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RECENT CASES

Antitrust—Monopolies—Merger of Firm with a Potential Competitor that May Enter the Market by Toe-Hold Acquisition Violates Section 7 of Clayton Act

The Federal Trade Commission (FTC) issued a complaint requesting divestiture of the merger of Bendix Corporation, a diversified manufacturer of components and assemblies for the automotive and aerospace industries,[1] with Fram Corporation, the third leading producer in the highly concentrated market of replacement filters for automobiles.[2] The FTC contended that the merger violated section 7 of the Clayton Act[3] by substantially lessening competition in the automotive filter aftermarket,[4] since it was possible for Bendix to enter the market by toe-hold acquisition—an acquisition of a small company capable of expansion into a substantial competitive force. The hearing examiner dismissed the FTC complaint after finding that Bendix Corporation would not have entered the automotive filter aftermarket by internal expansion,[5] and therefore, was not a potential competitor with Fram.[6] On appeal to the FTC, *held*, reversed. A merger that substantially lessens competition by removing from the market's

1. Bendix participated in a minor capacity in the filter industry. In 1966, Bendix's automotive filter sales allowed it to control 0.35% of the market, which was equal to or greater than one-third of the firms in that market. Bendix's filter division was losing money, however, and Bendix began to explore the possibility of an acquisition to remedy its losses. Bendix Corp., 3 TRADE REG. REP. (1970 Trade Cas.) ¶ 19,288, at 21,444 (FTC June 18, 1970).

2. Approximately 55% of Fram's 1966 sales were automotive filters. Fram was the third-ranking producer with 12.4% of the market. In the passenger car filter aftermarket Fram ranked third in sales with 17.2% of the market. *Id.* at 21,442.

3. "No corporation engaged in commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share capital and no corporation subject to the jurisdiction of the Federal Trade Commission shall acquire the whole or any part of the assets of another corporation engaged also in commerce, where in any line of commerce in any section of the country the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly." 15 U.S.C. § 18 (1964).

4. Three types of automotive filters—oil, air, and fuel—are used on all kinds of engines, from light truck and passenger car engines to heavy truck and off-highway equipment engines. There are 2 general markets for these filters: (1) sales to the original equipment manufacturers for installation in the new engine and (2) sales to firms for replacing woru-out filters (the aftermarket). Sales in the aftermarket require complex marketing and advertising techniques.

5. Bendix's filter division mainly produced heavy duty oil and fuel filters for original equipment makers. Only a small proportion of the sales of the filter division were made in the lucrative aftermarket. *See* note 2 *supra*.

6. The FTC hearing examiner adhered to the traditional guidelines established by the Supreme Court and the FTC in previous cases. FTC v. Proctor & Gamble Co., 386 U.S. 568 (1967).

periphery a potential competitor that may enter the market by toe-hold acquisition violates section 7 of the Clayton Act. *Bendix Corp.*, 3 TRADE REG. REP. (1970 Trade Cas.) ¶ 19,288 (FTC June 18, 1970).

The Clayton Act was enacted to provide a more efficacious means of curbing the proliferation of anti-competitive mergers[7] when it appeared that the Sherman Act[8] had failed to arrest this trend. Section 7 of the Clayton Act prohibits both stock and asset acquisition[9] of one commercial corporation by another that would result in a substantial abatement of competition in a particular market. Although primarily created to prevent entry of a firm into a market by merger of leading firms,[10] section 7 was challenged in its incipience for also precluding entry by toe-hold acquisition of a minor firm by a leading firm.[11] A justifiably uneasy Congress was assured by section 7 proponents that a combination of two small companies or a powerful firm with a small one was not proscribed, but was in fact encouraged,[12] since it resulted in stronger competition within the particular market. The Supreme Court, nevertheless, narrowed the questioned statutory test of whether a merger substantially lessens competition in any field of commerce[13] and focused its attention on whether the merger substantially lessens competition by removing the possibility that the merging firm would have entered the market through internal expansion.[14] Although no court has ordered

7. Section 7 of the Clayton Act was enacted to close some of the many gaps left by the Sherman Act. 95 CONG. REC. 11484 (1949) (remarks of Representative Celler).

8. The Sherman Act was originally enacted to curb the rapid growth of monopolistic businesses. The provisions were too limited, however, to be potent. H.R. REP. NO. 1191, 81st Cong., 1st Sess. 6-7 (1949).

9. The most common form of merger at the time of the Clayton Act's inception was by stock acquisition. After the Clayton Act proscribed anti-competitive stock acquisition mergers, however, most mergers began to take the form of asset acquisitions. Therefore, in 1950 Congress amended § 7 of the Clayton Act, 15 U.S.C. § 18 (1964), *amending* 15 U.S.C. § 18 (1950), to include asset acquisitions as well as stock acquisitions. 96 CONG. REC. 16433 (1950) (remarks of Senator O'Conor).

10. 96 CONG. REC. 16433 (1950) (remarks of Senator O'Conor).

11. The legislative history of the Clayton Act discloses that many officials were concerned that a strict interpretation of § 7 would prevent any corporation from acquiring the stock of any competitor. The exponents of the legislation affirmed, however, that the purpose of the Clayton Act was not to prevent the merger of 2 small corporations, but 2 large and wealthy corporations. *Id.*

12. The authors of § 7 arrested the fears of a sizeable faction in Congress by asserting that the provision would not be strictly interpreted by the judiciary, since the legislature had evinced a policy to promote pro-competitive mergers by toe-hold acquisition. Bendix Corp., 3 TRADE REG. REP. (1970 Trade Cas.) ¶ 19,288, at 21,450-52 (FTC June 18, 1970); 96 CONG. REC. 16433, 16436 (1950) (remarks of Senator O'Conor).

13. The broadness of the § 7 test, asking whether the effect of a merger "may be substantially to lessen competition in any field of commerce," was the factor of much alarm in Congress. *See* note 11 *supra*.

14. United States v. Penn-Olin Chem. Co., 378 U.S. 158 (1964). The Court held that the

divestiture predicated upon the possibility of entry by toe-hold acquisition,[15] the Supreme Court laid the basis for such a holding in three 1964 decisions.[16] These cases outlined the principle that potential competition, in whatever form, must be maintained as a regulator of economic behavior.[17] The Court, however, found the possibility of entry by internal expansion dispositive of all three cases.[18] The Supreme Court, joined by the lower federal courts and the FTC, has rigidly adhered to the more narrow guideline in decisions sinee 1964.[19]

In disposing of the hearing examiner's determination that Bendix was not a potential entrant into the automotive filter aftermarket, the FTC evinced that the examiner's analysis had focused exclusively on the probability of Bendix's entry by internal expansion while neglecting other means of entry.[20] Recognizing that previous Supreme Court cases had only considered internal expansion as one possible means of entry,[21] the Commission reasoned that the Court's determinations more appropriately concentrated on anti-competitive consequences rather than on the form of entry.[22] The Commission then turned to an analysis of the economic consequences of the instant merger and noted three salient features of the automobile filter aftermarket that made it particularly amenable to application of the toe-hold acquisition test: (1)

proper test for determining the tendency of a merger to substantially lessen competition in violation of the Clayton Act is whether there is reasonable probability that the acquiring corporation would have entered the field of the merged corporation by internal expansion, but for the merger. *See* EKCO Prod. Co. v. FTC, 347 F.2d 745 (7th Cir. 1965).

15. The Supreme Court has never confronted the issue. The FTC's instant opinion takes cognizance of the fact that it is introducing a new test. Bendix Corp., 3 TRADE REG. REP. (1970 Trade Cas.) ¶ 19,288, at 21,445 (FTC June 18, 1970).

16. In United States v. El Paso Natural Gas Co., 376 U.S. 651 (1964), the Court stated that the words, "may be substantially to lessen competition," in § 7 manifest the congressional concern with probabilities of anti-competitiveness and not with certainties on one extreme or tenuous possibilities on the other. *Accord*, United States v. Continental Can Co., 378 U.S. 441 (1964); United States v. Penn-Olin Chem. Co., 378 U.S. 158 (1964).

17. In United States v. Continental Can Co., 378 U.S. 441, 461 (1964), the Court ruled that where an industry is already highly concentrated, it is important to prevent even slight increases therein, consistent with the purported aims of the Clayton Act.

18. In all 3 cases the entering firm already had a small industrial capacity in the market, which could have been extended by the interual growth of that firm.

19. FTC v. Proctor & Gamble Co., 38 U.S. 568 (1967); United States v. Joseph Schlitz Brewing Co., 253 F. Supp. 129 (N.D. Cal. 1966).

20. Bendix Corp., 3 TRADE REG. REP. (1970 Trade Cas.) ¶ 19,288, at 21,445 (FTC June 18, 1970).

21. *Id.*

22. The Commissioner stated that it would serve the purpose of the Clayton Act if the influence of a potential competitior were exerted either through a possibility of internal expansion or toe-hold acquisition. *Id.*

the pro-competitive effects of the imposing figure of Bendix at the market's edge; (2) the noticeable weakness of existing market competition; and (3) the substantial barriers to entry that made Bendix's presence on the fringe even more valuable.[23] The FTC ordered divestiture, concluding that the possibility of entry by toe-hold acquisition should be equivalent to the probability of internal expansion as a test for qualifying a firm as a potential competitor.[24]

The instant case, by introducing the possibility of entry into a market by toe-hold acquisition as a factor in determining whether a firm is a potential competitor, imposes an additional check on mergers being challenged under section 7 of the Clayton Act. A merger that might otherwise survive because the merging firm was not a likely entrant by internal expansion can now be proscribed by the probability of entry by toe-hold acquisition.[25] An approximation of the number of mergers that will be interdicted annually by this new limitation would be too speculative to have significance. Theoretically, any market that contains minor firms would be a susceptible target of the toe-hold acquisition test.[26] Moreover, any extra-market firm with the financial capacity and industrial propensity toward entrance could be categorized as a potential competitor capable of entry by toe-hold acquisition.[27] The courts may not, however, resort to the alternative restraint recognized by the instant decision because the possibility of internal expansion is often determinative of the case.[28] Nonetheless, the extensive scope of the entry-by-acquisition test gives the courts substantial discretionary latitude in defining an anti-competitive merger. An unfortunate complication may arise as a result of the courts being compelled to distinguish each

23. *Id.* at 21,450-53.

24. *Id.* at 21,445. The Commissioner stated that all likely routes for potential entry must be evaluated in determining the legality of the merger route that was actually chosen. In response to Bendix's election of the wrong route, the Commission ordered a complete divestiture of Fram from Bendix and required Bendix to obtain FTC approval of all acquisitions in the automotive filter aftermarket for the next 10 years.

25. The actual number of firms lounging on the periphery of a given market having some type of industrial capacity, which may be expanded internally to accomplish entry, must be finite. However, the number of firms somewhere in the marginal area that possess the financial potential for entry may be limited only to the number of firms operating at a substantial profit in closely related markets. Certainly the latter number is greater.

26. Logically, if a market has minor firms, then a merger of one of those firms and an outside firm would be defined as a toe-hold acquisition. *See* Bendix Corp., 3 TRADE REG. REP. (1970 Trade Cas.) ¶ 19,228, at 21,444 (FTC June 18, 1970).

27. *See* note 25 *supra*.

28. The courts have found the doctrine of internal expansion flexible enough to encompass almost all situations that were flagrantly anti-competitive. *See, e.g.*, Brown Shoe Co. v. United States, 370 U.S. 294 (1962); EKCO Prod. Co. v. FTC, 347 F.2d 745 (7th Cir. 1965).

combination of firms as either a toe-hold acquisition or a prohibited merger of leading firms, since each merger must be categorized as one or the other before the anti-competitiveness can be determined. The logical extension of the reasoning in the instant case would prompt the courts to consider any merger that combines the entering firm with one that is higher on the production scale than at least one other firm as less desirable than a union of the entering firm and the lowest intra-market firm. If, as the decision suggests, a toe-hold acquisition is seldom anti-competitive, then a toe-hold acquisition of the lowest firm in the market by the entering firm would be the least anti-competitive merger. The union would be proportionately more anti-competitive as one moves up the production scale and thus more vulnerable to proscription by section 7. Consequently, the only merger with certain immunity would be the union of the entering firm and the firm least capable of becoming a substantial competitor in the market. Realizing the dangerous breadth of the toe-hold acquisition test the courts may narrow its scope so that it applies only to factual situations such as the instant one—where the market was particularly sensitive to the presence of a potential competitor on its periphery and was significantly injured by the removal of that competitor.[29] If the entry-by-acquisition test were adopted wholly, in its undiluted form,[30] the judiciary would possess a latent power to control big business that section 7 of the Clayton Act did not purport to bestow.[31] It would be a regrettable commentary on judicial wisdom if the entry-by-acquisition test should reach the anomalous proportions described.

29. The Commission recognized 3 factors that rendered the automobile filter aftermarket especially sensitive to the presence of Bendix as a potential competitor. It may be difficult for the Court to find another market with the same degree of sensitivity. Thus, the instant holding could conceivably be limited by its inherently narrow factual circumstances. *See* note 25 *supra*.

30. The actual toe-hold acquisition test itself as delineated in the instant case was not modified, limited, or qualified in any manner. That the only merger with immunity from the reasoning of the instant decision would be the union of the entering firm and the lowest firm in the market would be a rationally anticipated result, unless the courts decide to limit the test to the factual situation in the instant case. *See* notes 25 & 29 *supra* and accompanying text.

31. The legislative history of § 7 reveals that the merger of minor firms was not intended to be proscribed. Indeed, it was stated conversely at several discussions. 96 CONG. REC. 16436 (1950); 95 CONG. REC. 11488 (1949); H.R. REP. No. 1191, 81st Cong., 1st Sess. 6-7 (1949).

Antitrust—Private Antitrust Actions Against Air Pollnters—Commercial Relationship Between Litigants Not Necessary to Maintain an Action for Violation of Section 1 of Sherman Act

Plaintiffs, alleging that defendant automobile manufacturers conspired to delay the development and installation of pollution control devices for motor vehicles, brought class actions[1] seeking treble damages[2] for violation of section 1 of the Sherman Act.[3] The plaintiffs claimed injury to their respective "business or property by reason of"[4] the alleged conspiracy.[5] Defendants claimed that the class actions could not be maintained,[6] and that even if class actions were proper, plaintiffs failed to allege that direct injuries were caused by specific overt acts pursuant to the alleged conspiracy. The defendants further contended that the complaints should be dismissed for failure to state a claim upon which relief could be granted because there was no "commercial

1. The actions are grouped in Appendix A to the opinion according to the respective classes represented. These include: (1) "all persons in the United States" (4 complaints); (2) "all farmers of the United States" (one complaint); (3) "all people within the State of ____ and its political subdivisions" (5 complaints); (4) "political subdivisions, public corporations and authorities within New York" (one complaint); (5) "residents" (3 complaints); and (6) "all persons who own property, real or personal, or who conduct a business within the State of California damaged as the result of air pollution caused by automobiles" (onc complaint). *In re Multidistrict Private Civil Treble Damage Antitrust Litigation Involving Motor Vehicle Air Pollution Control Equipment*, 5 TRADE REG. REP. (1970 Trade Cas.) ¶ 73,317, at 89,254 (C.D. Cal. Sept. 4, 1970).

2. Section 4 of the Clayton Act, 15 U.S.C. § 15 (1964): "Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue . . . and shall recover threefold the damages by him sustained, and the cost of the suit, including a reasonable attorney's fee."

3. 15 U.S.C. § 1 (1964) provides: "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States . . . is declared to be illegal."

4. The instant suits grew out of the antitrust conspiracy suit filed by the Justice Department against the Automobile Manufacturers Association and General Motors, Ford, Chrysler, and American Motors. The government action resulted in a consent decree that barred the defendant corporations from conspiring to delay the use of antipollution devices but did not state that they were guilty of conspiring in the past. United States v. Automobile Mfrs. Ass'n, 1969 Trade Cas. 87,456 (C.D. Cal.). Plaintiffs in the instant cases failed in their attempts to intervene in the earlier suit. United States v. Automobile Mfrs. Ass'n, 5 TRADE REG. REP. (1970 Trade Cas.) ¶ 73,070 (C.D. Cal. Nov. 7, 1969).

5. The alleged injuries varied according to class. For example, the governments claimed that they had been injured by damage to public buildings and greenery, increased benefits to welfare clients suffering from pollution-related diseases, and increased expenditures to combat air pollution. The suit on behalf of all farmers in the United States claimed crop damage resulting from air pollution.

6. Defendants contended that common questions of law and fact that predominated over questions individual to class members were absent and that the alleged classes were unmanageable.

relationship" between the plaintiffs and the defendants. The United States District Court for the Central District of California, *held,* defendants' motion to dismiss denied and cases ordered to be tried by a jury. Claims of injury to business or property by reason of a conspiracy by automobile manufacturers to delay the installation of pollution control devices on motor vehicles are actionable, despite the absence of a commercial relationship between the litigants. *In re Multidistrict Private Civil Treble Damage Antitrust Litigation Involving Motor Vehicle Air Pollution Control Equipment,* 5 TRADE REG. REP. (1970 Trade Cas.) ¶ 73,317 (C.D. Cal. Sept. 4, 1970).

The private antitrust suit, despite its attractive tender of treble damages, was rarely utilized in its first 50 years of availability.[7] These suits have been discouraged because plaintiffs have had difficulty in pleading and proving three distinct elements of the cause of action.[8] The first requirement in a private suit is proof of a "legal injury" and not just a violation of the statute.[9] The private plaintiff, moreover, has not been permitted to use evidentiary findings in a prior government-instituted suit to prove his injury when the previous suit resulted in a consent decree.[10] The strictness of the requirement for proof of injury, however, has been alleviated in recent cases that have allowed plaintiffs to maintain actions on the mere allegation that they have been injured by the statutory violation.[11] This liberal treatment has resulted from recognition of the inherent difficulty of properly setting forth in the pleadings all details and specific facts.[12] The second element that plaintiffs traditionally have had to plead and prove is a statutory violation as the proximate cause of the alleged injury. The courts frequently have determined the violation's causal effect on the plaintiff's

7. As of 1940, there were a mere 175 antitrust cases reported, with judgment for the plaintiff in only 13 of these. Note, *Antitrust Enforcement by Private Parties: Analysis of Developments in the Treble Damage Suit,* 61 YALE L.J. 1010 (1952).

8. *See* Pollock, *The "Injury" and "Causation" Elements of a Treble-Damage Antitrust Action,* 57 NW. U.L. REV. 691, 692 (1963).

9. *See, e.g.,* Turner Glass Corp. v. Hartford-Empire Co., 173 F.2d 49 (7th Cir.), *cert. denied,* 338 U.S. 830 (1949).

10. The proviso to § 5 of the Clayton Act, 15 U.S.C. § 16(a) (1964), expressly excepts "consent judgments or decrees" from the prima facie evidentiary advantage usually derived from government antitrust suits. *See* Note, *Antitrust Consent Decrees: A Proposal to Enlist Private Plaintiffs in Enforcement Efforts,* 54 CORNELL L. REV. 763, 771-72 (1969).

11. *E.g.,* Radiant Burners, Inc. v. Peoples Gas Light & Coke Co., 364 U.S. 656 (1961) (allegations adequate to show a violation causing injury to plaintiff are all that the law requires in order to state a claim in a private treble damage action); *cf.* Knuth v. Erie-Crawford Dairy Cooperative Ass'n, 395 F.2d 420 (3d Cir. 1968) (in an antitrust action, doubts should be resolved in favor of the position that will uphold the pleading).

12. *See, e.g.,* Radovich v. National Football League, 352 U.S. 445, 453-54 (1957).

injury as a matter of law and have denied a jury trial on this issue unless a significant causal connection has been shown.[13] The Supreme Court attempted to ease this restriction in *Bigelow v. RKO Radio Pictures, Inc.*[14] by finding that a plaintiff is entitled to a jury trial if he can show *some* causal relation between his losses and the defendant's violation of the antitrust laws. Although courts now generally permit private plaintiffs to reach juries when any reasonable inference of causal relation is possible,[15] some post-*Bigelow* decisions have indicated that the courts may still find an insufficient relation between the violation and the injury, and subsequently dismiss the plaintiff's complaint on the basis of the pleadings.[16] The final element in private antitrust actions has been the requirement, expressly stated in some cases, that a "commercial relationship" exist between the litigants.[17] Since the antitrust laws were designed "to promote competition and prevent its restraint,"[18] actions under these laws have been restricted to cases involving commercial losses, as distinguished from personal damage suffered by remote parties. Consequently, the statutory phrase "business or property"[19] has been construed by the courts to denote a commercial business or market.[20] A plaintiff presumably has no cause of action, therefore, if he is not within the "target area" of the conspiracy—that sector of the economy that has been directly injured by the antitrust violation.[21] These stringent requirements of injury, proximate cause, and commercial relationship were followed in a recent case decided by the Second Circuit. In *Billy Baxter, Inc. v. Coca-Cola Co.*,[22] the court endorsed the

13. *See, e.g.*, Abouaf v. Spreckels Co., 26 F. Supp. 830 (N.D. Cal. 1939).

14. 327 U.S. 251 (1946).

15. *E.g.*, Vines v. General Outdoor Advertising Co., 171 F.2d 487 (2d Cir. 1948); Louisiana Farmers' Protective Union v. Great Atl. & Pac. Tea Co., 131 F.2d 419 (8th Cir. 1942).

16. *E.g.*, A.J. Goodman & Son, Inc. v. United Lacquer Mfg. Corp., 81 F. Supp. 890 (D. Mass. 1949).

17. Conference of Studio Unions v. Loew's, Inc., 193 F.2d 51 (9th Cir. 1951), *cert. denied*, 342 U.S. 919 (1952) (affirming defendants' motion for judgment on the pleadings where none of the acts alleged effectuated a restraint on commercial competition in the movie industry).

18. Delaware Valley Marine Supply Co. v. American Tobacco Co., 184 F. Supp. 440, 443 (E.D. Pa. 1960), *aff'd*, 297 F.2d 199 (3d Cir. 1961), *cert. denied*, 369 U.S. 839 (1962).

19. 15 U.S.C. § 15 (1964).

20. *See, e.g.*, Peller v. International Boxing Club, 227 F.2d 593, 595-96 (7th Cir. 1955). This point is discussed further in Timberlake, *The Legal Injury Requirements and Proof of Damages in Treble Damage Actions Under the Anti-Trust Laws*, 30 GEO. WASH. L. REV. 231 (1961).

21. *See, e.g.*, Productive Inventions, Inc. v. Trico Prods. Corp., 224 F.2d 678 (2d Cir. 1955), *cert. denied*, 350 U.S. 936 (1956) (patent licensor denied standing to sue for treble damages for royalties lost because of injury to its licensee).

22. 39 U.S.L.W. 2137 (2d Cir. Aug. 25, 1970) (Waterman, J., dissenting). Plaintiff-franchiser claimed that competitors had used allegedly improper methods to persuade retail outlets to buy products other than those manufactured and sold by franchised bottlers paying royalties to

need for a plaintiff to show that his commercial injury was a direct, rather than an incidental, result of the defendant's illegal act in order for him to possess the requisite standing to sue for treble damages. These requirements demonstrate precisely why the private antitrust action has never been used in the past to combat pollution. There are suits pending, however, such as the one filed by two Chicago aldermen against all leading automobile, truck, and tractor manufacturers for conspiring to delay installation of air pollution control devices on their vehicles,[23] that reflect a willingness by plaintiffs to employ an old remedy in a yet untried manner.

The instant court found that the maintenance of class actions was proper with respect to common issues of law and fact in approximately one-half of the cases pending[24] but adhered to the principle that a plaintiff representative must be a member of the class purportedly represented. The court, therefore, decided that a governmental entity[25] could not maintain a class action on behalf of individual residents.[26] Turning its attention to the injury alleged by the plaintiffs, the court noted that it would not evaluate the complaint by strict interpretation of the traditional elements of the private antitrust suit but would utilize a more liberal approach because of the relation between antitrust laws and possible new sources of injury, such as air pollution. The court, therefore, expanded the meaning of the statutory phrase "injured *by reason of anything* forbidden in the antitrust laws"[27] to allow the plaintiffs to maintain the cause of action. Concluding that the plaintiffs

plaintiff. Plaintiff therefore contended that he was entitled to sue for treble damages for franchise royalties diverted by plaintiff's acts. Plaintiff's suit was dismissed for lack of standing to sue under § 4 of the Clayton Act.

23. Kean v. General Motors Corp., Civil No. 69c-1900 (N.D. Ill., filed Sept. 16, 1969).

24. "Although there may be some differences in the effect of smog on various crops or the fauna and flora of a state, political subdivision, public corporation or public authority, the pleadings as they now stand do allege a class properly represented in *Morgan* [in which an individual farmer represents all farmers in the United States] and in *Illinois, New Jersey, New Mexico, Connecticut, Wisconsin, New York* and *California* with respect to common issues of law and fact which predominate over questions affecting only individual members." 5 TRADE REG. REP. (1970 Trade Cas.) ¶ 73,317, at 89,253.

25. The cases alleging representation by a governmental entity involved the complaints of Illinois, New Mexico, California, Wisconsin, New York, Connecticut, New Jersey, Philadelphia, and Lackawana. *Id.*

26. The court concluded that in the context of the alleged acts by defendants and any damage resulting therefrom, a governmental agency raises issues that are peculiar only to its status as a governmental agency. The representation of governmental entities as a class, however, was approved. The court also stated that it would depend on the ingenuity of counsel to solve the problems in managing the classes until such management was recognized as impossible. *Id.* at 89,253-54.

27. 15 U.S.C. § 15 (1964) (emphasis added).

should be permitted to benefit from "any available remedy to make good the wrong done,"[28] the court found that the injury alleged would be assumed for purposes of the motion to dismiss and that the plaintiffs were entitled to have the issues of conspiracy and injury tried by a jury, despite the absence of a commercial relationship between the plaintiffs and the defendants.

The instant case substantially strengthens the private antitrust suit as a possible effective remedy against polluters by affirming the recent trend of easing the strict requirements of the three elements of the action. Under this decision, the first element is satisfied by a mere allegation that an injury was sustained. With respect to the second element of proximate cause, the court noted that the *Bigelow* rule, requiring submission of causal issues to the jury whenever there is a reasonable inference that the violation caused the injury, can be easily circumvented by a finding that the defendant's act was only an indirect factor in the chain of causation.[29] The instant case, however, allowed the plaintiffs to reach a jury by only showing *some* causal connection between their injury and the defendant's violation. The overwhelmingly significant contribution of the instant decision is its treatment of the third element of the private antitrust action. The court rendered the requirement of a strictly "commercial relationship" between litigants as unnecessary to sustain a cause of action and thus effectively broadened the class of possible plaintiffs. The plaintiffs were allowed to utilize an efficacious legal remedy for pollution damage even though the remedy had not previously been tried in this context. This expansive decision implements the legislative policy of providing a private cause of action, as manifested by section 4 of the Clayton Act,[30] to supplement governmental enforcement of antitrust laws.[31] Private suits also are encouraged by the tender of treble damages, which threatens potential antitrust violators with punitive damages.[32] There are policy considerations, however, that militate against the effectiveness of the private antitrust suit. Since the public has a definite interest in protecting industry from the claims of remote plaintiffs, specific proof of a direct causal injury to the private

28. 5 TRADE REG. REP. (1970 Trade Cas.) ¶ 73,318, at 89,256.

29. *See* A.J. Goodman & Son, Inc. v. United Lacquer Mfg. Corp., 81 F. Supp. 890 (D. Mass. 1949).

30. 15 U.S.C. § 15 (1964).

31. *See* United States v. Borden, 347 U.S. 514, 518 (1954).

