262 N.Y.S.2d at 469-70. In a strong dissent, Judge Fuld declared that while the contacts with Colorado were quantitatively greater, numbers were insignificant since the New York policy in seeing injured guests compensated overrode Colorado policy. Furthermore, the policy behind the guest statute of giving injured third parties priority would not be furthered since the party in the case was from Kansas. *Id.* at 132, 209 N.E.2d at 799, 262 N.Y.S.2d at 473.

29. The placing of greater weight on quantity of contacts than quality by the *Dym* majority confirmed fears of leading commentators on *Babcock* that the dominant contacts test would become a contact-counting test instead of a policy-consideration test. *See* Currie, *supra* note 21, at 1233-35; Ehrenzweig, *supra* note 21, at 1243-44; Leflar, *supra* note 21, at 1247-48. *See also* Note, *Conflict of Spirit: Babcock v. Dym*, 22 N.Y.U. INTRA. L. REV. 119 (1967).

30. *See, e.g.* Long v. Pan Am. World Airways, 16 N.Y.2d 337, 213 N.E.2d 796, 266 N.Y.S.2d 513 (1965) (Pennsylvania law applied in wrongful death action arising out of a Maryland airplane crash). This decision failed to clarify the *Babcock-Dym* confusion since Pennsylvania was the domicile of the parties as well as the state with most contacts. This confusion was further exemplified in *Macey v. Rozbicki*, 18 N.Y.2d 289, 221 N.E.2d 380, 274 N.Y.S.2d 591 (1966), a case which involved a New York domiciliary, vacationing in Ontario, who was injured while a passenger in an automobile which was owned by another New York domiciliary and registered and insured in New York. In response to a defense based on the Ontario guest statute, the court distinguished *Dym* on the basis that in *Macey*, the parties' stay in Ontario was to be shorter and the origin of their relationship was New York, and therefore, relying on *Babcock*, held the New York law applicable. Thus, it is evident that the *Macey* majority had interpreted the *Babcock* doctrine to be a contact-counting test rather than a policy-consideration approach. In a significant concurring opinion, however, contact-counting was rejected and *Babcock* was construed to have held that only those contacts that are significant to the policies behind the conflicting laws are to be analyzed in determining which law applies. *Id.* at 292-99, 221 N.E.2d at 382-86, 274 N.Y.S.2d at 593-99. The analysis of the concurring opinion was approved in a series of cases following *Macey* that adopted the policy-consideration approach instead of the contact-counting approach. *See, e.g.*, Reich v. Purcell, 67 Cal. 2d 551, 432 P.2d 727, 63 Cal. Rptr. 31 (1967) (wrongful death action); Miller v. Miller, 22 N.Y.2d 12, 237 N.E.2d 877, 290 N.Y.S.2d 734 (1968) (wrongful death action); *In re* Estate of Clark, 21 N.Y.2d 478, 236 N.E.2d 152, 288 N.Y.S.2d 993 (1968) (property rights action); *In re* Estate of Crichton, 20 N.Y.2d 124, 228 N.E.2d 799, 281 N.Y.S.2d 811 (1967) (property rights action).

31. Under this test as developed by Brainerd Currie, the forum court analyzes the governmental interest advanced by each of the conflicting laws. The court then chooses the law of the jurisdiction having the greater interest in having its law applied. If the forum court finds both states'

hind the conflicting laws, replaced the *Babcock* approach. The newer Currie test was adopted by the New York Court of Appeals in *Tooker v. Lopez*,[32] a case in which both parties were domiciled and the car was registered and insured in New York. The fatal accident occurred in Michigan, however, and the defendant-host thus sought protection from liability under the more restrictive Michigan guest statute.[33] The court rejected the defense on the ground that for purposes of the conflicting statutes, only New York possessed significant contacts—both parties were New York domiciliaries and the automobile was insured there.[34] Further consideration by the court focused on the compensatory function of the New York legislation and the realization by the court that application of Michigan law would frustrate the legitimate policies of New York without any comparable advancement of Michigan interests.[35] *Tooker*, therefore, impliedly established the narrow requirement that at least one of the litigants be domiciled or the car insured there as a condition precedent to considerations of the situs state's interests. More significant, however, were the three rules propounded in Judge Fuld's concurring opinion[36] that are subject to uniform application in

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policies are significant, then this "true conflicts" problem usually is resolved by applying the law of the forum. The importance of policies is determined by examining the contacts, and to be relevant, the contact must bear a relationship to the policy with which the litigation deals. *See* B. CURRIE, *Conflict, Crisis and Confusion in New York*, in SELECTED ESSAYS ON THE CONFLICT OF LAWS 690, 729 (1963); R. LEFLAR, *supra* note 8, at § 97; Cavers, *supra* note 11, at 173-208. For cases following this test see Reich v. Purcell, 67 Cal. 2d 551, 432 P.2d 727, 63 Cal. Rptr. 31 (1967); Griffith v. United Air Lines, Inc., 416 Pa. 1, 203 A.2d 796 (1964); Wilcox v. Wilcox, 26 Wis. 2d 617, 133 N.W.2d 408 (1965).

32. 24 N.Y.2d 569, 249 N.E.2d 394, 301 N.Y.S.2d 519 (1969).

33. MICH. STAT. ANN. § 9.2101 (1968) provides recovery only for willful misconduct or gross negligence on the part of the driver.

34. *See* 24 N.Y.2d at 577, 249 N.E.2d at 398-99, 301 N.Y.S.2d at 525. The court indicated that the length of stay, origin of guest-host relationship and intent of parties are not significant policy considerations, and thus, *Dym* was expressly overruled.

35. The Michigan courts had suggested that the purpose behind their guest statute is protection of the vehicle owners. *Id.* at 577 n.1, 249 N.E.2d at 399 n.1, 301 N.Y.S.2d at 525 n.1.

36. "1. When the guest-passenger and the host-driver are domiciled in the same state, and the car is there registered, the law of that state should control and determine the standard of care which the host owes to his guest.

"2. When the driver's conduct occurred in the state of his domicile and that state does not cast him in liability for that conduct, he should not be held liable by reason of the fact that liability would be imposed upon him under the tort law of the state of the victim's domicile. Conversely, when the guest was injured in the state of his own domicile and its law permits recovery, the driver who has come into that state should not—in the absence of special circumstances—be permitted to interpose the law of the state as a defense.

"3. In other situations, when the passenger and the driver are domiciled in different states, the rule is necessarily less categorical. Normally, the applicable rule of decision will be that of the state where the accident occurred but not if it can be shown that displacing that normally applicable rule will advance the relevant substantive law purposes without impairing the smooth working of

similar factual situations in preference to Currie's more subjective governmental interest test.[37] The first two of these rules prescribe an automatic choice of law under specified circumstances; the third rule encompasses those situations not dealt with in the other two and creates a presumption in favor of the law of the accident's situs—a presumption which can be overcome only on a showing that another law would be more appropriate in light of the policies to be promoted. Thus, while the *Tooker* court ostensibly utilized the governmental interest test to achieve its desired result, *Tooker* constitutes the first decision to propose explicitly narrow rules that can facilitate application and promote more predictable results than previous methods.

The instant court noted initially that, contrary to earlier interpretations, the Ontario guest statute was designed to protect drivers from suits by ungrateful guests.[38] Focusing next on the principles of New York insurance law, the court recognized that insurance policies issued in New York on New York automobiles covered liability regardless of the place of the accident,[39] but reasoned that the insurance laws were not intended to impose liability on New York drivers when liability could not be established otherwise. The instant court declared, therefore, that it would not rely on the existence of New York's mandatory insurance law for its determination of the appropriate choice of law, when to do so would invariably impose liability, even though no New York policy was being advanced. The court was unable to find a legitimate New York interest that would justify it in ignoring Ontario law

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the multi-state system or producing great uncertainty for litigants." *Id.* at 585, 249 N.E.2d at 404, 301 N.Y.S.2d at 532-33. These rules have received favorable comment in Reese, *Chief Judge Fuld and Choice of Law*, 71 COLUM. L. REV. 548, 562 (1971).

37. Since 1966, 3 New York lower court cases using governmental interest analysis have resulted in inconsistent results. In each case the facts were the converse of *Babcock*—both parties were domiciliaries of, and the car insured in, Ontario while the accidents took place in New York. The Ontario guest statute was plcaded as a defense. In Kell v. Henderson, 26 App. Div. 2d 595, 270 N.Y.S.2d 552 (1966), the court held, contrary to the rationale of *Babcock*, that New York law applied. The court's holding, however, was confined to the procedural issue regarding the defendant's failure to raise his guest statute defense on time. *See* Rosenberg & Trautman, *Two Views on Kell v. Henderson*, 67 COLUM. L. REV. 459 (1967). In Arbuthnot v. Allbright, 35 App. Div. 2d 315, 316 N.Y.S.2d 391 (1970), the court reached what appears to be the correct result simply by applying Fuld's first rule, *see* note 36 *supra*, and held the Ontario statute was a good defense. Lastly, in Bray v. Cox, 39 App. Div. 2d 299, 333 N.Y.S.2d 783 (1972), the court disregarded the rule and held that New York's interest in highway safety and economic policy outweighed Ontario's policy interest, and thus, applied New York law. Since *Bray* was based on court decisions controlled by *Kell* and is contrary to *Arbuthnot* as well as Fuld's first rule, the decision will likely be overturned on appeal.

38. The court cited 2 articles as authority for this proposition. *See* Reese, *supra* note 36, at 558; Rosenberg & Trautman, *supra* note 37, at 469.

39. *See* N.Y. VEH. & TRAF. LAW § 311(4) (McKinney 1970).

to permit Ontario passengers to escape legislation that had been enacted to limit their conduct while automobile passengers in Ontario. To substantiate its findings and conclusions, the court recognized that its earlier decisions lacked both predictability and uniformity of result. In relation to these past deficiencies, the court reasoned that, although the traditional lex loci rule was unsatisfactorily broad, narrower and thus more equitable choice of law rules could be developed to achieve the desired predictability and uniformity. The court formally adopted the rules proposed by Judge Fuld in *Tooker*,[40] embracing the third rule specifically—that the law of the place of the tort will be applied unless to do otherwise would implement substantive policy of the forum state's statutes without sacrificing predictability or endangering interjurisdictional relations. In its application of Fuld's rule, the instant court reasoned that because the New York statute would expose New York domiciliaries to greater liability than that imposed upon Ontario drivers by the Ontario statute and would afford Ontario plaintiffs more substantial relief than would be available in the courts of their domiciles, adoption of the New York statute would encourage forum shopping, impair operation of the multistate system and produce uncertainty for litigants. Therefore, the court concluded that the substantive law purposes of New York would not be advanced through the application of its laws in the instant case and held that the foreign statute was applicable.[41] In a dissenting opinion, Judge Bergan declared that because the *Tooker* holding, which refused to apply the foreign guest statute, was based, not on the fact that a New York plaintiff was suing, but on the fact that the New York defendant was insured by a New York carrier, the instant court could not apply the Ontario guest statute on the basis of the distinction that an Ontario resident was the plaintiff.

The instant decision represents a significant advancement in conflicts law in the development of uniform rules that will result in more predictable results in future conflicts situations. The case reveals, however, two inherent problems that undoubtedly will plague the judiciary until narrower, more precise rules are developed: first, to the extent that rules are laid down in terms of undefined policy considerations, rather than precedential synthesis, there exists a substantial risk that the relevant policies will not be objectively identified; and secondly, even when the policies in question are subject to objective articulation, the neces-

40. *See* note 36 *supra*.

41. In a concurring opinion, Judge Breitel appeared to refer back to the center-of-gravity test by stating that plaintiff simply failed to establish that the relationship to New York was sufficient to overrule the rule of lex loci.

sarily subjective process of relating them to the concrete case before the court may lead to inconsistent results. Initially, for example, Judge Fuld's third rule as adopted by the instant court looks to a policy-consideration analysis for determining the proper result. This governmental interest analysis method necessarily requires that the courts ascertain the policies underlying the conflicting laws of the concerned jurisdictions. In the absence of meaningful legislative histories, however, this exercise becomes woefully conjectural, because the courts must determine what the laws were intended ultimately to achieve by interpreting the consequences of their operation. Guest statute cases offer ample evidence of the methodological dilemma. For example, having determined previously in *Babcock* that the Ontario guest statute was designed to proteet Ontario insurance companies from fraud, the instant court was able to conclude, without the benefit of legislative history, that a substantively identical statute was enacted to shield drivers from ungrateful guests.[42] This sort of inconsistent judicial interpretation is critical because the court's ultimate choice of law will depend on which of two or more inconsistent policy evaluations is adopted. Thus, in the factual context of the instant case, had the court chosen to reaffirm its prior constructions of Ontario public policy, New York law clearly would have applied, since the defendant-driver was insured there. Moreover, it could be argued that because the legislative history of the New York insurance law[43] explicitly expresses concern for nonresidents, as well as residents, who are injured by New York drivers, the policy underlying the New York law would have been advanced by its application. The burden on the court in assigning purposes to foreign legislation and in subsequently choosing between these purposes is therefore readily apparent. The ultimate consequence of efforts to meet the burden could be "judicial masquerading"[44] by which the court first reaches a decision and only then assigns an interpretation of policies to the conflicting laws to justify its predetermination. While such judicial techniques might sometimes produce the proper result, the development of a uniform, workable system of choice of law would be significantly impeded. Moreover, an examination of the large number of appeals and dissents in recent cases[45] reveals the growing judicial dissatisfaction with the subjective governmental interest approach. Nevertheless, in the process of

42. *Compare* Babcock v. Jackson, 12 N.Y.2d 473, 191 N.E.2d 279, 240 N.Y.S.2d 743 (1963), *with* Neumcier v. Kuehner, 31 N.Y.2d 121, 286 N.E.2d 454, 335 N.Y.S.2d 64 (1972).

43. *See* note 19 *supra*.

44. *See* Reese, *supra* note 36, at 559.

45. *See* cases cited notes 23, 30 & 42 *supra*.

developing workable rules, the problem of legislative policy ascertainment will continue to impede the courts' progress. A second problem with the instant case is that, even though several seemingly workable rules evolved from *Tooker*, the instant court may well have applied the third rule inaccurately, and therefore reached an incorrect result. Because the driver in the instant case was a domiciliary of New York and the car was insured there, the state's insurance law, recalling its explicit concern for compensating injured passengers,[46] should be of paramount importance in a determination of the choice of law, regardless of the purpose attached to the Ontario statute. If the fundamental purpose of the Ontario statute is construed to be the protection of Ontario insurance companies, its purpose obviously would not be frustrated if it is not applied when the driver is insured in the forum state. Thus, application of New York law, contrary to the holding by the instant court, would have been justified in the principal case to "advance the relevant substantive purposes" of the forum's law. Moreover, "the smooth working of the multi-state system" could be maintained and forum shopping inhibited were it clearly established that whenever the facts involve a New York driver whose car is insured there, New York law will apply. On the other hand, if the policy of Ontario's law is, as the instant court speculated, the protection of automobile owners from ungrateful guests, the question whether that protection was intended to extend to drivers who are domiciled and insured in other jurisdictions must be addressed. Because the broader interpretation of the statutory intent implies a questionable extension of legislative policy, especially since a conflicting policy has been explicitly stated by the New York legislature, the New York law could have been applied justifiably without impairment to the multistate system or creation of uncertainty for litigants. Therefore, the instant court's application of Fuld's third rule reveals the rule's susceptibility to inconsistent application—the very evil it was designed to eliminate. Judge Fuld's formulation perhaps should be refined to read: when the driver is neither domiciled nor his car insured in the jurisdiction employing a guest statute, that statute will not be applicable as a choice of law. This rule would be workable in its application to the New York guest statute cases decided since *Babcock*,[47] and it is reasonable to believe that the rule would apply to similar cases in all jurisdictions. Consistency, predictability, and equity in the conflicts area is therefore possible through further development of flexible but narrow rules. An

46. *See* note 19 *supra*.

47. *See* cases cited notes 23, 30, 37 & 42 *supra*.

ad hoc, case-by-case interest analysis alone will not be more equitable and will certainly be more unpredictable. It is therefore incumbent upon other courts to emulate and improve upon the instant court's efforts to develop narrower rules for deciding conflict of laws issues.

