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Recent Cases

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RECENT CASES

Administrative Law—Judicial Review of SEC Decisions—No-Action Letter Under Commission's Proxy Rules Procedures Has Sufficient Finality and Formality to be Reviewable

Petitioners, stockholders in Dow Chemical Company,[1] sought judicial review of a Securities and Exchange Commission (SEC) determination not to require the inclusion of petitioners' resolution[2] in the proxy materials distributed by the corporation to its stockholders.[3] The SEC contended that its no-action letter[4] was not a reviewable order because it lacked sufficient finality and formality.[5] In the alternative, the SEC further argued that the petitioners' resolution was not a proper subject for stockholder consideration under Rule 14a-8(c) of the

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1. Petitioners, Medical Committee for Human Rights, had acquired by gift, 5 shares of Dow Chemical Company stock.

2. The final version of petitioners' resolution read:
"RESOLVED, that the shareholders of the Dow Chemical Company request that the Board of Directors, in accordance with the laws [*sic*] of the Dow Chemical Company, consider the advisability of adopting a resolution setting forth an amendment to the composite certificate of incorporation of the Dow Chemical Company that the company shall not make napalm." Medical Committee for Human Rights v. SEC, 432 F.2d 659, 663 (D.C. Cir. 1970), *cert. granted*, 39 U.S.L.W. 3413 (U.S. March 23, 1971). *See* note 3 *infra*.

3. The proxy materials were distributed prior to the 1969 annual stockholders' meeting. The petitioners had initially submitted a similar resolution for inclusion in the 1968 proxy statement, but they were informed it was already too late for that statement. *See* note 5 *infra*. They had coupled their concern for human life with an economic argument that the use in Vietnam of napalm produced by Dow is hurting the company's image, making it difficult to recruit well-qualified college men.

4. No-action letters are traditionally given by the SEC staff to one party in a nonadversary context. In the present case, however, the SEC Division of Corporate Finance had given Dow a no-action letter concerning the corporation's decision not to include the petitioners' proposal. Subsequently, both parties submitted legal memoranda to the SEC for a redetermination on the issue of whether the stockholders' proposal should be included. The Commission then approved the determination of the Division of Corporate Finanee.

5. The applicable statute is § 25(a) of the Securities Exchange Act of 1934, 15 U.S.C. § 78y(a) (1964), which provides in part that a person aggrieved by an SEC order can obtain review in the Court of Appeals for the District of Columbia within 60 days of the entry of the order.

The Commission also alleged lack of jurisdiction because the petition had not been filed within 60 days after the date of entry of the order. The Commission's decision was reached on March 24, 1969, and the petition to review was filed 66 days later on May 29, 1969. The Medical Committee had been notified by phone on March 24th that a decision had been reached, but it received no written information concerning the SEC's decision until a letter was mailed to it on April 2, 1969. Rule 22(k) of the SEC Rules of Practice provides that for the computation of time, the date of entry is the date of adoption of the order, but it also requires that the order be available for public inspection. 17 C.F.R. § 201.22(k) (1970).

Commission.[6] Petitioners sought no affirmative relief, but urged that the case be remanded for SEC reconsideration within the proper limits of discretion.[7] On petition to the United States Court of Appeals for the District of Columbia, *held,* the Commission's decision was reviewable.[8] An SEC no-action letter excluding a stockholder's resolution from proxy materials has the requisite finality and formality to be reviewable when it is based on written memoranda of opposing counsel and accords with the SEC's proxy procedures. *Medical Committee for Human Rights v. SEC,* 432 F.2d 659 (D.C. Cir. 1970), *cert. granted,* 39 U.S.L.W. 3413 (U.S. March 23, 1970).

The availability and scope of judicial review of administrative decisions has developed to a point where the common law,[9] general legislation,[10] and specific agency provisions[11] have commingled to form a body of law that has few absolute rules but many interrelated guiding principles.[12] The most pervasive of these principles is the presumptive right to judicial review of an administrative decision.[13] This right,

6. 17 C.F.R. § 240.14a-8(c) (1970). This rule permits management to exclude proposals of security holders under 5 enumerated circumstances. The 2 asserted by Dow were that the proposal was "primarily for the purpose of promoting general economic, political, racial, religious, social or similar causes," [*Id.* at § 240.14a-8(c)(2)] and that it was also "a recommendation or request that the management take action with respect to matters relating to the conduct of the ordinary business operations of the issuer," [*Id.* at § 240.14a-8(c)(5)]. *See* note 45 *infra.*

7. The SEC has several statutory remedies but the most applicable would be court orders of mandamus directed to management. Such orders are provided for in § 21(f) of the Securities Exchange Act of 1934, 15 U.S.C. § 78u(f) (1970). *See generally* Aranow & Einhorn, *Corporate Proxy Contests: Enforcement of SEC Proxy Rules by the Commission and Private Parties,* 31 N.Y.U.L. REV. 873 (1956).

8. The cause was remanded to allow the Commission to include the basis for its decision in the record. The court also stressed that the decision should be in harmony with the concept of corporate democracy intended by Congress.

9. For a discussion of the common law principles applicable to judicial review see 4 K. DAVIS, ADMINISTRATIVE LAW TREATISE §§ 28-03-.07 (1958); L. JAFFE, JUDICIAL CONTROL OF ADMINISTRATIVE ACTION 327-36 (1965).

10. The general provisions concerning judicial review of administrative decisions are codified in § 10 of the Administrative Procedure Act, 5 U.S.C. §§ 701-06 (1964).

11. Throughout federal law there are sections explaining the reviewability of specific administrative decisions. *See, e.g.,* 7 U.S.C. § 194 (1964) (review of cease and desist orders for breach of meat packing rules); 15 U.S.C. § 21(c) (1964) (review of cease and desist orders concerning illegal monopolies or combinations). *See also* M. FORKOSCH, ADMINISTRATIVE LAW §§ 317-18 (1956).

12. *See generally* 4 K. DAVIS, *supra* note 9, § 28.03.

13. *See* L. JAFFE, *supra* note 9, at 336-53. *See also* Abbott Labs. v. Gardner, 387 U.S. 136, 140 (1967) (unless there is a persuasive reason to believe Congress intended to cut off review, review will be allowed); Environmental Defense Fund, Inc. v. Hardin, 428 F.2d 1093 (D.C. Cir. 1970) (a clear showing of legislative intent is necessary to preclude judicial review). Section 10 of the Administrative Procedure Act, 5 U.S.C. § 702 (1964), expressly provides for such review: "A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof."

however, has been periodically modified by a series of qualifications or prerequisites. A person seeking review, for example, must exhaust all administrative remedies before seeking judicial relief.[14] The reasons articulated for this requirement include: the guarantee of a complete record;[15] a desire for economy by allowing administrative actions to proceed to conclusion without disruption;[16] a judicial respect for separation of powers;[17] and the "absence of an alternative consistent with the orderly conduct of the government's business."[18] Courts have not, however, rigidly enforced this principle. The exhaustion requirement generally has been relaxed if the petitioner would otherwise suffer irreparable injury[19] or if the administrative remedy is inadequate.[20] The requirement is closely related to the concepts of ripeness and finality,[21] which measure whether a controversy is sufficiently developed to be the subject of judicial review. Originally the test used to determine the reviewable status of a controversy was a mechanical one requiring a

14. It is the "long settled rule of judicial administration that no one is entitled to judicial relief for a supposed or threatened injury until the prescribed administrative remedy has been exhausted." Myers v. Bethlehem Shipbuilding Corp., 303 U.S. 41, 50-51 (1938). *See* Scanwell Labs., Inc. v. Shaffer, 424 F.2d 859, 875 (D.C. Cir. 1970); L. JAFFE, *supra* note 9, at 424-58. *But cf.* 3 K. DAVIS, *supra* note 9, §§ 20.01-10. The doctrine of exhaustion of remedies should not be confused with primary jurisdiction. The latter is not actually a principle of judicial review but rather one that asks whether an agency or the court should initiate action in a case. *Id.* § 19.01.

15. Scanwell Labs., Inc. v. Shaffer, 424 F.2d 859, 875 (D.C. Cir. 1970).

16. Goldman, *Administrative Delay and Judicial Relief*, 66 MICH. L. REV. 1423, 1445. (1968).

17. L. JAFFE, *supra* note 9, at 425.

18. United States v. Kauten, 133 F.2d 703, 706 (2d Cir. 1943).

19. Columbia Broadcasting Sys. v. United States, 316 U.S. 407 (1942) (test is not one of "overrefined technique" but rather protection from irreparable injury); Isbrandtsen Co. v. United States, 211 F.2d 51 (D.C. Cir.), *cert. denied*, 347 U.S. 990 (1954).

20. McNeese v. Board of Educ., 373 U.S. 668, 674-76 (1963) (procedures to remedy segregation in schools deemed inadequate to protect fourteenth amendment rights); Smith v. Illinois Bell Tel. Co., 270 U.S. 587 (1926) (2-year delay in commission action resulted in refusal to require exhaustion); Deering Milliken, Inc. v. Johnston, 295 F.2d 856 (4th Cir. 1961) (if reason for review is because of unnecessary delay, exhaustion is not required). *See also* Note, *Judicial Acceleration of the Administrative Process: The Right to Relief from Unduly Protracted Proceedings*, 72 YALE L.J. 574 (1963).

21. In Environmental Defense Fund, Inc. v. Hardin, 428 F.2d 1093, 1098 (D.C. Cir. 1970), the court spoke of ripeness and finality as preventing entry into the administrative decision-making process before the controversy had been brought into focus; no additional administrative action should be necessary to determine the dispute. *See* Administrative Procedure Act § 10c, 5 U.S.C. § 704 (1964); L. JAFFE, *supra* note 9, at 423. For a recent decision concerning the finality of an order see Nor-Am Agricultural Prods. v. Hardin, 435 F.2d 1151 (7th Cir. 1970) (en banc). The distinction between exhaustion and ripeness is that the former focuses narrowly on whether a party should be required to seek an administrative remedy, whereas the latter deals with the nature of a judicial controversy. 3 K. DAVIS, *supra* note 9, § 21.01.

positive order,[22] but the test now focuses on "substance over form," considering pragmatically the effect of a decision rather than its superficial appearance.[23] The de-emphasis on the necessity of a positive directive has raised the question of whether administrative opinions, advice, findings, and reports should be considered reviewable.[24] This concern has resulted in an additional emphasis upon the related requirement that an administrative action must possess a degree of formality to be reviewable.[25] The administrative process is frequently one of negotiation, characterized by considerable flexibility. If judicial review were available for every informal stage of this process, the advantages that set it apart from the judicial system would be lost.[26] The courts, however, have established no rigid guidelines on the requirement of formality. Although the absence of a formal hearing has not resulted in a proceeding being found nonreviewable per se,[27] the courts have required the action to be of "definite and concrete character."[28] Moreover, even though an order possesses the requisites for reviewability,[29] the scope of review has often been curtailed by a showing

22. This doctrine was originated in Procter & Gamble Co. v. United States, 225 U.S. 282 (1912), but was best expressed in United States v. Los Angeles & S.L.R.R., 273 U.S. 299, 309-10 (1927). In the latter case, the Court stated: "The so-called order here complained of is one which does not command the carrier to do, or to refrain from doing, anything; which does not grant or withhold any authority, privilege or license; which does not extend or abridge any power or facility; . . . which does not change the carrier's existing or future status or condition; which does not determine any right or obligation." In Rochester Tel. Corp. v. United States, 307 U.S. 125, 142 (1939), however, the Court "interred" the negative order doctrine of *Proctor & Gamble* and said that the maintenance of the status quo is as much a decision as an order that changes the status of the parties.

23. *E.g.*, Cities Serv. Gas Co. v. FPC, 255 F.2d 860 (10th Cir.), *cert. denied*, 358 U.S. 837 (1958). "The order of the agency is final for purposes of review when it imposes an obligation, denies a right, or fixes some legal relationship as a consummation of the administrative process." *Id.* at 863. *See* Isbrandtsen Co. v. United States, 211 F.2d 51 (D.C. Cir.), *cert. denied*, 347 U.S. 990 (1954) (final order need not be last order); Phillips v. SEC, 171 F.2d 180 (2d Cir. 1948) (substance controls but orders still may not be preliminary). *See generally* Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 123 (1951); Columbia Broadcasting Sys. v. United States, 316 U.S. 407 (1942).

24. FPC v. Metropolitan Edison Co., 304 U.S. 375 (1938). *See generally* M. FORKOSCH, *supra* note 11, § 305.

25. *Cf.* Helco Prods. Co. v. McNutt, 137 F.2d 681 (D.C. Cir. 1943); American Sumatra Tobacco Corp. v. SEC, 93 F.2d 236 (D.C. Cir. 1937).

26. *See* L. JAFFE, *supra* note 9, at 408-10. *See generally* Frozen Food Express v. United States, 351 U.S. 40 (1956).

27. *See, e.g.*, Cities Serv. Gas Co. v. FPC, 255 F.2d 860, 862-63 (10th Cir.), *cert. denied*, 358 U.S. 837 (1958); Phillips Petroleum Co. v. FPC, 227 F.2d 470, 475 (10th Cir. 1955), *cert. denied*, 350 U.S. 1005 (1956).

28. Ashwander v. TVA, 297 U.S. 288, 324 (1936). *See also* Northeast Airlines, Inc. v. CAB, 345 F.2d 662 (1st Cir. 1965).

29. While not a factor in deciding if an order is reviewable, a court must determine prior to

that a particular area is committed to the agency's discretion.[30] Nevertheless, because all administrative decisions invoke some degree of discretion, the question is not whether an agency has the discretionary right but whether the discretion was properly exercised.[31] It has been universally held that the power to act arbitrarily is not one of the administrative alternatives delegated by Congress when it grants an agency the authority to act with discretion in a specific area.[32]

In determining whether an SEC decision is subject to judicial review, it is necessary to consider the relevant language in federal statutes dealing with securities[33] as well as both the common law and the Administrative Procedure Act (APA).[34] The application of the guiding principles of judicial review to the securities area, however, does not differ markedly from the general application previously discussed. The exhaustion of remedies criterion, for example, is most often associated with the requirement that an issue to be reviewable must first have been urged before the Commission.[35] Similarly, courts have guaranteed the finality requirement by interpreting the phrase "any order" in the judicial review sections of the securities statutes[36] to mean any *final* order.[37] The requirement of formality, however, has taken on a more

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review whether the petitioner is an aggrieved party who has standing. *See generally* 3 K. DAVIS, *supra* note 9, at § 22.01-.18; L. JAFFE, *supra* note 9, at 501-45.

30. Administrative Procedure Act § 10, 5 U.S.C. § 701(a)(1) (1964): "This chapter applies . . . except to the extent that . . . (2) agency action is committed to agency discretion by law." *See* Curran v. Laird, 420 F.2d 122 (D.C. Cir. 1969).

31. This distinction refers to the "all-or-none" fallacy, which would hold that if a decision were discretionary, it would be totally nonreviewable. The framers of the Administrative Procedure Act recognized this problem and attempted to solve it by using the phrase "except to the extent that," instead of "except when" to limit judicial review.

32. Berger, *Administrative Arbitrariness: A Synthesis*, 78 YALE L.J. 965, 966 (1969).

33. The SEC has the authority for coordinating 6 different federal enactments in the area of securities. Each of these statutes has a provision for judicial review of SEC orders. *See* Securities Act of 1933, § 9, 15 U.S.C. § 77i (1964); Trust Indenture Act of 1939, § 322(a), 15 U.S.C. § 77vvv (1964); Securities Exchange Act of 1934, § 25(a), 15 U.S.C. § 78y (1964); Public Utility Holding Company Act of 1935, § 24, 15 U.S.C. § 79x (1964); Investment Company Act of 1940, § 43, 15 U.S.C. § 80a-42 (1964); Investment Advisors Act of 1940, § 213, 15 U.S.C. § 80b-13 (1964).

34. Administrative Procedure Act § 10, 5 U.S.C. §§ 701-06 (1964).

35. For example, § 25(a) of the Securities Exchange Act provides in part: "No objection to the order of the Commission shall be considered by the court unless such objection shall have been urged before the Commission." 15 U.S.C. § 78y (1964). *See, e.g.*, Gearhart & Otis, Inc. v. SEC, 348 F.2d 798 (D.C. Cir. 1965) (§ 25(a) applies also to objections arising after an agency decision). *See generally* Fontaine v. SEC, 259 F. Supp. 880 (D.P.R. 1966) and cases cited therein.

