Vanderbilt Law Review

Volume 24
Issue 6 *Issue 6 - Symposium on Legal Paraprofessionals*

Article 8

11-1971

Recent Cases

Law Review Staff

RECENT CASES

Civil Rights—Desegregation—Busiug and the Use of Racial Quotas in Pupil Assignment Are Constitutionally Permissible Remedies To Elimiuate Racial Segregation in Dual School Systems

Plaintiff brought a class action against defendant board of education[1] seeking the elimination of racial segregation that allegedly persisted in the public school system.[2] Although it was agreed between the parties that the dual school system had not yet been dismantled,[3] the desegregation proposals that were submitted to the district court differed substantially concerning the techniques to be used in overcoming the system's racial imbalance, particularly for schools at the elementary level.[4] One

1. Defendant's school system, the forty-third largest in the United States, encompasses the city of Charlotte and surrounding Mecklenburg County, North Carolina. It covers an area of 550 square miles, spanning roughly 22 miles east-west and 36 miles north-south.

2. Plaintiff originally brought a class action against defendant school board to expedite integration and prevent unfavorable gerrymandering of school districts. That suit resulted in a court-ordered plan calling for geographic zoning with a free transfer provision. Swann v. Charlotte-Mecklenburg Bd. of Educ., 243 F. Supp. 667 (W.D.N.C. 1965). In September 1968 plaintiff filed a "motion for further relief" to expedite desegregation and eliminate other racial inequalities. Swann v. Charlotte-Mecklenburg Bd. of Educ., 300 F. Supp. 1358 (W.D.N.C. 1969).

3. As a result of the desegregation plan approved in Swann v. Charlotte-Mecklenburg Bd. of Educ., 243 F. Supp. 667 (W.D.N.C. 1965), during the 1968-69 school year, 21,000 of 24,000 Negro students attended school within the city of Charlotte, and two-thirds of them attended 21 schools that were either totally Negro or more than 99% Negro. Swann v. Charlotte-Mecklenburg Bd. of Educ., 300 F. Supp. 1381, 1386 (W.D.N.C. 1969).

4. The district court directed the school board to submit a plan by November 1969 that would achieve total desegregation for the following school year. Swann v. Charlotte-Mecklenburg Bd. of Educ., 306 F. Supp. 1291 (W.D.N.C. 1969). The school board's request for extension of time in submitting that plan was denied, and the board submitted an incomplete plan. Swann v. Charlotte-Mecklenburg Bd. of Educ., 306 F. Supp. 1299 (W.D.N.C. 1969). In December 1969 the district court held the board's plan unacceptable and appointed an expert to prepare a desegregation plan. It provided for: (1) the modification of the school board's high school plan by busing 300 Negroes to the nearly all-white Independence High School; (2) the use of the school board's junior high school plan combined with the use of "satellite" zones, thereby effecting substantial desegregation of every junior high school in the system; and, (3) the complete revision of the school board's elementary school zones and extensive busing and pairing of schools, thereby integrating every elementary school. In February 1970 the district court was presented with a completed school board plan. The plan called for the closing of 7 schools and the reassignment of their pupils; the restructing of school attendance zones to achieve greater racial balance; the creation of a single athletic league; racially mixed faculties; and a majority-to-minority transfer system. On the secondary school level its effect was to produce a 17% to 36% Negro population in 9 of the high schools with a 2% Negro population in the tenth, and a Negro population of as high as 38% in 20 junior high schools, with a 90% Negro population in the twenty-first. On the elementary school level, however, the plan

proposal, called the "Finger Plan," was drafted by a court appointed expert, and recommended racial quotas in pupil assignment, geographic zoning, and busing to achieve the desegregation of virtually all the schools in the system. Defendant's proposal, in contrast, rejected busing as a desegregation technique, at least on the elementary school level, and relied primarily on geographic zoning to achieve racial balance. It failed, however, to desegregate approximately half of the elementary schools. Plaintiff maintained that in order to implement full desegregation, busing and the use of racial quotas in pupil assignment were within the court's remedial powers under the equal protection clause. Defendant contended that busing would impose an unreasonable burden upon the school system, and further asserted that sections 2000c(b) and 2000c-6 of Title IV of the Civil Rights Act of 1964[5] deprived the court of power to require either the busing or the assignment of students to overcome racial imbalance in public schools. The district court adopted the Finger Plan calling for busing and pupil assignment based on racial quotas.[6] The Court of Appeals for the Fourth Circuit affirmed the district court's plan for secondary school desegregation, but vacated and remanded the portion of the plan dealing with elementary schools, concluding that the extensive busing placed an unreasonable burden on the school board.[7] On remand, after defendant chose not to amend its desegregation proposal,[8] the district court reaffirmed its original desegregation plan.[9] On

produced significantly less desegregation. Utilizing mainly the gerrymandering of school zones, it resulted in the placement of 50% of the Negro pupils in 9 schools that ranged from 86% to 100% Negro. Swann v. Charlotte-Mecklenburg Bd. of Educ., 311 F. Supp. 265 (W.D.N.C. 1970).

5. 42 U.S.C. § 2000c(b) (1964) provides: " 'Desegregation' means the assignment of students to public schools and within such schools without regard to their race, color, religion, or national origin, but 'desegregation' shall not mean the assignment of students to public schools in order to overcome racial imbalance." 42 U.S.C. § 2000c-6 (1964), authorizing the Attorney General to institute federal suits, provides in part: "[N]othing herein shall empower any official or court of the United States to issue any order seeking to achieve a racial balance in any school by requiring the transportation of pupils or students from one school to another or one school district to another in order to acbieve such racial balance, or otherwise enlarge the existing power of the court to insure compliance with constitutional standards."

6. Swann v. Charlotte-Mecklenburg Bd. of Educ., 311 F. Supp. 265 (W.D.N.C. 1970).

7. Swann v. Charlotte-Mecklenburg Bd. of Educ., 431 F.2d 138 (4th Cir.), *cert. granted*, 399 U.S. 926 (1970) (Supreme Court directed reinstatement of the district court's order pending further proceedings in the district court).

8. The district court received 2 new plans for the elementary schools: a plan prepared by the Department of Health, Education, and Welfare (HEW) based on contig ous zoning of schools, and a plan proposed by 4 members of the 9-member school board achieving substantially the same result as the Finger plan but with slightly less busing. A majority of the school boc rd declined to change its plan. The district court then gave the school board its choiee of the 3 plans other than their own or the option to submit a new plan. The school board "acquiesced" in the Finger plan.

9. Swann v. Charlotte-Mecklenburg Bd. of Educ., 318 F. Supp. 786 (W.D.N.C.), *cert. granted*, 400 U.S. 802 (1970).

certiorari to the United States Supreme Court, *held*, affirmed. When necessary to eliminate a state imposed dual school system, busing and the use of racial quotas in pupil assignment are within the district court's remedial powers under the equal protection clause. *Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. 1 (1971).[10]

In *Brown v. Board of Education*,[11] the Supreme Court held that racial segregation in public schools was unconstitutional because it denied equal protection of the laws to children of a minority group.[12] Following that landmark decision, the Court turned its attention to the standard of compliance to be applied by the district courts and considered the immense problems of implementing its desegregation mandate. It declared in *Brown II*[13] that desegregation was to proceed "with all deliberate speed"[14] and placed primary responsibility on school authorities for devising and effectuating desegregation plans. It was only when school authorities neglected this constitutional duty that the lower courts were empowered to intervene and impose suitable desegregation remedies of their own.[15] The response of affected school boards was far from cooperative. Some devised grade-a-year plans[16] that had little or no effect on racial balance in most school systems. In addition, many schools were subject to state enacted pupil placement laws.[17] While these tactics initially were acceptable as an effort to get the desegregation process moving, they later were attacked in the courts as ineffective

10. The following cases were argued with the instant case: Moore v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 47 (1971) (Supreme Court dismissed for lack of jurisdiction); North Carolina State Bd. of Educ. v. Swann, 402 U.S. 43 (1971) (North Carolina anti-busing statute held unconstitutional); McDaniel v. Barresi, 402 U.S. 39 (1971) (busing and rezoning permitted); Davis v. Board of School Comm'rs, 402 U.S. 33 (1971) (pairing and racial balance quotas held permissible).

11. 347 U.S. 483 (1954).

12. The *Brown* holding was limited to de jure school segregation, which is segregation that has the official sanction of state law or is otherwise caused by state action. It is distinguishable from de facto school segregation, which is attributable to private causes such as housing patterns or population shifts and not to direct state action. *See* Hobson v. Hansen, 269 F. Supp. 401 (D.D.C. 1967).

13. Brown v. Board of Educ., 349 U.S. 294 (1955).

14. *Id.* at 299-300.

15. *Id.* at 300.

16. *See, e.g.*, Maxwell v. County Bd. of Educ., 301 F.2d 828 (6th Cir. 1962), *rev'd on other grounds*, 373 U.S. 683 (1963); Goss v. Board of Educ., 301 F.2d 164 (6th Cir. 1962), *rev'd on other grounds*, 373 U.S. 683 (1963).

17. These laws conferred varying degrees of discretion upon either state or local authorities to assign pupils individually to schools within their system. *See* Covington v. Edwards, 264 F.2d 780 (4th Cir. 1959) (county board of education considered each student application for transfer on its individual merits); Carson v. Warlick, 238 F.2d 724 (4th Cir. 1956) (upheld pupil placement law which required school board to consider the health, safety and general welfare of pupils when making a student assignment).

desegregation devices that perpetuated the dual school system.[18] Finally, in *Griffin v. County Board*,[19] the Supreme Court indicated its growing impatience in the face of this intransigence. Noting the massive resistance to desegregation on the part of state political officials and school authorities, and recognizing their corresponding failure to provide effective desegregation plans, the Court concluded that the standard of "all deliberate speed" was no longer adequate. The same year, Congress passed the Civil Rights Act of 1964[20] in an apparent attempt to accelerate compliance by school officials with court desegregation orders. In one respect the Act clearly created operative procedures because it authorizes the Attorney General to initiate desegregation suits[21] and provides for the termination of financial assistance to school districts that fail to comply with federal desegregation guidelines.[22] On the other hand, it contains some sections that seemingly restrict the remedial authority of federal courts in school cases. These sections provide that the meaning of desegregation does not include the assignment of students to overcome racial imbalance and that the Act authorizes neither the courts nor school officials to order students transported for that purpose.[23] In spite of the efforts by the Court and Congress, very little school desegregation was accomplished. During the years 1963-66, the percentage of black students in southern states attending schools with white children rose from slightly more than one percent to six percent.[24] Attributable generally to the passage of the Civil Rights Act and particularly to the school authorities' fear of losing federal school funds,[25] the progress represented by the trend was small in proportion to the amount of desegregation legally required. As a result, the freedom-of-choice plans in effect during this period were widely challenged in the courts as inade-

18. Green v. School Bd., 304 F.2d 118 (4th Cir. 1962) (school assignment of pupils based on race held invalid); Northcross v. Board of Educ., 302 F.2d 818 (6th Cir.), *cert. denied*, 370 U.S. 944 (1962) (pupil assignment law was not adequate as a plan for reorganizing schools into a nonracial system).

19. 377 U.S. 218 (1964). *See also* Watson v. City of Memphis, 373 U.S. 526 (1964) (opinion stated that *Brown I* never contemplated infinite number of delaying tactics to defeat segregation).

20. 42 U.S.C. §§ 2000c, 2000d to -4 (1964).

21. 42 U.S.C. § 2000c-6 (1964).

22. 42 U.S.C. § 2000d (1964), *as amended*, 42 U.S.C. § 2000d-5 (Supp. V, 1970).

23. 42 U.S.C. § 2000c(b) (1964). Courts have concluded that Congress included these provision to make clear it was not creating a right of action under the fourteenth amendment against de facto segregation. *Contra*, Goss v. Board of Educ., 270 F. Supp. 903 (E.D. Tenn. 1967). *See generally* United States v. Jefferson County Bd. of Educ., 372 F.2d 836 (5th Cir. 1966), *cert. denied*, 389 U.S. 840 (1967).

24. Carter, *The Warren Court and Desegregation*, 67 MICH. L. REV. 237, 245 (1968).

25. *Id.*

quate.[26] In *Green v. New Kent County School Board*,[27] the Supreme Court assessed the constitutionality of a Virginia freedom-of-choice plan and noted that instead of producing a unitary school system, the plan effectively had placed the burden of integration on the black children who had to elect to go to white schools. In light of the school board's failure to meet its affirmative duty, the Court declared that the freedom-of-choice plan had to be replaced by a desegregation plan that was feasible and promised realistically to work. After the *Green* Court handed down its vigorous standard for the evaluation of school desegregation progress, the lower courts began to utilize affirmative integration plans to remedy past official discrimination.[28] Even so, school board resistance to any plans that called for extensive busing continued to impair the speed with which the courts could dismantle dual school systems. In 1969, the Supreme Court in *Alexander v. Holmes County Board of Education*[29] again voiced its impatience with the speed of desegregation. In refusing a Justice Department motion for additional time to submit a desegregation plan for 33 Mississippi school districts, the Court declared that school districts were "to terminate dual school systems at once."[30] Thereafter, increased pressure was brought to bear on school authorities by the executive branch and the courts to overcome sham compliance with desegregation orders. The result was that an increased variety of specific remedial requirements came into use, such as racial balance quotas, rezoning, pairing of schools, and some busing.[31] Even though lower courts have found these remedial requirements to be within the *Green* and *Alexander* rationale, the Supreme Court had not yet determined which of them were constitutionally acceptable means of achieving the unitary school system required by *Brown I*.

---

26. *E.g.*, Monroe v. Board of Comm'rs, 391 U.S. 450 (1968); Raney v. Board of Educ., 391 U.S. 443 (1968).

27. 391 U.S. 430 (1968).

28. *See, e.g.*, United States v. Montgomery County Bd. of Educ., 395 U.S. 225 (1969) (school board ordered to move towards goal of racial balance in school faculty); United States v. Jefferson County Bd. of Educ., 380 F.2d 385 (5th Cir. 1967) (school board required to take affirmative action to eliminate effects of dual school system).

29. 396 U.S. 19 (1969).

30. *Id.* at 20.

31. *See* Felder v. Harnett County Bd. of Educ., 409 F.2d 1070 (4th Cir. 1969) (desegregation plan required racial balance quotas or pairing of schools); United States v. School Dist. 151, 404 F.2d 1125 (7th Cir. 1968) (bus transportation as a means to eliminate segregation may validly be employed); Davis v. Board of School Comm'rs, 364 F.2d 896 (5th Cir. 1966) (Constitution requires that teachers be assigned without regard to color). *Contra*, Goss v. Board of Educ., 270 F. Supp. 903 (E.D. Tenn. 1967) (there is no constitutional right to be bused); Deal v. Cincinnati Bd. of Educ., 369 F.2d 55 (6th Cir.), *cert. denied*, 389 U.S. 847 (1966) (board of education has no constitutional duty to bus black or white children out of their neighborhoods).

In the instant case, the Court initially reviewed the history of desegregation efforts since the *Brown I* decision. It pointed out that while for many years school officials had temporized and openly resisted *Brown I's* command to end the dual school system, the Supreme Court had gradually and necessarily tightened its compliance standards in order to overcome these tactics. More specifically, it declared that on the basis of the *Green* and *Alexander* decisions, defendant had an affirmative duty to devise a desegregation plan that was feasible and capable of immediate enforcement. Concluding that defendant had defaulted in this respect,[32] the Court reasoned that the instant case was an appropriate one for judicial intervention and for the exercise of broad equitable powers in fashioning a desegregation remedy. Turning its attention to the Civil Rights Act of 1964, the Court rejected defendant's argument that the Act limited the power of the federal courts to deal with segregation in the schools. In its view, the Act imposed no such limitation, but instead defined the existing powers of federal courts to implement *Brown I's* mandate. It explained further that the Act's apparent ban against the use of student assignment and busing as desegregation techniques was, in actuality, merely a legislative attempt to make clear that no right of action existed under the fourteenth amendment against de facto segregation.[33] In its analysis of the specific desegregation remedies in question, the Court found that while the Constitution did not require the use of quotas in regulating the racial composition of schools, their use was a helpful starting point in making the transition from a dual to a unitary school system.[34] It added, however, that in some cases the existence of one-race schools would be tolerated as long as school officials could meet the burden of showing that those schools do not result from present or past official discrimination. Continuing its analysis, the Court held that even though defendant's pupil assignment plan was racially neutral, it was nonetheless unacceptable because it failed to counteract effectively the lingering vestiges of past school desegregation. Accordingly, the remedial alteration of attendance zones was upheld by the Court as another reasonable method of overcoming racial imbalance. Finally, the

32. *See* note 4 *supra.*

33. Title IV of the Civil Rights Act of 1964 was not designed to restrict the courts' historic equitable powers. However, Title IV's legislative history indicates Congress' concern that someone would read the Act as creating a right of action under the fourteenth amendment where so-called "de facto segregation" existed—where there was a racial imbalance but no proof that it was caused by the discriminatory action of state or local officials. Hence, §§ 2000c(b) and 2000c-6 of Title IV were added to foreclose such an interpretation, but neither expanded nor withdrew any remedial powers from the courts.

34. The Finger plan called for a ratio of 71% white to 29% black in the school system.

Court addressed the question of the permissibility of busing and found that it too was an acceptable method for dismantling the dual school system. In making that determination, the Court acknowledged the legitimate concern for student health and safety and the potential burden that busing would impose upon defendant's system. It refused, however, to give those considerations overriding effect.[35] Summarizing its position, the Court held that since the desegregation plan adopted by the district court was neither unreasonable nor unworkable, it should be affirmed in its entirety.

The importance of the instant decision stems more from the public controversy that has arisen than from strictly legal questions concerning the soundness of its reasoning and conclusions. Indeed, from a legal standpoint, the instant Court's approval of busing and the use of racial quotas follows quite logically from the rationale of prior desegregation decisions that have grown out of *Brown I*. During the years immediately following *Brown I*, the Supreme Court's desegregation mandate met open resistance and ingenious methods of circumvention.[36] As a result, the Court was forced to impose increasingly more rigorous standards of compliance upon the school boards. For example, it abandoned the relatively moderate freedom-of-choice plan in favor of desegregation proposals that called for affirmative action to create racial balance in the schools.[37] In the same vein, it declared that mere racial neutrality on the part of school officials would not be enough to satisfy *Brown I* because, for all practical purposes, the school systems operating under that standard remained segregated. The instant decision is just the latest phase in the Supreme Court's long search for a key to the desegregation problem. In this decision, more than in any other, the Court has attempted to establish guidelines that lower courts can employ to dictate the detailed organizational and administrative changes constitutionally required to remedy the effects of a dual school system.[38] For the present at least, its impact should be to accelerate the pace of desegregation in

35. This conclusion by the Court can best be understood through an examination of defendant school board's past practices. In 1966-67, the school system, without regard to desegregation plans, intended to bus approximately 23,000 students for an average daily round trip of 15 miles. More elementary school children than junior and senior high school students were to be bused and children 4-5 years of age were to travel the longest routes. The district court estimated that the Finger plan would require an additional 138 buses, but 105 of those buses were already available and 22 more had already been ordered. These busing facilities existed in part because North Carolina requires transportation for all children who live more than one and one-half miles from school. N.C. GEN. STAT. § 115-186(b) (1966).

36. *See* notes 16 & 17 *supra*.

37. *See* note 27 *supra*.

38. *See* note 31 *supra*.

many states primarily because the lower courts will be less reluctant from a legal standpoint to utilize busing and racial quotas to achieve the racial balance called for in *Brown I*.[39] Evidence of this already can be seen in the many school systems currently subject to massive busing orders.[40] Regardless of the early indications of compliance, however, it is still premature to conclude that the Supreme Court has taken a significant stride toward the elimination of the dual school system, and toward the realization of equal educational opportunity. In view of the current public response to the instant decision, the opposite conclusion seems to be the more likely result. The controversy revolves around one central point: busing and the use of racial quotas are highly unpopular measures, especially among whites.[41] As the ultimate desegregation weapons in a court's arsenal, they unquestionably will have a dramatic impact upon every community in which they are used, potentially affecting every school age child, irrespective of wealth, race, or place of residence. It is this prospect that most alarms opponents of busing and racial quotas. Not only does it prompt them to withdraw their children from the schools, but it also might influence them to withdraw their leadership and financial support from public education altogether. Worse still, if whites continue to abandon the public schools, the schools will be unable to promote the interaction among students of different races that *Brown I* found to be so essential to the development of racial tolerance and a sense of equality in a democratic society. In short, the side effects of assaulting racial discrimination in the public schools are jeopardizing the very goal of equal educational opportunity that is being sought. This is the underlying irony of the desegregation movement, and the courts are now caught squarely in the dilemma. Constitutionally bound to dismantle the dual school system, they possess desegregation weapons that they dare not use to the fullest extent for fear of destroying the good characteristics of public schools along with the bad.

Given this perspective, it is crucially important for lower courts to examine the instant decision to find a permissible basis for alternatives to busing and the use of racial quotas. Even if this were not dictated by the counterproductiveness of using these two measures, it eventually would be forced upon the courts because of the immense administrative, economic, and physical problems involved in trying to reorganize a school system along nonracial lines. Some school systems, mainly those

39. N.Y. Times, Apr. 22, 1971, at 25, col. 1.

40. N.Y. Times, Sept. 5, 1971, § 4, at 1, col. 1.

41. Squires, *Needed: U.S. Policy on School Busing*, The Nashville Tennessean, Sept. 5, 1971, § B, at 1, col. 5.

near larger cities, may face insuperable time problems in transporting students long distances between home and school; in that situation something less than perfect racial balance would have to satisfy the courts. A more critical and typical problem, however, is the lack of resources to finance such a school reorganization, particularly where massive busing is required. This latter problem, while not overwhelming in the instant case,[42] is beginning to loom larger elsewhere in the country. In Corpus Christi, Texas, for example, the school board maintains that it cannot afford the 125 buses needed to comply with a district court busing order.[43] A very similar problem exists in Pontiac, Michigan.[44] While it was thought at one time that federal funds could be used to alleviate this problem, no relief for local school boards appears to be forthcoming from that source. In fact, President Nixon has instructed Secretary Richardson to prohibit the use of funds from the Emergency School Assistance Act for the purpose of busing.[45] In view of the burgeoning problems associated with busing and the use of racial quotas, the development of alternative desegregation measures[46] should proceed as rapidly as possible.[47] One possible alternative measure would be to draw school zones so that they cut across racially impacted residential areas; another would be to build new schools in strategic locations to serve students of both races.[48] Whatever form they take, these measures, at the very least, must be capable of achieving an enduring state of desegregation in the schools. At the very best, they should be capable of translating the elusive ideal of equal educational opportunity into a reality for children of minority groups.

---

42. *See* note 35 *supra*.

43. Wall Street J., Aug. 20, 1971, at 1, col. 3.

44. N.Y. Times, May 29, 1971, at 17, col. 3.

45. TIME, Aug. 16, 1971, at 10.

46. In Dallas, Texas, for example, the court approved a plan that called for the creation of a $15 million television network that would connect elementary classrooms and allow the children to have daily one-hour sessions from a similar class in a school dominated by a different race. In addition, the plan provided that any student who volunteered for the majority-to-minority transfer program would be rewarded with a 4-day school week. TIME, Aug. 16, 1971, at 11.

47. Fortunately, there are signs that the Supreme Court will be amenable to this shift in approaeh; it set no ironclad standard requiring the creation of absolute racial balance in the public schools.