Constitutional Law—Fifth Amendment—Self-Incriminatory Information Supplied on a Federal Income Tax Return Cannot Be Used in a Criminal Prosecution Unrelated to Federal Income Tax Laws

Defendant was convicted in federal district court of conspiring to violate federal gambling statutes.[1] To prove an element of the conspiracy,[2] the Government offered into evidence information reported on defendant's federal income tax return. Defendant alleged that the use of the tax return as evidence violated his fifth amendment[3] privilege against self-incrimination. The Government contended that the voluntary submission of the information to the Internal Revenue Service constituted an implied waiver of the constitutional privilege. On appeal to the Ninth Circuit Court of Appeals, *held*, reversed. The use of incriminating information, supplied by a taxpayer in his federal income tax return, in a criminal prosecution unrelated to income tax laws violates the fifth amendment privilege against self-incrimination. *Garner v. United States*, No. 71-1219 (9th Cir., June 5, 1972).

The fifth amendment grants a privilege against compelled self-incrimination to every individual. Determining the applicability of the privilege to disclosures of information required by regulatory statutes and delineating the constitutionally permissible uses to which legitimately exacted information subsequently may be put are problems courts have encountered with increasing frequency.[4] Although it has not ruled on the specific question of whether information required by a governmental regulatory scheme may be used in unrelated criminal

1. Defendant was charged with conspiring to violate one or more of the following criminal statutes: 18 U.S.C. § 1084 (1970) (interstate transmission of bets or wagers by one in the business of betting or wagering); 18 U.S.C. § 1952 (1970) (use of interstate facility to distribute proceeds of unlawful activity); and 18 U.S.C. § 224 (1970) (bribery in sporting contests).

2. That element was to prove that defendant was engaged in the "business of betting or wagering" within the meaning of 18 U.S.C. § 1084 (1970).

3. The fifth amendment provides in part: "nor shall [any person] be compelled in any criminal case to be a witness against himself." U.S. CONST. amend. V.

4. *See* note 10 *infra*.

prosecutions, the Supreme Court has discussed the scope of the fifth amendment in relation to disclosure problems.[5] In *United States v. Sullivan*,[6] the Court held that a taxpayer whose income was largely derived from illegal liquor sales could not refuse to file an income tax return on fifth amendment grounds, although by way of dicta the Court indicated that the taxpayer could have refused to answer certain incriminatory questions in the return.[7] Subsequently, in *United States v. Lewis*,[8] the Court held that self-incriminatory information required by registration and occupational tax laws for gamblers was not privileged on fifth amendment grounds. The Court found that the statutes posed only an initial question to the gambler—whether to gamble at the cost of losing his constitutional privilege.[9] *Lewis* stated an implied waiver theory under which an individual who voluntarily disclosed self-incriminatory information was held to have waived his fifth amendment privilege. Once established, this theory formed the basis of lower court decisions denying the fifth amendment's application in disclosure cases.[10] The waiver concept was challenged in a series of cases beginning in 1965 with *Albertson v. Subversive Activities Control Board*,[11] in which members of the United States Communist Party successfully asserted their fifth amendment rights against a compulsory registration statute. Unlike *Sullivan*, in which the tax information required was neutral on its face and requested pursuant to a noncriminal regulatory function, the *Albertson* case concerned disclosure requirements that were asserted against a highly selective group of persons inherently suspect of criminal activities.[12] Looking at the persons against whom the statute was directed, and noting that the registration area of inquiry covered activities reached by criminal prohibitions,[13] the Court found that the statute served more a criminal than regulatory purpose and held

5. In Shapiro v. United States, 335 U.S. 1 (1948), the Court defined the applicability of the privilege when public records are involved, holding that the use of incriminatory information found on public records required to be kept by the individual did not violate the fifth amendment if the use of the information was related to the statutory purpose. Since the use of the information in the instant case was unrelated to the purpose of the statute that required the return to be filed, the court did not discuss the *Shapiro* doctrine.

6. 274 U.S. 259 (1927).

7. *Id.* at 263.

8. 348 U.S. 419 (1955).

9. *Id.* at 422-23.

10. Grimes v. United States, 379 F.2d 791 (5th Cir.), *cert. denied*, 389 U.S. 846 (1967); United States v. Zizzo, 338 F.2d 577 (7th Cir. 1964), *cert. denied*, 381 U.S. 915 (1965); Stillman v. United States, 177 F.2d 607 (9th Cir. 1949).

11. 382 U.S. 70 (1965).

12. *Id.* at 79.

13. *Id.*

the disclosure requirements unconstitutional. The Supreme Court continued this factual scrutiny of disclosure statutes in *Marchetti v. United States*,[14] a case involving registration requirements and occupational tax disclosures of gamblers. By adopting the *Albertson* approach and rejecting the waiver theory as unpersuasive,[15] the Court again focused on the nature of the statute and the persons to whom it was directed. Finding that the disclosure law aimed at a group inherently suspect of criminal activities and was essentially a criminal rather than regulatory law, the Court held that it violated the fifth amendment.[16] Although these cases did much to clarify the privilege under statutes requiring disclosure of self-incriminatory information from criminally suspect groups, the Court had not yet dealt with a purely regulatory statute directed to the public at large. That challenge came in a 1971 case, *California v. Byers*.[17] Byers, involved in an auto accident, was charged with failing to stop and give his name and address as required by state law. He argued that furnishing the required information would have been self-incriminatory, and that his refusal was therefore protected by the fifth amendment. The California Supreme Court, although it found the fifth amendment applicable, saved the statute in question by holding that the information could be required, but could not be used for criminal prosecution. By a five-to-four vote, the Supreme Court reversed and held that the privilege was not applicable even though the information in question might have been available for use in a prosecution arising out of the accident—a use unrelated to the regulatory purpose of the disclosure statute.[18] Four members of the Court,[19] emphasizing the regulatory, noncriminal purpose of the statute, balanced the governmental interest in obtaining the information against the individual's rights and held that the privilege should not apply. Four other members[20] found a clear and substantial risk of self-incrimination. Mr. Justice Harlan, casting the deciding vote, admitted that a real risk of self-incrimination existed, but held that this risk alone was not sufficient to extend the protection of the amendment.[21] Thus, although five Justices found that the regula-

14. 390 U.S. 39 (1968).

15. *Id.* at 51.

16. *Accord*, Grosso v. United States, 390 U.S. 62 (1968); Haynes v. United States, 390 U.S. 85 (1968).

17. 402 U.S. 424 (1971).

18. The recognized purpose of the law was to provide indentification procedures and information for the efficient handling of civil liability claims arising from auto accidents. *Id.* at 430.

19. The 4 members included Chief Justice Burger and Justices Stewart, White and Blackmun.

20. The 4 members included Justices Black, Douglas, Brennan and Marshall.

21. 402 U.S. at 439.

tory statute imposed a real risk of self-incrimination, the Court refused to extend the privilege either to prevent prosecutorial use of the information or to invalidate its compelled disclosure.

In the instant case, the court initially noted that *Sullivan* and subsequent disclosure cases decided by the Supreme Court on fifth amendment challenges left open the applicability of the amendment to nontax-related prosecutions using incriminatory information supplied on federal income tax returns. The court then distinguished the *Albertson-Marchetti* line of decisions[22] from the instant case, finding that those decisions dealt with statutes designed to elicit information from individuals inherently suspect of criminal activities.[23] The court next addressed itself to the Government's contention that defendant's voluntary reporting of the information constituted an implied waiver of his constitutional privilege. Relying on *Marchetti*'s discussion of the implied waiver theory,[24] the court found that the concept has no relevance when constitutional rights are at issue. The court then examined the *Byers* decision and found that the question of the uses to which compelled information might be put had not been at issue in that case. In the court's view, *Byers* held merely that the filing of information required under a regulatory statute itself was not incriminating. Finding that prior Supreme Court decisions did not control the issue, the court moved to an examination of the context of the disclosures. Noting that the disclosures were compelled under federal law,[25] the court found two questions presented—first, the constitutionality of the compelled disclosures, and secondly, the constitutionality of the use made by the Government of the information already disclosed. After determining that resolution of the first question should not predetermine the second issue, the court concluded that the compelled disclosure was constitutional, because the purpose of the disclosure was not inherently violative of individual rights. On the second issue, however, the court held that the combination of compelled disclosure and unrelated prosecutorial use amounted to a constitutionally impermissible abrogation of the defendant's privilege against self-incrimination.

In the instant decision, the Ninth Circuit has significantly expanded the scope of the fifth amendment's protection. To reach the conclusion

22. *See* note 16 *supra.*

23. The court specifically noted that the *Albertson* and *Marchetti* decisions distinguished *Sullivan* on the ground that the questions on an income tax return are not directed at an area of criminal activity, but are neutral on their face.

24. 390 U.S. at 51-52.

25. INT. REV. CODE OF 1954, § 7203 (crime to fail to file any return, pay any tax or supply any information); INT. REV. CODE OF 1954, § 7206 (crime to file false return).

that information supplied on a tax return cannot be used in an unrelated criminal prosecution, the court necessarily made two intermediate findings. Following the Supreme Court's holding in *Marchetti*, it first rejected the waiver theory, the prior law in the eircuit.[26] Secondly, it distinguished the instant case from *Byers*, which had presented a similar problem and thus was arguably controlling. Like the *Byers* decision, the instant case addressed the unrelated prosecutorial use of information required by a regulatory statute.[27] Unlike the *Byers* decision, however, the instant case involved an actual attempt by the Government to use previously compelled information in a criminal prosecution. In *Byers* the constitutional issues were presented in the context of a prosecution for failure to disclose the required information, and the issue was thus whether disclosure could be compelled under a regulatory statute. The question of subsequent use arose only because the California Supreme Court, by validating the disclosure requirement only to the extent a use restriction was imposed, held in essence that the risk of a subsequent prosecutorial use would otherwise have allowed a claim of fifth amendment privilege. In reversing the California decision, the Supreme Court's holding therefore was necessarily limited to the proposition that the risk of subsequent criminal prosecution does not justify the claim of fifth amendment privilege when information is required under a regulatory statute. Although the instant court thus found a valid technical distinction between *Byers* and the instant case, the question remains whether that distinction is sound in light of the generally inhospitable reception accorded the theory of use restrictions by the Supreme Court in *Byers*. In voiding the use restriction imposed by the California Supreme Court, the *Byers* Court balanced the interest of the state in obtaining the information against the individual's interest in withholding it,[28] and concluded that since the purpose of the disclosure requirement was regulatory and essentially noncriminal, a use restriction on validly compelled information would be detrimental to the state's interests.[29] The Ninth Circuit, however, recognized that the Government's interest

26. *See* Stillman v. United States, 177 F.2d 607, 617 (9th Cir. 1949).

27. *See* note 18 *supra*.

28. Mr. Justice Harlan noted: "The question whether some sort of immunity is required as a condition of compelled self-reporting inescapably requires an evaluation of the assertedly noncriminal governmental purpose in securing the information, the necessity for self-reporting as a means of securing the information, and the nature of the disclosures required." 402 U.S. at 454. *See generally* Friendly, *The Fifth Amendment Tomorrow: The Case for Constitutional Change*, 37 U. CIN. L. REV. 671, 720 (1968); Mansfield, *The Albertson Case: Conflict Between the Privilege Against Self-Inerimination and the Government's Need for Information*, 1966 SUP. CT. REV. 103, 160.

29. 402 U.S. at 427, 443.

in initially obtaining the information—the interest weighed by the court in *Byers*—is not the same as the Government's interest in subsequent prosecutorial use of that information. The governmental interest in requiring disclosure is broad and necessary to effective performance of the state's regulatory function; the governmental interest in prosecutorial use, however, is confined to that of easing the burden of obtaining criminal convictions. Similarly, the nature of the individual's interest differs in the two situations. The difference is between a risk of self-incrimination in the first instance and actual self-incrimination in the second. Thus the instant court observed that finding compelled disclosures valid should not ipso facto mean that courts could then ignore the self-incriminatory nature of the information and find its prosecutorial use also constitutionally valid. It therefore determined that the need for balancing the governmental requirement for information against the individual's countervailing interest applies only to the question of compelling disclosure, not to the question of an unrelated subsequent use of the information. This determination seems well founded; whatever the outcome of a balancing test when only the risk of self-incrimination exists, the fifth amendment's unqualified language apparently proscribes any balancing at all when the question becomes the actual use of compelled self-incriminatory information. In terms of practical application, the decision implies that the Government should not be allowed to circumvent the fifth amendment by using a regulatory statute to obtain criminal evidence to which it would not otherwise have access. If faced squarely with the issue, the Supreme Court might find the *Byers* balancing of interests controlling and allow use of the information.[30] But it should not overlook the dual nature of the questions presented, nor should it ignore the Ninth Circuit's rationale in rejecting the *Byers* approach. To compel disclosure under *Byers* and then to allow prosecutorial use of the information requires the individual to subject himself to criminal prosecution for nondisclosure in order to maintain his constitutional privilege against self-incrimination.

Constitutional Law—First Amendment—Section 15 of the Hatch Act Is Impermissihly Vague and Overhroad in Violation of the First Amendment

Plaintiffs, the National Association of Letter Carriers and six fed-

30. The dissent in the instant case held that *Byers* was controlling on the question of unrelated prosecutorial use of validly compelled information.

eral employees,[1] initiated a class action on behalf of all federal employees covered by section 9(a)[2] of the Hatch Political Activities Act of 1939,[3] which forbids covered employees to take an active part in partisan political activities. Plaintiffs sought relief both in the form of a judgment declaring section 15[4] of the Act unconstitutional and an injunction prohibiting its enforcement by defendants.[5] Plaintiffs contended that section 15, which defines prohibited political activity by

1. The federal employee plaintiffs included: 2 letter carriers in the United States Postal Service, who were also members of the National Association of Letter Carriers; an officer in the Internal Revenue Service; an assistant regional field director of the United States Postal Service, who was also a member of the Letter Carriers Union; a systems analyst in the National Library of Medicine and aspirant to the position of precinct committeewoman in the Arlington County Democratic Committee; and the director of a branch of the National Center for Health Services Research and Development and aspirant to the Republican nomination to the Maryland State Senate. Originally, 6 local Democratic and Republican committees joined in the action as plaintiffs, seeking to challenge the constitutionality of § 12 of the Hatch Act, which proscribes political activity by employees in state programs financed in whole or in part by the federal government. 5 U.S.C. § 1502(a)(3) (1970). The court, however, determined that the membership in these committees was not sufficiently broadly based to insure adequate representation of the entire class of state employees.

2. Hatch Political Activities Act § 9(a), 5 U.S.C. §§ 7324(a),(c),(d) (1970). Section 9(a) applies generally to any "employee in an Executive agency or an individual employed by the government of the District of Columbia." 5 U.S.C. § 7324(a) (1970). The pre-1940 Commission rulings incorporated by § 15 and the summary of those rulings contained in *United States Civil Service Commission, Form 1236* (1950), however, provide that disciplinary action will be taken against employees who seek to circumvent the statute by carrying on partisan political activities through members of their family. *See* note 11 *infra*. Specifically excluded from this category of employees are: "(1) an employee paid from the appropriation for the office of the President; (2) the head or assistant head of an Executive department or military department; (3) an employee appointed by the President, by and with the advice and consent of the Senate, who determines policies to be pursued by the United States in its relations with foreign powers or in the nationwide administration of Federal Laws; (4) the Commissioners of the District of Columbia; or (5) the Recorder of Deeds of the District of Columbia." 5 U.S.C. §§ 7324(d)(1)-(5) (1970).

3. The Act was passed in 2 parts: the first, Act of Aug. 2, 1939, ch. 410, 53 Stat. 1147, which covers federal employees, is codified in 5 U.S.C. §§ 7321-27 (1970); the second, Act of July 19, 1940, ch. 640, 54 Stat. 767, which covers state and local personnel principally employed in projects funded by the federal government, is codified in 5 U.S.C. §§ 1501-08 (1970). The constitutionality of the second part of the Act was upheld by the Supreme Court in Oklahoma v. United States Civil Serv. Comm'n., 330 U.S. 127 (1947).

4. Hatch Political Activities Act § 15, ch. 640, § 15, 54 Stat. 771 (1940) appears in amended form in both 5 U.S.C. § 1501(5) (1970) and 5 U.S.C. § 7324(a) (1970). *See* note 10 *infra*.

5. Defendants were the Civil Service Commission and the Secretary of Health, Education and Welfare. The Commissioner of the Civil Service is charged with enforcing the provisions of the Act with respect to covered state and local employees and federal employees in the competitive service only. The power to discipline other federal employees rests with the employing agency. *See* 3 THE COMMISSION ON POLITICAL ACTIVITY OF GOVERNMENT PERSONNEL, A COMMISSION REPORT 22 (1968) [hereinafter cited as COMMISSION REPORT]. The penalty for violation of the Act is either dismissal from employment or, by unanimous vote of the Commission, 30 days' suspension without pay. 5 U.S.C. § 7325 (1970).

government employees, is both vague and overbroad and therefore impermissibly restrains their first amendment rights of political expression. Defendants argued, first, that men of common intelligence know what is comprehendcd by active and partisan political conduct, and secondly, that a prior Supreme Court determination of the constitutionality of the statute was controlling. A threc-judge federal court for the District of Columbia *held*, judgment for plaintiffs. Section 15 of the Hatch Act is impermissibly vague and overbroad in violation of the first amendment. *National Association of Letter Carriers v. United States Civil Service Commission*, 346 F. Supp. 578 (D.D.C. 1972), *appeal docketed*, No. 634, U.S., Oct. 31, 1972.