32. *See, e.g.*, Bruce's Juices, Inc. v. American Can Co., 330 U.S. 743, 751-52 (1947); Bergen Drug Co. v. Parke, Davis & Co., 307 F.2d 725, 728 (3d Cir. 1962). General policy considerations regarding private antitrust actions are discussed in Note, *Proximate Cause as a Limitation on Section 4 of the Clayton Act*, 44 N.Y.U. L. REV. 160, 161 (1969).

plaintiff should be required.[33] For this reason, the policy considerations that encourage private suits are not in themselves a sufficient justification for the court to lessen the degree of proof required to state a cause of action.[34] The expense of defending numerous antitrust suits and the fact that two-thirds of the mandatory treble damages is a penalty should also caution against an unreasonable imposition of liability that might unjustly reward a remote plaintiff.[35] Despite policy reasons for limiting the private antitrust suits, the instant decision is justified on a broader base that recognizes the potential use of antitrust law to combat the automobile industry's failure to develop antipollution devices. The widespread ramifications that the private antitrust action might have on other industries makes this decision an attractive tool for plaintiffs. Nevertheless, it should be observed that the plaintiffs in the instant case must still prove to a jury that there was in fact a conspiracy that resulted in a loss to them before they can recover treble damages. Because of the nature of the various plaintiffs' claims and the extensiveness of the classes represented, the proof of proximate causation required for recovery will be difficult in some of the cases. The significance of the instant case, nevertheless, remains clear. Rather than being bound by the traditional restrictive approach, the decision liberalizes the statutory provisions concerning the injury and causation elements of the plaintiff's complaint in order to determine that a cause of action exists. Since vast class actions apparently will be allowed when proper representative plaintiffs are selected, it is probable that similar suits may soon be utilized to combat industrial polluters on the national and local levels. The result is a potentially powerful new use for the private antitrust action as an aid in the fight against pollution.

Communicatious—Fairness Doctrine Does Not Require Regular Presentatiou of Antipollutiou Announcements

Petitioner, Friends of the Earth Society, filed a complaint with the Federal Communications Commission (FCC) alleging that Station

33. *See* Fanchon & Marco v. Paramount Pictures, Inc., 100 F. Supp. 84 (S.D. Cal. 1951), *aff'd*, 215 F.2d 167 (9th Cir. 1954), *cert. denied*, 348 U.S. 912 (1955). This contention is discussed in Timberlake, *supra* note 20, at 240.

34. *See* Snow Crest Beverages, Inc. v. Recipe Foods, Inc., 147 F. Supp. 907, 909 (D. Mass. 1956).

35. Harrison v. Paramount Pictures, Inc., 115 F. Supp. 312 (E.D. Pa. 1953), *aff'd*, 211 F.2d 405 (3d Cir.), *cert. denied*, 348 U.S. 828 (1954) (holding plaintiff's injury too remote to maintain a cause of action against motion picture producer under the Clayton Act).

WNBC-TV had failed to comply with the fairness doctrine and meet its public interest obligations concerning coverage of the issue of air pollution caused by automobiles and gasoline.[1] Petitioner contended that automobile and gasoline commercials, like cigarette commercials, represent only one side of a controversial issue of public importance. Station WNBC-TV denied petitioner's allegations and argued that it had fulfilled its fairness obligation with respect to the issue of air pollution in its overall performance.[2] The FCC, *held,* complaint denied. Since automobile and gasoline commercials do not raise a controversial issue of public importance, broadcasters are not required to provide regular free time for antipollution spot announcements in order to fulfill their fairness doctrine obligations. *FCC Opinion Letter to Gary Soucie,* No. FCC 70-862 (Aug. 5, 1970).

Comprehensive regulation of broadcasting by the federal government began with the enactment of the Radio Act of 1927,[3] which provided for the formation of the Federal Radio Commission to administer its provisions. From its inception the Commission, now the Federal Communications Commission, was concerned with the content of broadcast programming.[4] The Communications Act of 1934,[5] which utilized the Radio Act as its basis, presently embodies most of the statutory law in the field of broadcast control, and is the basis for regulation of program content.[6] Regulation of this kind apparently was envisioned by Congress,[7] and has been sanctioned by the Supreme Court.[8] The 1934 Act broadly instructs the Commission to allocate

1. The petitioner originally wrote WNBC setting forth his objections to the programming in regard to pollution and seeking free time to present antipollution spot announcements. He particularly objected to automobile and gasoline commercials. The petitioner asked the FCC to require WNBC to carry their antipollution announcements free of charge.

2. *See generally* FCC Opinion Letter to Dodson, No. FCC 70-915 (Aug. 26, 1970), *summarized in* 39 U.S.L.W. 2157 (Sept. 22, 1970). The FCC held that a broadcaster could refuse to carry a union's spot announcement during a strike, even though the station carried the company's commercial messages. *See also* FCC Memorandum Opinion and Order, No. FCC 70-861 (Aug. 5, 1970); FCC Opinion Letter to Business Executives Move for Vietnam Peace, No. FCC 70-860 (Aug. 5, 1970).

3. Ch. 169, 44 Stat. 1162, *as amended* 47 U.S.C. §§ 151-609 (1964).

4. *See* FCC v. Pottsville Broadcasting Co., 309 U.S. 134 (1940); FCC, PUBLIC SERVICE RESPONSIBILITIES OF THE BROADCAST LICENSEES 10 (1946); 1928 FRC ANNUAL REP. 155-56.

5. Ch. 652, 48 Stat. 1064 (1934), *as amended* 47 U.S.C. §§ 151-609 (1964).

6. *See* Red Lion Broadcasting Co. v. FCC, 395 U.S. 367 (1969); National Broadcasting Co. v. United States, 319 U.S. 190 (1943). *But cf.* 47 U.S.C. § 326 (1964) (forbidding censorship or interference with the right of free speech by the Commission).

7. *See* 67 CONG. REC. 5478-79 (1926) (remarks of Representative White).

8. In National Broadcasting Co. v. United States, 319 U.S. 190 (1943), the Court stated that the Communications Act of 1934 "itself establishes that the Commission's powers are not limited

broadcast frequencies on the basis of the "public convenience, interest, or necessity."[9] In 1949, the FCC formulated the fairness doctrine in order to implement this mandate and to achieve better program content.[10] This doctrine was designed to develop "an informed public opinion through the public dissemination of news and ideas concerning the vital public issues of the day."[11] In essence, the fairness doctrine requires that broadcasters, while presenting controversial issues of public importance, afford a reasonable opportunity for the presentation of opposing viewpoints.[12] Thus, the threshold decision that must be made in determining the applicability of the fairness doctrine is whether the issue in question is a controversial issue of public importance.[13] Normally, this question is resolved by the broadcaster, using "reasonable judgment in good faith on the facts in each situation."[14] The FCC has failed to articulate any standard or test that may be utilized in judging whether an issue is controversial or noncontroversial,[15] leaving broadcasters without clear guidance in their efforts to fulfill their fairness obligations.[16] The Commission has ruled

to the engineering and technical aspects of the regulation of radio communication . . . . [T]he Act does not restrict the Commission merely to supervision of the traffic. It puts upon the Commission the burden of determining the composition of that traffic." *Id.* at 215-16.

9. 47 U.S.C. § 307(a) (1964).

10. Editorializing by Broadcast Licensees, 13 F.C.C. 1246, 1248-52 (1949); *see* Red Lion Broadcasting Co. v. FCC, 395 U.S. 367 (1969); Banzhaf v. FCC, 405 F.2d 1082 (D.C. Cir. 1968); 29 Fed. Reg. 10415 (1964).

11. Editorializing by Broadcast Licensees, 13 F.C.C. 1246, 1249 (1949). "And we have recognized . . . the paramount right of the public in a free society to be informed and to have presented to it for acceptance or rejection the different attitudes and viewpoints concerning these vital and often controversial issues which are held by the various groups which make up the community." *Id.*

12. The fairness doctrine has been recognized as a legitimate exercise of the authority delegated by Congress. In 1959, Congress exempted legally qualified political candidates on certain news-type programs from the "equal time" requirements of § 315 of the Communications Act of 1934, 47 U.S.C. § 315 (1964), *formerly* ch. 652, § 315, 48 Stat. 1088 (1934), thus tacitly recognizing the fairness doctrine. The legislative history of the amendment also supports this view. *See* S. REP. NO. 562, 86th Cong., 1st Sess. 8-9 (1959).

13. Sullivan, *Editorials and Controversy: A Broadcaster's Dilemma*, 32 GEO. WASH. L. REV. 719, 725 (1964); Note, *Regulation of Program Content by the FCC*, 77 HARV. L. REV. 701, 709 (1964); *see* Banzhaf v. FCC, 405 F.2d 1082 (D.C. Cir. 1968); Editorializing by Broadcast Licensees, 13 F.C.C. 1246 (1949).

14. 29 Fed. Reg. 10416 (1964).

15. Commentators have urged that various standards be adopted. *See, e.g.*, Sullivan, *supra* note 13, at 726-27 (degree of social significance); Note, *supra* note 13, at 709 (whether the issue is one on which some concerted public action might reasonably be brought to bear); 53 IOWA L. REV. 480, 490 (1967) (public opinion).

16. One commentator thinks that the meaning of "controversial issue" is so unclear that no one really knows what it means. Thus there is a possible fertile ground for governmental intrusion amounting to censorship. Sullivan, *supra* note 13, at 768.

that an issue may be controversial regardless of the form of presentation,[17] the extent of its coverage by other media,[18] or its characterization as local or national in nature.[19] The Commission has further held that a broadcaster should be judged by his overall performance[20] and that an honest mistake in judgment[21] or simple negligence[22] will relieve him from Commission sanctions.[23] There have been, however, a number of situations in which the Commission has pre-empted the broadcaster's judgment and has established by decree that certain issues are controversial because of their peculiar nature. The FCC, for example, determined that the nuclear test ban treaty,[24] CATV and subscription television,[25] debt adjusting practices,[26] and cigarette advertising[27] were controversial issues requiring the application of the fairness doctrine.[28] It is not clear what factors the Commission considers important in making its judgments,[29] but the most significant one

17. Petition of Sam Morris, 11 F.C.C. 197 (1946); *cf.* Report on "Living Should Be Fun" Inquiry, 33 F.C.C. 101 (1962); Public Notice-B, 40 F.C.C. 571, 572 (1963).

18. WSOC Broadcasting Co., 17 P & F RADIO REG. 548 (1968).

19. *See* Note, *supra* note 13, at 709.

20. *See, e.g.*, Harry Lerner, 15 F.C.C.2d 75 (1968); Captain James E. Hamilton, 40 F.C.C. 454 (1957).

21. Golden West Broadcasters, 8 F.C.C.2d 987 (1967); Andrew B. Letson, 40 F.C.C.2d 987 (1967).

22. Golden West Broadcasters, 8 F.C.C.2d 987 (1967); *see* Anti-Defamation League, 4 F.C.C.2d 217 (1966) (isolated violations held insufficient to invoke sanctions).

23. Several possible remedies for violation of the fairness doctrine are open to the Commission. It has the authority to revoke or suspend licenses, to issue cease-and-desist orders, and to make rules. The Commission also may impose fines for certain willful violations. *See* Note, *supra* note 13, at 703.

24. Cullman Broadcasting Co., 40 F.C.C. 576 (1963).

25. *See, e.g.*, WBRE-TV, Inc., 1 F.C.C.2d 833 (1965); Pennsylvania Community Antenna Ass'n, 6 P & F RADIO REG. 2d 112 (1964); WSOC Broadcasting Co., 17 P & F RADIO REG. 548 (1958).

26. Radio Denver, Inc., 5 P & F RADIO REG. 2d 570 (1965).

27. Television Station, WCBS-TV, 9 P & F RADIO REG. 2d 1423 (1967).

28. The FCC also has determined that other issues were controversial. Lamar Life Broadcasting Co., 40 F.C.C. 556 (1963) (civil rights); Tri-State Broadcasting Co., 40 F.C.C. 508 (1962) (supposed Communist infiltration and encirclement); Report on "Living Should Be Fun" Inquiry, 33 F.C.C. 101 (1962) (health products and advice); The Evening News Ass'n, 40 F.C.C. 441 (1950) (labor strike); *see* Rochester Area Council of Churches, Inc., 7 P & F RADIO REG. 2d 869 (1966) (community action project); *cf.* American Friends of Vietnam, Inc., 6 P & F RADIO REG. 2d 126 (1965) (war in Vietnam); Petition of Sam Morris, 11 F.C.C. 197 (1946) (alcohol advertising). *See also* FCC Opinion Letter to Dorothy Healey, No. FCC 70-658 (June 24, 1970) (personal attack doctrine); Madalyn Murray, 40 F.C.C. 647 (1965) (personal attack doctrine).

29. The Commission has occasionally pointed to some factors it deems relevant. Pennsylvania Community Antenna Ass'n, 6 P & RADIO REG. 2d 112 (1965) (active consideration by local government officials); Report on "Living Should Be Fun" Inquiry, 33 F.C.C. 101 (1962) (health hazard); New Broadcasting Co., 40 F.C.C. 439 (1950) (actively being "controverted" by members of Congress or the public); The Evening News Ass'n, 40 F.C.C. 441 (1950) (common knowledge).

appears to be the extent of coverage already given to one side of the issue by the broadcast licensce.[30] Once it has been determined that an issue is controversial, the broadcaster is obligated to afford a fair opportunity for presentation of opposing viewpoints. Fair opportunity has often been equated with "significant" amount of time,[31] but this standard has not been adequately defined. Notwithstanding this lack of clarity, the broadcaster must make a "good faith judgment" to allot time fairly,[32] and coverage of opposing viewpoints must be given even if sponsorship is unavailable.[33] Programming also must be sought on the licensee's own initiative if no other source is available.[34] There had been very little occasion to deal with the application of the fairness doctrine to advertising[35] until the recent landmark decision of *Television Station WCBS-TV*,[36] which was affirmed in *Banzhaf v. FCC*.[37] The decision held that cigarette commercials[38] represent a controversial issue of public importance that warrants the application of the fairness doctrine and requires a "significant" amount of rebuttal time.[39] The FCC found that the frequency of presentation of one side of this controversy necessitated

30. *E.g.*, Lamar Life Broadcasting Co., 40 F.C.C. 556 (1963); New Broadcasting Co., 40 F.C.C. 439 (1950). If a significant amount of coverage has already been given the issue, there is a presumption that the broadcaster has already determined in his best judgment that the issue is controversial.

31. Red Lion Broadcasting Co. v. FCC, 395 U.S. 367 (1969).

32. Television Station, WCBS-TV, 9 F.C.C.2d 921, 941 (1967); Cullman Broadcasting Co., 40 F.C.C. 576, 577 (1963); Lawrence M.C. Smith, 40 F.C.C. 549, 550 (1963); Editorializing by Broadcast Licensees, 13 F.C.C. 1246, 1250 (1949).

33. Red Lion Broadcasting Co., 5 P & F RADIO REG. 2d 503 (1965); Cullman Broadcasting Co., 40 F.C.C. 576 (1963).

34. Governor John J. Dempsey, 40 F.C.C. 445 (1950). *See also* Metropolitan Broadcasting Co., 40 F.C.C. 491 (1959).

35. Until the cigarette decision, only one other case had dealt with advertising. In that decision a complaint was filed that sought to have a broadcaster's license revoked because the station refused the petitioner time to present temperance viewpoints. The complaint was denied. Petition of Sam Morris, 11 F.C.C. 197 (1946).

36. 9 F.C.C.2d 921 (1967).

37. 405 F.2d 1082 (D.C. Cir. 1968).

38. The holding was expressly limited to cigarettes. The Commission rejected the argument that the decision could not be limited to only one product, but must extend to many others whose normal use involves some health hazard. Television Station, WCBS-TV, 9 F.C.C.2d 921, 943 (1967). One Commissioner, however, argued that this decision could not be limited to cigarettes: "The Commission will be hard pressed to find a rational basis for holding that cigarettes differ from all other hazards to life and health. Contrary to the argument in the Commission's opinion, the normal use of automobiles does pose a health hazard, polluting the atmosphere to a degree that is dangerous not only to those using the automobiles but, even worse, in some localities to everyone including infants and invalids." *Id.* at 954 (Loevinger, concurring).

39. The Commission felt that cigarettes were unique for 2 reasons: (1) the extensive governmental and private reports that showed the normal use of cigarettes to be detrimental to health, and (2) the pending congressional action. *Id.* at 943.

the presentation of the opposing viewpoints on a "regular basis."[40] The opinion did not specifically require spot advertisements, but the spot advertisement remained the only practical method of fulfilling the licensee's obligation.[41] In reaching its conclusion, however, the majority emphasized that it was limiting this application of the fairness doctrine to cigarette commercials only.

In the instant decision, the FCC found that cigarette advertisements present a unique situation and are distinguishable from automobile and gasoline commercials. The majority distinguished cigarettes from other products on three grounds. First, it found that, unlike automobiles and gasoline, cigarette smoking is a personal habit and does not involve ecological problems. Secondly, the Commission observed that although it is now proposing a total ban on cigarette commercials,[42] no one would propose such a ban on "the fruits of the technological revolution."[43] Thirdly, the FCC found that if effective action is to be taken to eliminate pollution, the focus must be on the products themselves, not the "peripheral aspects of advertising."[44] The Commission concluded, therefore, that automobile and gasoline commercials do not present a controversial issue of public importance[45] necessary to invoke the fairness doctrine.[46] The majority, however, noted that a broadcaster has

40. "For, while the Fairness Doctrine does not contemplate 'equal time', if the presentation of one side of the issue is on a regular continual basis, fairness and the right of the public to be adequately informed compels the conclusion that there must be some regularity in the presentation of the other side of the issue. This consideration is not limited to advertising." *Id.* at 941. "The mere fact that information is available, or even that it is actually heard or read, does not mean that it is effectively understood. A man who hears a hundred 'yeses' for each 'no' when the actual odds lie heavily the other way, cannot be realistically deemed adequately informed." Banzhaf v. FCC, 405 F.2d 1082, 1099 (D.C. Cir. 1968).

41. "A licensee which has just presented a very lengthy program on this issue obviously might reach a different judgment as to what his obligation was in respect for the next week or so. But as stated, the carriage of the normally substantial amount of weekly commercials raises a concomitant responsibility to be met over relatively the same period of time." Television Station, WCBS-TV, 9 F.C.C.2d 921, 942 (1967).

42. *See* Notice of Proposed Rule Making, 32 Fed. Reg. 13162 (1967); FCC Opinion Letter to Gary Soucie, No. FCC 70-862, at 3 (Aug. 5, 1970).

43. The FCC reasoned that outright prohibition of cigarettes may not be effective, as in the case of the former ban on alcohol. Therefore there is all the more reason to use alternative means, such as education, to stop the use of cigarettes. This, however, is not true with automobiles. There could be little effeetive bootlegging of cars or gasoline; therefore, an outright ban would be effective. *Id.* at 5-6.

44. Furthermore, the FCC held that even if automobile commercials did invoke the fairness doctrine by raising an issue of public importance, fairness would not require regular presentation of antipollution commercials. Such a result, the Commission argued, would undermine the American system of broadcasting. *Id.* at 8-9.

45. The Commission noted that if the pollution issue were raised directly by commercials or otherwise, the fairness doctrine would apply. *Id.* at 10.

46. This action is consistent, the Commission felt, with the obligation of the National

an obligation to inform the public about environmental issues whether or not he carries commercials. One Commissioner dissented, contending that the issue is not whether cigarettes and automobiles are similar in all respects, but whether the advocacy of their use raises an issue of public importance sufficient to invoke the fairness doctrine. The dissent concluded that by applying this analysis it becomes clear that the fairness doctrine is applicable to automobile and gasoline commercials because it is only by the effective presentation of the competing interests concerning the use of the automobile that the American public can be told the whole truth about all aspects of the products they use and consume.[47]

In the instant decision the FCC, in refusing to extend the rationale of the anti-smoking decisions, seems to have misinterpreted the issue presented by the complaint. The dissent recognized that the relevant question was not whether cigarettes and automobiles are similar in all respects, but whether the advocacy of the use of automobiles and gasoline by commercials raises a sufficiently controversial issue of public importance to invoke the fairness doctrine.[48] The resolution of this issue should be based on a consideration of several factors. First, many automobile commercials leave the impression that the use of high-powered automobiles will result in a glamorous, virile life. These commercials, however, do not reveal the increased air pollution that results from the use of high-powered cars.[49] The complaint sought only to require the broadcaster to present alternative life styles, such as the

Environmental Policy Act of 1969, 42 U.S.C.A. §§ 4321-47 (Mar. Supp. 1970), and the holding of Red Lion Broadcasting Co. v. FCC, 395 U.S. 367 (1969).

47. The dissenting commissioner, Nicholas Johnson, also argued that the majority's underlying rationale, that the requirement of spot antipollution announcements will destroy commercial television, was misplaced. Prior to the antismoking decision, the same argument was advanced and time has shown that antismoking commercials will not destroy commercial television. Furthermore, there is no economic information available to warrant such a conclusion. The dissent also points out that the majority decision would subject the broadcaster to review, under the "public interest" doctrine, only once every 3 years. Thus, the dissent argues, the unscrupulous broadcaster would be able to suppress or misrepresent any views, at least until his license expires. FCC Opinion Letter to Gary Soucie, No. FCC 70-862, dissent at 3-11 (Aug. 5, 1970) (Comm'r Johnson).

48. "Once again, the majority has successfully seized and wrestled to the ground a phantom of its own creation." FCC Opinion Letter to Gary Soucie, FCC No. 70-862, dissent at 9 (Aug. 5, 1970) (Comm'r Johnson).

49. "The spots in question invoke the familiar Madison Avenue techniques: the enticement of glamour and excitement, ('Be a Big Rider!'); the allure of travel and faraway places; the invocation of the ethic of masculinity; pleasant surroundings often out of more usual context (by showing an automobile on a clean beach); and the reassuring appearance of well-known, pleasant-looking personalities intoning blandishments prepared by the manipulation specialists." FCC Opinion Letter to Gary Soucie, FCC No. 70-862, dissent at 8 (Aug. 5, 1970) (Comm'r Johnson).

use of low-polluting cars, that would result in a decrease in pollution.[50] Secondly, air pollution caused by automobiles represents a substantial health hazard for millions of people, and the general concern for the effective control and eventual elimination of air pollution should need no documentation.[51] Thirdly, the decisions to smoke cigarettes and to purchase high-powered automobiles are individual decisions. These choices are directly influenced by advertisements, but neither automobile nor cigarette commercials mention the detrimental effects caused by the product's normal use. The health hazard from smoking directly affects only the smoker, but automobile air pollution affects the entire community. The justifiable conclusion is that the detrimental effect on society is greater from automobile air pollution than from cigarette smoking. Thus it can reasonably be argued that the need for public education about the viable alternatives to automobile air pollution is greater than the need to educate the public about the hazards of smoking. An analysis of these factors leads to the conclusion that automobile and gasoline commercials present one side of a controversial issue of public importance and therefore should require the application of the fairness doctrine. In many situations it is possible for a broadcaster to satisfy this obligation with normal programming. But since automobile and gasoline commercials are presented with such frequency, the FCC should require that broadcasters air opposing viewpoints on a regular basis in order to fulfill the fair opportunity requirement.[52] This standard would provide the individual licensee with a concrete guide with which to discharge his fairness obligations and assure that the general public would be adequately informed about opposing viewpoints.[53] If the broadcaster fails to comply with an FCC

50. "There are, after all, alternatives to automobiles—new rapid transit systems, subways, electric automobile engines, bicycle riding, and plain old walking." *Id.* at 5. *See also* A. LEAVITT, SUPERHIGHWAY SUPERHOAX (1970); Washington Post, July 20, 1970, at A22, col. 1.

51. *E.g.*, Cassell, *The Health Effects of Air Pollution and Their Implications for Control*, 33 LAW & CONTEMP. PROB. 197 (1968); Note, *Cigarette Advertising and the Public Health*, 6 COLUM. J.L. & SOC. PROB. 99 (1970); *see* Clean Air Act of 1955, Pub. L. No. 88-206, 69 Stat. 322 (codified at 42 U.S.C. §§ 1857-571 (1964)); Air Quality Act of 1967, Pub. L. No. 90-148, 81 Stat. 485, *amending* 42 U.S.C. §§ 1857-571 (codified at 42 U.S.C. §§ 1857 to 57j-3 (Supp. IV, 1969)); National Environmental Policy Act of 1969, 42 U.S.C.A. §§ 4321-47 (Mar. Supp. 1970).

52. The Commission rejected a similar argument in FCC Opinion Letter to Business Executives Move for Vietnam Peace, FCC No. 70-860 (Aug. 5, 1970), by not requiring a broadcaster to sell spot announcement time for commercials urging the immediate withdrawal of American forces in Vietnam. The FCC also has refused to permit those opposing Marine and Army spot announcements to voice their opposition with free spot announcements. Fairness Doctrine Ruling, 24 F.C.C.2d 156, 158 (1970).

53. The public must receive the necessary information to make an intelligent decision to buy a product or to advocate a course of political action. Generally unfair or misleading advertising is the

ruling or does not comply with the fair opportunity requirement, the Act empowers the Commission to employ interim sanctions.[54] The use of these sanctions, such as the imposition of a fine or the suspension of a license, are more effective ways to discipline a broadcaster than the threat of revocation, which until 1968 had been utilized only once.[55] Some commentators have argued it is unconstitutional to require broadcasters to provide time for the expression of opposing viewpoints on controversial issues because it has a "chilling" effect on the exercise of first amendment rights.[56] They contend that the broadcaster will simply refrain from presenting controversial subjects, rather than donate the rebuttal time. This contention, however, has been discredited because the "chilling" effect caused by the regular presentation requirement is outweighed by the value of the information disseminated.[57] Moreover, this regular presentation solution would not introduce government censorship into broadcasting because the mode, manner, and substantive content of the antipollution announcements would remain in the discretion of the individual broadcaster.[58] A further beneficial result of requiring antipollution announcements on a regular basis would be the elimination of possible private censorship, fostered by the economic reliance of broadcasting companies on the automobile and gasoline industries.[59] In conclusion, it is submitted that this solution is clearly

concern of the FTC, but the FCC may deny the renewal of a license to any broadcaster who knowingly broadcasts a false advertisement, or does not identify paid commercials of political broadcasts as such. *See* Note, *supra* note 13, at 711.

54. *See* note 23 *supra.*

55. *See* Renewal of AM and TV licenses, 14 F.C.C.2d 3 (1968) (Cox & Johnson dissenting).

56. *See, e.g.*, Robinson, *The FCC and the First Amendment: Observations on 40 Years of Radio and Television Regulation*, 52 MINN. L. REV. 67, 152 (1967); Sullivan, *supra* note 13. *See also* Red Lion Broadcasting Co. v. FCC, 395 U.S. 367 (1969); Banzhaf v. FCC, 405 F.2d 1082 (D.C. Cir. 1968); 47 U.S.C. § 326 (1964). *Cf.* FCC Memorandum, Opinion and Order, No. FCC 70-861 (Aug. 12, 1970); Anti-Defamation League, 9 F.C.C.2d 190 (1966), *aff'd*, 403 F.2d 169 (D.C. Cir. 1968), *cert. denied*, 394 U.S. 390 (1969).

57. *See* Red Lion Broadcasting Co. v. FCC, 395 U.S. 367 (1969); Barren, *In Defense of "Fairness": A First Amendment Rationale for Broadcasting's "Fairness" Doctrine*, 37 U. COLO. L. REV. 31 (1964); Note, *The Implications of the Extension of the Fairness Doctrine to Editorial Expressions Implied in Commercial Advertising*, 34 ALBANY L. REV. 452 (1970); Note, *Fairness, Freedom and Cigarette Advertising: A Defense of the Federal Communications Commission*, 67 COLUM. L. REV. 1470 (1967); *cf.* Wirta v. Alameda-Contra Costa Transit Dist., 434 P.2d 982 (Cal. 1967).

58. *See* Banzhaf v. FCC, 405 F.2d 1082 (D.C. Cir. 1968). The fear that the Commission would become the arbitrator of all issues is unfounded. Neither initially nor ultimately does the Commission decide what is controversial—that decision remains with the public and their proxies, the President and Congress.

59. "[S]tation owners and a few networks would have unfettered power to make time available only to the highest bidders, to communicate only their own views on public issues, people and candidates, and to permit on the air only those with whom they agreed. There is no sanctuary in

within the FCC's statutory authority. The public interest obligation imposed on the Commission by the Communications Act of 1934 requires that the public receive full and truthful information.[60] In addition, Congress has recently required federal agencies "to create and maintain conditions under which man and nature can exist in productive harmony and fulfill the social, economic and other requirements of the present and future generations of Americans."[61] Regular presentation of antipollution announcements as required by the fairness doctrine would effectively implement these expressions of national policy.[62]

Constitutional Law—Establisbment Clanse—Tax Exemption for Property Used Solely for Religious Purposes Held Constitutional

Plaintiff[1] sought to enjoin the New York City Tax Commission from granting tax exemptions for church properties used solely for religious worship. Plaintiff contended that the exemptions, which were authorized by various state constitutional and statutory provisions,[2]

the First Amendment for unlimited private censorship operating in a medium not open to all. 'Freedom of the press from governmental interference under the First Amendment does not sanction repression of that freedom by private interest.' " Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 392 (1969), *citing* Associated Press v. United States, 326 U.S. 1, 20 (1945). *See also* M. MILLER, THE JUDGES AND THE JUDGED 197-99 (1952). The power of the 100 largest American corporations in broadcasting is tremendous. These companies control 85% of television advertising time. *See* Statement on S.J. Res. 209, by Commissioner Johnson before the Subcommittee on Communications of the Senate Commerce Committee 14 (Aug. 14, 1970). The argument that requiring antipollution announcements would be the end of commercial television is without factual basis. Even the cessation of cigarette advertising is predicted to have only a minor effect on television revenues. *See* Wall Street Journal, Sept. 15, 1970, at 1, col. 6 (S.W. ed.).