48. Brief for United States as Amicus Curiae at 25, Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1 (1971).

Civil Rights—Section 1983—Mnnicipality Subject to Section 1983 Damage Suit if Local Law Recognizes Municipal Liability

Plaintiff brought suit for damages in federal court against defendant, the District of Columbia,[1] under section 1983 of Title 42, United States Code,[2] when defendant's allegedly inadequate training and supervision of its policemen resulted in the deprivation of plaintiff's constitutional rights.[3] Plaintiff contended that he was arrested by one of defendant's policemen without probable cause and with excessive force.[4] Although local law recognized municipal liability,[5] defendant argued that the municipality was not within the meaning of a "person" against whom liability can be imposed by section 1983, and it, therefore, moved for dismissal on the ground of sovereign immunity. The trial court dismissed the complaint without opinion. On appeal to the United States Court of Appeals for the District of Columbia Circuit, *held*, reversed and remanded. When local law recognizes municipal liability, a cause of action under section 1983 for deprivation of civil rights will lie against the municipality. *Carter v. Carlson*, 447 F.2d 358 (D.C. Cir. 1971) *petition for cert. filed*, 40 U.S.L.W. 3308 (U.S. Sept. 26, 1971) (No. 71-564).

Section 1983, originally enacted as the first section of the Civil Rights Act of 1871,[6] established a broad civil remedy against "every

1. In addition to the District of Columbia, 3 other defendants were named in plaintiff's complaint: District of Columbia policeman Carlson, precinct captain Prete, and Police Chief Layton. Plaintiff sought to hold Carlson liable for assault and battery or negligence in making the arrest, and Prete and Layton liable for negligent training and supervision. Plaintiff sought to hold the District of Columbia liable for the tortious conduct of its officers under the theory of *respondeat superior*, and for its own negligence regarding the supervision and training of its officers. In each instance, plaintiff asserted both a common law tort theory of liability and a claim for deprivation of civil rights under 42 U.S.C. § 1983 (1964). This Comment concerns only the § 1983 claim against the District for its negligent training and supervision.

2. 42 U.S.C. § 1983 (1964): "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. While the specific constitutional violation asserted by plaintiff is not mentioned, the court discusses the fouth amendment protection against illegal search and seizure.

4. The complaint alleged that officer Carlson arrested plaintiff in a Washington, D.C. bar in 1968 without probable cause, and that the officer beat plaintiff with brass knuckles. For the purpose of testing the sufficiency of the complaint, the court assumed these allegations to be true.

5. Carter v. Carlson, 447 F.2d 358 (D.C. Cir. 1971) *petition for cert. filed*, 40 U.S.L.W. 3308 (U.S. Sept. 26, 1971) (No. 71-564).

6. Act of Apr. 20, 1871, ch. 22, § 1, 17 Stat. 13. This Act acquired the popular name, the Ku Klux Act, since it was the major congressional response to the chaos and violence that accompanied reconstruction in the South. In fact it was labelled a bill "To enforce the provisions of the 14th Amendment to the Constitution of the United States." H.R. REP. NO. 320, 42d Cong., 1st

person" who, while acting "under color of" state law, deprives another person of his rights under the Constitution or laws.[7] Although it was originally construed narrowly,[8] section 1983 recently has been interpreted to include a multiplicity of situations, precipitating a marked increase in litigation under its provisions.[9] This judicial expansion of section 1983 was based on the section's underlying policies:[10] first, to override certain kinds of state law;[11] second, to provide a remedy when state law was inadequate; and third, to provide a federal remedy when the state remedy, though adequate in theory, was not available in practice.[12] The breadth of section 1983 has been limited by the denotation of the statutory phrase "every person," whose meaning was derived from the extensive legislative history of the Civil Rights Act of 1871.[13] The early debates questioned congressional ability to impose liability upon towns and counties[14] as was suggested in the Sherman amendment[15] to the Act. It was felt that "Congress has no constitutional power to impose any obligation upon county and town organizations, the mere instrumentality for the administration of state law."[16] Following two House rejections of modified versions, the Sherman amendment was replaced by section six of the Act of April 20, 1871, which imposed liability on "any person" who has knowledge of the specific wrongs being committed in deprivation of one's constitutional rights.[17] While numerous lower court decisions had held that municipalities were not

Sess. (1871). For a general history of the Civil Rights Act of 1871 and its subsequent history see Shapo, *Constitutional Tort: Monroe v. Pape, and the Frontiers Beyond*, 60 NW. U.L. REV. 277 (1965); Comment, *Federal Comity, Official Immunity, and the Dilemma of Section 1983*, 1967 DUKE L.J. 740.

7. 42 U.S.C. § 1983 (1964).

8. For a discussion of the early interpretation of the Civil Rights Act of 1871 see Shapo, *supra* note 6. Only within the past 25 years have damage suits based upon § 1983 been sought against municipalities and other public entities. *See* cases cited note 18 *infra*.

9. 1970 DIRECTOR OF ADM. OFFICE OF THE UNITED STATES COURTS ANN. REP., table 12b; *see* Note, *Limiting the Section 1983 Action in the Wake of Monroe v. Pape*, 72 HARV. L. REV. 1486 (1969). It is interesting to note that *United States Code Annotated* reports only 19 decisions litigated under § 1983 in the first 65 years after its adoption. *See* 42 U.S.C.A. § 1983 (1964). Recent developments have extensively broadened the application of § 1983 as evidenced by the volume of cases reported in *United States Code Annotated*.

10. For a discussion of these policies see *Monroe v. Pape*, 365 U.S. 167 (1961).

11. What the *Monroe* Court meant by "certain kinds of state law" has never been discussed in subsequent opinions. It appears that this phrase was used to denote state law that contradicts or inadequately protects federal civil rights. A study of the factual situations in the § 1983 cases may give rise to an operational definition of this phrase.

12. 365 U.S. at 173-74; *see* McNeese v. Board of Educ., 373 U.S. 668, 671-72(1963).

13. *See* materials cited note 6 *supra*.

14. CONG. GLOBE, 42d Cong., 1st Sess. 800-21 (1871).

15. *Id.* at 663.

16. *Id.* at 804.

17. *Id.* This section is now 42 U.S.C. § 1986 (1964).

"persons" for the purposes of section 1983,[18] the Supreme Court did not consider municipal liability under section 1983 until 1961 in *Monroe v. Pape*.[19] The Court then held that although section 1983 provides a federal remedy for the deprivation of federal rights and is supplementary to state remedies, it should be interpreted with reference to concepts of common-law tort liability.[20] Furthermore, the Court, looking solely to the debates and resolution concerning the Sherman amendment, concluded, *in pari materia*, that, because the response to the Sherman proposal had been so antagonistic, the word "person" in the final text clearly was not intended to include municipalities.[21] This exemption of municipalities has been broadened to the point that most entities which are not human beings are excluded from section 1983 liability.[22] Consequently, it has been held that cities,[23] counties,[24] and states[25] are outside the purview of the section.[26] Moreover, the Ninth Circuit in *Brown v. Town of Caliente*,[27] extended the exact *Monroe* holding to bar a section 1983 action against a municipality even though local law recognized municipal liability.[28] The *Brown* decision did not, however, consider the

18. *See, e.g.*, Cuiska v. City of Mansfield, 250 F.2d 700 (6th Cir. 1957), *cert. denied*, 356 U.S. 937 (1958) (governmental immunity of municipalities not abrogated by Civil Rights Act); Hewitt v. City of Jacksonville, 188 F.2d 423 (5th Cir.), *cert. denied*, 342 U.S. 835 (1951) ("person" as used in Civil Rights Act does not include a state or its governmental subdivisions); Bomar v. Keyes, 162 F.2d 136 (2d Cir.), *cert. denied*, 332 U.S. 825 (1947) (City of New York not a "person" under Civil Rights Act).

19. 365 U.S. 167 (1961). Plaintiff's complaint alleged that 13 Chicago policemen broke into his home without a search warrant and ransacked his home while his entire family was made to stand naked in the living room. Then plaintiff was taken to a police station and detained on "open" charges for 10 hours without arraignment before a magistrate or without being allowed to phone his family or an attorney. The City of Chicago as well as the policemen were named as defendants under § 1983. Municipal liability was not recognized in the jurisdiction.

20. *Id.* at 180, 183, 187.

21. *Id.* at 191.

22. *See, e.g.*, Zuckerman v. Appellate Div., 2d Dep't, Sup. Ct., 421 F.2d 625 (2d Cir. 1970) (state court not a "person"). *See also* Kates, *Suing Municipalities and Other Public Entities Under the Federal Civil Rights Act*, 4 CLEARINGHOUSE REV. 177 (1970). Some public entities, however, such as school boards, have been deemed to be "persons" under § 1983. *See, e.g.*, Harkless v. Sweeny Independent School Dist., 427 F.2d 319 (5th Cir. 1970), *cert. denied*, 400 U.S. 991 (1971) (equitable relief for reinstatement and back pay granted).

23. *E.g.*, Brown v. Town of Caliente, 392 F.2d 546 (9th Cir. 1968); Fisher v. City of New York, 208 F. Supp. 681 (S.D.N.Y. 1962).

24. *E.g.*, Stevenson v. Sanders, 311 F. Supp. 683 (W.D. Ky. 1970).

25. *E.g.*, Diamond v. Pitchess, 411 F.2d 565 (9th Cir. 1969); Penn v. Stumpf, 308 F. Supp. 1238, 1240-41 (N.D. Cal. 1970).

26. *See generally* Kates, *supra* note 22. It must be noted, however, that injunctive relief has been granted under § 1983 against a municipality. *See, e.g.*, Dailey v. City of Lawton, 425 F.2d 1037, 1039 (10th Cir. 1970).

27. 392 F.2d 546 (9th Cir. 1968).

28. 392 F.2d at 547; *see* Wilcher v. Gain, 311 F. Supp. 754, 755 (N.D. Cal. 1970).

relevance of section 1988 of Title 42, United States Code,[29] which has been interpreted to permit the incorporation of local rules into federal statutes when the former better serve the policies of the federal civil rights statutes.[30] Thus the only recourse under section 1983 for an aggrieved party seeking damages has been an action against an individual, such as a policeman,[31] warden,[32] or other public official,[33] who violates the plaintiff's civil rights "under color of" local law.[34]

In the instant case, the court initially acknowledged that *Monroe v. Pape* is generally cited as authority for the proposition that no damage suit against a municipality is authorized under section 1983. The court emphasized, however, that in *Monroe*, unlike the case at bar, municipal liability was not recognized by local law. The court noted a threefold significance to this distinction. First, the court reasoned that the congressional intent behind the Civil Rights Act of 1871, as interpreted in *Monroe*,[35] was not to legislate municipal liability but to defer to local law regarding this liability. Therefore, the court concluded that local laws which recognize municipal liability should control the scope of liability under section 1983. Secondly, the court recognized that the application of local laws of municipal liability to section 1983 is consistent with section 1988.[36] Thirdly, the court found that Congress's control over the District of Columbia precludes any interference with a state's exclusive power to impose municipal liability. The court therefore concluded that the Supreme Court's decision in *Monroe* should be limited

29. 42 U.S.C. § 1988 (1964): "The jurisdiction in civil and criminal matters conferred on the district courts by the provisions of this chapter and Title 18, for the protection of all persons in the United States in their civil rights, and for their vindication, shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect; but in all cases where they are not adopted to the object, or are deficient in the provisions necessary to furnish suitable remedies and punish offenses against law, the common law, as modified and changed by the constitution and statutes of the State wherein the court having jurisdiction of such civil or criminal case is held, so far as the same is not inconsistent with the Constitution and laws of the United States, shall be extended to govern the said courts in the trial and disposition of the cause, and if it is of a criminal nature, in the infliction of punishment on the party found guilty." The court's comparison of § 1983 with § 1988 is an approach that neither the *Monroe* court nor the plaintiff utilized.

30. *See, e.g.*, Sullivan v. Little Hunting Park, 396 U.S. 229, 240 (1969).

31. *See, e.g.*, Stringer v. Dilger, 313 F.2d 536 (10th Cir. 1963).

32. *See, e.g.*, Roberts v. Pepersack, 256 F. Supp. 415 (D. Md. 1966), *cert. denied*, 389 U.S. 877 (1967).

33. *See, e.g.*, Sostre v. Rockefeller, 312 F. Supp. 863, 880-81 (S.D.N.Y. 1970).

34. Kates, *supra* note 22. *See also* Shapo, *supra* note 6.

35. 365 U.S. at 187-92.

36. *See* materials cited note 29 *supra*. The court cited Sullivan v. Little Hunting Park, 396 U.S. 229, 240 (1969), for the proposition that either federal or state law rules on damages may be used, whichever better serves the policies of the federal statutes. *See* Brazier v. Cherry, 293 F.2d 401, 409 (5th Cir. 1961).

to cases in which municipal liability is not recognized by local law and remanded the case for a determination on the merits of the section 1983 claim.

By incorporating into section 1983, local law that permits recourse against the resources of the municipality, the instant case has preserved the fundamental congressional intent to afford adequate redress for the deprivation of an individual's civil rights. While the modest incomes and assets of most civil servants could not satisfy a substantial claim under section 1983, the more sizeable resources of the municipality could provide this redress[37] when its negligence is shown to have precipitated the deprivation of the claimant's constitutional rights. By removing the burden of singular liability from the individual employee in these situations, the instant solution seems more desirable than that of *Monroe* and *Brown*. Moreover, the imposition of municipal liability not only will help to insure recovery on a valid claim, but should encourage municipalities to intensify the screening, training, and supervision of its employees. Perhaps the most significant element of the instant decision, however, is its incorporation of local tort law into section 1983 by means of section 1988. This seemingly novel methodology, explicitly adopted in this case, appears to have implicit authority in the *Monroe* decision. The Court in *Monroe* noted that while section 1983 represents a federal remedy supplementary to a state remedy, it should be viewed against the background of common-law tort liability.[38] Thus, without express reference to section 1988, *Monroe* assents to structuring potential municipal liability under section 1983 around local rules of tort liability. Therefore, whether a municipality can be sued under section 1983 is dependent upon the sovereign immunity law of the jurisdiction in which the case is commenced. In addition to an obvious impairment of uniformity in recovery against municipalities, the method adopted by the instant court makes the definition of "person" depend upon local rather than federal interpretation. This rule threatens the policy of section 1983 to provide a supplementary remedy to inadequate state law.[39] Under the instant court's approach, a section 1983 suit against a municipality is only as adequate as the local remedy; it is coextensive with, rather than supplementary to, local remedies. The wisdom of this method is particularly questionable since it threatens to subject a remedy for constitutional

37. *See* Kates, *supra* note 22. It must be noted, however, that the financial crises being experienced by many cities question their ability to provide adequate recompense to the aggrieved party. Yet, however severe the municipality's financial condition may appear, satisfaction of a substantial claim against a municipality appears much more probable than against a public servant.

38. 365 U.S. at 187.

39. *Id.* at 183.

deprivations to local tort law disparities.[40] The variation in the vindication of abridged constitutional rights introduced by the instant decision and the current split between the Ninth Circuit in *Brown* and the instant court suggests the need for precise clarification of the interrelationship of federal and local tort law under section 1983. Clarification by legislative action or distinct judicial guidelines should provide either the express inclusion or exclusion of municipalities as "persons" under section 1983. In reaching this determination, it is critically important to note that while Congress did not intend to legislate municipal liability, the paramount congressional concern was to provide an adequate and consistent remedy for the deprivation of a claimant's constitutional rights.

Constitutional Law—Citizenship—Statute that Conditions Retentiou of United States Citizenship upon Residency Requirement Is Constitutional When Citizenship Is Not Protected hy the Fourteenth Amendment Citizenship Clause

Plaintiff, a citizen of both Italy and the United States,[1] forfeited his American citizenship[2] by failing to comply with section 301(b) of the Immigration and Nationality Act of 1952.[3] Section 301(b) provides that

40. *See generally* Shapo, *supra* note 6. This excellent discussion of § 1983 analyzes the interrelationship of local and federal law in the federal civil rights statutes. It suggests that § 1983 is a federal tort remedy for the deprivation of rights that may or may not be included in the rights, privileges, and immunities of the United States Constitution.

1. Plaintiff, Mario Aldo Bellei, born in Italy in 1939 of an Italian father and a native-born American mother, became a citizen of both countries at birth.

2. Although there is a definitional distinction between the terms "citizenship" and "nationality" and between "citizen" and "national," the terms are employed interchangeably for the purposes of this Comment.

3. Section 301(b) provides that: "Any person who is a national and a citizen of the United States at birth under paragraph (7) of subsection (a) of this section shall lose his nationality and citizenship unless he shall come to the United States prior to attaining the age of twenty-three years and shall immediately following any such coming be continuously physically present in the United States for at least five years: *Provided*, That such physical presence follows attainment of the age of fourteen years and precedes the age of twenty-eight years." 8 U.S.C. § 1401(b) (1964). Section 301(a)(7) provides that "the following shall be nationals and citizens of the United States at birth: (7) a person born outside the geographical limits of the United States and its outlying possessions of parents one of whom is an alien, and the other a citizen of the United States who, prior to the birth of such person, was physically present in the United States or its outlying possessions for a period or periods totaling not less than ten years, at least five of which were after attaining the age of fourteen years. . . ."

although a foreign-born child of an American citizen acquires United States citizenship at birth, he must live within the United States continuously for at least five years between the ages of fourteen and twenty-eight in order to retain that citizenship.[4] Plaintiff sought to enjoin the Secretary of State from enforcing section 301(b) and asked the federal court to declare the section unconstitutional on the ground that the provision was violative of his fifth amendment due process rights.[5] A three-judge district court[6] granted plaintiff's motion for summary judgment and held section 301(b) unconstitutional on due process grounds.[7] On appeal to the United States Supreme Court, *held,* reversed. Congress may impose a residency requirement as a condition subsequent to its statutory grant of citizenship when this citizenship is neither included under nor protected by the fourteenth amendment citizenship clause. *Rogers v. Bellei,* 401 U.S. 815 (1971).

The citizenship clause of the fourteenth amendment, which designates as citizens persons born or naturalized in the United States and subject to the jurisdiction of the United States,[8] represents the first and only constitutional definition of United States citizenship. Four statutes conferring citizenship upon the foreign-born child of an American citizen had been enacted by Congress at the time of the ratification of the fourteenth amendment in 1868, and four of these statutes were enacted subsequent to the amendment's ratification.[9] As a necessary concomitant to its power to confer derivative citizenship,[10] Congress consistently

4. Although plaintiff never resided permanently in the United States, he traveled on an American passport and registered with the Selective Service System in the United States. Plaintiff was warned on several occasions that he would have to fulfill the residency requirement imposed by § 301(b) or forfeit his citizenship. When plaintiff applied for a renewal of his United States passport in 1964, the Department of State refused his application on the ground that plaintiff had forfeited his American citizenship by virtue of § 301(b).

5. Plaintiff also alleged that enforcement of § 301(b) was violative of both the punishment clause of the eighth amendment and of the ninth amendment.

6. Bellei v. Rusk, 296 F. Supp. 1247 (D.D.C. 1969).

7. The district court concluded that "Congress may not proceed by granting citizenship, and then either qualifying the grant by creating a second-class citizenship or terminating the grant." *Id.* at 1252.

8. U.S. CONST. amend. XIV, § 1.

9. Act of Mar. 26, 1790, § 1, 1 Stat. 103; Act of Jan. 29, 1795, § 3, 1 Stat. 414; Act of Apr. 14, 1802, § 4, 2 Stat. 153; Act of Feb. 10, 1855, § 1, 10 Stat. 604, (later codified as REV. STAT. § 1993; Act of Mar. 2, 1907, § 6, 34 Stat. 1229; Act of May 24, 1934, § 1, 48 Stat. 797; Act of Oct. 14, 1940, 54 Stat. 1137. Each of the above statutes, which conferred citizenship upon the foreign-born children of American citizens, attached one or more conditions—both conditions precedent and subsequent—to the citizenship grant. All required residence of a parent in the United States before derivative citizenship could vest. The Acts of 1907 and 1934 required oaths of allegiance, and the Acts of 1934 and 1940 required 5 years continuous residence in the United States.

10. Derivative citizenship is a form of indirectly conferred citizenship. In the principal case, plaintiff's citizenship was derived from or through his mother's American citizenship. The com-

has imposed conditions, both precedent and subsequent, upon its statutory grant of citizenship to an American citizen's foreign-born child. Although the Supreme Court generally has upheld the validity of these conditional-grant statutes,[11] its treatment of the congressional power to withdraw citizenship once granted has been less predictable. In *Perez v. Brownell*,[12] for example, a closely divided Court upheld the authority of Congress to revoke an individual's American citizenship when the citizen had voted in a foreign election.[13] In a rigorous dissent, Chief Justice Warren agreed that United States citizenship could be voluntarily relinquished and admitted that certain other acts in derogation of undivided loyalty to the United States could result in expatriation,[14] but he firmly asserted that the power to denationalize was within neither the letter nor the spirit of the powers with which Government was endowed.[15] The

---

mon-law concept of derivative citizenship of a foreign-born child of a citizen is based upon a statutory enunciation of this principle. A Statute of Those that be Born Beyond the Sea, 25 Edw. III, stat. 2 (1350). *See* Calvin's Case, 2 Howell's State Trials 575, 585 (1608) (holding that all children of subjects of the King are ipso facto citizens was based upon argument that 25 Edw. III, stat. 2 (1350), was declarative of the common law); De Geer v. Stone, 22 Ch. D. 243, 247 (1875) (one born in Holland held to have been a British subject by common law as declared by 25 Edw. III, stat. 2 (1350)); Ludlam v. Ludlam, 26 N.Y. 356, 363 (1863) (25 Edw. III, stat. 2 (1350) asserted as declaratory of the common law of derivative citizenship). One commentator, however, hypothesized that without a statutory grant, foreign-born children of citizens could not derive American citizenship through their parents and that derivative citizenship had no relation to the common law. *See Alienigenae of the United States*, 2 AM. L. REGISTER 193 (1854). The Supreme Court adopted this latter view in United States v. Wong Kim Ark, 169 U.S. 649 (1898). In that case, the Court held that a foreign-born child of an American citizen could himself become a citizen only through the legislative authority of Congress. *Id.* at 702.

11. *See, e.g.*, Montana v. Kennedy, 366 U.S. 308 (1961) (citizenship denied since father was not citizen at time of plaintiff's birth); United States v. Macintosh, 283 U.S. 605 (1931) (oath of allegiance to the United States as condition precedent to the granting of citizenship upheld as valid); United States v. Schwimmer, 279 U.S. 644 (1929) (denial of citizenship upheld when plaintiff's general citizenship qualifications were doubted); Maney v. United States, 278 U.S. 17 (1928) (citizenship voidable because of jurisdictional defect); Weedin v. Chin Bow, 274 U.S. 657 (1927) (derivative citizenship descends only if father was United States resident prior to child's birth). *See also* Lee You Fee v. Dulles, 236 F.2d 885 (7th Cir. 1956), *rev'd per curiam on confession of error*, 355 U.S. 61 (1957) (upheld validity of § 301(g), which imposed a condition subsequent similar to § 301(b)).

12. 356 U.S. 44 (1958).

13. Other acts that, if voluntarily undertaken by an American citizen, would result in revocation of citizenship include: leaving the country in time of war or national emergency in order to avoid the draft; serving in the armed forces of a foreign nation; and making a formal renunciation of United States citizenship. 8 U.S.C. § 1481 (1964); *see* notes 14 & 15 *infra* and accompanying text.

14. *See, e.g.*, Savorgnan v. United States, 338 U.S. 491 (1950) (citizenship forfeited by obtaining foreign citizenship through naturalization); Mackenzie v. Hare, 239 U.S. 299 (1915) (citizenship forfeited by marriage to foreign national).