Prior to the enactment of the Hatch Political Activities Act of 1939, Civil Service Rule I prohibited "competitive classificd employees" from engaging actively in political affairs.[6] The rule did not apply, however, to the growing number of political appointees who administered the programs established during the New Deal administration.[7] In response to cases of misuse of federal relief funds by these political appointees during the 1938 primary election compaigns,[8] Congress passed the Hatch Act, which extended the prohibition of Rule I, with certain exceptions, to all employces serving in the executive branch of

6. For the current version of Rule I see 5 C.F.R. § 4.1 (1972). The practice of restricting the political activities of public employees often has been resorted to as a means of frustrating the spoils system. *See generally* Mosher, *Government Employees Under the Hatch Act*, 22 N.Y.U.L. REV. 233, 253-55 (1947); Rose, *A Critical Look at the Hatch Act*, 75 HARV. L. REV. 510, 510-13 (1962). As early as 1801, President Thomas Jefferson directed his executive department heads to inform their subordinates that it was "deemed improper for officers depending on the Executive of the Union to attempt to control or influence the free exercise of the elective right." 10 J. RICHARDSON, MESSAGES AND PAPERS OF THE PRESIDENTS, 1789-1897, at 98 (1897). Similar directives were issued by Presidents Harrison and Roosevelt. W. FOULKE, ROOSEVELT AND THE SPOILSMEN 52 (1925). In 1841 President Tyler issued an order prohibiting both political assessments and political activity by federal employees. 4 J. RICHARDSON, *supra* at 52. Subsequently, Congress passed the Civil Service Act, which established the Civil Service Commission and authorized the President to promulgate rules prohibiting any government officer from using "his official authority or influence to coerce the political action of any person or body." Civil Service Act of 1883, ch. 27, 22 Stat. 403, 404 (codified in scattered sections of 5 U.S.C.). Although the Civil Service Act outlawed coercive conduct, later legislation proscribed the voluntary political activity of the employee. President Theodore Roosevelt, a former Civil Service Commissioner, added the following language to Civil Service Rule I: "Persons who by the provisions of these Rules are in the competitive classified service, while retaining the right to vote as they please and to express *privately* their opinions on all political subjects, shall take no active part in political management or political campaigns." Exec. Order No. 642 (emphasis added). With the omission of the word "privately," Congress adopted substantially the same language in § 9(a) of the Hatch Act. *See* note 10 *infra*. Rule I was reworded at the same time to conform to the statutory language. *See* Exec. Order No. 8705, 3 C.F.R. 907 (1943).

7. *See* 1 COMMISSION REPORT, *supra* note 5, at 9-10.

8. 3 COMMISSION REPORT, *supra* note 5, at 259.

the federal government.[9] The operative provision of the Act, section 9(a), prohibits active participation by federal employees in partisan political activities,[10] which, by virtue of section 15,[11] includes those acts determined by the Civil Service Commission to be prohibited under Rule I, such as serving as a delegate to a political party convention.[12] At the same time, federal employees retain the right to vote as they choose and to express their views on political matters.[13] In a case in which the constitutional validity of section 9(a) was challenged, *United Public Workers v. Mitchell*,[14] the Supreme Court upheld the provision, characterizing it as a permissible exercise of congressional authority to protect the integrity of the public service.[15] The appellant in *Mitchell*, a machine operator in the Philadelphia mint who had violated the Act by serving as a party committeeman and as a poll watcher, argued that enforcement of section 9(a) had infringed his first amendment freedom to engage in political affairs. The Court admitted that the challenged section produced a "measure of interference"[16] with the appellant's first amendment right, but explained that the right to engage in political affairs is not absolute and it may be balanced against the public interest that is promoted by an efficient civil service. Although it conceded that

9. *See* note 2 *supra*. No government agency created since 1938 has been exempt from the Act. 1 COMMISSION REPORT, *supra* note 5, at 10 n.14.

10. Section 9(a) provides in pertinent part that a covered employee may not "(1) use his official authority or influence for the purpose of interfering with or affecting the result of an election; or (2) take an active part in political management or in political campaigns." 5 U.S.C. §§ 7324(a)(1), (2) (1970). Section 18 of the Act qualifies § 9 to the extent of allowing government employees to engage in *nonpartisan* political activities. 5 U.S.C. §§ 1503, 7326 (1970).

11. Section 15 provides: "For the purpose of this subsection, the phrase 'an active part in political management or in political campaigns' means those acts of political management or political campaigning which were prohibited on the part of employees in the competitive service before July 19, 1940, by determinations of the Civil Service Commission under the rules prescribed by the President." 5 U.S.C. § 7324(a) (1970). The section thereby incorporates by reference approximately 3,000 pre-1940 rulings. *See* 1 COMMISSION REPORT, *supra* note 5, at 2. At the time § 15 was enacted, however, Congress was unaware of the specific contents of the incorporated rulings. *See* 86 CONG. REC. 2947 (1940); Rose, note 6 *supra*. The Civil Service Commission published periodically, in a booklet entitled "Form 1236," a summary of activities found to violate Rule I. Since 1951, Form 1236 has been designated "Pamphlet 20."

12. 5 C.F.R. § 733.122(11) (1970).

13. 5 U.S.C. § 7324(b) (1970).

14. 330 U.S. 75 (1946) (4-3 decision).

15. In 2 pre-Hatch Act cases, both cited by the majority in *Mitchell*, the Court upheld the constitutionality of legislation prohibiting money contributions by government employees, solicited by or made to other employees for political purposes. United States v. Wurzbach, 280 U.S. 396 (1930); *Ex parte* Curtis, 106 U.S. 371 (1882). It has been argued, however, that these cases in fact dictate a result contrary to that reached in *Mitchell*. *See* 330 U.S. at 112 (Black, J., dissenting); Nelson, *Public Employees and the Right to Engage in Political Activity*, 9 VAND. L. REV. 27, 37-38 (1955).

16. 330 U.S. at 95.

political neutrality is not indispensable to a workable merit system, the majority accorded substantial weight to the legislative determination that such restrictions are desirable.[17] In a dissenting opinion, Mr. Justice Black characterized the statute as both vague and overbroad and contended that it unnecessarily deprived the public of the political participation of a large segment of the population.[18] Mr. Justice Douglas, in a separate dissenting opinion, cautioned that Congress should be required to demonstrate a "clear and present danger" to the civil service system before being permitted to impose prior restraints on first amendment activities.[19] He suggested that a distinction be made between federal administrative personnel and industrial workers and that the political conduct of only the former class should be regulated.[20] Continuing justification[21] for restrictions such as those upheld in *Mitchell* has been premised primarily on the asserted need of public employees for the protection the Act affords against the political coercion of their superiors.[22] Proponents of the Act argue that the political inactivity of government employees is a necessary condition for this protection.[23] Moreover, they contend that the Hatch Act, through its prohibition of political involvement, prevents government employees from becoming the means by which the incumbent party can perpetuate its political domination.[24]

17. *Id.* at 102. The Court formulated the following standard: "For regulation of employees it is not necessary that the act regulated be anything more than an act reasonably deemed by Congress to interfere with the efficiency of the public service." *Id.* at 101.

18. *Id.* at 106-07 (Black, J., dissenting). Justice Black found a "hopeless contradiction" existing between the right of employees to express political opinions, *see* note 12 *supra* and accompanying text, and the many restrictions on the right contained in the incorporated rulings, *see* note 11 *supra*. 330 U.S. at 107-08. The court in the instant case adopted this same rationale in finding § 15 vague and overbroad. *See* note 38 *infra* and accompanying text.

19. 330.U.S. at 124 (Douglas, J., dissenting).

20. *Id.* at 120-26. In answer to this suggestion, the majority stated: "Whatever differences there may be between administrative employees of the government and industrial workers in its employ are differences in detail so far as the constitutional power under review is concerned. Whether there are such differences and what weight to attach to them, are all matters of detail for Congress." *Id.* at 102.

21. Although *Mitchell* was widely criticized for its deferential treatment of legislation curtailing fundamental freedoms, it has not been overruled. *See, e.g.*, Bruff, *Unconstitutional Conditions Upon Public Employment: New Departures in the Protection of First Amendment Rights*, 21 HASTINGS L.J. 129 (1969); Mosher, note 6 *supra*; Sbestack, *The Public Employee and His Government: Conditions and Disabilities of Public Employment*, 8 VAND. L. REV. 816 (1955); Wormuth, *The Hatch Act Cases*, 1 W. POL. Q. 163 (1948); Comment, *The Hatch Act—A Constitutional Restraint of Freedom?*, 33 ALBANY L. REV. 345 (1969).

22. 1 COMMISSION REPORT, *supra* note 5, at 3.

23. Representative Ramspeck stated during the House debates on § 9(a): "We have to remove the rank and file employees from being pawns in the political game." 84 CONG. REC. 9616 (July 20, 1939).

24. 3 COMMISSION REPORT, *supra* note 5, at 13 (statement of John W. Macy, Jr., Chairman, U.S. Civil Service Commission).

Finally, proponents of the Act maintain that political neutrality is essential to public confidence in the impartiality and efficiency of the civil service.[25] Despite these numerous policy justifications for the Act, however, significant developments in the area of first amendment protection perhaps have diminished the persuasiveness of *Mitchell* as authority to sustain the constitutionality of the Act. The Court has expressly rejected the notion, which prevailed at the time *Mitchell* was decided, that public employment is a privilege that can be conditioned upon the forfeiture of first amendment liberties.[26] In addition, the Court has required the government to demonstrate that the condition imposed advances a compelling state interest.[27] Furthermore, the Court has subjected legislation impinging upon first amendment rights to a stricter standard of review[28]

25. *Id.* at 14; *See* Esman, *The Hatch Act—A Reappraisal*, 60 YALE L.J. 986, 994-96 (1951); Nelson, *supra* note 15, at 42-45.

26. *See* Davis v. Massachusetts, 167 U.S. 43, 48 (1897); Crenshaw v. United States, 134 U.S. 99 (1890). The classic statement of this doctrine was made by Chief Justice Holmes while sitting on the Massachusetts Supreme Court: "The petitioner may have a constitutional right to talk politics, but he has no constitutional right to be a policeman. There are few employments for hire in which the servant does not agree to suspend his constitutional rights of free speech as well as of idleness by the implied terms of his contract. The servant cannot complain, as he takes the employment on the terms which are offered him." McAuliffe v. Mayor, 155 Mass. 216, 220, 29 N.E. 517, 517-18 (1892). It has been argued recently that a public employee bas a legally protectable property interest in his employment that cannot be made conditional or withheld without due process of law. *See* Reich, *The New Property*, 73 YALE L.J. 733, 764-72 (1964). *See also* Greene v. McElroy, 360 U.S. 474 (1959).

27. In a series of loyalty oath cases, the Supreme Court invalidated conditions on state employment as patently arbitrary. The Court held in Wieman v. Updegraff, 344 U.S. 183 (1952), that disqualification for state employment on the grounds of membership in a subversive organization, regardless of knowledge of its purposes, is an unconstitutional restraint on the freedom of association. The Court expanded the associational freedom in Elfbrandt v. Russell, 384 U.S. 11 (1966), by ruling that even knowledge of the illegal purposes of the organization is an insufficient reason for withholding employment. In Keyishian v. Board of Regents, 385 U.S. 589 (1967), the Court stated that a prospective employee must have a specific intent to further the illegal purposes of the subversive organization before he can be denied employment. *Accord*, Pickering v. Board of Educ., 391 U.S. 563 (1968); Baggett v. Bullitt, 377 U.S. 360 (1964); Cramp v. Board of Pub. Instruction, 368 U.S. 278 (1961); Shelton v. Tucker, 364 U.S. 479 (1960). *See generally Developments in the Law—Academic Freedom*, 81 HARV. L. REV. 1045 (1968). For a discussion of the theory of unconstitutional conditions on employment see Van Alstyne, *The Demise of the Right—Privilege Distinction in Constitutional Law*, 81 HARV. L. REV. 1439 (1968); Note, *Another Look at Unconstitutional Conditions*, 117 U. PA. L. REV. 144 (1968).

28. *See, e.g.*, Coates v. City of Cincinnati, 402 U.S. 611 (1971); United States v. Robel, 389 U.S. 258 (1967); Keyishian v. Board of Regents, 385 U.S. 589 (1967); Mills v. Alabama, 384 U.S. 214 (1966); Elfbrandt v. Russell, 384 U.S. 11 (1966); Dombrowski v. Pfister, 380 U.S. 479 (1965); Sherbert v. Verner, 374 U.S. 398 (1963); NAACP v. Button, 371 U.S. 415 (1963); Cramp v. Board of Pub. Instruction, 368 U.S. 278 (1961); Shelton v. Tucker, 364 U.S. 479 (1960); Wieman v. Updegraff, 344 U.S. 183 (1952). *See generally* Note, *The First Amendment Overbreadth Doctrine*, 83 HARV. L. REV. 844 (1970); Note, *Less Drastic Means and the First Amendment*, 78 YALE L.J. 464 (1969).

than the simple reasonableness test employed in *Mitchell*.[29] The government must prove not only that the otherwise privileged first amendment conduct that is sought to be regulated constitutes a "clear and present danger" to a substantial state interest,[30] but also that there are no "less drastic means" available for protection of that interest.[31] Moreover, the Court has subjected such inhibiting legislation to careful scrutiny for vagueness[32] and overbreadth.[33] When constitutional infirmities are found to exist, the Court has declared the statute void on its face, irrespective of its application in the particular case, because of its "chilling effect" on privileged conduct.[34] Finally, the Supreme Court on several occasions has emphasized that the political freedom of the individual is the basis of a democratic society[35] and that discussion of public issues should therefore be uninhibited.[36]

Initially, the instant court distinguished the *Mitchell* decision from the instant controversy on the ground that the Supreme Court in *Mitchell* merely had endorsed the objectives of section 9(a) of the Act without passing on the validity of the means employed in section 15 to achieve them. The court then explained that the Commission rulings

29. *See* note 17 *supra*. Commentators have differed regarding the precise test used by the *Mitchell* court. *Compare* Wormuth, note 21 *supra* (interest-balancing test) *with* Heady, *The Hatch Act Decisions*, 41 AM. POL. SCI. REV. 687 (1946) (rational basis test).

30. Sweezy v. New Hampshire, 354 U.S. 234 (1957); Cantwell v. Connecticut, 310 U.S. 296 (1940); Thornhill v. Alabama, 310 U.S. 88 (1940).

31. United States v. Robel, 389 U.S. 258 (1967); Aptheker v. Secretary of State, 378 U.S. 500 (1964); Sherbert v. Verner, 374 U.S. 398 (1963); Mancuso v. Taft, 341 F. Supp. 574 (D.R.I. 1972). For a discussion of this doctrine see Note, *Less Drastic Means and the First Amdnement*, 78 YALE L.J. 464 (1969).

32. "[A] statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process of law." Connally v. General Constr. Co., 269 U.S. 385, 391 (1926). For a discussion of vagueness see Note, *The Void-For-Vagueness Doctrine in the Supreme Court*, 109 U. PA. L. REV. 67 (1960).

33. *See generally* Note, *The First Amendment Overbreadth Doctrine*, 83 HARV. L. REV. 844 (1970).

34. *See* cases cited note 21 *supra*. Several state courts have employed the first amendment doctrines of vagueness, overbreadth, and less drastic means in ruling public employee disabling statutes similar to the Hatch Act unconstitutional. *See* Bagley v. Washington Township Hosp. Dist., 65 Cal. 2d 499, 421 P.2d 409, 55 Cal. Rptr. 401 (1966); DeStefano v. Wilson, 96 N.J. Super. 592, 233 A.2d 682 (1967); Minielly v. State, 242 Ore. 490, 411 P.2d 69 (1966).

35. *See* Sweezy v. New Hampshire, 354 U.S. 234 (1957).