60. *See* notes 5-11 *supra* and accompanying text.

61. National Environmental Policy Act of 1969, 42 U.S.C.A.. §§ 4321-47 (Mar. Supp. 1970).

62. "It is sad and somewhat disheartening that this Commission holds dearer the quantity of commercial profits than the quality of human life itself." FCC Opinion Letter to Gary Soucie, No. FCC 70-862, dissent at 13 (Aug. 5, 1970) (Comm'r Johnson).

1. Frederick Walz is a Bronx lawyer who purchased a 22 by 29 foot, weed-choked plot on Staten Island and promptly sued the Tax Commission for his $5.24 tax bill for the year. N.Y. Times, May 4, 1970, at 1, col. 1 (city ed.). Amicus curiae briefs were filed in support of Walz's position by the ACLU, Madalyn Murray O'Hair, and the Society of Separationists, Inc.

2. N.Y. CONST. art. XVI, § 1 provides: "Exemptions from taxation may be granted only by general laws. Exemptions may be altered or repealed except those exempting real or personal property used exclusively for religious, educational or charitable purposes as defined by law and owned by any corporation or association organized or conducted exclusively for one or more of such purposes and not operating for profits." This provision is implemented by N.Y. REAL POP. TAX LAW § 420(1) (McKinney Supp. 1970), which states in part: "Real property owned by a

indirectly required him to financially support religious bodies in violation of the establishment clause of the first amendment.[3] The trial court granted defendant's motion for summary judgment. Both the Appellate Division of the New York Supreme Court[4] and the New York Court of Appeals[5] affirmed. On certiorari to the United States Supreme Court, *held*, affirmed. A tax exemption for property used solely for religious purposes, which is enacted with no intention to sponsor religion and entails only minimal and remote involvement between church and state, does not violate the establishment clause of the first amendment. *Walz v. Tax Commission*, 397 U.S. 664 (1970).

Every state has either constitutional or statutory provisions exempting from taxation property used solely for religious purposes,[6] and no judicial decision has ever held that the exemptions violate the establishment clause.[7] This unbroken chain of precedents may partially explain why the Supreme Court has never reached the merits of the exact question presented in the instant case.[8] The Court, however, has frequently struggled to interpret the scope of the establishment clause since its decision in *Everson v. Board of Education*,[9] in which a state

corporation or association organized exclusively for the moral or mental improvement of men and women, or for religious, bible, tract, charitable, benevolent, missionary, hospital, infirmary, educational, public playground, scientific, literary, bar association, medical society, library, patriotic, historical or cemetery purposes . . . and used exclusively for carrying out thereupon one or more such purposes . . . shall be exempt from taxation as provided in this section."

3. "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . ." U.S. CONST. amend. I. In Everson v. Board of Educ., 330 U.S. 1 (1947), the Court incorporated the establishment clause into the fourteenth amendment, thus making it binding upon the states. Appellant contested only the tax exemption of property used solely for religious purposes. By doing this, appellant evidently intended to deny the Tax Commission the argument that the property exempted served an educational or charitable purpose as well as a religious purpose.

4. Walz v. Tax Comm'n, 30 App. Div. 2d 778, 292 N.Y.S.2d 353 (1968).

5. Walz v. Tax Comm'n, 24 N.Y.2d 30, 246 N.E.2d 517, 298 N.Y.S.2d 711 (1969).

6. *See, e.g.*, CONN. GEN. STAT. REV. §§ 12-81(12) to (13) (1958); TENN. CONST. art. II, § 28 (permissive exemption); VA. CONST. art. XIII, § 183 (mandatory exemption). For a further presentation of state constitutional and statutory provisions dealing with religious property tax exemptions see Van Alstyne, *Tax Exemption of Church Property*, 20 OHIO S.L.J. 461 (1959), Note, *Constitutionality of Tax Benefits Accorded Religion*, 49 COLUM. L. REV. 968 (1949), and Note, *The Establishment Dilemma: Exemption of Religiously Used Property*, 4 SUFFOLK U.L. REV. 533 (1970).

7. Walz v. Tax Comm'n, 397 U.S. 664, 685 (1970) (Brennan, J., concurring).

8. Previously the Supreme Court had refused to hear cases appealed on the same issue presented in *Walz*. *See, e.g.*, Lundberg v. County of Alameda, 46 Cal. 2d 644, 298 P.2d 1, *appeal dismissed sub nom.* Heisey v. County of Alameda, 352 U.S. 921 (1956); Murray v. Comptroller of Treas., 241 Md. 383, 216 A.2d 897, *cert. denied*, 385 U.S. 816 (1966); General Fin. Corp. v. Archetto, 93 R.I. 392, 176 A.2d 73 (1961), *appeal dismissed*, 369 U.S. 423 (1962).

9. 330 U.S. 1 (1947).

statute providing for payment of bus fares for parochial school children was upheld. In the years following *Everson*, the Court has interpreted the establishment clause in deciding the constitutionality of state statutes incidentally aiding religious functions[10] and permitting the use of public school time for religious instruction,[11] prayer[12] and Bible reading[13] in public schools, statutes requiring businesses to close on Sunday,[14] and state office oaths requiring a declaration of belief in God.[15] An analysis of these decisions reveals three identifiable theories on the requirements of the establishment clause.[16] First, the "no-aid" doctrine, as stated in *Everson*, assumes that the purpose of the establishment clause was to erect "a wall of separation between church and State." This theory dictates that government, in order to maintain this wall, cannot "pass laws which aid one religion, aid all religions, or prefer one religion over another."[17] Although a strictly literal interpretation of the "no-aid"

10. Board of Educ. v. Allen, 392 U.S. 236 (1968) (state statute providing for loans of textbooks to parochial schools held constitutional).

11. In Illinois *ex rel.* McCollum v. Board of Educ., 333 U.S. 203 (1948), a "released time" program in which public school classrooms were used for religious instruction was held unconstitutional on the ground that it used the tax-supported school system to aid religious groups in spreading their faith. Later, in Zorach v. Clauson, 343 U.S. 306 (1952), however, a statute was held constitutional which merely permitted public schools to release students during the school day to go to religious centers for instruction on a voluntary basis.

12. Engel v. Vitale, 370 U.S. 421 (1962) (state directive requiring an official prayer to be said aloud in public school classes is contrary to the establishment clause).

13. School Dist. v. Schempp, 374 U.S. 203 (1963) (Bible reading and recitation by public school children as part of the curricular activities of students is unconstitutional).

14. Sunday closing laws have been upheld. For example, in McGowan v. Maryland, 366 U.S. 420 (1961), the Court found that although the so-called "blue laws" may originally have been enacted for religious reasons, the primary purpose of these laws today is secular in nature and does not amount to an establishment of religion. Three other similar cases were decided along with *McGowan*: Two Guys from Harrison-Allentown, Inc. v. McGinley, 366 U.S. 582 (1961); Braunfeld v. Brown, 366 U.S. 599 (1961); Gallagher v. Crown Kosher Super Market, Inc., 366 U.S. 617 (1961).

15. Torcaso v. Watkins, 367 U.S. 488, 496 (1961) ("religious test for public office" violates applicant's freedom of belief and religion).

16. These 3 theories are set forth in P. KAUPER, RELIGION AND THE CONSTITUTION 59-79 (1964). *See generally* W. KATZ, RELIGION & AMERICAN CONSTITUTIONS (1963); P. KURLAND, RELIGION AND THE LAW (1962); L. PFEFFER, CHURCH, STATE, AND FREEDOM (1967).

17. 330 U.S. 1, 15-16 (1947). The often-quoted full citation reads: "The 'establishment of religion' clause of the First Amendment means at least this: Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another. Neither can force nor influence a person to go to or to remain away from church against his will or force him to profess a belief or disbelief in any religion. No person can be punished for entertaining or professing religious beliefs or disbeliefs, for church attendance or non-attendance. No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion. Neither a state nor the Federal Government can, openly or secretly, participate in

doctrine seems to preclude any type of aid, the doctrine in practice has been used to nullify only those statutes expressly directed to religious ends.[18] Secondly, the theory of "neutrality" reemphasized by the Court in *School District v. Schempp*,[19] requires government impartiality between religious sects[20] and between believers and nonbelievers.[21] The *Schempp* decision adds the more useful idea that "to withstand the strictures of the Establishment Clause there must be a secular legislative purpose and a primary effect that neither advances nor inhibits religion."[22] The application of the "neutrality" theory has provided latitude for governmental aid to religion when such aid was only incidental to the accomplishment of a secular purpose. Thirdly, the theory of "accommodation," which was first conceived in *Zorach v. Clauson*,[23] may be viewed as a pragmatic modification of the strictly literal conceptualism of the "no-aid" and "neutrality" doctrines. The Court stated in *Zorach* that the first amendment does not require separation of church and state in every instance.[24] Rather, the Court acknowledged the necessity of interrelationships between government and religion and recognized that government cannot be completely indifferent to religion in American life. This theory intimates that government under certain circumstances "may accommodate its institutions and programs to the religious interest of the people" without unconstitutionally establishing religion in the process.[25] Proponents of the proposition that tax exemptions for religious properties do not

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the affairs of any religious organizations or groups and *vice versa*. In the words of Jefferson, the clause against establishment of religion by law was intended to erect 'a wall of separation between church and State.'" *Id.* Jefferson's phrase, penned in a letter written in 1802 to a Baptist association, was adopted by the Court in Reynolds v. United States, 98 U.S. 145, 164 (1878), and declared to be an authoritative declaration of the meaning of the first amendment. The expression has been used in almost every case concerned with the establishment clause. *E.g.*, cases cited notes 9-13 *supra*.

18. *Compare* Everson v. Board of Educ., 330 U.S. 1 (1947), *with* Illinois *ex rel.* McCollum v. Board of Educ., 333 U.S. 203 (1948).

19. 374 U.S. 203 (1963).

20. Mr. Justice Douglas, speaking for the Court in Zorach v. Clauson, 343 U.S. 306, 314 (1952), could find "no constitutional requirement which makes it necessary for government to be hostile to religion and throw its weight against efforts to widen the effective scope of religious influence. The government must be neutral when it comes to competition between sects."

21. "That [First] Amendment requires the state to be a neutral in its relations with groups of religious believers and non-believers; it does not require the state to be their adversary. State power is no more to be used so as to handicap religions than it is to favor them." Everson v. Board of Educ., 330 U.S. 1, 18 (1947); *accord*, Torcaso v. Watkins, 367 U.S. 488, 495 (1961).

22. School Dist. v. Schempp, 374 U.S. 203, 222 (1963).

23. 343 U.S. 306, 315 (1952).

24. *Id.* at 312.

25. P. KAUPER, *supra* note 16, at 69.

violate the establishment clause have based their contentions on several grounds.[26] First, they have contended that the historic tradition of these exemptions should be accorded substantial consideration.[27] Secondly, authorities have argued that these exemptions reflect the state's recognition of the socially beneficial manifestations of organized religion, such as privately funded hospitals, homes for orphans and the aged, and similar charitable pursuits. The thesis is that the property tax exemption is justified since governmental interest is being served by privately funded sources.[28] Finally, it has been argued that taxation of religious property, which is nonproductive of income, will cause the forced sale of church property, thereby violating the free exercise clause, which prohibits governmental interference with an individual's right to pursue freely his religion.[29] On the other hand, persons opposed to the tax exemption of religious institutions base their contention on the undisputed premise that a direct tax-funded subsidy of religion would violate the establishment clause.[30] Protagonists of the tax exemptions

26. The articles cited as authority for Mr. Justice Brennan's concurring opinion in *Walz* are particularly persuasive in support of religious tax exemptions. Bittker, *Churches, Taxes and the Constitution*, 78 YALE L.J. 1285 (1969); Freund, *Public Aid to Parochial Schools*, 82 HARV. L. REV. 1680 (1969); Giannella, *Religious Liberty, Nonestablishment, and Doctrinal Development: Part I. The Religious Liberty Guarantee*, 80 HARV. L. REV. 1381 (1967); Giannella, *Religious Liberty, Nonestablishment, and Doctrinal Development: Part II. The Nonestablishment Principle*, 81 HARV. L. REV. 513 (1968).

27. Tax exemptions for religious properties existed during the lifetimes of writers of the Constitution, and as early as 1802 Congress provided for tax exemptions for churches. Walz v. Tax Comm'n, 397 U.S. 664, 677 (1970). For a discussion of the history and development of the establishment clause itself see Engel v. Vitale, 370 U.S. 421, 425-30 (1962); Everson v. Board of Educ., 330 U.S. 1, 8-15 (1947); and C. ANTIEAU, A. DOWNEY & E. ROBERTS, FREEDOM FROM FEDERAL ESTABLISHMENT (1964). *See also* Paulsen, *Preferment of Religious Institutions in Tax and Labor Legislation*, 14 LAW & CONTEMP. PROB. 144 (1949).

28. The most convincing justification of the property tax exemption on the basis of socially valuable contributions by religious organizations is found in Murray v. Comptroller of Treas., 241 Md. 383, 216 A.2d 897, *cert. denied*, 385 U.S. 816 (1966). The *Murray* court reasoned that since many functions of religious organizations are substantially beneficial to the community, churches thereby save the State the expense of providing similar services. The court found that an entirely secular state goal was achieved in encouraging church building and maintenance programs by granting tax exemptions. This finding was supported by factual studies showing that church buildings are thought to attract persons to communities and tend indirectly to increase the general tax assessment base by raising land value in the neighborhood. *Accord,* J. TOBIN, W. HANNAN & L. TOLMAN, THE EXEMPTION FROM TAXATION OF PRIVATELY OWNED REAL PROPERTY 56 (1934).

29. Mr. Justice Brennan, in a concurring opinion in *Schempp*, warned that in striking down an activity deemed to be an establishment, a court might seriously interfere with the free exercise of religion. 374 U.S. at 296.

30. "No tax in any amount, large or small, can be levied to support any religious activities or institutions . . . ." Everson v. Board of Educ., 330 U.S. 1, 16 (1947).

reason that since an exemption creates an economic benefit, it is logically tantamount to a direct subsidy and is thus unconstitutional.[31]

In the instant case, the Court interpreted the term establishment, as used in the first amendment, to connote sponsorship, financial support, and active involvement of the sovereign in religious activity. In order to accommodate the first amendment's guarantee of religious freedom with the amendment's prohibition against the establishment of religion, the Court reasoned that there is an area of free interplay between the two constitutional requirements in which benevolent neutrality of the sovereign will permit religious exercise to exist with neither sponsorship nor interference. In addition, the majority implemented the concept of "neutrality" expounded in *Schempp,* which requires a value judgment on a question involving the religion clauses to turn on whether particular acts of government are intended to establish or interfere with religious exercise or have the effect of doing so. In exercising this value judgment, the Court, noting that deference should be given to state legislatures in determining objectives of taxation, found that the New York legislature had granted a property tax exemption not only to property used for religious purposes but also to property owned by many other non-profit organizations that provide beneficial services to the community.[32] The Court, however, expressly avoided justifying the property tax exemption on the basis of the socially beneficial welfare services performed by churches. Instead, the majority focused its attention on rebutting the argument that a tax exemption is tantamount to a direct governmental subsidy and thus unconstitutional.[33] The indirect economic benefit of a tax exemption, the Court held, was qualitatively different from a direct subsidy, which would necessarily involve sustained and detailed administrative relationships. Moreover, the Court reasoned that a tax exemption creates only a minimal and remote involvement between church and state. Taxation of church property, on the other hand, would

31. *See* Van Alstyne, *supra* note 6, at 461; Note, *Constitutionality of Tax Benefits Accorded Religion*, 49 COLUM. L. REV. 968, 985 (1949). Two law review articles written during appeal stages of the instant case took the position that the tax exemptions should be abolished. Note, *Constitutionality of the Real Property Church Exemption*, 36 BROOKLYN L. REV. 430 (1970); Note, *The Establishment Dilemma: Exemption of Religiously Used Property*, 4 SUFFOLK L. REV. 533 (1970).

32. N.Y. REAL PROP. TAX LAW § 420(1) (McKinney Supp. 1970). The common denominator of all of the exempted organizations was the nonprofit characteristic.

33. The majority was probably influenced by Boris Bittker's analysis of the weaknesss of the anti-exemption reasoning. Bittker concluded that "the assertion that an exemption is equivalent to a subsidy is untrue, meaningless, or circular, depending on context, unless we can agree on a 'correct' or 'ideal' or 'normal' taxing structure as a benchmark from which to measure departures." Bittker, *supra* note 26, at 1304.

expand the involvement of government by necessitating valuation of the property and giving rise to tax lien and foreclosure problems. For these reasons, the majority concluded that the New York statute granting tax exemptions to religious organizations for property used solely for religious worship does not violate the first amendment. Mr. Justice Douglas, the lone dissenter,[34] argued that the tax exemption is an unconstitutional subsidy of religion.[35] Mr. Justice Brennan and Mr. Justice Harlan, in separate opinions, concurred in the majority's finding but expressed different reasons for their conclusions.[36]

The instant decision is a significant step in the evolution of a realistic approach for resolving questions that involve the religion clauses of the first amendment. By conceptualizing the existence of an area of free interplay between the establishment clause and the free exercise clause, the Court has provided a neutral area in which the government can operate without violating the Constitution. In contrast, the theories advanced by some previous cases were based on catchwords[37] or implied that only a precipitous path existed between the establishment and free exercise clauses.[38] The instant decision becomes even more desirable when it is recognized that the plaintiff's basic assumption—that there is a distinct and separate classification of church property used solely for religious purposes—is fallacious. Church

34. In his dissent, Mr. Justice Douglas reiterated the belief, previously expressed in Engel v. Vitale, 370 U.S. 421, 443 (1962) (concurring opinion), that the *Everson* case, in which he voted with the 5 to 4 majority, was "out of line with the First Amendment." Douglas seems convinced that any aid to institutions teaching a sectarian creed is in violation of the establishment clause. 397 U.S. at 703.

35. Mr. Justice Douglas expressed the opinion that this Court had taken a step down the establishment path, and that eventually churches would be "on the public payroll." 397 U.S. at 711. The majority took exception to this opinion noting that historically the tax exemption for churches had never led to further involvement between church and state. *Id.* at 678. Although not relying on the historic tradition of the church property tax exemption as conclusive proof of constitutionality, the majority found that the long practice of such exemptions provided a presumption of constitutionality that should not be cast aside lightly.

36. Mr. Justice Brennan distinguished the property tax exemption from a direct subsidy by stating that a subsidy requires coercion of all taxpayers and involves a direct transfer of public money. Thus, a subsidy is affirmative state action as compared with the passive nature of an exemption. Brennan quoted Freund, *supra* note 26, at 1687 n.16, where it was stated that "the symbolism of tax exemption is significant as a manifestation that organized religion is not expected to support the state; by the same token the state is not expected to support the church." 397 U.S. at 691. Mr. Justice Harlan noted that subsidies, unlike exemptions, require periodic legislative debate and thus invite more political controversy than exemptions. 397 U.S. at 699.

37. Mr. Justice Reed, the sole dissenter in *McCollum*, objected to the "wall of separation" metaphor as used by the majority on the ground that "[a] rule of law should not he drawn from a figure of speech." 333 U.S. at 247.

38. *See generally* Illinois *ex rel.* McCollum v. Board of Educ., 333 U.S. 203 (1948); Everson v Board of Educ., 330 U.S. 1 (1947) ("no-aid" doctrine).

buildings serve secular purposes, such as providing a meeting place for Boy Scout troops or headquarters for social welfare programs, as well as religious purposes.[39] In addition, since the voluntary contributions of church members support many of these socially beneficial programs the necessity of paying property taxes from donations would limit the amount of privately funded charity work carried on by religious organizations.[40] Ultimately, government would have the responsibility for filling the gap thereby created. In this context, however, it should be observed that if the Court had invalidated the exemption, ultimately property worth many billions of dollars would have become available for tax assessment,[41] thus easing the constant pressure upon public officials to find new sources of revenue. Although opponents of the tax exemption have lost their judicial attempt to invalidate the exemption, they may now undertake a legislative lobby for removal of the exemption. This approach has considerable merit since the Court in the instant case emphasized the discretion of state legislatures to determine the proper objects of taxation. The Court indicated that it would be constitutional for a state legislature to remove the exemption so long as the action was taken in accordance with a proper secular policy.[42] Utilizing the reasoning of the instant case, it also can be argued, however, that the entanglement implicit in taxation of church property would significantly hinder the free exercise of religion. The tax might be considered as a price on the right to worship. As a result, some religious institutions might be discriminated against if they were unable to afford the additional cost of the house of worship. The instant decision may have a profound effect upon the issue of whether federal aid to parochial schools violates the Constitution. This issue is currently before the Court, and the flexible approach articulated in the instant case should be of considerable help to proponents of the aid. A strict "no-tax" holding, on the other hand, probably would have required the converse "no-support" holding in the case of aid to parochial education.[43]

39. "Any assumption that a church building itself is used for exclusively religious activities, however, rests on a simplistic view of ordinary church operations." Walz v. Tax Comm'n, 397 U.S. 664, 688 (1970) (Brennan, J., concurring).

40. *See* Giannella, *supra* note 26, at 553.

41. Approximately $880 billion worth of assessed real property exists in the United States. Of that figure, approximately $79.5 billion is the cash or replacement value of real estate used by religious institutions, according to a 1964 study by Dr. Martin Larson. M. LARSON, CHURCH WEALTH AND BUSINESS INCOME 47 (1965).

42. "Leaving churches outside the taxing boundary is no more an automatic violation of the establishment clause . . . than locating them within the taxing statute is an automatic violation of the free exercise clause." Bittker, *supra* note 26, at 1288.

43. *See* N.Y. Times, May 10, 1970, § 4, at 13, col. 6 (city ed.).

Inescapably, cases involving religion elicit emotional responses, and a consensus of public opinion[44] may tacitly influence a court decision in this area. This fact, however, does not necessarily render the decision invalid as lacking constitutional objectivity. Just as public values molded the writing of the religion clauses of the Constitution, public values may legitimately influence contemporary judicial interpretations of those same clauses.

Constitutional Law—Voting—Durational Residency Requirement Violates Equal Protection Clause

Plaintiff filed a class action requesting injunctive relief and a declaratory judgment invalidating as unconstitutional the state durational residency requirements for voting.[1] Two and one-half weeks after moving to Tennessee,[2] plaintiff attempted to register to vote in the upcoming primary election[3] but was declared ineligible pursuant to a state law requiring that individuals reside in the State for one year and in the county for three months prior to voting in any election.[4] After an unsuccessful appeal to the local election commission,[5] plaintiff instituted the instant suit. Plaintiff contended that both the three-month and one-year residency requirements violated the equal protection clause of the fourteenth amendment. The State argued that the plaintiff's challenge to

44. L. PFEFFER, *supra* note 16, at 216-17 (public opinion, which generally approves and supports the exemption from property tax, has been a significant factor in its continuation).

1. Plaintiff did not question the State's power to insure that voters are bona fide residents of the State. *Cf.*, Carrington v. Rash, 380 U.S. 89, 91 (1965) (a state's power to insure that potential voters are bona fide residents does not allow the state to exclude servieemen moving into the state from voting). At issue is the validity of durational residency requirements—whether a citizen must reside in a given locality for a specified period before becoming eligible to vote.

2. Plaintiff moved to Tennessee to become an assistant professor at Vanderbilt Law School. Since plaintiff intended to remain in Nashville indefinitely, it was not disputed that he was a bona fide resident of the county and state.

3. The primary election was being held to select candidates for governor, United States Senate and House of Representatives, and state representatives. A general election also was being held to select many state and local officers.

4. TENN. CONST. art. IV, § 1 provides in part: "Every person of the age of twenty-one years, being a citizen of the United States, and a resident of this State for twelve months, and of the county wherein such person may offer to vote for three months, next preceeding the day of election, shall be entitled to vote . . . ." *See also* TENN. CODE ANN. §§ 2-201, -304 (Supp. 1969) (reiterating the constitutional provisions).

5. Plaintiff's appeal to the election commission exhausted the administrative remedies available for correcting the registrar's decision under TENN. CODE ANN. § 2-319 (1956).

the validity of the three-month requirement was moot,[6] and that durational residency requirements are necessary to insure the purity of the ballot box[7] and thus represent a valid exercise of state power. The three-judge federal court, *held*, judgment for plaintiff. Durational residency requirements for voting are not necessary to promote any compelling state interest and therefore violate the equal protection clause of the fourteenth amendment. *Blumstein v. Ellington*, No. 5815 (M.D. Tenn. Aug. 31, 1970), *appeal docketed*, 39 U.S.L.W. 3150 (U.S. Oct. 13, 1970) (No. 769).

Although the right to vote is not specifically guaranteed by the United States Constitution, it has been scrupulously protected by the courts. The Supreme Court has recognized that this right is fundamental to individual liberty.[8] Despite the importance of the right to vote, states traditionally have been granted broad power to specify reasonable requirements for voting.[9] Once a state has granted voting rights, however, any classification that discriminates against a recipient of the franchise may violate the equal protection clause of the fourteenth amendment.[10] The courts have utilized two standards to evaluate challenges based on equal protection grounds.[11] Under the traditional test, a statute that fosters discrimination is unconstitutional unless it furthers some state interest. To comply with this standard, it is not necessary that the classification created be the most precise or practical

6. Prior to the August 6th election, the court declined to issue a preliminary injunction to require the state to allow plaintiff's class to vote, indicating that to reopen registration rolls on the eve of the election would be "so obviously disruptive as to constitute an example of judicial improvidence." Blumstein v. Ellington, No. 5815 (M.D. Tenn., Aug. 31, 1970). After the election, the State contended that the 3-month requirement was moot because the August 6th election already had been held and plaintiff would satisfy the residency requirement before the November election.

7. States traditionally argue that durational residency requirements are necessary in order to prevent dual voting, to insure that voters are familiar with local candidates and issues, and to curtail "colonization of voters"—importing nonresident to vote for a particular candidate.

8. In Yick Wo v. Hopkins, 118 U.S. 356, 370 (1886), the Court indicated by way of dictum that voting is a fundamental political right because it is preservative of all other rights. *See also* Carrington v. Rash, 380 U.S. 89, 96 (1965) (serviceman has fundamental right to vote in state of residence); Pope v. Williams, 193 U.S. 621, 632 (1904) (durational residency requirement does not violate fundamental right to vote).

9. Lassiter v. Northampton County Bd. of Elections, 360 U.S. 45, 51 (1959) (literacy test for voting upheld as fair on face). *See also* note 27 *infra*.

10. *E.g.*, City of Phoenix v. Kolodziejski, 399 U.S. 204 (1970) (disfranchising nonproperty owners in election to authorize issuance of general obligation bonds); Harper v. Virginia Bd. of Elections, 383 U.S. 663, 667-69 (1966) (poll tax disfranchised citizens who failed to pay).

11. *Developments in the Law—Equal Protection*, 82 HARV. L. REV. 1065 (1969). For a history of the early development of the equal protection clause see Tussman & TenBroek, *The Equal Protection of the Laws*, 37 CALIF. L. REV. 341 (1949).

method to accomplish a specified goal.[12] The traditional test has normally been employed to examine legislative regulation of the economy.[13] Under the second standard, which is commonly denoted as the "compelling interest test," the courts have held that a discriminatory statute is constitutional only if it is necessary to promote a compelling state interest and if the class created by the statute is defined so that it is neither over- nor under-inclusive.[14] A statute that includes more people within the defined class than are necessary to accomplish the compelling state interest is over-inclusive, while a statute whose burden falls on some members of the class and excludes others is under-inclusive.[15] Courts have consistently applied the compelling interest test more stringently than the traditional test.[16] The stricter standard, for example, often has been employed in situations when a statute has created a classification based upon suspect criteria, such as race,[17] wealth,[18] or lineage,[19] or when a statutory classification has affected fundamental liberties, such as the

12. For example, a state may conserve funds by denying benefits to an unnecessarily large number of welfare recipients. Dandridge v. Williams, 397 U.S. 471 (1970), *noted in* 23 VAND. L. REV. 1390 (1970) (upheld imprecise classification denying or reducing AFDC benefits to potential recipients). A state also may produce income by levying taxes on a somewhat arbitrary basis. Metropolis Theatre Co. v. City of Chicago, 228 U.S. 61, 69-70 (1913) (licensing fee for theater based on price of tickets sold). *But see* Turner v. Fouche, 396 U.S. 346, 361-64 (1970) (requirement that a school board member be a property owner was so unreasonable that it was unconstitutional even under the traditional test).