36. *See, e.g.*, Securities Act of 1933, § 9, 15 U.S.C. § 77i (1964) ("[a]ny person aggrieved by an order . . ."); Trust Indenture Act of 1939, § 322(a), 15 U.S.C. § 77vvv (1964) ("[o]rders of the Commission . . . shall be subject to review . . .").

37. *See, e.g.*, Stardust, Inc. v. SEC, 225 F.2d 255 (9th Cir. 1955) (order for an initial

expansive role because SEC regulations provided for a number of different types of formal and informal proceedings.[38] Discretionary action is allowed under relevant SEC statutes,[39] and these statutes coupled with the APA provision[40] serve to apply this principle to SEC matters. In order to understand the applicability of these principles of judicial review to SEC proxy rules, it is necessary to examine the function of these rules.[41] First promulgated in 1935, the proxy rules are the manifestation of strong congressional intent to insure management's continued responsiveness to the wishes of the stockholders.[42] One method of insuring "corporate democracy" has been the stockholder proposal provisions of the proxy rules,[43] which give individual stockholders a means of communicating through proxy materials with other stockholders on matters of "common concern."[44] Just what constitutes "common concern" has been limited, by regulation, to areas that are deemed proper subjects for stockholder action.[45] If management decides

investigation to determine jurisdiction to investigate petitioner's actions, held merely preliminary); Jones v. SEC, 79 F.2d 617 (2d Cir. 1935), *cert. denied*, 297 U.S. 705 (1936) (interlocutory order not reviewable; must be formal order).

38. *See* 17 C.F.R. §§ 201.1-203.8 (1970); 3 L. Loss, Securities Regulation 1894-99 (2d ed. 1961). Some of these proceedings have not been deemed to have sufficient formality to be reviewable. *E.g.*, Third Ave. Ry. v. SEC, 85 F.2d 914 (2d Cir. 1936) (letter seeking amendment of rules governing filing of financial statements and letter denying amendment were not deemed sufficiently formal to be reviewable); Standard Fruit & S.S. Co. v. Midwest Stock Exch., 178 F. Supp. 669 (N.D. Ill. 1959) (dicta that advisory opinion not sufficiently formal to be reviewable in court of appeals). *But see* Phillips v. SEC, 171 F.2d 180 (2d Cir. 1948) (lack of a formal order is not determinative).

39. *E.g.*, Securities Act of 1933, § 20, 15 U.S.C. § 77t (1964). *See* Leighton v. SEC, 221 F.2d 91 (D.C. Cir.), *cert. denied*, 350 U.S. 825 (1955).

40. *See* note 30 *supra*.

41. SEC Reg. 14a, 17 C.F.R. § 240.14a (1970). The rules were adopted under the rule-making authority of § 14(a) of the Securities Exchange Act, 15 U.S.C. § 78n(a) (1964).

42. *See* S. Rep. No. 1455, 73d Cong., 2d Sess. 74 (1934); H.R. Rep. No. 1383, 73d Cong., 2d Sess. 5, 13 (1934). *See also* SEC v. Transamerica Corp., 163 F.2d 511, 517 (3d Cir. 1947), *cert. denied*, 332 U.S. 847 (1948).

43. These rules are now collected in 17 C.F.R. § 240.14a-8 (1970). They provide that stockholders who are unwilling or unable to distribute proxy materials on their own may submit them to the corporation for inclusion in its proxy materials. If the corporation opposes a particular proposal it must include at the stockholder's request a statement, not to exceed 100 words, in support of the proposal. The rules require only that management include those proposals that are proper subjects for stockholder consideration. *See* note 45 *infra*.

44. Some method of communication is essential because without it the management would have a tremendous advantage in the solicitation of proxies. After the adoption of the rules, the financial burden of these proposals was no longer carried by the individual, but rather was incorporated into the cost of the proxy materials.

45. Management today may omit proposals that (1) are not proper subjects under state law, (2) are personal claims or generally economic, political, racial, religious, or social in nature, (3) have been included in one of the last 2 years without being acted on at the annual meeting, (4) have been

to omit a proposal it considers improper, there is an established, but essentially informal, procedure for Commission review of this determination.[46] This informality carries over to the SEC's decision, which is frequently rendered without announcing an explicit reasoning process upon which its judgment is based. Before the instant case, the informal nature of this procceding had caused several scholars to assume that any resulting SEC decision would be nonreviewable.[47] If this conelusion were correct it would have precluded direct action against the SEC and thereby limited the aggrieved stockholder to a private action against the corporation.[48] No court, however, had squarely met the issue of the reviewability of an SEC no-action letter under the proxy rules, and no court had considered the advisability of reviewing the agency decision as opposed to direct action against the corporation.

The instant court first found that the petitioner had exhausted all available administrative procedures.[49] Since the no-action letter was a culmination of those procedures, the SEC's decision was ruled to have sufficient particularity and finality to be reviewable. Acknowledging that these procedures did not include a formal hearing, the court nevertheless decided that the process of gathering written information and arguments from both parties in accordance with SEC regulations[50]

voted on in the previous 5 years and have failed to receive significant support, or (5) relate to the conduct of ordinary business practices. 17 C.F.R. § 240.14a-8(c) (1970). For the historical development of the concept of a "proper subject" see 2 L. Loss, *supra* note 38, at 868-71, and Bayne, *The Basic Rationale of Proper Subject*, 34 U. DETROIT L.J. 575 (1957).

46. 17 C.F.R. § 240.14a-8(d) (1970). Essentially this procedure requires management to submit the proposal to the Commission along with its reasons for omitting it from the proxy materials. No strict formalities are mentioned, but the management must give the Commission time "to consider the management's position and take such action as may be appropriate." 19 Fed. Reg. 246 (1954). This would include the possibility of requesting a statement of the stockholder's position, which would make the proceeding more adversary. If management does omit a proposal, it has the burden of submitting an opinion of counsel with supporting case or statutory law. SEC Securities Exchange Act Release No. 4947 (Jan. 6, 1954).

47. *See, e.g.*, Klastorin v. Roth, 353 F.2d 182, 183 n.2 (2d Cir. 1965); Aranow & Einhorn, *supra* note 7, at 888; Clusserath, *The Amended Stockholder Proposal Rule: A Decade Later*, 40 NOTRE DAME LAW. 13, 17 (1964).

48. The Supreme Court expressly acknowledged the existence of this right in J.I. Case Co. v. Borak, 377 U.S. 426 (1964). In *Borak* the Court ruled that § 14(a) contains the implicit right to a private action to enforce a stockholder's interest in a proxy statement. For a discussion of the cases preceding *Borak* see Aranow & Einhorn, *supra* note 7, at 883-84.

49. The court had initially considered the question of the timeliness of the petition and held that because the petitioner had not been formally notified until 9 days after the decision was rendered, the 60-day period should begin to run at that time. *See* note 5 *supra*. The court also considered the case to be in the proper court notwithstanding the available private action based on *Borak*. The court felt that there was a public interest in reviewing the agency's decision-making process along with the merits of the case.

50. *See* note 46 *supra*.

evidenced enough formality to satisfy this prerequisite of a reviewable decision. The court also examined the policy considerations implicit in the concept of corporate democracy, recognizing that active stockholder participation should be generally encouraged. Although the court observed that regulations establish exceptions that allow certain matters to be controlled exclusively by management,[51] it decided that when these exceptions are interpreted and manipulated so that they become the rule rather than the exception,[52] then it is the court's duty to restore the proper balance.[53] In concluding that the SEC decision satisfied the criteria necessary to constitute a reviewable order, the court recognized the additional problem of describing the scope of that review. The court acknowledged that administrative agencies are vested with a certain amount of discretion which is insulated from judicial review,[54] but found that the analysis of that discretion must take place in an atmosphere that presumptively favors judicial review.[55] The court concluded that the public interest is best served when formal agency decisions are subject to a limited review of the legal context in which the decision is made. The court, therefore, remanded the case to the SEC for action consistent with the instant opinion.

The decision to review the SEC's no-action letter in the instant case has potential relevance for three distinct areas of concern. The first is the future viability of the process known as corporate democracy. This process began as a noble effort to reassociate America's corporations with their investing owners rather than with their managers,[56] but it soon became obvious that its direct practical value was less than significant.[57] This result was inevitable because the corporate form with its widely

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

52. The court viewed the management's interpretation as threatening to destroy, in effect, all stockholder proposals. Conceivably, any proposal could be viewed either as so general as to promote a "cause" or so specific as to infringe on the ordinary business operations of the corporation. *See* note 6 *supra.*

53. It has been asserted that the instant court effectively invalidated the proper subject exception based on "general political or social concerns." Manne, *Corporate Militants*, Barron's, Oct. 12, 1970, at 5, col. 1.

54. The court recognized that because of the large volume of work before the SEC, the agency must be given some freedom for discretion.

55. *See* note 13 *supra.*

56. *See* SEC v. Transamerica Corp., 163 F.2d 511, 516-18 (3d Cir. 1947), *cert. denied*, 332 U.S. 847 (1948). *See also* note 42 *supra* and accompanying text.

57. The number of stockholder proposals either submitted to or included in proxy materials has not been great under the SEC rules. Some of the nation's largest corporations, however, have been involved in shareholder proposals. *See* Emerson, *Some Sociological and Legal Aspects of Institutional and Individual Participation Under the SEC's Shareholder's Proposal Rule*, 34 U. DETROIT L.J. 528, 537 (1957).

dispersed owners is less than uniquely suited to a "New England town meeting" concept of democracy.[58] The instant decision should serve to make management more amenable to stockholder proposals since the continued submission and circulation of these proposals will confront management with the necessity of defending and explaining its positions and policies.[59] This exposure and analysis will be a healthy practice for most corporations regardless of the outcome on any single issue. Throughout this process, however, the proper subjects restriction will continue to protect the corporation from day-to-day interference by the stockholders in ordinary business dealings. The instant decision also is significant in the broad area of judicial review of administrative action. As a matter of practical feasibility, it is clear that not all actions taken by administrative agencies should be subject to judicial review. It is essential, therefore, to differentiate between reviewable and non-reviewable actions. An examination of the constituent requirements furnishes an appropriate means of making the needed distinction. It is submitted that the requirement of formality is the least defensible of those discussed herein. In contrast to the requirement of formality, the requirements of exhaustion of remedies and finality both place emphasis on the aggrieved individual, delaying review only until administrative action is about to affect the individual without other recourse for relief. The requirement of formality, on the other hand, focuses upon the nature of the proceeding.[60] Therefore, because the aggrieved party should be the prime concern,[61] any requirement of formality should be liberally construed in future judicial review cases. The final significant impact of the instant decision relates to the court's indication that the SEC should announce plainly the basis for its no-action decisions. While not an aspect of its holding, this was an obvious attempt to strike at a favorite bureaucratic technique whereby agencies merely restate the positions for each side and then release their finding without regard for an announced decision-making process.[62] The dangers inherent in this practice are twofold. First, many petitioners become discouraged or frustrated with

58. *See* Manne, *supra* note 53, at 16, col. 1.

59. *See* Freeman, *An Estimate of the Practical Consequences of the Stockholder Proposal Rule*, 34 U. DETROIT L.J. 549 (1957).

60. *See* notes 25-28 *supra* and accompanying text.

61. The area of proxy regulation emphasizes the interests of aggrieved stockholders. "[A]mong [the] chief purposes [of § 14(a)] is 'the protection of investors,' which certainly implies the availability of judicial relief where necessary to achieve that result." J.I. Case Co. v. Borak, 377 U.S. 426, 432 (1964).

62. One study of SEC operations found this tactic to be widely used at the SEC Division level. *See* Clusserath, *supra* note 47, at 43.

the system because of this inadequacy. Secondly, there is no accumulating base of agency law from which future parties may gain insight into agency precedent. A persuasive argument can be made that to alter this system would be to destroy administrative flexibility;[63] however, a proper balance between rigid precedent and unbridled flexibility is a far more attractive alternative than either extreme. In conclusion, it is unlikely that the instant decision will drastically change the role of corporate democracy in the United States, but it does offer an excellent opportunity to examine some of the inbred weaknesses in the administrative framework and hopefully points the way for some overdue modifications.

Creditors' Rights—Section 77 Railroad Reorganization—Federal Priority Under Section 191 Denied; Interline Balance Claims Granted Priority Under Equitahle Six-Mouths Rule

The trustee of the Tennessee Central Railway Company, which was being reorganized under section 77 of the Bankruptcy Act,[1] petitioned in federal district court for a determination of the order of priority of creditor claims to the cash proceeds from the sale of part of the railroad's property and to the property unsold.[2] The principal creditors seeking priority were the United States, holder of a mortgage lien on the railroad property, and several rail carriers asserting claims for interline freight balances that accrued within six months of the filing of the

63. *See* 3 L. Loss, *supra* note 38, at 1894.

1. 11 U.S.C. § 205 (1964). "Stated briefly, § 77 has for its main purpose, 'the rehabilitation of the debtor . . . and its creditors and security holders, under a fair and equitable plan of reorganization which shall so modify or alter the rights of both secured and unsecured creditors that the fixed charges shall be brought within the probable future earnings available for the payment thereof.' During the process of reorganization, the section contemplates the continued corporate existence of the debtor under the control and supervision of the court. Although § 77 does not depart from the general theory of the Bankruptcy Act that one of the main purposes is to permit the creditors to share in the debtor's assets, yet it should be borne in mind that the section reflects a public policy that the operation of the railroads as sound, economic units should be achieved for the benefit of the public, regardless of the interests of creditors and stockholders." 5 W. COLLIER, BANKRUPTCY ¶ 77.02, at 469 (14th ed. 1969) (footnotes omitted).

2. Following several years of financial difficulty the debtor went into reorganization; shortly thereafter, the Interstate Commerce Commission, convinced that the debtor was hopelessly insolvent, authorized the abandonment of its entire line. Consistent with the purpose of § 77 to keep existing railroads in operation whenever possible, the Commission turned over temporary control of the debtor's lines to 3 other railroads to keep them running. Subsequently, it arranged for them to be sold. *In re* Tennessee C. Ry., 316 F. Supp. 1103 (M.D. Tenn. 1970).

reorganization petition.[3] Interline freight balances are freight charges collected by one railroad on behalf of other railroads pursuant to a reciprocal agreement involving the extension of short-term credit to the collecting carrier.[4] In the instant case, the debtor railroad had collected freight charges on behalf of the rail carriers but had failed to remit the payments due. The United States sought priority under section 191 of Title 31, United States Code,[5] which gives the United States first priority in assets "[w]henever any person indebted to the United States is insolvent." The United States also maintained that even if its claim for priority under section 191 were denied, it was still entitled to priority over all other creditors at common law because of the mortgage lien that it held on the railroad property. The rail carriers, on the other hand, contended that section 191 was not applicable to railroad reorganization proceedings under section 77 and that their claims for the interline freight balances were entitled to priority above even a mortgage lienholder because they came within the equitable six-months rule, which gives first priority to creditors who provide supplies or services necessary to a railroad's operation within six months prior to the initiation of reorganization proceedings. In the United States District Court for the Middle District of Tennessee, *held,* judgment granting priority to the rail carriers. Since section 191 cannot be applied in section 77 railroad reorganizations to give the United States first priority, claims for interline freight balances will have priority over a federal mortgage lien under the six-months rule if maintenance of the balances was necessary to the railroad's operation and beneficial to the mortgagee's security interest. *In re Tennessee Central Railway,* 316 F. Supp. 1103 (M.D. Tenn. 1970).

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3. In addition, 2 other categories of creditors were involved: (1) municipalities and counties, claiming recovery for back taxes for periods prior to the filing of the reorganization and (2) suppliers of cross-ties and diesel fuel to the debtor during the 6 months before the filing of the reorganization petition. The federal government's claim totaled $5,500,000; the rail carriers' claim for the interline freight balances was $1,200,000; the municipal and county tax claims were $80,000; and suppliers' claims were in excess of $100,000. The value of these claims is more than double the value of the debtor's assets. *Id.*

4. Most railroads, when shipping over another's lines, arrange to do so on a collect basis. This means that the terminal or settling carrier collects the total freight charge from the consignee and, in turn, distributes the money proportionately to all other railroads that were involved with the particular shipping movement. On the other hand, when freight is shipped on a prepaid basis, the shipper is required, at the point where freight is transferred from his line to another, to pay all charges due any railroad that will subsequently handle the shipment. Obviously, operating on a prepaid basis requires a greater degree of liquidity than shipping collect.

