Vanderbilt Law Review

Volume 26
Issue 3 *Issue 3 - Symposium on Race Relations*

Article 11

4-1973

Recent Cases

Law Review Staff

RECENT CASES

Injunctions—Contempt Power—Citation Proper Against Nonparty Who Violates Court Order in School Desegregation Case

On March 5, 1972, the sheriff of Jacksonville and the superintendent of the Duval County schools filed with the United States District Court for the Middle District of Florida a petition for injunctive relief, alleging that appellant Eric Hall and other adult "outsiders" were engaged in a deliberate attempt to prohibit Jacksonville's Ribault Senior High School from functioning as an educational institution and to prevent the Duval County School Board from complying with a desegregation order issued by the court.[1] On the same day, the district court, in an ex parte proceeding, entered an order prohibiting all unauthorized outsiders from going upon the grounds or into the buildings of the high school.[2] Hall and six other adult outsiders were served with copies of the order, although none was a party to the original desegregation litigation or named as a party in the order. On March 9, 1972, Hall appeared on the Ribault campus for the stated purpose of violating the court order and was duly arrested and taken into custody by a United States marshal. After a nonjury trial, the district court found Hall guilty of criminal contempt and sentenced him to 60 days' imprisonment. On appeal to the United States Court of Appeals for the Fifth Circuit, Hall

1. The original desegregation order was entered on June 23, 1971. Mims v. Duval County School Bd., 329 F. Supp. 123 (M.D. Fla.), *aff'd*, 447 F.2d 1330 (5th Cir. 1971). After this order had been put into effect, increasing racial unrest and violence among the students at Ribault Senior High School brought "meaningful and orderly instruction" to a standstill. Mims v. Duval County School Bd., 338 F. Supp. 1208, 1209 (M.D. Fla. 1971).

2. The order provided in relevant part: 2. Until further order of this Court, no person shall enter any building of the Ribault Senior High School or go upon the school's grounds except the following: (a) Students of Ribault Senior High School while attending classes or official school functions. (b) The faculty, staff, and administration of Ribault Senior High School and other employees of the Duval County School Board having assigned duties at the school. (c) Persons having business obligations which require their presence on the school's premises. (d) Parents of Ribault Senior High School students or any other person who has the prior permission of the principal or his designee to be present on the school's premises. (e) Law enforcement officials of the City of Jacksonville, the State of Florida or the United States Government.

. . . .

6. Anyone having notice of this order who violates any of the terms thereof shall be subject to arrest, prosecution and punishment by imprisonment or fine, or both, for criminal contempt under the laws of the United States of America . . . ." Mims v. Duval County School Bd., 338 F. Supp. 1208, 1209-10 (M.D. Fla. 1971).

argued that his nonparty status put him beyond the proper reach of the court's order under both the traditional rules of federal equity jurisprudence[3] and the specific provisions of Rule 65(d)[4] of the Federal Rules of Civil Procedure. The circuit court rejected both contentions and *held*, affirmed. A district court may punish for criminal contempt a nonparty who knowingly violates a court order designed to protect the court's judgment in a school desegregation case. *United States v. Hall*, 472 F.2d 261 (5th Cir. 1972).

Whether an injunction or other order binds one not a party to the underlying suit or proceeding so that he may be held in contempt[5] for violation is a question that always has troubled the courts. Some early cases purported to announce a sweeping and apparently absolute rule—that an injunction or other order does not bind nonparties.[6] The principle underlying this rule is that due process forbids a court to adjudicate the legal rights and relationships of a person who has not had the opportunity to be heard before the court.[7] Further, a court arguably usurps the role of the legislature if it assumes to prescribe a rule of conduct for persons not properly before it.[8] Observers also recognized at an early date, however, that if all nonparties remained unaffected by

3. *See* notes 12-20 *infra* & accompanying text.

4. FED. R. CIV. P. 65(d) provides in part: "Every order granting an injunction and every restraining order . . . is binding only upon the parties to the action, their officers, agents, servants, employees, and attorneys, and upon those persons in active concert or participation with them who receive actual notice of the order by personal service or otherwise." *See* notes 20-27 *infra* & accompanying text.

5. There is general agreement that courts have inherent power to punish contempt of court by fines or imprisonment. *See Ex parte* Robinson, 86 U.S. (19 Wall.) 505, 510 (1873); United States v. Hudson, 11 U.S. (7 Cranch) 32, 34 (1812). The contempt power of the federal courts presently is codified at 18 U.S.C. § 401 (1970). In general, a contempt proceeding is "civil" if it is remedial in nature and designed to coerce obedience or to compensate the complainant for losses sustained; it is "criminal" if its purpose is to vindicate the court's authority and dignity. However, few courts have been able to distinguish satisfactorily civil and criminal contempt. *See* Goldfarb, *The Varieties of the Contempt Power*, 13 SYRACUSE L. REV. 44, 57 (1961). *See generally* Moskovitz, *Contempt of Injunctions, Civil and Criminal*, 43 COLUM. L. REV. 780 (1943). In the instant case, Hall was charged with criminal contempt.

6. For Lord Eldon, the rule was unbending: "I have no conception, that it is competent to this Court to hold a man bound by an injunction, who is not a party in the cause for the purpose of the cause." Iveson v. Harris, 32 Eng. Rep. 102, 104 (Ch. 1802). *See* Scott v. Donald, 165 U.S. 107, 117 (1897) (binding nonparties does not comport with "well-settled principles of equity procedure").

7. Harris v. Hardeman, 55 U.S. (14 How.) 334, 339-40 (1852); Webster v. Reid, 52 U.S. (11 How.) 437, 459-60 (1850); *see* Note, *Contempt by Strangers to a Federal Court Decree*, 43 VA. L. REV. 1294, 1297 (1957).

8. *See* Dobbs, *Contempt of Court: A Survey*, 56 CORNELL L. REV. 183, 250 (1971); Dunbar, *Government by Injunction*, 13 L.Q. REV. 347, 362-63 (1897); Gregory, *Government by Injunction*, 11 HARV. L. REV. 487, 501-02 (1898). *See generally* F. FRANKFURTER & N. GREENE, THE LABOR INJUNCTION 82-89, 123-33 (1930).

a court order in all situations, nonparties could thwart the order's purpose by acting independently or, more importantly, by acting on behalf of a party. These fears impelled some early courts to state broadly that all persons having knowledge of an order are bound not to violate it.[9] In some cases this broad language seems unwarranted by the facts;[10] in others, the holding is based upon the flexible principle that a nonparty who knowingly violates or interferes with a court order creates an "obstruction to the orderly and effective administration of justice"[11] and is in contempt of court. Despite such broad language, most early courts looked to the nonparty's relationship to the injunction defendant in deciding whether the injunction or other order should be held binding.[12] The decrees were therefore held to bind the agents and employees of an enjoined party, because the courts found agents and employees adequately represented at the injunction proceeding by their principals or employers.[13] Similarly, court orders were found binding upon nonparties who aided and abetted the injunction defendant in violating the order.[14] In 1930, the leading case of *Alemite Manufacturing Corp. v. Staff*[15] apparently settled the circumstances under which an injunction binds a nonparty. In *Alemite*, the court had enjoined Staff's employer from infringing Alemite's patent; after the injunction issued, Staff severed all relationship with his former employer and began infringing the patent. The district court held Staff in contempt for violating the origi-

9. *See, e.g., In re* Lennon, 166 U.S. 548, 554 (1897); Chisolm v. Caines, 121 F. 397, 401-02 (C.C.D.S.C. 1903); *In re* Reese, 107 F. 942, 945 (8th Cir. 1901).

10. In *In re* Lennon, 166 U.S. 548 (1897), for example, Lennon, although not a party, was an employee of the injunction defendant. Therefore, a more accurate holding would have been that an employee is bound by an injunction properly issued against his employer. *Cf.* United States Playing-Card Co. v. Spalding, 92 F. 368, 369 (C.C.S.D.N.Y. 1899) (discussing the breadth of the holding in *Lennon*).

11. *In re* Reese, 107 F. 942, 945 (8th Cir. 1901). Critics have challenged the "obstruction of justice" theory as ignoring the more basic question whether the order should affect the nonparty at all. *See Developments in the Law—Injunctions*, 78 HARV. L. REV. 994, 1028-29 (1965). Other writers have approved the theory. *See* Note, *supra* note 7, at 1299; *cf.* Frankfurter & Landis, *Power of Congress over Procedure in Criminal Contempts in "Inferior" Federal Courts—A Study in Separation of Powers*, 37 HARV. L. REV. 1010, 1022-23 (1924).

12. For a catalogue of the various party-nonparty relationships and their effects see Note, *Binding Nonparties to Injunction Decrees*, 49 MINN. L. REV. 719 (1965).

13. *See, e.g.*, Toledo, A.A. & N.M. Ry. v. Pennsylvania Co., 54 F. 746, 750 (C.C.N.D. Ohio), *appeal dismissed sub nom. In re* Lennon, 150 U.S. 393 (1893). One who is the employee of an enjoined party at the time the order is issued but who later severs all relationship with the injunction defendant no longer is bound by the order. Harvey v. Bettis, 35 F.2d 349 (9th Cir. 1929); Mexican Ore Co. v. Mexican Guadalupe Mining Co., 47 F. 351 (C.C.D.N.J. 1891).

14. *See, e.g.*, W.B. Conkey Co. v. Russell, 111 F. 417 (C.C.D. Ind. 1901), *appeal dismissed sub nom.* Bessette v. W.B. Conkey Co., 133 F. 165 (7th Cir. 1904); *cf.* Lawson v. United States, 297 F. 418 (8th Cir. 1924).

15. 42 F.2d 832 (2d Cir. 1930).

nal injunction. In reversing, the circuit court, speaking through Judge Learned Hand, held that an injunction only binds parties, those who abet a party in violating the injunction, and those legally identified with a party.[16] Furthermore, the court held that insofar as a decree purports to bind others, it is "pro tanto brutum fulmen."[17] Finally, Judge Hand noted that "it is not the act described which the decree may forbid, but only that act when the defendant does it."[18] Four years later, in *Chase National Bank v. City of Norwalk*,[19] the Supreme Court substantially adopted the principles announced by Judge Hand, as a matter of equity jurisdiction and procedure. Additionally, these principles constitute the "common-law doctrine" that is the basis of Federal Rule of Civil Procedure 65(d),[20] which explicitly delineates the binding effect of federal injunctions and restraining orders. Rule 65(d) is apparently mandatory, requiring compliance by all federal courts,[21] and although failure to comply with the Rule may not render the injunction void, a material departure from its terms may warrant vacation or reversal.[22] Judicial fidelity to Rule 65(d) in general has been consistent and scrupulous.[23] Even though Rule 65(d) by its terms allows no exceptions to its coverage, and despite the Supreme Court rule that the Federal Rules are to be followed in bankruptcy cases[24] "as nearly as may be,"[25] there always

16. One commentator has suggested that Judge Hand's sweeping language should be limited to factual contexts in which a relatively unimportant personal property right is infringed and the deliberateness of the defendant's conduct is uncertain. That commentator believes that, in cases like the instant one, *Alemite* should constitute no bar to holding the nonparty in contempt. Note, *The Range of Federal Injunctions*, 6 UTAH L. REV. 363, 376 & n.105 (1959).

17. 42 F.2d at 832.

18. *Id.* at 833.

19. 291 U.S. 431 (1934). In this case plaintiff sought an injunction to forbid the removal from the city streets of certain equipment belonging to it. The injunction ran not only against the city of Norwalk, but also against "all persons to whom notice of the order of injunction should come." *Id.* at 436. The Court found the order invalid insofar as it purported to bind persons not parties nor associates or confederates of parties.