13. *E.g.*, Morey v. Doud, 354 U.S. 457 (1957) (statute that allowed only American Express money orders to be sold in local stores held to deny equal protection of the laws); Lindsley v. Natural Carbonic Gas Co., 220 U.S. 61 (1911) (upheld statute prohibiting bottling of gas taken from below certain depth). *But see* Dandridge v. Williams, 397 U.S. 471 (1970) (utilizing the traditional test to evaluate a classification allegedly denying AFDC payments to some otherwise qualified indigents).

14. *See, e.g.*, Levy v. Louisiana, 391 U.S. 68, 69-70 (1968) (interpretation of statute that would prohibit illegitimate children from bringing a wrongful death action for the loss of a parent held to be an unconstitutional, invidious discrimination); Rinaldi v. Yeager, 384 U.S. 305, 308-09 (1966) (statute forcing only incarcerated convicts to pay the cost of the transcript in an unsuccessful appeal invalidated because the classification was under-inclusive).

15. For a discussion of the nature of under- and over-inclusive classifications see *Developments in the Law—Equal Protection*, 82 HARV. L. REV. 1065, 1084-88 (1969).

16. *Compare* McLaughlin v. Florida, 379 U.S. 184, 190-96 (1964) (no compelling interest justifying state prohibition of black-white cohabitation), *with* McDonald v. Board of Election Comm'rs, 394 U.S. 802, 806-07 (1969) (followed traditional test holding that the legislature might have rational reasons for denying absentee ballots to citizens in pretrial confinement within their county of residenee).

17. *E.g.*, Loving v. Virginia, 388 U.S. 1 (1967); McLaughlin v. Florida, 379 U.S. 184 (1964); Korematsu v. United States, 323 U.S. 214 (1944).

18. Harper v. Virginia Bd. of Elections, 383 U.S. 663 (1966).

19. Levy v. Louisiana, 391 U.S. 68 (1968).

right to procreate,[20] travel,[21] or vote.[22] Prior to 1965,[23] the traditional test was utilized to uphold durational residency requirements.[24] Since that time, however, the Supreme Court has repeatedly found that the more exacting compelling interest standard should be applied to judge legislative classifications that impair voting rights.[25] Accordingly, a federal district court in Massachusetts in *Burg v. Canniffe*[26] recently applied the compelling interest standard to invalidate the state's one-year residency requirement for voting. The Supreme Court recently had the opportunity to examine durational residency requirements for voting under this standard but dismissed the case without reaching the merits of the constitutional question.[27] The judiciary has not been the only

20. Skinner v. Oklahoma *ex rel.* Williamson, 316 U.S. 535 (1942).

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

22. *E.g.*, Williams v. Rhodes, 393 U.S. 23 (1968). *But cf.* McDonald v. Board of Election Comm'rs, 394 U.S. 802 (1969) (applied the traditional test to uphold an absentee ballot statute that resulted in the denial of the right to vote to citizens held in pretrial confinement).

23. Prior to the introduction of the compelling interest test into voting rights litigation, the Court relied on the traditional equal protection test to protect voting rights. Baker v. Carr, 369 U.S. 186 (1962) (reapportionment of state legislature). Other constitutional provisions were also utilized. *E.g.*, Wesberry v. Sanders, 376 U.S. 1, 17 (1964) (reapportionment of congressional districts required by U.S. CONST. art. 1, § 2).

24. For instance, the Supreme Court has twice upheld Maryland's durational residency requirement in pre-1965 cases. Pope v. Williams, 193 U.S. 621, 633-34 (1904); Drueding v. Devlin, 234 F. Supp. 721, 723-24 (D. Md. 1964), *aff'd per curiam*, 380 U.S. 125 (1965).

25. City of Phoenix v. Kolodziejski, 399 U.S. 204 (1970) (citizens who paid no real property tax disfranchised in city election to issue general obligation bonds); Evans v. Cornman, 396 U.S. 812 (1970) (residents of federal enclave disfranchised); Cipriano v. City of Houma, 395 U.S. 701 (1969) (citizens who paid no real property tax disfranchised in election to issue municipal revenue bonds); Kramer v. Union Free School Dist. No. 15, 395 U.S. 621 (1969) (citizens who owned or leased no taxable real property and had no children in school disfranchised in school district election); Williams v. Rhodes, 393 U.S. 23 (1968) (statute discriminating against minor political parties in placing candidates on ballot); Harper v. Virginia Bd. of Elections, 383 U.S. 663 (1966) (citizens who failed to pay poll tax disfranchised); Carrington v. Rash, 380 U.S. 89 (1965) (residents in military who in-migrated disfranchised). The Court has ordered that many kinds of electoral districts be reapportioned under the compelling interest test. *E.g.*, Avery v. Midland County, 390 U.S. 474 (1968).

26. No. 69-855-C (D. Mass., July 8, 1970). The statute in question provided for 6-months' residenee in the state in addition to 6-months' residence, locally, thus requiring a total of a year's residence in the state. The court did not consider the 6-month local requirement.

27. In Hall v. Beals, 396 U.S. 45 (1969), a 3-judge court upheld the constitutionality of Colorado's 6-month durational residency requirement. The Supreme Court noted probable jurisdiction, but when the state legislature reduced the required residency period to 2 months, the Court by a 6 to 2 decision dismissed the case as moot. For discussions of the validity of durational residency requirements for voting see Macleod & Wilberding, *State Voting Residency Requirements and Civil Rights*, 38 GEO. WASH. L. REV. 93 (1969); Note, *The Impact and Constitutionality of Voter Residence Requirements as Applied to Certain Intrastate Movers*, 43 IND. L.J. 901 (1968); Note, *State Residency Requirements and the Right to Vote in Presidential Elections*, 58 KY. L.J. 300 (1970); Comment, *Residence Requirements for Voting in Presidential Elections*, 37 U. CHI. L. REV. 359 (1970).

governmental branch to scrutinize durational residency requirements as a condition for voting. In the Voting Rights Act of 1970,[28] Congress prohibited durational requirements as a prerequisite to voting for the President and Vice President. The Act expressly states that such requirements are not based on a compelling state interest and therefore violate the equal protection clause of the fourteenth amendment.[29] Although durational residency requirements have previously been challenged on constitutional grounds, aggrieved plaintiffs generally have been handicapped in obtaining judicial resolution of the constitutional issue by the judiciary's adherence to the doctrine of mootness.[30] In *Hall v. Beals*,[31] for example, the Supreme Court dismissed as moot an attack on a durational residency requirement.[32] The problem of mootness in voting rights cases, however, has occasionally been overcome by utilizing the doctrine that an issue "capable of repetition, yet evading review" is not moot.[33] In 1969, the Supreme Court invoked this

28. Pub. L. No. 91-285, §§ 202-04, 84 Stat. 314. The Act recently was upheld as constitutional in Christopher v. Mitchell, 39 U.S.L.W. 2196 (D.D.C. Oct. 2, 1970).

29. "[T]he imposition and application of the durational residency requirement as a precondition to voting for the offices of President and Vice President, and the lack of sufficient opportunities for absentee registration and absentee balloting in presidential elections—

(1) denies or abridges the inherent constitutional right of citizens to vote for their President and Vice President;

(2) denies or abridges the inherent constitutional right of citizens to enjoy their free movement across State lines;

(3) denies or abridges the privileges and immunities guaranteed to the citizens of each State under article IV, section 2, clause 1, of the Constitution;

(4) in some instances has the impermissible purpose or effect of denying citizens the right to vote for such officers because of the way they might vote;

(5) has the effect of denying to citizens the equality of civil rights, and due process and equal protection of the laws that are guaranteed to them under the fourteenth amendment; and

(6) does not bear a reasonable relationship to any compelling State interest in the conduct of Presidential elections." Voting Rights Act of 1970, Pub. L. No. 91-285, § 202, 84 Stat. 314.

30. The Supreme Court has held that article III, section 2 of the Constitution, which lists cases and controversies that come within the judicial power of the United States, prohibits consideration of cases in which one of the litigants no longer has a stake in the outcome. *Cf.* Powell v. McCormack, 395 U.S. 486 (1969). Therefore, a plaintiff whose cause is heard after the election is over, or after he has completed the required period of residence, may find his challenge dismissed as moot. For a discussion of the mootness problem see Note, *Mootness on Appeal in the Supreme Court*, 83 HARV. L. REV. 1672 (1970).

31. 396 U.S. 45 (1969).

32. The case was mooted, however, not because the election was over and plaintiff had satisfied the residency requirement, but because the statute challenged had been amended. *See also* Brockington v. Rhodes, 396 U.S. 41 (1969) (refusal to examine a statute discriminating against independent electors because the plaintiff had sued for mandamus only and relief could no longer be granted).

33. The "capable of repetition" doctrine originated in Southern Pac. Terminal Co. v. ICC, 219 U.S. 498, 515 (1911).

concept to reach the constitutional challenge to a statute discriminating against independent electors, even though the election that presented the issue already had been held.[34]

In the instant case, the court initially found that none of the policies underlying the mootness doctrine would be served by refusing to decide the controversy. The court concluded, therefore, that it should decide the case on the merits since the issue was likely to recur.[35] After reaching this decision, the court held that since the plaintiff was still a member of the class of citizens who had lived in the county for less than three months, he had standing to represent that class. Turning to the plaintiff's constitutional challenge to the durational residency requirements,[36] the court noted that a balance must be sought between the individual's right to vote and the state's power to regulate voting requirements. The court further found that recent decisions firmly establish the compelling interest test as the applicable equal protection standard when the right to vote is at stake.[37] Applying this standard,[38] the court concluded that durational residency requirements do not support a compelling state interest because they are not necessary to insure the purity of the ballot box.[39] The court, therefore, declared these requirements unconstitutional as violative of the equal protection clause of the fourteenth amendment.

The instant decision is the most definitive judicial pronouncement that durational residency requirements for voting are unconstitutional. Coupled with the Massachusetts decision in *Burg v. Canniffe,*[40] and the

34. Moore v. Ogilvie, 394 U.S. 814 (1969). *See also* Carroll v. President & Comm'rs, 393 U.S. 175 (1968) (injunction preventing political rally for 10 days vacated after expiration); Sibron v. New York, 392 U.S. 40 (1968) (criminal conviction overturned after plaintiff had completed his 6-month sentence).

35. The court found that Hall v. Beals, 396 U.S. 45 (1969), was not controlling since that case was dismissed as moot only because the statute under consideration had been superseded. The court buttressed its decision by citing Brockington v. Rhodes, 396 U.S. 41 (1969), which was decided the same day as *Hall.* The Court dismissed *Brockington* as moot because the plaintiff sued for mandamus to have his name added to the ballot in the 1968 election. The Court indicated that the outcome might have been different had plaintiff brought a class action or sued for declaratory relief to invalidate the statute.

36. The court took judicial notice of the fact that the durational residency requirements applied to the right to register as well as the right to vote.

37. The court indicated that Drueding v. Devlin, 234 F. Supp. 721 (1964), *aff'd per curiam,* 380 U.S. 125 (1965), which upheld durational residency requirements under the traditional test, was no longer a viable precedent.

38. The court indicated that a classification based on length of residence may be suspect, but cited only the dissenting opinion of Mr. Justice Harlan in Shapiro v. Thompson, 394 U.S. 618, 658 (1969), in support of that holding.

39. The court indicated that the system of voter registration is adequate to prevent dual voting, and, therefore, durational residency requirements are surplusage.

40. 39 U.S.L.W. 2059 (D. Mass., July 8, 1970). In *Burg*, the court invalidated only the one-year state requirement, leaving the 6-month local requirement intact.

Voting Rights Act of 1970, the court's holding will provide future plaintiffs[41] with strong and persuasive authority on which to base challenges to durational residency requirements for voting. If the instant decision is widely followed, the political implications will undoubtedly be significant since statistics indicate that five to eight million voters have been disfranchised by such requirements in recent elections.[42] Furthermore, this decision may encourage constitutional challenges to similar requirements in other areas.[43] Under the rationale of this decision, for example, the validity of residency requirements for obtaining medical assistance, judicial relief, or engaging in the practice of a profession may be questionable[44] since these requirements do not appear to support à compelling state interest.[45] Although the instant decision will be useful to support this argument, it would have been a more valuable precedent if the court had held that durational residency

41. The case has provided the impetus for similar suits in other states, since every state has durational residency requirements for voting. *E.g.*, Hadnott v. Amos, 39 U.S.L.W. 2263 (M.D. Ala. Oct. 19, 1970) (6-month county and 3-month precinct residency requirements for voting violate the equal protection clause); Buford v. Holton, 39 U.S.L.W. 2253 (E.D. Va. Oct. 27, 1970) (one-year voter residency requirement violates equal protection clause); Macleod & Wilberding, *supra* note 27, at 96-97 (table indicating prevailing requirements in each state). An analogous situation developed when a 3-judge court in Maryland invalidated the State's maximum grant AFDC provision. Williams v. Dandridge, 297 F. Supp. 450 (D. Md. 1968), *rev'd*, 397 U.S. 471 (1970). On the heels of that decision, comparable regulations were successfully challenged in several states. Lindsey v. Smith, 303 F. Supp. 1203 (W.D. Wash. 1969); Westberry v. Fisher, 297 F. Supp. 1109 (D. Me. 1969); Dews v. Henry, 297 F. Supp. 587 (D. Ariz. 1969). As additional suits were filed, maximum grant provisions were quickly repealed in other states. *See* Robinson v. Hackney, 307 F. Supp. 1249 (S.D. Tex. 1969). Thus, by the time the Supreme Court reversed *Williams*, there were few maximum grant provisions still in effect.

42. Macleod & Wilberding, *supra* note 27, at 93; Schmidhauser, *Residency Requirements for Voting and the Tensions of a Mobile Society*, 61 MICH. L. REV. 823, 829 (1963); Comment, *supra* note 27, at 360. There are indications that a high percentage of young, black, and other traditionally Democratic voters are in the class affected. *Id.*

43. *See* Cole v. Housing Auth., 312 F. Supp. 692, 703 (D.R.I. 1970) (2-year residency requirement for eligibility to live in low-rent public housing violates the equal protection clause).

44. States have mustered several arguments to justify durational residency requirements for voting, such as the need for familiarity with local issues and candidates and the need to protect against dual voting. *See* note 27 *supra*.

45. Although legislative history usually does not indicate the rationale behind durational residency requirements for obtaining occupational licenses, members of the group regulated frequently lobby for such restrictions to enhance economic security by limiting competition and to foster social recognition. *See generally* Monaghan, *The Constitution and Occupational Licensing in Massachusetts*, 41 B.U.L. REV. 157, 167 (1961). It is difficult to imagine a compelling state interest served by Hawaii's one-year requirement for embalmers (HAWAII REV. LAWS § 469-1 (1968)), or California's 2-year residency requirement for obtaining a license as a collection agency manager (CAL. BUS. & PROF. CODE § 6886 (West 1964)). *See* COUNCIL OF STATE GOVERNMENTS, PROFESSIONAL AND OCCUPATIONAL LICENSING IN THE WEST 3, 23, 28 (1964). *See also* note 48 *infra*. Durational residency requirements for abortions and divorces are justified as measures to prevent local hospitals and courts from being overworked.

requirements constitute an unconstitutional abridgement of the right to travel.[46] Although the prospect of temporary disfranchisement may not deter many persons from changing residences,[47] it can be plausibly argued that any unnecessary interference with a constitutionally protected right is invalid. While the right to travel argument was not specifically considered in the instant case, in the future it may be the primary basis for challenging durational residency requirements in other fields.[48] The instant decision is also significant for its liberal interpretation of the mootness doctrine. In this regard, the court specifically found that since the class involved would be adversely affected by the statute as long as it remained in effect, the "controversy" would correspondingly retain vitality until such time as the statute might be invalidated. The court's decision thus intimates that the use of a class action in itself may prevent a case from being dismissed as moot,[49] and hence the decision opens a viable avenue for future challenges to durational residency requirements. Unlike the instant case, however, these future challenges may still be subject to dismissal if the plaintiff is no longer a member of the class at the time the case is heard.[50]

Creditors' Rights—Attachment—Prejudgment Attachment of Chattels Without Prior Notice and Hearing Violates Due Process Clause of Fourteenth Amendment

Plaintiff, conditional vendee, sought to permanently enjoin the enforcement of a New York statute[1] that authorized the prejudgment

46. Shapiro v. Thompson, 394 U.S. 618 (1969) (invalidating durational residency requirements for receiving public welfare).

47. For a discussion of whether residence requirements for voting constitute a "penalty" on the right to travel see Comment, *supra* note 27, at 380-82.

48. *E.g.*, Keenan v. North Carolina Bd. of Law Examiners, 39 U.S.L.W. 2193 (E.D.N.C. Oct. 2, 1970) (one-year residency requirement as a prerequisite for taking bar examination invalidated as a violation of the constitutional right to travel and the equal protection clause).

49. The court based its holding on the Supreme Court's decision in Hall v. Beals, 396 U.S. 45 (1969), and Brockington v. Rhodes, 396 U.S. 41 (1969). *See* note 35 *supra*.

50. Because the Supreme Court has not been clear or consistent in erecting the barriers of mootness and standing (*see* Note, *supra* note 30), anomalous situations arise. For example, if a lower court upholds the validity of a durational residency statute, the Supreme Court can dismiss the attack on appeal without considering the constitutional issues by noting that the plaintiff has since satisfied the residency requirement and that the question is therefore moot. However, if a lower court declares such a statute unconstitutional, the Supreme Court, in order to reverse, must either determine that the issue was moot when first decided or pass on the constitutional question.

1. N.Y. CIV. PRAC. LAW §§ 7101-11 (McKinney 1963).

attachment of a debtor's property without providing for prior notice and a hearing.[2] Prior to the commencement of the plaintiff's suit, the defendant-creditor had instituted a replevin action seeking to repossess certain household furnishings[3] sold to the plaintiff under a conditional sales contract. Pursuant to the New York statute and at the defendant's request,[4] a local sheriff had sought to levy an attachment on the chattels in question but had been temporarily enjoined by a federal district judge. In seeking to make the injunction permanent, plaintiff contended that, in light of the recent Supreme Court decision in *Sniadach v. Family Finance Corp.*,[5] the statutory provision for seizing property prior to notice and a hearing violated the due process clause of the fourteenth amendment.[6] The defendant maintained that the statute was constitutional since it afforded adequate procedural safeguards for debtor property rights[7] and since the attachment procedure it authorized had become established through tradition as a legitimate collection device.[8] Upon trial before a three-judge panel of the United States District Court for the Northern District of New York, *held*, the statute is unconstitutional.[9] A prejudgment attachment of a debtor's chattels without prior notice and a hearing violates the due process clause of the fourteenth amendment. *Laprease v. Raymours Furniture Co.*, 315 F. Supp. 716 (N.D.N.Y. 1970).

Attachment was originated in medieval England[10] as a device for

2. Three actions involving similar facts were joined for hearing.

3. The furnishings included a bed, box-spring and matress, highchair, chest, dinette set, stove, refrigerator, rug, end-tables, chair, and record player.

4. Prior to attaching an alleged debtor's property, the creditor was statutorily required to deliver to the sheriff an affidavit and requisition describing the property and to post a bond. N.Y. CIV. PRAC. LAW § 7102 (McKinney 1963).

5. 395 U.S. 337 (1969) (Wisconsin statute permitting prejudgment garnishment of wages without prior notice or hearing violates the due process clause of the fourteenth amendment).

6. The plaintiff also raised the following contentions: (1) that the searches and seizures incident to the attachment violated the fourth amendment (*see* N.Y. CIV. PRAC. LAW § 7110 (McKinney 1963) (allowing sheriff to break open buildings and seize chattels without a warrant)) and (2) that the requirement that the debtor post bond violated the equal protection clause of the fourteenth amendment (*see* N.Y. CIV. PRAC. LAW § 7103 (McKinney 1963)).

7. The alleged safeguards presumably included the statutory requirements that the creditor post bond and sign an affidavit and that the sheriff hold the property for 3 days prior to delivering it to the creditor. N.Y. CIV. PRAC. LAW § 7102 (McKinney 1963).

8. The defendant claimed that the statute had descended from a replevin statute codified in 1788. Laprease v. Raymours Furniture Co., 315 F. Supp. 716, 721 n.4 (N.D.N.Y. 1970).

9. In addition to invalidating the statute on due process grounds, the court found that it violated the search and seizure provisions of the fourth amendment. *Id.* at 722. The court failed to reach the equal protection contentions.

10. "Foreign attachment" was the procedure established in the middle ages for reaching non-resident merchants' property under the control of a third party. S. RIESENFELD, CREDITORS' REMEDIES AND DEBTORS' PROTECTION 177 (1967).

compelling a defendant to appear in court.[11] In the nineteenth century, garnishment developed as an outgrowth of attachment, and today they are both primarily statutory remedies.[12] Although the two procedures are functionally similar, they are nevertheless distinguishable. An attachment seizes a debtor's property in his possession, whereas a garnishment seizes the funds, effects, or credits of a debtor in the possession of a third person. While garnishment is used primarily as a collection device that often avoids suit on a debt,[13] attachment serves two other functions: (1) to gain in rem or quasi in rem jurisdiction[14] over debtors, and (2) to prevent fraudulent conveyances by debtors in the anticipation of adverse judgments. It is a well established proposition that in order to permanently deprive a person of his property, due process requires the giving of adequate notice and an opportunity to be heard.[15] Although traditionally these general requirements have been transgressed only in instances of compelling public policy,[16] the Supreme Court, in 1928, indicated in *McKay v. McInnes*[17] that a prejudgment attachment does not violate due process because the deprivation is only temporary and serves notice upon the debtor. For 40 years, the *McInnes* rule stood unqualified and was

11. The defendant's property would be attached, and if he did not appear to defend in the suit, the property would be forfeited to the state, and not to the plaintiff as is the custom today. Note, *Some Implications of Sniadach*, 70 COLUM. L. REV. 942, 945 (1970).

12. Forty-one states have garnishment or attachment statutes. Brunn, *Wage Garnishment in California: A Study and Recommendations*, 53 CALIF. L. REV. 1214, 1222, 1250-53 (1965). *See also* Rothschild v. Knight, 184 U.S. 334 (1902) (state legislatures decide when the attachment remedy is available).

13. Employees frequently realize that a garnishment places unpleasant burdens on the employer and therefore often seek to settle their accounts when threatened with garnishment. Note, *Wage Garnishment in Washington—An Empirical Study*, 43 WASH. L. REV. 743, 749 (1968).

14. An in rem action is brought against the property itself, as when the plaintiff alleges a claim to the title; a quasi in rem action is one in which the plaintiff has property of the defendant attached in order to acquire personal jurisdiction. A subsequent judgment against an absentee defendant may be satisfied only to the extent of the value of the property attached. F. JAMES, CIVIL PROCEDURE 21,644 (1965).

15. *See, e.g.*, Shroeder v. City of New York, 371 U.S. 208 (1962) (due process requires notice and an opportunity to be heard); Mullane v. Central Hanover Trust Co., 339 U.S. 306 (1950) (an opportunity to be heard is of little value without actual notice).

16. *See, e.g.*, Fahey v. Mallonee, 332 U.S. 245 (1947) (public interest in preserving the credit of a bank overrides the requirement of giving notice in seizing an ill-managed bank); Yakus v. United States, 321 U.S. 414 (1944) (compelling public interest may authorize summary action subject to later judicial review); North American Storage Co. v. Chicago, 211 U.S. 306 (1908) (seizure without notice by public health inspector of decayed food sold for human consumption upheld).

17. 279 U.S. 820, *aff'g per curiam* 127 Me. 110, 141 A. 699 (1928) (attachment of real estate and corporate stock does not violate the due process clause of the fourteenth amendment). *See also* Ownbey v. Morgan, 256 U.S. 94 (1921) (attachment of stock of non-resident upheld).

consistently reinforced by judicial decisions.[18] Finally in 1969, in the landmark case of *Sniadach v. Family Finance Corp.*,[19] the Supreme Court held that due process requires that a debtor be afforded the benefit of a hearing prior to a prejudgment wage garnishment. In reaching its decision, the Court distinguished *McInnes* by indicating that wages are a "special" form of property whose loss can create severe hardship. The question immediately raised by scholars was whether the scope of *Sniadach* would be expanded to encompass debtors' property other than wages.[20] Recently, in *Klim v. Jones*,[21] a federal district court in California, recognizing the inequity inherent in seizing an alleged debtor's property without a hearing, invalidated an innkceper's lien statute, which permitted immediate seizure of a lodger's personal effects upon nonpayment of rent. The *Klim* decision extended the rationale of *Sniadach* outside the context of wage garnishment to that of attachment of chattels. More recently, however, in *Fuentes v. Faircloth*,[22] a Florida district court distinguished the *Sniadach* decision and upheld the constitutionality of a replevin statute permitting the repossession of chattels without affording a prior hearing. In reaching this conclusion, the court reasoned that the hardship attendant to a unilateral freezing of wages was a fundamental prerequisite to the *Sniadach* decision and that this hardship is clearly lacking when the property seized[23] is not essential for day-to-day living. Thus an unequivocal limitation was engrafted onto the rule of *Sniadach*.

In the instant case, the court extended the rationale of the *Sniadach* decision to prejudgment attachments of household furnishings. Reasoning that goods necessary for ordinary day-to-day living are, like wages in *Sniadach*, a "specialized type of property," the court concluded that to permit their taking "on the unilateral command of an adverse party 'may impose severe hardships' on purchasers of these essentials."[24] The court determined, therefore, that due process required the giving of notice and an opportunity to be heard before a legitimate seizure of the plaintiff's property could be effectuated.[25] Turning to the

18. *E.g.*, Schillachi v. Olesen, 161 F. Supp. 227, 231 (S.D. Cal. 1958); Nicoma Park Tel. Co. v. State, 198 Okla. 445, 180 P.2d 626 (1947).

19. 395 U.S. 337 (1969), *noted in* 22 VAND. L. REV. 1400 (1969).

20. *See, e.g.*, Hawkland, *Prejudgment Garnishment of Wages After Sniadach*, 75 COM. L.J. 5, 7 (1970).

21. 315 F. Supp. 109 (N.D. Cal. 1970).

22. 317 F. Supp. 954 (D. Fla. 1970).

23. The property seized in *Fuentes* included a gas stove and a stereo set. Deprivation of the same type of property was held to impose the requisite hardship in *Laprease*.

24. 315 F. Supp. at 722-23.

25. The court indicated that a full evidentiary hearing was not necessary, but rather that the

defendant's contention that the procedure authorized in the New York statute had become established through tradition, the court pointed out that age alone does not insulate legal customs from attack.[26] Recognizing that the debtor could still be deprived of the use of his property for "a theoretical minimum of 4 days," the court reasoned that the posting of a creditor's bond would not ameliorate the hardship of this deprivation. Since the New York statute authorized the seizure of property without prior notice or a hearing, the court held that it violated the due process clause of the fourteenth amendment.

Upon synthesizing the instant decision with *Sniadach*, three significant observations become apparent that warrant independent analysis and discussion. First, both decisions involved a "special" type of debtor's property categorized as necessary for day-to-day existence. Secondly, both decisions recognized that the respective facts presented involved no "special" creditor or state interest that might justify a prompt attachment without prior notice to the debtor. Thirdly, both decisions indicated that whenever the two foregoing conditions are present in a prejudgment attachment or garnishment, due process commands that the alleged debtor be given notice and an opportunity to assert defenses prior to being deprived of his property. Having identified these fundamental similarities between *Laprease* and *Sniadach*, it becomes desirable to project and to analyze the significant implications that may flow therefrom.