5. 31 U.S.C. § 191 (1964). This statute is frequently referred to as "§ 3466," its older name, which is derived from the Revised Statutes of 1878.

Section 191,[6] one of the oldest federal statutes in existence, was a codification of the common law prerogative of the Crown to have first priority in the payment of its claims.[7] To obtain priority under section 191, the debtor must be insolvent,[8] and this insolvency must be manifested in one of three ways:[9] (1) a voluntary assignment of the debtor's property; (2) attachment by process of law of the estate and effects of an absconding, concealed, or absent debtor; and (3) the commission of an act of bankruptcy. Consistent with the section's unqualified language[10] and its purpose to protect governmental claims, the Supreme Court has repeatedly held that section 191 should be given a liberal construction and a broad application.[11] This view has resulted in a continuing problem, however, because of the potential overlap and conflict between section 191 and other federal priority statutes, particularly those appearing in the Bankruptcy Act. In an 1875 case dealing with this problem,[12] the Supreme Court's analysis of section 191 and the Bankruptcy Act, as it then existed, revealed no inconsistency in applying both statutes concerning the priorities given to federal claims. The Court's holding on this point, however, was of relatively short duration. As a result of the 1898 amendments to the Bankruptcy Act,[13] the Court later ruled that even though section 191 could be applied, the United States' priority was fifth instead of first.[14] More than a decade

6. Section 191 was first enacted in essentially its present form in 1797. Act of Mar. 3, 1797, ch. 20, § 5, 1 Stat. 515. Slight changes were made in 1799, but the priorities remained the same as in the present codification. *See* Act of Mar. 2, 1799, ch. 22, § 65, 1 Stat. 676.

7. *See* United States v. State Bank, 31 U.S. (6 Pet.) 29, 35 (1832). *See also* United States v. Fisher, 6 U.S. (2 Cranch) 214, 236-37 (1805) (act upheld as constitutional); Blair, *The Priority of the United States in Equity Receiverships,* 39 HARV. L. REV. 1 (1925).

8. This term has been held to mean an insufficiency of property or assets rather than the inability to pay one's debts as they mature. *See, e.g.,* United States v. Oklahoma, 261 U.S. 253, 259-61 (1923); United States v. Press Wireless, Inc., 187 F.2d 294, 295 (2d Cir. 1951). The meaning of this term is noted along with more general comments upon § 191 in 3 R. CLARK, RECEIVERS § 669 (3d. ed 1959, Supp. 1968-69).

9. *See* United States v. Emory, 314 U.S. 423 (1941); Bramwell v. United States Fidelity & Guar. Co., 269 U.S. 483 (1926); United States v. Hooe, 7 U.S. (3 Cranch) 45 (1805). For some mild criticism of this unusual form of statutory construction see Blair, *supra* note 7, at 3-5.

10. In United States v. Vermont, 377 U.S. 351, 357 (1964), the Supreme Court stated that "[s]ection 3466 [§ 191] on its face permits no exception whatsoever . . . ."

11. *E.g.,* Price v. United States, 269 U.S. 492, 500 (1926).

12. Lewis v. United States, 92 U.S. 618, 623 (1875).

13. Act of July 1, 1898, ch. 541, § 64(b), 30 Stat. 563 (now 11 U.S.C. § 104 (Supp. V, 1969)) provides in part: "The debts to have priority, except as herein provided, and to be paid in full out of the bankrupt estates, and the order of payment shall be . . . (5) debts owing to any *person* who by the laws of the States or the United States is entitled to priority." (emphasis added).

14. Guarantee Title & Trust Co. v. Title Guar. & Sur. Co., 224 U.S. 152, 157-60 (1912). This case provides a good illustration of the analysis necessary to decide whether a statute restricts the operation of § 191. Specific mention of the United States was held to be a prerequisite to finding such a restriction.

thereafter, the Court changed its position a second time in an unprecedented interpretation of the applicability of section 191 in conventional bankruptcy proceedings. In *Davis v. Pringle,*[15] the Court held that the United States was not a "person" within the meaning of the Bankruptcy Act and therefore was not entitled to any priority by incorporation of section 191. Because the decision was clearly inconsistent with the traditional view of section 191 which allows no limitation upon its operation without an express statutory restriction on federal priority, Congress specifically nullified the *Davis* holding and restored the United States to its former priority by amending the Bankruptcy Act the next year.[16] The response of the Supreme Court was to return to its policy of giving section 191 broad applicability. Analyzing the scope of another federal priority statute in 1941 in *United States v. Emory,*[17] the Court held that the National Housing Act[18] did not create an implied exception to the operation of section 191. It reasoned that only the plainest inconsistency between section 191 and the purposes of the Housing Act would warrant a limitation on the operation of section 191.[19] In a very recent decision, *United States v. Key,*[20] the Supreme Court, relying once again on the plain inconsistency test, applied section 191 to give the United States first priority in corporate reorganizations under Chapter X of the Bankruptcy Act.[21] Even though not necessary to that precise holding, the Court further stated that under the plain inconsistency rationale section 191 would also be applicable to section 77 railroad reorganizations. One important secondary authority on bankruptcy has agreed with this view,[22] although no court has yet considered the issue directly.

The six-months rule is an equitable doctrine that first appeared in railroad reorganization proceedings.[23] It is premised on the belief that

15. 268 U.S. 315 (1925). This decision appeared to overrule Guarantee Title & Trust Co. v. Title Guar. & Sur. Co., 224 U.S. 152 (1912), which had not considered the question whether the United States was a "person" within the meaning of the Bankruptcy Act.

16. Congress amended the Bankruptcy Act so that "person" in the fifth category of priority included the United States. Act of May 27, 1926, ch. 406, § 15(b)(7), 44 Stat. 667 (now 11 U.S.C. § 104 (Supp. V, 1969)).

17. 314 U.S. 423 (1941).

18. Act of June 27, 1934, ch. 847, § 2, 48 Stat. 1246 (now 12 U.S.C. § 1703 (Supp. V, 1969)).

19. In Massachusetts v. United States, 333 U.S. 611, 628-29 (1948), the approach of *Emory* was applied to a § 191 claim under the Social Security Act. This case provides a good illustration of the analysis necessary before a limitation on § 191's operation can be found.

20. 397 U.S. 322 (1970).

21. 11 U.S.C. §§ 501-676 (1964 & Supp. V, 1969).

22. 4 W. COLLIER, *supra* note 1, ¶ 67.24, at 339.

23. For an historical background of the 6-months rule see 3 R. CLARK, *supra* note 8, § 668(b). *See also* 37 AM. L. REV. 677 (1903) (remarks of Henry Clay Caldwell on the tragic occurrenee that

both the public and the creditors of a railroad have a vital interest in the railroad's continued operation, even if it is financially unstable.[24] Consequently, those who provide supplies and services necessary to keep a railroad in operation are thought to contribute to the public good and also to preserve the railroad's security value for its creditors. If the supplies and services are provided within six months of the reorganization proceedings, the courts have deemed it inequitable to require creditors of this nature to suffer a loss in the event of the railroad's insolvency. Because the six-months rule is a doctrine of judicial discretion, it has been variously applied, and a division of authority has arisen concerning which of the railroad's assets can be tapped for the payment of six-months claims. Two major theories exist. The first, the net income theory, was formulated in *Fosdick v. Schall*[25] in which the Supreme Court reasoned that "[e]very railroad mortgagee in accepting his security impliedly agrees that the current debts made in the ordinary course of business shall be paid from the current receipts before he has any claim upon the income."[26] Thus, under this theory, six-months creditors have a preference over the mortgagee against the current earnings or operations fund of the railroad, but not against the net income that remains after the payment of current operation expenses, which is subject only to the claims of the mortgagees. Moreover, payment of the six-months creditors from the corpus of the mortgaged property is impermissible under this view without an inequitable diversion of current earnings to the mortgagee's benefit and to the creditors' detriment. The second and more recent theory concerning the type of assets subject to six-months claims is the necessity of payment theory. It grew out of two Supreme Court decisions. In *Miltenberger v. Logansport Railway*,[27] the Court upheld the payment of claims for

convinced him of the correctness of the 6-months rule); 30 AM. L. REV. 161 (1896) (speech by Caldwell on railroad receiverships in the federal courts).

24. *See* 3 R. CLARK, *supra* note 8, § 676; 6A W. COLLIER, *supra* note 1, ¶ 9.13(5), at 249; Fordham, *Preferences of Prereceivership Claims in Equity Receiverships*, 15 MINN. L. REV. 261 (1930); Wham, *Preference in Railroad Receiverships*, 23 ILL. L. REV. 141 (1928).

25. 99 U.S. 235 (1878). This case arose out of a conflict between the owner of railroad cars, selling them to a railroad in receivership on a deferred payment plan, and a mortgage holder, claiming the cars through an after-acquired property clause in his mortgage agreement. Because the cars were necessary to the operation of the railroad, the 6-months claimant was entitled to payment out of the current earnings.

26. *Id.* at 252. *See also* Southern Ry. v. Carnegie Steel Co., 176 U.S. 257 (1900); Burnham v. Bowen, 111 U.S. 776 (1884); *In re* Chicago & N.W. Ry., 110 F.2d 425 (7th Cir. 1940).

27. 106 U.S. 286 (1886). Claims due other railroads for materials and repairs and for tickets and freight balances were allowed over the objections of mortgage holders. Crucial to this decision was the finding that the payment of these claims was necessary and indispensable to the business of the railroad and the preservation of its property. The Court even suggested that payment out of the corpus of the mortgaged property might be allowed under proper circumstances. *Id.* at 311.

traffic balances out of current earnings because their incurrence was necessary to the operation and the business of the railroad. In a subsequent decision,[28] the Court added a dimension to the *Miltenberger* rationale by suggesting that it also permitted an invasion of the mortgaged corpus without an inequitable diversion of current earnings if the claims were based on debts incurred to keep the railroad a going concern. Though seemingly a semantic distinction, the difference between debts incurred as necessary to the operation and business of a railroad and those incurred to keep it a going concern should be noted. The former category embraces debts incurred for fuel, equipment, or maintenance since these items are necessary to the railroad's physical operation and make possible the production of income. The latter includes debts undertaken for the preservation of goodwill or business potential both of which are considered necessary to keep even a physically well-equipped railroad solvent and a going business. Only a few courts have decided whether claims for interline freight balances are entitled to priority under either theory of the six-months rule, and none have expressly characterized the balances to determine whether they can be used to pay the claims of the other railroads. If the balances are part of the current earnings, then under both theories claims for them will be given priority. If, on the other hand, the balances are part of the corpus, these claims will get no priority under the net income theory while priority is possible under the necessity of payment theory.[29] In *Southern Railway v. Flournoy*[30] the court found that participation in the freight interchange system was essential to the continuation of the debtor railroad's business, and, impliedly following the necessity of payment theory, accorded claimants for interline balances priority over the claims of mortgagees. Another decision[31] similarly concluded that interline balances were essential to a railroad's operation and, following *Flournoy*, gave claims for interline balances the protection of the six-months rule.

Although the court in the instant case observed that one of the purposes of section 77 was to allow creditors to share in the railroad's

28. Gregg v. Metropolitan Trust Co., 197 U.S. 183 (1905). In this case there was no diversion of income to the benefit of the mortgagees that could justify payment of a claim for railroad ties alleged to be necessary to keep the railroad a going concern. Without special equities the Court would not allow an invasion of the mortgaged corpus for payment of the claim.

29. *Compare* Southern Ry. v. Flournoy, 301 F.2d 847 (4th Cir. 1962), *with In re* New York, N.H. & H.R.R., 405 F.2d 50 (2d Cir. 1968). *See also In re* Central R.R., 273 F. Supp. 282 (D.N.J. 1967).

30. 301 F.2d 847 (4th Cir. 1962).

31. *In re* Central R.R., 273 F. Supp. 282 (D.N.J. 1967) (interline accounts create debtor-creditor relationship, not trust relationship).

assets under a fair and equitable plan, it initially found that section 77's overriding policy was to maintain the railroads as sound, operational, economic units for the benefit of the public. Rejecting the United States' contention that section 191 gave preference to its mortgage lien, the court pointed out that the section had long been held inapplicable to conventional bankruptcy proceedings. Therefore, following the Supreme Court's rationale in *Davis v. Pringle*,[32] the court held that section 191 could not be integrated into the Bankruptcy Act to create priorities for the United States not expressly placed there by Congress. Accordingly, the court found that section 191 does not give the United States priority in section 77 reorganization proceedings. In a supplementary opinion, the court examined *United States v. Key*,[33] decided by the Supreme Court during the instant reorganization proceedings, in which it was suggested that "[n]othing in section 77 casts any doubt on the continued priority of the United States under [section 191]."[34] The supplementary opinion concluded that the language in *Key* was dictum because the Court there dealt only with the applicability of section 191 to Chapter X reorganizations. Turning to the carriers' contention that the six-months rule warranted preference of their claims above the government's mortgage lien, the court stressed the unusual facts of the instant reorganization. Distinct in this regard, according to the court, was the carriers' willingness to continue interline freight balances on a collect basis when the debtor's financial problems were well-known.[35] Since the court concluded that this unquestionably kept the debtor railroad in operation, it found that the carriers had conferred a benefit on the government as mortgagee, even though there was no technical diversion of income, and therefore had an equitable right to priority in their claims, if the other requirements of the six-months rule were met. In order to make this determination, the court analyzed both the net income and necessity of payment theories and adopted the latter.[36] While not directly characterizing interline balances, the court found that even if they were part of the mortgaged corpus instead of current earnings, the *sine qua non* of paying six-months claims from the mortgaged corpus was not a diversion of income to the benefit of the mortgagees. The

32. 268 U.S. 315 (1925).

33. 397 U.S. 322 (1970).

34. *Id.* at 330.

35. *See* notes 3-4 *supra* and accompanying text.

36. The court in its treatment of the issue of payment of claims from the mortgaged corpus mentioned that these 2 approaches were very similar. This is correct, but it should be noted that they differ markedly on the issue of corpus invasion for the payment of 6-months claims.

court, therefore, held that the carriers should be given priority over the United States on their claims for interline freight balances.

The instant court's denial of priority to the United States under section 191 is questionable because of its reliance on *Davis* and disregard for the *Emory* and *Key* decisions. In *Davis,* a straight bankruptcy case, the Supreme Court refused United States priority under section 191, reasoning that section 191 could not be incorporated into section 64 of the Bankruptcy Act to give federal priority because the United States was not a "person" entitled to priority under the laws of the United States. The court in the present case, however, construed *Davis* to represent the broader proposition that section 191 cannot be incorporated into the Bankruptcy Act, as a whole, to create priorities not specifically placed there by Congress.[37] While such an expansive construction of *Davis* is possible, it should be noted that section 77 is independent of the priority sections applicable in ordinary bankruptcy. In addition, the court omits any mention of the legislative response to the *Davis* decision; the year after it was handed down Congress amended the Bankruptcy Act specifically to overrule its holding. Another factor casting doubt on the validity of the instant decision is the court's disregard for the *Emory* and *Key* decisions, which were clearly relevant to any determination of the applicability of section 191. While it may have been defensible to ignore the *Key* dictum to the effect that section 191 applied in railroad reorganizations, the instant court should have more carefully considered its holding in light of that Supreme Court precedent. Similarly, it should be noted that the plain inconsistency test, as applied in *Emory* and *Key,* is more consistent with the traditionally liberal interpretation of section 191. In past applications, there has been a presumption that section 191 is operative unless some substantial reason for its exclusion was raised; however, in the instant court's view, a statute such as the Bankruptcy Act is presumed to be exclusive in its sphere, and section 191 cannot encroach unless specifically incorporated. This contrast is more than a meaningless difference in approach because the former interpretation advances the legislative purpose of section 191 and the latter does not.

Because of the conflicts problems that section 191 has raised, a determination of whether it provides desirable results in the modern context must be made. When the section was enacted in 1797, the federal government's economic power had not so thoroughly permeated society,[38] and section 191's harsh impact was rarely felt. Now that the

37. *See* note 32 *supra* and accompanying text.