36. In New York Times Co. v. Sullivan, 376 U.S. 254, 270 (1964), the Court stated that the first amendment reflects "a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open." *See also* Bond v. Floyd, 385 U.S. 116 (1966); Mills v. Alabama, 384 U.S. 214 (1966); Garrison v. Louisiana, 379 U.S. 64 (1964). For the view that the Hatch Act is unconstitutional under the principles set forth in *Garrison* and *Sullivan* see Bruff, *supra* note 21, at 154-58.

which were incorporated by section 15[37] provide an unsatisfactory and confusing definition of partisan political conduct, noting, for example, that the pre-1940 prohibition of the public expression of political opinions conflicts with the right to such expression that is embodied in section 9(a).[38] Although it recognized that the Commission had ignored the prior contradictory rulings,[39] the court expressed fear that the basic inconsistency would engender uncertainty and confusion among employees covered by the Act. Moreover, the court pointed out that the Commission has interpreted section 9(a) as a proscription against political opinions that are uttered with an intent to influence others.[40] Because all political speech may appear calculated to influence, the majority reasoned that the Act is "capable of a sweeping and uneven application."[41] Rejecting defendants' contention that men of common intelligence can understand what activities are forbidden by the statute, the court observed that even those responsible for enforcing its provisions have expressed doubt concerning the proper scope of the Act.[42] Finally, the majority predicted that conscientious employees would rather forego opportunities for political involvement, even though not specifically disallowed by the Act, than risk dismissal from their positions. This "chilling effect," the court warned, not only is unacceptable under the first amendment but also is contrary to the principle that political speech is the essence of self-government.[43] Assuming *arguendo*, as defendants asserted, that *Mitchell* was controlling, the court observed that the "less drastic means"[44] test enunciated in subsequent Supreme Court deci-

37. *See* note 11 *supra.*

38. The court suggested that one explanation for Congress' incorporating rulings inconsistent with § 9(a) was its unawareness of the specific contents of these rulings. *See* note 11 *supra.*

39. *See, e.g., In re* Turner, 1 POL. ACTIVITIES REP. [Federal] 614 (1951).

40. *See, e.g., In re* Watson, 1 POL. ACTIVITIES REP. [Federal] 370 (1948) (expression of opinions calculated to influence the actions of voters constitutes "campaigning" within the meaning of the Act). *Compare* U.S. CIVIL SERV. COMM'N. PAMPHLET No. 20 at 13 (1959) (employee may not write for publication any letter "soliciting" votes for a partisan candidate or party) *with* Wilson v. United States Civil Serv. Comm'n. 136 F. Supp. 104 (D.D.C. 1955) (writing a letter to a local paper criticizing political candidate does not fall within § 9 definition of "active participation"). *See generally* 1971 POL. ACTIVITIES REP. [Digest] No. 268-70 (Commission rulings).

41. 346 F. Supp. at 583.

42. *See* Statement by John W. Macy, Jr., Chairman of the United States Civil Service Commission, before the Commission on Political Activity of Government Personnel, May 15, 1967 3 COMMISSION REPORT, *supra* note 5, at 13. For a statement of the "common intelligence" standard of vagueness, see note 32 *supra.*

43. The court apparently was quoting from *Garrison v. Louisiana*, 379 U.S. 64 (1964): "[S]peech concerning public affairs is more than self-expression; it is the essence of self-government." *Id.* at 74-75; *see* note 35 *supra.*

44. *See* note 28 *supra.*

sions[45] has displaced the rational basis test used in *Mitchell*. The court therefore held that section 15 of the Hatch Political Activities Act is unconstitutional on its face for vagueness and overbreadth.[46]

Although the instant court effectively invoked the first amendment doctrines of vagueness and overbreadth in its holding that section 15 is void on its face, the court impliedly affirmed the general prohibition against partisan political activity contained in section 9(a). The instant decision is therefore of limited importance to government employees since it leaves to Congress the option to enact a more precisely drawn statute containing similar restrictions. On the basis of the Supreme Court's post-*Mitchell* decisions regarding public employee disabilities, however, it is difficult to imagine that section 9(a) would survive a frontal constitutional attack. The policy arguments traditionally offered in support of section 9(a) fail to justify the continuance of the political restraints. The asserted justifications proceed on the basis of several assumptions, the first of which is that the present need for wholesale restraints on political conduct is as great as it was when the statute was enacted. According to the report of the President's Commission on Political Activity of Government Personnel, however, greater emphasis on competitiveness and merit in the civil service has paralleled the increased size and responsibility of the federal government and has eliminated the patronage schemes that existed in 1939 when the statute was enacted.[47] That the Hatch Act addresses largely historical evils hardly justifies its denial to government employees of the full incidents of citizenship. A second assumption underlying the view that favors retention of the Act is that only by withdrawing government employees from the political arena can they be protected from the political coercion of their superiors. While it is no doubt true that the political neutralization of government workers lessens their potential utility as political pawns and thus reduces the likelihood of attempted manipulation by their superiors, it is probable that the Act's criminal sanctions[48] against coer-

45. *See* cases cited note 30 *supra*.

46. In a dissenting opinion, Circuit Judge Mackinnon argued, *inter alia*, that the Act is neither vague, because it gives public employees sufficient notice, nor overbroad, because Congress did not intend to give effect to those prior Commission rulings that conflicted with the provisions of § 9(a). Rather, the dissenting judge argued, Congress intended for the incorporated rulings merely to serve as an upper limit on subsequent interpretations of the Act.

47. 1 COMMISSION REPORT, *supra* note 5, at 10.

48. The Hatch Act makes it unlawful for government employees to give or receive anything of value from other employees for political services, 5 U.S.C. § 7323 (1970); to offer a promise of employment or other benefit to employees for political activities, 18 U.S.C. § 600 (1970) (originally enacted as § 3 of the Hatch Act); or to deprive government personnel of employment or other benefits due to their support of or opposition to any candidate or political party in any

cion would alone suffice to protect employees from harassment. Thirdly, proponents of the Act assume that public employees necessarily would succumb to political pressure and therefore could be molded into a massive "power bloc"[49] on election day. It is just as likely, however, that public servants free to participate in partisan politics would be more vocal about the abuses within the civil service. Moreover,the majority of government employees are members of large unions[50] whose interests may not comport with the policies of the party in office. The unions would be an effective force in resisting attempts to mobilize employees during political campaigns. In restricting, not the substance of political expression, but the right to express oneself, the Hatch Act precludes the government employee unions from effectively utilizing the democratic process to promote their own interests. A final assumption made that is implicit to the position of the proponents of the Act is that political activity by government personnel would compromise their impartiality in the eyes of the public.[51] Most government workers are employed in nonsupervisory positions, however, and it is doubtful whether the public would experience any concern over the fact that a clerk or mechanic is an active Republican or Democrat. The public would certainly be more inclined to look for possible political motives in the actions of policy making employees who are largely exempted from the coverage of the Act. Accordingly, Congress might consider patterning legislation after the less-restrictive British approach, which disallows political activity only by those in the upper echelons of the public service.[52] Under that system, almost two-thirds of those in the British service are free to participate actively in political affairs.[53] Thus, the availability of less

election, 18 U.S.C. § 601 (1970) (originally enacted as § 4 of the Hatch Act). Furthermore, the President is authorized to make rules disallowing prejudice against employees refusing to contribute money or services for political purposes. 5 U.S.C. §§ 7321-22 (1970). The Federal Corrupt Practices Act § 312, 18 U.S.C. § 602 (1970), provides employees with additional protection by outlawing the solicitation of political contributions. *See also* 18 U.S.C. § 606 (1970) (intimidation to secure political contributions unlawful). For a general discussion of these and other provisions see Clark, *Federal Regulation of Election Campaign Activities*, 6 FED. B.J. 5 (1944).

49. *See* Epstein, note 52 *supra*. That the *Mitchell* Court perceived such a threat is indicated by its statement that "Congress may reasonably desire to limit party activity of federal employees so as to avoid a tendency toward a one-party system." 330 U.S. at 86.

50. Steinbach, *Public Employee Unionization—A Constitutionally Protected Right?*, 15 S.D.L. REV. 258, 264 (1970).

51. 3 COMMISSION REPORT, *supra* note 5, at 226.

52. *Id.* For a detailed examination of the British system see Epstein, *Political Sterilization of Civil Servants: The United States and Great Britain*, 10 PUB. AD. REV. 281, 284-90 (1950). Even a former Civil Service Commissioner, Milton J. Esman, has suggested that "Congress . . . explore more fully the British practice of excepting industrial and service workers from limitations on political activity." Esman, *supra* note 25, at 1004.

53. 3 COMMISSION REPORT, *supra* note 5, at 281.

drastic alternatives and the questionable validity of the assumptions underlying the Hatch Act weigh heavily against continued application of the interdiction embodied in section 9(a). As one commentator has noted, the law presents a "curious spectacle: an alien can safely advocate violent revolution, if his speech is so far ineffective as to raise no immediate danger of insurrection; but a citizen cannot serve the state as a Democrat or Republication, if he is already serving as a public employee."[54] On appeal, therefore, it is hoped that the Supreme Court will confront not only the narrower issues of vagueness and overbreadth, but will examine also the constitutionality of section 9(a) in light of its own pronouncements since the *Mitchell* decision.

Constitutional Law—Juries—Nonunanimous Verdicts in State Criminal Proceedings Do Not Violate Dne Process

The Louisiana Constitution[1] and Code of Criminal Procedure[2] provide that a twelve-man jury may return, by at least a nine-three vote, a verdict of guilty or not guilty on criminal offenses that require punishment at hard labor. Following his conviction by a nine-three vote, appellant sought state post-conviction relief, alleging that the Louisiana procedure is violative of the due process clause.[3] Appellant reasoned that since the fourteenth amendment requires a state to prove guilt beyond a reasonable doubt,[4] a nonunanimous verdict implicitly demonstrates juror reasonable doubt and therefore violates due process. The Supreme Court of Louisiana[5] adopted the State's contention that unanimity is neither a requisite of due process nor a *sine qua non* of proof beyond reasonable doubt, and thus affirmed appellant's conviction. On appeal to the United States Supreme Court, *held*, affirmed. A nine-three verdict does not evidence a conviction despite juror reasonable doubt and

54. Wormuth, *supra* note 21, at 173; *see* note 26 *supra*.

1. LA. CONST. art. 7, § 41.

2. LA. CODE CRIM. P. ANN. art. 782 (1967).

3. Appellant also claimed that he had been deprived of equal protection because the Louisiana system required unanimous verdicts in capital and 5-man jury trials. The instant Court, however, found that since the Louisiana statute served a rational purpose and was not invidiously discriminatory, there was no deprivation of equal protection. Appellant conceded that under Duncan v. Louisiana, 391 U.S. 145 (1968), and DeStefano v. Woods, 392 U.S. 631 (1968), the sixth amendment was not applicable. *See* note 17 *infra*.

4. *In re* Winship, 397 U.S. 358 (1970) (held that proof of guilt beyond a reasonable doubt was constitutionally required).

5. State v. Johnson, 255 La. 314, 230 So. 2d 825 (1970).

therefore does not violate the due process requirements of the fourteenth amendment. *Johnson v. Louisiana*, 406 U.S. 356 (1972).

The unanimous verdict requirement evolved from the early common-law procedure for adjudicating claims known as compurgation,[6] which required that twelve individuals attest the validity of either party's allegations. Although under the common-law procedure twelve witnesses (jurors), who had prior knowledge of the dispute initially were called, additional persons were summoned until at least twelve had verified one party's claim.[7] The requirement of twelve votes remained as the jury gradually evolved into a body that considered the veracity of evidence offered by the parties and based its determination wholly on that evidence. The Constitution guarantees[8] a trial by jury in the federal courts, but is silent on both the number of jurors necessary and the need for unanimity in their decision. Nevertheless, the seventh amendment has been held[9] to preserve in civil actions in the federal courts the essential common-law elements of trial by jury—specifically, the unanimous verdict of a twelve-man panel.[10] The sixth amendment, however, governs criminal actions in the federal courts[11] and has been held to embody those common-law rights respecting trial by jury that were recognized in this country and in England when the Constitution was adopted. In 1930, the Court in *Patton v. United States*[12] held that these common-law rights included the unanimous verdict of a twelve-

6. *See* Ryan, *Less Than Unanimous Jury Verdicts in Criminal Trials*, 58 J. CRIM. L.C. & P.S. 211 (1967).

7. J. DEVLIN, TRIAL BY JURY 48 (1965); Haralson, *Unanimous Jury Verdicts in Criminal Cases*, 21 MISS. L.J. 185, 188 (1950); 112 U. PA. L. REV. 769, 771 (1964).

8. U.S. CONST. art. III, § 2 provides: "The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury . . . ." U.S. CONST. amend. VI provides: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed . . . ." U.S. CONST. amend. VII provides: "In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved . . . ."

9. Maxwell v. Dow, 176 U.S. 581 (1900); Springville v. Thomas, 166 U.S. 707 (1897); American Publishing Co. v. Fisher, 166 U.S. 464 (1897).

10. The jury, however, is no longer required to consist of 12 persons. Six-man juries were declared constitutional in Williams v. Florida, 399 U.S. 78 (1970). As of June 1971, 25 federal districts had provisions for 6-man civil juries. Devitt, *The Six Man Jury in the Federal Court*, 53 F.R.D. 273 (1971). Moreover, the right to a unanimous civil verdict is waiveable. FED. R. CIV. P. 48; *cf.* Patton v. United States, 281 U.S. 276 (1930). The states, however, are not bound by the seventh amendment and thus are not required to provide unanimous civil verdicts. Maxwell v. Dow, 176 U.S. 581, 594 (1900). In fact, about half of the states now have some procedure for majority verdicts in some civil cases. A list of these jurisdictions can be found in 27 WASH. & LEE L. REV. 361 n.6 (1970).

11. Patton v. United States, 281 U.S. 276 (1930).

12. 281 U.S. 276 (1930).

man jury.[13] In *Duncan v. Louisiana*,[14] a 1968 Supreme Court decision, the Court extended the application of the sixth amendment guarantee of trial by jury to state proceedings through incorporation of that requirement in the due process clause of the fourteenth amendment. However, the Court in *Duncan* did not consider whether the right to trial by jury in state proceedings includes the right to a unanimous verdict.[15] The Court in *DeStefano v. Woods*[16] faced this exact issue, but avoided the question by holding that *Duncan* should be applied prospectively only; the Court therefore did not decide whether the fourteenth amendment requires juror unanimity. Thus, in cases like the instant one that were tried before the *Duncan* decision, the accused has been foreclosed from challenging a nonunanimous criminal verdict on sixth amendment grounds.[17] Although the 1900 Supreme Court decision of *Maxwell v. Dow*[18] contains dicta to the effect that the states need not require unanimous criminal verdicts,[19] post-conviction relief usually has been sought

13. "Those elements were—(1) that the jury should consist of twelve men, neither more nor less; (2) that the trial should he in the presence and under the superintendence of a judge having power to instruct them as to the law and advise them in respect of the facts; and (3) that the verdict should be unanimous." *Id.* at 288; *cf.* FED. R. CRIM. P. 31(a): "The verdict must be unanimous." *See also* 2 J. STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 559 n.2 (5th ed. 1891): "A trial by jury is generally understood to mean *ex vi termini*, a trial by a jury of twelve men, impartially selected, who must *unanimously* concur in the guilt of the accused before a legal conviction can be had." *But see* note 9 *supra*.

14. 391 U.S. 145 (1968).

15. *Id.* at 158-59 n.30.

16. 392 U.S. 631 (1968).

17. In Apodaca v. Oregon, 406 U.S. 404 (1972), which was decided on the same day as the instant case, the Court was faced with the question that was avoided in *DeStefano*, since the petitioners in *Apodaca* had been convicted after *Duncan*. The Court concluded that the sixth amendment guarantee of a jury trial, which applies to the states by the fourteenth amendment, does not require a unanimous verdict. Following the *Williams'* rationale the Court decided that the essential purpose of the jury trial is served despite the absence of unanimity requirement. *Id.* at 410-11. This decision appears to question the requirement of unanimity in federal criminal cases as well. Since the right to trial by jury in both state and federal courts is now measured against the sixth amendment, it seems only logical that the same requirements should apply on both levels; especially since the Court has said that the fourteenth amendment does not apply a "watered down" version of the Bill of Rights to the states, *e.g.*, Malloy v. Hogan, 378 U.S. 1, 10-11 (1964), and that the same standards protect personal rights from federal encroachment. Therefore, *Apodaca* could be read to permit unanimous federal juries. *But cf.* Johnson v. Louisiana, 406 U.S. 356, 395-96 (1972) (dissenting opinion to both *Johnson* and *Apodaca*).

18. 176 U.S. 581 (1900).