In regard to the first condition—the "special" nature of the property involved—both *Laprease* and *Sniadach* intimated that the due process clause draws a qualitative distinction between stoves and refrigerators on the one hand and oil wells and IBM stock on the other. With this distinction, the courts have implicitly indicated that due process of law affords greater protection to the poor than to the wealthy.[27] To suggest that due process discriminates among the classes of people it protects is anomalous, and future courts may be logically compelled to disregard this distinction and require prior notice and a hearing for all prejudgment attachments, regardless of the type of property involved. If the courts should resolve, however, to confine the

minimum requirement of due process would be met by an ex parte hearing before a judge or court showing the justification for attachment. *Id.* at 723.

26. The court cited Justice Black's dissent in *Sniadach* to support this proposition. 395 U.S. at 350.

27. The plaintiff in *Laprease* was a welfare recipient and the chattel was indispensable to her. If the plaintiff had not been poor, the court probably would have reached a different result. See note 24 *supra* and accompanying text.

prior hearing requirement to poor debtors only, then the reasoning of *Laprease* and *Sniadach* concerning what property is protected would serve as a convenient means of limitation. In order to further insulate the interests of the poor in retaining properties necessary for day-to-day living, courts may go beyond the hearing requirement and extend the right to counsel to all preattachment hearings. Since the purpose of these hearings is obviously to protect the rights of the debtor, the debtor should be represented by counsel so that his rights will in fact be protected through the effective assertion of defenses. It has been argued that a right to state-provided counsel in civil litigation may be the next constitutional right to be recognized by federal courts.[28] Whether this right will eventually be acknowledged and whether the presence of a hardship to the debtor will continually be recognized as a condition precedent to preattachment hearings will ultimately depend upon the willingness of the judiciary to apply an anomalous distinction among classes of debtors protected by the due process clause.

In reference to the second condition—the absence of a "special" creditor or state interest—both *Laprease* and *Sniadach* imply that the presence of such interests would obviate the necessity of providing notice and hearing prior to an attachment. In determining whether a given interest is "special," the overriding test should be whether the interests of the creditor or state would be irreparably harmed by requiring the giving of prior notice. It is submitted that irreparable harm would occur only in instances where prompt attachment is required. In situations involving possessory liens, for example, to require that notice be given prior to attachment could conceivably remove any possibility of recovery by the creditor.[29] Similarly, prior notice may be impossible or impractical in in rem and quasi in rem actions because the debtor has often left the jurisdiction for parts unknown. In such instances, at least constructive notice of the attachment should be obligatory,[30] and, of course, if the debtor's whereabouts later become known, actual notice

28. *E.g.*, Note, *Attachment and Garnishment*, 68 MICH. L. REV. 986, 1008-09 (1970). The rationale underlying this right would be similar to that in criminal trials.

29. This analysis indicates that Klim v. Jones, 315 F. Supp. 109 (N.D. Cal. 1970), was decided improperly since the innkeeper therein involved had a "special" interest in seizing the debtor-lodger's belongings without notice. To require prior notice in *Klim* was to afford the debtor ample opportunity to leave the inn and perhaps the jurisdiction with his property without paying his bill. *See* note 21 *supra* and accompanying text. On the other hand, Fuentes v. Faircloth, 317 F. Supp. 954 (D. Fla. 1970) involved no "special" creditor interest and should have required prior notice and a hearing. *See* notes 22-23 *supra* and accompanying text.

30. For example, constructive notice could be easily provided through an announcement in a legal newspaper.

and a hearing should be afforded.[31] An additional factor that courts should consider in determining when a "special" interest exists is the seriousness of the potential injuries that notice or lack of notice may precipitate. For instance, if the creditor would stand to suffer only pecuniary damage while the debtor would lose the use of property of substantial intrinsic value, the debtor's interest would appear to be paramount.[32] The possible existence of such circumstances manifests that the hearing requirement should be liberally invoked and dispensed with only in circumstances in which a prompt attachment is absolutely essential to the prevention of irreparable injury to the creditor.

Having considered the two conditions that are fundamental to the *Laprease* and *Sniadach* decisions, the question next becomes whether the courts will broadly interpret those conditions. By extending the application of the notice and hearing requirement, courts could clearly provide greater protection to debtors by diminishing the unfair coercive advantage presently available to creditors,[33] without appreciably jeopardizing creditors' rights. Under the majority of state statutes, the only protection currently afforded a debtor prior to attachment is the requirement that a creditor's bond be posted, usually in an amount equal to twice the value of the property to be attached. By requiring such bonds, the statutes clearly deter fraudulent attachments to some extent, but they do not effectively neutralize the creditor's unilateral power to threaten to garnishee or attach the debtor's property.[34] Moreover, many of these bonding statutes also require the posting of debtors' bonds[35] and thereby discourage impoverished debtors from asserting valid defenses. In addition, as the court in *Laprease* recognized, the posting of a creditor's bond does not discount the fact that the debtor may be completely deprived of the use of his property from the time of attachment until the eventual rendition of judgment. Thus, it is commendable that the *Laprease* decision has established that mere compliance with a bonding statute will not satisfy due process requirements in prejudgment attachments. Because the scope of the

31. *See* Mullane v. Central Hanover Trust Co., 339 U.S. 306 (1950).

32. *See* Note, *Provisional Remedies in New York Reappraised Under Sniadach v. Family Finance Corp.: A Constitutional Fly in the Creditor's Ointment*, 34 ALBANY L. REV. 426, 431 (1970).

33. The displeasure of employers in administering garnishment is a substantial threat to the employee and a powerful weapon for the creditor. Note, *supra* note 13, at 743.

34. *See* Note, *Prejudgment Wage Garnishment: Notice and Hearing Requirements under Sniadach v. Family Finance Corp.*, 11 B.C. IND. & COM. L. REV. 462, 463-64 (1970).

35. Note, *supra* note 28, at 1009.

Laprease decision includes such areas as the repossession of secured collateral governed by the Uniform Commercial Code, the hearing requirement could conceivably increase the judicial workload to a considerable extent. It is important to observe, however, that since most preattachment hearings will be of summary nature, the incidental administrative burden should not outweigh the need for adequate safeguards for debtor property rights. Presently, the only limitation imposed by the U.C.C. upon repossession is a general proscription against breaches of the peace with no distinction being made concerning the type of property seized or the necessity of a prompt repossession.[36] It is submitted that even though a given transaction may involve a security agreement within the ambit of the Code, the debtor should be given an opportunity to assert any defenses that may have arisen since the execution of the agreement.[37] Besides encompassing attachments pursuant to security interests under the U.C.C., the *Laprease- Sniadach* rationale should also logically extend to the area of post-judgment garnishment and attachment.[38] While the argument for a prior hearing in post-judgment proceedings is less compelling than in the prejudgment context because the debtor has presumably "had his day in court," the argument is nevertheless viable, for the debtor may have valid defenses that have arisen since the judgment was rendered. For example, the attachment may breach a post-judgment settlement between the parties or violate an exemption statute.[39] It is submitted, therefore, that even in post-judgment situations, due process requires the giving of notice and a hearing prior to seizure of a debtor's property unless a "special" creditor or state interest is involved.

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36. UNIFORM COMMERCIAL CODE § 9-503.

37. For example, the breach of an accord orally agreed upon after default would be a valid defense.

38. Note, *supra* note 28, at 1012.

39. *E.g.*, Consumer Credit Protection Act § 102, 15 U.S.C. §§ 1601, 1673-75 (Supp. IV, 1969), places a maximum limit of the amount of wages garnishable and prohibits the firing of an employee for garnishment on a single indebtedness. *See* UNIFORM CONSUMER CREDIT CODE § 5.104 (giving a debtor greater protections). Federal laws also exempt payments received under various welfare programs such as the Social Security Act or the Veterans' Benefits Act. Social Security Act § 201, 42 U.S.C. § 407 (1964); Veterans' Benefits Act § 1, 38 U.S.C. § 3101 (1964). The preponderant majority of states grant homestead and life insurance exemptions, and 3 states completely exempt unpaid wages from creditor claims. For an incisive discussion of the various exemptions see S. RIESENFELD, *supra* note 10, at 230-64.

Criminal Procedure—Probation Revocation—Revocation of Probation Without a Limited Hearing Violates Due Process Clause of the Fourteenth Amendment

Petitioner was convicted of burglary and placed on probation for five years.[1] Subsequently, his probation was revoked without a hearing.[2] After exhausting state remedies,[3] petitioner brought a petition for a writ of habeas corpus[4] in federal court, contending that the revocation of his probation without a hearing was a denial of due process of law under the fourteenth amendment.[5] The state maintained that since probation was a privilege and not a right, its revocation could be made summarily. The district court[6] denied relief. On appeal to the United States Court of Appeals for the Seventh Circuit, *held,* reversed. Revocation of probation without a limited hearing to determine if probation conditions were violated denies the probationer his constitutional right to due process of law. *Hahn v. Burke,* 430 F.2d 100 (7th Cir. 1970).

The constitutional requirements for probation revocation have received little attention by the Supreme Court. In the two cases in which the question was presented, the Court suggested in dicta that there was no constitutional due process requirement for a hearing before the

1. The Wisconsin probation order is unclear from the reported opinion. Petitioner apparently was directed to return to Illinois, where his mother was residing, and practice his trade of barbering. Illinois did not accept him as a probationer. Petitioner, who claimed he misunderstood the probation order and thought that it barred his return to Wisconsin, went to California.

2. The Department of Public Welfare, evidently viewing the flight to California as a violation of probation, acted pursuant to the following statute: "If a probationer in its charge violates the conditions of his probation, the department may order him brought before the court for sentence . . . or if already sentenced may order him to prison . . . a copy of the order of the department shall be sufficient authority for the officer executing it to take the probationer . . . to prison." WIS. STAT. ANN. § 57.03 (1957).

3. Petitioner's petition for a writ of error *coram nobis* was denied by the Circuit Court for Clark County in February, 1968. The Wisconsin Supreme Court treated the appeal of this denial as a petition for a writ of habeas corpus and denied it. Neither of these 2 decisions are reported. *See* Hahn v. Burke, 430 F.2d 100 (7th Cir. 1970).

4. Petitioner brought suit under authority of a federal statute on habeas corpus which read: "An application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that the appellant has exhausted the remedies available in the courts of the State . . . ." 28 U.S.C. § 2254(b) (Supp. IV, 1969).

5. Petitioner raised 3 major objections in his appeal. In addition to his due process claim, he objected to the failure of the State courts to appoint counsel for him for his appeal. He also claimed that Wisconsin, by extraditing him to Illinois for trial on charges there, had waived jurisdiction over him and had no power to jail him on his return from Illinois. Wisconsin did incarcerate petitioner on his return from Illinois but subsequently gave him probation again.

6. This decision was by the District Court for the Western District of Wisconsin. It is unreported.

revocation of probation.[7] As early as 1935, the Court in *Escoe v. Zerbst*[8] reasoned that since probation was instituted for federal prisoners by the Federal Probation Act,[9] it is not a right but a privilege granted by Congress. The Court, therefore, found that Congress could dispense with notice or a hearing as part of the procedure of probation. In both *Escoe*[10] and *Burns v. United States,*[11] however, the Court emphasized that probation revocation cannot be arbitrary or lacking in substantive due process. Moreover, the assertive language of *Escoe* indicating that procedural due process is not required in probation revocation was dictum because the Court found that a hearing was required on statutory rather than constitutional grounds.[12] Nevertheless, the *Escoe* right-privilege distinction has been followed by most federal courts[13] in denying that there is a due process right to a hearing before revocation of conditional liberty, which includes parole, probation, and conditional pardon.[14] Only two federal decisions have found a constitutional right to such a hearing, and both of these cases can be distinguished.[15] Similarly,

7. Escoe v. Zerbst, 295 U.S. 490 (1935); Burns v. United States, 287 U.S. 216 (1932).

8. 295 U.S. 490 (1935).

9. 18 U.S.C. §§ 3651, 3653-55 (1964).

10. "[T]here shall be an inquiry so fitted in its range . . . as to justify the conclusion that discretion has not been abused . . . ." 295 U.S. at 493.

11. "[T]he probationer is entitled to fair treatment, and is not to be made the victim of whim or caprice." 287 U.S. 216, 223 (1932).

12. The statute provided for the probationer to be "brought before the court" after a violation of the terms of the probation had been alleged. 18 U.S.C. § 3653 (1964). The Court in *Escoe* interpreted this to mean that the probationer had a statutory right to attempt to "explain away" the allegations against him. 295 U.S. at 493.

13. The federal declarations in the area were either dicta (*e.g.*, United States v. Markovich, 348 F.2d 238 (2d Cir. 1965); Bennett v. United States, 158 F.2d 412 (8th Cir. 1946)) or an interpretation of state law (*e.g.*, Linton v. Cox, 358 F.2d 859 (10th Cir. 1966)). For a discussion of federal probation procedure see Sklar, *Law and Practice in Probation and Parole Revocation Hearings,* 55 J. CRIM. L.C. & P.S. 175 (1964).

14. Many courts and most commentators have viewed parole, probation, and conditional pardon as being separate parts of the same concept, that of conditional liberty. *See, e.g.*, Weihofen, *Revoking Probation, Parole or Pardon Without a Hearing,* 32 J. CRIM. L.C. & P.S. 531 (1942); Note, *Parole Revocation Procedure,* 65 HARV. L. REV. 309 (1951); Comment, *Revocation of Conditional Liberty—California and the Federal System,* 28 S. CAL. L. REV. 158 (1954). Many courts in handling parole violations have relied on the *Escoe* right-privilege classification. *E.g.*, Rose v. Haskins, 388 F.2d 91 (6th Cir. 1968); Williams v. Dunbar, 377 F.2d 505 (9th Cir. 1967); Richardson v. Markley, 339 F.2d 967 (7th Cir. 1965); Jones v. Rivers, 338 F.2d 862 (4th Cir. 1964). The *Rose* and *Richardson* cases both include dicta barring due process claims in probation revocation.

15. One case, Fleenor v. Hammond, 116 F.2d 982 (6th Cir. 1941), was distinguished by the court of decision in the later case of Rose v. Haskins, 388 F.2d 91 (6th Cir.), *cert. denied,* 392 U.S. 946 (1968), holding that a conditional pardon was different from parole or probation because there was no supervision of the conditionally pardoned prisoner. The other case, Hollandsworth v. United States, 34 F.2d 423 (4th Cir. 1929), was decided before *Escoe.*

state courts have rarely found a constitutional requirement for a hearing before revocation of probation.[16] The majority of state courts have used the right-privilege distinction to deny the right to a hearing.[17] A few courts, however, have used the contract theory of probation as the basis for rejecting constitutional claims.[18] Under this theory, which is largely discredited, when a defendant is granted probation he enters into a contract with the state to follow the probation conditions. The state can imprison the probationer who violates his probation contract.[19] Although most states, in practice, conduct some type of hearing before revoking conditional liberty,[20] these hearings are generally held in compliance with statutory[21] rather than constitutional law. The *Escoe* right-privilege classification has been used extensively by the Supreme Court in denying procedural protection to "privileges" in other areas of the law.[22] In recent years, however, there has been a growing disfavor with the distinction,[23] and a new test for determining whether procedural due process will be required has gradually evolved. One Justice of the

16. There are only 3 jurisdictions in which a constitutional right to a hearing before probation revocation has been recognized. *See Ex parte* Lucero, 23 N.M. 433, 168 P. 713 (1917); State v. Zolantakis, 70 Utah 296, 259 P. 1044 (1927); State v. Shannon, 60 Wash. 2d 883, 376 P.2d 646 (1962). The only other jurisdictions in which there have been required hearings have had statutes expressly providing for hearing (*see, e.g.*, N.Y. Code Crim. Proc. § 935 (McKinney Supp. 1970); S.C. CODE ANN. §§ 55-595 to -596 (1962)) or have had statutes with wording similar to the "brought before the court" phrasing of the federal statute (*see* MISS. CODE ANN. § 4004-25 (Supp. 1968); NEV. REV. STAT. § 176.215 (1969); PA. STAT. ANN. tit. 19, § 1084 (1964)).

17. *See, e.g.*, Varela v. Merrill, 51 Ariz. 64, 74 P.2d 569 (1937) (suspension of sentence); Curtis v. Bennett, 256 Iowa 1164, 131 N.W.2d 1 (1964), *cert. denied*, 380 U.S. 958 (1965) (parole revocation); *Ex parte* Boyd, 73 Okla. Crim. 441, 122 P.2d 162 (1942) (suspension of sentence).

18. This theory stems from dicta by Chief Justice Marshall in United States v. Wilson, 32 U.S. 150 (1833).

19. *See* Fuller v. State, 122 Ala. 32, 26 So. 146 (1899); People v. Dudley, 173 Mich. 389, 138 N.W. 1044 (1912). The Supreme Court in *Burns* held, however, that probation was a "matter of favor, not of contract." 287 U.S. at 220.

20. *See* Sklar, *supra* note 13.

21. Currently, only 2 states specifically provide for a revocation proeedure without a hearing. IOWA CODE ANN. § 247.26 (1969) (probation may be revoked at any time without notiee); MO. ANN. STAT. § 549.101 (Supp. 1969) (probation may be revoked with or without a hearing). The statutes of 7 states are silent on the problem and these have generally been interpreted not to require a hearing. *See, e.g.*, ARIZ. REV. STAT. ANN. § 13-1657 (1956); CAL. PENAL CODE § 1203.2 (West 1970). In all the other states, some type of hearing is held according to statutes. The substance and safeguards of these hearings vary greatly. For a fairly recent compilation of the statutes in this area, see Sklar, *supra* note 13.

22. *E.g.*, Barsky v. Board of Regents, 347 U.S. 442 (1954) (physician's license revocation); United States *ex rel.* Knauff v. Shaughnessy, 338 U.S. 537 (1950) (admission of an alien); Nishimura Ekiu v. United States, 142 U.S. 651 (1892) (detention of an alien).)

23. The criticisms of the right-privilege distinction are excellently presented in Van Alstyne, *The Demise of the Right-Privilege Distinction in Constitutional Law*, 81 HARV. L. REV. 1439 (1968). *See also* Comment, *supra* note 14.

Supreme Court rejected the classification test in a 1951 case[24] and outlined the factors to be weighed in considering the elements of due process required in a particular situation.[25] Ten years later, the Court followed this lead in *Cafeteria Workers Union v. McElroy*,[26] holding that a balancing of the government function and the private interest involved must be made in determining the procedures that due process may require. More recently, in *Shapiro v. Thompson*,[27] the Court said that a constitutional challenge could not be answered by the argument that public assistance benefits were a "privilege" and not a "right." The Court's most recent pronouncement was in *Goldberg v. Kelly*,[28] a welfare case where the recipient demanded a hearing before benefits were discontinued. Declaring that the recipient was "immediately desperate," the Court concluded that the extent of due process required "depends upon whether the recipient's interest in avoiding that loss [of status] outweighs the governmental interest in summary adjudication."[29] Thus, while the courts have overwhelmingly rejected claims of a constitutional right to a hearing on revocation of conditional liberty, the right-privilege classification relied on by most courts has been all but specifically rejected by the Supreme Court.

In the instant case, the court, after disposing of some collateral contentions,[30] found that *Escoe's* rejection of a right to a hearing was not binding. Noting the erosion of the right-privilege distinction by recent Supreme Court decisions, the court further found that essential due process no longer turns on the distinction between a privilege and a right.[31] The court applied the *Goldberg* balancing test after observing

24. Joint Anti-Facist Refugee Comm. v. McGrath, 341 U.S. 123, 149 (1951) (Frankfurter, J., concurring).

25. Justiee Frankfurter, in his concurring opinion, proposed a 6-point standard. Factors to be considered were: (1) the nature of the interest involved; (2) the manner in which the interest was adversely affected; (3) the reason why the interest was disturbed; (4) the availability of an alternative; (5) the protection implicit in the office of the functionary involved; and (6) a general balancing of the interests involved. *Id.* at 163.

26. 367 U.S. 886 (1961) (worker was summarily barred from plaee of work for security reasons).

27. 394 U.S. 618 (1969) (welfare payments were denied because of a one-year residency requirement).

28. 397 U.S. 254 (1970).

29. *Id.* at 263.

30. The court found that the indigent counsel claim was not valid on its merits and that it could not rule on the jurisdictional claim because petitioner had not exhausted state remedies on that issue. *See* note 4 *supra*. The court also preliminarily indicated that there was no mootness because the revocation of probation was still on petitioner's criminal record. The court ruled that jurisdictional requirements under 28 U.S.C. § 2254 (1964), were satisfied because petitioner filed his habeas corpus petition while in prison. 430 F.2d at 102.

31. The court also dismissed the contract theory of probation as a reason for denying the hearing. 430 F.2d at 104.

that the probationer who is denied his liberty is at least as "immediately desperate" as the welfare recipient was in *Goldberg*. The court concluded that petitioner's loss of freedom outweighed the burden on the state of providing a limited hearing before revocation of probation. It held, therefore, that the due process clause requires a limited hearing—where the probationer can be confronted with his probation violation and can be heard—before the revocation of his probation.

The instant case rationally applies recent Supreme Court decisions on due process to an area of the law that has been permeated by the dubious right-privilege distinction. This ritualized test of classifying a status as either a "right" or a "privilege" was too compartmentalized to provide a useful guideline for determining due process requirements. In place of this antiquated classification, the instant case applies the balancing test to probation revocations. The decision, however, leaves several questions unanswered. First, the opinion does not consider the important question of what must take place at the required limited hearing. Significantly, the Supreme Court already has upheld the right to counsel in a probation revocation hearing.[32] Other procedural safeguards, such as the right to a jury trial, the right to confront and cross-examine witnesses, the right to notice of the hearing, and the right to subpoena witnesses and evidence, inevitably will be examined in future cases. It is submitted that notice and the right to confront and cross-examine witnesses should be available since it is essential that the probationer have time to prepare for the hearing and be able to confront witnesses, whose testimony is often the basis for probation revocation. Secondly, the decision leaves unanswered the question of whether there should be differentiation between probation revocations that involve factual questions and those that present legal questions. The fact-finding hearing should more closely approximate a full hearing, complete with the rules of evidence, because determination of facts probably will be more conclusive if it is necessary to appeal the decision. Thirdly, the expense of providing for revocation hearings seems to have been disregarded by the court.[33] The expense of these hearings may be used as an argument to limit their scope. Finally, the decision does not face the problem that judges may limit or eliminate the discretionary grant of probation because they may be subsequently faced with a constitutionally required revocation hearing. It has been suggested that

32. Mempa v. Rhay, 389 U.S. 128 (1967).

33. The court alluded to the problem superficially. 430 F.2d at 104. *See* Warren, *Probation in the Federal System of Criminal Justice*, 19 FED. PROB. 3 (Sept. 1955).

judicial economy in the face of an overburdened docket may dictate the curtailment of probation grants.[34]

Assuming that the Supreme Court adopts the reasoning of the instant case, the requirement of a limited hearing before probation revocation will have widespread significance in the area of conditional liberty. Just as the *Escoe* case was applied broadly to all facets of conditional liberty,[35] including parole, conditional pardon, and probation, a High Court affirmance of this case presumably would be held controlling in the entire area. Moreover, such a decision might be the first step in the eventual requirement of a full hearing before probation revocation is allowed. Several policy arguments have been advanced against having a full hearing,[36] including the expense and administrative difficulties that would be involved. In the area of parole, for example, court or administrative officers would be required to spend a considerable amount of time testifying at hearings, instead of carrying out their supervisory functions. A further policy argument that has been made against a full hearing results from concern for the safety of witnesses.[37] These arguments are clearly outweighed, however, because the rehabilitative function of the conditional liberty concept should not be compromised by an arbitrary revocation procedure that breeds distrust in probationers. A full hearing, possibly including a jury, is necessary to insure that probation is revoked only in necessary instances. Even though the problems of overcrowded dockets would be aggravated by a required full hearing, these problems should not be used to justify trampling on the rights of probationers and parolees. Furthermore, the requirement of a full hearing for probation revocation may prove to be a further incentive to eliminate the problems of judicial administration and overcrowded dockets. Regardless of the instant decision's unsettling effects on the field of conditional liberty, its recognition of a probationer's constitutional right to a hearing before the revocation of his probation is commendable. In the future, the procedural safeguards to which a probationer is entitled before revocation of probation will not

34. This argument has been effectively rejected by the Utah Supreme Court. That court questioned "[w]hy should any honest judge adopt such a policy? The very suggestion shows a lack of confidence in the integrity of our courts, which we do not share." McPhie v. Turner, 10 Utah 2d 237, 240, 351 P.2d 91, 93 (1960).

35. *See* note 14 *supra* and accompanying text.

36. For an excellent summary of the policy arguments on both sides of this question see Sklar, *supra* note 13.

37. *Id.* at 195. This argument is meritless, especially since the same problem is faced every day in criminal courts throughout the country.

depend on what state he happens to be in,[38] but rather on juidical interpretation of what the Constitution requires.

Criminal Procedure—Search and Seizure—Warrantless Search Conducted at Police Station Valid as Continuation of Prior Search Incident to Arrest or as Inventory of Property Held in Custody

Appellant was convicted of possessing counterfeit bills[1] that were found in his suitcase during a warrantless search conducted at the local police station. At the time of appellant's arrest an initial unproductive search of his motel room and suitcases was made.[2] In order to comply with local practice,[3] appellant and his personal articles were then removed to the police station where a more intensive search of one suitcase revealed the incriminating evidence inside a glove. Upon trial, appellant contended that his fourth amendment right of security against unreasonable search and seizure[4] had been violated and that the evidence should therefore be suppressed. The United States District Court for the Western District of Tennessee upheld the initial search of the motel room as incident to appellant's arrest, but failed to determine the legality of

38. The state statutory guarantees range from "summary and informal hearing . . . not subject to the rules of evidence or of pleadings" (MICH. STAT. ANN. § 28.1134 (1954)) to a written notice of the charges and a court-appointed attorney if neeessary and a "reasonable time [for probationer] to prepare his defense" (N.C. GEN. STAT. § 15-200.1 (Supp. 1969)). *See* note 21 *supra* and accompanying text.

1. The Federal Counterfeiting Law, 18 U.S.C. § 472 (1964) provides: "Whoever . . . keeps in possession or conceals any falsely made, forged, counterfeited, or altered obligation or other security of the United States, shall be fined not more than $5,000 or imprisoned not more than fifteen years, or both."

2. Appellant and 3 companions were registered at a Memphis motel. The manager's suspicions were aroused when appellant used a credit card to charge an unusually expensive breakfast. In addition, the manager found that the license number appellant gave at the desk upon registration was incorrect. Investigation revealed that the credit card along with a loaded pistol and other items of personal property had recently been stolen from a Memphis resident. Summoned by the motel manager, local police used a passkey to enter the 2 rooms of the appellant and his companions, where they were arrested and searched. United States v. Robbins, 424 F.2d 57, 58 (6th Cir. 1970).

3. Local practice was to allow the arrestees to make a telephone call within an hour of arrest. The first search was interrupted to allow compliance with this practice. *Id.*

4. "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." U.S. CONST. amend. IV.

the search conducted at the police station.[5] On appeal to the United States Court of Appeals for the Sixth Circuit, where the salient question was whether the second search was constitutionally sanctioned, *held*, affirmed.[6] When police conduct a warrantless search of any arrestee's property at the police station subsequent to the arrest, the search is valid either as a continuation of the prior search incident to the arrest or as an inventory of property held in custody. *United States v. Robbins*, 424 F.2d 57 (6th Cir. 1970).

The determination of what searches are reasonable when conducted without a warrant has been the subject of considerable judicial controversy. The Supreme Court first approved the warrantless search incident to an arrest by way of dictum in a 1914 decision, *Weeks v. United States*.[7] In 1925, the dictum in two cases[8] extended the permissible scope of warrantless searches beyond the person of the arrestee to the area within his control. Shortly thereafter, in *Marron v. United States*,[9] the area of authorized search was further broadened to encompass the "place where the arrest is made." Two prohibition era cases[10] temporarily qualified this power by holding that an arrest cannot be used as a pretext to search for evidence. Subsequently, however, the Court again broadened its guidelines, in *Harris v. United States*,[11] by sustaining the warrantless search of a man's entire house as incident to arrest on the theory that the house was within his "control." Justice Frankfurter registered a strong dissent,[12] questioning where the line of limitation can reasonably be drawn when a search is permitted to extend

5. It is unclear how the trial court reached its decision on the charge of possession of counterfeit bills without first making a determination as to the validity of the search that produced the sole evidence on which the charge was based.