38. Plumb, *Federal Liens and Priorities—Agenda for the Next Decade,* 77 YALE L.J. 228, 244 (1967).

government is involved extensively at every level of the credit structure of our economy, continuation of the federal priority under section 191 will lead to increasingly more drastic effects.[39] The government obligations of a failing business, for example, will often be so great that the federal claim alone will absorb all of the available assets and leave nothing for the other creditors. This would have been the result in the instant case if the court had held section 191 applicable. It is submitted, therefore, that section 191 effectively prevents a concern with large governmental obligations from securing additional private financing because of the fear of federal priority. Certainly this result is contrary to the governmental policy of encouraging private investment. In recent years some very creditable measures have been advanced to ameliorate the harshness of section 191.[40] Essentially, they call for recognition of the priority of certain types of debts, such as administrative and funeral expenses and wage claims, over federal claims and provide for a legislative declaration of the exclusiveness of the priority scheme in the Bankruptcy Act.[41] Unfortunately, Congress has not yet acted to resolve this problem.

Even though the reasoning in this case is questionable, by granting priority under the six-months rule to the rail carriers' claims for interline freight balances, the court seems to be bringing equity in line with both the financial realities of a national railroad system and the purposes of section 77.[42] No railroad today could remain in business without the ability to make interline freight shipments because it would be limited to providing service in only those areas where its tracks lie. The willingness of railroads to maintain interline accounts enables them to offer national service with only minimal difficulty to the shipper. Moreover, with

39. *Id.* at 244-48.

40. Kennedy, *The Relative Priority of the Federal Government: The Pernicious Career of the Inchoate and General Lien,* 63 YALE L.J. 905, 932 (1954); 84 ABA REPORTS 731 (1959).

41. *See* note 40 *supra.* The American Bar Association's proposed changes in § 191 (or § 3466) provide in part:

SEC. 3466 PRIORITY IN INSOLVENCY.

(a) PRIORITY ESTABLISHED. When an insolvent debtor of the United States is divested of the title or possession, or both title and possession, of all or substantially all of his property for the purpose of effecting general administration for the benefit of creditors otherwise than in bankruptcy, or when the estate of a deceased debtor of the United States is insolvent, the claims of the United States shall be entitled to priority of payment, subject to the following qualifications:

. . . .

(6) RULE IN BANKRUPTCY. This section is a law of the United States entitling the United States to priority within the meaning of the Bankruptcy Act, and in proceedings under that Act the claims of the United States shall have the degree of priority therein specified.

42. *See* note 1 *supra.*

railroads everywhere experiencing financial problems, the use of these interline accounts on a collect basis certainly provides a partial alleviation of the liquidity crisis. As the court in this case noted, Tennessee Central could not have operated on any other basis because it did not have the funds to prepay its shipments to their ultimate destinations. Perhaps the most significant effect of the instant decision is that it minimizes the risks to other railroads of shipping with a financially unstable railroad on a collect basis. Even if a railroad becomes insolvent, its interline balances, representing freight charges settled and held for remittance to other railroads, will be collectible in reorganization proceedings because of their preferred position under the six-months rule. The protection given by the instant case to the short-term credit practice of the interline accounting system provides a needed impetus to assist the troubled railroads in their efforts to stay solvent.

Criminal Procedure—Breach of the Peace—State Peace Bond Statute Estahlishes Criminal Proceedings and Mnst Satisfy Requirements of Dne Process and Eqnal Protection Clanses

Following the declaration of a third-party complaint, defendant was arrested and brought before a magistrate in accordance with the Hawaiian peace bond statute.[1] Satisfied that the complainant's fear of being injured by the accused was not groundless, the magistrate directed the defendant to give bond with sufficient surety that he would not commit an offense against the person or property of the complainant.[2] Defendant, incapable of paying the bond, was committed to prison for the term over which the bond would have been effective.[3] At his hearing, the defendant contended that the statute unconstitutionally

1. HAWAII REV. STAT. § 709-31 (1968) provides: "When any one fears that another intends to commit an offense against his person, or property, with violence, he may apply to any district magistrate, who shall take the declaration of the applicant, under oath, reduced to writing; and if it appears that he has reason to fear the commission of the offense, the magistrate may cause the person complained of to be arrested and brought before him by warrant."

2. The magistrate acted pursuant to HAWAII REV. STAT. § 709-33 (1968): "If the [accused] fails in showing that the application is groundless, the magistrate shall direct the accused to give bond, in a sum proportioned to the nature of the offense, with sufficient surety that he will commit no offense against the person or property of the complainant."

3. Although the court did not state the precise term for which the bond had been set, it did note that, notwithstanding a one-year statutory maximum, incarceration for over a year was possible if the bond were renewed at the end of the first year pursuant to HAWAII REV. STAT. § 709-36 (1968). A defendant may, however, be released earlier if payment of the bond is made or if the magistrate, upon "good cause shown," chooses to release him. HAWAII REV. STAT. § 709-34 (1968).

discriminated against impecunious defendants whose failure to pay a peace bond automatically resulted in incarceration.[4] Defendant further maintained that the statute deprived him of his liberty without due process by placing upon him the burden of proving his innocence[5] and by relaxing the quantum of proof normally required in criminal cases to less than "beyond a reasonable doubt." Conceding these operative effects of the statute, the State contended that since peace bond hearings are not criminal proceedings, the constitutional safeguards afforded a criminal defendant are not required.[6] On application for a writ of habeas corpus to the Third Circuit Court of Hawaii, *held*, application granted. The Hawaiian peace bond statute establishes criminal proceedings and therefore must satisfy the requirements of the due process and equal protection clauses of the Constitution. *Santos v. Nahiwa*, 39 U.S.L.W. 2149 (Hawaii Cir. Ct., Aug. 31, 1970).

During the reign of Edward III, Parliament created the office of justice of the peace[7] and authorized the holder of that office to demand security from all those that were not "of good fame" for their future "good behavior towards the king and his people."[8] These fourteenth century enactments are the common law precursors of similar statutes in more than 30 states.[9] A few of these statutes, commonly called "behavior bond statutes,"[10] expressly preserve for the justice of the peace the power to require those of "bad character"[11] or "not of good fame"[12] to enter into a recognizance with sufficient sureties for their future good behavior. The majority of the statutes, however, limit the jurisdiction of the magistrate[13] to "peace bond" proceedings. As distinguished from the "behavior bond" hearings, "peace bond"

4. HAWAII REV. STAT. § 709-34 (1968) provides: "If the bond is not executed according to the order of the magistrate, the prisoner shall be committed to prison and shall remain in custody until the bond is so executed, such custody not to exceed the term for which the bond shall operate."

5. *See* note 2 *supra*.

6. Respondents argued that peace bond proceedings are not embraced by the fourteenth amendment since they are more civil than criminal in nature.

7. Statute of Westminster, 1 Edw. 3, stat. 2, c. 16 (1327).

8. Statute of Westminster, 34 Edw. 3, c. 1 (1360).

9. For a complete list of state statutes see Note, *Peace and Behavior Bonds—Summary Punishment for Uncommitted Offenses*, 52 VA. L. REV. 914, 926-27 n.65 (1966).

10. Note, *supra* note 9, at 915-20.

11. COLO. REV. STAT. ANN. § 39-2-1(1) (1963).

12. VA. CODE ANN. § 19.1-20 (1960); W. VA. CODE ANN. § 62-10-1 (1966). *See also* Fedele v. Commonwealth, 205 Va. 551, 138 S.E.2d 256 (1964).

13. The office given the statutory power to conduct peace bond proceedings varies among the states but it generally includes more than the justice of the peace. In Tennessee, for example, magistrates include, *inter alia*, judges, justices of the peace, mayors, and chief officers and recorders of any incorporated city or town. TENN. CODE ANN. § 38-301 (Supp. 1970).

proceedings are initiated by a third-party's entering a complaint with the justice of the peace that another person intends[14] to commit an offense against the complainant's person[15] or property.[16] The magistrate may then have the person arrested and brought before him for a hearing.[17] If the magistrate finds there is a just reason to fear violence, he may require the accused to give security, in such sum and for such duration as he feels necessary[18] to keep the peace toward all people of the state and particularly toward the complainant.[19] If the accused fails to give bond, he may be imprisoned in some states for as long as two years.[20] Notwithstanding such a harsh possibility, peaee bond proceedings have traditionally failed to secure for the accused the safeguards normally afforded defendants in state and federal criminal proceedings. In the absence of statutory provisions, for example, the accused has no right to a jury trial.[21] Moreover, the quantum of proof required is generally a preponderance of the evidence rather than beyond a reasonable doubt.[22] Nonetheless, peace bond proceedings have remained relatively undisturbed by constitutional attack.[23] Instead, courts have drawn a distinction between the punitive nature of a criminal prosecution for a past offense and the preventive function of a peace bond against an uncommitted future offense.[24] It has been generally held that since a

14. States vary in the extent to which a person's intent must be manifest. In some states a mere threat will suffice, while in others his intent must be manifested by his conduct. For a complete listing of the requirements of the several states see Note, *supra* note 10, at 920-21 n.37. *See also* Murray v. State, 32 Ala. App. 305, 25 So. 2d 704 (1946); Commonwealth v. Cushard, 184 Pa. Super. 193, 132 A.2d 366 (1957).

15. *E.g.*, *In re* Bordelon, 210 La. 1080, 29 So. 2d 162 (1946); Commonwealth v. Taub, 187 Pa. Super. 440, 144 A.2d 628 (1958); *Ex parte* McCain, 153 Tex. Crim. 517, 221 S.W.2d 781 (1949).

16. *E.g.*, People *ex rel.* Smith v. Blaylock, 357 Ill. 23, 191 N.E. 206 (1934).

17. The time for conducting the hearing may vary, but in some states the magistrate may conduct it at any time he chooses, conceivably at 3:00 A.M. *E.g.*, TENN. CODE ANN. § 19-205 (1955).

18. Most states place limits on the amount of the bond and the duration of commitment. For a complete list of these limits see Note, *supra* note 10, at 926-27 n.65.

19. *See* State *ex rel.* Yost v. Scouszzio, 126 W. Va. 135, 27 S.E.2d 451 (1943).

20. 39 U.S.L.W. 2149 (Hawaii Cir. Ct. Aug. 31, 1970); Arnold v. State, 213 Miss. 667, 57 So. 2d 484 (1952).

21. *In re* Way, 56 Cal. App. 2d 814, 133 P.2d 637 (1943); Herz v. Hamilton, 198 Iowa 154, 197 N.W. 53 (1924); Commonwealth v. Taub, 187 Pa. Super. 440, 144 A.2d 628 (1958).

22. Ford v. State, 96 Miss. 85, 50 So. 497 (1909) (doubts should be resolved in favor of the preservation of the peace); State *ex rel.* Shockley v. Chambers, 278 S.W. 817 (Mo. Ct. App. 1926) (doubts should be resolved in favor of requiring the bond to be given instead of in favor of acquittal).

23. *See* cases cited note 21 *supra*. "Behavior bonds," however, have been successfully challenged as being unconstitutionally vague. Commonwealth v. Franklin, 172 Pa. Super. 152, 92 A.2d 272 (1952). *Contra*, Jones v. Peyton, 411 F.2d 857 (4th Cir. 1969).

24. *See* cases cited note 21 *supra*.

peace bond proceeding seeks to prevent crime, it does not come within the ambit of constitutional safeguards accorded defendants in criminal proceedings.[25] Expansion of the fourteenth amendment,[26] however, especially as it pertains to indigent defendants,[27] has raised questions concerning how long this distinction can continue to shelter the broad discretion enjoyed for so long by magistrates in discharging their historic duty as conservators of the peaee.[28]

The instant court initially concluded that a peace bond hearing is a criminal proceeding[29] and must afford the same constitutional rights as any other criminal proceeding. In this regard, the court found that the Hawaiian peace bond statute fails to meet two standards of due process: first, it places upon the defendant the affirmative burden of proving his innocence; and secondly, it requires less than the quantum of proof normally demanded in criminal cases.[30] After finding that the defendant was an indigent, the court turned to the equal protection issue and concluded that the statute unduly discriminates against those without economic means to post bond. More specifically, the court pointed out that the statute establishes two classes: "defendants who have the economic capacity to post a peace bond and . . . defendants who are indigents."[31] The court reasoned that the classification has no rational relationship with the declared governmental objective of protecting those who have been threatened by others. Thus, succinctly and without citing authority, the court concluded that the statute's constitutional infirmities were fatal and ordered the defendant's discharge.[32]

The decision of the Hawaiian Circuit Court marks the first significant judicial effort to correct what has become an anachronism in a setting of expanding constitutional rights. Like many common law doctrines the peace bond has become a non-heroic Don Quixote of the law, which like the last knight errant of chivalry, "now wanders

25. *Id.*

26. *See generally* Tucker, *The Supreme Court and the Indigent Defendant*, 37 S. CALIF. L. REV. 151 (1964).

27. *E.g.*, Williams v. Illinois, 399 U.S. 235 (1970); Gideon v. Wainwright, 372 U.S. 335 (1963); Smith v. Bennett, 365 U.S. 708 (1961); Griffin v. Illinois, 351 U.S. 12 (1956).

28. Note, *supra* note 9, at 922-23.

29. "[U]nder a peace bond proceeding, a hearing or trial is held, a determination is made by the magistrate, and . . . the results are similar to that of a sentence imposed after conviction of a criminal charge in that defendant is deprived sometimes of his liberty or deprived of property (cost of posting bond)." Santos v. Nahiwa, S.P. No. 651, at 3 (Hawaii Cir. Ct. Aug. 31, 1970).

30. *See* note 2 *supra*.

31. Santos v. Nahiwa, S.P. No. 651, at 4 (Hawaii Cir. Ct. Aug. 31, 1970).

32. The court noted 3 further possible reasons why the statute violates the Constituton. First, it abrogates the presumption of innocence; secondly, it fails to provide a trial by jury; and thirdly, it fails to charge defendant by Grand Jury. 39 U.S.L.W. 2149 (Hawaii Cir. Ct. Aug. 31, 1970).

aimlessly through the reports, still vigorous, but equally . . . dangerous."[33] While extended applicability of the fourteenth amendment to state proceedings has secured for criminal defendants the right to counsel,[34] to trial by jury,[35] to confrontation and cross examination,[36] to notice,[37] and to a transcript of lower court proceedings when required for appeal,[38] the defendant in a peace bond proceeding has remained neglected. The rationale for this disregard has hinged on a distinction[39] that itself reflects a waning attitude; for even incarceration for a past crime has come to be viewed by modern penologists,[40] at least in part, as a rehabilitation to prevent future offenses and not as a retribution for past violence. The Hawaiian court has resolved the issue by holding that the peace bond proceeding is a criminal proceeding. The question therefore remains whether a different characterization of peace bond proceedings would require a different resolution of the constitutional issues. In this regard, it is submitted that if the court had described the proceedings as civil or "quasi criminal"[41] it still could have comfortably made the same holding vis-a-vis due process. The Supreme Court has recently held that the label attached to a proceeding cannot in and of itself defeat the requirements of the fourteenth amendment.[42] The realities of the proceeding are controlling.[43] "It is the likelihood of involuntary incarceration . . . which commands observance of the constitutional safeguards of due process."[44]

In treating the equal protection issue, the court has failed to clearly delineate its reasons for holding the statute unconstitutional. Notwithstanding its visceral appeal, the decision's cursory treatment of this issue threatens to dilute its value and credibility. It may be helpful, therefore, to examine more closely the instant statute and alternative statutory schemes and their limitations. The Hawaiian statute classifies defendants solely on the basis of economics. While it may be that a

33. Polk v. Faris, 9 Yerg. 209, 233 (Tenn. 1836) (speaking of the Rule in Shelley's Case but equally apropos of peace bonds).

34. Gideon v. Wainwright, 372 U.S. 335 (1963).

35. Duncan v. Louisiana, 391 U.S. 145 (1968).

36. Pointer v. Texas, 380 U.S. 400 (1965).

37. *In re* Oliver, 333 U.S. 257 (1948).

38. Griffin v. Illinois, 351 U.S. 12 (1956).

39. *See* cases cited notes 24-25 *supra* and accompanying text.

40. *See generally Special Project—The Collateral Consequences of a Criminal Conviction*, 23 VAND. L. REV. 929, 1218 (1970).

41. Herz v. Hamilton, 198 Iowa 154, 197 N.W. 53 (1924).

42. *In re* Winship, 397 U.S. 358, 365-66 (1970); Giaccio v. Pennsylvania, 382 U.S. 399, 402 (1966).

43. *In re* Gault, 387 U.S. 1, 27-28 (1967).