15. Perez v. Brownell, 356 U.S. 44, 64-66 (1958). Having concluded that Congress could not impose involuntary expatriation, Chief Justice Warren attempted to establish a standard for volun-

influence of this dissent was evidenced by the Court's limited but immediate departures from *Perez*, invalidating, on a case-by-case basis, certain involuntary expatriation provisions of the nationality acts.[16] In one case,[17] for example, the Court invalidated provisions that provided for denationalization of persons leaving the country in time of war or national emergency to evade the draft. Similarly, the Court in *Schneider v. Rusk*[18] held that a provision allowing the involuntary expatriation of only naturalized, as opposed to native-born, citizens, was violative of the due process clause of the fifth amendment because it discriminated unreasonably against naturalized citizens. The Court, however, avoided a general repudiation of *Perez* and offered no redefinition of congressional authority to withdraw citizenship. More recently, in *Afroyim v. Rusk*,[19] the Court overruled *Perez v. Brownell* and intimated that it was embracing the doctrine expressed by Chief Justice Warren in his *Perez* dissent. The Court in *Afroyim* relied upon legislative[20] and judicial[21] assertions denying the existence of a congressional power to withdraw citizenship and upon the absence of an express constitutional grant of congressional expatriation power, to conclude that the citizenship clause of the fourteenth amendment not only controls the status and scope of American citizenship, but also prohibits Congress from imposing involuntary relinquishments of this citizenship.[22]

---

tary relinquishment. He argued that before voluntary relinquishment could be found, a citizen's conduct must invariably involve a dilution of undivided allegiance sufficient to indicate voluntary abandonment of citizenship. *Id.* at 66-69.

16. Schneider v. Rusk, 377 U.S. 163 (1964) (invalidated § 352(a)(1) of the 1952 Act, which provided for denationalization of naturalized American citizens who resided for 3 or more years in the country of their former nationality); Kennedy v. Mendoza-Martinez, 372 U.S. 144 (1963) (invalidated § 401(j) of the 1940 Act and § 349(a)(10) of the 1952 Act, which provided for denationalization of persons leaving the country in time of war or national emergency to evade the draft). It is interesting to note that in Trop v. Dulles, 356 U.S. 86 (1958), decided the same day as *Perez*, the Court, in a plurality opinion, held that the use of denationalization as a punishment was barred by the punishment clause of the eighth amendment.

17. Kennedy v. Mendoza-Martinez, 372 U.S. 144 (1963).

18. 377 U.S. 163 (1964).

19. 387 U.S. 253 (1967).

20. Congress, in 1794, 1797, and 1818, considered and rejected proposals to enact laws that would have described specified conduct as resulting in involuntary expatriation. *Id.* at 257.

21. "The simple power of the national Legislature, is to prescribe a uniform rule of naturalization, and the exercise of this power exhausts it, so far as respects the individual." Osborn v. Bank of the United States, 22 U.S. (9 Wheat.) 738, 827 (1824) (dictum). The Court in *Osborn* was concerned with defining the powers of the Bank of the United States, and the statement relating to citizenship was directed toward refuting an analogy drawn between naturalization and the incorporation of a bank. In so doing, the Court declared that a constitutional distinction could not be upheld between native-born and naturalized citizens.

22. The *Afroyim* decision has been criticized, however, for its vague description of voluntary relinquishment and its seemingly indefinite scope. *See, e.g., The Supreme Court, 1966 Term*, 81

Distinguishing *Afroyim* and *Schneider*, the instant Court initially found that in those cases the protection of the fourteenth amendment citizenship clause was applicable because both plaintiffs were within the definition of a citizen stated in the first sentence of that amendment.[23] Since the instant plaintiff was neither born nor naturalized in the United States and was not subject to the jurisdiction of the United States, the Court reasoned that the basis of his citizenship was statutory rather than constitutional, and that therefore he was not entitled to the protection of the citizenship clause. Analyzing the judicial and legislative history of statutory citizenship grants, the Court confirmed congressional power to confer citizenship upon the foreign-born children of American citizens.[24] The Court then focused upon the narrow issue of whether Congress could impose conditions subsequent to a grant of citizenship. Finding no logical distinction between conditions precedent and subsequent, the instant Court reasoned that in the absence of citizenship clause protection, there should be no constitutional distinction between these two concepts.[25] Finally, noting the potential value of residency requirements in preventing problems of dual nationality, the Court concluded that the imposition of these requirements as a condition subsequent to granting derivative citizenship was not unreasonable, arbitrary, unlawful, or unconstitutional.[26]

Although the instant Court based its decision upon fourteenth amendment grounds, section 301(b) was initially challenged by the plaintiff and held unconstitutional by the district court as violative of the fifth amendment due process clause. It is appropriate, therefore, to consider the due process ramifications of this provision's constitutionality, even

---

HARV. L. REV. 69, 138 (1967); 17 BUFFALO L. REV. 925, 935 (1968); 44 N.Y.U.L. REV. 824, 826 (1969). The Attorney General and the Department of State, moreover, have concluded that the *Afroyim* rule is inapplicable to controversies arising under § 301(b). *See* 17 BUFFALO L. REV. 925, 935 (1968).

23. The first sentence of the fourteenth amendment provides that: "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside." U.S. CONST. amend. XIV, § 1.

24. Rogers v. Bellei, 401 U.S. 815, 831 (1971). The Court reviewed the statutory history of congressional grants of citizenship, pointing out that the Court has specifically recognized the power of Congress *not* to grant a United States citizen the right to transmit citizenship by descent. Until the 1934 Act, the transmission of citizenship to one born abroad was limited to the child of a qualifying American father and withheld entirely from the child of an American mother and an alien father.

25. *Id.* at 834-35. Essential to this conclusion was the Court's refusal to extend the rules of *Schneider* and *Afroyim* to citizenship not based upon the fourteenth amendment citizenship clause. The Court contended that the 2 earlier cases were based on the fourteenth amendment, but that the instant case was not.

26. *Id.*

though these were artfully avoided[27] by the Court in the principal case. By its declaration that some citizens—the first-sentence-fourteenth-amendment citizens—are protected by the fourteenth amendment citizenship clause, while other citizens are not afforded this protection by reason of the circumstances of their birth, the Court established a classification that subjects the latter category to involuntary denationalization. This classification raises a dangerous double standard because it limits the scope of the *Afroyim* rule against involuntary expatriation to native-born and naturalized citizens, thereby imposing a voidable second-class citizenship upon citizens whose status is derived from a statutory grant of Congress. Since citizenship constitutes the right to secure other rights under the sovereign authority,[28] the Court's decision places these statutory citizens in the anomalous position of possessing constitutionally protected rights,[29] but of having no constitutionally protected right to obtain those rights. While due process generally does not require equal treatment for all persons,[30] it does require any classification that causes unequal treatment to have a rational basis reasonably related to the legislative purpose of the challenged provision.[31] Although the instant Court argued the appropriateness of congressional concern for the dual nationality problem, it is submitted that this legitimate concern, to which the residency requirement is addressed, cannot constitute reasonable justification for the imposition of a classification that will subject some United States citizens to involuntary expatriation. Admittedly, the residency requirement serves an important and occasionally necessary acculturative purpose,[32] but after completing the prescribed period of American residence, the dual national is no less a dual

27. The Court avoided a consideration of the due process issue when it concluded that *Schneider*, a decision relying almost exclusively on fifth amendment due process grounds, actually was based on the fourteenth amendment citizenship clause.

28. *See* Perez v. Brownell, 356 U.S. 44, 64 (1958); Boudin, *Involuntary Loss of American Nationality*, 73 HARV. L. REV. 1510, 1529 (1960).

29. Section one of the fourteenth amendment protects all *persons*, including citizens and aliens, against deprivations of "life, liberty, or property, without due process of law." U.S. CONST. amend. XIV, § 1.

30. *See, e.g.*, Hirabayashi v. United States, 320 U.S. 81 (1943) (curfew imposed upon Japanese Nisei in military area upheld as not violative of due process clause); West Coast Hotel Co. v. Parrish, 300 U.S. 379 (1937) (minimum wage legislation for women upheld as not violative of due process clause).

31. *See, e.g.*, Bolling v. Sharpe, 347 U.S. 497 (1954) (segregated schools held to be discriminatorily violative of the due process clause); Steward Mach. Co. v. Davis, 301 U.S. 548 (1937) (classification supported by public policy and practical convenience held not violative of fifth amendment).

32. The district court made the same concession as to the acculturative efficacy of the residency requirement. 296 F. Supp. at 1252.

national and must contend with the many difficulties associated with that status.[33] At best, the unilaterally imposed residency requirement is a temporary, ineffective measure with which to deal with dual nationality.[34]

In distinguishing *Afroyim* and *Schneider* the Court embraced a very narrow, plain-meaning construction of the fourteenth amendment citizenship clause, the effect of which is to exelude foreign-born children of American citizens from the protection of the clause and to subject them to denationalization under section 301(b). Four significant considerations strongly militate against the adoption of this constitutional construction. First, the citizenship clause, and indeed the entire first section of the fourteenth amendment, was intended as a general declaration of fundamental rights that does not lend itself to the strict word-by-word interpretation imposed by the instant Court. The drafters were seeking to define United States citizenship and the fundamental privileges and immunities associated therewith in broad language;[35] there is no evidence of an intention to exclude any particular category of American citizenship from the scope of the clause.[36] Since the broad terminology employed throughout the amendment is indicative of an intention not to enumerate specific rights, the amendment, and the citizenship clause in particular, should be interpreted with the knowledge that each word cannot be assigned a precise constitutional significance without emasculating the sweeping declaratory nature of the amendment. Secondly, the narrow construction adopted by the instant Court, in addition to exalting the plain meaning of the citizenship clause over the spirit of the fourteenth amendment, raises a serious question of

33. Some of those difficulties could include: being called upon to fulfill obligations to 2 states that are at war with each other; compulsory military service in 2 states during peacetime; and the fact that states are likely to regard with disfavor those nationals who owe allegiance to foreign states and who contribute substantially to the welfare and security of those foreign states. N. BAR-YAACOV, DUAL NATIONALITY 4-6 (1961).

34. "[D]ual nationality will be with us as long as some states look chiefly to the place of birth (*jus soli*), and others to descent (*jus sanguinis*). Also, we shall have it as long as some states do, and some do not, require their permission for their nationals to become naturalized elsewhere; and as long as some states do, and some do not, permit automatic change of nationality by marriage." F. Russell, *Dual Nationality in Practice—Some Bizarre Results*, 4 INT'L LAW. 756, 763 (1970). A broad solution to the dual nationality dilemma has been offered by Bar-Yaacov. He suggests that children obtain the nationality of the country in which their parents have established a permanent residence, presuming that the residence of the child follows the residence of the parents. N. BAR-YAACOV, *supra* note 33, at 271.

35. *See* CONG. GLOBE, 39th Cong., 1st Sess. 474-76 (1866); J. JAMES, THE FRAMING OF THE FOURTEENTH AMENDMENT 78, 179 (1956).

36. The drafters spent a considerable portion of their time and energies attempting to formulate a definition that would include ex-slaves and some consideration was given to the effect of the amendment upon the American Indians and the Chinese. J. JAMES, *supra* note 35, at 78.

constitutional construction with respect to the privileges and immunities clause. If foreign-born children of American citizens are excluded from the scope of the citizenship clause, it should necessarily follow that they are also excluded from protection under the privileges and immunities clause[37] since that clause relies upon the citizenship clause definition of citizenship. This result surely was not intended by the drafters, who, by including the privileges and immunities clause, were attempting to insulate the status of American citizenship from the effect of discriminatory state legislation,[38] rather than limit the rights of any one category of citizens. Although the scope and import of the privileges and immunities clause have not yet been fully articulated, it is implausible that the instant Court intended that foreign-born children of American citizens not be included within its protection. Exclusion of these citizens would jeopardize several of their fundamental rights that are assertedly based upon the privileges and immunities clause, including: the right to travel from state to state;[39] the right to vote for national officers;[40] and the right to enter public lands.[41] Thirdly, the instant Court's narrow construction of the citizenship clause increases the probability that a foreign-born child of an American citizen will be rendered stateless by the operation of section 301(b). Although the instant Court rationalized the impact of its ruling on the plaintiff by assuming that his Italian citizenship would adequately protect him, not every foreign-born child of an American citizen possesses another nationality upon which to rely if deprived of his United States citizenship.[42] Since the power to denationalize freely in furtherance of limited political and diplomatic ends supports the concomitant power to create statelessness,[43] the operation of the condition subsequent could prove instrumental in depriving a foreign-born child of any nationality whatsoever. The plight of the stateless individual certainly is not enviable, for he can be readily expelled from the country

37. The privileges and immunities clause provides that "no state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States." U.S. CONST. amend. XIV, § 1.

38. J. JAMES, *supra* note 35, at 180.

39. Edwards v. California, 314 U.S. 160 (1941) (Douglas, Black & Murphy, JJ., concurring).

40. Twining v. New Jersey, 211 U.S. 78 (1908) (the Court listed several rights arising from the privileges and immunities clause, including the right to petition Congress, and the right to safety while in the custody of a United States marshal).

41. *Id.*

42. The foreign-born children of American citizens who are born in nations applying the principle of *jus sanguinis*, under which nationality and citizenship are acquired exclusively by descent through one's parents, regardless of place of birth, acquire only the nationalities of their parents.

43. Boudin, *supra* note 28, at 1529.

of his original nationality as well as from any other nation.[44] Fourthly, in 1868 when the fourteenth amendment was first proposed, there were comparatively few emigrants from the United States, and therefore, the anticipated number of foreign-born children of American citizens was insignificant.[45] For this reason, a special provision in the citizenship clause for foreign-born children was unnecessary. With over 40,000 Americans currently leaving the United States each year to reside abroad permanently,[46] however, there will be a substantial number of foreign-born children placed in the instant plaintiff's predicament. A broader construction of the citizenship clause therefore is necessary to give effect to the inclusive spirit of the amendment and to alleviate a problem that, although unforeseen by the drafters, will become more pervasive as the current American exodus mounts.

Constitutional Law—Equal Protection—School Financing System that Substantially Relies on Local Property Tax Violates Equal Protection Clause

Appellants initiated a class action seeking to have the California public school financing system[1] declared unconstitutional as a violation of equal protection.[2] Appellants alleged that the system, with its substan-

44. H. KELSEN, PRINCIPLES OF INTERNATIONAL LAW 377 (2d ed. 1966).

45. During the decade between 1860 and 1870, gross immigration to the United States exceeded net immigration by approximately 230,000 migrants, indicating that 23,000 emigrated from the United States each year. Most of these emigrants, who had been aliens in the United States, returned to their native lands. They did not therefore pose the significant citizenship difficulties encountered in the instant case. *See* J. SPENGLER & O. DUNCAN, DEMOGRAPHIC ANALYSIS 277-78 (1956).

46. TIME, Nov. 30, 1970, at 14.

1. Plaintiffs were Los Angeles County public school children and their parents. The children brought suit on behalf of a class consisting of all public school pupils in California, "except children in that school district, the identity of which is presently unknown, which school district affords the greatest educational opportunity of all school districts within California." Serrano v. Priest, 487 P.2d 1241, 1244, 96 Cal. Rptr. 601, 604 (1971). The parents brought suit on behalf of all parents who have children in the school system and who pay real property taxes in the county of their residence. The defendants were the Treasurer, the Superintendent of Public Instruction, and the Controller of the State of California, as well as the Tax Collector, Treasurer, and Superintendent of Schools of the County of Los Angeles. The county officials were sued both in their local capacities and as representatives of a class composed of the school superintendent, tax collector, and treasurer of each of the other counties in the state.

2. Appellants also sought an order directing appellees to reallocate school funds to remedy the invalidity and for an adjudication that the trial court retain jurisdiction of the action so that it might restructure the system if appellees and the legislature failed to act within a reasonable time.

tial dependence on local property taxes[3] and resultant wide disparities in school revenue, invidiously discriminates against the poor and makes the quality of a child's education a function of the wealth of his locality.[4] Urging that the right to an education in California's public schools is a fundamental interest that cannot be conditioned on wealth, appellants maintained that there is no compelling state interest necessitating the present method of financing. Appellees, while disputing that the financing scheme discriminates on the basis of wealth,[5] maintained first that the variations in per pupil expenditure are reasonably related to the legislative policy of delegating the right to determine tax rates to local districts in order that the expenditure reflect the relative importance that the district places on education; and second, that classification by wealth is constitutional as long as the wealth is that of the district, not the individual. Upon motion,[6] the trial court dismissed the complaint for failure to state a cause of action, and the Court of Appeals affirmed.[7] On appeal to the Supreme Court of California, *held,* reversed and remanded.[8] A public school financing system with substantial dependence

---

Appellants alleged that the financing scheme involved violated both the fourteenth amendment of the United States Constitution and article I, §§ 11 and 21, of the California constitution. Section 11 provides: "All laws of a general nature shall have a uniform operation." Section 21 states: "No special privileges or immunities shall ever be granted which may not be altered, revoked, or repealed by the Legislature; nor shall any citizen, or class of citizens, be granted privileges or immunities which, upon the same terms, shall not be granted to all citizens." The California courts have construed those provisions as "substantially the equivalent" of the equal protection clause of the fourteenth amendment. Department of Mental Hygiene v. Kircher, 62 Cal. 2d 586, 588, 400 P.2d 321, 43 Cal. Rptr. 329, 330 (1965).

3. The property valuations recently ranged from a low of $103 to a peak of $952,156 per child. "Per child" determinations are based not on total enrollment, but on "average daily attendance," a figure computed by adding together the number of students actually present on each school day and dividing that total by the number of days actually taught. California educational revenues for the fiscal year 1968-69 came from the following sources: local property taxes, 55.7%; state aid, 35.5%; federal funds, 6.1%; and miscellaneous sources, 2.7%. 487 P.2d at 1247, 96 Cal. Rptr. at 607 (1971).

4. Appellants also argued that the school financing system violates CAL. CONST. art. IX, § 5, which states, in pertinent part: "The Legislature shall provide for a *system of common schools* by which a free school shall be kept up and supported in each district at least six months every year . . . ." (emphasis added). Appellants maintained that the present financing method produces separate and distinct systems, each offering an educational program that varies with the relative wealth of the district's residents. The court rejected this argument, and found that the provision in § 5 did not require uniform educational expenditures in order for there to be a "system of common schools."

5. Since appellants alleged in their original complaint that a correlation existed between the amount of per pupil expenditure and the quality of education, the court took judicial notice of the fact as admitted by the demurrer to the complaint.

6. Both State and local officials, demurring, moved to dismiss.

7. 10 Cal. App. 3d 1110, 89 Cal. Rptr. 345 (1970).

8. On October 21, 1971, the California Supreme Court issued a clarification of its earlier ruling, pointing out that it had not yet actually struck down the school finance system, but had

on local property taxes and resultant wide disparities in school revenue violates the equal protection clause of the fourteenth amendment. *Serrano v. Priest*, 487 P.2d 1241, 96 Cal. Rptr. 601 (1971).

The traditional rule for whether a statutory classification violates the equal protection clause of the fourteenth amendment[9] is that a presumption of constitutionality[10] applies if the classification is rationally related to a legitimate governmental objective.[11] Because of this presumption of constitutionality and because there existed only the minimal requirement that legislative classifications be rational,[12] the Supreme Court found that the traditional test did not adequately protect fundamental rights and consequently created a second test, the "compelling interest" test.[13] This relatively recent test requires that the state establish not only that it has a compelling interest which justifies the law, but also that the distinctions drawn are necessary to fulfill the legislative purpose.[14] By placing the burden on the state, and reversing the presumption of constitutionality, the compelling interest test[15] greatly reduces the

merely ordered the case returned to the trial court to determine if the facts are as alleged. If they are, the trial court must find the system unconstitutional. Wise, *The California Doctrine*, SATURDAY REVIEW, Nov. 20, 1971, at 78, 82.

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

10. *See* Yick Wo v. Hopkins, 118 U.S. 356, 370 (1886) (class legislation prohibited unless it affects alike all persons similarly situated).

11. *See, e.g.*, Rapid Transit Corp. v. City of New York, 303 U.S. 573, 578 (1938) (object of raising revenue is rationally related to the imposition of a 3% tax on the gross incomes of public utilities); Gulf, C. & S. F. Ry. v. Ellis, 165 U.S. 150, 155 (1897) (penalty imposed upon railroad corporations for failing to pay debts struck down as an arbitrary and irrational classification).

12. *See, e.g.*, McGowan v. Maryland, 366 U.S. 420 (1961). In *McGowan*, the Court upheld state legislation that prohibited merchants in all but one county of the state from the retail sale on Sunday of such items as automobile and boating accessories, flowers, toilet goods, hospital supplies, and souvenirs. The legislation also exempted individuals in one county from a statewide prohibition against the operation of a bathing beach, bathhouse, dancing saloon, or amusement park on Sunday.

13. *See* Shapiro v. Thompson, 394 U.S. 618, 658 (1969) (compelling interest test used to strike down welfare residency requirements in 3 states); Harper v. Virginia Bd. of Elections, 383 U.S. 663 (1966) (compelling interest test used to strike down Virginia's poll tax); McLaughlin v. Florida, 379 U.S. 184 (1964) (statute providing for punishment of interracial cohabitation declared invalid as violation of equal protection).

14. *See* Carrington v. Rash, 380 U.S. 89 (1965). Although the Court found Texas' interest valid in excluding military personnel stationed in Texas from the franchise because a transient's interest in local affairs is often insubstantial, the Court found the statute invalid because the state could, with little difficulty, make a distinction between those who had a bona fide domicile and those who did not. *See also* Rinaldi v. Yeager, 384 U.S. 305 (1966) (Court invalidated classification affecting criminal appellants because there were alternatives available to the State which made the classification unnecessary).

15. *See* Skinner v. Oklahoma *ex rel.* Williamson, 316 U.S. 535, 541 (1942) (Oklahoma statute providing for compulsory sterilization of "habitual criminals" held subject to "strict scrutiny" because it affected "one of the basic civil rights").

likelihood that a statute will withstand constitutional challenge.[16] The compelling interest test has two branches: (1) the "suspect" criteria branch and (2) the "fundamental interests" branch. Two criteria[17] for classifications that the Court has held to be suspect are race[18] and wealth.[19] The fundamental interests concept has been defined to include the following areas: (1) the right to vote;[20] (2) the procedural rights of criminal defendants;[21] (3) the right to procreate;[22] (4) the right to free interstate movement;[23] and, possibly, (5) the right to an education.[24] A 1956 case, *Griffin v. Illinois*,[25] indicated a tendency on the part of the Court to require the state to show a compelling interest when a statutory

16. *See Developments in the Law—Equal Protection*, 82 HARV. L. REV. 1065 (1969).

17. *See also* Williams v. Rhodes, 393 U.S. 23 (1968) (criterion of political allegiance arguably added to suspect classifications).

18. Loving v. Virginia, 388 U.S. 1, 11 (1967) (statutory scheme to prevent marriages between persons solely on the basis of racial classifications struck down); McLaughlin v. Florida, 379 U.S. 184 (1964) (statute punishing interracial cohabitation struck down); *see* Korematsu v. United States, 323 U.S. 214, 216 (1944) (racial classifications, especially suspect in criminal statutes, subject to the "most rigid scrutiny"). *See also* Hirabayashi v. United States, 320 U.S. 81, 100 (1943) (distinction between citizens because of "ancestry" struck down); W. LOCKHART, Y. KAMISAR & J. CHOPER, CONSTITUTIONAL LAW—CASES—COMMENTS—QUESTIONS 1228 (1967).