20. *See* Regal Knitwear Co. v. NLRB, 324 U.S. 9, 13-14 (1945). Rule 65(d) actually is based on § 19 of the Clayton Act, which in turn was declaratory of common law. *See* NLRB v. Blackstone Mfg. Co., 123 F.2d 633 (2d Cir. 1941). Section 19 was repealed in 1948 for the stated reason that it was covered by Rule 65(d). *See* 7 J. MOORE, FEDERAL PRACTICE ¶ 65.01[10] n.6 (2d ed. 1972). For the text of Rule 65(d) see note 4 *supra*.

21. *See* 7 J. MOORE, *supra* note 20, ¶ 65.11.

22. *See id.* ¶ 65.11 & n.6.

23. *See* Zenith Radio Corp. v. Hazeltine Research, Inc., 395 U.S. 100 (1969) (nonparties bound only within scope of Rule 65(d)); Le Tourneau Co. v. NLRB, 150 F.2d 1012 (5th Cir. 1945) (same); Baltz v. The Fair, 178 F. Supp. 691 (N.D. Ill. 1959), *aff'd*, 279 F.2d 899 (7th Cir. 1960) (same); *cf.* Consolidation Coal Co. v. Disabled Miners, 442 F.2d 1261 (4th Cir.), *cert. denied*, 404 U.S. 911 (1971) (court must be diligent in following Rule 65).

24. The Federal Rules as a whole are not directly applicable to proceedings in bankruptcy. *See* 7 J. MOORE, *supra* note 20, ¶ 65.02[3].

25. General Order 37, 11 U.S.C. app. at 2211 (1970). The Supreme Court promulgated the

has been an exception to Rule 65(d) for bankruptcy cases. Perhaps as a result of the qualifying language in the Court rule, it is well established that courts may issue an in rem injunction binding on all persons—parties and nonparties alike.[26] In nonbankruptcy cases, however, Rule 65(d) has been, with few exceptions,[27] an effective limitation on the scope of federal court injunctions.

In the instant case, the court first found *Alemite* and *Chase National Bank* distinguishable: in each case, the nonparty's act, however damaging to the plaintiff, did not affect the injunction defendant's duty and ability to comply with the injunction, nor did it threaten the plaintiff's rights against the defendant as adjudicated by the court. In the instant case, however, the court found that Hall's acts threatened to prevent the school board from performing its constitutional duty to desegregate the Jacksonville school system and threatened to deprive the students of their constitutional right to attend integrated schools. The court therefore concluded that Hall's acts had imperiled the district court's power to render an effective judgment in the case before it and that, under the authority of *United States v. UMW*,[28] a case in which substantial doubt of the court's statutory power to issue an injunction was held not to bar issuance of a temporary restraining order,[29] the district court had inherent jurisdictional power to issue an order, binding on all persons, to protect its ability to render an effective judgment. As an alternative rationale, the court analogized desegregation cases to in rem proceedings—in both cases the court's judgment is peculiarly susceptible to interference by an a priori undefinable class of persons.

General Orders under § 30 of the Bankruptcy Act. Section 30 subsequently was repealed and a new rule-making procedure authorized. *See* 28 U.S.C. § 2075 (1970). *See generally* 2 J. MOORE, *supra* note 20, ¶ 1.03[2].

26. *See, e.g., In re* Lustron Corp., 184 F.2d 798 (7th Cir. 1950), *cert. denied*, 340 U.S. 946 (1951); *In re* George F. Nord Bldg. Corp., 129 F.2d 173 (7th Cir.), *cert. denied*, 317 U.S. 670 (1942); Zeleznik v. Grand Riviera Theater Co., 128 F.2d 533 (6th Cir. 1942); Converse v. Highway Constr. Co., 107 F.2d 127 (6th Cir. 1939).

27. *See, e.g.*, United States v. Dean Rubber Mfg. Co., 71 F. Supp. 96 (W.D. Mo. 1946), in which it was said that an injunction against the distribution of defective prophylactics would be in rem. The statement seems to be a dictum unrelated to the actual decision of the case. *See* Dobbs, *supra* note 8, at 257 n.305.

28. 330 U.S. 258 (1947).

29. In *UMW*, the district court issued an ex parte restraining order forbidding defendant union to call a strike. The union called a strike, believing that under § 2 of the Norris-LaGuardia Act, 29 U.S.C. § 101 (1970), the district court was without jurisdiction to issue the order. In affirming the union's contempt conviction, the Supreme Court apparently held the union bound to obey the order even if the district court were found to be without jurisdiction to issue it. For discussions of the *UMW* case see Z. CHAFEE, SOME PROBLEMS OF EQUITY 364-80 (1950); Cox, *The Void Order and the Duty to Obey*, 16 U. CHI. L. REV. 86, 100-15 (1948). *See* notes 34-40 *infra* & accompanying text.

Therefore the instant court said that in both cases, in order to protect its judgment, the court has broad and flexible powers to issue orders binding on all persons and to punish for contempt those who violate the orders.[30] The court further noted that because Rule 65(d) merely codifies the common-law doctrine of the effect of injunctions on nonparties,[31] and because federal courts had power at common law to issue in rem injunctions and had continued to do so under the Rule, the district court had the power, in the analogous school desegregation situation, to issue orders binding on all persons, notwithstanding Rule 65(d). Although it conceded that injunctive relief ordinarily requires a hearing, and that there was no hearing in the instant case, the court overcame this apparent impropriety by characterizing the instant order as a temporary restraining order, which may issue ex parte under Rule 65(b).[32]

Although the result in the instant case seems just,[33] the reasoning of the court is unconvincing and could set an unfortunate precedent. For example, the court's first alternative ground of decision—that courts of equity have inherent jurisdictional power to issue binding orders to protect their judgments—seems unsupported by precedent. In *United States v. UMW*,[34] upon which the court relied heavily, the issue was the court's ability to enter binding orders despite its lack of subject-matter jurisdiction, but in the instant case the court purported to issue an order binding persons over whom it had not acquired personal jurisdiction.[35] Authorities generally agree that courts should not invoke the *UMW* doctrine to remedy a lack of personal jurisdiction,[36] and it seems unwise to extend a doubtful precedent to encroach upon fundamental individual rights. Furthermore, the intrinsic authoritative effect of the

30. The Supreme Court has recognized the unusual breadth and flexibility of a district court's equitable powers in a school desegregation case. Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 15 (1971).

31. *See* note 20 *supra* & accompanying text.

32. The court found support for this characterization in the fact that Hall violated the order 4 days after its issuance, well within the 10-day limit for temporary restraining orders. For a discussion of the requirements of Rule 65(b) see 7 J. MOORE, *supra* note 20, ¶¶ 65.05-.07.

33. Hall was fully aware of the order, his only apparent purpose in violating the order was to flout the authority of the court, and the order was designed to serve the broad public interest. *Cf.* note 16 *supra*.

34. 330 U.S. 258 (1947). *See* note 29 *supra*.

35. The distinction seems fundamental. Subject-matter jurisdiction represents the governmental allocation of judicial tasks and spheres of competence among the various courts; being before the wrong court ordinarily will not prejudice the individual litigant. Personal jurisdiction, however, reflects the individual's basic right to notice and an opportunity to be heard before his legal relationships are adjudicated. *See* note 7 *supra* & accompanying text.

36. *See* Z. CHAFEE, *supra* note 29, at 374; Rodgers, *The Elusive Search for the Void Injunction: Res Judicata Principles in Criminal Contempt Proceedings*, 49 B.U.L. REV. 251, 272-73 (1969).

UMW decision is uncertain because of the sharp division among the justices deciding it.[37] Finally, the Supreme Court may have repudiated *UMW* in *In re Green*,[38] a case that the instant court apparently did not consider. In *Green*, a state court had issued a restraining order pending its determination whether the National Labor Relations Act had pre-empted state-court jurisdiction. The Court reversed a contempt conviction, holding that a state court is without power to issue a binding order if federal legislation in fact has pre-empted its jurisdiction. On its facts, *In re Green* cannot be distinguished from *UMW*,[39] which therefore must be considered severely weakened, if not overruled.[40] The instant court's characterization of school desegregation cases as in rem actions is also of questionable propriety. Courts ordinarily invoke in rem jurisdiction to adjudicate right and title to real or other tangible property; they ordinarily do not use it, as in the instant case, to regulate conduct.[41] The in rem injunction, as used in the instant case, is objectionable essentially because it adjudicates individual rights without affording a hearing to the individual and because it gives the court overly broad power to prescribe a rule of conduct for all the world. Moreover, the cases cited by the court in support of the district court's assumption of in rem jurisdiction were, with but one exception,[42] bankruptcy proceedings. The obvious factual dissimilarity between the administration of a bankrupt's assets and the desegregation of a school system makes the former a dubious precedent for the latter.[43] Finally, the court's recharacterization of the district court's order as a temporary restraining order is inconsistent with Rule 65(b), which requires that a restraining order

37. Only 5 of 9 justices thought there is a duty to obey an order if the court later is found to have been without jurisdiction; of these 5, however, 3 thought the court below had jurisdiction over the case. As Professor Chafee points out, there is "a lack of impressive solidity on this point . . . ." Z. CHAFEE, *supra* note 29, at 367.

38. 369 U.S. 889 (1962).

39. In a footnote, the *Green* Court found *UMW* distinguishable because it "involved a restraining order of a federal court and presented no question of pre-emption of a field by Congress where, if the federal policy is to prevail, federal power must be complete." 369 U.S. at 692 n.1. It is hard to see why frustration of the policy of the National Labor Relations Act by a state court is more objectionable than frustration of the policy of the Norris-LaGuardia Act by a federal court.

40. *See Developments in the Law—Injunctions*, *supra* note 11, at 1079.

41. *See* Dobbs, *supra* note 8, at 254-58; Note, *supra* note 12, at 729-31. It would be difficult to say that the district court's desegregation decree affected any right or title to the school system or to the underlying racial controversy.

42. United States v. Dean Rubber Mfg. Co., 71 F. Supp. 96 (W.D. Mo. 1946). *See* note 27 *supra*.

43. Furthermore, the court's use of the in rem analogy to escape the confines of Rule 65(d), *see* note 31 *supra* & accompanying text, was improper because the in rem cases under the Rule were bankruptcy cases, to which it is not certain that the Federal Rules apply at all. *See* notes 24-26 *supra* & accompanying text.

expire by its terms within ten days[44] and that it define the irreparable injury feared by the applicant.[45] On the other hand, the district court's order could not be termed a preliminary injunction, because under Rule 65(a) no preliminary injunction may issue without notice to the adverse party. Whether characterized as a temporary restraining order or as a preliminary injunction, the district court's order is still defective under Rule 65(d) because it purported to bind the world at large, rather than the limited class of persons permitted by the Rule. Given the facts presented to the instant court, there was probably no way in which the court reasonably could have reached the result it did within the confines of precedent and Rule 65. Yet at the district court level a few minor changes in the papers filed—naming the outsiders as parties defendant and complying with the procedural requirements of Rule 65(b)—would have resulted in a valid temporary restraining order binding on Hall and the six other adult outsiders. Additionally, this procedure would have satisfied the needs of the school board—presumably Hall and the other six were the principal instigators of unrest at Ribault Senior High School, and anyone joining them in disruptive activities would be bound by the restraining order under the "active concert or participation" clause of Rule 65(d).[46] To permit insubstantial changes in paperwork to control the validity of an order and thereby to require reversal of an otherwise just conviction would be a triumph of form over substance that the instant court could not accept. Nevertheless, reaching the correct result forced the court to strain old principles and articulate new theories that in the future may be applied to deprive nonparties of the essential right to participate and be heard in proceedings that adjudicate their legal relationships.