44. Heryford v. Parker, 396 F.2d 393, 396 (10th Cir. 1968).

classification so drawn is not "wholly" irrelevant to the deterrent purpose of the statute, it at least maximizes consideration of only one factor to the exclusion of all others. There is a class of defendants whose threats are minimal[45] and for whom the realization that the authorities have notice of their private designs[46] makes imprisonment an unnecessary deterrent. By failing to make an exception of this group, the economic-oriented classification is overinclusive and thereby violates the equal protection and due process clauses.[47] This conclusion, however, does not invalidate the purpose of the statute; the state clearly has a legitimate objective in attempting to deter the perpetration of threatened crimes. The question, therefore, is whether, in light of the constitutional and policy implications involved, the state thinks the objective is sufficiently desirable to change the statute. Should the state decide to attempt to realize this objective, the "overkill" of the statute might be remedied by permitting an impecunious defendant's release on his own recognizance without bond (ROR) when noneconomic factors suggest that incarceration is not necessary to dissuade him.[48] Equal protection as well as substantive due process may then require making ROR also available to the pecunious defendant since the same noneconomic factors could make deprivation of money unnecessary to effect the state's objective. Although inclusion of ROR for both indigent and pecunious defendants corrects the statute's constitutional infirmities whenever noneconomic factors suggest that deprivation of either property or liberty is unnecessary, an unconstitutional discrimination remains when the same factors suggest that ROR is not a sufficient deterrent. When payment of the maximum bond is not sufficient to deter a pecunious defendant, the statute does not permit his incarceration. On

45. The complainant can demand a bond merely by showing that he has reasonable cause to fear either corporeal or property injury by the defendant. Although consideration of noneconomic factors permits variation of the amount of bond and duration of confinement, these factors are never allowed to dispense entirely with the requirement of bond or incarceration once the defendant fails to disprove that the complainant has a reasonable cause to fear.

46. It has been argued that this factor is actually one of the most effective deterrents of peace bond proceedings. Note, *supra* note 9, at 922.

47. Since liberty involves such a fundamental interest, it must be assumed that more than a mere rational basis is required to establish the statute's constitutionality under the equal protection clause. Under the more stringent test of equal protection, the statute's constitutionality rests on 3 factors: (1) whether there is a legitimate state objective in implementing the classification; (2) whether the classification is drawn as narrowly as possible to achieve that objective; and (3) whether the state has a compelling interest in furthering the objective. Consideration of the third factor is not necessary in the instant case since the statute clearly fails on the second. *See generally Developments in the Law—Equal Protection*, 82 HARV. L. REV. 1065 (1969).

48. Note that ROR will only cure the overinclusion of the statute and does not remedy all possible substantive and procedural due process infirmities or other equal protection objections.

the other hand, when money is not sufficient to deter an indigent because of his inability to post bond, jail is automatic. Money is no more an effective deterrent for the pecunious defendant who intends to forfeit the bond in order to consummate his threat than it is for the impecunious defendant who is unable to pay bond; nevertheless, the economic classification operates to allow the former to go free and to require the latter to be imprisoned.[49] In effect the state has imposed two different policies: As to pecunious defendants, inadequacy of money to deter the crime does not require incarceration, but as to impecunious defendants, inadequacy of money to deter the crime requires incarceration. The inconsistency may be corrected either by requiring incarceration of the pecunious defendant when non-economic factors suggest that money will not deter him, or by completely removing the possibility of incarceration from the statute. It is submitted that use of incarceration, if not unconstitutional,[50] is at least undesirable. Though the state's interest in deterring threatened crimes may be a valid and worthy objective, it should not be elevated above the longstanding requirement in criminal law that intent be accompanied by an *actus reus*. Unless there exists an act sufficient to constitute an attempt, the state's interest should not take priority over so deeply ingrained a notion of fairness that prohibits imprisonment of the criminal defendant in the absence of an overt act. A more reasonable solution would be to completely remove the possibility of incarceration and rely solely on the use of bonds. This alternative would not materially compromise the state's objective since the majority of defendants are likely to be pecunious defendants whose crimes can be deterred by the payment of money.[51] Though a reverse discrimination

49. A more intricate method of arriving at the same conclusion is by focusing on the proposition that jail is a substitute for the deterrent value of money. When there is no deterrent value in exacting a bond from a pecunious defendant, he is not incarcerated. When the money for which the indigent defendant has substituted jail would be of no deterrent value if he had it to post bond, he is incarcerated. To correct this inconsistency, 3 alternatives are available: pecunious defendants could be jailed when money is of no deterrent value; the impecunious defendant could be released when it is shown that if he had money to post bond it would be of no deterrent value; or jail could be dispensed with in all cases. The second alternative is patently unsatisfactory and leads to an absurd situation when a threat to assault the complainant causes an impecunious defendant to be imprisoned, while an unequivocal and determined threat to kill the complainant requires the defendant's release. The remaining 2 alternatives will be discussed in the text.

50. Incarceration is not only an important policy consideration, but it also may be a constitutional impasse by violating the fundamental fairness requirement of the fourteenth amendment as set forth in Griswold v. Connecticut, 381 U.S. 479, 499-502 (1965) (Harlan, J., concurring).

51. It is recognized that the assumption that most crimes can be deterred by the payment of money has not been empirically verified. This premise, however, seems consistent with the Hawaiian legislature's decision not to provide for incarceration of pecunious defendants. If the legislature did not feel that most threatened crimes could be deterred by the payment of money it seems questionable that they would have enacted a peace bond statute at all.

would then operate to deprive the pecunious defendant of money while depriving the impecunious defendant of nothing, the inequality would not be as serious as that in the present statute because the deprivation of money to further the state's objective would not abridge as fundamental an interest as would the deprivation of liberty.[52] In any event, it seems clear that no statute or policy decision can be realistically or fairly predicated on purely economic factors. There are simply too many other elements at play that demonstrate the total inadequacy of such an approach. Adoption of this alternative, however, is less important than acceptance of the approach involved in reaching it. Verbalized intuition has all too frequently caused courts to create an aura of imprecision around the resolution of constitutional issues. If these ambiguities are ever to be clarified, an effort must be made to clearly identify and balance the individual and state interests involved.

Criminal Procedure—Presumption of Innocence—Cautionary Instruction to Jury that Presumption of Innocence is Not Intended To Aid the Guilty To Escape is Not Misleading or Erroneons

Defendant, convicted of assault with a deadly weapon, charged as error a portion of the trial court's instruction to the jury concerning the purpose and effect of the presumption of innocence in a criminal proceeding. The first instruction on the presumption of innocence contained the standard positive definition of the rule,[1] but the second instruction, which was inserted as a cautionary device, warned that the presumption is a "humane provision of the law" and "is not intended to aid anyone who is in fact guilty to escape."[2] Defendant contended that

52. Moreover, since the majority of defendants can be deterred by the requirement of a bond, the state could more easily demonstrate a compelling state interest in discriminating against pecunious defendants than in discriminating against indigent defendants by the use of imprisonment.

1. "YOU ARE INSTRUCTED that the defendant is presumed to be innocent of the crime charged against him until he is proven guilty beyond a reasonable doubt. This presumption of the defendant's innocence accompanies him throughout the trial and goes with the jury in their retirement and deliberation in the jury room . . . and it entitles the defendant to an acquittal unless it is overcome by such evidence as to satisfy the jury of the defendant's guilt beyond a reasonable doubt." Carillo v. State, 474 P.2d 123, 124 (Wyo. 1970).

2. The full text of this instruction, which followed immediately after the instruction set forth in note 1, *supra*, was as follows: "YOU ARE INSTRUCTED that the rule which clothes every person accused of crime with the presumption of innocence and imposes upon the State the burden of establishing his guilt beyond a reasonable doubt *is not intended to aid anyone who is in fact guilty to escape*, but is a humane provision of the law, intended insofar as human agencies can, to guard

this latter instruction was an outdated, misleading, and erroneous qualification that destroyed the protection of the presumption. The state asserted that similar instructions have been approved by the majority of courts that have decided this issue. On appeal to the Wyoming Supreme Court, *held*, affirmed. When a jury is fully instructed about the presumption of innocence and the meaning of "reasonable doubt," a cautionary instruction that the presumption is not intended to aid a guilty person to escape is not improper or misleading. *Carillo v. State*, 474 P.2d 123 (Wyo. 1970).

Although the presumption of innocence is not expressly required by the Constitution, it has been adopted as a principle of criminal law by the United States Supreme Court.[3] In addition, several state statutes provide that the presumption is a right to be afforded all accused citizens.[4] Since the origin of the presumption of innocence is unknown,[5] there are a number of hazy definitions of the rule. It has been generally described, however, as a "conclusion drawn by the law in favor of the citizen, by virtue whereof, when brought to trial upon a criminal charge, he must be acquitted, unless he is proven to be guilty."[6] In actual practice the presumption of innocence serves two purposes. It initially acts as a rule of procedural law that allocates the burden of proof[7] to protect the accused.[8] By placing the burden on the state, the presumption allows the accused to remain inactive without fear of conviction until the prosecution has produced a quantity of evidence that is sufficient to allow the case to go to the jury for consideration,[9] and to persuade the jury beond a "reasonable doubt"[10] that the evidence requires a verdict of conviction.[11] The second function served by the presumption of

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against the danger of any innocent person being unjustly punished. To establish the guilt of a defendant beyond a reasonable doubt is not meant that such guilt shall be established to an absolute certainty. Absolute certainty in the establishment of any fact is rarely attainable, and never required in courts of justice." *Id.* at 124.

3. Coffin v. United States, 156 U.S. 432, 453 (1895).

4. *E.g.*, CAL. PENAL CODE § 1096 (West 1970); NEV. REV. STAT. § 52.070 (1968); VT. STAT. ANN. tit. 13, § 6502 (1958).

5. The origin of the rule behind the presumption of innocence has been traced back to Athens, Sparta, and Deuteronomy. Coffin v. United States, 156 U.S. 432, 454-55 (1895). In the United States, "[t]he presumption of innocence is predicated not upon any express provision of the federal constitution, but upon ancient concepts antedating the development of the common law." Reynolds v. United States, 238 F.2d 460, 463 (9th Cir. 1956).

6. Coffin v. United States, 156 U.S. 432, 458-59 (1895).

7. Soules, *Presumptions in Criminal Cases*, 20 BAYLOR L. REV. 277, 279 (1968).

8. 23A C.J.S. *Criminal Law* § 1221 (1961); 9 J. WIGMORE, EVIDENCE § 2511 (1940 & Supp. 1970); Soules, *supra* note 7, at 279-80.

9. *See* 9 J. WIGMORE, *supra* note 8, § 2487.

10. *Id.* § 2497.

11. *Id.* § 2485.

innocence is to warn the jury to consider only the evidence actually presented during the trial in reaching its verdict.[12] The need for this warning apparently resulted from the recognition of the inherent characteristic of human nature to assume that a person who is arrested is guilty of the crime with which he is charged. Simon Greenleaf, an eminent nineteenth century legal scholar, said that because men do not usually commit crimes, the presumption must be that any particular individual is totally free of guilt.[13] Notwithstanding the appeal of this logic, it is probable that observation of the entire pretrial criminal process involving the police, the legal forces of the state, and the investigation of the grand jury will create the natural suspicion that the accused is guilty.[14] Due to the danger of this suspicion and the policy decision that it is better for society to free a guilty person than convict an innocent one,[15] the presumption of innocence was created as the law. The positive statement of the presumption is rarely omitted from an instruction because of its importance as a reminder to the jury and the potential for error if it is not included.[16] A split of authority, however, has developed among both state and federal jurisdictions over the inclusion of an addendum to the presumption of innocence in order to warn the jury that the presumption is not intended to aid a guilty person to escape punishment. This qualification apparently was added to assure the jury that the presumption is rebuttable and that given the proper showing of evidence a man can be found guilty despite his prima facie appearance of innocence.[17] Seven state courts and two federal circuits have upheld an instruction including this qualification.[18] Three states and

12. *Id.* § 2511. Although Wigmore labels this cautionary device as only an implied corollary to the burden of proof, the logic behind this additional function should be given equal respect since it is all that distinguishes the presumption of innocence from the technical definition of the burden of proof.

13. 1 S. GREENLEAF, EVIDENCE § 34 (7th ed. 1854).

14. This pretrial process includes the defendant's apprehension, arrest, indictment, arraignment, and escort under guard from jail to the courtroom.

15. "The noble (*divus*) Trajan wrote to Julius Frontonus that no man should be condemned on a criminal charge in his absence, because it was bettor to let the crime of a guilty person go unpunished than to condemn the innocent." Dig. *L.* XLVIII, tit. 19, 1. 5, *as cited in*, Coffin v. United States, 156 U.S. 432, 454 (1895); *cf.* McCormick, *Charges on Presumptions and Burden of Proof*, 5 N.C.L. REV. 291, 304 (1927) ("a great many presumptions, if not most, are rooted in a mixture of the two soils, *probability* on the one hand, independent procedural or social *policy* on the other").

16. *Cf.* United States v. Press, 336 F.2d 1003 (2d Cir. 1964). *See also* 23A C.J.S. *Criminal Law* § 1221 (1961).

17. *Cf.* State v. Hanlon, 38 Mont. 557, 100 P. 1035 (1909).

18. United States v. Farina, 184 F.2d 18 (2d Cir.), *cert. denied*, 340 U.S. 875 (1950); Moffitt v. United States, 154 F.2d 402 (10th Cir.), *cert. denied*, 328 U.S. 853 (1946); State v. Farnsworth, 51 Idaho 678, 10 P.2d 295 (1932); People v. Dowling, 95 Ill. App. 2d 223, 238 N.E.2d 131 (1968); Turner v. State, 102 Ind. 425, 1 N.E. 869 (1885); State v. Barnes, 202 Kan. 21, 446 P.2d 774 (1968);

two circuits have held such an instruction to be erroneous.[19] Wyoming was recently added to the states of the majority view by its approval of a cautionary instruction in *Kennedy v. State*.[20] Decisions following both the majority and minority views, however, appear internally inconsistent. Under the majority view, some courts have held that the cautionary instruction is proper but might constitute an error if not qualified by a positive instruction on the presumption of innocence.[21] Other courts have addressed only the technical accuracy of the instruction and have ignored its possible prejudicial effect.[22] Under the minority view, one court has held that the cautionary instruction is error, but not reversible error.[23] In addition to this lack of a meaningful consensus, there is no discernible trend developing in favor of either position. Although certiorari to the Supreme Court was denied in two earlier cases, the Court in December of 1970 decided to hear arguments in the *Kennedy* case.[24]

In the instant case, the court re-examined its holding in *Kennedy*, which had approved an identical cautionary instruction.[25] In addressing

State v. Hanlon, 38 Mont. 557, 100 P. 1035 (1909); State v. Gee Jon, 46 Nev. 418, 211 P. 676 (1923); Kennedy v. State, 470 P.2d 373 (Wyo. 1970).

19. Shaw v. United States, 244 F.2d 930 (9th Cir. 1957); Gomila v. United States, 146 F.2d 372 (5th Cir. 1944); Martinez v. People, 470 P.2d 26 (Colo. 1970); Chinn v. State, 210 So. 2d 666 (Miss. 1968); State v. Romeo, 42 Utah 46, 128 P. 530 (1912). For the leading decision supporting this view see Reynolds v. United States, 238 F.2d 460 (9th Cir. 1956). *See also* United States v. Farina, 184 F.2d 18, 21 (2d Cir.) (Frank, J., dissenting), *cert. denied*, 340 U.S. 875 (1950).

20. 470 P.2d 372 (Wyo. 1970).

21. *E.g.*, United States v. Farina, 184 F.2d 18 (2d Cir.), *cert. denied*, 340 U.S. 875 (1950); Moffitt v. United States, 154 F.2d 402 (10th Cir.), *cert. denied*, 328 U.S. 853 (1946); People v. Henderson, 378 Ill. 436, 38 N.E.2d 727 (1942); State v. Medley, 54 Kan. 627, 39 P. 227 (1895); State v. Hanlon, 38 Mont. 557, 100 P. 1035 (1909).

22. *E.g.*, People v. Dowling, 95 Ill. App. 2d 223, 238 N.E.2d 131 (1968); Turner v. State, 102 Ind. 425, 1 N.E. 869 (1885); State v. Gee Jon, 46 Nev. 418, 211 P. 676 (1923); Kennedy v. State, 470 P.2d 372 (Wyo. 1970).

23. Shaw v. United States, 244 F.2d 930 (9th Cir. 1957). *Contra*, Martinez v. People, 470 P.2d 26 (Colo. 1970) (dicta that this instruction was a poor statement of law but was not reversible error because it had been used by the courts for such a long time).