19. "[I]t is in entire conformity with the character of the Federal Government that [the States] should have the right to decide for themselves what shall be the form and character of the procedure in such trials, whether there shall be an indictment or an information only, whether there shall he a jury of twelve or a lesser number, and whether the verdict must be unanimous or not. These are matters which have no relation to the character of the Federal Constitution." *Id.* at 605; *accord*, Jordan v. Massachusetts, 225 U.S. 167, 176 (1912). There are, in addition to Louisiana, a

on the ground that a nonunanimous verdict indicates that the state has failed to prove guilt beyond a reasonable doubt. The reasonable doubt standard emerged as the jury changed from a testimonial panel to a fact-finding body because it became necessary to instruct the jury concerning the quantum of proof required to support a verdict.[20] Although long assumed an incident of due process,[21] proof of guilt beyond a reasonable doubt was not held constitutionally required until the 1970 Supreme Court decision, *In re Winship*.[22] Two federal circuits have considered the interrelationship between due process and satisfaction of the reasonable doubt standard by nonunanimous verdicts, but have rendered conflicting decisions. In *Hibbon v. United States*,[23] the Sixth Circuit held that an accused could not, under any circumstances, waive his right to a unanimous verdict because that right is an essential element of due process and is "inextricably interwoven" with proof beyond a reasonable doubt.[24] In *Fournier v. Gonzalez*,[25] however, the First Circuit concluded that due process[26] does not require unanimity[27] and explained that a

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number of states which allow less than unanimous verdicts in criminal cases under some circumstances. Some states allow nonunanimous verdicts only for offenses below the grade of felony. *E.g.*, MONT. CONST. art. 3, § 23 (2/3 of the jury); OKLA. CONST. art. 2, § 19 (3/4 of the jury); TEX. CONST. art. 5, § 13 (3/4 of the jury); IDAHO CONST. art. 1, § 7 (5/6 of the jury). In Oregon, 10 members of the jury may render a verdict in all but first-degree murder cases. ORE. CONST. art. 1, § 11. There are some states, on the other hand, which expressly provide that there can be no conviction except by unanimous verdict. *See, e.g.*, UTAH CONST. art. 1, § 10.

20. 112 U. PA. L. REV. 769 (1964). Thus, historically the requirement of unanimity and proof beyond a reasonable doubt arose separately and for different reasons. The reasonable doubt requirement arose much later for, although a demand for a higher degree of persuasion in criminal cases was expressed in ancient times, the cyrstallization into "beyond a reasonable doubt" may have occurred as late as 1798. *In re* Winship, 397 U.S. 358, 361 (1970). The requirement of unanimity, on the other hand, was firmly established by the end of the fourteenth century. 1 W. HOLDSWORTH, A HISTORY OF ENGLISH LAW 318 (7th ed. 1956).

21. "It is the duty of the Government to establish his guilt beyond a reasonable doubt. This notion . . . is a requirement and a safeguard of due process of law in the historic, procedural content of 'due process.'" Leland v. Oregon, 343 U.S. 790, 802-03 (1952) (Frankfurter, J., dissenting).

22. 397 U.S. 358 (1970).

23. 204 F.2d 834 (6th Cir. 1953).

24. "The unanimity of a verdict in a criminal case is inextricably interwoven with the required measure of proof. To sustain the validity of a verdict by less than all of the jurors is to destroy this test of proof for there cannot be a verdict supported by proof beyond a reasonable doubt if one or more jurors remain reasonably in doubt as to guilt. It would be a contradiction in terms. We are of the view that the right to a unanimous verdict cannot under any circumstances be waived, that it is of the very essence of our traditional concept of due process in criminal cases, and that the verdict in this case is a nullity because it is not the unanimous verdict of the jury as to guilt." *Id.* at 838.

25. 269 F.2d 26 (1st Cir.), *cert. denied*, Sampedro v. Puerto Rico, 359 U.S. 931 (1959).

26. Since that case arose in Puerto Rico, the due process clause involved was that of the fifth and not the fourteenth amendment. The due process clause of the fourteenth amendment

nonunanimous verdict may satisfy the state's obligation to prove guilt beyond a reasonable doubt. Moreover, several state courts[28] have considered the issue whether a dissenting vote on a three-man judicial panel evidences a failure to satisfy the reasonable doubt standard and have concluded that two-one decisions do not violate due process. Faced with the evident split of authority, the instant Court addressed the issue whether nonunanimous verdicts contravene due process guarantees by permitting conviction despite juror reasonable doubt.

After finding that the sixth amendment was inapplicable under the *DeStefano* holding, the instant Court observed that although it never expressly had required unanimity, the dicta in *Maxwell* indicated that nonunanimity is not violative of due process safeguards. Independently of *Maxwell*, moreover, the Court found no facts to indicate that the nine jurors had failed to follow the court's instructions requiring proof beyond a reasonable doubt or that any of the guilty votes did not reflect the honest belief that guilt had been established. The Court therefore held that, in relation to the nine guilty votes, the state had satisfied its burden of proof.[29] Moreover, the Court explained that the presence of three dissenting jurors could not per se establish reasonable doubt. The Court reasoned that because one dissent under a procedure requiring unanimity does not result in acquittal but rather in a hung jury,[30] nonunanimity should not necessarily be equated with the existence of reasonable doubt. Therefore, the Court held that a verdict rendered by nine of twelve jurors does not evidence a conviction despite reasonable doubt and thus does not violate the due process requirements of the fourteenth amendment.

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which is involved in the instant case has been held to impose the same requirement on the states as does the due process clause of the fifth upon the federal government. *See* Curry v. McCanless, 307 U.S. 357, 370 (1939); Heiner v. Donnan, 285 U.S. 312, 326 (1932).

27. The First Circuit appears to have relied on the dicta in *Maxwell*. The court stated that *Hibdon* could have been based on the federal rule involved (31(a)) or on the question of voluntary waiver of the unanimity requirement. The court stated, however, that the language in *Hibdon* to the effect that proof beyond a reasonable doubt required unanimity was wholly unsupported and erroneous. Fournier v. Gonzalez, 269 F.2d 26, 29 (1st Cir.).

28. People v. DeCillis, 14 N.Y.2d 203, 199 N.E.2d 380, 250 N.Y.S.2d 288 (1964); People v. Scifo, 42 Misc. 2d 464, 242 N.Y.S.2d 980 (N.Y. City Crim. Ct. 1963), *aff'd*, 43 Misc. 2d 153, 250 N.Y.S.2d 558 (Sup. Ct. 1964), *cert. denied*, 380 U.S. 941 (1965); State v. Robbins, 176 Ohio St. 362, 199 N.E.2d 742 (1964), *commented on in* Morano, *Retreat From Unanimity and Reasonable Doubt in Criminal Cases*, 1969 U. TOL. L. REV. 337; *cf.* Ashton v. Commonwealth, 405 S.W.2d 562 (Ky.), *rev'd on other grounds*, 384 U.S. 195 (1966).

29. In reaching this conclusion the Court also rejected the argument that majority jurors will ignore the sincere doubts of minority jurors. The Court stated that it had no grounds for believing that the majority will refuse to listen to the arguments of the minority and vote to convict even though deliberation has not been exhausted. 406 U.S. at 361.

30. Downum v. United States, 372 U.S. 734, 736 (1963).

In his dissenting opinion,[31] Mr. Justice Douglas postulated that nonunanimous verdicts effectively eliminate the impact of minority positions on the deliberation process because the majority of jurors may simply ignore the dissenters.[32] Moreover, Justice Douglas expressed his belief that unanimous verdicts and proof beyond a reasonable doubt are so interrelated[33] and so embedded in our constitutional system that any departure from the requirement of juror unanimity should be undertaken only following a constitutional amendment. In their separate dissenting opinions, Mr. Justice Stewart[34] and Mr. Justice Brennan[35] predicted that majority verdicts will negate the effect of the constitutional guarantee against systematic discrimination in the jury selection process.[36] They concluded therefore that because the guarantee against jury selection discrimination and the requirement of unanimity were intended to complement each other, the Louisiana statute operated to deny due process.[37]

Although the instant Court's resolution of the constitutional issue—whether the reasonable doubt standard is satisfied by a nonunanimous verdict—appears to be sound, its approval of nonunanimous verdicts is questionable from a practical standpoint. The Court's decision concerning the constitutionality of the statute in question depended on whether it believed that a jury finds its verdict as an entity[38] or as a collection of individuals.[39] The Court appears to have accepted the latter characterization. Thus, the prosecutor's burden of proof remains the same under the holding of the instant case—he must meet the subjec-

31. 406 U.S. at 380.

32. "First, it eliminates the circumstances in which a minority of jurors (a) could have rationally persuaded the entire jury to acquit, or (b) while unable to persuade the majority to acquit, nonetheless could have convinced them to convict only on a lesser-included offense." 406 U.S. at 388.

33. Mr. Justice Marshall in his dissent, 406 U.S. at 399, reaches much the same conclusion and states that, "[t]he doubts of a single juror are in my view evidence that the government has failed to carry its burden of proving guilt beyond a reasonable doubt." *Id.* at 403.

34. 406 U.S. at 397.

35. *Id.* at 395.

36. The clear purpose of the guarantee against systematic discrimination is to ensure universal participation of all the citizens in the administration of criminal justice. The dissenters felt that the right to participate also includes the right to have one's opinions heard and that a unanimous verdict destroys that right by making their participation meaningless.

37. They felt that only a unanimous jury, selected by an impartial system, could serve to "minimize the potential bigotry of those who might convict on inadequate evidence, or acquit when evidence of guilt is clear." 406 U.S. at 398.

38. Hibdon v. United States, 204 F.2d 834 (6th Cir. 1953).

39. State v. Robbins, 176 Ohio St. 362, 199 N.E.2d 742 (1964); *cf. In re* Winship, 397 U.S. 358 (1970).

tive standard of each individual juror to justify a guilty vote.[40] What the instant decision really affects is the prosecutor's task of persuasion, because it decreases the absolute number of votes necessary for conviction. The reduction is not itself violative of due process, however, because the Supreme Court upheld the constitutionality of six-man juries in *Williams v. Florida*.[41] If, on the other hand, the Court initially had assumed that a jury reaches its verdict as a single, unified entity, the instant decision would not be sound. Under the second approach, the jury as a single body must accept guilt beyond a reasonable doubt; therefore the reasonable doubt of one man is equivalent to the reasonable doubt of the group.[42] If this were the proper theory, one dissenting vote would necessitate an acquittal.[43] However, under procedures that require juror unanimity, a hung jury necessitates a new trial rather than acquittal. Therefore, under the weight of authority,[44] the Court's assumption that the jury reaches its verdict individually appears to be correct.[45] Nevertheless, the practical implications of sanctioning the nonunanimous verdict merit discussion. Five major policy arguments commonly are propounded in support of nonunanimous verdicts. First, it has been argued that one unreasonably stubborn or obstinate juror can produce a hung jury. Recent empirical studies indicate, however, that hung juries are generally the result of several dissenting jurors.[46]

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40. Comment, *Waiver of Jury Unanimity—Some Doubts About Reasonable Doubt*, 21 U. CHI. L. REV. 438 (1954).

41. Any reduction in the number of jurors required to be convinced results in a lessening of the burden of persuasion. The Supreme Court in Williams v. Florida, 399 U.S. 78 (1970), expressly held that the reduction does not violate due process.

42. "Guilt must be established beyond a reasonable doubt. All twelve jurors must be convinced beyond that doubt; if only one of them fixedly has a reasonable doubt, a verdict of guilty cannot be returned." Billeci v. United States, 184 F.2d 394, 403 (D.C. Cir. 1950).

43. Mr. Justice Marshall, however, in his dissent, 406 U.S. at 401-02, criticized this argument as relying on a complete *non sequitur*. "The reasonable doubt rule, properly viewed, simply establishes that, as a prerequisite to obtaining a valid conviction, the prosecutor must overcome all of the jury's reasonable doubts; it does not, of itself, determine what shall happen if he fails to do so. That is a question to be answered with reference to a wholly different constitutional provision, the Fifth Amendment ban on double jeopardy . . . ." *Id.* at 401. According to the view of double jeopardy that prevails in this country, if a jury has attempted to reach a unanimous verdict and failed, a new trial may be held. Thus, the state is free to treat the vote of a hung jury as a nullity rather than as an acquittal.

44. *See* 137 A.L.R. 394 (1942).

45. The duty of the prosecutor is to convince beyond a reasonable doubt those who are empowered to decide, *i.e.* the requisite majority. Samuels, *Criminal Justice Act*, 31 MODERN L. REV. 16 (1968).

46. "[J]uries which begin with an overwhelming majority in either direction are not likely to hang. It requires a massive minority of 4 or 5 jurors at the first vote to develop the likelihood of a hung jury.

. . . .

Secondly, proponents of nonunanimity argue that there is danger that a corrupt juror could prevent unanimity. The threat of juror corruption is more hypothetical than real, and to the extent that it does exist, is probably de minimis.[47] Thirdly, nonunanimous verdicts assertedly will reduce the number of hung juries and thereby save the expense of retrial.[48] Assuming that fewer mistrials are desirable,[49] the savings from such a small percentage of cases does not, however, justify eliminating one of the defendant's traditional safeguards. Fourthly, it is contended that unanimity is an unreasonable and unrealistic requirement.[50] Of course, society bases many of its more important legislative and appellate judicial decisions on majority votes, but legislation and appellate review differ substantially from criminal jury trials in both function and the nature of issues under consideration.[51] Finally, unanimity assertedly is no longer a necessary safeguard for the accused. Some commentators have suggested that unanimity originally was required to moderate the application of cruel and harsh penalties that were imposed by the common law.[52] Since these disproportionately harsh penalties largely have disappeared and numerous due process safeguards[53] are now recog-

". . . [F]or one or two jurors to hold out to the end, it would appear necessary that they had companionship at the beginning of the deliberation. . . . To maintain his original position, not only before others but even before himself, it is necessary for [a juror] to have at least one ally." H. KALVEN & H. ZEISEL, THE AMERICAN JURY 462-63 (1966). Thus in a normal hung jury, the initial vote may well have been 7-5 or even 6-6. Majority verdicts, therefore, do not remove the veto power of a single obstinate juror but rather allow the jury to reach a verdict even though there has been substantial disagreement among the jurors.

47. *See* Comment, *Should Jury Verdicts Be Unanimous in Criminal Cases*, 47 ORE. L. REV. 417 (1968). In England, however, this problem is perhaps more serious. A bill providing for nonunanimous criminal verdicts was recently passed in Great Britain. Criminal Justice Act 1967, c. 80, § 13.1 (as printed in PUBLIC GENERAL ACTS 1967 at 1635). The bill is said to have been introduced because of evidence of criminal interference with one or two jurors in important cases. *See Majority Verdicts*, 116 NEW L.J. pt.2 1620 (1966).

48. In a jurisdiction retaining the unanimity requirement only about 5.6% of the total case load results in hung juries. With the use of Louisiana's 9-3 verdict, the percentage will be reduced to approximately 2.5%. Thus, the Louisiana provision will only prevent hung juries in about 3 of 100 cases. H. KALVEN & H. ZEISEL, *supra* note 46, at 460.

49. "I think a mistrial from a hung jury is a safeguard to liberty. In many areas it is the sole means by which one or a few may stand out against an overwhelming contemporary public sentiment." Huffman v. United States, 297 F.2d 754, 759 (5th Cir. 1962) (Brown, J., dissenting).

50. It would appear that unanimity is not such an unworkable requirement since only in about 5% of *all* cases do juries fail to reach a unanimous verdict.

51. First, other decision-making bodies are not bound by the requirement of proof beyond a reasonable doubt; secondly, legislatures are concerned with abstract concepts such as proper policy, and appellate judges with what is the law; but the jury is charged with the duty of making factual determinations that are much more susceptible to a definite resolution.

52. Haralson, *supra* note 7, at 191.

53. In addition to the many rights guaranteed by and through the fourteenth amendment due process clause, there are a substantial number of safeguards that relate directly to the jury

nized, it has been argued that the defendant is adequately protected and no longer requires the additional safeguard of unanimity.[54] However, this argument is rather speculative and consequently offers only theoretical justification for removing the proven protection inherent in unanimity. The collective substance of the five arguments for nonunanimity is therefore questionable. The proponents of unanimous verdicts, on the other hand, have based their arguments primarily on the anticipated effect that nonunanimous juries will have on the minority juror position.[55] According to those favoring unanimity, the reliability of the verdict will be diminished because, when the requisite majority has been obtained, further deliberation will not be required.[56] They reason that unanimity, by its nature, fosters a more careful and thorough deliberation[57] because debate and discussion must continue until a unanimous verdict is attained.[58] Furthermore, unanimity is assertedly of immense value in promoting the public's confidence in our system of administering justice. American jurisprudence traditionally has emphasized that it

itself: (1) the availability of peremptory challenges and challenges for cause; (2) the judge's instructions; (3) the directed verdict; (4) the setting aside of a guilty verdict as lacking any supporting evidence; (5) the judge's power to grant a change of venue or to limit trial publicity.