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44. It should be noted that the district court's order was to be in effect "[u]ntil further order." This does not give the impression of the limited duration inherent in a temporary restraining order.

45. If the court's characterization of the order as a temporary restraining order is accepted, the court need not have developed the in rem theory, because a temporary restraining order is binding without a hearing under Rule 65(b). On the other hand, if the in rem rationale is accepted, the temporary restraining order characterization was unnecessary because an in rem injunction may be issued ex parte.

46. *See* Rosenthal, *Injunctive Relief Against Campus Disorders*, 118 U. PA. L. REV. 746, 762-63 (1970).

Public Welfare—Federal Court Jurisdiction—Retroactive Award of Welfare Payments Is Inappropriate Exercise of District Court's General Equity Jnrisdiction and Violates Eleventb Amendment

Plaintiff welfare recipients[1] brought a class action seeking to enjoin enforcement[2] of a New York welfare statute[3] that provided for payment of higher benefits to welfare recipients residing in New York City than to those residing in the surrounding suburban area, on the ground that the statute and the regulations promulgated thereunder violated the equal protection clause of the fourteenth amendment[4] and provisions of the Social Security Act.[5] Pursuant to a favorable judgment on the merits,[6] plaintiffs submitted a proposed order requiring defendants to award

1. Plaintiffs, recipients of Aid to the Aged, Blind or Disabled (AABD) residing in Nassau and Westchester Counties, brought suit on behalf of all AABD recipients who resided in the 7-county area immediately surrounding New York City. At a later stage in the litigation, the court granted intervention on behalf of all 7-county recipients of assistance under the Aid to Families with Dependent Children (AFDC) program. Named as defendants were the Commissioner of the Department of Social Services of the State of New York and the Department itself.

2. Plaintiffs sought a declaratory judgment that the statute in question was unlawful, and preliminary and permanent injunctions against its enforcement. Plaintiffs made no reference at the time to an award of retroactive payments.

3. On March 31, 1969, the New York Legislature enacted § 131-a of the Social Services Law, ch. 184, § 5, [1969] N.Y. Laws 217, which established 2 schedules of maximum monthly grants allowable to welfare recipients, one applicable to New York City and the second to all other social service districts in the state. Prior to the adoption of § 131-a, the Department of Social Services had administratively prescribed the standards of public assistance, dividing the state into 3 areas and establishing differentials among them. The 7-county area involved in the instant case was combined with New York City into a single region. On May 2, 1969, the legislature amended the recently adopted statute, ch. 411, § 1, [1969] N.Y. Laws 652, to permit the Commissioner of Social Services to raise or lower the rate schedules for all districts except New York City. The Commissioner subsequently exercised this authority on June 5, 1969, by raising the 7-county allowance from $60 to $65 for an individual, and from $183 to $191 for a family of 4 (compared to $70 and $208, for New York City).

4. "No State shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV, § 1.

5. Plaintiffs contended that the statute violated 42 U.S.C. §§ 301 *et seq.*, 1202(a)(1), 1352(a)(1), 1382(a)(1) (1970). 42 U.S.C. § 302(a)(1) provides in part: "A State plan for old-age assistance . . . must . . . provide that it shall be in effect in all political subdivisions of the State, and, if administered by them, be mandatory upon them. . . ." Identical requirements are found in § 1202(a)(1) (Aid to the Blind); § 1352(a)(1) (Aid to the Permanently and Totally Disabled); and § 1382(a)(1) (combined programs of Aid to the Aged, Blind or Disabled and Medical Assistance to the Aged).

6. The 3-judge district court granted a preliminary injunction against enforcement of § 131-a, determining that the differential between allowance levels in New York City and the surrounding area constituted "an arbitrary, invidious and irrational inequality" in violation of plaintiffs' equal protection rights. Rothstein v. Wyman, 303 F. Supp. 339, 347 (S.D.N.Y. 1969). The court deferred

retroactively to all class members the payments that had been denied them under the contested statute. Defendants objected to the proposal, arguing that the court, in balancing the equities, should give special consideration to the heavy administrative costs involved in carrying out the proposed order and to the additional strains it would impose upon an already overburdened administrative mechanism.[7] Defendants contended further that the instant action, to the extent that it sought retroactive payments, was a suit against the State of New York in violation of the eleventh amendment of the United States Constitution.[8] Plaintiffs countered that because of the recipients' low incomes, the importance to them of the admittedly small sums involved outweighed any adverse impact of retroactive payments upon the state and, moreover, that the eleventh amendment does not prevent a federal court from providing a comprehensive remedy for the deprivation of constitutional and statutory rights, including both injunction and retroactive award of benefits.[9] The district court adopted plaintiffs' proposal.[10] On appeal to the United States Court of Appeals for the Second Circuit, *held,* reversed. An order compelling a state to make retroactive payments of public assistance benefits is both an inappropriate exercise of a federal district court's general equity jurisdiction and a violation of the eleventh amendment of the United States Constitution. *Rothstein v. Wyman,* 467 F.2d 226 (2d Cir. 1972), *cert. denied,* 41 U.S.L.W. 3527 (U.S. Apr. 2, 1973).

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its determination of the alleged violations of the Social Security Act in anticipation of an HEW ruling. 303 F. Supp. at 351. On direct appeal, the United States Supreme Court vacated and remanded for determination of the statutory grounds in plaintiffs' complaint. Wyman v. Rothstein, 398 U.S. 275 (1970) (per curiam). The Court stated that its recent decision in Rosado v. Wyman, 397 U.S. 397 (1970), dictated that a federal court called to pass upon the constitutionality of a state's welfare program should consider first any pendent statutory claims. 398 U.S. at 276. On remand from the 3-judge court for determination of the statutory claim, a single federal judge ruled for plaintiffs on the merits and granted their motion for reinstatement of the injunction. Rothstein v. Wyman, 336 F. Supp. 328 (S.D.N.Y. 1970).

7. Defendants submitted, at a later stage, the affidavit of a deputy commissioner in charge of operations, who estimated that the total costs to the state of the proposed order would be $1,724,000. Defendants pointed out that much of the retroactive award would go to persons no longer on the welfare rolls, thereby preventing already inadequate state funds from reaching those persons whose needs were immediate and urgent.

8. U.S. CONST. amend. XI provides: "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State."

9. Plaintiffs further asserted that New York's acceptance of federal funds under the Social Security Act for use in its welfare program constituted an implied waiver of its eleventh amendment immunity.

10. Rothstein v. Wyman, 2 CCH POV. L. REP. ¶ 15,172 (S.D.N.Y. Feb. 7, 1971). Final judgment was not entered until a year later, after the court had considered defendants' requests to cancel the retroactive order. Rothstein v. Wyman, 2 CCH POV. L. REP. ¶ 15,237 (S.D.N.Y. Feb. 25, 1972).

The categorical assistance programs established under the Social Security Act of 1935[11] are based on a "scheme of cooperative federalism,"[12] under which the federal government maintains a dominant role in financing, establishing minimal standards, and determining the overall direction of public assistance programs.[13] Against this federal power, a participating state retains considerable latitude in administering the assistance programs, especially in setting a standard of need and determining the level of benefits.[14] During the early years of categorical assistance, dissatisfied claimants seldom attempted to secure judicial review of these state administrative provisions.[15] However, as a result of the adoption of more liberal class action procedures,[16] the accelerating organization of welfare recipients,[17] the increased availability of legal assistance to the poor, and the acceptance of welfare benefits as a statutory entitlement rather than a privilege,[18] the incidence of suits to correct abuses in state welfare practices has increased appreciably during the past decade.[19] Because victory on the major substantive issues was of primary importance in the early years of welfare litigation, the remedial appropriateness of retroactive benefit orders by federal courts seldom was questioned, and such awards frequently were made as a matter of course.[20] Thus the cases dealing with retroactive welfare benefits usually have lacked an articulated rationale for either granting or denying such benefits.[21] With the recent resolution of many of the sub-

11. 42 U.S.C. § 301 *et seq.* (1970). For a general overview of the programs see ADVISORY COMM'N ON INTERGOVERNMENTAL RELATIONS, STATUTORY AND ADMINISTRATIVE CONTROLS ASSOCIATED WITH FEDERAL GRANTS FOR PUBLIC ASSISTANCE (1964) [hereinafter cited as ADVISORY COMM'N]; Wedemeyer & Moore, *The American Welfare System,* 54 CALIF. L. REV. 326 (1966).

12. Jefferson v. Hackney, 406 U.S. 535, 542 (1972); King v. Smith, 392 U.S. 309, 316 (1968).

13. *See* ADVISORY COMM'N, *supra* note 11, at 27. Each state choosing to apply for assistance under the categorical programs must submit a state plan for HEW approval; the plan must meet certain basic qualifications under the Act, 42 U.S.C. §§ 302, 602, 1202, 1352, 1382 (1970), and must conform to rules and regulations promulgated by the Secretary, *id.* § 1302.

14. *See* Dandridge v. Williams, 397 U.S. 471, 478 (1970); King v. Smith, 392 U.S. 309, 318-19 (1968).

15. Note, *Federal Judicial Review of State Welfare Practices,* 67 COLUM. L. REV. 84, 90 (1967).

16. For a discussion of the use of class actions in welfare litigation see P. Nussbaum, How To Commence Welfare Litigation in Federal Court 45-47 (Center on Social Welfare Policy & Law, Columbia University, undated).

17. *See* Note, *supra* note 15, at 90.

18. *See* Goldberg v. Kelly, 397 U.S. 254, 262 & n.8 (1970); Shapiro v. Thompson, 394 U.S. 618, 627 n.6 (1969). *See also* Reich, *Individual Rights and Social Welfare: The Emerging Legal Issues,* 74 YALE L.J. 1245, 1255 (1965).

19. *See* Rosado v. Wyman, 397 U.S. 397, 422 n.23 (1970), and cases therein cited.

20. Levy, *The Aftermath of Victory: The Availability of Retroactive Welfare Benefits Illegally Denied,* 3 CLEARINGHOUSE REV. 253 & n.1 (1970).

21. *See* Westberry v. Fisher, 309 F. Supp. 12, 20 (D. Me. 1970), and cases therein cited; *cf.*

stantive questions, however, judicial focus is shifting to the propriety of retroactive awards.[22] Employment of this remedy by the federal courts has been attacked on two distinct grounds: as an improper exercise of the courts' general equity jurisdiction and as a violation of the eleventh amendment of the United States Constitution. Under general equitable principles, the courts have consciously examined the litigants' interests in the grant or denial of retroactive benefits to determine where the preponderance of the equities lies. In *Bryson v. Burson,*[23] a federal district court balanced plaintiffs' financial needs and diligence in bringing the action[24] against the potential economic and administrative burden that a retroactive order would place on the state, and, finding the remedy to be within its equitable discretion, compromised by awarding payments retroactive to the date on which the action was filed.[25] An opposite conclusion was reached, after weighing similar factors, by the Ninth Circuit Court of Appeals in *Bryant v. Carleson.*[26] Assuming that it possessed the authority to make a retroactive award,[27] the court reasoned that the state's prior unlawful conduct,[28] together with the plight of the welfare recipients who were denied payments, nevertheless could not justify endangering the state's already troubled fiscal position.[29] Although very few courts have articulated this equity analysis,[30] even

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Fontaine, *The Constitutional Law of Remedies in Welfare Litigation,* 23 MAINE L. REV. 41, 42-43 (1971).

22. Levy, *supra* note 20, 4 CLEARINGHOUSE REV. at 6. The purpose of seeking retroactive benefits is twofold: to recompense the welfare recipient for benefits wrongfully denied him, often providing the means for his continued subsistence, and to deter intentional wrongdoing by state welfare administrators. *Id.*, 3 CLEARINGHOUSE REV. at 253.