24. United States v. Farina, 184 F.2d 18 (2d Cir.), *cert. denied*, 340 U.S. 875 (1950) (cautionary instruction approved); Moffitt v. United States, 154 F.2d 402 (10th Cir.), *cert. denied*, 328 U.S. 853 (1946) (cautionary instruction approved); Kennedy v. State, 470 P.2d 372, *rehearing denied*, 474 P.2d 372 (Wyo.) (denial made on basis that issue had been reheard in *Carillo*), *appeal docketed*, 39 U.S.L.W. 3259 (Dec. 15, 1970) (No. 1065).

25. The court noted that the decision in *Kennedy* had scant utility as preeedent in future hearings on this issue for two reasons. First, the *Kennedy* court had ignored the contention raised by defendant's counsel in the instant case that despite the accuracy (both in fact and in legal theory) of the cautionary instruction on its face, the practical effect of the instruction was to mislead and possibly prejudice the jury. Secondly, the *Kennedy* court had diametrically misinterpreted a portion of the holding in Reynolds v. United States, 238 F.2d 460 (9th Cir. 1956), the leading statement of law in favor of defendant's position. While *Reynolds* had held an almost identical cautionary instruction to be prejudicial error because its effect was to subvert the original intent of the

the defendant's contention that there was a modern or "enlightened" trend to view the cautionary instruction as a self-defeating qualification, the court found no ostensible trend in other jurisdictions but rather found support on behalf of both views. The court also noted that the cautionary instruction had been used by the state trial courts for years and that there was no dissent in *Kennedy*. After reconsidering the reasoning and arguments underlying this question, the court decided that its holding in *Kennedy* was correct. The court, therefore, concluded that when a jury is fully instructed about the presumption of innocence and the meaning of reasonable doubt, the cautionary instruction is proper.

The instant decision merely adopts the majority view that it is proper to add a cautionary qualification to the presumption-of-innocence instruction, but it provides a focal point for a discussion of possible serious constitutional defects inherent in the majority viewpoint. The decision, in short, may be constitutionally defective because it enhances the risk of a deprivation of an accused's right to a fair trial under the sixth amendment and to due process of law under the fourteenth amendment. In order to analyze and evaluate the problems involved, it is necessary to re-examine one of the fundamental purposes of the presumption of innocence—the prevention of a conviction when the state has not proved its case against the accused. Ultimately, this purpose is to insure a fair trial to every defendant.[26] Although the presumption has never been expressly described as a constitutionally protected right, its purpose of insuring a fair trial may bring it within the penumbra of the sixth amendment.[27] Moreover, since the presumption protects the right to a fair trial, it also may be included in the guarantees of the due process clause.[28] In practical terms, the presumption of innocence serves as a counterweight that is intended to nullify the tendency of jurors to assume that the defendant is guilty.[29] The insertion of a cautionary instruction counteracts this balancing effect and tips the scales of justice away from the defendant, leaving no effective check on the jurors' suspicion of guilt. Since the presumption of innocence is one

presumption of innocence, the Wyoming Supreme Court had recognized *Reynolds* as authority to the contrary.

26. *See* Miller v. United States, 120 F.2d 968, 973 (10th Cir. 1941) (bars that guard the right to a fair trial, such as court procedure, rules of evidence, and proper instructions to the jury, must not be lowered).

27. *Cf.* Griswold v. Connecticut, 381 U.S. 479, 484 (1965) ("specific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance").

28. *Cf. id.* at 499-502 (the due process clause stands on its own bottom and protects basic values implicit in the concept of ordered liberty) (Harlan, J., concurring).

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

facet of the law that is familiar to laymen, it is probable that a jury will listen more closely to an instruction on this subject than to one on some complex substantive rule of law.[30] If an attentive and comprehending juror accepts the cautionary instruction as a mere restatement of the limits of the burden of proof imposed by the presumption of innocence, then the defendant's right to a fair trial has been impaired. Other possible juror reactions, however, could inhibit the intended function of the presumption of innocence. The consecutive instructions stressing both the positive effect of the presumption and then its distinct limitations, for example, may confuse jurors and possibly tempt them to disregard both instructions.[31] In effect, this reaction could force the accused to prove his innocence. Another possibility is that a bewildered juror will be led to infer that there is one rule of evidence for an accused person thought to be guilty and another for a defendant thought to be innocent. A corollary to this possibility would exist if a juror believed that the rule concerning the presumption of innocence is intended to be given effect only after the guilt or innocence of the accused has been determined.[32] These possibilities suggest that there is a substantial risk that a cautionary instruction has the effect of diminishing the intended effect of the presumption of innocence. The cautionary instruction, moreover, is undesirable because it tends to foster a situation in which the normal operation of the jury trial must overcome prejudice working against the accused. For these reasons, the cautionary instruction drastically reduces the likelihood of a fair trial. It is hoped that in the *Kennedy* case the Supreme Court will resolve the question of the propriety of the inclusion of this cautionary instruction. If the Court does not address this issue, the probability of a conviction on a given set of facts will vary according to the prevailing view in the particular jurisdiction with some convictions resulting from possible misinterpretations of one of the essential elements of a fair trial.

Environmental Law—Pollution—No Unconstitutional State Action is Involved in Recruitment, Licensing, and Failure to Regulate an Industrial Polluter

Plaintiff, Environmental Defense Fund, Inc. (EDF), sought injunctive relief against unnecessary atmospheric emissions of toxic

30. United States v. Farina, 184 F.2d 18, 21-23 (2d Cir.) (Frank, J., dissenting), *cert. denied*, 340 U.S. 875 (1950).

31. Chinn v. State, 210 So. 2d 666 (Miss. 1968).

32. State v. Romeo, 42 Utah 46, 64, 128 P. 530, 537 (1912) (cautionary instruction was error because it interfered with the normal operation of the presumption of innocence).

substances from the defendant's pulp and paper mill.[1] The basis of the plaintiff's claim under Section 1983 of Title 42, United States Code,[2] was a deprivation of ninth and fourteenth amendment rights to a minimally degraded environment. The plaintiff contended that the deprivation involved state action since the state recruited[3] and licensed[4] the defendant and failed to abate the pollution through appropriate regulation.[5] Defendant moved to dismiss on the grounds that EDF lacked standing to seek relief and that it had failed to state a cause of action because the requisite "state action" was not present. The United States District Court for the District of Montana, *held,* motion granted.[6] A state's recruitment, licensing, and failure to regulate an industrial polluter does not involve state action within the purview of either the ninth and fourteenth amendments or section 1983. *Environmental Defense Fund, Inc. v. Hoerner Waldorf Corp.,* 1 Envir. Rep. Cas. 1640 (D. Mont. 1970).

Historically, suits to prevent environmental degradation have been based upon principles of tort nuisance law.[7] In recent years, however,

1. Defendant's kraft process pulp and paper mill allegedly emitted noxious sulfur compounds and other toxic substances into the atmosphere that caused harm to plant, animal, and human life. Plaintiff contended that such atmospheric pollution was unnecessary because the mill could be operated without the emission of harmful compounds through the application of modern technological processes.

2. 42 U.S.C. § 1983 (1964) provides: "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

3. The Mayor of Missoula, Montana extended an invitation to the defendant, on behalf of the Missoula City Commission, to become a part of the local economy. The State Planning Board invited and encouraged public acceptance of the plant through assurances that it would cause practically no pollution problems.

4. Before the defendant, a foreign corporation, could establish its plant in Montana, it had to comply with applicable state laws for the privilege of conducting business. Moreover, before the defendant could discharge effluent into a contiguous stream, the state water pollution control council under supervision of the State Board of Health had to grant a permit. These laws have subsequently heen repealed. Ch. 300, § 143, [1967] Mont. Laws, *repealing* MONT. REV. CODES ANN. §§ 15-1701 to -1705 (1947) (foreign corporations); ch. 142, § 15, [1955] Mont. Laws & ch. 97, § 223, [1967] Mont. Laws, *repealing* MONT. REV. CODES ANN. §§ 69-1322 to -1329 (1947) (effluent permit).

5. Plaintiff alleged that defendant's activities were potentially subject to regulation under the Clean Air Act of Montana. MONT. REV. CODES ANN. §§ 69-3904 to -3923 (1970).

6. The court found that EDF was entitled to bring a nonclass representation action on behalf of the public interest and therefore denied the motion to dismiss for lack of standing.

7. *E.g.,* Hampton v. North Carolina Pulp Co., 223 N.C. 535, 27 S.E.2d 538 (1943) (water pollution); Riblet v. Spokane-Portland Cement Co., 41 Wash. 2d 249, 248 P.2d 380 (1952) (air pollution); *see* Note, *Toward a Constitutionally Protected Environment,* 56 VA. L. REV. 458 n.3 (1970).

legislation has been enacted at the federal and state levels giving administrative agencies the authority to establish control standards and enforcement procedures to curb pollution.[8] This legislation has led to the application, in some pollution suits, of the doctrine of primary jurisdiction, which requires initial resort to an appropriate agency before judicial relief is given.[9] The general inadequacy of existing remedies has given rise to arguments that pollution should be attacked on constitutional grounds.[10] Although the Constitution does not expressly guarantee a personal right to a decent environment, the right to life and liberty is protected against arbitrary state interference by the fourteenth amendment. In addition, the ninth amendment expresses the tenet that the enumeration of rights in specific constitutional guarantees should not be construed to deny or disparage other rights retained by the people. It is unclear whether this additional protection was originally intended to apply to the states or has become incorporated within the due process guarantee of the fourteenth amendment.[11] There is considerable historical support, however, for the proposition that the ninth amendment was intended by the framers as a rule of construction that would prevent a narrow interpretation of specific constitutional

8. *E.g.*, Clean Air Act of 1955, 42 U.S.C. §§ 1857-71 (1964) (providing for research and development of federal-state cooperative programs to control air pollution); Air Quality Act of 1967, 42 U.S.C. §§ 1857 to 57j-3 (Supp. V, 1970) (authorizing establishment of federal air quality criteria and limited enforcement powers with primary emphasis upon state implementation and enforcement); Clean Air Amendments of 1970, Pub. L. No. 91-604, 84 Stat. 1676 (empowering Environmental Protection Agency to set national air quality standards for specific pollutants from all sources and to bring suits against individual polluters or take over state enforcement should a state fail to enforce its mandatory air-pollution control plan); Clean Air Act of Montana, MONT. REV. CODES ANN. §§ 69-3904 to -3923 (1970); Air Pollution Control Act, N.Y. PUB. HEALTH LAW §§ 1264-99 (McKinney Supp. 1970); Tennessee Air Pollution Control Act, TENN. CODE ANN. §§ 53-3408 to -3423 (Supp. 1970); *cf.* National Environmental Policy Act of 1969, 42 U.S.C. §§ 4321-47 (Supp. V, 1970) (creating a Council on Environmental Quality and requiring federal agencies to consider environmental factors in the decision-making process to implement national environmental policy).

9. Ellison v. Rayonier, Inc., 156 F. Supp. 214 (W.D. Wash. 1957) (suit to obtain damages for water pollution); Schofield v. Material Transit, Inc., 42 Del. Ch. 144, 206 A.2d 100 (New Castle Ct. Ch. 1960) (suit to abate air pollution); White Lake Ass'n v. Whitehall, 1 Envir. Rep. Cas. 1383 (Mich. Ct. App. Feb. 27, 1970) (suit to abate water pollution). *Contra*, Houston Compressed Steel v. Texas, 1 Envir. Rep. Cas. 1416 (Tex. Civ. App. June 25, 1970) (suit to enjoin air pollution violating regulations adopted under Texas Clean Air Act). *See generally* 3 K. DAVIS, ADMINISTRATIVE LAW TREATISE §§ 19.01-.09 (1958).

10. *E.g.*, Roberts, *The Right to a Decent Environment; E=MC²: Environment Equals Man Times Courts Redoubling Their Efforts*, 55 CORNELL L. REV. 674 (1970); Note, *supra* note 7; *cf.* Maechling, *The Emergent Right to a Decent Environment*, 1 HUMAN RIGHTS 59, 72 (1970).

11. *See* Griswold v. Connecticut, 381 U.S. 479, 492-93 (1965) (Goldberg, J., concurring); Kutner, *The Neglected Ninth Amendment: "The Other Rights Retained by the People,"* 51 MARQ. L. REV. 121, 125 (1968).

guarantees or a denial of inherent individual rights.[12] While not expressly utilizing the ninth amendment for this purpose, the Supreme Court in *Griswold v. Connecticut*,[13] without the aid of any specific constitutional guarantee, recognized that a fundamental societal value, the right of marital privacy, was constitutionally protected against governmental interference. Justice Goldberg's concurring opinion emphasized the comprehension of fundamental values within the concept of liberty, embraced by the fourteenth amendment, but used the ninth amendment as an additional justification for his conclusion. In numerous recent decisions under statutes not directly concerned with environmental protection, environmental quality has been implicitly recognized as a fundamental value similarly entitled to constitutional protection.[14]

A federal civil remedy for deprivation of a constitutionally protected right inflicted "under color of" state law is provided by section 1983, originally enacted as section 1 of the Civil Rights Act of 1871.[15] Under this section, prior exhaustion of state judicial and administrative remedies is not required as a prerequisite for relief.[16] The major obstacle to litigants under section 1983 has been the "color of" state law qualification. This requisite has been interpreted as the equivalent to the state action requirement of the fourteenth amendment.[17] State action has been found, however, in many cases in which state involvement in the deprivation of constitutional rights was neither exclusive nor direct. For example, both governmental action making possible private interference with the exercise of first amendment rights[18] and inaction by the state that has the effect of encouraging

12. *See* 1 J. MADISON, ANNALS OF CONGRESS 440 (3d ed. Gales & Seaton 1884); 2 J. STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 651 (5th ed. 1891), *quoted in* Griswold v. Connecticut, 381 U.S. 479, 490 (1965) (Goldberg, J., concurring); Kutner, *supra* note 11; *cf.* Kent, *Under the Ninth Amendment What Rights are the "Others Retained by the People"?*, 29 FED. B.J. 219 (1970).

13. 381 U.S. 479 (1965) (statute making the use of contraceptives illegal held unconstitutional as a violation of the right of marital privacy). For a discussion of the evolution of the right of privacy as a precedential basis for constitutional protection of the environment see Note, *supra* note 7, at 464-67.

14. *E.g.*, Udall v. FPC, 387 U.S. 428 (1967) (Federal Power Act); United States v. Standard Oil Co., 384 U.S. 224 (1966) (Rivers and Harbors Act); Palisades Citizens Ass'n v. CAB, 420 F.2d 188 (D.C. Cir. 1969) (Federal Aviation Act); Scenic Hudson Preservation Conf. v. FPC, 354 F.2d 608 (2d Cir. 1965), *cert. denied*, 384 U.S. 941 (1966) (Federal Power Act). For a discussion of the significance of these cases in the evolution of environmental rights see Note, *supra* note 7, at 467-73.

15. Act of April 20, 1871, ch. 22, § 1, 17 Stat. 13 (codified at 42 U.S.C. § 1983 (1964)).

16. *See* Damico v. California, 389 U.S. 416 (1967); McNeese v. Board of Educ., 373 U.S. 668 (1963); Monroe v. Pape, 365 U.S. 167 (1961).

17. United States v. Price, 383 U.S. 787, 794 n.7 (1966).

18. NAACP v. Alabama, 357 U.S. 449 (1958) (compelled disclosure of membership lists

private racial discrimination[19] have been held to involve unconstitutional state action. Moreover, the actions of private defendants have been held to infringe constitutional rights when the state has so insinuated itself in their conduct as to become a joint participant.[20] This has been particularly true in instances where private businesses have been licensed to conduct operations upon public property and state agencies have failed to use their authority to prevent racial discrimination or interference with first amendment rights.[21] These decisions have indicated a judicial propensity to minimize the state action requirement when a fundamental or preferred right is involved.[22]

Another problem frequently encountered by federal litigants concerns their standing to maintain a cause of action. In recent years, this problem has been particularly acute for organizations purporting to represent the public's interest in environmental protection. Federal courts, however, have increasingly recognized the standing of these organizations to challenge administrative decisions detrimental to the environment under the provisions of applicable statutes.[23] Concurrently,

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under circumstances of this case held likely to violate the right of associational privacy protected by the fourteenth amendment).

19. Reitman v. Mulkey, 387 U.S. 369 (1967) (section of California constitution allowing discrimination in the disposition of real property held to violate the fourteenth amendment). *But cf.* Adickles v. S.H. Kress & Co., 409 F.2d 121 (5th Cir. 1968) (state criminal trespass law restating common law rule allowing restaurant owners to choose customers did not constitute state action encouraging racial discrimination).