19. Harper v. Virginia Bd. of Elections, 383 U.S. 663 (1966) (striking down Virginia's poll tax); *see* McDonald v. Board of Election Comm'rs, 394 U.S. 802, 807 (1969) (dictum). *See also* Michelman, *On Protecting the Poor Through the Fourteenth Amendment, Forward to the Supreme Court—1968 Term*, 83 HARV. L. REV. 7, 20 (1969).

20. Harper v. Virginia Bd. of Elections, 383 U.S. 663 (1966) (striking down poll tax); *see* Carrington v. Rash, 380 U.S. 89 (1965) (statute excluding military personnel from the franchise struck down); Reynolds v. Sims, 377 U.S. 533 (1964) (right to vote is impaired not only when a qualified individual is barred from voting, but also when the impact of his ballot is diminished by unequal apportionment).

21. In Griffin v. Illinois, 351 U.S. 12, 19 (1956), for example, the petitioners had been prevented from bringing writ of error after conviction because they could not afford a certified bill of exception. The Court, in a 5-4 decision, asserted: "In criminal trials a State can no more discriminate on account of poverty than on account of religion, race, or color." *Id.* at 17. *See also* Douglas v. California, 372 U.S. 353 (1963) (required appointment of counsel by the state for appeal guaranteed by law).

22. *See* Skinner v. Oklahoma *ex rel.* Williamson, 316 U.S. 535, 541 (1942) (Oklahoma statute providing for compulsory sterilization of "habitual criminals" held subject to "strict scrutiny" because it affected "one of the basic civil rights").

23. The Supreme Court in Shapiro v. Thompson, 394 U.S. 618 (1969), held unconstitutional statutory provisions that denied welfare assistance to persons who were residents and met all other eligibility requirements except that they had not resided within the jurisdiction for at least a year immediately preceding their applications for assistance.

24. *See, e.g.*, Brown v. Board of Educ., 347 U.S. 483 (1954) (race determinative); Hobson v. Hansen, 269 F. Supp. 401 (D.D.C. 1967), *aff'd sub nom.*, Smuck v. Hobson, 408 F.2d 175 (D.C. Cir. 1969) (ability grouping in schools struck down). Even when the effect of classification has been harmful to educational opportunities for blacks, most courts have hesitated to disturb school boards acting without a racially discriminatory motive. *See* Downs v. Board of Educ., 336 F.2d 988 (10th Cir. 1964); Bell v. School City, 324 F.2d 209 (7th Cir. 1963).

25. 351 U.S. 12 (1956).

classification according to the wealth of an individual affects fundamental interests. In *Griffin*, the first in a line of criminal procedure cases, the Court held that when a state statutorily guarantees writs of error as of right,[26] it cannot administer the statute so as to deny effective appellate review to the poor while granting review to all others.[27] In 1963, in *Douglas v. California*,[28] the Court extended the wealth principle to require appointment of counsel by the state for indigents in the one appeal guaranteed by California law.[29] In 1966, in *Harper v. Virginia Board of Elections*,[30] poverty significantly reappeared outside the criminal area as a special ground for the application of the compelling interest test.[31] In *Harper*, the Court held invalid a one dollar and fifty cent poll tax and invoked the compelling interest test because of the combination of wealth as a suspect classification and voting as a fundamental interest.[32] Similarly, in *Shapiro v. Thompson*,[33] when the Court invalidated the one year welfare residency requirements of three states, the combination of a wealth classification and the fundamental right to interstate movement was dispositive. Because a wealth classification has never been found to be sufficient in itself to necessitate the compelling interest test, the determination of whether an interest is "fundamental" is crucial to the availability of the compelling interest test.[34] Although the Court historically has referred to education as at least a fundamental value,[35] there is no

26. *Id.* at 18.

27. *Id.* at 13. *See also* Burns v. Ohio, 360 U.S. 252 (1959) (*Griffin* extended to invalidate the imposition upon indigents of a $20 filing fee as a condition precedent to all criminal appeals to the Ohio Supreme Court); Eskridge v. Washington State Bd. of Prison Terms & Paroles, 357 U.S. 214, 216 (1958) (made result in *Griffin* retroactive).

28. 372 U.S. 353 (1963).

29. *See In re* Antazo, 3 Cal. 3d 100, 473 P.2d 999, 89 Cal. Rptr. 255 (1970) (poor defendant denied equal protection when imprisoned only because he could not pay a fine).

30. 383 U.S. 663 (1966).

31. *See* Harvith, *The Constitutionality of Residence Tests for General and Categorical Assistance Programs*, 54 CALIF. L. REV. 567 (1966); *cf.* Boddie v. Connecticut, 401 U.S. 371 (1971). The Court in *Boddie*, using a due process rationale, held that it is unconstitutional to allow poverty to effectively bar an individual seeking a divorce from access to civil courts.

32. *See* Coons, Clune, & Sugarman, *Educational Opportunity: A Workable Constitutional Test for State Financial Structures*, 57 CALIF. L. REV. 305 (1969); *Developments in the Law—Equal Protection*, 82 HARV. L. REV. 1065 (1969); Note, *Discriminations Against the Poor and the Fourteenth Amendment*, 81 HARV. L. REV. 435 (1967).

33. 394 U.S. 618 (1969).

34. *See* Coons, Clune, & Sugarman, *supra* note 32, at 373.

35. *See* Brown v. Board of Educ., 347 U.S. 483 (1954); Meyer v. Nebraska, 262 U.S. 390 (1923) (state statute forbidding teaching of any modern language other than English to children who had not successfully passed the eighth grade held a violation of due process); Interstate Ry. v. Massachusetts, 207 U.S. 79, 87 (1907) (state statute that required street railway company to charge one-half the regular fare for the transportation of pupils to and from the public schools upheld); Coons, Clune, & Sugarman, *supra* note 32, at 375; Horowitz & Neitring, *Equal Protection Aspects of Inequalities in Public Education and Public Assistance Programs from Place to Place Within a State*, 15 U.C.L.A.L. REV. 787, 811 (1968).

direct judicial authority for the proposition that education is a fundamental right.[36] Reasoning from the *Harper* rationale, however, a strong argument has been made that an individual who is denied his right to vote is in no way damaged more severely than an individual who is compelled to go to schools that are inadequate because of insufficient financing.[37] In 1969, the Fifth Circuit Court of Appeals, in *Hargrave v. McKinney*,[38] acknowledged the validity of this position in a Florida school funding case when it stated that education might well be considered a fundamental interest. In *McInnis v. Shapiro*,[39] on the other hand, the plaintiffs argued that the Illinois public school funding system[40] offended equal protection because a classification by educational needs is the only one that is not arbitrary and irrational,[41] but the three-judge court upheld the wealth classification under the traditional rational relationship test. The Supreme Court affirmed in a brief per curiam opinion that could easily be viewed as a refusal by the Court to hold formally that education is a fundamental interest.[42]

In the instant case, the court initially reviewed the California public school financing system and concluded that the combination of a high tax rate within a district[43] and state equalization aid[44] does not, as a practical matter, offset the "inequalities inherent in a financing system

36. *See* Hargrave v. McKinney, 413 F.2d 320, 324 (5th Cir. 1969), *vacated.* Askew v. Hargrave, 401 U.S. 476 (1971).

37. *See* Coons, Clune, & Sugarman, *supra* note 32, at 366-69.

38. 413 F.2d 320, 324 (5th Cir. 1969). *But see* Van Dusartz v. Hatfield, 40 U.S.L.W. 2228 (D. Minn., Oct. 12, 1971).

39. 293 F. Supp. 327 (N.D. Ill. 1968) (3-judge court), *aff'd mem. sub nom.*, McInnis v. Ogilvie, 394 U.S. 322 (1969).

40. Coons, Clune, & Sugarman, *supra* note 32, at 312. The Illinois public school financing system is similar to that of California.

41. *See* 293 F. Supp. at 329.

42. McInnis v. Ogilvie, 394 U.S. 322 (1969) (per curiam); *see* Burrus v. Wilkerson, 397 U.S. 44, *aff'g mem.* 310 F. Supp. 572 (W.D. Va. 1969) (relied on *McInnis* in an attack on the constitutionality of Virginia's financing scheme); Hargrave v. Kirk, 313 F. Supp. 944 (M.D. Fla. 1970) (*McInnis* distinguished on the facts).

43. Although the California Legislature has placed ceilings on permissible district tax rates, statutory maxima may be surpassed in a "tax override" election if a majority of the district's voters approve a higher rate. Nearly all districts have voted to override the statutory limits. CAL. EDUC. CODE §§ 20751, 20803 (West Supp. 1971).

44. The California State School Fund, pursuant to the "foundation program," undertakes to supplement local taxes in order to provide a "minimum amount of guaranteed support to all districts." *Id.* § 17300. The state contribution is distributed in 2 main forms. "Basic state aid" consists of a flat grant to each district of $125 per pupil per year regardless of the wealth of the district. CAL. CONST. art. IX, § 6; CAL. EDUC. CODE §§ 17751, 17801 (West 1969). "Equalization aid" is distributed in inverse proportion to the wealth of the district, but only to an amount that will ensure that each elementary school pupil receives $345 annually, and that each high school student receives $488 annually. *Id.* §§ 17656, 17660, 17665.

based on widely varying local tax bases."[45] In rejecting appellee's underlying thesis that classification by wealth is constitutional as long as the wealth is that of the district and not the individual, the court found that the statutory classification was indeed one determined by wealth—a suspect classification—and that discrimination on the basis of district wealth is invalid. The court next considered the second element of appellant's equal protection attack: that the right to equal educational opportunity in public schools is a fundamental interest. Without any direct authority holding education is a fundamental interest, the instant court first looked to decisions which had recognized the fundamental importance of education in other contexts[46] and considered these for their persuasive effect. The court then reasoned that the right to an education is at least as significant as an individual's right to vote and a criminal defendant's right to certain procedural safeguards, both of which are acknowledged fundamental interests. The court concluded that the impact which compulsory education exerts on personality development and on free enterprise democracy compels the treatment of education as a fundamental interest.[47] Having found both a suspect classification and a fundamental interest, the court, using the compelling interest test, held that a state-engineered public school financing system, with a substantial reliance on local property taxes and resultant wide disparities in school revenue, invidiously discriminates on the basis of wealth and adversely affects the fundamental right to equal educational opportunity.[48]

Although the instant decision follows as closely as possible the rationale of *Harper* and *Shapiro*, it represents a distinct departure from the questionable precedent of *McInnis*. While the instant court used the compelling interest test, *McInnis* used the traditional rational relationship test and found no invidious discrimination in a similar school fund-

45. 487 P.2d at 1247, 96 Cal. Rptr. at 607 (1971). Statistics show the following range of per pupil expenditures for the 1969-70 school year:

	Elementary	High School	Unified
Low	$ 407	$ 722	$ 612
Median	672	898	766
High	2,586	1,767	2,414

Id. Similar spending variations have been noted throughout the country, particularly when suburban communities and urban ghettoes are compared. *See, e.g.*, Levi, *The University, The Professions, and The Law*, 56 CALIF. L. REV. 251, 258-59 (1968).

46. Materials cited note 24 *supra*.

47. 487 P.2d at 1258, 96 Cal. Rptr. at 618 (1971).

48. *See* Coons, Clune, & Sugarman, *supra* note 32, at 319 (discussion of alternative methods of public school funding).

ing scheme. In asserting the applicability of the compelling interest test, the California Supreme Court found the appellants' contentions in the instant case significantly different from the appellants' position in *McInnis,* in which it was argued that "educational needs" is the only appropriate standard by which to measure educational funding against the equal protection clause. Furthermore, unlike the *McInnis* court, the instant court carefully analyzed the funding scheme and found that as a practical matter, local property tax bases often vary so greatly from one district to another that the disparities in school revenue cannot be eliminated by either a poorer district's imposition of a higher tax rate, or by state equalization aid.[49] One aspect of the appellants' proof remains to be presented on remand: appellants must prove at trial[50] that the quality of education is in fact affected by the amount of per pupil expenditure, since the court accepted their allegation to that effect only for purposes of appellee's general demurrer. Because there is substantial authority supporting the premise, appellants should have little difficulty in doing so.[51] Beyond the proof determination, one additional question must be resolved in order to view correctly the significance of the court's holding: whether the court in fact held that the educational system violated the California constitution as well as the Federal Constitution.[52] If in fact the court found that the California constitution was violated, as appellants clearly alleged, then even an adverse appeal to the United States Supreme Court cannot reverse the consequences of the decision on the California educational system.[53] If, on the other hand, the court decided the case on federal equal protection grounds alone, then it is likely that the Supreme Court will be compelled to review the decision for the simple reason that the California public school funding system resembles the educational funding system of every state except Hawaii.[54] Thus the instant decision could result in a complete restructuring of public school

49. " 'In some cases districts with low expenditure levels have correspondingly low tax rates. In many more cases, however, quite the opposite is true; districts with unusually low expenditures have unusually high tax rates owing to their limited tax base.' " 487 P.2d at 1252, 96 Cal. Rptr. at 612 (1971).

50. Materials cited note 8 *supra.*

51. *See* McInnis v. Shapiro, 293 F. Supp. 327, 331 (N.D. Ill. 1968); Hobson v. Hansen, 269 F. Supp. 401, 438 (D.D.C. 1967).

52. *See* note 2 *supra.*

53. *See* Fay v. Noia, 372 U.S. 391, 428-30 (1963) (Court declined review of state court judgment resting on independent and adequate state grounds, notwithstanding presence of federal grounds); Minnesota v. National Tea Co., 309 U.S. 551 (1940) (Court could not clearly separate the state and federal questions and therefore vacated the judgment and remanded the cause for further proceedings). *See also Supreme Court Treatment of State Court Cases Exhibiting Ambiguous Grounds of Decision,* 62 COLUM. L. REV. 822 (1962).

54. Coons, Clune, & Sugarman, *supra* note 32, at 312.

funding throughout the nation.[55] Of further significance is the fact that the court, in finding that such a system would be invalid and in concluding that education is a fundamental interest, extended the compelling interest test for the first time to the delivery of a governmental service.[56] The instant court, in finding education a fundamental interest,[57] took into account the unique influence that a compulsory school system exercises on the molding of a citizen's personality. In so doing, the court reasoned that other public services, such as police, fire, and health, are not equally fundamental. The court, however, did not have the issue of the constitutionality of these other public service financing systems directly before it and, consequently, the instant decision could pave the way for other challenges to a broad range of governmental services.[58] This would require the Supreme Court to articulate further the factors warranting the use of the compelling interest test in equal protection challenges.

Constitutional Law—Freedom of Speech—A Per Se Ban ou All Editorial Advertisements hy a Broadcast Liceusee Violates the First Ameudmeut

Petitioner, an organization opposed to the Vietnam war, filed a complaint with the Federal Communications Commission (FCC) after a radio station refused to sell petitioner broadcast time for announcements urging immediate withdrawal of American forces from Vietnam.[1] The station based the refusal on its established policy of broadcasting only noncontroversial advertisements and banning all paid advertisements on controversial public issues. Petitioner alleged that this policy

55. Since the instant decision, a federal district court has ruled that Minnesota's public school financing system, essentially the same as California's, violates the fourteenth amendment equal protection guarantee. Van Dusartz v. Hatfield, 40 U.S.L.W. 2228 (D. Minn. Oct. 12, 1971).

56. *See* Kelly v. Tate County School Dist., Civil No. 30,722 (D. Miss., Sept. 17, 1971) (set aside sale of public school property to all-white public school); *cf.* Hawkins v. Town of Shaw, 437 F.2d 1286 (5th Cir. 1971) (disparities in municipal sewer services between white and black neighborhoods found to deny equal protection).

57. 487 P.2d at 1258, 96 Cal. Rptr. at 618 (1971).

58. Note, *California Educational Financing System Violates Equal Protection*, 5 CLEARINGHOUSE REVIEW 287, 299 (1971).

1. WTOP, an all-news radio station in Washington, D.C., had refused to broadcast any of several one minute announcements prepared by petitioner.

violated its first amendment right of free speech,[2] but the FCC denied relief, holding that the exclusion of all editorial advertisements was a permissible exercise of the broadcaster's discretion.[3] On petition to the United States Court of Appeals for the District of Columbia, *held*, reversed and remanded. When a broadcast licensee accepts noncontroversial paid announcements, its absolute refusal to sell any advertising time to applicants seeking to present controversial public issues is violative of the first amendment. *Business Executives' Move for Vietnam Peace v. FCC*, 450 F.2d 642 (D.C. Cir. 1971).

In 1934, Congress created the FCC[4] and broadly delegated to that authority the duty of insuring that broadcast licensees act in the public interest.[5] Along with this mandate, however, Congress also specifically cautioned the Commission against abridging first amendment rights in its regulation of radio communication.[6] In order to give meaning to these charges, the Commission looked to the Government's relationship with newspaper publishers. There, in the context of freedom of the press, the first amendment had long been interpreted to protect the publisher from government censorship.[7] The Commission initially applied this principle

2. Petitioner also alleged that the station's policy violated the fairness doctrine of the FCC. The doctrine "requires that licensees devote a reasonable percentage of their broadcasting time to the discussion of public issues of interest in the community served by their stations and that such programs be designed so that the public has a reasonable opportunity to hear different opposing positions on the public issues of interest and importance in the community." Editorializing by Broadcast Licensees, 13 F.C.C. 1246, 1257-58 (1949).

3. Business Executives Move for Vietnam Peace, 25 F.C.C.2d 242 (1970). The Commission dismissed petitioner's first amendment argument, holding that the fairness doctrine affords all the protection the first amendment demands.

4. Comprehensive federal regulation of broadcasting began with the enactment of the Radio Act of 1927, ch. 169, 44 Stat. 1162. The Radio Act established the Federal Radio Commission (FRC), the FCC's predecessor, and charged it with administering broadcast regulations. The FCC was established by the Communications Act of 1934, 47 U.S.C. §§ 151-609 (1964), which presently contains the statutory authorizations pertinent to the control of broadcasting.

5. 47 U.S.C. § 307(a) (1964) provides that the Commission has an obligation to ensure that broadcast licensees serve the "public convenience, interest or necessity." While this provision has been the basis for the Commission's regulation of program content, its vagueness has led to much controversy between the Commission and the industry. The standard of "public convenience, interest or necessity" has been held not to be sufficiently vague to prevent fair enforcement, NBC v. United States, 319 U.S. 190 (1943), and to be as concrete as the complicated factors inherent in a decision concerning the communications industry allow. FCC v. RCA Communications, Inc., 346 U.S. 86, 90 (1953). In its Program Policy Statement of July 29, 1960, the Commission announced that to meet this standard in the area of program content, the broadcaster must "make a positive, diligent and continuous effort, in good faith, to determine the tastes, needs and desires of the public in his community and to provide programming to meet those needs and interests." Henry v. FCC, 302 F.2d 191, 192-93 (D.C. Cir. 1962).

6. 47 U.S.C. § 326 (1964) provides that "no regulation . . . shall be promulgated . . . which shall interfere with the rights of free speech by means of radio communication."

7. Except under certain unusual circumstances, freedom of the press has been interpreted to mean immunity from prior restraints or censorship by a governmental agency. After publication,

to the broadcast industry and interpreted its mandate against abridging first amendment rights as a prohibition against censoring the broadcaster.[8] Since active advocacy of the public interest might infringe upon a broadcaster's freedom of speech, the FCC seemed reluctant, at first, to use the public interest standard as a basis of program regulation.[9] Consequently, nearly a decade passed before the Supreme Court, in *National Broadcasting Co. v. United States*,[10] first established the permissible scope of FCC activity within first amendment confines. In that case, the Court upheld an FCC regulation under which a broadcaster's license had been revoked for practices deemed by the Commission to be inimical to the public interest.[11] Concluding that the broadcaster's right of free speech had not been violated, the Court reasoned that because of the limited number of broadcast frequencies, radio was not widely available as a forum and should be subject to more pervasive federal regulation than other media.[12] Upon this constitutional

---

both public and private redress are available through libel laws and criminal sanctions. *See, e.g.*, Near v. Minnesota *ex rel.* Olson, 283 U.S. 697, 715-16 (1931).

8. The Commission acknowledged a conflict between this interpretation and its public interest mandate in Editorializing by Broadcast Licensees, 13 F.C.C. 1246 (1949). Concerning licensees' obligations to operate their stations in the public interest the Commission stated: "[W]e believe that the paramount and controlling consideration is the relationship between the American system of broadcasting carried on through a large number of private licensees upon whom devolves the responsibility for the selection and presentation of program material, and the congressional mandate that this licensee responsibility is to be exercised in the interests of . . . the public. . . ." 13 F.C.C. at 1247. The FRC, moreover, had been created as a result of judicial rulings that the Department of Commerce had no statutory authority to allocate radio frequencies. Because the problem was technical in nature, it was argued that the FRC, and later the FCC, could not go beyond the technical aspect of broadcast regulation. Note, *Regulation of Program Content by the F.C.C.*, 77 HARV. L. REV. 701 (1964). Accordingly, the Commission was required to devote a majority of its time to developing a technical regulatory scheme that would bring broadcasting out of the chaos in which it had floundered before governmental regulation began. As a result, little time was spent investigating the quality or content of what was broadcast. *See* Sentinel Broadcasting Corp., 8 F.C.C. 140 (1940) (public interest, convenience or necessity contemplates the most widespread and effective technical service possible); Robinson, *The FCC and the First Amendment: Observations on 40 Years of Radio and Television Regulation*, 52 MINN. L. REV. 67, 69-70 (1967).

9. Early FRC and FCC decisions in the area of program content were made in cases involving applications for license renewals. The actions that caused the Commission to deny a license renewal indicate the extent of provocation necessary before the Commission felt it could safely act. *See* Trinity Methodist Church v. FRC, 62 F.2d 850 (D.C. Cir.), *cert. denied*, 288 U.S. 599 (1932) (licensee used broadcast time to attack Catholics and Jews and was found in contempt in state court for statements tending to obstruct the judicial process); KFKB Broadcasting Ass'n v. FRC, 47 F.2d 670 (D.C. Cir. 1931) (3 one-half hour segments daily devoted to prescribing broadcaster's medical preparations for patients who were never seen, but who described their illness in letters).

10. 319 U.S. 190 (1943).

11. The suit involved the Commission's chain broadcasting regulations that dealt with network control and use of local station broadcasting time. 319 U.S. at 194.

12. Justice Frankfurter stated: "Unlike other modes of expression, radio inherently is not available to all. That is its unique characteristic, and that is why, unlike other modes of expression,

underpinning, and in furtherance of its public interest mandate, the Commission constructed the fairness doctrine.[13] By requiring that broadcasters seek out all sides of a controversial public issue and present opposing viewpoints in a fair manner,[14] the doctrine made the public interest an active concept by placing an affirmative duty upon the broadcasting industry to act in accordance therewith.[15] Further realizing that effective regulation would be impossible if the public interest were stifled by broadcasters' first amendment rights, the Commission promulgated standards requiring broadcasters to offer free reply time to any individual or group personally attacked on the broadcasters' station.[16] The Supreme Court upheld this requirement in *Red Lion Broadcasting Co. v. FCC.*[17] In that case, the broadcaster argued that the scarcity rationale enunciated in *National Broadcasting* was no longer a legitimate basis for FCC regulation,[18] and that without this constitutional backing, the reply

it is subject to governmental regulation." 319 U.S. at 226. Almost every decision that has dealt with the Commission's power to regulate in nontechnical areas has quoted some portion of Justice Frankfurter's opinion. Robinson, *supra* note 8, at 86.

13. The first formal statement of the fairness doctrine was issued in Editorializing by Broadcast Licensees, 13 F.C.C. 1246 (1949). *See* note 2 *supra*. For a judicial discussion of the development of the doctrine see Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 375-81 (1969).