6. The appellate court heard arguments on the issues of the validity of the arrest, the detention before arraignment, the first search, and the second search. 424 F.2d at 58.

7. 232 U.S. 383 (1914) (unlawful to break into a person's house and search through his effects without a search warrant).

8. Agnello v. United States, 269 U.S. 20 (1925); Carrol v. United States, 267 U.S. 132 (1925).

9. 275 U.S. 192 (1927). In *Marron*, federal agents with warrants to search for liquor discovered a ledger dealing with illicit liquor transactions which, though not expressly mentioned in the warrants, was admitted as evidence obtained through a valid search incident to arrest.

10. United States v. Lefkowitz, 285 U.S. 452 (1932) (the room in which the arrest was made was rifled for books, papers, and other evidence of soliciting illicit liquor trade); Go-Bart Importing Co. v. United States, 282 U.S. 344 (1931) (officers under false color of warrant entered the office of a company, arrested 2 of its officials, and made a general search of the premises).

11. 331 U.S. 145 (1947) (5-4 decision sustaining a conviction for illegal possession of selective service documents obtained in a warrantless search that had been directed towards another crime).

12. *Id.* at 167. Justice Frankfurter felt that the Court was giving retroactive legality on the basis of what the illegal search uncovered.

beyond the person of the arrestee. A year later, the Court regressed to a more restrictive position, announcing that a warrantless search is invalid whenever it is practicable to obtain a warrant.[13] Two years later, in *United States v. Rabinowitz*,[14] the Court shifted its emphasis from the warrant to the nature of the search, despite the forceful dissenting views of Justice Frankfurter.[15] The critical test became "not whether it [was] reasonable to procure a search warrant, but whether the search was reasonable."[16] This flexible rule had been unchallenged for fourteen years when the decision in *Preston v. United States*[17] dramatically narrowed the justification for warrantless searches to the need to seize weapons or prevent destruction of evidence. The clear implication of this decision was that a warrantless search incident to an arrest had to be substantially contemporaneous with and confined to the immediate vicinity of the arrest.[18] Most lower courts, however, continued to rely on the loosely defined search limitations laid down in *Rabinowitz*[19] and allowed warrantless searches of entire premises on which arrests were made.[20] In contrast to this permissive development in searches incident to arrest, the Supreme Court had meanwhile allowed warrantless searches in the related field of "stop and frisk" to extend only as far as required by the original justification for initiating the search.[21] In 1969, these two trends converged in *Chimel v. California*,[22] in which the Court endorsed Justice Frankfurter's dissent in *Harris* and *Rabinowitz* to amplify its concern with searches that go "beyond the area from which

13. Trupiano v. United States, 334 U.S. 699 (1948) (even objects in plain view cannot be seized without a warrant when there had been time to get one).

14. 339 U.S. 56 (1950). Concluding that reasonableness should be determined independently of the amendment's warrant requirements, the majority affirmed a conviction of a stamp dealer for forging "overprints" on postage stamps found in an extensive warrantless search that had been directed toward another purpose.

15. 339 U.S. at 68 (Frankfurter & Jackson, JJ., dissenting). "With all respect I suggest that it makes a mockery of the Fourth Amendment to sanction search without a search warrant merely because of the legality of the arrest." *Id.* at 70.

16. *Id.* at 66.

17. 376 U.S. 364 (1964). The Court unanimously overturned the conviction of the defendants, who had been arrested on a vagrancy charge while sitting in a parked automobile, for conspiring to rob a bank, largely on evidence obtained by a warrantless search of their car in the police garage after they had been taken into custody.

18. *See* Stoner v. California, 376 U.S. 483, 486 (1964).

19. *See generally Search and Seizure in the Supreme Court: Shadows on the Fourth Amendment*, 28 U. CHI. L. REV. 664 (1961).

20. *See* 16 LOYOLA L. REV. 217 (1970).

21. *See* Terry v. Ohio, 392 U.S. 1 (1968). *See also* Note, *Search and Seizure*, 21 CASE W. RES. L. REV. 366 (1970).

22. 395 U.S. 752 (1969).

the person arrested might obtain weapons or evidentiary items."[23] Since the fourth amendment suggests no rational limitation once this happens, the Court ruled that a warrantless search must be contemporaneous with the arrest and confined to the immediate vicinity of the arrestee to be constitutionally justifiable.[24]

In the instant case, the Sixth Circuit initially ratified the district court's determination that the preliminary search was valid as incident to the appellant's lawful arrest. The court then reasoned that because the first search had been interrupted solely to permit compliance with a local requirement, the subsequent search, which produced the incriminating evidence, was merely a continuation of the initial search and therefore was valid even though it was remote in time and place from the arrest.[25] Alternatively, the validity of the second search was upheld as a routine police inventory procedure. The lone dissenter rejected both the continuation and inventory theories of the majority and determined that the search conducted at the police station was clearly invalid under the *Chimel* guidelines.[26]

The instant court was presented with an opportunity to reevaluate the law of search and seizure in accordance with the policies enunciated in *Chimel*.[27] Instead of doing so, it side-stepped the challenge presented with a holding that is at best questionable. It is apparent from Supreme Court and Sixth Circuit decisions that mere possession of the accused's property does not confer on authorities the right to conduct a warrantless search;[28] additionally, it is clear that an initial search remote from the point of arrest is invalid.[29] Thus, the crucial inquiry becomes in what way, if any, are the policy considerations underlying search incident to arrest significantly altered by a perfunctory search at the time

23. *Id.* at 766.

24. *See* Note, *Chimel v. California: A Potential Roadblock to Vehicle Searches*, 17 U.C.L.A.L. REV. 626 (1970).

25. In so concluding, the court distinguished Colosimo v. Perini, 415 F.2d 804 (6th Cir. 1969), *vacated*, 38 U.S.L.W. 3520 (U.S. June 20, 1970), a prior Sixth Circuit decision which declared unreasonable a search of an automobile at the scene of arrest but remote in time from the arrest. According to the court, the distinction between the instant case and *Colosimo* is that in the former the search began contemporaneously with the arrest and continued at a subsequent time, while in the latter there was no initial search at the time of the arrest. 424 F.2d at 59.

26. 424 F.2d at 59 (McCree, J., dissenting).

27. *See* text accompanying notes 21-23 *supra*.

28. Preston v. United States, 376 U.S. 364 (1964); Colosimo v. Perini, 415 F.2d 804 (6th Cir. 1969), *vacated*, 38 U.S.L.W. 3520 (U.S. June 20, 1970) (holding search of impounded car subsequent to arrest unreasonable).

29. United States v. Cain, 332 F.2d 999 (6th Cir. 1964) (car searched in police garage after arrest of accused on the street held invalid); *see* Stoner v. California, 376 U.S. 483 (1964) (holding search of hotel room 2 days prior to arrest too remote).

of arrest. The resolution of this issue necessarily involves a balancing of the individual's right to be secure from an unreasonable search against the public interest in unhampered investigation of crime.[30] *Chimel* has instructed that the right of personal privacy is paramount unless the search incident to arrest is compelled to safeguard the arresting officer or the public.[31] Therefore, technical distinctions attempting to justify a remote search as a continuation of one contemporaneous with an arrest run counter to the basic policies underlying the search incident to arrest exception to the warrant requirement.[32] Under the instant court's ruling, extensive warrantless searches could be arranged by the police merely by interrupting a cursory search at the time of arrest for some plausible excuse, only to return later for a more exhaustive search unfettered by constitutional safeguards. There are no logical temporal or spacial limitations to such a theory.[33] The only limit to the use of such tactics would appear to be police self-restraint, which is questionable in view of the repeated abuses of the *Rabinowitz* principle through the arrangement of arrests in such a way that arrestees would be considered "in control" of any area that the police wished to search.[34] Although such procedures are highly effective in law enforcement, all too often the persuasiveness of evidence obtained in this manner has a retroactive influence in determining the validity of the search. Even if the continued search concept of the instant case is tempered by subsequent judicial rulings to suppress evidence found, it would fail to meet constitutional requirements, since the fundamental purpose of the fourth amendment is to prevent unreasonable intrusions by law enforcement officers, rather than to censure them in retrospective examinations.[35] As a result of the holding in the instant case, it becomes necessary to choose whether to reject the court's decision or adopt the idea that an individual's fourth amendment rights cease at the time of his arrest. The alternative determination that the search remote from the arrest was valid as a police inventory also ignores the reasons underlying the warrantless

30. *See* McDonald v. United States, 335 U.S. 451 (1948) (search without warrant invalid when a warrant could have been secured).

31. Chimel v. California, 395 U.S. 752 (1969); *see* Simeone, *The "New" Rules on Searches Incident to Arrest*, 25 Mo. B.J. 566 (1969).

32. *Compare* Brett v. United States, 412 F.2d 401 (5th Cir. 1969), *cert. denied*, 396 U.S. 921 (1970), *with* United States v. Rabinowitz, 339 U.S. 56 (1950), *and* Harris v. United States, 331 U.S. 145 (1947).

33. *See* Davis v. United States, 423 F.2d 974 (5th Cir. 1970). In *Davis*, decided 2 days after the instant decision, the majority rejected the government's argument that a post-arrest search could be a valid continuation of a search incident to arrest.

34. *See* Note, *supra* note 24, at 632-33.

35. Chimel v. California, 395 U.S. 752, 758 (1969).

search. The chief justification for inventory procedures is to protect police from false charges of theft; however, this type of police protection should not override basic constitutional guarantees of privacy.[36] Although there is sporadic judicial authority supporting the inventory theory as a legitimate basis for search,[37] these cases were decided prior to *Chimel* and were limited to situations in which a statute required forfeiture of the arrestee's property.

The instant decision should not be judged, however, solely in the light of *Chimel*, but rather in the context of a half century of judicial vacillation and inconsistency.[38] Two decades ago, *Rabinowitz* was praised as a decision that sought to bring all searches within the framework of the fourth amendment;[39] just as *Rabinowitz* failed to fulfill this purpose, so may *Chimel*. Heavy case loads and overcrowded dockets may be responsible, but the lower courts have been largely unresponsive to the obvious need for more sensitive guidelines in the area of warrantless searches.[40] From this perspective, the instant decision can be viewed as merely another innuendo in the judiciary's struggle with the fourth amendment, the duration of which must create considerable doubt as to the Court's ability to cope with the problem and some indication that federal legislation may be needed to conclusively delineate the permissible scope of warrantless searches.[41]

36. The inventory theory as a basis for warrantless search is dealt with at length in the recent Tenth Circuit case of Faubion v. United States, 424 F.2d 437 (10th Cir. 1970), in which the majority rejected the inventory argument. *See also* See v. Seattle, 387 U.S. 541 (1967); Camara v. Municipal Court, 387 U.S. 523 (1967) (both cases recognizing that the name or alleged purpose of the official intrusion could not insulate it from constitutional requirements). *See generally* Note, *supra* note 24.

37. *See, e.g.*, Cooper v. California, 386 U.S. 58 (1967) (search of a car held valid a week after arrest since the car was being held pending forfeiture and was closely related to the reason for which the accused was arrested). *Contra*, Brett v. United States, 412 F.2d 401 (5th Cir. 1969), *cert. denied*, 396 U.S. 921 (1970) (search of defendant's clothes stored by police several days after arrest held invalid as not contemporaneous with the arrest).

38. Two very recent decisions are typical of the apparent inconsistencies in the guidelines the Court has been laying down. In Chambers v. Maroney, 399 U.S. 42 (1970), suspects were arrested in their automobile on a dark street, and for the safety of the arresting officers the suspects and their automobile were taken directly to the police station where in the presence of the suspects the car was searched. These circumstances convinced the majority of the Court that the search should be upheld, over the strong dissent of Justice Harlan. In Vale v. Louisiana, 399 U.S. 30 (1970), the Court in a 6 to 2 decision declared illegal the search of the defendant's house, despite the fact that the arresting officers had every reason to expect to find the drugs that were found, and also despite the fact that the mother and brother of the arrestee were in the house and could easily have hidden or destroyed the drugs before a search warrant could have been obtained.

39. *See Search and Seizure in the Supreme Court: Shadows on the Fourth Amendment*, 28 U. CHI. L. REV. 664 (1961).

40. *Id.* at 690. After *Rabinowitz*, the lower courts created broad categories of "searches," which were presumed to be reasonable and thereby avoided evaluating the scope of each individual search.

41. *See id.* at 705-06 (1961).

National Banks—National Banks Need Not Comply With State Banking Laws When Seeking to Relocate Principal Office and Retain the Former as a Branch

Appellants[1] sought declaratory and injunctive relief to prevent the Comptroller of the Currency from issuing a certificate of authority that would permit Prospect Park National Bank (PPNB) to relocate its principal office and to prevent the bank from making such a move. PPNB had submitted simultaneous applications pursuant to sections 30[2] and 36(c)(2)[3] of the National Banking Act to the Comptroller of the Currency seeking approval of a proposed plan to move its main office from a static urban community to an expanding suburban community,[4] and to retain the former principal office as a branch. Appellants contended that the proposed move would be forbidden to state banking associations by state statute[5] and thus the issuance of a certificate of authority by the Comptroller should be enjoined on the ground that section 30 must be construed with and limited by section 36(c)(2), which incorporates state standards in determining whether a national bank should be permitted to branch.[6] Appellee asserted that the proposed

1. The appellants are Ramapo Bank, Broadway Bank & Trust Co., New Jersey Bank, and the Commissioner of the New Jersey Department of Banking & Insurance, the plaintiff intervenor. The Ramapo Bank and Broadway Bank & Trust Co. are banking corporations of the State of New Jersey, and the New Jersey Bank is a national banking association.

2. "Any national banking association, with the approval of the Comptroller of the Currency, may change the location of the main office of such association to any other location outside the limits of the city, town, or village in which it is located, but not more than thirty miles distant, by vote of shareholders owning two-thirds of the stock of such association." 12 U.S.C. § 30 (1964).

3. "A national banking association may, with the approval of the Comptroller of the Currency, establish and operate new branches . . . (2) at any point within the State in which said association is situated, if such establishment and operation are at the time authorized to state banks by the statute law of the State in question by language specifically granting such authority affirmatively and not merely by implication or recognition, and subject to the restrictions as to location imposed by the law of the State on State banks." 12 U.S.C. § 36(c)(2) (1964).

4. Appellee bank is the only bank located in Prospect Park, a highly urbanized borough bordering Patterson, New Jersey. Prospect Park has a population of 5,200 that has remained constant since 1930. Wayne Township where appellee wanted to establish its main office, is a large suburban community with a population that has increased from 11,822 in 1950 to approximately 47,000 in 1968. Wayne is served by 6 banking offices, including those of appellants.

5. The express statutory law of New Jersey prohibits the establishment of branch offices by state banking institutions in any municipality, other than that in which the principal office is located, if another bank has its principal office situated there. N.J. STAT. ANN. § 17:9A-19(B)(3) (Supp. 1970). Furthermore, a state bank may not relocate its principal office outside of the municipality in which it is located. N.J. STAT. ANN. §§ 17:9A-22 to -23 (1963).

6. Appellants also asserted that they were entitled to a trial de novo in district court on the ground that in all instances in which an agency hearing is not subject to the procedural requirements of § 7 of the Administrative Procedure Act a trial de novo is required. 5 U.S.C. § 556-57 (Supp.

relocation was governed solely by section 30, which makes no reference to state statutory law as a limit on the relocation of a national bank's main office. Following an informal hearing in which the Comptroller determined that the applications fully comported with the requirements of sections 30 and 36(c)(2),[7] appellants initiated the instant action. In granting appellee's motion for summary judgment, the district court sustained the approvals given by the Comptroller and declined to grant injunctive relief.[8] On appeal to the Court of Appeals for the Third Circuit, *held,* affirmed. There is no requirement that a national bank must comply with state branch banking statutes when seeking to relocate its principal office and retain its former headquarters as a branch. *Ramapo Bank v. Camp,* 425 F.2d 333 (3d Cir.), *cert. denied,* 39 U.S.L.W. 3147 (U.S. Oct. 13, 1970).

Although it was early resolved that Congress had the authority to regulate national banks without regard to state laws,[9] the original national banking act was not enacted until 1863.[10] This act, however, did not permit national banks to relocate their headquarters or to establish branches. In 1886, Congress recognized this shortcoming and adopted a statute, now section 30 of the National Banking Act, that vested the Comptroller of the Currency with the power to approve the relocation of a national bank's principal office.[11] This statute permitted the relocation of a main office anywhere within a 30-mile radius of the original site without regard to municipal boundaries. In response to the urgings of national banking associations,[12] Congress adopted the McFadden Act in 1927, which permitted national banks to establish branch banks within municipal limits if the appropriate state statutory law accorded the same privilege to state banking associations.[13] As conceived by its sponsor, the

IV, 1969). The court dismissed this contention because it found the record amply supported the district court's approval of the Comptroller's findings.

7. The Comptroller is not required to conduct a hearing by the National Banking Act and the question of whether to hold a hearing is wholly discretionary with the Comptroller. Establishment of Branch Banks and Seasonal Agencies, 12 C.F.R. § 4.5 (1970). At the request of appellants, the Comptroller's regional office conducted an informal hearing on August 20, 1968. The Comptroller made an independent examination of the record and on April 8, 1969, issued an opinion approving the applications of appellee bank.

8. Ramapo Bank v. Camp, Civil No. 423-69 (D.N.J. May 19, 1969).

9. McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316 (1819).

10. National Banking Act, 12 Stat. 665 (1863).

11. Act of May 1, 1886, ch. 73, § 2, 24 Stat. 18, *as amended* 12 U.S.C. § 30 (1964). The reason for the enactment of this amendment was to relieve Congress of the necessity of enacting a special law each time a national bank desired to change its location or name. *See* 17 CONG. REC. 1349-51 (1886).

12. *See* H.R. REP. NO. 83, 69th Cong., 1st Sess. 7 (1926).

13. National Banking Act of 1927, ch. 191, § 7(c), 44 Stat. 1228, *as amended* 12 U.S.C. § 36(c)(2) (1964).

McFadden Act, the relevant part of which has been codified as section 36(c)(2) of the National Banking Act, was designed to allow the national and state banks to compete freely without a statutory advantage being accorded to either type of association.[14] In 1933, the National Banking Act was further expanded to allow statewide branching by national banks to the extent that state banking institutions were permitted to branch by the express statutory law of the particular state.[15] This amendment was deemed necessary to place national and state banking associations more nearly in a state of competitive equality by removing the restriction on statewide branching by national banks.[16] Section 30 of the National Banking Act was amended in 1959 to require the express approval of the Comptroller as a condition precedent to the relocation of a national bank's principal office within the limits of the city in which it was located.[17] Although broad discretion has been accorded the Comptroller in the field of national banking, his authority is not without limitations.[18] His findings are subject to judicial review, and his rulings frequently have been reversed. Several courts, for example, have held that the Comptroller exceeded his authority by approving a national bank's application to branch into an area prohibited to state banks by state statutory law.[19] Furthermore, the Supreme Court has invalidated a Comptroller's certificate that would have permitted a national bank to branch into a city by means other than taking over an established bank as required by state law.[20] Although a number of courts have construed

14. On the occasion of the enactment of the McFadden Act, its sponsor stated that "competitive equality has been established among all the members of the Federal reserve system." 68 CONG. REC. 5815 (1927) (remarks of Representative McFadden).

15. Act of June 16, 1933, ch. 89, § 23, 48 Stat. 189, *amending* National Banking Act of 1927, ch. 191, § 7(c), 44 Stat. 1228 (codified at 12 U.S.C. § 36(c)(2) (1964)).

16. Speaking on the floor of the Senate, Senator Glass, the sponsor of the amendment, said that branching would be allowable "in only those States the laws of which permit branch banking." 76 CONG. REC. 2511 (1933).

17. 12 U.S.C. § 30 (1964). This amendment was considered a desirable addition to the National Banking Act ". . . [s]ince a change in location of a bank may be a matter of importance to the community, and since the Comptroller must approve any change of location of a branch, he should have the authority to approve changes of location of the main office within the city." H.R. REP. NO. 692, 86th Cong., 1st Sess. 4 (1959).

18. *See, e.g.*, First Nat'l Bank v. Saxon, 352 F.2d 267 (4th Cir. 1965); Community Nat'l Bank v. Saxon, 310 F.2d 224 (6th Cir. 1962); Camden Trust Co. v. Gidney, 301 F.2d 521 (D.C. Cir.), *cert. denied*, 369 U.S. 886 (1962). *See generally* 1 K. DAVIS, ADMINISTRATIVE LAW TREATISE § 4.04 (Supp. 1965).

19. *See, e.g.*, Bank of Dearborn v. Manufacturers Nat'l Bank, 377 F.2d 496 (6th Cir. 1967); Industrial State Bank & Trust Co. v. Camp, 284 F. Supp. 900 (W.D. Mich. 1968); Hoosier State Bank v. Saxon, 248 F. Supp. 233 (N.D. Ind. 1965); Commercial State Bank v. Gidney, 174 F. Supp. 770 (D.D.C. 1959).

20. First Nat'l Bank v. Walker Bank & Trust Co., 385 U.S. 252 (1966).

section 36(c)(2),[21] only two have considered simultaneous relocation and branching applications under sections 30 and 36(c)(2). The District Court of the Western District of Michigan has twice upheld such simultaneous applications,[22] thereby permitting two nationals banks to relocate their main offices and retain their former headquarters as branches. In these cases, the court found that Congress had not intended to limit the relocation of a national bank's principal office by incorporating state statutory standards into section 30. The Seventh Circuit Court of Appeals, however, reached the opposite result when faced with the same facts. In *Marion National Bank v. Van Buren Bank,*[23] the court overturned the Comptroller's approval, even though each application considered separately was lawful, because it determined that the net effect of the national bank's maneuver was the establishment of a branch that would not have been authorized to a state bank under state statutory law.[24]

In the instant case, the court initially concluded that the Comptroller's finding should be sustained if it were supported by substantial evidence and were not arbitrary, capricious, or an abuse of discretion. Noting that the Comptroller had conducted a thorough investigation of the record, the court upheld his determination that the proposed move was a bona fide relocation of the main office to which section 30 and not section 36(c)(2) was applicable. The court reasoned that since branching considerations under section 36(c)(2) and state branching law were inapplicable, it was irrelevant that PPNB sought to use simultaneous applications as a device to obtain in substance that which was precluded to state banking associations by state law. The court determined that the doctrine of competitive equality did not compel a conjunctive reading of sections 30 and 36(c)(2) since neither the legislative history nor the statutory language of either section indicated that state law was intended to govern the relocation of national banks' main offices.[25] The court declined to utilize the statutory construction

21. *See* cases cited notes 18-19 *supra.*

22. Merchants & Miners Bank v. Saxon, Civil No. 66-1042 (W.D. Mich. July 13, 1966); Traverse City State Bank v. Empire Nat'l Bank, 228 F. Supp. 984 (W.D. Mich. 1964).

23. 418 F.2d 121 (7th Cir. 1969).

24. Speaking for the court, Judge Fairchild said, "[W]e affirm the judgment solely upon the basis that the maneuver proposed involves creation of a branch which would not be authorized to state banks by the statute law of Indiana and is therefore not authorized for national banks by 12 U.S.C. § 36(c)." *Id.* at 135.

25. The court acknowledged that the opposite result had been reached by the Court of Appeals for the Seventh Circuit in Marion Nat'l Bank v. Van Buren Bank, 418 F.2d 121 (7th Cir. 1969), in which it was held that § 30 and § 36(c)(2) were to be considered conjunctively. The court, however, observed that the basis for the Seventh Circuit's holding in *Marion* (*see* First Nat'l Bank

device of *in pari materia* in its consideration of whether main office relocation should be limited by state law on the ground that both sections 30 and 36(c)(2) have an independent scope and purpose. The court therefore upheld the Comptroller's ruling that PPNB could simultaneously relocate its main office and retain the former office as a branch.

The instant decision represents a step toward a national banking system unfettered by state law restrictions regarding branching. Under the rationale of the decision a national bank may now branch from a decaying and static urban area into a growing suburban community irrespective of state branching laws. Frequent utilization of this relocation procedure by national banks will weaken the competitive position of many state banking institutions whose branching operations are restricted by state law. Presently, fourteen states have statutes that prohibit branch banking in any form by state banking institutions,[26] and 24 states significantly restrict the areas available to a state bank seeking to establish a branch.[27] Consequently, in order for state banking associations in these states to remain competitive with the national banks, their legislatures will be compelled to revise their banking statutes to allow freer branching. The effect of the instant decision, therefore, may be unlimited branching by both state and national banks in all states. Although this result might be desirable from the standpoint of the national economy,[28] it is contrary to the express policy of 38

v. Walker Bank & Trust Co., 285 U.S. 252 (1966)) was inapposite in that it treated only § 36(c)(2) and made no mention of § 30. 425 F.2d at 344.

26. ARK. STAT. ANN. § 67-340 (1966); COLO. REV. STAT. ANN. § 14-3-1 (1963); FLA. STAT. ANN. § 659.06 (1966); ILL. ANN. STAT. ch. 16½, § 106 (Smith-Hurd 1970); IOWA CODE ANN. § 524.1202 (1970); KAN. STAT. ANN. § 9-1111 (Supp. 1969); MINN. STAT. ANN. § 48.34 (1970); MO. ANN. STAT. § 362.107 (1968); MONT. REV. CODES ANN. § 5-1028 (1968); NEB. REV. STAT. § 8-1,105 (1962); N.D. CENT. CODE § 6-03-14 (Supp. 1969); OKLA. STAT. ANN. tit. 6, § 501 (1966); TEX. REV. CIV. STAT. ANN. art. 342-903 (Supp. 1970); W. VA. CODE ANN. § 31A-8-12 (Supp. 1970).

27. ALA. CODE tit. 5, § 125(1) (1960); CONN. GEN. STAT. REV. § 36-59 (Supp. 1969); GA. CODE ANN. § 13-203.1 (Supp. 1969); HAWAII REV. STAT. § 403-53 (Supp. 1968); IND. ANN. STAT. § 18-1707 (1964); KY. REV. STAT. ANN. § 287.180 (Supp. 1969); LA. REV. STAT. ANN. § 6:54 (1950); ME. REV. STAT. ANN. tit. 9, § 442 (1964); MASS. ANN. LAWS ch. 172A, § 12 (1970); MICH. STAT. ANN. § 23.710(171) (Supp. 1970); MISS. CODE ANN. § 5228 (Supp. 1968); N.H. REV. STAT. ANN. §§ 384-B:1 to -B:6 (1968); N.J. STAT. ANN. § 17:9A-19 (Supp. 1970); N.M. STAT. ANN. §§ 48-2-17 to -19 (1966); N.Y. BANKING LAW § 105 (McKinney Supp. 1970); OHIO REV. CODE ANN. §§ 1111.01-.05 (Baldwin Supp. 1969); ORE. REV. STAT. §§ 714.010-.990 (1969); PA. STAT. ANN. tit. 7, §§ 902(b), 903(b), 904-07 (1967); S.D. COMPILED LAWS ANN. §§ 51-20-1 to -12 (Supp. 1970); TENN. CODE ANN. § 45-211 (1964); UTAH CODE ANN. §§ 7-3-6 to -6.3 (Supp. 1969); VA. CODE ANN. § 6.1-39 (1966); WASH. REV. CODE ANN. § 30.40.020 (Supp. 1969); WIS. STAT. ANN. § 221.04 (Supp. 1969).

28. *See Hearings on the Conflict of Federal and State Banking Laws Before the House Comm. on Banking and Currency*, 88th Cong., 1st Sess. 275-79 (1963).

states[29] and the federal government.[30] Whether the instant decision produces such a drastic change depends to a great extent on how widely subsequent courts accept it as persuasive authority. It is submitted that this case should not be considered as authority in future adjudications of the same issue. While the opinion is logically consistent, it is incompatible with the basic policy of competitive equality, which pervades the National Banking Act.[31] It is obvious from the language and legislative history of section 36(c)(2)[32] that it was the intent of Congress to implement this policy by permitting national banks to branch only in those states that permit branching and only to the extent that those states accord branching privileges to state banking associations. By construing sections 30 and 36(c)(2) of the National Banking Act separately, the instant court has accomplished that which Congress intended to disallow by the enactment of section 36(c)(2). The court could have reached a more desirable result, and one that would have been in harmony with the policy of the National Banking Act, by voiding the Comptroller's certificate on the ground that the transaction in question allowed, in substance, branching into an area denied to state banks in violation of the doctrine of competitive equality.[33] In order to meet the banking needs of rapidly expanding population centers, it may be desirable to rid the economy of the arbitrary restrictions imposed by branch banking statutes, but the alteration of the express policy of the National Banking Act is properly a matter of congressional consideration and pronouncement, not a matter of statutory construction. If the instant decision is widely accepted, Congress will be forced either to tacitly accept the judicial modification of the policy of the National Banking Act or to amend sections 30 and 36(c)(2) so that state law specifically is incorporated as the standard in simultaneous main office relocation and branching transactions. Since Congress has traditionally supported the policy of the National Banking Act, it is

29. *See* notes 26-27 *supra* and accompanying text.