23. 308 F. Supp. 1170 (N.D. Ga. 1969). The case originated as a class action by plaintiffs challenging the constitutionality of the residency requirements of Georgia welfare statutes.

24. *See* Machado v. Hackney, 299 F. Supp. 644, 646 (W.D. Tex. 1969), *vacated,* 397 U.S. 593 (1970).

25. 308 F. Supp. at 1174.

26. 465 F.2d 111 (9th Cir. 1972). The suit arose as a class action by AFDC recipients challenging California's failure to increase dollar maximums under its AFDC program.

27. The court assumed *arguendo* that it possessed the jurisdiction and power to order retroactive payments, but expressed serious doubt as to whether such authority actually existed. *Id.* at 114.

28. The court stated that there was no question that the state had continued to receive federal funds " 'in flagrant violation and disregard of Federal law . . . .' " *Id.* at 113. Other courts have considered the need to deter such official lawlessness as a factor to weigh in determining whether to award retroactive payments. *See, e.g.,* Alvarado v. Schmidt, 317 F. Supp. 1027, 1042 (W.D. Wis. 1970).

29. 465 F.2d at 114. The court was undoubtedly influenced by the fact that retroactive payments would have cost the state approximately $90,000,000. For a similar case denying retroactive benefits because of their financial burden on the state see Robinson v. Hackney, 307 F. Supp. 1249 (S.D. Tex. 1969).

30. *Cf.* note 21 *supra* and accompanying text.

fewer have explored the constitutional argument. The eleventh amendment,[31] which has been construed to prohibit nonconsensual suits against a state by its own citizens in the federal courts,[32] applies both to actions in which the state itself is a party and to those involving other parties in which satisfaction of the resulting judgment would require an expenditure of state funds.[33] In *Ex parte Young*,[34] however, the Supreme Court excepted from this general proscription suits to enjoin state officials from enforcing unconstitutional legislation.[35] In *Thompson v. Shapiro*,[36] a three-judge district court addressed briefly the contention

31. *See* note 8 *supra* for the text of the amendment. The adoption of the eleventh amendment, which followed closely the Supreme Court's decision in Chisholm v. Georgia, 2 U.S. (2 Dall.) 419 (1793), was motivated by the belief that the traditional doctrine of sovereign immunity should apply to the states. *See* Note, *Sovereign Immunity in Suits To Enjoin the Enforcement of Unconstitutional Legislation*, 50 HARV. L. REV. 956, 957 (1937); Comment, *Waiver of State Immunity to Suit with Special Reference to Suits in Federal Courts*, 45 MICH. L. REV. 348, 348-49 (1947). For a discussion of the history and interpretation of the eleventh amendment see Cullison, *Interpretation of the Eleventh Amendment (A Case of the White Knight's Green Whiskers)*, 5 HOUSTON L. REV. 1 (1967); Mathis, *The Eleventh Amendment: Adoption and Interpretation*, 2 GA. L. REV. 207 (1968).

32. *See* Hans v. Louisiana, 134 U.S. 1 (1890). A state can, of course, consent to be sued and thus relinquish the protection of the eleventh amendment. The accepted rule has been that such a relinquishment must be shown to be clear and unequivocal. *See* Great N. Life Ins. Co. v. Read, 322 U.S. 47, 54 (1944). *But cf.* Parden v. Terminal Ry., 377 U.S. 184 (1964); Petty v. Tennessee-Missouri Bridge Comm'n, 359 U.S. 275 (1959) (both cases suggest that the strict standard required for relinquishment has been relaxed toward a standard of implied consent). *See generally* Comment, *Private Suits Against States in the Federal Courts*, 33 U. CHI. L. REV. 331 (1966).

33. *See* Ford Motor Co. v. Department of Treasury, 323 U.S. 459, 463-64 (1945). The eleventh amendment does not provide immunity for counties, cities, or other lesser governmental units. Lincoln County v. Luning, 133 U.S. 529 (1890); Markham v. City of Newport News, 292 F.2d 711 (4th Cir. 1961).

34. 209 U.S. 123 (1908). The case arose out of a federal suit by shareholders of 9 railroads to restrain defendant Young, the Attorney General of Minnesota, from enforcing an allegedly unconstitutional statute reducing railroad rates. The federal court granted the requested relief and issued a preliminary injunction over Young's objection that the suit was in fact a suit against the state and thus foreclosed by the eleventh amendment. When Young subsequently sued in state court for a writ of mandamus to compel the railroads' compliance with the new law, he was judged guilty of contempt and jailed. The United States Supreme Court upheld the injunction, and Justice Peckham announced the following rule: "The act to be enforced is alleged to be unconstitutional, and if it be so, the use of the name of the state to enforce an unconstitutional act to the injury of complainants is a proceeding without the authority of, and one which does not affect, the state in its sovereign or governmental capacity." 209 U.S. at 159. One commentator, while pointing out that the decision rested on "purest fiction," upholds *Ex parte Young* as indispensable to constitutional government and the rule of law, in that it has brought within the scope of federal judicial review actions that might otherwise have escaped review and has subjected states to the restrictions of the United States Constitution. C. WRIGHT, FEDERAL COURTS § 48, at 183-86 (2d ed. 1970).

35. *Accord*, Griffin v. County School Bd., 377 U.S. 218, 228 (1964).

36. 270 F. Supp. 331 (D. Conn. 1967), *aff'd*, 394 U.S. 618 (1969). Plaintiff brought suit against the Connecticut Commissioner of Welfare, in his official capacity, seeking an injunction against enforcement of the state's one-year residence requirement and payment of monies unconstitutionally withheld.

that an award of retroactive welfare payments violated the eleventh amendment by constituting, in effect, a suit against the state without its consent. Interpreting *Ex parte Young* to hold that the eleventh amendment does not forbid suits against state officials who have acted unconstitutionally, the court decided that it was not precluded from ordering defendant welfare commissioner to tender monies he had unconstitutionally withheld.[37] On direct appeal, the Supreme Court affirmed the decision without discussing the constitutionality of retroactive benefits.[38] Only one welfare case has dealt at length with the effect of the eleventh amendment on a federal court's power to award retroactive benefits. In *Westberry v. Fisher*,[39] a federal district court held that because the conceded purpose of plaintiffs' action was to establish a liability that ultimately would be payable out of Maine's public fisc, the suit was directed against the state in substance and therefore was constitutionally proscribed.[40] Moreover, the court answered plaintiffs' contention that *Ex parte Young* and its progeny sanction the award of retroactive damages against a state by distinguishing suits to enjoin the unconstitutional conduct of state officials from actions to recover money damages for their past violations. It reasoned that, although actions of the first type are not forbidden by the eleventh amendment,[41] the *Young* doctrine has never been extended by the Supreme Court to cases within the second category; rather, when confronted with actions for damages, the Court has adhered consistently to the strict rule that a state cannot be sued in federal court without its consent.[42] Thus the federal decisions on the propriety of awarding retroactive welfare benefits lack uniformity, both in theory and result.[43]

37. Thompson v. Shapiro, 270 F. Supp. 331, 338 n.5 (D. Conn. 1967). One of the judges dissented from the award of money damages to plaintiff, saying that Connecticut had not consented to be sued in an action for damages. *Id.* at 341 (Clarie, J., dissenting).

38. Shapiro v. Thompson, 394 U.S. 618 (1969).

39. 309 F. Supp. 12 (D. Me. 1970). *Westberry* began as a class action by AFDC recipients attacking the constitutionality of Maine's so-called "maximum grant" regulations. After a 3-judge court had held that the state regulations violated the equal protection clause of the fourteenth amendment, 297 F. Supp. 1109 (D. Me. 1969), the case was remanded to a single district judge for determination of plaintiff's damage claims.

40. 309 F. Supp. at 18, *citing* Kennecott Copper Corp. v. State Tax Comm'n, 327 U.S. 573, 576-77 (1946); Ford Motor Co. v. Department of Treasury, 323 U.S. 459, 463-64 (1945).

41. 309 F. Supp. at 19, *citing* Griffin v. County School Bd., 377 U.S. 218, 228 (1964); Georgia R.R. & Banking Co. v. Redwine, 342 U.S. 299, 303-06 (1952).

42. 309 F. Supp. at 19.

43. Disagreement even exists among the courts that award retroactive payments over the proper method of making those payments. Most cases have awarded benefits retroactively to the entire class. *E.g.*, Campagnuolo v. White, CCH Pov. L. Rep. ¶ 1305.75 (D. Conn. Oct. 7, 1971); Woods v. Miller, [1968-1971 Transfer binder] CCH Pov. L. Rep. ¶ 13,025 (D. Nev. Mar. 19, 1971);

The instant court initially noted that, as an instrumentality of the federal government, it must attempt to effectuate the policies of the United States in evaluating the parties' claims. Balancing the relative hardships of the parties in view of the "cooperative federalism" approach of the entire federal welfare program,[44] the court reasoned that the increased tensions in federal-state relations which could result from a federal court order requiring a state to expend funds against its will outweighed the possible hardships on plaintiffs were retroactive payments not allowed. Consequently, the court held that the district court's award of retroactive welfare benefits, when measured by the restraining "principles of equity, comity, and federalism,"[45] constituted an improper exercise of its equity powers. Turning next to the question of state immunity under the eleventh amendment, the court reasoned that because past Supreme Court affirmances of decisions awarding retroactive benefits had not addressed specifically the issue of federal court power to order such relief,[46] it was free to decide this question for itself. The court then distinguished between an injunctive decree and one that establishes a liability to be satisfied from state monies. While the former merely conditions the state's future receipt of federal funds on state officials' compliance with federal standards, the court noted, the latter actually requires an affirmative act from the state itself—the expenditure of state funds to make restitution for its agents' past wrongs—and is therefore no different from an award of damages in a suit against the state itself.[47] Thus, the court held that the district court's retroactive award of public assistance benefits in the instant case, aside from being an improvident exercise of the court's equity powers, was foreclosed by the eleventh amendment.

Doe v. Hursh, 337 F. Supp. 614 (D. Minn. 1970); Ojeda v. Hackney, 319 F. Supp. 149 (N.D. Tex. 1970); Brooks v. Yeatman, 311 F. Supp. 364 (M.D. Tenn. 1970); Baxter v. Birkins, 311 F. Supp. 222 (D. Colo. 1970). Other courts have awarded retroactive payments to the named plaintiffs only in a class action, *e.g.*, Machado v. Hackney, 299 F. Supp. 644 (W.D. Tex. 1969), *vacated*, 397 U.S. 593 (1970), and one 3-judge court remanded to a single district judge with instructions to consider a retroactive order, Alvarado v. Schmidt, 317 F. Supp. 1027 (W.D. Wis. 1970). Finally, some courts have declined to rule on the issue of retroactivity, instead remanding to the state welfare agency for its determination in line with established procedures. *E.g.*, Grubb v. Sterrett, 315 F. Supp. 990 (N.D. Ind. 1970); Solman v. Shapiro, 300 F. Supp. 409 (D. Conn.), *aff'd*, 396 U.S. 5 (1969); *cf.* Robinson v. Washington, 302 F. Supp. 842 (D.D.C. 1968). *See generally* Fontaine, *supra* note 21, at 43-47.

44. *See* notes 11-14 *supra* and accompanying text.

45. Mitchum v. Foster, 407 U.S. 225, 243 (1972).

46. *But cf.* McDonald v. Department of Pub. Welfare, 430 F.2d 1268 (5th Cir. 1970).

47. Relying on the rule that a state's waiver of its eleventh amendment immunity must be clear and unequivocal, *see* note 32 *supra*, the instant court also rejected plaintiffs' contention that New York had waived its immunity in accepting federal funds under the Social Security Act for use in its welfare program.