20. United States v. Price, 383 U.S. 787, 794 (1966) (indictment under 18 U.S.C. § 242 (1964) held good when it alleged that defendants had deprived persons of fourteenth amendment rights by securing their release from jail, intercepting, assaulting, and killing them in accord with preconceived plan).

21. *See, e.g.*, Burton v. Wilmington Parking Auth., 365 U.S. 715 (1961) (restaurant engaging in racial discrimination); Kissinger v. New York City Transit Auth., 274 F. Supp. 438 (S.D.N.Y. 1967) (advertising company refusing with the Authority's approval to accept posters opposing Vietnam War); Anderson v. Moses, 185 F. Supp. 727 (S.D.N.Y. 1960) (restaurant cancelling scheduled dinner because of unpopularity of organization's views).

22. *See* Williams, *The Twilight of State Action*, 41 TEXAS L. REV. 347 (1963); Note, *supra* note 7, at 475. These commentators have questioned whether the requirement would be minimized in the case of a nonfundamental or preferred right. *Id.*

23. *E.g.*, Environmental Defense Fund, Inc. v. Hardin, 428 F.2d 1093 (D.C. Cir. 1970) (EDF has standing as person "adversely affected" by an order under 7 U.S.C. § 135(d) (1964) to challenge Secretary of Agriculture's failure to take action to restrict the use of DDT); Citizens Comm. v. Volpe, 425 F.2d 97 (2d Cir. 1970) (citizens group and conservation organization are "aggrieved" persons entitled under the Administrative Procedure Act, 5 U.S.C. § 702 (Supp. V, 1970), to obtain judicial review of the issuance of a highway construction permit by the Army Corps of Engineers); Scenic Hudson Preservation Conf. v. FPC, 354 F.2d 608 (2d Cir. 1965), *cert denied*, 384 U.S 941 (1966) (members of conservation group are "aggrieved" persons entitled under §§ 313(a), (b) of Federal Power Act, 16 U.S.C. §§ 825 l (a), (b) (1964), to obtain judicial review of FPC order licensing hydroelectric project); *cf.* Office of Communications of United Church of Christ v. FCC, 359 F.2d 994 (D.C. Cir. 1966) (representatives of listening public are "parties in

the assertion of environmental interests has been made possible by judicial interpretation of federal statutes in light of environmental criteria not expressed in the statutes.[24] Furthermore, the Supreme Court recently reinforced this approach to the law of standing by mentioning in dictum environmental values as one of a variety of interests that may be asserted by a federal litigant, provided they are "arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question."[25]

In the instant case, the court initially denied the defendant's motion to dismiss for lack of standing, declaring that it would follow the contemporary trend in allowing a public interest organization to maintain an action on behalf of the public.[26] Proceeding to the constitutional issue, the court recognized that every person is constitutionally protected by the ninth[27] and fourteenth amendments against arbitrary state action that interferes with his natural and personal state of life and health. The court reasoned, however, that this protection extends only against affirmative or permissive actions of the state that are unconstitutional or the proximate cause of unconstitutional action. The court concluded that while recruitment, licensing, and failure to regulate an industrial polluter might well constitute state action, it is neither unconstitutional state action within the purview of the ninth and fourteenth amendments nor sufficient to satisfy the equivalent jurisdictional requirements of section 1983.[28] The

interest" entitled under § 309(d) (l) of Federal Communications Aet, 47 U.S.C.§ 309(d) (1964), to contest renewal of broadcast license). *Contra,* Sierra Club v. Hickel, 1 Envir. Rep. Cas. 1660 (9th Cir. Sept. 16, 1970) (conservation organization failing to allege injury to itself or its members had no standing under Administrative Procedure Act, 5 U.S.C. §§ 701-06 (Supp. V, 1970), to sue for injunction blocking commercial development of national forest as recreational facility).

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

25. Association of Data Processing Serv. Organizations, Inc. v. Camp, 397 U.S. 150, 153-54 (1970) (competitor's standing to challenge order of Comptroller of Currency granting national banks authority to provide data processing services recognized in light of potential economic injury from increased competition). For an analysis of the new criteria for standing establisbed by *Data Porcessing* and the possibility of further liberalization to embrace a test of "injury in fact" see Davis, *The Liberalized Law of Standing,* 37 U. CHI. L. REV. 450 (1970).

26. *See* note 23 *supra* and accompanying text. The court held, however, that the suit was not maintainable as a class action under FED. R. CIV. P. 23 because EDF, a New York non-profit corporation, was not a member of the class of persons it sought to represent—persons "entitled to tbe full benefit, use, and enjoyment of the . . . Missoula Regional Eco-System." This holding was not fatal because the court had already found a basis of standing to bring a nonclass representation action on behalf of a public interest.

27. The court cited Justice Goldberg's coneurring opinion in Griswold v. Connecticut, 381 U.S. 479, 486 (1965) and Red Lion Broadcasting Co. v. FCC, 381 F.2d 908 (D.C. Cir. 1967), for the proposition that the ninth amendment, as incorporated within the fourtcenth, constituted a limitation upon state power.

28. The court said by way of dictum that if it had not dismissed the action for failure to state a

court, therefore, granted the defendent's motion to dismiss for failure to state a claim.

The grave dangers posed by environmental pollution to both individual and societal life and health require the development of effective remedies. Whether these remedies are ultimately developed by legislative or judicial action is less important than the need for celerity in reaching a comprehensive solution. It is unfortunate that the instant court did not recognize the necessity for constitutional protection of the environment, even though state and national legislation may provide a means for effectuating such a guarantee.[29] The court could have easily fashioned a constitutional remedy for unnecessary air pollution. Its basis for denying relief—no constitutional state action—is unsound and contrary to precedent.[30] The requisite state action was clearly present in the instant case. State licensing enabled the defendant to interfere unreasonably with other persons' rights to life and health by polluting the atmosphere, and failure to abate such activity obviously encouraged its continuation. Moreover, promotion of the defendant's enterprise made the state a joint participant in the defendant's nonregulated activities. Perhaps the instant court's reluctance to fashion a remedy was attributable to uncertainty about the existence and extent of a constitutional right to a minimally degraded environment. The court's hesitancy also may have stemmed from its belief that complex pollution problems can be more effectively handled by administrative agencies established by federal and state legislation and that the doctrine of primary jurisdiction requires prior resort to such agencies.[31] These possible grounds for the court's reluctance, however, are unfounded for two reasons. First, precedents recognizing that fundamental societal values, such as the right of privacy,[32] are constitutionally protected afford persuasive support for the recognition of environmental rights. This recognition already has been accomplished within the narrower confines of statutory construction.[33] Moreover, the ninth amendment

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claim it would have held that this was a proper case in which to apply the concept of primary jurisdiction. This would have involved a refusal to hear the case in order that the complex and technical questions concerning air pollution might be left to administrative determination under the Air Quality Act of 1967, 43 U.S.C. §§ 1857-571 (Supp. V, 1970), which was enacted for the development of air quality standards. While expressing its concern about the problems of air pollution, the court said that pollution was a national problem that the courts could not deal with on a piecemeal basis without producing great injustice. The court reasoned that any solution should be achieved through federal and state legislation.

29. *See* note 8 *supra* and accompanying text.

30. *See* notes 18-22 *supra* and accompanying text.

31. *See* note 28 *supra.*

32. *E.g.*, Griswold v. Connecticut, 381 U.S. 479 (1965).

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

provides an additional justification for the expansion of constitutional guarantees of life and liberty to meet threats of massive environmental degradation that directly endanger the enjoyment of these rights. Secondly, actions to redress deprivations of constitutionally protected environmental rights under section 1983 should not be delayed by invocation of the doctrine of primary jurisdiction in light of previous decisions making exhaustion of administrative remedies unnecessary.[34] While administrative efforts to curb pollution are highly necessary and desirable, their effectiveness may be impaired by several problems that typically have confronted administrative agencies, such as the reluctance to abandon obsolete control standards, insufficient manpower for effective uniform enforcement, and subjection to political pressure from the industrial sector.[35] Judicial enforcement of a constitutional guarantee is necessary in cases where administrative regulation fails to protect the environment. *Brown v. Board of Education*[36] and *Baker v. Carr*[37] provide ample precedent for judicial activism when other organs of government have failed to meet their constitutional responsibilities. Further, the very complexity of the air pollution problem may make court action desirable. It has been suggested that the most appropriate solution would be to control all emissions at their source to the greatest extent technologically feasible.[38] Courts would be more flexible in the application of such a standard to individual cases than an administrative agency primarily concerned with the cumulative effects of individual pollutants.[39] By dealing directly with the pollution problem in the courts, public awareness would be heightened, thereby increasing the likelihood of effective legislative solutions.[40] For these reasons, the instant case

34. Damico v. California, 389 U.S. 416 (1967); McNeese v. Board of Educ., 373 U.S. 668 (1963).

35. Other problems are listed in Comment, *Equity and the Eco-System: Can Injunctions Clear the Air?*, 68 MICH. L. REV. 1254, 1259-60 (1970).

36. 347 U.S. 483 (1954) (racially separate but equal schools constitute a denial of equal protection guaranteed by the fourteenth amendment).

37. 369 U.S. 186 (1962) (allegations that state legislative apportionment denies equal protection of the laws guaranteed by the fourteenth amendment held to present a justiciable constitutional cause of action despite political nature of issue).

38. Since the easiest way to gather evidence about whether pollutant emissions are excessive is at the source and because the precise effects of any single pollutant or possible combination of pollutants upon health are unpredictable, this means of attacking the problem should have a greater chance of success than a program designed to establish "safe" emission levels for specific pollutants. Cassell, *The Health Effects of Air Pollution and Their Implications for Control*, 33 LAW & CONTEMP. PROB. 197, 215 (1968).

39. *See* Comment, *supra* note 35; *cf.* Sive, *Some Thoughts of an Environmental Lawyer in the Wilderness of Administrative Law*, 70 COLUM. L. REV. 612, 629-30 (1970). *See generally* Cassell, *supra* note 38.

40. Comment, *supra* note 35, at 1262.

represents an example of unnecessary judicial reluctance to cope with a pressing problem facing society. Hopefully, it will not serve as a precedent to deter other courts from proceeding with the urgent task of fashioning a constitutional remedy for unnecessary environmental degradation.[41]

Landlord and Tenant Law—Warranty of Habitability Implied by Law in Leases of Urban Dwellings

The landlord, First National Realty Corporation, brought an action seeking possession of leased apartments from tenants who had failed to pay rent. The tenants admitted not paying the rent, but contended that the landlord's numerous violations of the District of Columbia Housing Regulations[1] provided them with an equitable defense to its claim.[2] The general sessions court refused to admit the tenants' proof of violations and entered judgment for the landlord. The District of Columbia Court of Appeals affirmed, rejecting the tenants' contention that a landlord has a contractual duty to maintain premises in compliance with housing regulations.[3] On appeal to the United States Court of Appeals for the District of Columbia, *held,* reversed and remanded. A warranty of habitability, measured by standards in housing regulations, is implied by law in leases of urban dwellings covered by those regulations, and a breach of this warranty gives rise to the usual remedies for breach of contract. *Javins v. First National Realty Corp.*, 428 F.2d 1071 (D.C. Cir.), *cert. denied,* 400 U.S. 925 (1970).

Originally, courts viewed the lease of a dwelling as a conveyance of an interest in land,[4] and applied real property law to resolve

41. The instant decision has further import in the area of standing because in allowing EDF to maintain a constitutional cause of action the court expanded the ability of public interest organizations to assert environmental rights. This result is fully justified by recent decisions. *See* notes 23-25 *supra* and accompanying text. It indicates that a constitutional remedy might be effectively utilized by such plaintiffs in the future.

1. Tenants alleged that approximately 1,500 violations had occurred during the term of the lease.

2. As provided by Rule 4(c) of the Landlord and Tenant Branch of the District of Columbia Court of General Sessions, the tenants did not claim money damages for the landlord's alleged breach of contract, but set up this equitable defense or claim by way of recoupment or set-off only to defeat the landlord's action.

3. Saunders v. First Nat'l Realty Corp., 245 A.2d 836 (D.C. Ct. App. 1968).

4. *E.g.*, Evans v. Faught, 231 Cal. App. 2d 698, 42 Cal. Rptr. 133 (Dist. Ct. App. 1965);

controversies regarding leases. Under the landlord-tenant law that developed, the courts considered the value of the lease to the tenant to be the land itself and required only that the landlord transfer the land and agree to leave the tenant to his own peaceful possession.[5] The landlord was under no obligation to keep the leased premises in repair, unless the lease expressly stated otherwise.[6] Justification for this "no-repair" rule was predicated on the doctrine of *caveat emptor,* which required the tenant to inspect the premises and take "as is."[7] As a result, the tenant not only became responsible for making necessary repairs, but also bore the risk that the property might not be suitable for its intended use.[8] In exchange for the landlord's obligation to transfer the land and leave the tenant in peaceful possession, the tenant agreed to pay rent. The duty to pay rent continued as long as the tenant remained in possession, even though the premises became uninhabitable. Only physical ejectment by the landlord absolved the tenant from paying rent.[9] Because of the harsh consequences to the tenant, the traditional rules eventually became subject to several exceptions. Some courts, for example, rejected the theory that the land was the most important part of the leasehold. These courts recognized that in the changing urban environment, the tenant is more interested in shelter,[10] with services such as heat, water, and sanitation provided by the landlord.[11] Another line of cases refused to

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Michaels v. Brookchester, Inc., 26 N.J. 379, 140 A.2d 199 (1958). *See also* 1 H. TIFFANY, REAL PROPERTY § 74 (3d ed. 1939).

5. *See generally* Quinn & Phillips, *The Law of Landlord-Tenant: A Critical Evaluation of the Past with Guidelines for the Future*, 38 FORD L. REV. 225, 227 (1970).

6. *See* Viterbo v. Friedlander, 120 U.S. 707 (1887); Schurman v. American Stores Co., 145 F.2d 721 (4th Cir. 1944); Gamble-Robinson Co. v. Buzzard, 65 F.2d 950 (8th Cir. 1933); Gaddis v. Consolidated Freightways, Inc., 239 Ore. 553, 398 P.2d 749 (1965). *See also* 1 AMERICAN LAW OF PROPERTY § 3.78 (A.J. Casner ed. 1952).

7. *See* 1 AMERICAN LAW OF PROPERTY § 3.45 (A.J. Casner ed. 1952).

8. *E.g.*, Lawler v. Capital City Life Ins. Co., 68 F.2d 438 (D.C. Cir. 1933); Widmar v. Healey, 247 N.Y. 94, 159 N.E. 874 (1928). The lessor had a duty, however, to disclose any latent defect that the lessee could not discover by reasonable inspection. Cole v. Lord, 160 Me. 223, 202 A.2d 560 (1964).

9. For a discussion of the hardships cast upon the tenant by the traditional rules see Quinn & Phillips, *supra* note 5, at 229-30.

10. *E.g.*, Ainsworth v. Ritt, 38 Cal. 89 (1869); Womack v. McQuarry, 28 Ind. 103 (1867); Shawmut Nat'l Bank v. City of Boston, 118 Mass. 125 (1875); White v. Steele, 33 S.W.2d 224 (Tex. Civ. App. 1930). These courts rejected the common law rule that required a tenant to continue paying rent even after the leased building had been destroyed. The landmark case supporting the common law rule is Paradine v. Jane, 82 Eng. Rep. 897 (K.B. 1647).

11. *E.g.*, Maywood v. Logan, 78 Mich. 135, 43 N.W. 1052 (1889) (lessee could recoup against rent due; damages suffered because of the lessor's failure to provide unpolluted water); Davis v. Smith, 26 R.I. 129, 58 A. 630 (1904) (responsibility of landlord to provide sanitary plumbing); Buchanan v. Orange, 118 Va. 511, 88 S.E. 52 (1916) (lessor's failure to provide heat warrants lessee's vacating the premises).

apply the traditional principles to short-term leases of furnished dwellings.[12] These decisions reasoned that since the parties intended that the premises be immediately occupied, the lessee had no reasonable opportunity to inspect them.[13] The growing recognition of the landlord's responsibility to provide services was best evidenced, however, by the doctrine of constructive eviction.[14] Under this doctrine, courts upheld a tenant's right to rescind the lease and cease paying rent if it was found that the landlord's poor services had substantially interfered with the tenant's quiet enjoyment.[15] This remedy had limited value, however, since it required that the tenant abandon the premises before bringing suit.[16] Moreover, as long as the tenant remained in possession, he was obligated to pay rent, regardless of the condition of the premises.[17] Although recognizing the landlord's obligation to provide adequate services, the courts held this obligation to be mutually independent from the duty of the tenant in possession to pay rent.[18] Tenants who abandoned the premises to seek judicial relief often found it difficult to prove that the conditions were substantially poor.[19] In any event, the procedure was time consuming and doubly expensive if the tenant lost, because the back rent would still be due.[20] Since the abandonment requirement proved especially harsh on ghetto families,[21] a few courts

12. *E.g.*, Young v. Povich, 121 Me. 141, 116 A. 26 (1922) (premises infested with bedbugs); Ingalls v. Hobbs, 156 Mass. 348, 31 N.E. 286 (1892) (infested with bugs at commencement of lease); Morgenthau v. Ehrich, 77 Misc. 139, 136 N.Y.S. 140 (App. T. 1912) (premises infested with vermin).