30. *See* notes 13, 15 *supra.*

31. For other statutory areas in which Congress has applied state banking laws to national banks see 12 U.S.C. § 51 (1964) (allowable capitalization of a newly created national bank); *id.* § 85 (limitation on loan interest rates); *id.* § 92(a) (trust provisions cannot contravene state law). *id.* § 214(c) (Supp. 1970) (conversions and mergers cannot contravene state law).

32. *See* notes 3, 11, 14, 16 *supra* and accompanying text.

33. Courts have often looked beyond the formal compliance with a statutory provision to determine whether the substance of the proposed transaction is in accord with the legislative purpose of the act in question. *See* Haggar Co. v. Commissioner, 308 U.S. 389 (1940) (declared value excess profits taxes); Gregory v. Helvering, 293 U.S. 465 (1935) (corporate reorganization). *See generally* B. BITTKER & J. EUSTIS, FEDERAL INCOME TAXATION OF CORPORATIONS AND SHAREHOLDERS 17 (1966).

likely that Congress, if confronted with this problem, will choose the latter course of action, thereby nullifying the effect of the instant case.

Taxation—Corporate Income Tax—Liquidating Corporation Denied Nonrecognition Benefits of Section 337 Because Sales of Depreciable Assets Were Integral Part of Its Business

Taxpayer, a California corporation, owned and operated a professional baseball team.[1] Pursuant to a "working agreement"[2] with Pittsburgh Athletic Co. and to the baseball draft,[3] Pittsburgh and other major league baseball teams could select for purchase certain of taxpayer's player contracts. During the period from 1948 to 1957, taxpayer sold a large number of player contracts at a substantial overall profit[4] and reported the gains as ordinary income.[5] Following the adoption of a plan of complete liquidation, taxpayer sold eight player contracts to Pittsburgh[6] within the twelve-month statutory liquidation

1. The team was a minor league team known as the Hollywood Stars, a member of the Pacific Coast Baseball League.

2. The Pittsburgh Athletic Co. paid Hollywood $20,000 a year under this working agreement, which gave Pittsburgh the right to select at any time, under certain conditions, the contracts of any players belonging to Hollywood. It was customary for Pittsburgh to pay the fair market value for all player contracts it bought. This arrangement was vital to Hollywood and other minor league teams because they were unable to compete with major league teams in recruiting good young players. If Hollywood had not agreed to the provisions of this working arrangement with Pittsburgh, it would have been impossible to obtain enough players to field a baseball team, since all the good players were owned by major league teams and would be assigned to minor league teams like Hollywood only under these conditions.

3. The world of professional baseball is governed by a detailed set of agreements and rules, codified in *The Baseball Blue Book*. These rules establish a procedure whereby players on minor league teams can be selected by major league teams in a "player draft." Hollywood, as a member of the Pacific Coast League, was thereby required to sell to a major league team each year on demand at least one player contract previously assigned to it by a major league team and also the contracts of any players with 5 or more years of service. This draft prevented minor league teams such as Hollywood from holding players indefinitely.

4. Hollywood received $799,800 for 224 contracts sold during the entire period, $100,000 of which was profit. During the same period, it made $280,000 in profits from other sources. In 1956-57, it realized a profit of $150,000 on such sales, while losing $130,000 on all other activities.

5. In contrast, Hollywood deducted as an annual expense the entire cost of the player contracts purchased each year. During the period 1947-58 it purchased 175 contracts for $561,450.

6. On October 1, 1957, Hollywood assigned the contracts of 2 players to Pittsburgh. The sale called for installment payments, and Hollywood reported the initial payment of $50,000 as ordinary income on its income tax return for the fiscal period ending October 31, 1957. The remaining $90,000, which Hollywood received because the players were retained by Pittsburgh after April 1, 1958, was reported as nontaxable income, under § 337 of the Internal Revenue Code of 1954, on its

period and reported the gain as nontaxable income under section 337 of the Internal Revenue Code.[7] The Commissioner contended and subsequently ruled that the transaction involved property held primarily for sale to customers in the ordinary course of business and was therefore excluded from nonrecognition trcatment under section 337.[8] The Tax Court agreed with the Commissioner,[9] and the Court of Appeals for the Ninth Circuit affirmed.[10] The Supreme Court, however, reversed and remanded[11] for reconsideration in light of its recent decision in *Malat v. Riddell.*[12] On remand, the Commissioner contended that the sales of the contracts were excluded from nonrecognition treatment under section 337 because they were an integral part of the business.[13] The Tax Court again found for the Commissioner, holding that the

income tax return for the period ending October 31, 1958. In January 1958, Hollywood assigned 6 player contracts to the Columbus Baseball Club for $27,000. The court treated this sale as one to Pittsburgh since Columbus was similarly affiliated with it. This gain was also reported as nontaxable income under § 337.

7. INT. REV. CODE of 1954, § 337(a) provides in part: "If—

(1) a corporation adopts a plan of complete liquidation on or after June 22, 1954, and

(2) within the 12-month period beginning on the date of the adoption of such plan, all of the assets of the corporation are distributed in complete liquidation, less assets retained to meet claims, then no gain or loss shall be recognized to such corporation from the sale or exchange by it of property within such 12-month period."

8. INT. REV. CODE of 1954, § 337(b)(1) provides in part: "For purposes of subsection (a), the term 'property' does not include—

(A) stock in trade of the corporation, or other property of a kind which would properly be included in the inventory of the corporation if on hand at the close of the taxable year, and property held by the corporation primarily for sale to customers in the ordinary course of its trade or business . . . ."

9. Hollywood Baseball Ass'n, 42 T.C. 234 (1964). The facts are stated in detail in this opinion. The Tax Court's reasoning was three-pronged. It found the contracts were held "primarily for sale" because there was an "essential or substantial holding for sale," placing particular emphasis on the frequency of the sales and the amount of profit derived from them. The court noted that Hollywood had continually reported the receipts from these sales as ordinary income in the past and concluded that this was consistent with the contracts being held for sale in the ordinary course of business. Finally, the court relied on Corn Prods. Ref. Co. v. Commissioner, 350 U.S. 46 (1955), in reasoning that profits arising from the everyday sale of property that is an integral part of the business should not receive nonrecognition treatment under § 337. Lee, *New Case Greatly Broadens Exception to Nonrecognition Provisions of Section 337*, 33 J. TAX. 20 (1970).

10. Hollywood Baseball Ass'n v. Commissioner, 352 F.2d 350 (9th Cir. 1965).

11. Hollywood Baseball Ass'n v. Commissioner, 383 U.S. 824 (1966). The Supreme Court remanded to the court of appeals, which in turn remanded to the Tax Court for new factual findings.

12. 383 U.S. 569 (1966).

13. The Commissioner argued that §§ 337, 1221, and 1231 of the 1954 Internal Revenue Code should be similarly construed. Under § 1221, the Supreme Court had ruled that sales that were integral to a business were not entitled to capital asset treatment. Corn Prods. Ref. Co. v. Commissioner, 350 U.S. 46 (1955). Thus the Commissioner reasoned that *Corn Products* should be extended to § 337 and thus deny nonrecognition treatment to the taxpayer. *See* notes 15-23 *infra* and accompanying text.

contracts were stock in trade held by taxpayer principally for sale in the ordinary course of business. The court based its decision on a finding that the contracts were an integral part of petitioner's business.[14] On appeal to the Ninth Circuit Court of Appeals, *held,* affirmed. When sales of depreciable assets are an integral part of a liquidating corporation's business, even though the assets are not held primarily for sale to customers in the ordinary course of business, the sales are not entitled to nonrecognition treatment under section 337 of the Internal Revenue Code. *Hollywood Baseball Association v. Commissioner,* 423 F.2d 494 (9th Cir.), *cert. denied,* 39 U.S.L.W. 3142 (U.S. Oct. 13, 1970).

Section 337(a) of the 1954 Internal Revenue Code provides that corporations adopting a plan of complete liquidation and thereafter distributing all of their assets within twelve months will not recognize gain or loss from a sale or exchange of their property within this period.[15] Since section 337(a) was aimed primarily at "winding-up" sales, Congress deemed it necessary to prevent taxpayers from escaping taxation of income derived from sales in the ordinary course of business merely because the sales occurred during the liquidation period.[16] In order to effectuate this legislative purpose, section 337(b)(1)(A) was enacted to exclude from special treatment "stock in trade" and property held by the corporation "primarily for sale to customers in the ordinary course of its trade or business."[17] Sections 1221 and 1231 of the Code have exclusionary provisions similar to those of section 337.[18] Section

14. Hollywood Baseball Ass'n, 49 T.C. 338 (1968).

15. *See* note 7 *supra.* Prior to 1954, there was a substantial tax advantage inherent in a sale of distributed property by shareholders after liquidation of corporate assets as opposed to a sale of assets by the corporation itself, followed by a liquidating distribution of the proceeds of the sale to the shareholders. Since the property received by the shareholders in liquidation would receive a stepped-up basis, the realization of capital gain upon subsequent sale would be substantially smaller than if the corporation had sold the property with its low basis before liquidation. Any sale negotiated by the corporation before liquidation that was made by the shareholders after liquidation was imputed to the corporation. Commissioner v. Court Holding Co., 324 U.S. 331 (1945). Section 337 has the effect of changing the result in cases like *Court Holding Co.,* since a sale by the shareholders imputed to the corporation would receive nonrecognition treatment as to any gain realized. *See* B. BITTKER & J. EUSTICE, FEDERAL INCOME TAXATION OF CORPORATIONS AND SHAREHOLDERS §§ 9.63, .64 (2d ed. 1966).

16. *See* H.R. REP. NO. 1337, 83d Cong., 2d Sess. A-107 (1954); *cf.* S. REP. NO. 1622, 83d Cong., 2d Sess. 259 (1954).

17. *See* note 8 *supra.* Not all property held primarily for sale in the ordinary course of business fails to qualify for nonrecognition under § 337(b)(1)(A). If a corporation sells "substantially all of the property" attributable to its trade or business to one person in one sale, then the property and any installment obligations acquired in respect of the sale qualify for nonrecognition under § 337. *See* INT. REV. CODE of 1954, § 337(b)(2). This is known as the bulk sales exception.

18. INT. REV. CODE of 1954, § 1221 provides in part: "[T]he term 'capital asset' . . . does not include—

(1) stock in trade of the taxpayer or other property of a kind which would properly be included

1221 defines a capital asset as property held by the taxpayer that does not fall into certain excluded categories.[19] One of these exclusions is property held primarily for sale to customers in the ordinary course of business, further evidencing a congressional policy of treating profits and losses arising from the everyday operation of a business as ordinary income. Although the sale or exchange of a capital asset results in capital gain or loss, the sale of property excluded from section 1221's definition of a capital asset receives ordinary income treatment. Section 1231, however, provides that gain from a sale or exchange of real or depreciable personal property used in a trade or business for over six months will receive capital gains treatment, thereby extending this favorable treatment to a class of property—depreciable property used in the trade or business[20]—explicitly excluded from the definition of capital

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in the inventory of the taxpayer if on hand at the close of the taxable year, or property held by the taxpayer primarily for sale to customers in the ordinary course of his trade or business . . . ."

INT. REV. CODE of 1954, § 1231(b)(1) provides in part: "The term 'property used in the trade or business' means property used in the trade or business, of a character which is subject to the allowance for depreciation . . . which is not—

(A) property of a kind which would properly be includible in the inventory of the taxpayer if on hand at the close of the taxable year,

(B) property held by the taxpayer primarily for sale to customers in the ordinary course of his trade or business . . . ."

One court has indicated that the exclusionary provisions of all 3 statutes should be similarly construed. *See* Jeanese, Inc. v. United States, 227 F. Supp. 304 (N.D. Cal. 1964).

19. INT. REV. CODE of 1954, § 1221; *see* note 18 *supra.*

20. INT. REV. CODE of 1954, § 1231 was originally enacted as § 117(j) of the 1939 Code in 1942 in response to a problem of limited scope. Shipping companies whose vessels possessed a wartime fair market value greatly exceeding their adjusted basis were realizing an involuntary profit on the destruction of insured vessels by the enemy and on the requisition of vessels for military use, as were industrial firms whose plants and equipment were being condemned by the United States for use in the war program. Because it seemed unfair to tax these involuntary profits at the high wartime rates, Congress provided "that the gain on an involuntary conversion of business property should be taxed at the capital gains rate," while preserving for taxpayers whose property had declined in value the right to report an ordinary loss. B. BITTKER, FEDERAL INCOME, ESTATE AND GIFT TAXATION 553 (3d ed. 1964). As enacted, however, the section applies to any sale or exchange of business property, as well as to involuntary conversions. Congress evidently recognized that many taxpayers were selling plant, machinery, and equipment either because of an implicit threat of condemnation or due to other wartime conditions, and realized that it would be impossible to distinguish between such sales and those that were wholly voluntary. Moreover, such sales of business property to more efficient producers might stimulate the war production effort. Section 1231 thus "encouraged the taxpayer to depreciate business property as rapidly as possible, since depreciation deductions reduce ordinary income," while an eventual sale of the property produced profit that was taxable as long-term capital gain. *Id.* at 561. In 1962, Congress modified this result by adding § 1245 to the 1954 Code, providing that "when the taxpayer disposes of certain depreciable property, his gain (if any) must be reported as ordinary income to the extent of his post-1961 depreciation deductions." *Id.* The "recapture" of depreciation applies only to depreciable personal property and depreciable real property devoted to certain uses. Thus, although § 1245 reaches many transactions not falling into the § 1231 category, § 1231 was certainly the principal

asset by section 1221. Consequently, Congress in effect has declared that although property used in a trade or business is not a capital asset, it will be treated as a capital asset.[21] Section 1231 excludes from its treatment property held primarily for sale in the ordinary course of business[22] and thus remains consistent in this respect with both sections 337 and 1221. Although Congress was specific in providing particular exclusions from the general rules of sections 337, 1221, and 1231, the Supreme Court, nevertheless, created a non-statutory exception to the definition of capital asset in section 1221 in *Corn Products Refining Co. v. Commissioner.*[23] In that case, the Court held that the transactions of a grain manufacturer who bought and sold corn futures to insure an adequate supply of raw materials and to protect against price increases were not entitled to the capital asset treatment of section 117 of the 1939 Code (section 1221 of the 1954 Code) because they were an "integral part" of the business. This attempt to further limit the types of property that would receive capital asset treatment under section 1221 was mollified somewhat by the Court's subsequent decision in *Malat v. Riddell.*[24] In that case, the Court dealt specifically with section 1221's exclusion of property held primarily for sale in the ordinary course of business and determined that "primarily" means "principally" or "of first importance."[25] Although the Court reaffirmed the *Corn Products* doctrine in *Malat,* the *Malat* holding actually makes it more difficult for property to be excluded under the *Corn Products* exception and in effect increases the number of properties that can be designated as capital assets. The government has attempted to extend the *Corn Products* doctrine to sales of depreciable property but has enjoyed no success.[26] In

reason for its enactment, and § 1231 transactions furnish the principal opportunity for its application.

21. Deltide Fishing & Rental Tools, Inc. v. United States, 279 F. Supp. 661, 666 (E.D. La. 1968).

22. INT. REV. CODE of 1954, § 1231; *see* note 18 *supra.*

23. 350 U.S. 46 (1955).

24. 383 U.S. 569, 572 (1966). *Malat* involved a landowner who sold land that he claimed to have purchased for rental purposes. The government contended that the intended use was dual: either developing for rental purposes, or selling, whichever seemed more profitable. The district court found that there was a dual purpose and ruled that the property was "primarily" held for sale to customers in the ordinary course of business, because "primarily" meant "substantially." *Id.* at 571. The Supreme Court disagreed and ruled that "primarily" means "of first importance" or "principally," and remanded for further findings. *Id.* at 572.

25. *Id.* at 572. The Tax Court in the instant case, like the district court in the *Malat* case, held initially that property is "primarily held for sale" if there is only an "essential or substantial holding for sale." *See* 42 T.C. at 259.

26. Bernstein, *"Primarily for Sale": A Semantic Snare,* 20 STAN. L. REV. 1093, 1116 n.111 (1968).

Deltide Fishing & Rental Tools, Inc. v. United States,[27] the only case to confront this problem squarely, a district court decided that the *Corn Products* doctrine does not apply to section 1231 depreciable assets. The court reasoned that by enacting section 1231 Congress had created a "fence of immunity" from this doctrine around property used in the trade or business and had decided that this property should receive capital asset treatment even though it does not technically qualify as a capital asset.[28] *Deltide* concluded that the *Corn Products* non-statutory exception to the definition of capital asset should not be applied to property that has been specifically labeled a capital asset by Congress.[29]

The instant court affirmed the Tax Court's decision but the reasoning used by the two courts differed significantly. The court specifically rejected the Tax Court's determination that the player contracts were held "primarily" for sale, as the term is defined by *Malat*.[30] The court reasoned, however, that the instant case was controlled by the *Corn Products* doctrine, because this doctrine was cited with approval in *Malat*.[31] Although *Corn Products* involved only section 1221 assets, the court reasoned that this section's underlying policy of not giving preferential treatment to profits and losses from everyday business operations was equally applicable to section 1231 assets. Rejecting both the reasoning and holding of the *Deltide* decision, the court concluded that the *Corn Products* doctrine applies to depreciable assets under section 1231. Turning to legislative history, the court found that the purpose of the exclusionary provisions of section 337 was unclear. Nevertheless, the similarity of that section's exclusions with the correlative provisions of sections 1221 and 1231, coupled with the fact that the Supreme Court had remanded the instant case for reconsideration in light of *Malat*, prompted the court to hold that *Corn Products* also applies to section 337 assets. In determining whether the

27. 279 F. Supp. 661 (E.D. La. 1968).

28. *Id.* at 666.

29. The court also thought it important that, although all capital asset provisions were dealt with in § 117 of the 1939 Code, Congress split that section into several headings in the 1954 Code, with § 1221 under the title "*General* Rules for Determining Capital Gains and Losses," and § 1231 under the heading "*Special* Rules for Determining Capital Gains and Losses." 279 F. Supp. at 667.

30. As the instant court points out, the Tax Court tried to merge the "primarily" test of *Malat* with the "integrally" test of *Corn Products*. 423 F.2d at 497.

31. "The record also makes it clear that [the Tax Court's] holding is not really based upon *Malat* . . . but on the decision in Corn Products Refining Co. v. Commissioner. . . . In short, we think it quite unrealistic to say that *in fact*, to use the lanauge of *Malat*, Hollywood's player contracts were held by it 'principally' for sale to customers, or that sale to such customers was 'of first importance' in its holding of the contracts." *Id.* at 495.

transactions of the instant case fell within the *Corn Products* exception, the court reviewed numerous prior cases[32] and concluded that the "integral" test is satisfied when the activities are carried on to protect or insure the functioning of the taxpayer's business. Since the sales of baseball player contracts were essential to the functioning of the instant taxpayer's business, the court held that they were excluded from nonrecognition treatment under section 337.

Although the instant court undoubtedly reached the correct conclusion, a close examination of the reasoning used by the court reveals serious problems that may present a dangerous precedent. The court could have avoided this danger by resting its decision squarely on *Malat,* as the Supreme Court suggested by remanding the case. The court, however, took an unrealistic view of the taxpayer's business in holding that its primary reason for existence was "to make money by playing professional baseball and selling tickets to the games."[33] The number and frequency of sales of player contracts, together with their role as the taxpayer's only valuable source of profit in recent years, clearly would have justified a holding that the contracts were held "principally" for sale in the ordinary course of business.[34] Instead, the court chose to apply the *Corn Products* doctrine and thereby created a judicial exception to section 1231 property, just as the Supreme Court had done to section 1221 assets in *Corn Products.*[35] Application of the *Corn Products* reasoning to section 1231 assets is subject to criticism since it closes one more door to tax relief for the taxpayer and flies in the face of both the legislative history and the supporting language of the statute. As the *Deltide* court concluded, Congress specifically provided that property used in the trade or business would be given capital asset treatment under section 1231 unless it fell into one of the enumerated categories. Because Congress singled out property that is not defined as a capital asset under section 1221 to receive capital asset treatment and did not include the *Corn Products* exception in section 1231's exclusions, it is clear that Congress did not intend that the *Corn Products* doctrine be extended. This proposition was strengthened by the subsequent enactment of section 1245, which was an attempt to reduce somewhat

32. These cases involved the sale of equipment no longer usable in the business, whereas the player contracts were never sold because the players were no longer fit to play baseball. *See id.* at 502-03.

33. *Id.* at 495.

34. *See* note 4 *supra.*

35. One writer called it "judicial indifference to statutory language." Bernstein, *supra* note 26, at 1116.

the enormous tax savings that resulted from taxpayers, depreciating section 1231 property, using this depreciation as a deduction against their ordinary income, and then incurring only a capital gains tax on the subsequent sale of that property.[36] Section 1245 "recaptures" the depreciation by requiring the taxpayer, after the sale of the depreciable property,[37] to report the gain as ordinary income to the extent of his post-1961 depreciation deductions. If Congress had intended that *Corn Products* apply to section 1231, it would not have specifically enacted section 1245 to reduce these tax savings when *Corn Products* would require taxation at ordinary rates anyway.[38] Another reason militating against the instant decision is the difference that would have resulted if the sale of the contracts had been a bulk sale. Section 337(b)(2) would have assured it nonrecognition treatment, suggesting that Congress did not intend that all property which is an integral part of the business, such as inventory, should be excepted from the benefits of section 337.[39] A liberal reading of this decision might even mean that ordinary business assets such as machinery and real estate would be excluded from tax relief under section 337 because the assets sold were considered to be an integral part of the business.[40] Thus, the instant decision makes section 337, as well as sections 1231 and 1245, virtually inapplicable to such sales.

It is submitted, however, that a narrow reading of this decision is both possible and desirable. The court's holding was based on the finding that the contract *sales* were an integral part of the business, not the contracts themselves. Thus, the profits from the sales failed to qualify for nonrecognition under section 337 because the sales, not the

36. "The President stated that our capital gains concept should not encompass this kind of income. He indicated that this inequity should be eliminated. . . . He states that we should not encourage the further acquisition of such property through tax incentives as long as the loophole remains. This problem also is of major significance in connection with the recent depreciation liberalization announced by the Treasury Department. . . . [A]dditional ordinary income would be converted into capital gain if this were not dealt with in this provision." 2 U.S. CODE CONG. & AD. NEWS 3297, 3398 (1962).

37. The depreciable property to which § 1245 applies is specifically stated in the Code section. It reaches some transactions not falling into the § 1231 category and most of those which do fall in the § 1231 category. It should be noted, however, that § 1245 does not completely eliminate the possibility of reporting a profit on the sale of depreciable property as long-term capital gain under § 1231. Buildings and their structural components, for example, are not subject to § 1245. *See* B. BITTKER, *supra* note 20, at 562.

38. Although the decision renders § 1245 almost totally useless, there will still be certain instances that do not fall within the *Corn Products* exclusion and the property will still be treated under §§ 1231 and 1245.

39. Lee, *supra* note 9, at 23.

40. *Id.* at 22.

contracts, were deemed by the court to be an integral part of the business. It is arguable, of course, that since the problem only arises when there is a sale of the property, this distinction is without substance. It is significant, however, that the instant court never stated that the contracts themselves were an integral part of the business. The significance is readily apparent if one recalls that the Supreme Court's holding in *Corn Products* was that the transactions in corn futures, *not* the corn futures themselves, constituted an integral part of the business. The *Deltide* court examined this distinction and concluded that the mere fact that business property is an integral part of the total business process does not mean that gains from the disposition of such property must be treated as ordinary income "where the disposition of the property is not necessary to the essence of the revenue-producing process."[41] The broad extension of the instant case to all property integral to a business, therefore, may not be valid.[42] Only "sales" that are deemed integral to a business will be denied nonrecognition. Since the Supreme Court has denied certiorari in the instant case, this suggested narrow reading would limit the scope of the case's application and would be more in keeping with the legislative history of sections 1221, 1231, and 337. Thus during a period of liquidation under section 337, a sale of ordinary business assets, which are an integral part of the business, will not be taxed as ordinary income if it is proved that the "sale" of these assets is not integral to the business. It is hoped that the narrow interpretation suggested will provide future courts with an effective standard in applying the instant holding to section 337 transactions.

Torts—Aviation—Air Traffic Controller Has Duty to Warn Pilot of Adverse Weather Conditions That Cause Visihility to Fall Below FAA Minimums

Plaintiffs, victims of a charter airline crash,[1] sought damages in

41. 279 F. Supp. at 668.

42. The wood used to make paper in a paper mill, for example, is an integral part of the business, but the sale of that wood is not an integral part of the business. There are certainly instances, however, when the mill might sell excess wood to get rid of a surplus. If the instant case is interpreted narrowly, the sales of the wood would get nonrecognition treatment under § 337.

1. The C-46 plane had been chartered by a college to transport the school football team from Santa Maria, California, to Toledo, Ohio, and return. The plane crashed on takeoff for the return

federal district court under the Federal Tort Claims Act (FTCA)[2] for the negligence of a government air traffic controller in failing to warn the pilot of the airline not to take off at a time when visibility was below Federal Aviation Administration (FAA) minimums.[3] Plaintiffs alleged that the controller was under a duty to warn the pilot not to take off because of the extreme weather conditions that existed. The United States contended that under the applicable regulations,[4] the pilot had the sole responsibility for judging whether weather conditions were suitable for flight.[5] The trial court ruled that the controller was under a duty to warn the pilot of the adverse weather conditions.[6] On appeal to the United States Court of Appeals for the Ninth Circuit, *held*, affirmed. When a flight is clearly prohibited by FAA regulations because of adverse weather conditions, an air traffic controller has a duty to warn the pilot not to take off. *Stork v. United States,* 430 F.2d 1104 (9th Cir. 1970).

Historically, the pilot has been considered primarily responsible for the safety of his aircraft.[7] The FAA regulations have reflected this view,

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trip on October 29, 1960. The delay in resolution of the cases against the United States was caused principally by a declaratory relief action brought by the insurer of the aircraft owner seeking a ruling that its insurance contract was void due to breaches of warranty by the owner. Thirty-five cases were joined for this action, which tried the issue of liability of the United States. Stork v. United Stares, 278 F. Supp. 869, 872 (S.D. Cal. 1967).

2. 28 U.S.C. § 1346(b) (1964).

3. The regulation in effect at the time of the crash provided: "No flight shall be started unless the take off, enroute operation, and landing at destination can be conducted in accordance with the requirements of Part 60 of this subchapter, but in no case less than the minimums specified below." 14 C.F.R. § 42.55 (1961). Part (b) of the regulation refers to 42 C.F.R. §§ 609-10 (1961) for the rules governing instrument flight and also states that the visibility minimums for each airport can be found in the Approach and Landing Charts and Radio Facility Charts of the Coast and Geodetic Survey and the Airman's Guide. According to testimony by a weather bureau official, visibility at the Toledo airport when the crash occurred was zero miles in fog. This condition is declared "when the distance at which an object can be seen is less than 125 feet." 278 F. Supp. at 874.

4. *See* note 3 *supra.*

5. The United States also contended that under the existing regulations the controller had neither the duty nor the authority to deny take-off clearance. The trial court rejected this contention. FAA regulations had rendered the question moot by the time of the instant court's decision. *See* note 25 *infra.* The government further contended that the proximate cause of the crash was the negligence of the pilot in attempting to take off in violation of the minimum visibility standard set by the aircraft owner, and in not properly burning out his engines before take-off, thereby preventing the engine spark plugs from igniting and contributing to the stall that caused the aircraft to crash. The plane also was overloaded by 1,400 pounds.

6. The court also found that the proximate cause of the crash was a stalling of the aircraft brought on by the premature lift-off, which was caused by the loss of lateral bearings by the pilot due to his inability to see the runway lights.