14. *See* Robert Harold Scott, 11 F.C.C. 372 (1946); Note, *The Federal Communications Commission's Fairness Regulations: A First Step Towards Creation of a Right of Access to the Mass Media*, 54 CORNELL L. REV. 294 (1969).

15. 13 F.C.C. at 1251. The Commission made it clear, however, that an individual's interest in self-expression is subordinate to the public interest in reaching the truth. "It is this right of the public to be informed, rather than any right on the part of the Government, any broadcast licensee or any individual member of the public to broadcast his own particular views on any matter, which is the foundation stone of the American system of broadcasting." *Id.* at 1249.

16. The Commission, however, never made effective use of the fairness doctrine. No licensee was ever disciplined for failure to perform his duties under the doctrine, and denials of license renewals were rare. Singer, *The FCC and Equal Time: Never-Neverland Revisited*, 27 MD. L. REV. 221, 248 (1967). The lack of effective enforcement resulted in an attitude in the industry that prompted Chief Justice, then Judge, Burger to remark as recently as 1966: "After nearly five decades of operation the broadcast industry does not seem to have grasped the simple fact that a broadcast license is a public trust subject to termination for breach of duty." Office of Communication of The United Church of Christ v. FCC, 359 F.2d 994, 1003 (D.C. Cir. 1966).

17. 395 U.S. 367 (1969). Red Lion Broadcasting Co. was licensed to operate a Pennsylvania radio station, WGCB. WGCB carried a 15-minute broadcast by the Reverend Billy James Hargis in which Hargis discussed a book entitled *Goldwater—Extremist on the Right* by Fred Cook. Hargis alleged that Cook had been fired by a newspaper for making false charges against city officials, worked for a Communist-affiliated publication, had defended Alger Hiss, and attacked J. Edgar Hoover. Cook demanded reply time and the station refused. *Id.* at 371-72.

18. Red Lion Broadcasting Co. is not alone in this view. Several writers have pointed out that there are now more radio and television stations than daily newspapers, and that this disparity is increasing. *See, e.g.*, Robinson, *supra* note 8, at 156-59. The Seventh Circuit has noted that the mushrooming number of FM and UHF frequencies has made a channel available to anyone able to afford the equipment. Radio Television News Directors Ass'n v. United States, 400 F.2d 1002, 1019 (7th Cir. 1968), *rev'd on other grounds*, 395 U.S. 367 (1969).

time order infringed upon its first amendment rights. The Court, however, not only affirmed the scarcity rationale, but also recognized a passive constitutional right in the public,[19] consistent with the first amendment's purpose of preserving an uninhibited market place of ideas,[20] to receive information from the broadcast media. Comparing the broadcast licensee to a fiduciary, the Court entrusted the licensee with the active duty of preserving the public's first amendment rights in broadcasting.[21] At the time of this decision, it had repeatedly been held in the context of publicly owned non-broadcasting forums, that the denial of access to paid advertisements solely because of their controversial nature was violative of the first amendment.[22] *Red Lion,* however, stopped short of extending similar access to the broadcast media.[23]

In the instant case the court initially observed that until recently only broadcasters had been found to have first amendment interests in the operation of the radio and television industries.[24] The court found that one reason for this attitude was a judicial view of state action that imposed first amendment limitations solely upon the actions of the fed-

19. *See* note 15 *supra.*

20. 395 U.S. at 390.

21. While finding the broadcaster to be a fiduciary for the public, the Court saw the Government, not the public, as the proper body to enforce that relationship. 395 U.S. at 398. Freedom of expression was not extended to mean freedom of self-expression in the public. "The *Red Lion* case . . . finds the law of freedom of expression in mid-passage. Old and new theories of broadcast regulation walk into each other in the case." Barron, *Access—The Only Choice for the Media,* 48 TEXAS L. REV. 766, 771 (1970).

22. *See, e.g.,* Lee v. Board of Regents of State Colleges, 306 F. Supp. 1097 (W.D. Wis. 1969) (advertisements in school newspaper); Kissinger v. New York City Transit Authority, 274 F. Supp. 438 (S.D.N.Y. 1967) (advertisements on subway station walls); Wirta v. Alameda-Contra Costa Transit Dist., 68 Cal. 2d 51, 434 P.2d 982, 64 Cal. Rptr. 430 (1967) (advertisements on city transit buses). Streets, parks, and other public places traditionally have been recognized as proper forums for discussion of public issues. The Supreme Court has allowed regulation of these facilities only to the extent necessary to serve the public convenience or to protect the peace. *See* Cox v. Louisiana, 379 U.S. 536 (1965) (a restriction on free speech, designed to promote the public convenience, is constitutional if not susceptible to discriminatory application); Cox v. New Hampshire, 312 U.S. 569 (1941) (state law requiring a parade permit in order to ensure public safety and convenience in use of public streets a constitutional regulation). *See also* Valentine v. Chrestensen, 316 U.S. 52 (1942) (protection of free speech on public issues does not extend to speech that is nothing more than commercial advertising).

23. The FCC has recognized a right of access, however, for so-called equal time purposes and for responding to certain personal attacks. 47 U.S.C. § 315 (1964), for example, provides, with some exceptions, that if a licensee allows a political candidate to use his broadcasting station, he must afford equal opportunities to all other candidates for that office. *See also* text accompanying note 16 *supra*; Note, *Fairness Doctrine: Television as a Marketplace of Ideas,* 45 N.Y.U.L. REV. 1222, 1237 (1970).

24. The court did not consider petitioner's fairness doctrine argument. The court found that as the policy considerations surrounding both the fairness doctrine and the first amendment were the same, it would consider only the first amendment argument, which it found to be the essence of the case. Business Executives' Move for Vietnam Peace v. FCC, 450 F.2d 642, 649 (D.C. Cir. 1971).

eral government.[25] Reasoning that the reach of the first amendment should be determined on functional considerations and not on public-private technicalities which protect private conduct from legal limitations put on state action despite the essentially public nature of the enterprise,[26] the court examined the general relationship of interdependence between broadcasting and government.[27] From this analysis, the court concluded that a broadcast licensee not only has constitutional rights as a speaker, but also must abide by constitutional restrictions as an administrator of a forum for free speech. In this dual role, the court held that the broadcaster's constitutional interests in free speech coexist with those of the public. Moreover, the court found that the public has a first amendment interest not only in the content and mode of what it receives,[28] but also in effective self-expression. Thus, the court felt that the goal of a fully informed public could not be realized unless the public was given an opportunity for this individual self-expression.[29] If a vigorous and wide-open debate on important issues is desired,[30] therefore, the

25. *See* Massachusetts Universalist Convention v. Hildreth & Rogers Co., 183 F.2d 497 (1st Cir. 1950) (first amendment limits only the action of Congress or of agencies of the federal government, not private corporations); McIntire v. William Penn Broadcasting Co., 151 F.2d 597 (3d Cir. 1945) (a privately owned radio station, though licensed by the federal government, cannot be considered a governmental agency); Post v. Payton, 323 F. Supp. 799 (E.D.N.Y. 1971) (to recover under first or fourteenth amendment, it must be shown that defendant's conduct was equivalent to state or federal action).

26. *See* Food Employees Local 590 v. Logan Valley Plaza, Inc., 391 U.S. 308 (1968) (the fact of private ownership is not, in itself, a bar to the exercise of first amendment rights); Public Util. Comm'n v. Pollak, 343 U.S. 451 (1952) (federal regulations establish the interdependence between government and private business necessary to allow the application of the first amendment).

27. The court cited Shelley v. Kraemer, 334 U.S. 1 (1948), for the proposition that specific governmental approval of challenged private actions is sufficient state involvement to constitute state action. The broadcast licensee operates under a 3 year license from the Government. It has been argued that as the broadcaster's very existence is a result of the exercise of a governmental power, any restraint or inhibition put on the expression of ideas by the broadcaster is therefore authorized by the Government. Barron, *In Defense of "Fairness": A First Amendment Rationale for Broadcasting's "Fairness" Doctrine*, 37 U. COLO. L. REV. 31, 44 (1964).

28. The court noted that unlike *Red Lion*, in which the public's first amendment interests were invoked to uphold an administrative action already taken, the instant case involved an effort by the public itself to assert its first amendment rights in a direct attack on broadcast policies approved by the FCC. The court concluded that a constitutional right is meaningless if its application is limited to permitting governmental action. 450 F.2d at 650; *see* note 15 *supra*.

29. The instant court noted that the first amendment is intended to secure "the widest possible dissemination of information from diverse and antagonistic sources." Associated Press v. United States, 326 U.S. 1, 20 (1945). The court found that editorial advertisements were particularly suited for this purpose because the initial decision to produce the editorial is in the public and the advertisement would be presented in a fashion chosen by the advertiser, free from the control and editing of the broadcaster, 450 F.2d at 656.

30. The instant court specifically rejected the contention that newscasts, documentaries, and panel discussions satisfy the first amendment goal, enunciated in New York Times Co. v. Sullivan, 376 U.S. 254, 270 (1964), of "uninhibited, robust, and wide-open" debate on public issues.

court reasoned that the public would have to maintain the initiative in and control over the presentation of any particular viewpoint. Recognizing, however, that broadcast time is limited,[31] the court held that while the public has no unabridgeable first amendment right to use broadcast frequencies comparable to its right to speak or write, the time available does allow for a limited right to speak on the air. The court remanded for the FCC to develop reasonable regulatory guidelines[32] to deal with editorial advertisements.

The instant court faced a dilemma that could no longer be ignored. On one hand, in the face of an ever increasing number of radio and television stations and an ever diminishing number of daily newspapers,[33] the limited access rationale of *National Broadcasting* had no continuing viability as a basis for regulating the broadcasting industry. On the other hand, however, the court was unwilling to abdicate government control of broadcasting by accepting the industry's argument that freedom of speech protected only the freedom of the broadcaster. Although freedom of expression traditionally has implied absence of government control, the conditions under which freedom of expression exists today require that Government assume the burden of assuring a medium receptive to the communication of ideas.[34] For example, the very increase in the number of radio and television frequencies that made the limited access rationale untenable has since resulted in bland commercialism in today's programming.[35] Broadcasters have come to look to the first amendment as a guarantee of economic rather than civil rights, and have avoided controversy rather than offend sponsors who are hesitant to become associated with opinions that potential customers might find disagreeable.[36] Had the instant court permitted private control of

31. In speaking of limited broadcast time the court was not referring to the scarcity rationale, which is not based on broadcast time, but on the limited number of available frequencies.

32. The court, however, gave the Commission some direction in its task, noting that access may not be denied unless a particular type of expression presents a clear and present danger. 450 F.2d at 662. The Commission had expressed concern that the fairness doctrine would require the broadcaster, once he had accepted advertisements on one side of an issue, to accept some advertisements on the other side, free of charge if necessary. While holding that some free advertising time might be called for, the court expressed confidence in the Commission's ability to make adjustments in its regulations if broadcasters were threatened with actual financial harm.

33. *See* note 18 *supra*.

34. *See* Emerson, *Toward a General Theory of the First Amendment*, 72 YALE L.J. 877, 902 (1963).

35. For an argument that much of the lack of diversity in broadcasting is due to the FCC's standards, not those of the broadcaster, see Robinson, *supra* note 8, at 121.

36. Note, *The Federal Communications Commission's Fairness Regulations: A First Step Towards Creation of a Right of Access to the Mass Media*, 54 CORNELL L. REV. 294, 296-97 (1969); *see* Johnson, *Freedom to Create: The Implications of Anti-Trust Policy for Television Programming Content*, 8 OSGOODE HALL L.J. 11 (1970).

the broadcasting industry, in which the means of access to airways already are privately owned, the limited communication of controversial ideas and viewpoints would certainly have been further frustrated. Instead, for the first time, the court recognized a constitutional right of access to the mass media, and placed the burden of controlling that access on the FCC. The instant court has given minority and disfranchised groups access to mass audiences through the most effective means of modern communication.[37] The decision is particularly important in that it makes access for one point of view possible without requiring that the other side of an issue first be broadcast.[38] It is extremely difficult, however, to give the decision any immediate significance beyond the narrow holding the court was intent on providing. The court's reasoning has narrowly defined the right of access within general broadcasting as having its sole application to broadcasting time normally reserved for commercial purposes. The court implicitly restricted its holding to the broadcast media when it overcame the public-private technicality on the basis of the Government's involvement in and the public character of broadcasting. While newspapers and magazines would find it difficult if not impossible to exist without such things as governmental mailing privileges, it is unlikely that this will be regarded as sufficient governmental involvement to bring these publications within the rationale of the instant case.[39] Having thus limited its holding to the broadcast media, the court further narrowed its scope by acknowledging that when noncommercial time is involved, disputes must be decided by balancing the competing constitutional interests of the broadcaster against those of the public. The court recognized that broadcasters' constitutional interests in nonadvertising time are so great that their control of this aspect of programming would not be affected.[40] The effect of the instant decision will depend upon the spirit with which it is received, both by the Commission and the industry. But the recognition of a constitutional right of access, even in the narrow context in which it has been recognized, may well signal the beginning of an assault on privately owned

37. *See* Berelson, *Communications and Public Opinion*, in MASS COMMUNICATIONS 527 (W. Schramm ed. 1960).

38. *See* Green v. FCC, 447 F.2d 323 (D.C. Cir. 1971) (fairness doctrine does not require that broadcast stations donate air time for opponents of the draft to respond to armed services enlistment advertisements); note 23 *supra*.

39. For a publisher's appraisal of freedom of access see Daniel, *Right of Access to Mass Media—Government Obligation to Enforce First Amendment?*, 48 TEXAS L. REV. 783 (1970).

40. The instant court saw nonadvertising time as a forum that has not yet been opened to the public by broadcast licensees. Only when a forum has been opened to the public, as licensees have done with advertising time, is discriminatory denial of access a constitutional violation.

forums. An effective forum has been recognized as a necessary prerequisite to effective speech.[41] Since a small number of people are in a position to determine not only the content of information, but its availability, it might be anticipated that private ownership of such forums, including newspapers, may soon come under increasing constitutional attack.

Constitutional Law—Jnry Trials in Juvenile Court—Jnveniles in Delinquency Proceedings Not Constitutionally Guaranteed the Right to a Jury Trial

Appellant, a minor of sixteen, was adjudged a "delinquent child"[1] by the juvenile court of Philadelphia[2] on charges of robbery, larceny, and receiving stolen property. Although subject to possible incarceration until his majority,[3] the youth's request for a trial by jury was refused by the juvenile court judge.[4] Appellant argued that the adjudicative delinquency proceeding,[5] regardless of what it might be called, is actually a criminal trial and that denial of a jury trial violated his constitutional rights as guaranteed by the sixth amendment[6] and the due process clause of the fourteenth amendment. The Commonwealth contended that the right to trial by jury did not extend to juvenile courts because of the inherent functional differences between the criminal and juvenile sys-

41. *See* Wolin v. Port of N.Y. Authority, 392 F.2d 83 (2d Cir. 1968); note 22 *supra* and accompanying text.

1. PA. STAT. ANN. tit. 11, §§ 243(2), (4) (1965) states that a "delinquent child" is one under the age of 18 "who has violated any law of the Commonwealth or ordinance of any city, borough or township."

2. The official designation of this court is Court of Common Pleas, Family Division, Juvenile Branch, Philadelphia County, Pennsylvania. 215 Pa. Super. 760, 255 A.2d 921 (1969). The facts surrounding the crime were clouded with conflicting testimony, but involved the stealing of 25 cents. The event took place in October 1967, and McKeiver was placed on probation following the May 1968 hearing.

3. PA. STAT. ANN. tit. 11, § 243 (1965) (majority is reached at age 18).

4. "[T]he court shall hear and determine all cases affecting children arising under the provisions of this act without a jury." *Id.* § 247.

5. The delinquency proceeding is divided into 3 phases: (1) the pre-hearing phase to set the stage for adjudication; (2) the adjudicative phase in which the youth is adjudged "delinquent" or not; (3) the dispositional phase in which it is decided what is the best rehabilitation course for the juvenile. *See generally* Glen, *Bifurcated Hearings in the Juvenile Court*, 16 CRIME & DELIN. 255 (1970); 9 DUQUESNE L. REV. 681, 687 (1971) (comment on recent decision, *In re* D., and part of an untitled symposium on the juvenile court system).

6. "In all criminal prosecutions, the accused shall enjoy the right to a spcedy and public trial, by an impartial jury . . . ." U.S. CONST. amend. VI.

tems.[7] While recognizing the applicability of certain procedural due process safeguards to juveniles,[8] the Pennsylvania Supreme Court affirmed the juvenile court's denial of a trial by jury.[9] On appeal to the United States Supreme Court,[10] *held*, affirmed. A trial by jury is not constitutionally required in the adjudicative phase of a state juvenile court delinquency proceeding. *McKeiver v. Pennsylvania*, 403 U.S. 528 (1971).

Delinquency[11] proceedings are a quasi-civil[12] form of adjudication that originated around the turn of the century[13] as an alternative to the punitive and stigmatizing criminal trial.[14] Prior to the advent of the juvenile court system, children could be considered adults for criminal prosecutions as early as age seven.[15] Eventually, every state modified this common-law rule and adopted a juvenile court act[16] that increased the

7. The Superior Court adopted the Commonwealth's position. McKeiver Appeal, 216 Pa. Super. 760, 255 A.2d 921 (1969).

8. The Pennsylvania Supreme Court required 7 procedural safeguards in the adjudicatory hearing: (1) timely notice of the charges; (2) benefit of counsel; (3) confrontation of witnesses against the accused; (4) protection against self incrimination; (5) provision of a transcript of the hearing; (6) appellate review; and (7) proof of all allegations beyond a reasonable doubt. *See* note 31 *infra* and accompanying text.

9. *In re* Terry, 438 Pa. 339, 265 A.2d 350 (1970). The Pennsylvania Supreme Court consolidated the *McKeiver Appeal* with *Terry*. Both involved similar delinquency proceedings that turned on the right of juveniles to receive a jury trial. Under similar circumstances a North Carolina juvenile court denied a jury trial to a group of children and also excluded the general public from the proceeding. *In re* Burrus, 275 N.C. 517, 169 S.E.2d 879 (1969).

10. The United States Supreme Court granted certiorari in the North Carolina proceeding and consolidated it with the Pennsylvania appeals to resolve the issue of jury trials in juvenile delinquency proceedings.

11. The definitional term of "delinquency" varies from state to state. In Iowa, for example, a juvenile who attempted rape was not delinquent because one must habitually violate the law to be classified delinquent. State v. Breon, 244 Iowa 49, 55 N.W.2d 565 (1952). In New York, on the other hand, a youth convicted of driving without a license was adjudged delinquent for violating a state law. *In re* Jacobson, 283 App. Div. 719, 127 N.Y.S.2d 356 (1954). To circumvent invidious connotations that have developed in connection with the term "delinquency," the descriptive phrase "persons in need of supervision" (PINS) has arisen. *See* N.Y. FAMILY CT. ACT § 712 (McKinney 1963); Note, *Juvenile Delinquents: The Police, State Courts, and Individualized Justice*, 79 HARV. L. REV. 775 (1966).

12. Juvenile proceedings are considered more civil than criminal. *See In re* Gault, 387 U.S. 1, 17 (1966); Pee v. United States, 274 F.2d 556 (1st Cir. 1959) (authority in 51 jurisdictions recognizes civil nature of juvenile procedures). *But see* Carr, *Juries for Juveniles: Solving the Dilemma*, 2 LOYOLA U.L.J. 1 (1971) (in reality the juvenile system is sui generis—of its own kind).

13. The first juvenile court was established by Illinois in 1899. LAWS OF ILL., *Juvenile Courts* (1899). *See generally* Nicholas, *History, Philosophy and Procedures of Juvenile Courts*, 1 J. FAMILY L. 151 (1961).

14. *See* Mack, *The Juvenile Court*, 23 HARV. L. REV. 104, 119-20 (1909).

15. At common law, a child over the age of 7 could be tried in a criminal case, convicted and punished as an adult. Prior to age 7 there was an irrebuttable presumption of criminal incapacity. The presumption was rebuttable between 7 and 14. R. PERKINS, CRIMINAL LAW 839 (1957).

16. *See* Commonwealth v. Johnson, 211 Pa. Super. 62, 69, 234 A.2d 9, 13 (1967) (discussion of juvenile court act adoption in all states).

age of criminal responsibility and placed the juvenile under the *parens patriae*[17] power of the state for ultimate care and regenerative treatment. Under the theory of the juvenile court system, the child was to receive individualized justice[18] through an informal, flexible hearing that was not designed to determine guilt or innocence but to decide the optimum course for rehabilitation.[19] Since the child was not entitled to freedom, but only entitled to custodial care by either his parents or the state,[20] the juvenile court judge was allowed maximum discretion in the disposition of an adjudged delinquent.[21] Although the system was designed to protect the juvenile from the harsh criminal trial, he is often subjected to confinement[22] for longer periods than an adult who is guilty of similar criminal offenses.[23] Realizing this gap between the theoretical system[24] and actual practice,[25] the Supreme Court recently has attempted to bring

17. "*Parens Patriae*" refers to the powers of a state to assume the role of a parent. *Compare* Cinque v. Boyd, 99 Conn. 70, 121 A. 678 (1923) (classic *parens patriae* case), *with* Harris v. Souder, 233 Ind. 287, 119 N.E.2d 8 (1954) (points out the hard realities of the *parens patriae* power).

18. *See generally* Fox, *Juvenile Justice Reform: An Historical Perspective*, 22 STAN. L. REV. 1187 (1970).

19. *See* J. MACK, THE CHILD, THE CLINIC AND THE COURTS 310 (1925).

20. Shears, *Legal Problems Peculiar to Children's Courts*, 48 A.B.A.J. 719, 720 (1962), *cited in In re Gault*, 387 U.S. 1, 17 (1967).

21. *Cf.* Creek v. Stone, 379 F.2d 106 (D.C. Cir. 1967). *See also* MACK, *supra* note 19.

22. Confinement of an adjudged "delinquent" varies from state to state with varying degrees of rehabilitation. *See In re* Bethea, 215 Pa. Super. 75, 76, 257 A.2d 368, 369 (1969). Many delinquents are not confined in special facilities as envisioned by the system. In 1965 over 100,000 juveniles were confined in adult prisons. PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, CHALLENGE OF CRIME IN A FREE SOCIETY 179 (1967).

23. *See, e.g., In re* Gault, 387 U.S. 1, 29 (1967). Gault, 15, was accused of making lewd telephone calls. He was committed to juvenile industrial school until he reached the age of 21, unless discharged prior to that time. Had he been an adult, the maximum penalty would have been a $50 fine or imprisonment for 2 months. *See generally* Fortas, *Equal Rights—For Whom?*, 42 N.Y.U.L. REV. 401 (1967).

24. "In theory the juvenile court was to be helpful and rehabilitative rather than punitive. In fact, the distinction often disappears, not only because of the absence of facilities and personnel but also because of the limits of knowledge and technique. In theory the court's action was to affix no stigmatizing label. In fact a delinquent is generally viewed by employers, schools, the armed services—by society generally—as a criminal. In theory the court was to treat children guilty of criminal acts in non-criminal ways. In fact it labels truants and runaways as junior criminals . . . .

. . . .

"In theory it was to exercise its protective powers to bring an errant child back into the fold. In fact there is increasing reason to believe that intervention reinforces the juvenile's unlawful impulses." THE PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, TASK FORCE REPORT: JUVENILE DELINQUENCY AND YOUTH CRIME 9 (1967) [hereinafter cited as TASK FORCE REPORT]. Although this report was written prior to *Gault*, it is an unusually thorough and comprehensive work.