54. *But see* 406 U.S. at 399 (Stewart, J., dissenting): "So deeply engrained is the law's tradition of refusal to engage in after-the-fact review of jury deliberations, however, that these and other safeguards provide no more than limited protection."

55. The dissenters emphasized recognizable minority groups, but as Mr. Justice Marsball points out, "The juror whose dissenting voice is unheard may be a spokesman, not for any minority viewpoint, but simply for himself—and that, in my view, is enough." 406 U.S. at 402-03. It has been argued that nonunanimous verdicts are just another way of reducing the number of jurors—a procedure approved by *Williams*. A majority verdict, however, is far more effective in nullifying the minority than is an outright reduction in the size of the jury to the number needed to constitute the majority.

56. Mr. Justice Brennan in his dissent stated that in majority verdicts the jurors have "nothing but their own common sense to restrain them from returning a verdict before they have fairly considered the positions of jurors who would reach a different conclusion . . . . I think it simply ignores reality to imagine that most jurors in these circumstances would or even could fairly weigh the arguments opposing their position." 406 U.S. at 396. In a unanimous verdict jurisdiction, however, no member of the jury may be ignored by the others. In *Apodaca*, the Court rejected the argument that minority ethnic groups, even when represented on the jury, will not represent adequately the viewpoint of those groups simply because they may be outvoted in the final ballot. Those minorities will be present during the deliberation and their opinions will be heard. The Court concluded that there was no proof that a majority will ignore its instructions and vote for guilt or innocence based on prejudice rather than on the evidence. 406 U.S. at 378-80.

57. It appears that it took the jury only 41 minutes to reach the 10-2 verdict in *Apodaca*. 406 U.S. at 389.

58. "It is said that there is no evidence that majority jurors will refuse to listen to dissenters whose votes are unneeded for conviction. Yet human experience teaches that polite and academic conversation is no substitute for the earnest and robust argument neeessary to reach unanimity." 406 U.S. at 389. It is this problem which has caused some jurisdictions to include a minimum deliberation time in their statute. *See* Criminal Justice Act 1967 *supra* note 47.

is far worse to convict an innocent man than to free a guilty one; the presumption of innocence and the unanimous verdict are therefore crucially interwoven. In light of the relative practical weaknesses of the arguments favoring nonunanimity and the sound legal theories presented by the dissenters in the instant case, it is submitted that the instant Court has needlessly removed a tested safeguard of the criminal defendant. Moreover, the Court failed to articulate standards on what specific majority vote will be constitutional. Although the instant holding appears to be limited to the constitutionality of the nine-three verdict, its reasoning expressly failed to indicate disapproval of eight-four or seven-five verdicts. Although it is doubtful that the Court will sanction verdicts by a simple majority,[59] dictum in the instant decision announced, without definition, that conviction must be by a "substantial majority."[60] Since "no one really knows how the jury works, or indeed can satisfactorily explain to a theorist why it works at all,"[61] it is thus submitted that, although nonunanimous verdicts are now constitutional, there is still insufficient justification for abolishing the unanimity requirement altogether.[62] The practical implications of change therefore require careful study,[63] and unless new and compelling reasons are forthcoming to support nonunanimous verdicts, no change should be undertaken.

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59. Simple majority verdicts, however, have been used in Scotland for many years with apparently very little adverse effect.

60. Mr. Justice Blackmun, in his concurring opinion, admits that a system with a less than 75% requirement would give him great difficulty, and he quotes from the majority that "a substantial majority of the jury are to be convinced." 406 U.S. at 366. Although Mr. Justice Douglas said that the instant opinion together with the decision in *Williams* might result in 2-1 jury convictions in the future, this appears doubtful.

61. Samuels, *supra* note 45, at 27.

62. Mr. Justice Blackmun stated in his concurring opinion that although he did not find the system constitutionally offensive, he said that "in so doing I do not imply that I regard the State's verdict system as a wise one." 406 U.S. at 365-66. Majority verdicts, however, have been recommended by several organizations. "In capital cases no verdict may be rendered unless all the jurors concur in it. In other cases of felony a verdict concurred in by 5/6 of the jurors, and in cases of misdemeanor a verdict concurred in by 2/3 of jurors may be rendered. ALI CODE OF CRIMINAL PROCEDURE § 335 (Official Draft, 1930); *accord*, ABA STANDARDS RELATING TO TRIAL BY JURY § 1.1(d) (Approved Draft, 1968).

63. The statistics quoted by the dissent that tend to show majority verdicts result in a more favorable conviction to acquittal ratio for the state do not accurately represent all the facts since they ignore the results of the retrial for those cases resulting in hung juries.

Federal Rnles of Civil Procedure—Class Actions—Each Class Memher in a Rnle 23(h)(3) Class Action Must Satisfy Independently the Jnrisdictional Amount Under 28 U.S.C. § 1332(a)

Plaintiffs, owners of lakefront property[1] who sought damages[2] for impairment of their property rights caused by defendant's alleged pollution of the lake,[3] initiated a Rule 23(b)(3) class action[4] in federal court on the basis of diversity of citizenship. Although they purported to represent a class of more than 200 similarly situated riparian landowners, the named plaintiffs were the only members of the proposed class who met the 10,000-dollar "matter in controversy" jurisdictional amount requirements of 28 U.S.C. § 1332(a);[5] plaintiffs nevertheless alleged that their claims satisfied the requirement for the entire class.[6] The district court, sustaining defendant's contentions that it lacked subject matter jurisdiction over the unnamed plaintiffs for their failure to meet the requisite jurisdictional amount, ruled that the action was not maintainable as a class action under Rule 23(b)(3). On appeal to the

1. Plaintiffs were owners of lakefront property on Lake Champlain in Orwell, Vermont, and purported to represent the damaged lakefront landowners and lessees in the towns of Orwell, Shoreham, and Bridport, Vermont. The proposed class numbered more than 200 members.

2. Plaintiffs sought compensatory and punitive damages in the total amount of $40,000,000.

3. Allegedly the discharge of untreated or inadequately treated waste from defendant's now-closed pulp and paper making plant in the Village of Ticonderoga, passing into the lake via Ticonderoga Creek, created a massive sludge blanket on the bottom of the lake; masses of sludge apparently broke off periodically to wash up on plaintiffs' property. As a consequence, plaintiffs' property was claimed to be unfit for any recreational or other reasonable use and to be diminished permanently in value.

4. FED. R. CIV. P. 23(b)(3) provides for the maintenance of a class action when the court finds that the issues of law or fact common to the class members predominate over the individual issues, and that a class action is the superior method for a fair and efficient adjudication. For a discussion of the federal class action see 3B J. MOORE, FEDERAL PRACTICE ¶¶ 23.01-.97 (2d ed. 1969).

5. 28 U.S.C. § 1332(a) (1970) provides: "The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs, and is between—(1) citizens of different States; (2) citizens of a State, and foreign states or citizens or subjects thereof; and (3) citizens of different States and in which foreign states or citizens or subjects thereof are additional parties."

6. The district court found that the named plaintiffs had each made good faith claims of damage in excess of $10,000, but that it was, to a legal certainty, incredible that each of the unnamed plaintiffs had suffered pollution damage in that amount. 469 F.2d 1033 n.1. Plaintiffs attempted to allot to the unnamed plaintiffs their share of the claimed punitive damages ($10,000,000). They argued that no final determination of class status could be made until damages had been awarded. The court rejected this argument on the basis of Schroeder v. Nationwide Mut. Ins. Co., 242 F. Supp. 787 (S.D.N.Y. 1965) (a jurisdictional amount may not be created by a claim for exemplary damages which could not legally be awarded).

United States Court of Appeals for the Second Circuit, *held*, affirmed. Rule 23(b)(3) requires that each class member must satisfy independently the "matter in controversy" jurisdictional amount of 28 U.S.C. § 1332(a). *Zahn v. International Paper Co.*, 469 F.2d 1033 (2d Cir. 1972), *cert. granted*, 41 U.S.L.W. 3441 (U.S. Feb. 20, 1973) (No. 72-888).

The Constitution contains no requirement that any particular amount be in controversy in order to invoke the jurisdiction of federal courts.[7] Nevertheless, since the Judiciary Act of 1789,[8] federal statutes have required that a minimum amount be in controversy before the federal courts can hear a case. Presently, 28 U.S.C. § 1332(a) authorizes a federal court to assume jurisdiction in a diversity suit only if the "matter in controversy" equals or exceeds a 10,000-dollar minimum amount.[9] The effect of the "matter in controversy" requirement, however, has been the subject of extensive litigation[10] and its resulting interpretations have had significant repercussions on multiple-plaintiff cases. The initial rule concerning satisfaction of the jurisdietional amount in the multiple-plaintiff situation was announced by the Supreme Court in an early joinder case, *Pinel v. Pinel*.[11] The Court held that when two or more plaintiffs having separate and distinct demands unite in a single suit, each plaintiff must satisfy the requisite jurisdictional amount; but when several plaintiffs unite to enforce a single right in which they have a common and individual interest, their claims collectively may satisfy the jurisdictional amount.[12] The Supreme Court applied the *Pinel* "joint-several" rule to a common-law class action situation[13] in *Clark v. Paul Gray, Inc.*[14] In *Clark*, while one plaintiff was found to have

7. C. WRIGHT, FEDERAL COURTS § 32, at 107 (2d ed. 1970).

8. The Judiciary Act of 1789, ch. 20, § 12, 1 Stat. 73, 79, first provided a requisite jurisdictional amount of $500.

9. From the original $500 requirement, the "matter in controversy" sum grew to $2,000 in 1887, $3,000 in 1911, and to the present $10,000 figure in 1958.

10. *See, e.g.*, Thomson v. Gaskill, 315 U.S. 442 (1942); Knowles v. War Damage Corp., 171 F.2d 15 (D.C. Cir. 1948), *cert. denied*, 336 U.S. 914 (1949).

11. 240 U.S. 594 (1916). *Pinel* has been criticized by several commentators who argue that the amount in controversy should be measured by the recovery to a class as a whole. *See, e.g.*, Kalven & Rosenfield, *The Contemporary Function of the Class Suit*, 8 U. CHI. L. REV. 684, 704-05 n.66 (1941).

12. 240 U.S. 594, 597 (1916); *accord*, Troy Bank v. G.A. Whitehead & Co., 222 U.S. 39 (1911); Clay v. Field, 138 U.S. 464, 479-80 (1891).

13. The class action originated in the English Court of Chancery bill of peace, which developed in order to facilitate the adjudication of suits involving common issues and multiple parties. The device was used in the early United States courts in equity suits involving members of a class so numerous that it was impracticable to join them all as parties.

14. 306 U.S. 583 (1939). Suit was filed in the *Clark* case on July 14, 1937, and the Federal Rules did not become effective until Sept. 16, 1938.

satisfied the jurisdictional amount, the other potential plaintiffs were excluded, because the Court found that they did not individually meet the "matter in controversy" amount and that the claims at issue were separate and distinct.[15] In 1938 federal multiple-claim litigation was brought under the Federal Rules of Civil Procedure, Rule 23 of which required that a plaintiff attempting to sue on behalf of a class fit his action into one of three classifications: "true" class actions, which were to enforce joint, common, or derivative rights; "hybrid" actions, which involved individual causes of action directed to the adjudication of rights to a common fund or property interest; and "spurious" class actions, which were characterized as permissive joinder devices,[16] and which enforced the several rights of individual plaintiffs when a common question of law or fact affected those rights and common relief was sought.[17] Soon after the adoption of the Federal Rules, *Sturgeon v. Great Lakes Steel Corp.*,[18] relying on *Clark* and the *Pinel* doctrine,[19] held that in a "hybrid" or "spurious" class action, each plaintiff must satisfy the jurisdictional requisite, while in a "true" class action, individual plaintiffs could aggregate claims to fulfill the jurisdictional amount requirement.[20] This rule generally was followed[21] until 1966, when the amended version of Rule 23 discarded the tripartite classification in order to promote liberal use of the class action device.[22] The omission of all references to joint, common, or several class interests led to a split of

15. *Id.* at 588-89.

16. Weeks v. Bareco Oil Co., 125 F.2d 84, 88-89 n.5 (7th Cir. 1941).

17. *See* Moore, *Federal Rules of Civil Procedure: Some Problems Raised by the Preliminary Draft*, 25 GEO. L.J. 551, 570-76 (1937).

18. 143 F.2d 819 (6th Cir.), *cert. denied*, 323 U.S. 779 (1944).

19. *Id.* at 821.

20. *See id.* at 822.

21. *See, e.g.*, Gibbs v. Buck, 307 U.S. 66 (1939) (true class action; aggregation permitted); Ames v. Mengel Co., 190 F.2d 344 (2d Cir. 1951) (spurious; no aggregation permitted); Brotherhood of R.R. Trainmen v. Templeton, 181 F.2d 527 (8th Cir.), *cert. denied*, 340 U.S. 823 (1950) (true; aggregation permitted); Matlaw Corp. v. War Damage Corp., 164 F.2d 281 (7th Cir. 1947), *cert. denied*, 333 U.S. 863 (1948) (spurious; no aggregation permitted).

22. "The reform of Rule 23 was intended to shake the law of class actions free of abstract categories contrived from such bloodless words as 'joint,' 'common,' and 'several,' and to rebuild the law on functional lines responsive to those recurrent life patterns which call for mass litigation through representative parties. . . . [T]hat old perverse anomaly, the 'spurious' class action, was jettisoned." Kaplan, *A Prefatory Note*, 10 B.C. IND. & COM. L. REV. 497 (1969). For a discussion of the problems with the old categories of class actions which had supposedly been solved see COMM. ON RULES OF PRACTICE AND PROCEDURE OF THE JUDICIAL CONF. OF THE UNITED STATES, PROPOSED AMENDMENTS TO RULES OF CIVIL PROCEDURE FOR THE UNITED STATES DISTRICT COURTS, Advisory Committee's Note to Proposed Rule 23 (1966), *reprinted in* 39 F.R.D. 98 (1966). *See also* Z. CHAFFEE, SOME PROBLEMS OF EQUITY 245-46, 256-57 (1950); Kaplan, *Continuing Work of the Civil Committee: 1966 Amendments of the Federal Rules of Civil Procedure (I)*, 81 HARV. L. REV. 356, 375-86 (1967).

authority in federal courts concerning the amended rule's effect on the *Pinel* doctrine. In *Lesch v. Chicago & Eastern Illinois Railroad*,[23] the district court characterized the case as a "spurious" class action, thus retaining the trichotomy for analytical purposes,[24] but nonetheless held that a single plaintiff with a 10,000-dollar claim satisfied the amount in controversy requirement for the whole class. In *Gas Service Co. v. Coburn*,[25] the Tenth Circuit held that in any class action, whether previously classed as true, hybrid, or spurious, all claims could be aggregated to meet the "matter in controversy" requirement. Noting that Rule 82 prohibits utilization of the Federal Rules to expand a court's subject matter jurisdiction, the court reasoned that because all several-joint distinctions had been abolished, aggregation of claims in a Rule 23 action did not expand invalidly its subject matter jurisdiction.[26] The Fifth Circuit in *Alvarez v. Pan American Life Insurance Co.*,[27] however, held that the 1966 amendment made no change in the *Pinel* doctrine and that class actions still had to be categorized to determine whether aggregation was allowable. This holding was premised on the notion that aggregation without prior characterization of the class action would violate Rule 82.[28] The Supreme Court attempted to resolve the conflict in *Snyder v. Harris*.[29] The Court again employed the *Pinel* joint-several distinction and held that when no plaintiff in a "spurious" class action could meet the necessary jurisdictional amount, claims could not be aggregated to reach the requisite amount.[30] But the *Snyder* case failed to answer a significant question: whether a federal court, by applying

23. 279 F. Supp. 908 (N.D. Ill. 1968).

24. "In so far as 'true,' 'hybrid,' and 'spurious' characterize the nature of the right being enforced, they remain as useful analytical terms even after the revision to Rule 23, where the question as to jurisdictional amount is raised." *Id.* at 912 n.2.

25. 389 F.2d 831 (10th Cir. 1968), *rev'd sub nom.* Snyder v. Harris, 394 U.S. 332 (1969).

26. *See, e.g.*, Collins v. Bolton, 287 F. Supp. 393, 398-99 (N.D. Ill. 1968) (amended Rule 23 abolished old distinctions); Snyder v. Epstein, 290 F. Supp. 652, 658 (E.D. Wis. 1968) (amended Rule 23 established new criteria for maintenance of class actions). *See also* Cohn, *The New Federal Rules of Civil Procedure*, 54 GEO. L.J. 1204 (1966). FED. R. CIV. P. 82 prohibits any of the rules from expanding or decreasing the court's subject matter jurisdiction.