The instant decision marks the first time that a federal court has articulated both discretionary and mandatory limitations on its own power to award retroactive welfare payments. In light of the largely undeveloped state of the law of welfare remedies, both of the case's holdings seem likely to be followed by other federal courts.[48] The court's weighing of the competing claims to deny retroactive payments seems supportable as a proper exercise of its equitable powers in this instance, especially given the threatened administrative and financial burden on the state and the likelihood that a retroactive award might have deprived current recipients of needed funds. In support of its conclusion, however, the court has provided a rationale that, if followed by other courts, may unduly favor the state's position and prevent any truly equitable resolution of the parties' interests. Specifically, the instant court's articulation of the congressional policy of "cooperative federalism" as a background for weighing the relative hardships of the parties may persuade other courts to defer to the decisions of state welfare administrators; in this era of burgeoning welfare rolls and inadequate state budgets, courts are likely to welcome the cooperative federalism approach as a practical judicial response to social and political exigencies. The danger with this approach is its overemphasis on the policy of federal-state cooperation at the expense of a second fundamental goal of congressional welfare policy—satisfaction of the ascertained needs of impoverished persons. Thus, although the instant court did briefly consider this goal in weighing the parties' interest,[49] its rationale may nevertheless lead other courts to forego the necessary balancing of these often conflicting congressional policies. Several more difficult problems exist with the court's alternative holding. The court undoubtedly could have disposed of plaintiffs' claim solely on the ground that the district court order was an improvident exereise of the court's general equity jurisdiction; other courts have resolved this problem without proceeding to the eleventh amendment issue.[50] Thus the court's alternative holding—that the federal courts are constitutionally precluded from awarding retroactive relief—was apparently motivated by a desire to establish precedent in this newly developing area with the hope of ending the Supreme Court's silence on the retroactive benefits issue. Nevertheless, assuming *arguendo* that the eleventh amendment holding was indispensable to the

48. In a recent federal case, the court denied on eleventh amendment grounds a retroactive award of wrongfully withheld welfare payments, declaring itself "persuaded by, and in full agreement with, the recent decision in Rothstein v. Wyman . . . ." Like v. Carter, 41 U.S.L.W. 2406 (E.D. Mo. Jan. 6, 1973).

49. Rothstein v. Wyman, 467 F.2d 226, 235 (2d Cir. 1972).

50. *E.g.*, Bryant v. Carleson, 465 F.2d 111, 113-14 (9th Cir. 1972).

court's disposition of the instant case, that holding can be attacked on several grounds. First, a retroactive award of welfare payments can be viewed not as damages against the state for its violation of federal law but rather as an integral part of the court's injunctive relief, intended to restore the plaintiffs to their former condition.[51] Thus, by considering a claim for retroactive benefits as merely incidental to a petition for injunctive relief, federal courts can award such relief without violating the eleventh amendment, under the authority of *Ex parte Young* and its progeny.[49] The instant court's eleventh amendment holding is most susceptible to attack, however, when it is analyzed in terms of its possible ramifications. The court's holding, when viewed broadly, forecloses, in any nonconsensual suit by an individual, a federal court judgment that requires the payment of money from state funds. In an era when the recognition of constitutional rights by federal courts increasingly requires the allocation of public resources,[53] this interpretation would often render plaintiffs remediless in suits challenging allegedly unlawful state practices; and, by protecting unconstitutional "state action" from the full judicial power of the United States, the court's holding ultimately sets up the eleventh amendment in opposition to the fourteenth.[54]

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51. In Harkless v. Sweeny Independent School Dist., 427 F.2d 319 (5th Cir. 1970), the Fifth Circuit Court of Appeals awarded back pay to black teachers whose contracts had not been renewed when the school system desegregated, in violation of their fourteenth amendment rights. The court considered the plaintiffs' prayer for back pay not as a claim for damages, but as "an integral part of the equitable remedy of injunctive reinstatement." *Id.* at 324. *See also* 1 J. POMEROY, EQUITY JURISPRUDENCE § 112(2) (5th ed. 1941).

52. Levy, *supra* note 20, 3 CLEARINGHOUSE REV. at 331, 350-51; *see* Fontaine, *supra* note 21, at 55-56. In one welfare case, the district court, while declining to award retroactive payments, noted that it theoretically could condition its order to require the state to refund its federal AFDC monies unless it awarded the withheld benefits retroactively. Rosado v. Wyman, 322 F. Supp. 1173, 1196 (E.D.N.Y. 1970).

53. *See generally* Comment, *Enforcement of Judicial Financing Orders: Constitutional Rights in Search of a Remedy,* 59 GEO. L.J. 393 (1970); G. Sanders, Reallocation of Public Resources Necessitated by the Court Ordered Recognition of Constitutional Rights, January, 1973 (unpublished paper, Vanderbilt Univ. School of Law). For recent federal decisions requiring the expenditure of state funds in protection of plaintiffs' constitutional rights see Bradley v. Milliken, Civ. A. No. 35257 (E.D. Mich. July 11, 1972) (Order for Acquisition of Transportation) (state ordered to bear cost of additional buses acquired to implement unitary school system); Wyatt v. Stickney, 344 F. Supp. 387 (M.D. Ala. 1972) (state officials ordered to implement court-established medical and constitutional minimum standards in treating patients at mental institutions).

54. U.S. CONST. amend. XIV, § 1 provides in part: "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." One commentator suggests that the conflict between the eleventh and fourteenth amendments could have been avoided by a ruling in *Ex parte Young* that the fourteenth amendment had the effect of overruling the eleventh. Note, *supra* note 31, at 961. That decision explicitly found, however, that each amendment existed in full force. *Ex parte* Young, 209 U.S. 123, 150 (1908).

Furthermore, since it partially immunizes a state official who violates "the supreme law of the land," the instant court's view of state immunity appears inconsistent with the fundamental principles of constitutional government embodied in the supremacy clause.[55] The traditional doctrine of sovereign immunity has been subjected to vigorous criticism,[56] and that criticism is no less justified when the doctrine is embodied in the form of the eleventh amendment. Thus, the Supreme Court, when it eventually undertakes the balancing process necessary to resolve the conflict between these constitutional provisions, may well restrict the scope of the eleventh amendment, possibly limiting its immunity to cases in which no federal right is involved.[57] Whether upheld on the equity jurisdiction or the eleventh amendment theory, however, the instant decision represents a distinct impediment to the ability of potential welfare plaintiffs to secure full redress. While the decision in no way affects the availability of prospective relief to the litigant who challenges the legality of state welfare administration, it does diminish considerably his chances for obtaining retroactively the benefits that had been wrongfully withheld. Of course, the welfare litigant can circumvent this problem by bringing his action for retroactive relief in the state courts, or by seeking a "fair hearing"[58] before the state welfare department to determine whether he is entitled to a retroactive award of benefits. Either option, however, would require relinquishing the numerous advantages of proceeding in federal court,[59] where welfare plaintiffs traditionally have enjoyed their greatest success. Thus, should the instant decision be widely accepted, it will result in welfare plaintiffs' having a right without a remedy in the federal courts.*

55. *See* Note, *supra* note 31, at 962; *cf.* Iowa-Des Moines Nat'l Bank v. Bennett, 284 U.S. 239 (1931): "Cases discussing the question of what constitutes a suit against the State within the meaning of the Eleventh Amendment . . . have no bearing upon the power of this Court to protect rights secured by the federal Constitution." *Id.* at 246 n.5 (Brandeis, J.) (dictum).

56. *See* W. PROSSER, TORTS § 131, at 984-87 (4th ed. 1971).

57. Even if the instant court's interpretation of the eleventh amendment is upheld, its holding can be attacked on the ground that the state effectively consented to suit in the federal courts. In light of recent Supreme Court decisions relaxing the strict standard for relinquishment of eleventh amendment rights, *see* note 32 *supra* and cases therein cited, a state's acceptance of federal funds for use in its federally regulated welfare program can be interpreted as an implied waiver of its immunity. *See generally* Comment, *supra* note 32. *But cf.* Daye v. Pennsylvania, 344 F. Supp. 1337 (E.D. Pa. 1972) (a state's mere participation in a federal grant-in-aid program does not constitute a waiver of eleventh amendment immunity).

58. The "fair hearing" requirement is set out in 45 C.F.R. § 205.10 (1972). *See* U.S. DEP'T OF HEALTH, EDUCATION, & WELFARE, CHARACTERISTICS OF STATE PUBLIC ASSISTANCE PLANS UNDER THE SOCIAL SECURITY ACT 2 (1971).

59. *See generally* Note, *supra* note 15.

* After the preparation of this Comment, the United States Court of Appeals for the Seventh Circuit affirmed a lower court decision that awarded retroactive payments, from state funds, of

Taxation—Valuation—Income-Producing Lease of Undeveloped Airspace Is Real Property Interest That May Be Assessed Separately for Taxation

Petitioners purchased a lot in Baltimore City that was subject to a lease of the airspace superjacent to it.[1] The lessee, owner of a multistory office building situated on a lot adjacent to petitioner's, had obtained the lease to guarantee access to light and air.[2] The city board of assessments assessed the value of the air rights lease for taxation purposes on the ground that income-producing air rights constitute a separate classification of taxable real property. Petitioners contended that under the state constitution[3] air rights are not taxable as a class or subclass of real property and asserted that because fee owners who utilize their own air rights are not assessed and taxed separately on those air rights, owners who lease their air rights should not be assessed separately either.[4] The local Board of Municipal and Zoning Appeals vacated the assessment, but the Maryland Tax Court reversed and reinstated the assessment. On appeal to the Court of Appeals of Maryland, *held*, affirmed. An income-producing lease of undeveloped airspace is an interest in real property that can be assessed separately for the purpose of taxation. *Macht v. Department of Assessments*, No. 16 (Md. Ct. App., Nov. 8, 1972).

The property owner's rights in the airspace above his land[5] are based on the common-law doctrine "to whomsoever the soil belongs, he

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public assistance benefits withheld in violation of federal time-processing requirements. Denying appellants' contention that the suit for retroactive welfare benefits could not be maintained in federal court because it was barred by the eleventh amendment, the court expressly rejected the Second Circuit's reasoning in the instant case. Jordan v. Weaver, 41 U.S.L.W. 2406 (7th Cir. Jan. 18, 1973). This direct conflict between the 2 circuits should substantially increase the likelihood of Supreme Court review of the instant case.

1. A small building about 100 feet tall was situated on the lot. The lease covered the airspace above the height of 124 feet.

2. The term of the lease was 98 years, 9 months. The rent was fixed at twice the annual real estate taxes imposed on the entire property of the lessor—including land, improvements, and airspace—less the increase in taxes attributable to the lessor's predecessor. Rent was not to be in excess of $8,000 or less than $2,000 in calendar years 1962-70.

3. The Maryland Constitution provides that "the General Assembly shall, by uniform rules, provide for the separate assessment, classification and sub-classification of land, improvements on land . . . and all taxes . . . shall be uniform within each class or sub-class of land, improvements on land . . . which the respective taxing powers may have directed to be subjected to the tax levy . . . ." MD. ANN. CODE, Declaration of Rights, art. 15 (repl. vol. 1972).