25. "Many things happened that prevented this dream from becoming a widespread reality. First, municipal budgets were not equal to the task of enticing experts to enter this field in large numbers. Second, such experts as we had, notably the psychiatrists and analysts, were drawn away

the juvenile and criminal systems closer together by requiring certain constitutional safeguards in delinquency proceedings.[26] In *Kent v. United States*,[27] juveniles, like adults, were guaranteed the right to a hearing on jurisdictional waiver questions,[28] and the Court further indicated that the adjudicatory stage of a juvenile court "must measure up to the essentials of due process and fair treatment."[29] The Court also questioned the justifiability of affording juveniles fewer procedural protections than are given adults.[30] Following *Kent*, the procedural due process gap between juvenile and criminal court systems was narrowed significantly by the landmark decision of *In re Gault*.[31] This decision held that fundamental due process requires that a juvenile receive the right to counsel, to timely notice of charges, to confront witnesses, and to remain silent. An additional right was added when the Court declared in *In re Winship*[32] that a juvenile must be proved delinquent "beyond a reasonable doubt." While these decisions indicate a distinct trend toward more procedural requirements in juvenile courts, the Supreme Court has stopped short of guaranteeing to juveniles the same procedural safeguards that it has afforded adults.[33] While the Supreme Court was delineating certain procedural safeguards for juveniles the right to a jury trial, not afforded juveniles, was being expanded in adult criminal trials. The Court, in *Duncan v. Louisiana*,[34] held that the sixth amend-

by handsome fees they could receive for rehabilitating the rich. Third, the love and tenderness alone, possessed by the white-coated judge and attendants, were not sufficient to untangle the web of subconscious influences that possessed the troubled youngster. Fourth, correctional institutions designed to care for these delinquents often became miniature prisons with many of the same vicious aspects as the adult models. Fifth, the secrecy of the juvenile proceeding led to some overreaching and arbitrary actions." DeBacker v. Brainard, 396 U.S. 28, 36-37 (1969). In many of today's juvenile courts, overcrowding, understaffing, and the absence of legally trained judges is prominent. McCune & Skoler, *Juvenile Court Judges in the United States, Part I, A National Profile*, 11 CRIME & DELIN. 121, 128-29 (1965). *But see* TASK FORCE REPORT 38.

26. In Haley v. Ohio, 332 U.S. 596 (1948) the Supreme Court held that due process requirements must be applied to the admissibility of a 15 year old's confession when he is tried in a criminal court. The Court said that immaturity of youth militated against comprehension and basic exercise of individual rights. *Accord*, Gallegos v. Colorado, 370 U.S. 49 (1962).

27. 383 U.S. 541 (1966), *noted in* 19 VAND. L. REV. 1385 (1966).

28. Access to any probation office files on the youth and a statement of reasons for the court's disposition of the case also were guaranteed to the juvenile. 383 U.S. at 559.

29. *Id.* at 562. *See also* Pee v. United States, 274 F.2d 556 (D.C. Cir. 1959).

30. 383 U.S. at 551.

31. 387 U.S. 1 (1967), *noted in* 20 VAND. L. REV. 1161 (1967); *see* note 25 *supra*.

32. 397 U.S. 358 (1970), *noted in* 84 HARV. L. REV. 156 (1970).

33. The *Gault* majority quoted from *Kent*: "We do not mean . . . to indicate that the hearing to be held must conform with all of the requirements of a criminal trial or even of the usual administrative hearing; but we do hold that the hearing must measure up to the essentials of due process and fair treatment." 387 U.S. at 30.

34. 391 U.S. 145 (1968), *noted in* 21 VAND. L. REV. 1099 (1968).

ment right to a jury trial in serious[35] criminal cases is a fundamental right that must be recognized in state criminal proceedings. Buttressing the *Duncan* decision in *Bloom v. Illinois*,[36] the Court further extended the right to a trial by jury to criminal contempt hearings that heretofore had been considered civil proceedings. Since the Court in *Duncan* and *Bloom* had reasoned that when an individual is faced with a serious loss of liberty the authority and independence of the court does not take priority over the right to a jury trial,[37] it appeared that the right to a jury trial would be the next logical alteration of the juvenile court system. Following *Duncan* and *Bloom*, however, two lines of cases developed dealing with the juvenile's right to a jury trial.[38] The majority of courts maintained the traditional approach and ruled that a jury trial is inconsistent with the theory of juvenile court proceedings.[39] On the other hand, a vigorous minority disregarded the criminal-civil distinction of the juvenile system and held that the right to a jury trial in a delinquency proceeding is a fundamental element of due process.[40] In the face of this split of authority, the Supreme Court set a hearing for the *McKeiver* appeal.[41]

In the instant case the Supreme Court initially determined that the procedural due process safeguards developed by *Kent, Gault* and *Winship* were based on the concept of fundamental fairness to the juvenile during the fact-finding process and that the absence of a jury does

35. When the possible penalty exceeds 6 months imprisonment, the offense is regarded as "serious" and a right to a jury trial exists. Baldwin v. New York, 399 U.S. 66 (1970). The Court in *Duncan* did not discuss whether a juvenile proceeding was "serious" enough to require a jury trial.

36. 391 U.S. 194 (1968).

37. *See id.* at 211.

38. Twenty-nine states specifically deny the right to a jury trial in a juvenile delinquency proceeding, while 10 provide for a jury trial in certain circumstances. The state statutes are set forth in the instant decision at 403 U.S. 528, 548 n.7 (1971). States that do not have statutes resolving the jury question generally have held against the right of jury trial in a juvenile proceeding. *See, e.g., In re* Fletcher, 251 Md. 520, 248 A.2d 364 (1968); *In re* Perham, 104 N.H. 276, 184 A.2d 449 (1962).

39. *See, e.g.*, People v. Fucini, 44 Ill. 2d 305, 255 N.E.2d 380 (1970); Bible v. State, 254 N.E.2d 319 (Ind. 1970); State v. Turner, 253 Ore. 235, 453 P.2d 910 (1969).

40. *See, e.g.*, Nieves v. United States, 280 F. Supp. 994 (S.D.N.Y. 1968); Peyton v. Nord, 78 N.M. 717, 437 P.2d 716 (1968).

41. The Supreme Court previously faced this specific question in *DeBacker*, but sidestepped the issue by saying that *DeBacker* was decided at the juvenile court level prior to the *Duncan* decision. Therefore, there was no controversy at that time. Four of the 7 state supreme court justices in *DeBacker* believed denial of the right to trial by jury in juvenile cases was unconstitutional; however, 5 justices were needed to declare the Indiana statute unconstitutional. 396 U.S. at 30 (1969) (per curiam).

not violate the fairness principle.[42] Recognizing the failures and disappointments of the present juvenile system with regard to the ultimate goals of rehabilitation, the Court decided that requiring a jury trial might remake the juvenile proceeding into a complete adversary process with its attendant delay and formality and with the additional possibility of a public trial. This outcome, the majority determined, would effectively end the juvenile system's idealistic prospect of an intimate, informal, protective hearing.[43] Turning to the sixth amendment argument, the majority found that the Constitution only guarantees a right to a jury trial in criminal proceedings. Since the Court decided that a juvenile delinquency proceeding should not be equated with a criminal trial,[44] it concluded that there is no constitutional requirement for states to afford the right of a jury trial to juveniles in a delinquency proceeding.[45] In a dissenting opinion, Justice Douglas[46] reiterated an earlier dissent[47] in which he contended that *Gault* and *Duncan* require a juvenile to be guaranteed the right to a jury trial when the delinquency charge is an offense for which an adult would be granted the right to a jury trial.

The instant decision represents a departure from the recent trend of providing juveniles in delinquency proceedings the same constitutional

42. "We would not assert, however, that every criminal trial—or any particular trial—held before a judge alone is unfair or that a defendant may never be as fairly treated by a judge as he would be by a jury." Duncan v. Louisiana, 391 U.S. 145, 158 (1968). The instant Court emphasized that the states had a privilege of using a jury and that a juvenile judge could employ an advisory jury in any case. There was also a strong plea for state experimentation with the juvenile system. *See generally* Young, *Due Process and the Rights of Children*, 18 JUV. CT. JUDGES J. 102 (1967).

43. It also was noted that the President's TASK FORCE REPORT and other juvenile council and uniform law recommendations specifically stopped short of proposing the jury trial for juvenile proceedings. *See, e.g.*, UNIFORM JUVENILE COURT ACT § 24(a). The Court further noted S. REP. No. 91-620, 91st Cong., 1st Sess. 13-14 (1969), which recommended the abolition of juvenile jury trials in the District of Columbia.

44. The Court noted distinctions between the criminal and juvenile court systems set forth in the Pennsylvania Supreme Court's decision: (1) judges take a different view of their role in a juvenile proceeding; (2) the juvenile system has available and utilizes more fully the various diagnostic and rehabilitative services than does the criminal process; (3) the end result of a declaration of delinquency is significantly different from and less onerous than a finding of criminal guilt; and (4) the right to jury trial would be most disruptive of the unique nature and flexibility of the juvenile court. 438 Pa. at 344, 265 A.2d at 355.

45. Justice Blackmun announced the majority opinion and Justice Harlan concurred on the ground that criminal jury trials were not constitutionally required of the states by the sixth or fourteenth amendment. Justice Harlan based his opinion on his dissent in *Duncan*. Justice Brennan concurred except for the North Carolina decision, *In re* Burrus, because he felt the North Carolina court had violated due process by denying a public hearing. *See* note 10 *supra*.

46. Justice Douglas was joined by Justices Black and Marshall. The dissent placed great emphasis upon the fact that the appellants faced as much as 2 to 10 years in a reformatory or prison. Justice Douglas also added an appendix by a Rhode Island juvenile judge that rebutted many of the practical arguments against granting a jury trial.

47. DeBacker v. Brainard, 396 U.S. 28, 35 (1969).

guarantees that are provided adults in criminal trials. In limiting the *Kent-Gault-Winship* rationale the Court assumed a conflict between affording juveniles a right to a jury adjudication of "delinquency" and preserving the status quo of the flexible, yet disappointing, juvenile court system. Choosing to preserve the existing juvenile court system[48] over the rights of the child, the Court based its decision on the proposition that the right to a jury trial would not solve the myriad problems besetting juvenile justice and would reduce the flexible rehabilitative nature of delinquency proceedings.[49] Arguably, a type of informal protective proceeding without the inappropriate trappings of an adversary process is advisable for youthful lawbreakers.[50] It is submitted, however, that such a system can be maintained with greater efficacy and perhaps additional justice[51] by superimposing the right to a jury trial on the adjudicative hearing. Since the bifurcated nature of juvenile proceedings would insulate the jury from the dispositional phase, objective and accurate fact-finding during the adjudicative phase of the delinquency proceeding is possible without infringing on the flexibility and experimentation available in the dispositional phase. Using a relatively small,[52] functional jury upon the extremely infrequent request[53] from a juvenile would not be an impediment to the juvenile court judge's determination of the best approach for rehabilitation.[54] That the system's flexible format can be

48. A decision to require juvenile jury trials would have forced at least 29 states to revise their juvenile court acts and possibly experiment and improve them. *See* note 39 *supra*. *See generally* TASK FORCE REPORT.

49. For a criticism of similar reasoning used by the lower court see Comment, *Juvenile Criminal Law and Procedure*, 16 VILL. L. REV. 362 (1970). *See also* Note, *Juvenile Courts—Juries in the Juvenile System?*, 48 N.C. L. REV. 666 (1970).

50. *See* Paulsen, *Fairness to the Juvenile Offender*, 41 MINN. L. REV. 547 (1957). *But see* Tenney, *The New Dilemma in the Juvenile Court*, 47 NEB. L. REV. 67 (1968).

51. *See* 35 ALBANY L. REV. 849 (1971).

52. There is no requirement to impanel 12 jurors. Williams v. Florida, 399 U.S. 78 (1970). An interesting question arises concerning the right to trial by a jury of one's peers. According to the appendix in the instant case, a jury in a juvenile proceeding would not necessarily have to be composed of other juveniles. 403 U.S. at 5. Generally voting-age citizens would constitute a juvenile jury panel. *See In re* Grilli, 110 Misc. 45, 179 N.Y.S. 795 (Sup. Ct. 1920).

53. The Public Defender Service and the Neighborhood Legal Services Program of the District of Columbia filed a brief amicus curiae in which they reported a survey of the 10 states requiring jury trials with showed that of 30 juvenile courts processing about 75,000 cases a year, in only 4 courts had there been more than 15 jury trial requests in the past five and one-half years. 403 U.S. at 561-62. *See also* Burch & Knaup, *The Impact of Jury Trials Upon the Administration of Juvenile Justice*, 4 CLEARINGHOUSE REV. 345 (1970). Most delinquency proceedings have a valid confession. TASK FORCE REPORT 33.

54. *See* note 5 *supra*. The argument could be made that a jury would pre-empt the juvenile judge's options in deciding upon rehabilitation. For example, if a jury finds that a juvenile assaulted and injured his schoolmate and the state law requires a minimum sentence of 5 years in prison for such offense, is the juvenile court bound by the criminal sanction statute? This argument can be

preserved is evidenced sufficiently by the successful administration of juvenile courts in the ten states that provide the right to a jury trial.[55] Admittedly, a jury trial is accompanied by a certain amount of delay and procedural formality, but administrative inconvenience is secondary to the assurance of a fair adjudication of "delinquency." By relying on the preservation of administrative convenience the Court ignored the most critical issue—the rights of the child.[56] Although accepting the simplistic view that a child has less rights than an adult, the Court failed to define those rights. This failure, combined with the variance in state juvenile court statutes, ultimately will require the Supreme Court to resolve in piecemeal fashion all state controversies over the constitutionally guaranteed safeguards in juvenile delinquency proceedings. In addition, its failure to define the rights of children has effectively postponed further application of procedural due process in state juvenile courts as evidenced by the Ninth Circuit's recent refusal to allow a juvenile the right to bail.[57] Continued extension of procedural safeguards to juvenile courts remains improbable until the Court recognizes that any proceeding which may lead to an individual's loss of liberty is in the nature of a criminal proceeding to which the sixth amendment guarantees the right of a jury trial. By choosing to ignore the factual effect of delinquency adjudication, the Court has relegated the child to continue in a system of de facto incarceration. Although admitting the need for reform, the Court, unfortunately, exalted the theory of the system and ignored the realities facing the child who is adjudged "delinquent." What is best for the child is the *raison d'être* for the juvenile delinquency proceeding,[58] and until the rights of children are delineated and enforced by the courts, juveniles must face an imperfect system without the protection of individual rights guaranteed by the Constitution.

countered by the phased nature of the juvenile system. Once a child is determined "delinquent" in the adjudicative phase, the juvenile judge than can assume complete prerogative on the course of rehabilitation in the dispositional phase.

55. *See* note 38 *supra.*

56. "[T]here may be grounds for concern that the child receives the worst of both worlds: that he gets neither the protection accorded to adults nor the solicitious care and regenerative treatment postulated for children." Kent v. United States, 383 U.S. 541, 556 (1966). *See also* TASK FORCE REPORT 8, 23.

57. Kinney v. Lenon, No. 25, 522 (9th Cir., Aug. 13, 1971) (cited *McKeiver* in denying the right of bail).

58. *See* materials cited notes 14 & 49 *supra.*

Constitutional Law—Search and Seizure—Warrantless Wiretapping of Snspected Domestic Dissident Group's Conversations Violates Fourth Amendment

The United States, ordered by respondent district court[1] to make full disclosure to one defendant[2] of the content of his monitored conversation,[3] petitioned for a writ of mandamus to compel vacation of the order. The monitored conversation was overheard by federal agents during the warrantless wiretapping of domestic dissident groups. The United States contended that, in cases in which the national security is threatened, the President has inherent constitutional powers to preserve and protect the government which exempt him and his agents from the warrant requirement of the fourth amendment.[4] Respondent argued that there is no national security exemption from the warrant requirement when federal agents conduct a search and seizure by electronic surveillance of domestic dissident groups that are not affiliated with a foreign power.[5] The United States Court of Appeals for the Sixth Circuit, *held*, petition denied. When the national security is threatened by domestic dissidents not affiliated with a foreign power, the President does not have the inherent power to undertake a search and seizure by wiretapping of the oral communication of these persons unless a warrant is first obtained. *United States v. United States District Court for the Eastern District of Michigan*, 444 F.2d 651 (6th Cir.), *cert. granted*, 403 U.S. 930 (1971).

Even though the framers of the fourth amendment were concerned with unauthorized governmental intrusion into their homes rather than with eavesdropping,[6] case law and legislation have slowly recognized that

---

1. United States v. Sinclair, 321 F. Supp. 1074 (E.D. Mich. 1971).

2. The defendants had been indicted by a federal grand jury for destruction of government property in violation of 18 U.S.C. § 1361 (1964). In pretrial proceedings, the defendants moved for disclosure of certain electronic surveillance information. The Government revealed that one of the defendants, Lawrence Robert Plamondon, had participated in conversations which were overheard by government agents. After an *in camera* inspection of the surveillance logs, the district court ordered disclosure.

3. The wiretapping had been authorized by Attorney General Mitchell for surveillance of certain domestic dissident groups. Defendant's monitored conversation was not the object of the wiretapping.

4. The Government also asserted that even though the district judge found the wiretapping to be iilegal, he should have determined *in camera* that the interceptions were not relevant, and hence, not subject to disclosure.

5. Respondent also contended that since the disclosure order was a pretrial order, it was not appealable and that a writ of mandamus cannot be substituted for an appeal.

6. *See* Spritzer, *Electronic Surveillance by Leave of the Magistrate: The Case in Opposition*, 118 U. PA. L. REV. 169, 170 (1969).

a protection for private conversation is implicit in the fourth amendment. In its first wiretapping case, *Olmstead v. United States*,[7] however, the Supreme Court rejected the notion that wiretapping was prohibited unless a warrant was first obtained. The Court ruled that conversation was not protected by the fourth amendment unless there was an actual invasion of the premises and held that since wiretapping did not involve a physical trespass, there was no search for which a warrant was a prerequisite.[8] Although in subsequent cases[9] there was an erosion of the physical trespass concept of *Olmstead*, it was not until 40 years later that the Supreme Court in *Berger v. New York*[10] held that conversation was protected by the fourth amendment and that the use of electronic devices for the purpose of eavesdropping was a search within the purview of the fourth amendment.[11] Later that year, the Court in *Katz v. United States*[12] rejected the notion that the protection of the fourth amendment was limited to searches involving a physical trespass upon the premises. Finding that the fourth amendment protects an individual from unreasonable invasions of his reasonable expectation of privacy, the Court ruled that searches conducted without prior judicial ratification were "per se unreasonable under the fourth amendment."[13] Accordingly, it concluded that the warrantless wiretap of a telephone booth was a search that required judicial authorization to be constitutionally permissible.

7. 277 U.S. 438 (1928).

8. In response to *Olmstead*, Congress enacted § 605 of the Communications Act of 1934, 47 U.S.C. § 605 (Supp. V, 1970), which made it illegal for any person to "intercept and divulge" the communications of another without his prior authorization. In construing § 605 soon thereafter, the Court held in Nardone v. United States, 302 U.S. 379 (1937), that the executive branch was subject to the prohibitions of § 605 and that any evidence obtained in violation of the section was inadmissible in federal court. Since the *Nardone* court left intact the interpretation of the fourth amendment propounded by the *Olmstead* court, federal agents could circumvent § 605 by continuing to wiretap for investigative purposes as long as they did not divulge the intercepted communications. *See* Brownell, *The Public Security and Wire Tapping*, 39 CORNELL L.Q. 195 (1954); Rogers, *The Case for Wire Tapping*, 63 YALE L.J. 792 (1954).

9. Lopez v. United States, 373 U.S. 427 (1963) (recording defendant's conversation by concealed pocket wire recorder held not to be eavesdropping); Wong Sun v. United States, 371 U.S. 471 (1963) (statements made to police during warrantless search of house held to be illegally seized as fruit of unlawful action); Silverman v. United States, 365 U.S. 505 (1961) (electronic listening device that made physical intrusion held to be illegal search); On Lee v. United States, 343 U.S. 747 (1952) (statements made into a hidden receiver held to be not illegally seized since no trespass); Goldman v. United States, 316 U.S. 129 (1942) (use of detectaphone outside office wall held not to be illegal seizure since it made no physical intrusion into the office).

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

11. In discussing the cases following *Olmstead*, the Court stated: "They [subsequent cases] found 'conversation' was within the Fourth Amendment's protections, and that the use of electronic devices to capture it was a 'search' within the meaning of the Amendment, and we so hold." *Id.* at 51.

12. 389 U.S. 347 (1967).

13. *Id.* at 357.

The Court, however, left open the question[14] whether the Government could intrude upon private conversation in national security cases without being subject to the warrant requirement of the fourth amendment. Attempting to deal with this problem in compliance with the rationales of *Katz* and *Berger*,[15] Congress, in the Omnibus Crime Control and Safe Streets Act,[16] set forth certain procedures for acquiring warrants for electronic surveillance. Section 2518(7) of the Act permits federal agents in emergency situations to eavesdrop for 48 hours before applying for a warrant, and section 2511(3) acknowledges the constitutional power of the President to take such measures as he deems necessary to protect the United States from unlawful or forceful overthrow. By enacting the latter section Congress appeared to give its sanction to the inherent powers doctrine.[17] Under that doctrine, not only is the President thought to possess his express powers granted in article II of the Constitution, but, in addition, is thought to possess a residuum of implied power[18] incident to his express powers, which he may exercise for the nation's interest in times of emergency. Proponents of the doctrine have argued that the residuum of power encompasses any power that is neither vested in the legislature or judiciary nor expressly denied the President in the Constitution.[19] This concept of inherent presidential powers existing beyond those expressly provided in article II has been closely scrutinized by the Supreme Court. The Court has recognized the existence of inherent presidential powers in the sphere of foreign affairs,[20] basing its decision on the express power of the President over foreign relations,[21] but

14. Justice Stewart, in the opinion of the Court, stated: "Whether safeguards other than prior authorization by a magistrate would satisfy the Fourth Amendment in a situation involving the national security is not a question presented by this case." *Id.* at 358 n.23. Other members of the Court were less hesitant to reach a conclusion on this issue. In a concurring opinion, Justice White stated that prior judicial approval is not required when the President or Attorney General determines that electronic eavesdropping is reasonable to protect the national security. *Id.* at 363-64. In a riposte to Justice White's statement, Justice Douglas stated in his concurring opinion that a strict construction of the fourth amendment does not recognize a national security exemption—even spies and saboteurs are entitled to fourth amendment protection. *Id.* at 359-60.

15. Title III of the Omnibus Crime Control Act was expressly written to conform to the standards set forth in *Berger* and *Katz*. S. REP. No. 1097, 90th Cong., 1st Sess. 66 (1968).

16. 18 U.S.C. §§ 2510-20 (Supp. V, 1970).

17. *See* S. REP. No. 1097, *supra* note 15, at 174 (individual views of Sen. Hart).

18. W.H. TAFT, OUR CHIEF MAGISTRATE AND HIS POWERS 140 (1916).

19. *Id.* at 140-41.

20. Chicago & S. Air Lines, Inc. v. Waterman S.S. Corp., 333 U.S. 103 (1948) (presidential orders regulating overseas or foreign air transportation upheld as within power of President to regulate foreign affairs); United States v. Pink, 315 U.S. 203 (1942) (New York law conflicting with presidential compact with the U.S.S.R. held invalid); United States v. Curtiss-Wright Corp., 299 U.S. 304 (1936) (Joint Resolution allowing President to prohibit arms sales to countries in armed conflict upheld as within President's power to regulate foreign affairs).