13. Ingalls v. Hobbs, 156 Mass. 348, 350, 31 N.E. 286 (1892). This distinction between furnished and unfurnished dwellings that gradually developed in the United States was based on the landmark English case of Smith v. Marrable, 152 Eng. Rep. 693 (Ex. 1843).

14. *See* 1 AMERICAN LAW OF PROPERTY § 3.51 (A.J. Casner ed. 1952); 1 H. TIFFANY, REAL PROPERTY §§ 141-45 (3d ed. 1939).

15. *E.g.*, Tregoning v. Reynolds, 136 Cal. App. 154, 28 P.2d 79 (Dist. Ct. App. 1934) (destruction of slaughterhouse not substantial); Northwestern Realty Co. v. Hardy, 160 Wis. 324, 151 N.W. 791 (1915) (temporary loss of heat not substantial).

16. *E.g.*, Lori, Ltd. v. Wolfe, 85 Cal. App. 2d 54, 65, 192 P.2d 112, 119 (Dist. Ct. App. 1948); Rymiec v. Baczynski, 140 Misc. 70, 249 N.Y.S. 27 (App. T. 1930).

17. For a recent case upholding this rule see Jack Spring, Inc. v. Little, 39 U.S.L.W. 2311 (Ill. Nov. 18, 1970).

18. *E.g.*, Frazier v. Riley, 215 Ala. 517, 111 So. 10 (1926) (breach of landlord's covenant to repair does not bar an action for rent accruing while tenant remains in possession); Community Theaters, Inc. v. Weilbacher, 57 S.W.2d 941 (Tex. Civ. App. 1933) (landlord's failure to keep premises in good condition could not defeat the landlord's suit for rent). *See also* Piper v. Fletcher, 115 Iowa 263, 266, 88 N.W. 380, 381 (1901).

19. *See* note 15 *supra*.

20. *See* Quinn & Phillips, *supra* note 5, at 234-35.

21. Unfortunately, it is the ghetto tenant who is most severely affected. To have a cause of action, he must move from the property. Other housing, however, is often difficult to find, and, in any event, initial moving costs are often prohibitive. Consequently, many ghetto families have no choice hut to endure the miserable conditions.

applied the doctrine of constructive eviction without abandonment, granting relief to tenants who remained in possession.[22] These decisions, however, clearly represent a minority view.[23] In response to the inadequacy of the tenant's remedies, many states have attempted to impose repair and service obligations on landlords by enacting building and health codes.[24] Enforcement of these statutes, however, has proved cumbersome and ineffective in holding landlords to minimum standards of housing quality.[25] In addition, courts have attempted to provide relief to tenants by reappraising the theory of mutually independent obligations of the landlord and tenant and ruling that the obligations should be mutually dependent.[26] As a result, many courts now consider the lease a contract, as well as a conveyance, with basic principles of contract law determining the rights and obligations of the parties.[27] Although in the past, the rigid doctrines of real property law prevented the application of the implied warranties of contract[28] to real estate transactions,[29] many courts now hold sellers and developers of real

22. *E.g.*, Johnson v. Pemberton, 197 Misc. 739, 97 N.Y.S.2d 153 (N.Y.C. Mun. Ct. 1950) (in an action for possession based on non-payment of rent, landlord's delay in repairing fire damage results in rent abatement despite tenant's remaining on the premises); *accord*, Majen Realty Corp. v. Glotzer, 61 N.Y.S.2d 195 (N.Y.C. Mun. Ct. 1946). Both courts took judicial notice of a critical housing shortage in not requiring abandonment. *See* Schoshinski, *Remedies of the Indigent Tenant: Proposal for Change*, 54 GEO. L.J. 519, 529-31 (1966).

23. *See* Gombo v. Martise, 44 Misc. 2d 239, 253 N.Y.S.2d 459 (App. T.), *rev'g* 41 Misc. 2d 475, 246 N.Y.S.2d 750 (Civ. Ct. 1964). *See also* Schoshinski, *supra* note 22, at 531.

24. *E.g.*, CAL. CIV. CODE §§ 1941-42 (West Supp. 1970); MICH. STAT. ANN. § 5.2843 (1969); N.Y. MULT. DWELL. LAW §§ 75-80 (McKinney 1946).

25. *See* Gribetz & Grad, *Housing Code Enforcement: Sanctions and Remedies*, 66 COLUM. L. REV. 1254 (1966); Quinn & Phillips, *supra* note 5, at 239-49; Note, *Enforcement of Municipal Housing Codes*, 78 HARV. L. REV. 801 (1965). Enforcement of the codes has been troubled by a slow, costly, bureaucratic system that adjudicates only the most extreme violations. Criminal sanctions have been rarely used, and the civil fines have been so small that the landlord usually weighs the risks against the costs and concludes that it is less expensive to pay the fine than make the repairs.

26. *E.g.*, Berman v. Shelby, 93 Ark. 472, 125 S.W. 124 (1910) (covenants to pay rent and to furnish heat held mutually dependent); Brady v. Brady, 140 Md. 403, 117 A. 882 (1922) (covenants to pay rent and to repair held mutually dependent on grounds of parties' intention); Higgins v. Whiting, 102 N.J.L. 279, 131 A. 879 (Sup. Ct. 1926) (covenants to pay rent and to heat held mutual and dependent). *See* Bennett, *The Modern Lease—An Estate in Land or a Contract (Damages for Anticipatory Breach and Interdependency of Covenants)*, 16 TEX. L. REV. 47, 63-73 (1937). *But see* RESTATEMENT OF CONTRACTS § 290 (1932).

27. *E.g.*, Medico-Dental Bldg. Co. v. Horton & Converse, 21 Cal. 2d 411, 418, 132 P.2d 457, 462 (1942); University Club v. Deakin, 265 Ill. 257, 106 N.E. 790 (1914); Graham Hotel Co. v. Garrett, 33 S.W.2d 522 (Tex. Civ. App. 1930). *See also* 1 AMERICAN LAW OF PROPERTY § 3.11 (A.J. Casner ed. 1952); 6 S. WILLISTON, CONTRACTS § 890 (3d ed. 1962).

28. For application of implied warranties to commercial sales see UNIFORM COMMERCIAL CODE §§ 2-314, 2-315.

29. *See* Fegeas v. Sherill, 218 Md. 472, 147 A.2d 223 (1958) (house infested with termites); Kerr v. Parsons, 83 Ohio App. 204, 82 N.E.2d 303 (1948) (inadequate water supply). *See also*

property responsible for the quality of their product.[30] Builders of new homes, for example, have been held liable for breach of an implied warranty that all applicable building regulations have been satisfied.[31] Despite this desirable trend, most courts have steadfastly refused to imply warranties of quality or habitability in leases of dwelling houses.[32] In *Pines v. Perssion*,[33] however, the Supreme Court of Wisconsin implied a warranty of habitability in a one-year lease of a furnished home.[34] More recently, the Supreme Court of Hawaii, in *Lemle v. Breeden*,[35] repudiated the constructive eviction doctrine in favor of an implied warranty of habitability.[36] Although these cases concerned short-term leases,[37] the language of the opinions suggests a future application of the warranty concept to all leases of urban dwellings.

This growing trend toward extending implied warranties of contract law to leases was recognized in the instant decision. The court reasoned that this approach is more conducive to results that accord with both the expectations of the parties and the standards of the modern community. Observing that the urban tenant is no longer interested in the land, but rather in a suitable place to live, and that he is often incapable of making necessary repairs, the court determined that the rules of no-repair and *caveat emptor* are no longer valid. Noting the broad application of implied warranties to commercial transactions, the court reasoned that

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Dennison v. Harden, 29 Wash. 2d 243, 250, 186 P.2d 908, 912 (1947); 7 S. WILLISTON, CONTRACTS § 926, at 800-01 (3d ed. 1963); *id.* § 926A.

30. *E.g.*, Carpenter v. Donohoe, 154 Colo. 78, 388 P.2d 399 (1964) (implied warranty covers poor construction resulting in cracking walls); Bethlahmy v. Bechtel, 91 Idaho 55, 415 P.2d 698 (1966) (water seepage makes home uninhabitable); Waggoner v. Midwestern Dev., Inc., 83 S.D. 57, 154 N.W.2d 803 (1967) (implied warranty covers water seepage). *See generally* Bearman, *Caveat Emptor in Sales of Realty—Recent Assaults Upon the Rule*, 14 VAND. L. REV. 541 (1961).

31. *See* Carpenter v. Donohoe, 154 Colo. 78, 388 P.2d 399 (1964); Schiro v. W.E. Gould & Co., 18 Ill. 2d 538, 165 N.E.2d 286 (1960); Loraso v. Custom Built Homes, Inc., 144 So. 2d 459 (La. App. 1962).

32. *E.g.*, Susskind v. 1136 Tenants Corp., 43 Misc. 2d 588, 251 N.Y.S.2d 321 (N.Y.C. Civ. Ct. 1964); Rubinger v. Del Monte, 217 N.Y.S.2d 792 (App. T. 1961); Kearse v. Spaulding, 406 Pa. 140, 176 A.2d 450 (1962). These decisions followed the old common-law rule that a lessor is not obligated to repair unless he covenants to do so in a written lease contract.

33. 14 Wis. 2d 590, 111 N.W.2d 409 (1961).

34. The court concluded: "To follow the old rule of no implied warranty of habitability in leases would, in our opinion, be inconsistent with the current legislative policy concerning housing standards. The need and social desirability of adequate housing for people in this era of rapid population increases is too important to be rebuffed by that obnoxious legal cliche, *caveat emptor*." *Id.* at 596, 111 N.W.2d at 412-13.

35. 462 P.2d 470 (Hawaii 1969).

36. *Cf.* Reste Realty Corp. v. Cooper, 53 N.J. 444, 251 A.2d 268 (1969) (although the court recognized an implied warranty of habitability, the decision rested on the theory of constructive eviction).

37. *See* note 12 *supra* and accompanying text.

the legitimate expectations of a tenant deserve at least the same measure of protection as do those of the normal commercial buyer. In addition, the court cited both the inequality of bargaining power between landlord and tenant and the detrimental impact of poor housing on all of society as compelling reasons for protecting the tenants' legitimate desire for a habitable place in which to live. Consequently, the court concluded that the common law implied a warranty of habitability in all leases of urban dwellings, imposing on the landlord an obligation to keep the leased premises in a habitable condition. Moreover, the court ruled that the scope of this warranty is to be measured by standards established by applicable housing regulations, and that a violation of these standards affords the tenants the usual remedies for breach of contract. The court held, therefore, that the tenants were entitled to interpose the landlord's breach of warranty as a defense to the suit.[38]

The instant court's refusal to apply the antiquated rules of feudal property law to leases of urban dwellings in favor of an approach that reflects contemporary social values marks an encouraging and significant development in landlord-tenant law. Although the rationale of the decision had been formulated previously by several state courts,[39] its unequivocal approval by a federal appellate court, coupled with the denial of certiorari by the Supreme Court[40] should firmly establish an implied warranty of habitability in all leases of urban dwellings. Moreover, although the court confined its consideration to the plight of urban tenants, there appears to be no reason why its reasoning cannot be extended to leases beyond the urban setting. In rejecting the rigid rules of no-repair and constructive eviction, the court has taken a meaningful step toward more adequate protection for all tenants. By applying the warranty concept to leases, the court has made available a variety of remedies that the tenant can more effectively use to resolve his grievances.[41] No longer must the tenant abandon the premises before seeking judicial relief. More importantly, he may withhold the rent during the pendency of his suit. Although this latter right had been authorized previously by statute in some states,[42] the effectiveness of

38. The court remanded the case to allow the tenants an opportunity to prove the housing violations alleged. 428 F.2d at 1082-83.

39. *See* notes 33, 35 & 36 *supra*.

40. Javins v. First Nat'l Realty Corp., 428 F.2d 1071 (D.C. Cir.), *cert. denied*, 400 U.S. 925 (1970).

41. These remedies include damages, rescission, reformation, and specific performance.

42. *E.g.*, N.Y. REAL PROP. ACTIONS LAW § 755 (McKinney Supp. 1969); PA. STAT. ANN. tit. 35, § 1700-1 (Supp. 1970). The tenant usually deposits the rent in the court to hold in trust until the substantiality of the claim has been adjudicated.

these provisions has been largely undermined by bureaucratic problems similar to those experienced with the building and health codes.[43] Under the typical statute, for example, the right to withhold rent exists only after the violation of the housing standards has been recorded by municipal authorities.[44] Moreover, officials record only those violations believed serious enough to warrant prosecution. This procedure is slow and costly and permits adjudication of only the most serious violations. Significantly, the instant decision, in effect, dispenses with any recording requirement since it recognizes the tenant's right to withhold rent whenever he believes the building code has been violated. It is arguable that this broad discretion afforded the tenant places the landlord in an inequitable position. Clearly, there should be some limitation on the tenant's right to withhold rent, if for no other reason than to avoid multiplying the number of landlord-tenant suits that already overcrowd the dockets. It is submitted that the conflicting rights of landlord and tenant can best be accommodated through rigid enforcement by municipal authorities of comprehensive and explicit building codes. Definite guidelines for determining actionable violations would restrict the tenant's discretion and reduce the possibility of unwarranted refusals to pay rent. In addition, steeper civil fines and more effective use of criminal sanctions would do much to encourage landlord compliance with applicable regulations. When the landlord's violations go unnoticed by municipal authorities, however, the tenant should be entitled to rely on the contract remedies for breach of warranty recognized by the instant court. Moreover, these remedies should be available to tenants whose leases are not covered by building codes. Significantly, the court's holding can be interpreted to imply a common law warranty of habitability in all leases irrespective of whether they are covered by building codes. The court, however, left unanswered the question of the scope of a landlord's duty absent controlling regulations. It is likely, therefore, that this aspect of the decision will be the subject of considerable litigation. In any event, it seems clear that the future course of landlord-tenant relationships depends largely on the landlord. Judicial recognition of an implied warranty to maintain premises in a habitable condition leaves the landlord three choices. First, he can accept the burden of improving his tenement and incur the cost himself. Secondly, he can make the necessary improvements, but pass the cost on to the tenants by raising rents. Higher rents would likely force many poor

43. *See* note 25 *supra*.

44. *See, e.g.*, N.Y. REAL PROP. ACTIONS LAW § 755 (McKinney Supp. 1969); PA. STAT. ANN. tit. 35, § 1700-1 (Supp. 1970).

tenants to abandon the premises to find other housing in the midst of an already acute housing shortage,[45] a development that could activate government rent controls. Thirdly, a landlord who is unable to afford the necessary improvements may choose not to rent at all and simply collect property depreciation.[46] This result might force the government to take over more tenements in order to meet the increasing demands for urban housing. The problems posed admit to no easy solution. It is certain, however, that the tenant's need for adequate shelter requiring continuous repair and maintenance will not be diminished. Moreover, the tenant who is left to his traditional remedies has little, if any, chance of improving his situation. For these reasons, it is believed that the instant court correctly decided that the most effective solution, both in terms of fundamental fairness and the needs of society as a whole, is to provide greater legal protection to the tenant's right to a habitable place in which to live.

45. The use of mobile homes has been suggested as an aid in solving New York City's housing shortage and climbing rents, because it would allow people to pull out of hotels and dilapidated buildings and move into more deeent housing. N.Y. Times, Nov. 28, 1970, at 1, col. 2.

46. It has been stated that in 1969 alone, 30,000 buildings were left abandoned and without serviees by landlords in New York City. N.Y. Times, Oct. 4, 1970, at 42, col. 4.