7. For a discussion of the background of air traffic controller liability see Comment, *Air Traffic Control: Hidden Danger in the Clear Blue Skies,* 34 J. AIR L. & COM. 255 (1968).

providing that the pilot has responsibility for determining the suitability of weather conditions for flying, while the controller's responsibility has been limited to directing air traffic.[8] The statutory structure for expanding the traffic controller's responsibility originated with the passage of the Federal Tort Claims Act in 1946, which permits actions against the United States for negligent acts of government employees.[9] After its enactment, there was some doubt over whether an air traffic controller performed a function for which the United States could be held liable under the statute. In *Eastern Airlines, Inc., v. Union Trust Co.*,[10] the Court of Appeals for the District of Columbia, rejecting the assertion that air traffic controllers perform discretionary functions, found that controllers instead perform operational functions under the FTCA.[11] As a result, the government has never been successful in claiming immunity from suit for controller negligence under the FTCA.[12] Utilizing this statutory framework to adjudge the scope of the

8. The applicable regulations and FAA circulars are set out in the district court opinion. 278 F. Supp. at 875-79 nn.4-9.

9. Act of Aug. 2, 1946, Pub. L. No. 79-601, § 410, 60 Stat. 843 (codified at 28 U.S.C. § 1346(b) (1964)). The statute provides in relevant part: "[T]he district courts . . . shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages . . . for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the government while acting within the scope of his office or employment . . . ."

10. 221 F.2d 62 (D.C. Cir.), *aff'd sub nom.* United States v. Union Trust Co., 350 U.S. 907 (1955).

11. 28 U.S.C. § 2680 (1964) provides:

"[S]ection 1346(b) of this title shall not apply to

(a) Any claim based upon an act or omission of an employee of the Government . . . in the execution of a statute or regulation . . . or based upon the exercise or performance [of] . . . a discretionary function or duty . . . ."

12. The government has attempted to assert defenses based upon the exception for an act of a government employee in the execution of a regulation (*see* 28 U.S.C. § 2680(a) (1964)) and on the exception for any claim arising out of misrepresentation (*see* 28 U.S.C. § 2680(h) (1964)). For text of 28 U.S.C. § 2680(a) (1964) see note 11 *supra*. The execution of a regulation defense was raised in Ingham v. Eastern Air Lines, Inc., 373 F.2d 227 (2d Cir.), *cert. denied*, 389 U.S. 931 (1967). The court found that the controller had violated § 265.2 of the *Air Traffic Control Procedures Manual* of the FAA by not reporting a change in visibility to a pilot approaching for a landing, because the information was neeessary for the pilot to make his landing. Sinee the regulation was violated, the government could not escape liability by arguing that the controller had executed the regulation, since in fact he had not. One commentator points out that the manual in question is not a regulation and that the government's case also should fail on that basis. Levy, *The Expanding Responsibility of the Government Air Traffic Controller*, 36 FORDHAM L. REV. 401, 408-09 (1968). The misrepresentation defense was raised in Ingham, *supra*, and United Airlines, Inc., v. Wiener, 335 F.2d 379 (9th Cir.), *petition for cert. dismissed*, 379 U.S. 951 (1964). In *United Airlines*, a case involving a crash resulting from the failure to notify a commercial airliner of military aircraft flying in the area, the Ninth Circuit held that where the gravamen of the complaint is negligence, the misrepresentation exception does not apply. 335 F.2d at 398. *See* United States v. Neustadt, 366

controller's duty, the courts in recent years have tended to impose a concurrent responsibility for aircraft safety on controllers because of the congressional mandate authorizing the Federal Aviation Administrator to formulate rules and regulations to promote air safety.[13] Cases of alleged controller negligence have involved three factual categories.[14] The first category involves the question of governmental liability for mid-air collisions and near misses. The United States has been held liable under the FTCA when an air traffic controller has authorized two planes to land on the same runway,[15] when two controllers, acting independently, have ordered different planes to use the same route,[16] when a controller has failed to take further action after warning one plane of the possibility of collision,[17] and when a controller has failed to issue a warning immediately after a dangerous situation has developed.[18] On the other hand, the government has been absolved from responsibility in cases where there was contributory negligence on the part of the pilot.[19] The second category of cases on the issue of controller negligence involves responsibility for instanees of wake turbulence. The government has been successful in resisting the imposition of liability in two cases dealing with this question largely because the pilots in both cases were guilty of contributory negligence.[20] The two most recent decisions

U.S. 696, 711 n.26 (1961) (holding that complaint is within the misrepresentation exception but noting that misrepresentation is identified with invasion of commercial interests). *See also* Indian Towing Co. v. United States, 350 U.S. 61 (1955) (after undertaking a duty, government is under obligation to use due care in performance of the duty).

13. 49 U.S.C. §§ 1348(a)-(c) (1964).

14. Levy, *supra* note 12, at 411.

15. Eastern Air Lines, Inc. v. Union Trust Co., 221 F.2d 62 (D.C. Cir. 1955). *See* notes 10-12 *supra* and accompanying text.

16. Cattaro v. Northwest Airlines, Inc., 236 F. Supp. 889 (E.D. Va. 1964) (plaintiff was injured because of evasive action taken by commercial airliner to avoid collision).

17. Hochrein v. United States, 238 F. Supp. 317 (E.D. Pa. 1965) (private aircraft collided after one plane failed to acknowledge signal from controller).

18. Maryland *ex rel.* Meyer v. United States, 257 F. Supp. 768 (D.D.C. 1966) (controller failed to warn commercial airliner of presence of military plane). *See also* 2 J. KENNELLY, LITIGATION AND TRIAL OF AIR CRASH CASES ch. 8, at 1-12 (1968).

19. *See, e.g.*, United States v. Miller, 303 F.2d 703 (9th Cir. 1962) (controller's negligence does not relieve pilot of primary duty for his aircraft); United States v. Schultetus, 277 F.2d 322 (5th Cir. 1960) (clearance to land does not relieve pilot of responsibility toward his and other aircraft); Stanley v. United States, 239 F. Supp. 973 (N.D. Ohio 1965) (pilot's responsibility for his own safety was paramount where visual flight conditions prevailed and where controller had no reason to know and did not know plane was in the area).

20. Franklin v. United States, 342 F.2d 581 (7th Cir.), *cert. denied*, 382 U.S. 844 (1965) (evidence showed that pilot's stalling of the plane caused the crash); Johnson v. United States, 183 F. Supp. 489 (E.D. Mich. 1960), *aff'd*, 295 F.2d 509 (6th Cir. 1961) (pilot was negligent in flying too low on landing approach).

concerning wake turbulence have ruled, however, that a warning of the presence of turbulence does not discharge the controller's duty.[21] In *Furumizo v. United States*,[22] the Ninth Circuit found generally that the Federal Aviation Act places a duty for aircraft safety on the FAA and requires the controller to broaden his concern beyond traffic regulation to overall aircraft safety.[23] The third category of cases where liability for controller negligence has been alleged involves weather conditions. The government has contended in these cases that controller responsibility is limited to air traffic and that judgment concerning weather conditions is for the pilot. The courts, however, have held that controllers have a duty to provide accurate weather information to pilots[24] because of the heavy reliance by commercial carriers on the controllers. Similarly, most courts have ruled that the controller must exercise due care in providing this information.[25] At least one court has indicated that once the controller has supplied accurate weather information, his duty is discharged and the pilot must determine whether weather conditions are suitable for landing.[26] The development of the law in all three categories reveals that courts have recognized that controllers have considerable responsibility for the safe operation of the aircraft. Moreover, courts have refused to find that the controller has carried out his duty by merely following FAA regulations to the letter.[27]

In the instant case, the court initially found that visibility for the takeoff was below FAA minimums for non-scheduled air carriers. Observing that FAA regulations and procedures divide responsibilities for air safety between the pilot and the air traffic controller,[28] the court found that the normal division of responsibilities was not applicable since the flight was prohibited by FAA regulations. Rejecting the

21. Hartz v. United States, 387 F.2d 870 (5th Cir. 1968), *rev'g* 249 F. Supp. 119 (N.D. Ga. 1965) (warning of presence of "prop wash" was not sufficient to apprise pilot of light plane of danger); Furumizo v. United States, 245 F. Supp. 981 (D. Hawaii 1965), *aff'd*, 381 F.2d 965 (9th Cir. 1967) (controller failed to exercise proper judgment to maintain adequate separation at take off between Piper and C-47). The courts have not articulated precisely what the controller must do to discharge his duty.

22. 381 F.2d 965 (9th Cir. 1967).

23. *Id.* at 968.

24. *See, e.g.*, Ingham v. Eastern Air Lines, Inc., 373 F.2d 227 (2nd Cir. 1967).

25. *Id.*

26. Smerdon v. United States, 135 F. Supp. 929 (D. Mass. 1955) (pilot mistakenly understood report of weather conditions at alternate airport to be report of conditions at intended destination and proceeded toward fog-bound airport on basis of misunderstanding).

27. *See, e.g.*, United States v. Miller, 303 F.2d 703, 710-11 (9th Cir. 1962).

28. *See* note 8 *supra*.

government's contention that the controller did not have a duty to warn, even in the circumstances of the instant case, the majority found that the regulations require the exercise of judgment by the controller in the interests of the safety of the aircraft. The court, therefore, concluded that the authorized clearance operated as an official invitation to the pilot to proceed and that the controller's silence in the face of both adverse weather conditions and the regulation prohibiting flights under these conditions constituted a breach of duty.[29] The dissent argued that the controller did not have authority to deny clearance because of weather conditions and should not be required to give "gratuitous advice" to the pilot.[30]

The instant decision follows the judicial trend of expanding the scope of the controller's duty. This expansion is sound because of the increasing reliance that commercial air carriers have placed on controllers and the resulting need for higher standards for air traffic control.[31] Unfortunately, the court fails to take the opportunity to define precisely the scope of the controller's duty. The court's decision is conditioned on the violation of a regulation, which leaves unanswered the question of controller duty when regulations are not being violated. Since the court finds that some division of responsibility between pilot and controller is contemplated, the implication must be that responsibility will normally be divided unless weather conditions make such a division inapplicable. The controller, however, may still be under a duty to exercise judgment concerning weather conditions even though the division of responsibility applies. The placing of an additional judgment burden on the controller, coupled with his tense working conditions, may be undesirable in terms of air safety.[32] Admittedly, a

29. Facts produced at the trial could have supported another basis for controller liability. The transcript of the control tower's communication to the aircraft showed that the controller had misinformed the pilot on the distance between runway lights. Plaintiff contended the pilot was probably misled concerning the visibility conditions, causing the pilot to misjudge the visibility and the length of the take-off roll. The district court, however, ruled that these factors did not constitute a proximate cause of the crash. 278 F. Supp. at 873-75. The court did not deal specifically with the district court's holding that the pilot is under a duty to deny take off clearance when adverse weather conditions are present. This question was rendered moot by subsequent FAA regulations clearly providing that the controller has authority to deny take-off clearance when departure runway visibility is less than one-quarter mile or runway visual range is less than 2,000 feet. 278 F. Supp. at 878.

30. 430 F.2d at 1109.

31. *See* Comment, *supra* note 7.

32. The problem of increasing air traffic controller workloads is demonstrated in statistics released by the FAA. In 1960, Air Traffic Control handled 9,765,521 aircraft operating under Instrument Flight Rules. By 1970, the number rose by more than 100%, to 21,606,369. FAA, AIR TRAFFIC ACTIVITY 3 (1970). Continued growth will result in an estimated 45.3 million aircraft

controller should be required to use judgment while directing air traffic and should not be allowed to fulfill his duty by a slavish following of regulations. In addition, when weather conditions are clearly below FAA minimums for flight, such as in the instant case, the controller should be required to prevent pilots from taking off. On the other hand, unless weather conditions are clearly unsafe for flight, the controller should not be subject to the burden of exercising judgment, particularly when the pilot possesses the necessary information to make the decision and is not dependent on the controller to give him this information. It is submitted that the controller should not be under a duty to warn when conditions make it possible for responsibilities to be divided between the controller and the pilot. It is one thing to fail to warn an aircraft or to give incorrect information while it is in the air and dependent on the controller. It is another to require the controllers to warn while the plane is on the ground and the pilot has access to all relevant weather information. While it is understandable that courts seek to find means to provide relief to the victims of airline crashes and their successors, the judiciary should not impose duties that override the policy of providing effective means to safely control large numbers of private and commercial aircraft. It is suggested that an imposition of liability because of extraordinary circumstances is consistent with this broad policy objective, but a finding of governmental liability in situations where the pilot is fully informed and capable of reaching an independent decision, and where extraordinary weather conditions are not present, will not help produce greater safety for aircraft.

Torts—Landlord-Tenant—Landlord Owes Duty to Provide Protection for Tenants Against Criminal Acts by Third Parties

Plaintiff, a tenant in an urban apartment house, brought a negligence action against his corporate landlord seeking damages for an

handled by fiscal year 1980. FAA, STATISTICAL HANDBOOK OF AVIATION 5 (1969). Air Traffic Control, however, has not substantially increased its manpower. This is partially demonstrated by a more than 40% increase in productivity of controllers. To some extent this increase in productivity has been made possible by improved technology, but the greater increase has been achieved through extensive use of overtime. In 1969, the FAA requested appropriation for an increase of 2,800 controllers but even with the increase, controller productivity would be 39% greater than in 1964. *Hearings on the 1970 FAA Budget Request Before the Subcomm. on Dep't of Transp. & Related Agencies Appropriations of the House Comm. on Appropriations*, 91st Cong., 1st Sess., pt. 2, at 150 (1969). The total controller force at the time of the hearings was 21,127. *Id.* at 30. The FAA estimates a need for 27,976 controllers in 1971 and 46,400 in 1980. FAA, THE NATIONAL AVIATION SYSTEM PLAN: TEN YEAR PLAN 1971-1980, at 127 (1970). For a critical view of air traffic control from a pilot's point of view see V. LOWELL, AIRLINE SAFETY IS A MYTH 69-75 (2d ed. 1968).

assault and robbery committed by an unknown intruder in the common hallway of the apartment building. Plaintiff contended that because defendant knew that similar criminal acts had been occurring in the building with increased regularity,[1] the failure to provide guards at the building entrances constituted an actionable breach of its duty to afford protection for its tenants.[2] Defendant denied that it had a duty to protect its tenants from foreseeable criminal acts even though perpetrated in areas under its exclusive control.[3] The trial court held as a matter of law that the defendant had no duty to take affirmative action to protect its tenants from the criminal acts of third persons. On appeal to the United States Court of Appeals for the District of Columbia, *held*, reversed and remanded.[4] The landlord of an urban apartment building has a duty to provide security measures within his reasonable capacity for the protection of tenants from foreseeable criminal acts by intruders on the premises. *Kline v. 1500 Massachusetts Avenue Apartment Corp.*, No. 23,401 (D.C. Cir. Aug. 6, 1970).

A landlord has an affirmative duty to protect tenants from physical defects in his apartment building.[5] Traditionally, however, private landlords have not been subject to a duty to provide tenants with protection against criminal assaults on the premises by third persons.[6] This traditional rule has been based on two well-settled legal principles. First, an individual is not legally obligated to take affirmative action to protect another from the criminal acts of a third person.[7] Secondly, a landlord's duty to maintain premises within his control in a safe condition is limited to correcting known physical defects.[8] The

1. Police reports show that 20 crimes occurred in defendant's apartment building in 1966. Furthermore, defendant had knowledge that criminal acts had been perpetrated in its apartment building.

2. When plaintiff moved into the building, an employee of the defendant was on duty in the lobby and a doorman was stationed at the front entrance at all times. Additionally, the 2 side entrances were either watched or locked by 9:00 P.M. At the time of the assault, however, none of the entranees was locked or guarded.

3. At the trial, defendant stipulated that it bad been put on notice of a series of assaults, robberies, and other criminal offenses being perpetrated upon its tenants. On appeal, defendant admitted that the criminal acts were foreseeable.

4. The case was remanded for a detcrmination of damages only.

5. Cioffi v. Queenstown Apts., Sec. E, Inc., 243 F.2d 650 (D.C. Cir. 1957); Anderson v. Marston, 161 Me. 378, 213 A.2d 48 (1965); 2 F. HARPER & F. JAMES, THE LAW OF TORTS § 27.17 (1956). This duty is limited to correcting or making known the latent defects.

6. *See, e.g.*, Applebaum v. Kidwell, 12 F.2d 846 (D.C. Cir. 1926); Goldberg v. Housing Auth., 38 N.J. 578, 186 A.2d 291 (1962). *See also* 2 F. HARPER & F. JAMES, *supra* note 5, § 18.6.

7. Sidwell v. McVay, 282 P.2d 756 (Okla. 1955); W. PROSSER, TORTS § 54 (3d ed. 1964); *see* Bohlen, *The Moral Duty to Aid Others as a Basis of Tort Liability*, 56 U. PA. L. REV. 217 (1908).

8. Cohen Bros. v. Krumbein, 28 Ga. App. 788, 113 S.E. 58 (1922); Lemm v. Gould, 425 S.W.2d 190 (Mo. 1968); Meade v. Montrose, 173 Mo. App. 722, 160 S.W. 11 (1913).

development and crystallization of the first principle—nonliability for the mere failure to act—is largely attributable to judicial recognition that it is often impossible to anticipate the acts of another and to determine exactly to whom the defendant owes a duty.[9] Most courts, however, have recognized that this dilemma is greatly diminished when certain "special relationships" of control exist, such as employer-employee,[10] common carrier-passenger,[11] or innkeeper-guest,[12] since it is then more readily apparent to whom the duty is owed. Consequently, a duty to take affirmative action to provide protection from foreseeable criminal acts of third persons has been imposed in such relationships.[13] This rationale has been expanded to apply to new social relationships that have arisen as society has become increasingly urban. New York courts, for example, have held public housing authorities liable for failure to take affirmative action to prevent dangerous situations from arising in areas that they maintain.[14] In situations in which there are no judicially recognized "special relationships," the determination of when and to whom a duty arises remains difficult. Although guidelines have been proposed to facilitate this determination,[15] most courts have rejected these proposals as unrealistic and have instead advocated a case-by-case approach encompassing the overall social relationship.[16] The

9. Goldberg v. Housing Auth., 38 N.J. 578, 186 A.2d 291 (1962). *See also* Harper & Kime, *The Duty To Control the Conduct of Another*, 43 YALE L.J. 886 (1934).

10. Lillie v. Thompson, 332 U.S. 459 (1947); David v. Missouri Pac. R.R., 328 Mo. 437, 41 S.W.2d 179 (1931), *rev'd on other grounds*, 284 U.S. 460 (1932).

11. Hillman v. Georgia R.R. & Banking Co., 126 Ga. 814, 56 S.E. 68 (1906); Nute v. Boston & Me. R.R., 214 Mass. 184, 100 N.E. 1099 (1913); Kinsey v. Hudson & M.R.R., 130 N.J.L. 285, 32 A.2d 497 (Sup. Ct. 1943), *aff'd*, 131 N.J.L. 161, 35 A.2d 888 (Sup. Ct. 1944).

12. Fortney v. Hotel Rancroft, 5 Ill. App. 2d 327, 125 N.E.2d 544 (1955); McFadden v. Bancroft Hotel Corp., 313 Mass. 56, 46 N.E.2d 573 (1943).

13. Lillie v. Thompson, 332 U.S. 459 (1947) (employer); Quigley v. Wilson Line, 38 Mass. 125, 154 N.E.2d 77 (1958) (common carrier); Miller v. Derusa, 77 So. 2d 748 (La. 1955) (innkeeper). *See generally* Bohlen, *50 Years of Torts*, 50 HARV. L. REV. 725 (1937).

14. Geigel v. Housing Auth., 225 N.Y.S.2d 891 (Sup. Ct. 1962) (situation developed by allowing recreation in prohibited area); Da Rocha v. Housing Auth., 109 N.Y.S.2d 263 (Sup. Ct. 1951), *aff'd*, 282 App. Div. 728, 122 N.Y.S.2d 397 (1953) (situation created by providing recreation area in dangerous location). Liability, however, has not been imposed on private landlords.

15. RESTATEMENT (SECOND) OF TORTS, Explanatory Notes § 302 B, comment *e* at 90 (1965). The guidelines include situations in which a duty should be imposed: Where the actor's own affirmative act has exposed the other to harm; where the actor has undertaken a duty, by contract or otherwise, to protect the other; and where the actor entrusts a dangerous instrumentality to one whom he knows is likely to inflict harm with it. While these examples are valuable as suggestions, a strict adherence to them would not aid the courts in determining whether the overall relationship requires a duty.

16. Kendall v. Gore Properties, 236 F.2d 673 (D.C. Cir. 1956); Mayer v. Housing Auth., 84 N.J. Super. 411, 202 A.2d 439 (App. Div. 1964), *aff'd*, 44 N.J. 567, 210 A.2d 617 (1965); Goldberg v. Housing Auth., 38 N.J. 578, 186 A.2d 291 (1962); *see* Note, *Duty as a Limiting Factor in Tort Liability: Landlord-Tenant, Contractors, Manufacturers, Licensees*, 19 OKLA. L. REV. 320 (1966).

second principle underlying the traditional limitations on the landlord's duty—nonliability except for failure to correct known physical defects[17]—also is premised on the concept of control since a landlord possesses the exclusive ability to correct defects in such common areas as hallways and stairwells.[18] Many courts, however, have expanded the landlord's duty to include the elimination of any dangerous situation.[19] Furthermore, two recent decisions, in dicta, have acknowledged a landlord's liability for third-party criminal acts.[20] Although these developments have significantly eroded the traditional limitations on landlord liability for third party acts, several courts have refused to follow these decisions because of compelling practical considerations. Among these considerations are the difficulty in determining foreseeability of third-party criminal acts and the uncertainties in constructing a causative chain,[21] the vagueness of the duty imposed,[22] and the potential economic consequences of the imposition of this duty.[23] Although some courts have differed concerning the question of when an affirmative duty should be imposed, there has been general agreement that a standard of reasonable care is required when a duty arises.[24]

In the instant case, the court initially defined the risk to be guarded against as criminal assaults by intruders on the premises. The court then found that the traditional limitations on the landlord's liability were inapplicable when considered in the modern urban context in which the landlord exercises control over his apartment house. Comparing the

17. *See* note 8 *supra* and accompanying test.

18. Chalfen v. Kraft, 324 Mass. 1, 84 N.E.2d 454 (1949); Grasselli Dyestuff Corp. v. John Campbell & Co., 259 Mass. 103, 156 N.E. 17 (1927); *see* W. PROSSER, TORTS § 63 (3d ed. 1964).

19. *E.g.*, Da Rocha v. Housing Auth., 109 N.Y.S.2d 263 (Sup. Ct. 1951), *aff'd*, 282 App. Div. 728, 122 N.Y.S.2d 397 (1953) (duty to keep premises reasonably safe meant prohibition of recreation in unauthorized area); Siegel v. 1536-46 St. John's Place Corp., 184 Misc. 1053, 57 N.Y.S.2d 473 (N.Y. City Ct. 1945) (duty to keep premises reasonably safe meant exclusion of vicious animals).

20. Kendall v. Gore Properties, 236 F.2d 673 (D.C. Cir. 1956); Ramsay v. Morrissette, 252 A.2d 509 (D.C. Ct. App. 1969), *noted in* 48 N.C.L. REV. 713 (1970).

21. Goldberg v. Housing Auth., 38 N.J. 578, 186 A.2d 291 (1962) (no duty imposed because of the uncertainties as to whether measures by the landlord would have deterred the criminal acts of a third party).

22. *E.g.*, Goldberg v. Housing Auth., 38 N.J. 578, 186 A.2d 291 (1962); Mayer v. Housing Auth., 84 N.J. Super. 411, 202 A.2d 439 (App. Div. 1964), *aff'd*, 44 N.J. 567, 210 A.2d 617 (1965) (liability imposed after consideration of duty), *noted in* 20 RUTGERS L. REV. 140 (1965).

23. Genovay v. Fox, 50 N.J. Super. 538, 143 A.2d 229 (App. Div. 1958), *rev'd on other grounds*, 29 N.J. 436, 149 A.2d 212 (1959) (economic and other practical factors considered). Tenants would ultimately bear the expense of any measures made necessary by the imposition of a duty on the landlard.

24. Tair v. Rock Inv. Co., 139 Ohio St. 629, 41 N.E.2d 867 (1942); *see* W. PROSSER, TORTS § 63 (3d ed. 1964).

facts of the instant case to the innkeeper-guest relationship in which liability has traditionally been imposed, the court reasoned that a duty clearly arose because the defendant-landlord was the only person in a position to provide effective security for the common areas of the apartment building and because the risk was entirely foreseeable by the defendant.[25] After finding that a duty was present, the court determined that the scope of the duty was to be measured by the standard of reasonable care under all the circumstances.[26] Applying this standard, the court concluded that since the defendant had failed to provide security within its reasonable capacity against a foreseeable criminal assault, it had clearly breached its duty and was thus liable[27] for the tenant's consequent injuries. The dissent, although recognizing that a duty might be present, contended that the evidence as presented in the record was insufficient to impose liability.[28]

The instant case represents a continuation of the trend toward expansion of a landlord's duty to protect his tenants from foreseeable risks. This decision is particularly significant because for the first time a private landlord has been held liable for the criminal acts of a third party and the requisite duty and standard of care have been precisely delineated. The ramifications of this unequivocal holding will be felt immediately by both landlords and tenants. With the knowledge that failure to maintain reasonable security against criminal acts on their premises may result in financial liability, many landlords will likely take the necessary steps to provide adequate security systems. The cost of providing new security measures, although initially borne by landlords, will inevitably be passed on to the tenants in the form of higher rent. This additional expense, however, is not in itself objectionable because tenants presently pay for losses attributable to criminal attacks either directly or through increased insurance premiums.[29] Furthermore, it is likely that the rent increase will be minimal since the expense will be distributed among all tenants.[30] Although the landlord's duty to provide

25. *See* note 3 *supra*.

26. The court reasoned that the practices normally used in apartment houses of similar size and class would provide a test for determining reasonable care. In the instant case, the court decided that the security previously provided by the defendant would have been sufficient. No. 23, 401, at 17.

27. The court also stated that the defendant was liable because the rental contract contained an implied warranty of habitability under which the defendant was obligated to provide security within his reasonable capacity. *Id.* at 14.

28. *Id.* at 21.

29. *See* 20 RUTGERS L. REV. 140, 149 & n.60 (1965).

30. If a building with 500 individual apartments hired 2 full-time guards at $7,000 per annum, the cost per month to each tenant would be a little over $2.

reasonable seeurity measures is based upon the doctrine of exclusive control, liability for foreseeable criminal assaults by intruders should not be limited to attacks occurring solely in the common areas of the premises. The ultimate purpose of imposing this duty on the landlord is to prevent foreseeable attacks by third parties, and the duty should remain constant whether the tenant is assaulted in the hallway or in his individual apartment. Therefore, liability should be imposed for an attack anywhere within the building if it can be shown that the attack was a result of the landlord's breach of duty.

Although this decision in effect merely adds the landlord-tenant relationship to the growing number of social relationships in which an affirmative duty to act is imposed, it may have a broader significance because of the approach used by the court in reaching its conclusion. Instead of placing the instant fact situation into a predetermined classification with its standard principles governing liability, the court analyzed the complete situation and the total relationship thereby created.[31] This approach could serve as precedent for extending liability to parties heretofore immune because they were outside the traditional classes. Consequently, the importance of such common law labels as licensees and invitees would be eliminated since the courts would be free to examine the overall relationship between the parties to ascertain whether a duty should be imposed.[32] Irrespective of the future effect, the instant decision is commendable because the landlord's duty toward his tenants for too long has not been commensurate with the responsibilities demanded by the modern social relationship of which he is a part.

31. The instant court changed the focus of its attention in an effort to determine if a duty should be imposed. It concentrated on determining whether a duty was created by the specific facts of the case rather than deciding into which category the case would fit and then merely applying the rigid law applicable to that category.

32. Wallace v. Der-Ohanian, 199 Cal. App. 2d 141, 18 Cal. Rptr. 892 (Dist. Ct. 1962) (relationship between child and camp director sufficient to impose duty on director to protect child from sexual molestation); McLeod v. Grant County School Dist. No. 128, 42 Wash. 2d 316, 255 P.2d 360 (1953) (duty to prevent rape based on relationship between school and student).