21. United States v. Curtiss-Wright Corp., 299 U.S. 304, 316 (1936) (power of President over external affairs is construed broadly due to his express power over foreign relations).

in domestic affairs it has denied the existence of these powers except in cases in which the executive exercise of power has been directly attributable to a specific constitutional grant of power.[22] The leading case on the inherent powers doctrine in domestic affairs is *Youngstown Sheet & Tube Co. v. Sawyer*.[23] Rejecting the Government contention that President Truman's seizure of the steel mills during a national emergency was within his inherent powers, the Supreme Court held that the President, in the absence of statutory authorization, can exercise no legislative power that cannot be reasonably traced from a specific grant of presidential power in the Constitution. It should be noted, however, that only two members of the Court, Justices Black[24] and Douglas,[25] explicitly denied the existence of any inherent legislative powers in the Executive. Justice Jackson[26] disagreed and described the President's powers as "fluctuating," stating that the constitutionality of an exercise of power not directly attributable to a specific constitutional grant of power depends upon a test with two interdependent factors: the exigencies in which the power was exercised, and the congressional action in the area. Because of this divergence of opinion, the Court was unable to achieve a majority agreement on the existence or scope of inherent presidential power and thereby left undecided the question whether the Executive may use inherent power as a basis for wiretapping without a warrant in national security cases.[27] Despite this lack of clear judicial support for an inherent presidential power in the area of wiretapping, the executive branch has assumed its existence and has interpreted section 2511(3) as authorizing an exemption from the fourth amendment warrant requirement in national security cases involving both foreign and domestic subversive organizations.[28]

22. Cafeteria Workers v. McElroy, 367 U.S. 886 (1961) (dismissal of civilian cook at naval base for failure to meet security regulations is within power of President as Commander in Chief); Hirabayashi v. United States, 320 U.S. 81 (1943) (executive order establishing curfew for all persons of Japanese ancestry within a designated military area upheld as within the war power); Totten v. United States, 92 U.S. 105 (1875) (secret contract by President Lincoln for spying on southern forces upheld as within his war powers).

23. 343 U.S. 579 (1952).

24. *Id.* at 585.

25. *Id.* at 633.

26. *Id.*

27. Rejecting the Government's inherent power argument to make warrantless wiretaps in national security cases, a federal district court has held that warrantless eavesdropping by federal agents on domestic subversive organizations is a violation of fourth amendment warrant requirements. United States v. Smith, 321 F. Supp. 424 (C.D. Cal. 1971). *Contra* United States v. O'Neal, Crim. KC-Cr. 1204 (D. Kan. 1970); United States v. Dellinger, Crim. No. 69-180 (N.D. Ill. 1970).

28. Beginning with Franklin Roosevelt, every successive President has authorized the use of electronic equipment for eavesdropping in national security cases. Comment, *Privacy and Political*

The instant court reviewed[29] the history of wiretap litigation and concluded that an electronic surveillance is a search within the meaning of the fourth amendment and that a wiretap without a prior warrant is "per se unreasonable" under the Supreme Court holding in *Katz*. After examining the President's article II powers, the court could find no express constitutional language to support executive exemption from fourth amendment requirements in internal security matters. The court then considered the claim of inherent power in the Executive to exempt himself from fourth amendment requirements and concluded from its reading of the *Youngstown* case that the President has no inherent power to act in a legislative capacity even in time of emergency and, therefore, has no inherent power to exempt himself from the fourth amendment. Construing legislative action in the wiretap area, the court noted that by enacting section 2511(3) of the Omnibus Crime Control Act, Congress had provided a method by which the Executive could undertake wiretaps without prior judicial approval in emergency situations and pointed out that in the instant case the Executive had not attempted to use the procedure that Congress had provided. The court went on to rule that Congress, in promulgating the Omnibus Crime Control Act, had not attempted to give the Executive any power that was not already granted by the Constitution. The court also acknowledged the policy considerations that were behind the implementation of the fourth amendment and noted that its primary objective was to check the unreasonable use of search and seizure by the royal sovereign. The court thought it anomalous that the present Government would assert the power to search and seize without prior judicial review, since it was the unreasonable exercise of that very power which impelled the creation of the fourth amendment.

Freedom: Application of the Fourth Amendment to "National Security" Investigations, 17 U.C.L.A.L. REV. 1205, 1217, 1221-24, 1236 (1970). Attorney General Mitchell has interpreted § 2511(3) as allowing warrantless eavesdropping on domestic dissident groups. *Remarks of Attorney General John N. Mitchell Before the 1971 Kentucky State Bar Annual Banquet*, 35 KY. ST. B.J. 26, 28-31 (1971); 56 CORNELL L. REV. 161, 163 & n.8 (1970). In defense of the increasing use of federal data banks on citizens, the Attorney General has asserted claims similar to the inherent power argument. For an excellent exposition by William H. Rehnquist, Assistant Attorney General and recent Supreme Court appointee, of the Attorney General's position on the constitutional and statutory sources of the executive branch's investigative authority see 117 CONG. REC. 10225 (daily ed. June 29, 1971).

29. The court first disposed of 2 peripheral matters. *See* notes 4 & 5 *supra*. In the mandamus question, the court found that a pretrial order is appealable by a writ of mandamus under the All Writs Statute, 28 U.S.C. § 1651 (1964), which provides appeal in exceptional cases. The court determined that this case was exceptional since it presented an issue of first impression. On the relevancy determination question, the court cited Alderman v. United States, 394 U.S. 165 (1969), as requiring disclosure to the defendant of any monitored conversation regardless of the apparent innocence of the remarks.

Finding no support for the Government's position in the express words of the Constitution, case law, or statutes, the court concluded that the President has no inherent power to exempt himself from fourth amendment requirements when employing wiretaps against domestic subversive groups.[30]

The instant case represents the first decision at the federal appellate level that has squarely faced the constitutional issue whether a President can legally authorize warrantless wiretaps in investigations of American citizens. The court realized that an adoption of the inherent powers doctrine would invite abuses of executive power by removing electronic search and seizure from prior judicial scrutiny, thereby preventing the judiciary from acting as arbiter between the interests of the citizen and the federal government. Without judicial scrutiny prior to the act of monitoring, the only safeguard against indiscriminate wiretapping is the Attorney General's discretionary power to grant or refuse authorization. Under present political conditions, it would be difficult for any Attorney General to differentiate between subversive groups that pose an organized threat to the security of the United States and dissident groups who may appear subversive, but whose desire is to change the governmental structure of the United States through legal means. One of the most effective methods available to the Attorney General to discover the aims of various dissident or subversive groups has been to order a wiretap that will necessarily intrude upon the privacy of lawful dissenters.[31] Thus, even a responsible executive official is faced with the prospect of violating traditional fourth amendment protections. Far more dangerous to a democratic society is the possibility that an Attorney General could use an unbridled wiretap power to further the political aims of the administration that appointed him, rather than to protect national security. Indiscriminate use of this power could lead to the stifling of first amendment freedoms under the guise of protecting the national security. Thus, the court's holding confirms the fundamental principle that executive

30. Judge Weick, in dissent, stated that the court should have avoided the constitutional issue by making a relevancy determination in the *in camera* proceeding. Relying upon United States v. Clay, 430 F.2d 165 (5th Cir. 1970), he stated that if the contents of the wiretaps were not germane to any issue presented in a pretrial evidentiary hearing, then the court need not order production of the wiretap logs. In response to the majority's opinion, he stated that the power of the President as Commander in Chief and Chief Executive extends to both foreign and domestic subversives since both groups threaten the existence of the government. 444 F.2d at 671.

31. The effectiveness of wiretapping to obtain evidence for criminal prosecution has not been proved and the debate continues over its value. Therefore, the primary value of eavesdropping appears to be in the area of intelligence gathering. *See* Schwartz, *The Legitimation of Electronic Eavesdropping: The Politics of "Law and Order,"* 67 MICH. L. REV. 455, 498-99 (1969).

authority is limited by the individual rights protected by the fourth amendment.[32]

Although the court reached the correct result in the instant case, its reasoning is not compelling. By citing Justice Black's opinion in *Youngstown* as authority for dismissing the Government's claims to inherent power, the court adopted the view that the President has no inherent power to act when there is a domestic threat to the national security.[33] Historically, the President has acted beyond the scope of his express powers in domestic affairs in emergency situations.[34] As Justice Jackson pointed out in *Youngstown*, President Lincoln acted beyond the scope of his express powers when he suspended the writ of habeas corpus during the Civil War,[35] and yet his action was sustained by the courts.[36] It, therefore, is unrealistic to insist that the President has no inherent power to act in the nation's interest in internal security matters. A more useful and realistic approach to the problem of inherent presidential power is Justice Jackson's "fluctuating powers" concept.[37] Under that theory, the presidential power to act in situations like the instant case must be balanced against the relative weight of two factors: congressional action in the area, and the nature of the danger to the national security. Following this approach, the soundest conclusion is that since Congress established procedures whereby in national emergency situations a warrant could be obtained as late as 48 hours after instigation of a wiretap, there was neither any need nor any justification for the Attorney General's action in the instant case. The court would thus be able to pay tribute to the historical existence of inherent presidential power but, in addition, would be able to maintain the traditional role of the judiciary as the final interpreter of the fourth amendment.

---

32. Recently promulgated ABA standards do not provide for warrantless eavesdropping except to protect the nation from foreign powers or to protect national security information from foreign intelligence activities. ABA PROJECT ON STANDARDS FOR CRIMINAL JUSTICE, STANDARDS RELATING TO ELECTRONIC SURVEILLANCE § 3.1 (1971).

33. The court expressly limited its holding to domestic threats to the national security and did not decide what the President can or cannot lawfully do in his capacity as Commander in Chief to defend the country from attack, espionage, or sabotage by forces or agents of a foreign power.

34. For a brief list of presidential actions taken to meet sudden crises see Brief for Petitioner at 100 n.2, Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952).

35. 343 U.S. at 637 n.3.

36. *Ex parte* Milligan, 71 U.S. (4 Wall.) 2 (1866).

37. "Presidential powers are not fixed but fluctuate, depending upon their disjunction or conjunction with those of Congress." 343 U.S. at 635.

Labor Law—Railway Labor Act—Section 2 First's Duty To Exert Every Reasonable Effort Enforceable by Injunction When No Other Practical Means of Enforcement Is Available

Petitioner railroad sought to enjoin a threatened strike by respondent union on the ground that during negotiations the union failed to meet the reasonable effort requirement of section 2 First of the Railway Labor Act (RLA).[1] Petitioner contended that section 2 First constitutes a legally binding duty "to exert every reasonable effort to make and maintain agreements concerning rates of pay, rules, and working conditions,"[2] and that respondent should be enjoined from any self-help measures until it fulfills this obligation. The union contended that sections four, seven, and eight of the Norris-LaGuardia Act[3] deprived the district court of jurisdiction to enjoin self-help measures and that, in any event, section 2 First does not constitute a legally enforceable duty. The district court, declining to decide whether either party had violated section 2 First, held that the question was one for determination by the National Mediation Board[4] and thus was nonjusticiable.[5] It further held that the Norris-LaGuardia Act deprived the court of jurisdiction to enjoin the threatened strike. The Seventh Circuit affirmed, concluding that section 2 First is merely an exhortation to the parties stating the purpose and

1. 45 U.S.C. §§ 151-64 (1964). The dispute between the Company and the Union originated in 1959, when most of the nation's railroads began to reduce the number of brakemen on their trains. The unions resisted these efforts, offering proposals of their own. The dispute went unresolved through national negotiations, arbitration under congressional dictate, as well as subsequent bargaining on the local level. In the course of the bargaining, the parties held conferences pursuant to § 6 of the RLA, 45 U.S.C. § 156 (1964), the National Mediation Board mediated the dispute as required by § 5, 45 U.S.C. § 155 (1964), and the union declined voluntary arbitration provided by § 5. For a full history of this "crew consist" dispute see Chicago & N.W. Ry. v. United Transp. Union, 422 F.2d 979, 980 & n.4 (7th Cir. 1970).

2. The entire first paragraph of § 2 provides: "It shall be the duty of all carriers, their officers, agents and employees to exert every reasonable effort to make and maintain agreements concerning rates of pay, rules, and working conditions, and to settle all disputes, whether arising out of the application of such agreements or otherwise, in order to avoid any interruption to commerce or to the operation of any carrier growing out of any dispute between the carrier and the employees thereof" 45 U.S.C. § 152 First (1964).

3. 29 U.S.C. §§ 104, 107-08 (1964). Section 104 prohibits the enjoining of a number of specific acts including striking and advising or urging others to strike. Section 107 imposes certain procedural requirements on the issuance of injunctions in labor disputes. Section 108 requires the person in whose favor an injunction is issued to have made every reasonable effort to settle the dispute.

4. For a discussion of the organization and function of the National Mediation Board see note 11 *infra* and accompanying text.

5. The opinion of the district court is unreported.

policy of the subsequent provisions of the RLA, and is not a specific requirement that is subject to judicial enforcement.[6] On certiorari to the United States Supreme Court, *held,* reversed. Section 2 First of the Railway Labor Act constitutes a legally binding duty to exert every reasonable effort to settle a labor dispute, and this duty is capable of enforcement by injunction when no other practical means of enforcement is available. *Chicago & Northwestern Railway Co. v. United Transportation Union,* 402 U.S. 570 (1971).

Cognizant that prior railway labor legislation had been ineffective in the settlement of labor disputes in the railroad industry,[7] representatives of management and labor met jointly in 1926, and drafted and presented to Congress a proposed railway labor bill. After hearings on the bill, Congress enacted it as the Railway Labor Act of 1926.[8] Chief among the RLA's enumerated purposes is the avoidance of any interruption to commerce or to the operation of any carrier.[9] In order to accomplish that, the RLA establishes a bargaining process consisting of a series of steps that the parties to a labor dispute must follow in the settlement of their differences. Beginning with collective bargaining,[10] the steps progress to mediation under the auspices of the National Mediation Board,[11] to voluntary arbitration,[12] and finally, to possible Presidential intervention.[13] Although the right to use self-help measures is not expressly included in the bargaining process, it, nonetheless, has been judicially recognized by the Supreme Court in a recent decision that upheld a railway union's right to strike after all of the RLA's procedures had been exhausted without achieving a settlement.[14] Consistent with the RLA's underlying objective of promoting the voluntary settlement of labor disputes with a minimum of governmental intervention, Congress passed the Norris-LaGuardia Act in 1932.[15] Designed to curb federal

6. Chicago & N.W. Ry. v. United Transp. Union, 422 F.2d 979 (7th Cir. 1970).

7. *See* H.R. REP. NO. 328, 69th Cong., 1st Sess. 2-3 (1926).

8. 44 Stat. 577 (1926) (codified at 45 U.S.C. §§ 151-64 (1964)).

9. 45 U.S.C. § 151(a) (1964).

10. *Id.* § 152.

11. The National Mediation Board was established under the RLA as a nonpartisan body that, in addition to mediating disputes, oversees the election of employee representatives by members of the various crafts and certifies the representatives so elected. *Id.* §§ 152 Ninth, 155.

12. If the parties do not reach agreement at the mediation stage the National Mediation Board must try to persuade the parties to submit to arbitration. *Id.* § 155.

13. The President may establish an Emergency Board for the purpose of discovering and reporting the facts of the controversy to him. *Id.* § 160.

14. In Brotherhood of R.R. Trainmen v. Jacksonville Terminal Co., 394 U.S. 369 (1969), the Supreme Court found that while the right to strike was not explicitly provided in the RLA, the right to self-help was implicit in the statutory scheme.

15. 29 U.S.C. §§ 101-15 (1964).

court abuse of the injunctive remedy,[16] it limits the issuance of injunctions in labor disputes primarily to circumstances in which unlawful acts are threatened or have occurred causing irreparable damage to a complainant's property.[17] Even when clearly enjoinable acts have taken place, however, section 8 of Norris-LaGuardia still requires the complainant to show that he has made every reasonable effort to settle the dispute.[18] Since injunctive relief has traditionally been the remedy sought for violations of the RLA, the Norris-LaGuardia limitation on the injunctive powers of the federal courts has given rise to a direct conflict between the policies of the two Acts. The Supreme Court, in *Virginian Railway Co. v. System Federation Number 40,*[19] recognized this conflict and realized that it would have to make an accommodation with Norris-LaGuardia if it wanted to give any effect to the violated RLA provision. In that case the Court found a violation of section 2 Ninth of the RLA, which requires a railroad to recognize the bargaining representative of its employees. Upholding an injunction against the railroad's noncompliance with this section, the Court pointed out that while the purpose of Norris-LaGuardia was principally "to forbid blanket injunctions against labor unions,"[20] the general nature of its provisions, enacted in 1932, should not be construed to nullify the specific requirements of the RLA, as amended in 1934.[21] In *International Association of Machinists v. Street,*[22] the Court followed *Virginian Railway,* but added the qualification that injunctive relief should be used in a labor dispute only as a last resort and only when no other relief will protect a complainant's right.[23] In addition to section 2 Ninth of the RLA, the Supreme Court has enforced by injunction the section 6[24] duty to maintain the status quo

16. *See, e.g.*, Brotherhood of R.R. Trainmen v. Chicago River & I.R.R., 353 U.S. 30 (1957). "The Norris-LaGuardia Act . . . was designed primarily to protect working men in the exercise of organized, economic power, which is vital to collective bargaining. The Act aimed to correct existing abuses of the injunctive remedy in labor disputes." *Id.* at 40.

17. 29 U.S.C. § 107 (1964).

18. "No restraining order or injunctive relief shall be granted to any complainant who has failed to comply with any obligation imposed by law which is involved in the labor dispute in question, or who has failed to make every reasonable effort to settle such dispute either by negotiation or with the aid of any available governmental machinery of mediation or voluntary arbitration." 29 U.S.C. § 108 (1964).

19. 300 U.S. 515 (1937).

20. *Id.* at 563.

21. *Id.* Although the RLA was originally enacted prior to the Norris-LaGuardia Act, it was amended in several important aspects in 1934. 44 Stat. 577 (1926), *as amended,* 48 Stat. 1185 (1934).

22. 367 U.S. 740 (1961).

23. *Id.* at 773.

24. 45 U.S.C. § 156 (1964).

during negotiations,[25] and the section 2 Third[26] requirement that neither party interfere with or influence the other's selection of representatives.[27] Considerable uncertainty, however, surrounded the question whether the section 2 First duty to exert every reasonable effort constitutes a legally binding obligation capable of enforcement by injunction. While the RLA's drafters seemed to agree that section 2 First did create a legal duty, even they were not completely certain of its extent. For example, during the legislative hearings on the bill, the chief union spokesman explained at one point that the section 2 First reasonable effort duty was meant to be judicially enforceable,[28] but at another point, he qualified his position by stating that judicial compulsion would be appropriate only when one of the parties absolutely refused to confer or negotiate.[29] Although it has never considered the legal effect of section 2 First standing alone, the Supreme Court has addressed the question of the section's enforceability in conjunction with other sections of the RLA. In *Virginian Railway,* the Court explicitly rejected the argument that section 2 First did not constitute a binding duty.[30] It held that section 2 First operated in conjunction with section 2 Ninth and that its effect was to impose a binding obligation on the railroad, not only to recognize the employees' representative, but also to exert every reasonable effort to settle labor disputes existing between them. The strength of that reasoning, however, subsequently was brought into doubt when the Court, in *General Committee of Adjustment v. Missouri-Kansas-Texas Railroad Co.*,[31] observed that section 2 First merely stated a general policy which other provisions of the RLA buttress with more particular commands. Recently, however, two federal circuit courts considered the question of section 2 First's judicial enforceability and both suggested conclusions contrary to that reached in *General Committee.* The Second Circuit apparently assumed that section 2 First constitutes a legally binding duty when it refused to issue an injunction against the union on the ground that the union had met its duty to exert every reasonable effort to avert a strike.[32] Taking the same view of section 2 First, but in more direct terms, the Fourth Circuit in *Piedmont Aviation, Inc. v. Air Line*

25. Detroit & T.S.L.R.R. v. United Transp. Union, 396 U.S. 142 (1969).

26. 45 U.S.C. § 152 Third (1964).

27. Texas & N.O.R.R. v. Brotherhood of Ry. & S.S. Clerks, 281 U.S. 548 (1930).

28. *Hearings on H.R. 7180 Before the House Comm. on Interstate & Foreign Commerce*, 69th Cong., 1st Sess. 91 (1926).

29. *Id.* at 84-85.

30. 300 U.S. at 544-45.

31. 320 U.S. 323 (1943).

32. Chicago, R.I. & P.R.R. v. Switchmen's Union, 292 F.2d 61 (2d Cir. 1961).

Pilots Association,[33] enjoined a strike on section 2 First grounds because the union had failed to satisfy the reasonable effort provision.

In the instant case, the Court found at the outset that the parties had exhausted the formal bargaining procedures of the Railway Labor Act. Noting the railroad's claim that the union, nonetheless, had violated section 2 First by failing to exert every reasonable effort to reach an agreement, the Court proceeded to determine to what extent that section is judicially enforceable. It looked first to the Act's legislative background, and observed that the chief labor spokesman at the congressional hearings on the Act had stated that section 2 First was meant to impose a legally binding duty.[34] Marshalling additional support for this interpretation, the Court observed that *Virginia Railway* had explicitly repudiated the argument that section 2 First did not give rise to a legally binding obligation. In light of these considerations, the Court concluded that the duty to exert every reasonable effort "was designed to be a legal obligation, enforceable by whatever appropriate means might be developed on a case-by-case basis."[35] It concluded further that in light of the legislative dissatisfaction with earlier mediation procedures, section 2 First would be enforced, not by the National Mediation Board as the district court determined, but by the judiciary.[36] Turning to the question whether a federal court can enforce this duty by means of an injunction, the Court observed that while the purposes of the Norris-LaGuardia Act and the RLA sometimes conflict, an appropriate accommodation of the two statutes could be made. Accordingly, it found that even though the Norris-LaGuardia Act expresses a basic policy against enjoining labor activities, federal courts have jurisdiction to issue injunctions under the RLA when injunctive relief is the only practical means of enforcement available. Justice Brennan, dissenting, concluded that section 2 First constitutes a legal duty, but only to the extent that it requires the parties to go to the bargaining table and talk

33. 416 F.2d 633 (4th Cir. 1969).

34. The Court quoted the chief labor spokesman as saying during the hearings that "it is [the parties'] duty to exert every reasonable effort . . . to settle all disputes, whether arising out of the abrogation of agreements or otherwise, in order to avoid any interruption to commerce. In other words, the legal duty, the legal obligation is imposed, and as I have previously stated, and I want to emphasize it, I believe that the deliberate violation of the legal obligation could be prevented by court compulsion." 402 U.S. at 576.

35. 402 U.S. at 577.

36. The Court reasoned that since the duty is essential to the whole scheme of the Act, the courts are qualified to determine—and do, in fact, daily determine—whether a party has acted reasonably, and since the aggrieved party could not otherwise obtain relief because the Act did not empower the National Mediation Board with any adjudicatory authority, the duty is judicially enforeeable.

to each other.[37] Moreover, the dissent maintained that instead of recognizing the justiciability of section 2 First, *Virginian Railway* held precisely that the parties involved were under a duty to recognize each other and to begin the RLA's bargaining procedure. In conclusion, Justice Brennan argued that the majority's reasoning would give rise to excessive judicial involvement in labor disputes, contrary to the voluntary settlement policy of the RLA, and that, as a result, the threat of economic self-help, which plays a critical role in providing impetus toward a settlement, would be lessened.