4. The amount of the valuation was not at issue.

5. For a general history of airspace law see R. WRIGHT, THE LAW OF AIRSPACE (1968).

owns also to the sky and to the depths."[6] Recognition of this principle by American courts was first manifested by their authorization of trespass and ejectment actions for intrusions into the owner's airspace.[7] The courts later concluded that airspace rights constituted an interest in real property of sufficient quality to be reserved,[8] vested in adjoining property owners when vacated by the governmental owner,[9] or taken by eminent domain.[10] Upon this foundation, the advent of aviation brought assertions from property owners that continual invasion of their airspace by overflying aircraft amounted to the taking of an easement.[11] In *United States v. Causby*, however, the Supreme Court held that a landowner owns only as much of the space above the ground as he can occupy or use in connection with the land.[12] The railroads were the first to convey air rights in their efforts to sell and lease the airspace above railroad tracks in the large urban areas.[13] The Park Avenue Development in New York City, for example, was built in leased airspace above the New York Central Railroad right of way.[14] Moreover, in Chicago, airspace was purchased from the Chicago Union Station Company for the construction of the Chicago Daily News Building.[15] Taxation of developed air rights quickly followed the recognition that the rights could be conveyed profitably. The Cook County, Illinois board of assessors, in 1929, valued the air rights of the Merchandise Mart for taxation purposes[16] by subtracting the total of the construction cost of the build-

6. *Cujus est solum, ejus est usque ad coelum et ad inferos.* 2 BLACKSTONE, COMMENTARIES 18 (Lewis ed. 1902); BLACK'S LAW DICTIONARY 453 (4th ed. rev. 1968).

7. *E.g.*, Butler v. Frontier Tel. Co., 186 N.Y. 486, 79 N.E. 716 (1906) (ejectment allowed for stringing telephone wires over owner's land without surface contact). *See also* Annot., 42 A.L.R. 945 (1926).

8. *E.g.*, Pearson v. Matheson, 102 S.C. 377, 86 S.E. 1063 (1915) (reservation in deed from *A* to *B* limiting *B*'s right to build to 14 feet held valid).

9. *E.g.*, Taft v. Washington Mut. Sav. Bank, 127 Wash. 503, 221 P. 604 (1923) (airspace 16 feet above alley vested in adjoining property owners when vacated by city).

10. *E.g.*, Metropolitan West Side Elevated R.R. v. Springer, 171 Ill. 170, 49 N.E. 416 (1897) (erection of support pillars one foot into alley was a compensable taking).

11. *See, e.g.*, United States v. Causby, 328 U.S. 256 (1946).

12. *Id.* at 264. According to the Court, the concept of usable airspace includes that amount of space above the area actually occupied, the invasion of which would cause a direct and immediate interference with the owner's full enjoyment and exploitation of the property.

13. Four specific methods were developed, including the lease, fee conveyance with support easements, fee conveyance in both airspace and supports, and fee simple conveyance with easements back for surface usage. Note, *Conveyance and Taxation of Air Rights*, 64 COLUM. L. REV. 338, 346-47 (1964).

14. Brennan, *Lots of Air—A Subdivision in the Sky*, 1955 A.B.A. REAL PROP., PROB. & TR. LAW SECTION 24.

15. Schmidt, *Public Utility Air Rights*, 54 A.B.A. REPORTS 839, 849 (1929).

16. *Id.* at 855.

ing and the loss in value due to the loss of rentable airspace from the value of the entire fee.[17] The attorneys for the assessor decided, however, that air rights were not assessable until they were actually developed.[18] Development, in this context, implies some form of construction in the airspace to which a value can be attached. Thus, although there is a historical justification for evaluation and taxation of developed air rights,[19] no precedent exists for assessment and taxation of undeveloped air rights.[20] Taxation of undeveloped, but income-producing air rights has been advocated by commentators,[21] but this issue has not yet been addressed by any court.

Recognizing at the outset that under Maryland law[22] ownership of land incorporates rights in usable superjacent airspace, the court undertook a consideration of petitioner's two major arguments. Petitioners argued first that the city had no authority to value and assess air rights as a class or subclass of real property. In response to this contention, the court observed that the state constitution grants the General Assembly the power to provide for classifications and subclassifications of real property,[23] and pursuant to that authority specific statutory provisions have been enacted that permit separate assessment of buildings, improvements, and separate ownership of surface and mineral rights.[24] Petitioners contended that these sections, by enumerating the circumstances under which separate assessments are permitted for less than full interests in property, excluded authorization for other separate assessments by implication. The court rejected the propounded rule of statutory construction—that the inclusion of one is the exclusion of the other[25]—and held that the existence of specific provisions authorizing separate assessments does not preclude other separate assessments.[26]

17. *Id.* at 855-56.

18. *Id.* at 856. *But see* Note, *supra* note 13, at 352.

19. R. WRIGHT, *supra* note 5, at 305-41. *See generally* Hall, Harper & Leyden, *Approaches to the Valuation of Air Rights*, 24 APPRAISAL J. 325 (1956); Machen, *Air Rights Development*, 34 APPRAISAL J. 288 (1966).

20. Note, *supra* note 13, at 338-39, 350-53.

21. H. BABCOCK, APPRAISAL PRINCIPLES AND PROCEDURES 87 (1968). Some commentators note, however, that state laws may have to be amended to permit this action. Crawford, *Some Legal Aspects of Air Rights and Land Use*, 25 FED. B.J. 167, 174 (1965).

22. MD. ANN. CODE art. 1A, § 7 (1968 repl. vol.).

23. *See* note 3 *supra*.

24. "In valuing and assessing real estate, the land itself and the buildings or other improvements thereon shall be valued and assessed separately . . . .

"In the case of separate ownership of the surface of land and of minerals or mineral rights therein, the assessing authority may . . . make separate rate assessments . . . ." MD. ANN. CODE art. 81, § 19a (1972 Supp.).

25. *Inclusio unius est exclusio alterius*. BLACK'S LAW DICTIONARY 906 (4th ed. rev. 1968).

26. The court rejected petitioner's argument that State Tax Comm'n v. Gales, 222 Md. 543,

Moreover, the court explained that it was not persuaded that the assessment in question constituted a classification at all.[27] Petitioner founded his second argument on the proposition, which was conceded by the city, that if the building owners had purchased the air rights, they would not have been subject to a separate assessment. Therefore, petitioners contended that the city could not subject only air rights leased to another for the other's benefit to a separate assessment, and, even if the city could tax these rights separately, the sum of the assessments for "land" and "air rights," when air rights are leased, should not exceed the valuation of similar property when the air rights are owned by the fee owners and used for their own benefit. The court distinguished the two situations on the ground that a lease of airspace generates income, whereas the fee owner's use of his own undeveloped air rights does not. According to the court's reasoning, when petitioners relinquished unrestricted use of their airspace for a price, the airspace assumed a value for assessment purposes. Finally, the court observed that the nature of the rights and obligations of the parties implied a negative easement for a term of years rather than a lease. Rejecting petitioner's argument that under Maryland law an appurtenant easement is not assessable separately from the servient estate,[28] the court held that for tax purposes the value of the easement is includable as a separate element in the valuation of the servient estate.

Although the instant case has primary significance for Maryland, it presents problems that are common to many jurisdictions. Since most states do not have specific statutory provisions for air rights taxation,[29]

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reported as State Tax Comm'n v. Wakefield, 161 A.2d 676 (1960) supported their position. That case held unconstitutional an act directing that land used for agricultural purposes be valued as such for assessment. The court explained that *Gales* only had declared the effort to value agricultural land differently from similar land used for other purposes constitutionally invalid. The case did not stand for the proposition that any subclassification is invalid.

27. The dissent claimed that the city assessment department had created a classification or subclassification of land, thus exercising a power that had been reserved solely to the General Assembly.

28. Hill v. Williams, 104 Md. 595, 65 A. 413 (1906). The majority concluded that *Hill* stood for the proposition that the value of the easement is includable in the assessment. The dissent noted that such a characterization of the holding in *Hill* ignored the instant issue. Petitioners did not argue that the city could not include the value of the air rights lease in the assessment, but only that it could not be separately assessed. The dissent maintained that the court in *Hill* had held that easements are not assessable separately and thus that that decision was determinative even if the majority persisted in characterizing the lease as an easement. *See* text accompanying note 31 *infra*.

29. The state statutes governing air rights are generally similar to the Maryland law and do not deal with assessment specifically. *See* R. WRIGHT, *supra* note 5, at 108-11; Subcommittee of Comm. on New Developments in Real Estate Practice, *Recent Developments in Airspace Utilization*, 5 REAL PROP., PROB. & TR. J. 347, 354-56 (1970).

the validity of efforts to tax these rights will depend first on statutory interpretation of existing legislation. For the states to assess undeveloped air rights, the courts will have to construe authorization statutes broadly and reject, as the instant court did, the rule of statutory construction that excludes all classification not specifically mentioned in the statute. If, on the other hand, some jurisdictions adopt a stricter interpretation of the statute,[30] legislative amendments will be necessary to authorize taxation. Secondly, the state courts may find it difficult to characterize correctly the nature of the various interests in the air rights. In the instant case, the parties intended to lease the air rights, but the court chose to classify the interest created as an easement. Certainly the lease accomplished the same purpose as a light and air easement, but under Maryland law easements are not separately taxable,[31] while leases are. This unfortunate scrambling of terms may have serious tax consequences in other states that have enacted similar taxing statutes. Courts addressing this problem in the future should define clearly the interest of each party in the air rights, so that the tax consequences of the classifications will bear a rational relationship to the general property rights and duties of the parties. Although the instant case is one of first impression, recent history demonstrates that as population density increases in the urban areas, greater use of airspace will be necessary and the value of airspace rights to property owners will be enhanced.[32] Airspace will then be sold, leased, and subjected to less than full ownership interests like any other real property. When this interest becomes income-producing, there is really no reason why it should not be assessed separately just as income-producing oil, gas, and subsurface interests have been subjected to separate assessment and taxation. In each instance, an interest in the property produces income to the fee owner, regardless of his uses of the other interests. The majority in the instant case, however, overlooked one of the dangers inherent in separate assessment of air rights—failure to consider the diminution in the value of the other interests resulting from the restriction imposed on the use of the airspace. Separate assessment of any interest usually will imply a concomitant decline in the value of one or more of the other property

30. *See, e.g., In re* City of New York v. Schwartz, 36 App. Div.2d 402, 320 N.Y.S.2d 983 (Sup. Ct. 1971) (the fact that an interest is a real property interest for some purposes does not mean ipso facto that it is subject to assessment without specific statutory authorization for a specific assessment); Carolina Tel. & Tel. Co. v. Commissioner, 1 N.C. App. 133, 160 S.E.2d 128 (N.C. Ct. App. 1968) (tax statutes are to be strictly construed against the state).

31. *See* note 28 *supra.*

32. *See* Morris, *Air Rights are "Fertile Soil,"* 1 URBAN LAW. 247 (1969); Wright, *Airspace Utilization on Highway Rights of Way*, 55 IOWA L. REV. 761 (1970).

interests. In the instant case, for example, it could be argued that the diminution in value to the surface and first 124 feet of airspace—the unleased airspace—can be measured by the value of the rent required by the lease.[33] Failure to consider the loss in value to the fee thus could subject the fee owner to a higher total assessment if both the fee and the air rights are assessed separately. Therefore, although income-producing air rights should be assessed separately, other considerations must be evaluated in determining the value of the total property assessment.[34]

Workmen's Compensation—Recreational Injnries—Injuries to Resident Employee During Off-Duty, Off-Premises Activity Held Compensable as Within the Course of Employment

Claimant, a resident-employee at a summer camp, sought workmen's compensation benefits for injuries received while engaged in off-duty recreational activities away from his employer's premises.[1] Claimant contended that the injury occurred as a result of activity known and permitted by the employer and that it was compensable because the activity engaged in was a reasonable incident of his employment.[2] The employer asserted that the injury occurred on the employee's own time, away from the employer's premises, and was not related to the employ-

33. *Dissenting opinion* at 5.