27. 375 F.2d 992 (5th Cir.), *cert. denied*, 389 U.S. 827 (1967).

28. Frankel, *Some Preliminary Observations Concerning Civil Rule 23*, 43 F.R.D. 39, 49-50 (1967). The idea that holding that aggregation was allowable would alter federal subject matter jurisdiction in an impermissible fashion was based upon FED. R. CIV. P. 82. *See* Sibbach v. Wilson & Co., 312 U.S. 1 (1941); *cf.* Black & Yates, Inc. v. Mahogany Ass'n, 129 F.2d 227 (3d Cir. 1942) (spurious class action; aggregation not permitted).

29. 394 U.S. 332 (1969). This decision has been the subject of intense criticism by many commentators. *See, e.g., The Supreme Court, 1968 Term*, 83 HARV. L. REV. 7, 202-12 (1969); Note, *Aggregation Doctrine Continues to Limit Class Actions*, 24 SW. L.J. 354 (1970).

30. Mr. Justice Black has been criticized as having resurrected the apparently dead tripartite terminological distinctions. Kaplan, *supra* note 22, at 498.

the doctrine of ancillary jurisdiction,[31] may obtain jurisdiction over all the claims in a multiple-plaintiff action when some of the plaintiffs' claims meet the jurisdictional requirement. Ancillary jurisdiction, a concept developed through judicial necessity and without statutory authorization, originally was used to enable the courts to obtain jurisdiction over related issues or claims, the determination of which was necessary in order to resolve properly the controversy over which primary jurisdiction existed.[32] Ancillary jurisdiction has been expanded recently from a concept used in hearing related state claims[33] to a device for remedying apparent "matter in controversy" defects in multiple-plaintiff situations.[34] In *Lucas v. Seagrave Corp.*,[35] the District Court of Minnesota explained that ancillary jurisdiction existed to effectuate judicial economy, to prevent piecemeal litigation that might severely limit federal jurisdiction, and to render more complete justice and convenience to litigants.[36] The court then applied the doctrine to hold that a plaintiff who had not met the requisite jurisdictional amount nevertheless could proceed in federal court, because his claim and that of three other plaintiffs who had met the "matter in controversy" requirement contained a common nucleus of operative facts[37] and arose from the same transaction or occurrence.

The instant court initially stated that the proposed class action would have been characterized as "spurious" had it been brought prior to the 1966 amendment of Rule 23. Addressing the issue whether "spurious" claims could be aggregated to reach the jurisdictional amount, the court reviewed the origins of the aggregation doctrine and determined that prior to 1966, aggregation of separate and distinct claims in both joinder and class action situations was barred. The court then asserted that *Snyder* had decided that the old categories and doctrines

31. 7 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE 563-64 (1972).

32. Note, *Ancillary Jurisdiction in the Federal Courts*, 12 J. AIR L. & COM. 288 (1941). *See* Logan v. Patrick, 9 U.S. (5 Cranch) 288 (1809) (circuit court has jurisdiction to stay judgment, although subpoena was served upon defendant out of district in which the court sits). *See generally* Note, *Rule 14 Claims and Ancillary Jurisdiction*, 57 VA. L. REV. 265 (1971).

33. *See, e.g.*, UMW v. Gibbs, 383 U.S. 715 (1966) (federal judicial power extends to plaintiff's state law claim when primary federal question substantial and both claims "derive from a common nucleus of operative facts").

34. *See, e.g.*, General Research, Inc. v. American Employers' Ins. Co., 289 F. Supp. 735 (W.D. Mich. 1968) (under Rule 20 joinder, court heard claim of under $10,000 when joined with other claims which exceeded that amount).

35. 277 F. Supp. 338 (D. Minn. 1967).

36. *Id.* at 348; *see* Note, *Federal Practice: Jurisdiction of Third Party Claims*, 11 OKLA. L. REV. 326, 329 (1958).

37. *See* Lucas v. Seagrave Corp., 277 F. Supp. 338, 347-49 (D. Minn. 1967).

still applied when determining whether the jurisdictional amount has been satisfied and that they were unaltered in this context by amended Rule 23.[38] Acknowledging that no plaintiff in *Snyder* had met the jurisdictional amount, and that the case does not hold directly that every unnamed member of a proposed "spurious" class must have satisfied individually the jurisdictional amount,[39] the instant court nevertheless held it to be dispositive of the present case. The court further determined that, since *Clark v. Paul Gray, Inc.*[40] was factually similar to the instant case, it too was controlling and presented an insurmountable obstacle to plaintiffs.[41] Turning to policy considerations, the court determined that the policy of giving a liberal construction to the Federal Rules was outweighed in this instance by the policy of refusing to burden the federal courts. The court further stated that such local controversies could be tried more appropriately in state courts to avoid overburdening the federal courts.[42] The court therefore concluded that in class actions which formerly would have been classified as "spurious," separate and distinct claims may not be aggregated to satisfy the federal "matter in controversy" jurisdictional requirement.

In a vigorous dissent, Judge Timbers urged that the instant action should have been allowed to proceed as a class action. Suggesting that the majority had read *Snyder* too broadly,[43] he explained that since no plaintiff had met the monetary requisite in *Snyder*, its rationale was inapplicable to the instant case. He also viewed the majority as having relied on the *Clark* decision erroneously, since in his view *Clark* was not a class action but rather a case of permissive joinder. Judge Timbers premised his primary argument on the theory that the court should have allowed this action by invoking the doctrine of ancillary jurisdiction to include in the suit those plaintiffs whose claims had not reached 10,000 dollars. Tracing the history of the ancillary jurisdiction doctrine, he determined it to be a flexible, expanding concept designed to enable the court to resolve all issues involved in the subject matter before the court that arose from the same nucleus of operative facts. Judge Timbers then

38. *See* Snyder v. Harris, 394 U.S. 332, 336, 338 (1969).

39. Zahn v. International Paper Co., 469 F.2d 1033, 1034 (2d Cir. 1972).

40. 306 U.S. 583 (1939).

41. The court gave no reasons for its conclusion that *Clark* presented an insurmountable obstacle to plaintiffs.

42. Some state courts allow aggregation of claims in class actions to reach a requisite jurisdictional amount. *See* Judson School v. Wick, 108 Ariz. 176, 494 P.2d 698 (1972) (state court class action claims may be aggregated); El Ranco, Inc. v. New York Meat & Provision Co., 493 P.2d 1318 (Nev. 1972) (aggregation allowed). Other states allowing aggregation include California, Ohio, and Texas.

43. "[I]t seems to me that the majority reads . . . Snyder . . . for all it might be worth, rather than for the least it has to be worth." 469 F.2d 1033, 1036 (2d Cir. 1972) (dissenting opinion).

considered questions of policy. Noting that since the claims of the four named plaintiffs had met the "matter in controversy" requirement and must be adjudicated in federal court, he stated that the policy of increasing judicial economy would have been furthered by hearing all claims in one action, thus avoiding the duplicative litigation allegedly promoted by the majority opinion. He concluded that the majority decision undercuts both the liberal use of the Rule 23 class action and the trend toward expansion in the application of ancillary jurisdiction because it restricts the class action to the extraordinary situation in which all plaintiffs have claims of 10,000 dollars.

The class action is designed to serve a dual purpose: to reduce litigation by consolidating otherwise separate and duplicative actions and to enable resource-weak individuals with small claims to band together into a more potent litigative unit.[44] By requiring that each plaintiff individually meet the amount in controversy standard, the instant decision not only retards the realization of these policy objectives,[45] but in effect abrogates the 23(b)(3) class action as a procedural device, except in the unusual instance when each plaintiff has a 10,000-dollar claim. Although the majority asserted that it was bound by *Clark* and *Snyder*, both cases appear to be distinguishable from the instant situation. As the dissent observes, Clark's precedential value is dubious, because it was decided before the marked expansion in utilization of ancillary jurisdiction had begun[46] and was not a clearly defined class action situation.[47] Moreover, *Snyder* does not seem to control the instant action. It dealt with a situation in which no plaintiff had met the jurisdictional amount and the representative plaintiff sought to aggregate the total claims to satisfy the 10,000-dollar figure.[48] The instant case, however, is not an aggregation case at all.[49] Here, four representative plaintiffs, by meeting the jurisdictional amount, had validly invoked the court's jurisdiction, and consequently sought only to represent unnamed plaintiffs whose claims did not individually equal 10,000 dollars. In this case, the federal court will have to hear the four claims of the

44. Kaplan, *supra* note 22.

45. *Cf.* Snyder v. Harris, 394 U.S. 332, 342 (1969) (Fortas, J., dissenting); *The Supreme Court, 1968 Term, supra* note 29.

46. *Clark*, decided in 1939, considerably predates such cases as *Lucas*, which was decided in 1967.

47. This is illustrated by the disagreement between the majority in the instant case, which cited *Clark* as a class action, and the dissent, which classifed *Clark* as a case of permissive joinder.

48. The representative plaintiff's claim in *Snyder* was $8,740, while the aggregated total of all 4,000 claims was approximately $1,200,000. 394 U.S. at 333.

49. *Cf.* Lucas v. Seagrave Corp., 277 F. Supp. 338, 347 (D. Minn. 1967) ("This is not an aggregation situation, although many courts have characterized similar cases as such. . . .").

representative plaintiffs, while in *Snyder* there was no federal action after the class action was disallowed, because no plaintiff's claim had exceeded 10,000 dollars. Thus, *Snyder*'s purportedly compelling policy bases of judicial economy, convenience to the parties, and avoidance of burdensome litigation are inapposite. Granting *arguendo* that the *Snyder* tripartite analysis controls the strict-aggregation fact situation, it should not have been applied to the instant case since the jurisdictional amount had been reached without resort to aggregation. Judicial economy and convenience would have been served better by allowing the instant action to proceed as a class action in order to prevent separate and duplicative litigation of identical claims. Not only will the action have to be heard in federal court, but the unnamed plaintiffs will also run the risk of conflicting adjudications in state court, since there is no guarantee that a class action can be maintained in some state courts.[50] Resort to the ancillary jurisdiction concept, as suggested in Judge Timbers' dissent, would have averted the aforementioned frustrations of Rule 23's purpose. It would have enabled the court to adjudicate all related claims arising from the same nucleus of operative facts. Judicial utilization of ancillary jurisdiction would obviate the need for further litigation on the allowability of aggregation of claims. Since the claims of those who do not meet the "matter in controversy" requirement would be decided on the basis of the court's ancillary power, there would be no need for plaintiffs to attempt to aggregate their claims; one plaintiff's meeting the jurisdictional amount would per se invoke primary federal jurisdiction. Moreover, utilizing the ancillary concept to avoid the nonaggregation bar to federal courts would not be a novel approach,[51] and it has been suggested that such a development would not violate Rule 82.[52] Indeed, applying ancillary jurisdiction to avoid the amount in controversy requirement would be less far reaching than the application of ancillary jurisdiction to hear related state claims[53] which has resulted in arguable extensions of federal jurisdiction that consequently raise questions of constitutional rather than statutory limita-

50. There is a real possibility that plaintiffs who were not allowed to be parties to the federal class action cannot bring a class action in the state court, since many states, *e.g.*, Connecticut and Kentucky, do not allow aggregation to meet jurisdictional amounts. *See* note 42 *supra*.

51. *See, e.g.*, Lucas v. Seagrave Corp., 277 F. Supp. 338 (D. Minn. 1967) (plaintiff whose claim was under $10,000 allowed to join action under court's ancillary jurisdiction power); Johns-Manville Sales Corp. v. Chicago Title & Trust Co., 261 F. Supp. 905 (N.D. Ill. 1966) (court allowed Rule 20 joinder by invoking its ancillary jurisdiction, even though joined claim was less than $10,000).

52. Synder v. Harris, 394 U.S. 332, 354-55 (1969) (Fortas, J., dissenting).

53. *See* UMW v. Gibbs, 383 U.S. 715 (1966).

tions.[54] Moreover, utilization of ancillary powers should not be defeated by courts relying on the "floodgate" argument, because Rule 23(b)(3) places a higher priority on the adjudication of small claims than on the achievement of judicial economy.[55] Thus, the instant case provided an inviting opportunity for the application of the ancillary jurisdiction doctrine. The court could have achieved a result more compatible with the spirit of Rule 23 by disregarding the outmoded aggregation doctrines and proceeding instead on ancillary jurisdiction to resolve the controversy[56] completely in one action. If the courts will not utilize ancillary jurisdiction to avoid the application of a nineteenth century doctrine to a 1966 rule, congressional action represents the only relief for the diversity class action plaintiff[57] whose individual claim is less than 10,000 dollars. Such action may take the form of an amendment of 28 U.S.C. § 1332(a) to provide that "matter in controversy" in the class action context refers to the aggregate amount in controversy. By abolishing judicial use of the tripartite categorization, statutory action would provide a federal forum for groups of small claimants who have suffered similar harm, while assuring both continued substantiality of claims and a furthering of the enunciated purposes of Rule 23.[58]

54. Bangs, *Revised Rule 23: Aggregation of Claims for Achievement of Jurisdictional Amount*, 10 B.C. IND. & COM. L. REV. 601, 607 (1969).

55. Kaplan, *supra* note 22.

56. *See* Synder v. Harris, 394 U.S. 332, 353 (1969) (Fortas, J., dissenting) (new Rule broadens scope of "controversy").

57. 9 HOUSTON L. REV. 852, 858 (1972).

58. This solution has been recommended by Professor Wright. Wright, *Class Actions*, 47 F.R.D. 169, 184 (1969). However, it is doubtful whether an act of this kind will be passed by Congress, since such a stance would not seem to be politically expedient. Fearful of an increase in the number of public interest plaintiffs and broadly based class actions, the industrial lobby would no doubt exert intense pressure to discourage any legislative attempts to allow aggregation of claims. Another hope for legislation helpful to the small claimant to ease the hardships imposed by *Zahn* lies with the proposed Consumer Protection Bill. Such a bill would establish a federal agency to adjudge consumer complaints and would authorize a federal right of action to the aggrieved parties, thus encouraging class actions by similarly damaged plaintiffs if their suits are decided adversely by the proposed Consumer Protection Agency. *See Hearings on S. 3970 Before a Subcomm. of the Senate Comm. on Government Operations*, 92d Cong., 1st Sess. (1971). For a discussion of proposed legislative action to overrule *Snyder v. Harris* see Newberg, *Federal Consumer Class Action Legislation: Making the System Work*, 9 HARV. J. LEGIS. 217 (1972).

Taxation—Life Insnrance—Proceeds of Policy Owned hy a Trust Are Taxahle to Estate of an Insnred Who Paid Premiums Throngh the Trust

Decedent established a trust that by its terms was required to purchase an insurance policy on his life. Although the trust was irrevocable and nominally beyond decedent's control, the trustee was bound to use decedent's contributions to pay premiums on the policy. Upon decedent's death the trust was to terminate, and the trustee was to distribute its assets, the proceeds of the policy, to decedent's children. Decedent died less than one year after establishing the trust, and the Internal Revenue Service contended that the proceeds of the policy were taxable to the estate as a transfer in contemplation of death.[1] Decedent's executor paid tax on the proceeds and brought suit for a refund. The Federal District Court for the Eastern District of Michigan granted the executor's motion for summary judgment, reasoning that decedent could not be held to have transferred the proceeds because he never owned an interest in the policy.[2] On appeal to the United States Court of Appeals for the Sixth Circuit, *held*, reversed. When, within one year of death, a settlor funds a trust to purchase an insurance policy on his life, proceeds from the policy are taxable to his estate as a transfer in contemplation of death. *Detroit Bank & Trust Co. v. United States*, 467 F.2d 964 (6th Cir. 1972).

The Revenue Act of 1916 made no specific reference to life insurance when it imposed the first federal estate tax.[3] The regulations promulgated under the Act, however, included in the taxable amount insurance payable to the decedent's estate[4] and excluded insurance payable to named beneficiaries.[5] In 1918, Congress extended its definition of the taxable estate to include insurance proceeds "under policies taken out by the decedent upon his own life."[6] This vague standard[7] remained

1. INT. REV. CODE OF 1954, § 2035, provides in part: "(a) The value of the gross estate shall include the value of all property to the extent of any interest therein of which the decedent has at any time made a transfer . . . by trust or otherwise, in contemplation of his death.

"(b) If the decedent within a period of 3 years ending with the date of his death . . . transferred an interest in property, . . . such transfer . . . shall, unless shown to the contrary, be deemed to have been made in contemplation of death . . . ."

2. Detroit Bank & Trust Co. v. United States, 27 Am. Fed. Tax R.2d 71-1838 (E.D. Mich. 1971).

3. *See* Revenue Aet of 1916, ch. 463, tit. II, 39 Stat. 756, 777.