34. The recommendations favoring separate assessment of air rights by the Joint Development Statute and the Model Airspace Act support this conclusion and perhaps lend greater substance to predictions that the decision by the instant court is a harbinger of future decisions in other states. *See* Report, *supra* note 29, at 364; Subcommittee of Comm. on New Developments in Real Estate Practice, *A Model Airspace Code*, 6 REAL PROP., PROB. & TR. J. 259, 264 (1971).

1. The employer was a nonprofit organization which operated a summer camp approximately 30 miles from New York City. Claimant was a 16-year-old boy who was hired as a junior counselor at the camp. He was required to live at the camp, serve food, wash dishes, and clean the kitchen in return for room and board and an incentive bonus at the end of the season. In July, 1968, claimant went home to New York City during a 3-day break in camp sessions but was instructed to return on Sunday night to prepare for the next session. Upon his return, he and some fellow employees walked to a neighboring camp, entered the recreation hall, and participated in acrobatics during which time claimant injured his left knee. Brief for Employer-Respondent at 4, Brief for Workmen's Compensation Board-Appellant at 3, 4, Di Perri v. Boys Bhd. Republic, 31 N.Y.2d 215, 286 N.E.2d 897, 335 N.Y.S.2d 405 (1972) (4-3 decision).

2. Evidence showed that claimant and other employees had used the recreation hall on previous occasions, although it was not found that the employer had expressly given permission for them to do so. The employer knew of the practice and did not expressly forbid it. Di Perri v. Boys Bhd. Republic, 31 N.Y.2d 215, 217, 286 N.E.2d 897, 899, 335 N.Y.S.2d 405, 407 (1972).

ment. The New York Workmen's Compensation Board awarded compensation. The Appellate Division of the Supreme Court reversed and dismissed the claim, holding that there was no connection between the injury and any risk incident to the employment.[3] On appeal to the New York Court of Appeals, *held*, reversed and award reinstated. When an employee required to live away from home is injured while engaged in off-duty, off-premises recreational activities within the knowledge of his employer, his injury results from reasonable recreation incident to the employment and is compensable. *Di Perri v. Boys Brotherhood Republic*, 31 N.Y.2d 215, 286 N.E.2d 897, 335 N.Y.S.2d 405 (1972).

Under the traditional basis for federal and state workmen's compensation laws, an employee is entitled to recover benefits for personal injuries received in an accident "arising out of and in the course of employment."[4] "Arising out of" usually requires either some causal connection between the accident and the performance of some duty of the employment or between the accident and some risk incidental to the employment.[5] "In the course of" requires that the injured employee be in a place authorized by the employer and engaged in some duty of his employment or some act incidental to it when the injury occurs.[6] Recreational accidents present difficult problems under this standard. Any causal connection between the employment and the injury is often tenuous, and usually the employee is not performing any specific duty of his employment when he is injured. Therefore, compensation for recreational injuries to regular employees[7] has been awarded sparingly by

3. Di Perri v. Boys Bhd. Republic, 37 App. Div. 2d 317, 325 N.Y.S.2d 335 (1971).

4. N.Y. WORKMEN'S COMPENSATION LAW § 10 (McKinney 1965). At least 41 states and the Longshoremen's and Harbor Worker's Act, 33 U.S.C. § 902(2) (1971) have used this standard formula, adopted from the English workmen's compensation laws. 6 Edw. 7 c.58 (1906); 1 A. LARSON, WORKMEN'S COMPENSATION § 1.10 at 1 (1972) [hereinafter cited as LARSON].

The difficulty of applying these tests is discussed in Bernstein, *The Need for Reconsidering the Role of Workmen's Compensation*, 119 U. PA. L. REV. 992, 997 (1971); *see* Bohlen, *A Problem in the Drafting of Workmen's Compensation Acts*, 25 HARV. L. REV. 328, 329 (1912).

5. *See, e.g.*, Cudahy Packing Co. v. Parramore, 263 U.S. 418, 423-25 (1923) (employee hit by train while traveling to work; compensation awarded); Groom v. Cardillo, 119 F.2d 697, 699 (D.C. Cir. 1941) (bank employee suffered relapse of old illness; compensation denied); Security Mut. Cas. Co. v. Wakefield, 108 F.2d 273, 274 (5th Cir. 1939) (plant employee died from accidental poisoning; compensation denied).

6. This requirement derived from an English case and first appeared in this country in the decision of Wickham v. Glenside Woolen Mills, 252 N.Y. 11, 12-13, 168 N.E. 446 (1929). *But see* Riesenfeld, *Contemporary Trends in Compensation for Industrial Accidents Here and Abroad*, 42 CALIF. L. REV. 531 (1954).

7. In this context, a regular employee is a typical worker who lives in his own residence and commutes daily to his employment. A resident-employee is one who as a part of his employment lives on his employer's premises.

many courts.[8] Courts faced with recreational injury cases usually require the presence of one or more factors before compensation will be awarded: the injury must have occurred on the employer's premises during a lunch or recreational break; the employee must have been required, expressly or impliedly, to participate in the activity; or the recreation must have been of some benefit to the employer beyond simple improvement in employee morale or health.[9] These requirements, however, are not always applied strictly in cases dealing with injuries to employees who are required to reside away from their homes. Courts have been less exacting when the employment entails travel away from their homes, because the risks that accompany travel continue beyond periods of actual business activity. Courts are most liberal in allowing compensation in cases that involve employees required to reside on the employer's premises, because of the employee's mandatory exposure to the dangers created by a particular location.[10] In deciding how far to extend workmen's compensation to resident-employees, courts usually consider whether the injury was caused by some circumstance peculiar to the employment situation.[11] A number of courts have upheld compensation awards to resident-employees who suffered recreational injuries. These courts weigh such surrounding circumstances as

8. Note, *Recreational Injuries and Workmen's Compensation; Infusion of Common-Law, Agency-Tort Concepts*, 34 IND. L.J. 310, 314 (1958); 51 IOWA L. REV. 531, 533 (1966).

9. LARSON, *supra* note 5, § 22.00, at 349; *see, e.g.*, Liberty Mut. Ins. Co. v. Industrial Accident Comm'n, 39 Cal. 2d 512, 247 P.2d 697 (1952) (report employee drowned in lake where employer had never expressly permitted swimming; compensation denied); Pacheco v. Orchids of Hawaii, 502 P.2d 1399 (Hawaii 1972) (employee killed while driving to bank during authorized coffee break; compensation granted); Hydro-Line Mfg. Co. v. Industrial Comm'n, 15 Ill. 2d 156, 154 N.E.2d 234 (1958) (employee injured on totally voluntary baseball team; compensation denied); Ethen v. Franklin Mfg. Co., 286 Minn. 371, 176 N.W.2d 72 (1970) (employee injured at voluntary company picnic; compensation denied); Tedesco v. General Elec. Co., 305 N.Y. 544, 114 N.E.2d 33 (1953) (compensation awarded to employee while playing on company-subsidized team); Clevenger v. Liberty Mut. Ins. Co., 396 S.W.2d 174 (Tex. Civ. App. 1965) (auto salesman injured at company picnic; directed verdict for insurer); *cf. Ex parte* Blackmon, 270 So. 2d 108 (Ala. 1972) (nonresident maintenance employee killed during paid lunch hour; compensation denied); Kohlmayer v. Keller, 24 Ohio St. 2d 10, 263 N.E.2d 231 (1970) (employee injured neck at picnic designed to promote employee good will; compensation awarded).

10. *See* LARSON, *supra* note 5, § 24.00, at 421.

11. Lepow v. Lepow Knitting Mills, 288 N.Y. 377, 379-80, 43 N.E.2d 450, 451-52 (1942) (employee died of insect bite). Risks that are common to the public in general are not usually compensable. *Cf.* Underhill v. Keenan, 258 N.Y. 543, 180 N.E. 325 (1931) (hotel cook fell down steps; compensation denied). *But see* Behan v. County of Onondaga, 26 App. Div. 2d 579, 220 N.E.2d 815, 274 N.Y.S.2d 1027 (1966) (resident jail matron slipped on tile floor; compensation awarded).

An employee who *may* live on the employer's premises, but is not required to do so does not receive the same treatment as an employee *required* to be a resident. *See* Groff v. Uzzilla, 1 App. Div. 2d 273, 149 N.Y.S.2d 651 (1956) (restaurant cook died from fall down stairs on the way to his quarters; compensation denied).

the nature of the employer's premises and the recreational opportunities available,[12] whether the employer previously had allowed such recreation,[13] whether the injury occurred on or off the employer's premises,[14] and whether the employee was on continual call for work or had fixed working hours.[15] The United States Supreme Court has held that, when an employee is injured while pursuing approved recreation on the employer's premises, there is no need for a causal relation between the injury and the employment, and that the employment need only have exposed the employee to a "zone of special danger" from which the injury arose.[16] The Court has also upheld an award when a resident employee was killed while away from the employer's premises, apparently finding both "course of employment" and a "zone of special danger" from the isolated nature of the job site, the employer's previous acquiescence in personal recreational activity, and the continuously "on call" character of the employment.[17] Although the Supreme Court has

12. Dow v. Collins, 22 App. Div. 2d 250, 253, 254 N.Y.S.2d 554, 557, *appeal denied*, 15 N.Y.2d 487, 208 N.E.2d 790, 260 N.Y.S.2d 1027 (1964) (employee drowned while working on an island and using employer's fishing boat; compensation granted); LARSON, *supra* note 5, § 24.30, at 435.

13. *See, e.g.*, Daniul v. Allied Chem. Corp., 35 App. Div. 2d 1053, 316 N.Y.S.2d 559 (1970) (employee injured while playing "games" with employer's knowledge; compensation granted); Penzara v. Maffia Bros., 282 App. Div. 790, 123 N.Y.S.2d 6 (1953), *aff'd*, 307 N.Y. 15, 119 N.E.2d 570 (1954) (employee injured while repairing his car during slack period; compensation granted). *Contra*, Liberty Mut. Ins. Co. v. Industrial Accident Comm'n, 39 Cal. 2d 512, 516, 247 P.2d 697, 699 (1952) (resort employee drowned in lake where employer had never expressly permitted swimming; compensation denied). *But see* Reinert v. Industrial Accident Comm'n, 46 Cal. 2d 349, 353, 294 P.2d 713, 715 (1956) (camp counselor hurt in fall from horse; compensation granted).

14. *See* Lewis v. Knappen Tippets Abbett Eng'r Co., 304 N.Y. 461, 467, 108 N.E.2d 609, 611 (1952) (engineer sent to Israel was shot during a sight-seeing tour; compensation awarded); Lyons v. Camp Shows, Inc., 298 N.Y. 897, 898, 84 N.E.2d 808, 809 (1949) (actor injured while returning from trip to France; compensation granted); Scott v. Camp Shows, Inc., 298 N.Y. 896, 84 N.E.2d 808 (1949) (same; compensation granted).

15. *See, e.g.*, deSantis v. Camp Shows, Inc., 275 App. Div. 880, 881, 88 N.Y.S.2d 732, 733, *appeal denied*, 299 N.Y. 798, 87 N.E.2d 689 (1949) (USO entertainer hit by car while awaiting orders in San Francisco; compensation granted); Tushinsky v. National Broadcasting Co., 265 App. Div. 301, 303, 38 N.Y.S.2d 608, 611 (1942), *appeal denied*, 292 N.Y. 595, 55 N.E.2d 369 (1944) (musician killed by bus between rehearsal time and concert; compensation granted); *cf.* Caney v. Straight, 274 App. Div. 1077, 85 N.Y.S.2d 626 (1949) (hotel cook injured during rest period; compensation granted). Professor Larson draws a sharp distinction between recovery requirements for resident employees on call and those with fixed working hours. LARSON, *supra* note 5, §§ 24.20, 24.30.

16. O'Leary v. Brown-Pacific-Maxon, Inc., 340 U.S. 504, 507 (1951). In *O'Leary*, the employer on Guam had furnished its employees with a recreation hall near the ocean shore. After spending an afternoon in the recreation hall, an employee drowned in an attempt to save a stranger. The Court awarded compensation. For a discussion of the expanding interpretations of causal relationships see Henderson, *Should Workmen's Compensation Be Extended to Nonoccupational Injuries?*, 48 TEXAS L. REV. 117, 121-25 (1969).

17. O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc., 380 U.S. 359, 363 (1965). The

not yet decided a case involving an off-duty, off-premises recreational accident, lower federal courts have allowed compensation to resident employees in such circumstances.[18] These decisions place particular emphasis upon the isolated location of the employment and the employer's prior knowledge of the recreational activity from which the injury arose.[19] Under state law, the Appellate Division of the New York Supreme Court has employed much the same principles in resident-employee compensation awards.[20] In *Simon v. The Hedges*,[21] a dishwasher at a summer resort drowned while canoeing on his day off. The Appellate Division awarded compensation, noting that permission to use the lake for recreation was an inducement to employment and was thus clearly within the course of the decedent's employment. These same factors were emphasized in *Rizzo v. Syracuse University*,[22] where the Appellate Division awarded compensation to a graduate assistant assigned to a project in the Rocky Mountains who was injured while hiking during a lull in his work.[23] The court held that both the isolated

Court noted that the conditions of the employment created a zone where the employee had to seek recreation under exacting and unconventional conditions (wartime Korea) and that therefore the accident and death arose directly out of, and in, the course of employment.

18. *See, e.g.*, Self v. Hanson, 305 F.2d 699 (9th Cir. 1962) (employee injured while sitting in a parked automobile; compensation granted); Hastorf-Nettles, Inc. v. Pillsbury, 203 F.2d 641 (9th Cir. 1953) (employee in Alaska injured while returning to the job site from a trip to a city; compensation granted). The only contrary federal court decision in this series of cases has been the Fifth Circuit's denial of compensation in United States v. Pan American World Airways, Inc., 299 F.2d 74 (5th Cir. 1962), *cert. denied*, 370 U.S. 918 (1963), in which a resident employee at a missle tracking station was killed in an automobile accident while returning to the base from a village tavern. The result in that case is questionable because, under identical facts, the Fourth Circuit awarded compensation to a passenger in the same car in O'Hearne v. Pan American World Airways, Inc., 335 F.2d 70 (4th Cir. 1964).

19. *See* Self v. Hanson, 505 F.2d 699, 702-03 (9th Cir. 1962); Hastorf-Nettles, Inc. v. Pillsbury, 203 F.2d 641, 642-43 (9th Cir. 1953).

20. *E.g.*, Leonard v. People's Camp, Inc., 9 App. Div. 2d 420, 194 N.Y.S.2d 863, *aff'd*, 9 N.Y.2d 652, 173 N.E.2d 46, 212 N.Y.S.2d 69 (1961) (summer camp employee drowned in lake owned by employer; compensation awarded); Gabunas v. Pan American World Airways, Inc., 279 App. Div. 697, 108 N.Y.S.2d 372 (1951) (stewardess injured while bicycling during a stopover in Portugal; the court awarded compensation, holding that since the employee was on continual work call, all activities she performed during stopover were within the course of employment). In Roher v. Cherry Grove Hotel, 20 App. Div. 2d 593, 245 N.Y.S.2d 173 (1963), an employee on an island summer resort drowned while returning from a mainland shopping trip. The court held that the employment status continued during all normal activities—including recreation—by an employee whose job required travel or sojourn at a distance from his home. *Id.* at 593, 245 N.Y.S.2d at 175. *See* Eixman v. Rothman's East Norwich Inn, 6 App. Div. 2d 911, 175 N.Y.S.2d 675 (1958) (employee injured while returning from stroll; award upheld); Schneider v. United Whelan Drug Stores, 284 App. Div. 1072, 135 N.Y.S.2d 875 (1954) (employee on business trip injured after business had been completed; compensation granted).

21. 286 App. Div. 1044, 144 N.Y.S.2d 828 (1955).

22. 2 App. Div. 2d 641, 151 N.Y.S.2d 724 (1956).

23. *But cf.* Fireman's Fund Indem. Co. v. Industrial Accident Comm'n, 39 Cal. 2d 529, 247 P.2d 707 (1952) (housekeeper suffered broken leg during evening walk; compensation denied).

location of the work and previous permission by the employer for the recreational hiking brought the activity within the course of the employment.[24] The New York Court of Appeals has not previously decided a compensation dispute involving an off-duty, off-premises recreational injury to a resident employee; it has, however, denied awards to traveling employees in similar circumstances. In *Davis v. Newsweek Magazine*,[25] the court denied compensation when the traveling employee drowned while on a side trip from his planned route. The court conceded that the injuries to a restricted employee during reasonable activity should be compensable,[26] but stated that recreational injuries off the employer's premises and after working hours were not a risk of the employment and therefore not compensable. In *Congden v. Klett*,[27] the claimant, who was not a resident employee, was injured in the employer's swimming pool after working hours. Citing *Davis*, the Court of Appeals held that there was an insufficient nexus between the risk of employment and the off-duty, off-premises injury to make it compensable.[28] Finally, in *Kaplan v. Zodiac Watch Co.*,[29] the Court of Appeals held that there was no "work-related injury" when a traveling salesman was injured while hurriedly dressing in his hotel room.[30]

The majority in the instant case rejected each of the two bases relied upon by the Appellate Division in its dismissal of the award. In rejecting the theory that the injury was not compensable unless the activity either occurred on the employer's premises, was required by the employer, or benefited the employer in some material way, the instant court found the *Congden* rationale inapplicable to resident-employee

24. The court did not directly discuss the fact that the injury occurred off the employer's premises.

25. 305 N.Y. 20, 110 N.E.2d 406 (1953).

26. *Id.* at 26, 110 N.E.2d at 408. *See* Motto v. Cosmpolitan Tourist Co., 278 App. Div. 597, 101 N.Y.S.2d 873 (1951) (bus driver required to wait for fishing party was injured while accompanying the group; compensation granted); Block v. Camp Shows, Inc., 272 App. Div. 980, 72 N.Y.S.2d 681, *appeal denied*, 297 N.Y. 1032, 77 N.E.2d 523 (1947) (theater manager injured in route to nearby town for haircut; award granted).

27. 307 N.Y. 218, 120 N.E.2d 796 (1954).

28. In denying the award, the court noted that a contrary holding would lead to an absurd result. "If that is deemed a sufficient nexus between the employment and the injury, then one may say that in the ordinary effort of living, a man continually makes himself ready for his employer's service and thus should be compensated for whatever injury befalls him." *Id.* at 222, 120 N.E.2d at 798.

29. 20 N.Y.2d 537, 232 N.E.2d 625, 285 N.Y.S.2d 585 (1967).

30. *Id.* at 540, 232 N.E.2d at 626, 285 N.Y.S.2d at 587. The court noted that dressing was an activity common to all people and was in no way attributable to a particular incident of employment and was not compensable. *See* Paduano v. New York Workmen's Comp. Bd., 25 N.Y.2d 669, 254 N.E.2d 776, 306 N.Y.S.2d 476 (1969) (compensation denied when traveling employee had slipped in a shower).

cases and limited its rule to employees who work regular hours and who live at home.[31] The majority reasoned that when the employee was required to remain in a particular place for a specified length of time, an injury resulting from reasonable recreational activity is still compensable although technically not occurring on the employer's premises. The court used earlier New York cases such as *Simon* and *Rizzo* to demonstrate that compensation previously had been granted when recreational injuries had occurred on land not owned by the employer. The court went on to state that even if recovery were limited to those cases in which the injury occurred on the premises, the instant award would have to stand because the adjacent camp became an "incidental adjunct" to the employer's premises because of the prior permitted use of the facilities.[32] In rejecting the second theory—that the recreational activity in the instant case was purely personal and not compensable as part of the employment—the court found that, unlike the situation in *Kaplan*, the work environment in the instant case was an integral part of the entire occurrence, since the employee was entitled to recreation but was confined in a remote area and secluded from most forms of entertainment.[33] The court concluded that under the "reasonable activity" test stated in *Davis*,[34] the risk inherent in the recreational activity was an incident of the instant claimant's employment. The dissent[35] maintained that the majority had relied too much on a change in environment. Although it agreed with the majority that some allowances are to be made for injuries to employees living away from home, the dissent reasoned that this factor alone does not make all accidents compensable per se. The dissent stated that regardless of where the employee lives, a recreational injury occurring off the employer's premises and on the employee's own time is not compensable even if the activity was sanctioned by the employer. The dissent concluded that there must be a causal relation between the accident and the new environment before any compensation may be awarded and that such a connection was not sufficiently shown in the instant case.

By emphasizing the distinction between the stricter standards for

31. The Appellate Division's first ground for dismissing the claimant's award relied heavily upon the *Congden* rationale. 37 App. Div. 2d at 319, 325 N.Y.S.2d at 337.

32. 31 N.Y.2d at ___, 286 N.E.2d at 901, 335 N.Y.S.2d at 410. The point was suggested earlier in Presiding Judge Herlihy's dissent in the Appellate Division decision of the case. 37 App. Div. 2d at 320, 325 N.Y.S.2d at 338 (Herlihy, J., dissenting).

33. The second basis for the Appellate Division's dismissal of the compensation award drew from the language of *Kaplan*. 37 App. Div. 2d at 319, 325 N.Y.S.2d at 337.

34. 305 N.Y. at 28, 110 N.E.2d at 409.

35. Three justices dissented from the majority opinion.

recovery by a nonresident employee who has regular working hours and the employee who must live on the employer's premises, the instant court has taken an extremely broad view of the degree and nature of the risks that should be included in a resident employee's course of employment. The decision indicates that such a claimant can recover for injuries arising out of most permitted activities performed while living at the job situs, unless it can be shown that the activity was unreasonable under the circumstances or was of such a purely personal nature that any person would be performing the activity regardless of location. By refusing to apply the traveling employee analogy relied upon by the Appellate Division in the present case, the Court of Appeals apparently indicated its conclusion that there is not a sufficient similarity between traveling and resident employee situations to place the same restraints on recovery used by the court in cases such as *Davis*. It would be difficult, however, to justify a distinction between a compensation award to a resident-employee under the instant facts and the denial of an award to a traveling employee at the camp under identical circumstances, solely because of his status as a traveling employee. Perhaps a more basic distinction between traveling and resident employees in the Court of Appeals cases is not the employee's status as a resident as such, but the degree of isolation from most conventional forms of recreation imposed on him by his employment. Even an employee required to travel to distant communities is more likely to encounter a larger, hence safer, variety of recreational opportunities than the resident employee required to remain in one remote area. This isolation may be a sufficient factor to justify the instant court's expansion of "arising out of and in the course of employment" to include the risks inherent in the limited recreation available in the employment vicinity. Thus, injury from a recreational activity within the knowledge of an employer, even though it occurs while the employee is technically off-premises and off-duty, should be an inherent risk in the employment of a summer camp worker and should be born by the employer. The instant decision adopts no new test but it does represent one of the most liberal compensation awards to date. There is a danger that the case may be distinguished on its facts, however; the opinion creates some potential difficulties of application because it leaves open the questions of when an activity is considered to be within the knowledge of the employer, when an employer has permitted a specific recreational activity, and when an activity is reasonable under the circumstances. These potential ambiguities make it difficult to predict what future courts will do when faced with similar facts.