4. Treas. Reg. 37, Art. IV(I) (1916). This regulation was based on a section of the Revenue Act that applied to all types of property. Revenue Act of 1916, ch. 463, § 202(a), 39 Stat. 777.

5. Treas. Reg. 37, Art. X (1917).

6. Revenue Act of 1918, ch. 18, § 402(f), 40 Stat. 1098 (1919). Proceeds were includable only to the extent that they exceeded $40,000.

7. For a discussion of the confusion caused by the phrase "taken out by the decedent on his

in effect until the Revenue Act of 1942[8] replaced it with more precise tests. Under the 1942 Act, proceeds were to be included if the decedent retained any incident of ownership or paid part of the premiums[9] or if the insurance was payable to his estate.[10] The Internal Revenue Code of 1954 eliminated the "premium payment test," however, and based inclusion solely upon incidents of ownership or direct payment to the estate.[11] Congress reaffirmed its elimination of the premium payment test in 1957, when a Treasury attempt to introduce a modified form was rejected.[12] Nevertheless, the IRS resurrected the test in Revenue Ruling 67-463,[13] in which section 2035 of the 1954 Code was cited as authority for the proposition that a pro rata portion of the proceeds of an insurance policy would be taxed if the decedent had paid part of the premiums in contemplation of death.[14] Revenue Ruling 67-463 was rejected

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own life" see C. LOWNDES & R. KRAMER, FEDERAL ESTATE & GIFT TAXES § 13.2, at 273-74 (2d ed. 1962); Howard, *The Estate Tax Impact of Paying Life Insurance Premiums in Contemplation of Death*, 5 FORUM 97, 103, 116-17 (1969).

8. Revenue Act of 1942, ch. 619, § 404, 56 Stat. 944. *See* Int. Rev. Code of 1939, ch. 3, § 811(g), 53 Stat. 122; Revenue Act of 1926, ch. 27, § 302(g), 44 Stat. 71.

9. The 1942 Act taxed payments, receivable by any beneficiary except the executor, from any insurance policy: "(A) purchased with premiums, or other consideration, paid directly or indirectly by the decedent, in proportion that the amount so paid by the decedent bears to the total premiums paid for the insurance, or (B) with respect to which the decedent possessed at his death any of the incidents of ownership, exercisable either alone or in conjunction with any other person." Int. Rev. Code of 1939, ch. 3, § 811(g)(2), 53 Stat. 122, *as amended*, 56 Stat. 944 (1942).

10. Int. Rev. Code of 1939, ch. 3, § 811(g)(1), 53 Stat. 122, *as amended*, 56 Stat. 944 (1942). The 1942 Act also eliminated the $40,000 exemption for proceeds payable to named beneficiaries.

11. *See* INT. REV. CODE OF 1954, §§ 2035, 2042. Committee reports explained the abolition of the premium payment test on the ground that "[n]o other property is subject to estate tax where the decedent initially purchased it and then long before his death gave away all rights to the property and to discriminate against life insurance in this regard is not justified." S. REP. No. 1622, 83d Cong., 2d Sess. 124 (1954). *See* H.R. REP. No. 1337, 83d Cong., 2d Sess. 91 (1954). The minority report stated: "But life insurance is not like other property. It is inherently testamentary in nature." H.R. REP. No. 1337, 83d Cong., 2d Sess. B14 (1954).

12. H.R. 8381, 85th Cong., 1st Sess. § 56 (1957). For a discussion of this attempt to revive the premium payment test see Brown & Sherman, *Transfers in Contemplation of Death*, 101 TRUSTS & ESTATES 790, 844 (1962).

13. Revenue Ruling 67-463 provides in part: "[I]t is concluded that where a decedent, within three years of the date of death and in contemplation of death, made premium payments on a policy of insurance on his life, the incidents of ownership in which were transferred more than three years prior to his death, such payment was a transfer of an interest in the policy measured by the proportion the amount of premiums so paid bears to the total amount of premiums paid. Accordingly, the value of that portion of the amount receivable as insurance that the premiums paid within three years of death bear to the total premiums paid is includible in the decedent-insured's gross estate under the provisions of section 2035 of the Code." Rev. Rul. 463, 1967-2 CUM. BULL. 327, 329.

14. For a discussion of Revenue Ruling 67-463 and the grounds on which it was based see Simmons, *IRS Rules Premium Payments Within 3 Years of Death Puts Proceeds into Estate*, 28 J. TAXATION 146 (1968) (attacking the ruling); 14 N.Y.L. FORUM 198 (1968) (defending the ruling).

immediately in *Gorman v. United States*,[15] a case in which the decedent took out a life insurance policy one year before his death, named his wife as owner, and paid the first premium. The court declared that the premiums, but not the proceeds, were transferred in contemplation of death under section 2035.[16] In *Estate of Inez G. Coleman*,[17] a case involving similar facts, the Tax Court applied the same rule. Focusing on what had been "diverted" from decedent's estate, the court found that only the amount of the premiums had been transferred.[18] The Fifth Circuit followed suit, rejecting the argument that a decedent transfers a "bundle of rights" when he pays a premium. That circuit held in *First National Bank v. United States*[19] that the decedent, by paying premiums, had transferred at most a gift of cash to his daughters,[20] who had obtained the policy more than three years prior to his death.[21] In November 1971, however, the IRS promulgated Revenue Ruling 71-497,[22] which indicated that, although the Service no longer would challenge the status of the proceeds from policies transferred more than three years prior to death,[23] it would view as taxable the entire proceeds of all insurance policies purchased for a one-year term by decedents even if they designated someone else as owner. At virtually the same time, the

15. 288 F. Supp. 225 (E.D. Mich. 1968). Shortly before *Gorman* was decided another district court indicated its disapproval of Revenue Ruling 67-463 in a cryptic dictum. *See* Nance v. United States, 68-1 U.S. Tax Cas. 87,403 (D. Ariz. 1968). The court in *Nance* stated, "As an additional and alternative conclusion of law . . . if the gift of such premiums . . . was in contemplation of . . . death . . . the marital community . . . would have a right to and interest in such premiums only and would have no right to or interest in the proceeds of the policies, or any part thereof, other than the amount of the premiums". *Id.* at 87,406.

16. For a discussion of *Gorman* see Comment, *Gorman v. United States, an Angry Rebuttal to Revenue Ruling 67-463*, 11 ARIZ. L. REV. 323 (1969); 82 HARV. L. REV. 1765 (1969); 57 ILL. B.J. 502 (1969); 67 MICH. L. REV. 812 (1969); 64 NW. U.L. REV. 116 (1969); 43 TUL. L. REV. 882 (1969).

17. 52 T.C. 921 (1969).

18. *Id.* at 923. In a memorandum opinion 4 months later the Tax Court reaffirmed its *Coleman* decision. *See* Estate of William Chapin, 39 P-H Tax Ct. Mem. 70-11, 70-17 (1970). In a dictum a few months after *Chapin* a federal district court cited this line of cases approvingly. *See* Mercantile Trust Co. Nat'l Ass'n v. United States, 312 F. Supp. 108, 111 (E.D. Mo. 1970). A year and a half after *Mercantile Trust* another federal district court reached the same result without citing authority. *See* Kroloff v. United States, 71-2 U.S. Tax Cas. 88,024, 88,026 (D. Ariz. 1971).

19. 423 F.2d 1286 (5th Cir. 1970), *rev'g* 69-1 U.S. Tax Cas. 84, 829 (W.D. Tex. 1968).

20. Because of a defect in the pleading the court did not address directly the question whether the amount of the premiums was taxable. *Id.* at 1287.

21. Although the decedent had transferred the policy to his daughters, the transfer occurred more than 3 years before his death and was therefore not in contemplation of death. For a discussion of the Fifth Circuit's opinion see 8 HOUSTON L. REV. 168 (1970); 49 TEXAS L. REV. 365 (1971). For a discussion of the district court's opinion see 37 FORDHAM L. REV. 665 (1969).

22. Rev. Rul. 497, 1971-2 CUM. BULL. 329.

23. Revenue Ruling 71-497 expressly revoked Revenue Ruling 67-463. *See* notes 13-14 *supra*.

Fifth Circuit reached a similar conclusion in *Bel v. United States*.[24] In *Bel*, the court initially limited its *First National Bank*[25] decision to cases involving policies transferred at least three years before death.[26] It then declared taxable all of the proceeds of an accidental death policy purchased in his children's names by a decedent one year before he died.[27] The *Bel* decision therefore appears to have created a direct conflict with the cases in other circuits that hold only the amount of premiums taxable.

The instant court first noted that both Revenue Ruling 71-497[28] and the *Bel* decision[29] had appeared subsequent to the district court's disposition of the case. Quoting a Supreme Court decision[30] upholding the constitutionality of the federal estate tax, the court then asserted that transfers in contemplation of death include more than property passing directly from the decedent to the transferee. The court noted that such transfers also include property procured by the decedent's expenditures and intended to pass to another upon his death.[31] The court pointed out that transfers in contemplation of death are to be taxed in the same manner as testamentary transfers in order to prevent evasion of the federal estate tax.[32] Consequently, the court declared that it would not exalt form over substance and allow a trust device as a substitute for a taxable transfer of proceeds, even though that result could be defended by a technical construction of the statute.[33]

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24. 452 F.2d 683 (5th Cir. 1971), *rev'g* 310 F. Supp. 1189 (W.D. La. 1970), *cert. denied*, 406 U.S. 919 (1972).

25. First Nat'l Bank v. United States, 423 F.2d 1286 (5th Cir. 1970).

26. Bel v. United States, 452 F.2d 683, 690 n.3 (5th Cir. 1971). The Fifth Circuit recently has put in doubt the vitality of this distinction. *See* Bintliff v. United States, 462 F.2d 403 (5th Cir. 1972), *modifying* 329 F. Supp. 1356 (E.D. Tex. 1971). The court in *Bintliff* stated, "It is settled law in this court that tbe premiums paid in contemplation of death, not the whole of the life insurance proceeds, are includable in the decedent's gross estate under Section 2035. *See* First National Bank of Midland v. United States [citation omitted]. *But see* Bel v. United States, *supra*." *Id.* at 406. If the policies were transferred 3 years before death in *Bintliff*, the court failed to make this clear.

27. The court cited a Supreme Court decision for the idea that a transfer in contemplation of death includes "the transfer of property procured through expenditures by the decedent with the purpose, effected at his death, of having it pass to another." Chase Nat'l Bank v. United States, 278 U.S. 327, 337 (1929) (upholding the constitutionality of the federal estate tax).

28. Rev. Rul. 497, 1971-72 CUM. BULL. 329.

29. Bel v. United States, 452 F.2d 683 (5th Cir. 1971). Although *Bel* was decided one month after Revenue Ruling 71-497 was issued, the court did not mention the ruling.

30. Chase Nat'l Bank v. United States, 278 U.S. 327 (1929). *See* note 27 *supra*.

31. *See id.* at 337.

32. For this assertion the court relied upon United States v. Wells, 283 U.S. 102, 116-17 (1931), and Milliken v. United States, 283 U.S. 15, 23 (1931).

33. Judge McAllister dissented and endorsed the reasoning of the district court.

One week after the instant court declared the proceeds taxable a federal district court in

To understand the proper treatment of insurance proceeds, one must examine the congressional intent underlying section 2035 and the nature of the various types of life insurance policies.[34] The instant court apparently did not recognize that the intent of Congress in passing section 2035 was to preserve the taxable estate from last minute dissipation[35] by taxing wealth thus diverted from the gross estate.[36] When a decedent makes a cash gift in contemplation of death, his estate is deprived of only that amount of money, and only that amount is taxed. The present value of any property purchased by the donee is not taxed because the use to which the money is put is not examined.[37] Thus, when a decedent has transferred cash to pay the premiums on an insurance policy owned by another, he has depleted his estate only by the amount of the premiums. The proceeds of the policy, therefore, do not represent a depletion of the estate and should not be taxed merely because they result from a use made of the cash transferred.[38] If Con-

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Oregon reached the same result in a brief opinion. *See* First Nat'l Bank v. United States, 2 CCH FED. EST. & GIFT TAX REP. (72-2 U.S. Tax Cas.) ¶ 12,884 (D. Ore. Sept. 8, 1972).

34. Although a great deal has been written concerning taxation of insurance proceeds, attention has focused primarily upon the case law foundation for a revival of the premium payment test and upon the congressional committee reports discussing the test. *See* Howard, *supra* note 7, at 97-102; Rhodes, *Contemplation of Death, The Problem of Life Insurance Premiums*, 25 TAX LAW. 589, 591-92 (1971); Simmons, *supra* note 14, at 146-47; 37 FORDHAM L. REV. 665, 666 (1969); 57 ILL. B.J. 502, 508-09 (1969); 14 N.Y.L. FORUM 198, 199-200 (1968). For a discussion of the advisability of eliminating the test see W. WARREN & S. SURREY, FEDERAL ESTATE & GIFT TAXATION 506-22 (1961).

35. *See* Igleheart v. Commissioner, 77 F.2d 704, 711 (5th Cir. 1935); C. LOWNDES & R. KRAMER, *supra* note 7, at § 5.1; Pavenstedt, *Taxation of Transfers in Contemplation of Death: A Proposal for Abolition*, 54 YALE L.J. 70, 87-90 (1944).

36. *See* Estate of Inez G. Coleman, 52 T.C. 921, 923 (1969). For a discussion of this view see 67 MICH. L. REV. 812, 820-22 (1969).

37. Treas. Reg. § 20.2035-1(e) states that property transferred in contemplation of death is to be valued as of the applicable valuation date under § 2031 or under § 2032—at the time of death or within 6 months thereafter. The value of the very property which was transferred, the money, is the property to be valued regardless of what the transferee has done with it. *See* Humphrey's Estate v. Commissioner, 162 F.2d 1, 2 (5th Cir. 1947). *See also* Glaser v. United States, 306 F.2d 57 (7th Cir. 1962); Sullivan's Estate v. Commissioner, 175 F.2d 657 (9th Cir. 1949). The courts in *Glaser* and *Sullivan's Estate* recognized that § 2035 is designed to tax only the quantum of property transferred. They rejected the commissioner's argument that § 2040 should be read together with §§ 2035 and 2036 and that the entire value of joint property for which decedent had given consideration therefore should be taxed. *See* Trautman, *Estate Tax Planning Workshop: Severance and Tracing Problems in the Taxation of Jointly Owned Property*, 3 INST. ON ESTATE PLANNING ¶ 69.2406, at 24-9 (1969).

38. Commentators often draw an analogy between life insurance proceeds and the appreciation in value of real property that decedent transfers in contemplation of death. Since the appreciated value of the real property is taxed to decedent's estate, commentators assume that the appreciated value of the insurance premiums—the proceeds—also should be taxed. A more useful analogy can be drawn to the situation in which *O* purchases a home subject to a mortgage, with *D* making the mortgage payments during the 3-year period prior to his death. Any appreciation in

gress had intended to tax all benefits directly or indirectly obtained from a decedent it could have done so. Instead it chose to tax the decedent's estate including everything removed from it in contemplation of death. This treatment of insurance proceeds is justified not only by a literal reading of the estate tax provisions of the Code, but is also supported by policy considerations that encourage people to provide security for their families.[39] In the instant case the policy was only six months old and consequently could have had little value as an investment. Instead it served as a means by which security could be provided for decedent's children in the event that he should become unable to support them. Failing to tax the proceeds of such a risk-sharing arrangement does not permit the tax free testamentary transfer of a large accumulation of wealth in violation of the purpose of the federal estate tax. Instead it allows provision for family security at a reasonable cost. Forcing a beneficiary to account for estate taxes by purchasing a more expensive policy to provide the same after-tax security arguably violates public policy. Many insurance policies, however, are used as a means of investment, and the amount diverted from a decedent's estate to pay premiums would have served the same function if it had been put into a savings account. Policy considerations involved in taxing a portion of the proceeds of such an investment are quite different from those involved in taxing a family security device. Many policies, however, serve both a risk-sharing and an investment function, and over a period of time, as more premiums are paid, the risk-sharing function decreases and the investment function increases. Taxation therefore should take into account the particular combination in a given policy. In the instant case the policy served entirely as a risk-sharing device. Consequently, under the existing law and under any change that comports with presently identifiable public policy only the premiums paid by the instant decedent should have been taxed.

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the value of *O*'s home is clearly not taxable to *D*'s estate, because *D* at no time owned a transferable interest. Only the amount of the mortgage payments was diverted from *D*'s estate, and only that amount is taxable to it.

39. *See* INT. REV. CODE OF 1954, § 101, which exempts life insurance proceeds from income taxation.