On remand, the district court held that not only had the union failed to bargain in good faith, but that the railroad likewise had failed to comply with the section 2 First requirement. The court reasoned that although the railroad did not come before it with "clean hands,"[38] the certainty of "grave and irreparable" damage to the public in the event of a strike justified the issuance of an injunction. Concerning the point in the bargaining process to which the parties should be directed, the court found no authority to remand them to the National Mediation Board, which is an intermediate step in the RLA's bargaining process. Accordingly, it ordered them to resume negotiations at the initial collective bargaining stage.

The Supreme Court in the instant case attempted to dispel the uncertainty connected with section 2 First's judicial enforceability. Heretofore, only the Fourth Circuit had directly held section 2 First judicially enforceable,[39] and its ruling was subject to question because the Supreme Court's comments on the same issue, if not clearly contrary to the Fourth Circuit's conclusions, had been at least ambiguous. Now the federal courts undeniably have jurisdiction to examine the conduct of parties during negotiations under the RLA to determine whether they have exerted every reasonable effort to settle the dispute.[40] If the section 2 First duty is not met, the defaulting party may be enjoined from the use of economic self-help measures such as a strike or lockout.[41] The

37. The dissent felt that this view had the support of the RLA's legislative history and focused on a portion of the labor spokesman's testimony at the hearings in which he qualified his position that section 2 First created a legal duty by saying that "if [the parties] refuse *absolutely* to confer, to meet or discuss or negotiate, I think there is a question as to whether there might not be invoked some judicial compulsion . . . ." *Hearings on H.R. 7180, supra* note 28, at 66. (emphasis added).

38. Although it made a passing declaration that its decision would not violate § 8 of the Norris-LaGuardia Act, the district court did not discuss the explicit § 8 prohibition against issuing an injunction in favor of a party who has not exerted every reasonable effort to reach a settlement, but spoke only in terms of the familiar equity clean hands doctrine.

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

40. Chicago & N.W. Ry. v. United Transp. Union, 402 U.S. 570 (1971).

41. *See id.* at 582-83.

enforcement of section 2 First, however, is not as clear-cut as that description might suggest. The Supreme Court quite simply did not achieve what it set out to do and, as a result, section 2 First is surrounded with as much uncertainty as it ever was. One of the major problems with the instant decision was the Court's failure to characterize the standard governing compliance with section 2 First. Under earlier interpretations of the RLA, the courts determined compliance on an objective basis —whether or not a party actually participated in the RLA's bargaining process. As applied, it was immaterial whether or not a party had a bona fide intent to reach a settlement without first resorting to self-help measures. Now, by virtue of the instant decision, the Supreme Court has departed from that simple, but mechanical approach. Unfortunately, the Court's only guiding standard for the lower courts was its observation that section 2 First violations are limited almost entirely to cases in which one of the parties manifests "a desire not to reach a settlement."[42] The Court failed to describe in any meaningful way the objective indicia of that standard, leaving the lower courts to their own devices to find a feasible approach to the enforcement of section 2 First.[43] The practical importance of this omission is that the railroads and the unions are in a dilemma: while they may now know that section 2 First is judicially enforceable, they still do not know what course of conduct will constitute compliance with its requirements. In addition to that dilemma, the instant decision raises another problem. It creates a potential conflict between the RLA's voluntary settlement policy and the enforcement of the section 2 First duty. To find compliance with section 2 First, a court must determine affirmatively that a party had a desire to reach a settlement during the RLA's bargaining procedures. Since the objective standard of compliance utilized in earlier section 2 First decisions is no longer controlling, the negative implication is that courts henceforth must examine the subjective intent of the parties. As a necessary concomitant to this examination, it is submitted that courts inevitably will have to inquire into the reasonableness of the disputants' bargaining positions.[44] For example, courts might have to determine whether a

42. *Id.* at 578.

43. The Court did seem to approve of analogies to cases arising under § 8(d) of the National Labor Relations Act, 29 U.S.C. § 158(d) (1964), which requires good faith bargaining, when these analogies are made with great care and full awareness of the differences between the 2 Acts' purposes. 402 U.S. at 578-79 & n.11.

44. The Supreme Court, in *Virginia Railway*, noted that "whether action taken or omitted is in good faith or reasonable, are everyday subjects of inquiry by courts in framing and enforcing their decrees." 300 U.S. at 550. Although there is this suggestion that the Court would approve a determination of reasonableness under the RLA, it had never made nor approved such a determination.

party's obstinance in pursuing a particular wage demand is justified in the overall context of the negotiations. This judicial involvement in the bargaining process is without precedent under the RLA. No matter how carefully it handles the inquiry, a court will become intimately acquainted with the specifics of each party's position and almost unavoidably will show a preference for one. To the extent that a preference is indicated, the court will confer upon the favored party's bargaining position an unwarranted appearance of authority and will exert equally unwarranted pressure on the other party to abandon its demands. Clearly, that result would contain an element of coercion and would run counter to the RLA's basic policy of the voluntary settlement of labor disputes.[45] Despite these problems, the instant decision has some praiseworthy aspects. It is sound in terms of RLA policy that it advances. Just as the courts should not allow the purpose of the RLA's bargaining procedures to be defeated by the parties' refusal to recognize or to bargain with each other, they should not allow that purpose to be subverted by less obvious means. Indeed, it would be senseless to compel the parties to go through the bargaining process and not expect them to do so with a desire to reach a settlement. The parties are now obliged to do more than simply go to the bargaining table and talk. If a party fails to negotiate with genuine desire to reach a settlement, the court can enjoin it from utilizing the very self-help measures that it would like to use to get the other party to soften its demands. In short, the court can deprive a party of its principal economic weapon so that neither the railroads nor the unions have anything to gain by subverting the RLA's bargaining process. To the extent that subsequent disputes between the railroads and the unions are resolved at the bargaining table rather than by resorting to self help, the primary aim of the RLA is served. The nation's commercial arteries remain open.

While the Supreme Court's approval of injunctive relief to enforce section 2 First breaks no new ground, the district court's decision on remand does. If it is permitted to stand, the decision will mark a significant expansion of the federal courts' injunctive powers in labor disputes. Section 8 of the Norris-LaGuardia Act[46] prohibits the issuance of an injunction in a labor dispute in favor of a party that has failed to exert every reasonable effort to reach a settlement.[47] Presumably, if the rail-

45. *See, e.g.*, Brotherhood of R.R. Trainmen v. Toledo, P. & W.R.R., 321 U.S. 50, 58 (1944) (policy of RLA to "encourage use of nonjudicial processes of negotiation, mediation and arbitration for the adjustment of labor disputes").

46. 29 U.S.C. § 108 (1964).

47. Section 8 has been given effect by the Supreme Court when it based a decision not to enjoin a violent strike on the basis of that section. Brotherhood of R.R. Trainmen v. Toledo, P. & W.R.R., 321 U.S. 50 (1944).

road in the instant case failed to exert the requisite effort, section 8 would bar the issuance of an injunction on its behalf, no matter what course of action the union threatened to take. Nevertheless, reasoning that an injunction was the only practical and effective means of enforcing section 2 First, the district court enjoined the union from striking even though it explicitly found that the railroad had not exerted every effort to reach a settlement. Although this ruling flies in the face of Norris-LaGuardia's express language, both judicial precedent and basic policy considerations support the decision reached. When a court finds that neither party to a dispute has exercised every reasonable effort to settle, it must choose to give effect either to section 2 First of the RLA with its inherent right to self-help or to section 8 of the Norris-LaGuardia Act. In *Virginian Railway* the Supreme Court strongly implied that in such a situation the policies underlying the RLA should take precedence. Its basic reason was that the specific requirements of the RLA, as amended in 1934, should not be rendered null and void by the earlier general provisions of Norris-LaGuardia.[48] Moreover, in terms of national policy, the economic consequences of a strike or a lockout in the railroad industry are too severe to allow either to occur until the parties have at least exerted every reasonable effort to settle their dispute as required by the RLA.[49]

Even though the decisions of both the Supreme Court and district court seem to vindicate the purposes of the RLA, the intricate problems they raise suggest that the judiciary needs additional legislative guidance in this area. There are several reasons for this. First, the Supreme Court once again had to accommodate the sharply conflicting policy differences existing between the RLA and the Norris-LaGuardia Act. In the absence of a clear legislative pronouncement, this conflict no doubt will continue to plague the courts, and the courts no doubt will continue their ad hoc process of reconciling the varying interests in question. At best, that process amounts to nothing more than judicial speculation about Congress's intent concerning the propriety of enforcing section 2 First in a given situation. That approach is difficult to justify in view of the critical interests at stake in nationwide labor disputes. Secondly, once

48. 300 U.S. at 563.

49. A recent Department of Commerce study estimated that if a nationwide rail strike were allowed to continue for 30 days, the unemployment rate would rise by approximately 6.5 million men and total unemployment would approximate 15% of the nation's labor force, the highest percentage since 1939. The total cost of such a strike would be in excess of $25 billion. *Joint Hearings on H.R. 565 Before a Subcomm. on Railroad Work Rules Dispute of the House Comm. on Interstate & Foreign Commerce*, 88th Cong., 1st Sess. 953-59 (1963).

the courts determine that there has been a violation of section 2 First, there is no provision in the RLA prescribing the stage in the bargaining process to which the parties should be remanded. The district court noted this omission when it ordered the parties back to the initial negotiation stage instead of perhaps more wisely remanding them to the mediation stage. If the RLA had clearly authorized the court to remand the parties to the mediation stage, the resulting decision would have been more in line with the Act's voluntary settlement policy. After negotiating unsuccessfully through the RLA's protracted bargaining process, the relationship between the parties is not likely to be harmonious. At the mediation stage the aid of a skilled and impartial mediator would be available to reduce the friction. His calming presence, therefore, could substantially enhance the chances of persuading the parties to reach a settlement. Finally, perhaps the most damning criticism of the RLA goes to the very heart of the Act. Some have argued that the RLA is no longer an effective mechanism to fulfill the purpose for which it was designed—the settlement of disputes without interruption to railroad traffic.[50] To satisfy this latter criticism would require a substantial overhaul of the Act, whereas the correction of the more specific problems raised by the instant decision, in comparison, would require only relatively minor changes. Whatever the extent of the changes, it is clear that fresh congressional action in the railway labor field is presently needed.

Taxation—Deductions—Cost of Union Executive's Campaign for Reelection Nondeductible as Business Expense Under Section 162(a)

Taxpayer, president of an international labor union for sixteen years,[1] claimed a deduction under section 162(a) of the Internal Revenue Code[2] for expenses incurred during his unsuccessful campaign for reelec-

50. For a discussion of some of the criticism directed against the RLA and some suggested alternatives see Risher, *The Railway Labor Act*, 12 B.C. IND. & COM. L. REV. 51, 51-57 (1970).

1. International Union of Electrical, Radio, and Machine Workers, AFL-CIO-CLC (IUE). Petitioner had served as an officer of the CIO from its inception until its merger with the AFL, at which time he became an officer of the AFL-CIO. Concurrently in 1949 he was elected president of the IUE, an office he held for 8 consecutive 2-year terms ending with the election here in question.

2. INT. REV. CODE OF 1954, § 162(a) allows as a deduction "all the ordinary and necessary expenses paid or incurred . . . in carrying on any trade or business . . . ." The Tax Court also considered § 212 in conjunction with § 162(a), but, due to an earlier Supreme Court ruling that § 212 did not expand the types of deductions allowable beyond the scope of § 162(a), the court held that § 212 could not compel a different result. McDonald v. Commissioner, 323 U.S. 57, 62 (1944).

tion. The Commissioner determined a deficiency in the amount of the campaign costs,[3] asserting that taxpayer's expenditures were not necessary and ordinary expenses incurred while carrying on a trade or business within the meaning of section 162(a). The Commissioner further contended that the presidency of a large labor union is an office of such public interest that governmental support through allowance of a deduction for the cost of running for the office violates public policy. On petition to the Tax Court, *held,* deficiency affirmed. Campaign expenses incurred by a union executive while seeking reelection to the presidency of an international labor union are not deductible as a business expense under section 162(a). *James B. & Margaret Carey*, 56 T.C. 477 (1971).

Section 162(a) allows persons engaged in a trade or business to deduct from their gross income the necessary and ordinary expenses of producing this income.[4] Since neither the Code nor the Regulations fully define a "trade or business,"[5] it has been left largely to the courts to provide a workable definition. In addition, the judiciary has borne the task of determining what constitutes "carrying on" a trade or business. Although the courts may characterize a man's line of work as a trade or business, they have had difficulty determining exactly when he is engaged in that trade.[6] This question has been particularly troublesome when a taxpayer has sought to deduct the expenses incurred in changing jobs or the cost of being temporarily unemployed. For example, although it has been recognized that a taxpayer could be engaged in the business of selling his services to others,[7] the Tax Court traditionally has held that the very "seeking" of employment presupposes the nonexistence of being engaged in a trade or business.[8] On the other hand, it has

3. Taxpayer claimed as a deduction on his return a total of $16,070 expended in the campaign, and the Commissioner took issue with $14,403.22. Taxpayer conceded that part of this difference was due and the Commissioner conceded that the amount expended in defending a suit brought against petitioner in his capacity as president concerning the election proceedings was deductible.

4. INT. REV. CODE OF 1954 § 162(a).

5. Groh, *"Trade or Business": What It Means, What It Is and What It Is Not,* 26 J. TAXATION 78 (1967). Congress has made one exception in this regard by providing that the performance of the functions of a public office fall within the "trade or business" term. INT. REV. CODE OF 1954 § 7701(a)(26).

6. *See, e.g.,* Mort L. Bixler, 5 B.T.A. 1181 (1927) (fair manager's traveling expenses between fair sites held personal and nondeductible). *Compare* Raymond L. Collier, 23 P-H Tax Ct. Mem. 804 (1954) (unemployed executive not carrying on a trade), *with* Harold Haft, 40 T.C. 2 (1963) (unemployed jewelry salesman remained in trade).

7. Deputy v. DuPont, 308 U.S. 488 (1940) (Justice Frankfurter's concurring opinion noted that a man could be in the trade of holding himself out to others as engaged in selling his specific services).

8. *E.g.,* Thomas W. Ryan, 28 P-H Tax Ct. Mem. 506 (1959) (fees paid to law firm and employment agency in seeking work disallowed); Leon Chooluck, 23 P-H Tax Ct. Mem. 811 (1954)

been held that a taxpayer with an already recognized status or trade could deduct the expenses of "securing" work as a necessary cost of plying his trade.[9] Thus, a welder, with a series of short-term jobs, has been found to be continuously engaged in the trade of being a welder and has been permitted to deduct the expenses of securing and traveling to his next job.[10] Similarly, in *Harold Haft,*[11] the Tax Court ruled that a temporarily unemployed salesman could deduct the expenses of maintaining the contacts he had established during 21 years in the business. More recently, in *David J. Primuth,*[12] the Tax Court concluded that a corporate executive seeking a change of employers could deduct employment agency fees as an expense of carrying on his business of being a "corporate executive."[13] This construction of the phrase "carrying on any trade or business" has been followed and expanded in subsequent Tax Court cases.[14] In contrast to this line of reasoning, the courts have consistently employed a narrow interpretation of carrying on a trade or business when a public office procured through an electoral process is at issue.[15] In the leading case of *McDonald v. Commissioner,*[16] for example, the Supreme Court, drawing a distinction between "being a judge" and "trying to become a judge,"[17] held that while performance of the

(disallowed travel expenses from seeking employment as movie producer); *see* I.T. 1397, I-2 CUM. BULL. 145 (1922) which provides that "amounts expended . . . seeking a position . . . are not deductible . . . ."

9. *E.g.,* Caruso v. United States, 236 F. Supp. 88 (D.N.J. 1964) (petitioner allowed to deduct, as part of securing job, legal fees expended successfully seeking reinstatement as the guaranteed top applicant for a civil service position); Riddle v. United States, 205 F. Supp. 357 (D. Colo. 1962) (traveling expenses to solicit consulting work allowed engineer); *see* O.D. 579, 3 CUM. BULL. 130 (1920) (allowed deduction of fees paid to secure employment).

10. Rev. Rul. 189, 1960-1 CUM. BULL. 60, 65-66.

11. 40 T.C. 2 (1963); *see* Furner v. Commissioner, 393 F.2d 292 (7th Cir. 1968) (teacher who returned to school to obtain master's degree was still in the trade of teacher).

12. 54 T.C. 374 (1970).

13. *Id.* at 379. Although the majority opinion characterized the taxpayer's trade as being a "corporate executive," a concurring opinion would have restricted the taxpayer's trade to a "financial corporate executive" and the dissent narrowed it to employee of *Foundry* (taxpayer's prior employer). *Id.* at 382, 384.

14. *E.g.,* W. Richard Gerhard, 39 P-H Tax Ct. Mem. 1260 (1970) (allowed deduction of individual expenses incurred in personally searching for employment); Kenneth R. Kenfield, 54 T.C. 1197 (1970) (deduction of expenses incurred in finding a new employer in same capacity allowed although job offer subsequently refused and petitioner retained old job); Guy R. Motto, 54 T.C. 558 (1970) (petitioner was carrying on his trade of being an engineer when he incurred the deducted costs).

15. *See, e.g.,* McDonald v. Commissioner, 323 U.S. 57 (1944); Mays v. Bowers, 201 F.2d 401 (4th Cir. 1953) (disallowed deduction of expenses that city councilman incurred in election).

16. 323 U.S. 57 (1944). Taxpayer had been appointed to an uncompleted term as judge with the understanding that he would run for reelection at the term's end.

17. *Id.* at 60.

duties of a public office may constitute a business,[18] the cost of a judge's reelection campaign was not deductible as an expense of carrying on a trade.[19] Although the decision was predicated largely on its narrow construction of section 162(a), the majority opinion also mentioned the public's distaste for an income tax deduction for campaign expenses,[20] which derives from a general fear of governmental subsidy of political processes.[21] The extent to which this policy consideration actually influenced the *McDonald* Court is unclear,[22] but the introduction of the policy issue into a campaign deduction case raises the question whether an existing public policy can defeat an otherwise permissible deduction. When the Supreme Court addressed this question in *Commissioner v. Tellier,*[23] it held that the federal income tax is not an instrument for the advancement of public policy and that a deduction must thwart some plainly specified public policy to be disallowed.[24] The degree of specificity required, however, has never been clarified. Moreover, the nature of an office that would make it sufficiently "public" to invoke the policy against deductions for the cost of procuring the office has never been articulated. "Public office," for example, has never been held to include an elected business representative of a labor union.[25] Thus not only is there a question about whether the campaign costs of a labor union executive are expenses within the meaning of section 162(a), but also

18. *Id.* at 59.

19. "[T]he difficulty is not that petitioner's expenditures related to 'non-business' income . . . but that they were not incurred in 'carrying on' his 'business' of judging." *Id.* at 62.

20. *Id.* at 62-63.

21. *See* Mays v. Bowers, 201 F.2d 401 (4th Cir. 1953) (city councilman's campaign expenses disallowed). The general concern over election practices is evidenced by the fact that over the past 60 years Congress has acted several times to restrict political contributions in an effort to prevent corruption in public office. *See* Federal Corrupt Practices Act, ch. 368, tit. III, 43 Stat. 1070 (1925) (codified in scattered sections of Titles 2 and 18 U.S.C.); Lambert, *Corporate Political Spending and Campaign Finance,* 40 N.Y.U.L. Rev. 1033 (1965). *See also* INT. REV. CODE OF 1954, §§ 271, 276 (disallowing deductions for political campaigns, contributions, and debts owed by political parties). Likewise, when Congress enacted § 7701 of the 1954 Code legislative history shows that campaign contributions were expressly excluded. *1 Hearings on H.R. 8735 Before the House Comm. on Finance*, 73d Cong., 2d Sess. 29 (1934) (states that the amendment has "nothing to do" with campaign expenses).

22. The Court disallowed the deduction as not being within the language of § 23(a)(1), the 1939 predecessor of § 162(a), and treated the policy issues only in the context of its discussion of § 23(a)(2), the 1939 predecessor of § 212. The dissent felt that the decision was based partly on public policy. It, therefore, is unclear to what extent the disallowance was predicated on public policy.

23. 383 U.S. 687 (1966) (taxpayer found guilty of mail fraud allowed to deduct court costs).

24. *Id.* at 691; *accord,* Commissioner v. Heininger, 320 U.S. 467, 474 (1943).

25. Ernest H. Vernon, 28 P-H Tax Ct. Mem. 734 (1959), *aff'd mem.*, 7 Am. Fed. Tax. R.2d 542 (1961) (taxpayer was elected yearly as union's business representative).

about whether the "public office" policy is applicable against those expenses, if they are found to be an otherwise legitimate deduction.

The instant court noted at the outset that taxpayer's claim for a deduction under section 162(a) would turn on whether the *Primuth* or the *McDonald* rationale should be applied. Briefly distinguishing *Primuth* as having been based on different facts, the court held that the nature of the expenses in the instant case were sufficiently analogous to the campaign expenses at issue in *McDonald* to allow the court to follow that case's rationale. The court, therefore, reasoned that the expenses of seeking the union presidency bore little relationship to the performance of the functions of that office and disallowed the claimed deduction. Although the court had thus disposed of the claimed deduction under section 162(a), they nevertheless turned to petitioner's argument that the public policy considerations suggested by *McDonald* did not apply to union elections. Noting the Labor-Management Reporting and Disclosure Act of 1959[26] and citing its several sections dealing with union elections,[27] the court held that union elections were as important to the legislature as public elections and concluded that the policy against allowing expense deductions in political campaigns was fully applicable to the instant case. Six concurring judges,[28] however, questioned whether the Supreme Court actually had relied on public policy in *McDonald,* and reasoned that if the principle announced in *Primuth* applied to the instant case, then it was incorrect because the taxpayer's expenses were not within the meaning of section 162(a). The dissenting opinions, following the *Primuth* rationale for their interpretation of section 162(a), argued that election costs were an integral part of carrying on the business of being a labor executive. One dissent also argued that an examination of the legislative history of the Tax Reform Act of 1969 revealed no clear policy against allowing campaign-cost deductions.[29]

In choosing the *McDonald* rationale the instant court apparently has retreated from its expansive position in *Primuth.* In so doing, the court has added further confusion to its prior interpretations of section 162(a). The prior difference in the interpretation of section 162(a), as evidenced by *Primuth* and *McDonald,* was the result of courts' labeling the taxpayers' trade or business with titles that varied greatly in breadth.

26. Pub. L. No. 86-257, 73 Stat. 519 (codified in scattered sections of 29 U.S.C.).

27. 73 Stat. 519, 533-34, 29 U.S.C. §§ 481-83 (codified in scattered sections of 29 U.S.C.).

28. 56 T.C. at 485. The concurring judge was joined by the same 5 judges who joined his dissent in *Primuth.* 54 T.C. 374, 384 (1970).

29. The dissent noted that the Tax Reform Act of 1969, while disallowing certain deductions for policy reasons, did not mention election costs. 56 T.C. at 486.

The *Primuth* court, by describing the petitioner as a "corporate executive," was able to adopt a sufficiently broad interpretation of carrying on a trade or business[30] that could encompass petitioner's efforts in seeking a change of employers. In *McDonald,* however, the Court, by narrowly identifying the taxpayer as a single-term judge, implicitly held that when the judge's single term ceased, so did his identification with the business of being a judge.[31] Thus the choice before the instant court was whether to entitle petitioner "labor executive" or "single-term labor executive." In light of petitioner's long and active career in labor unions and given the brevity of the presidency's elective term, it is difficult to see how he could be considered a labor executive or labor leader for only as long as his term lasted; to do so would lead to the unrealistic conclusion that taxpayer had been in and out of the trade every two years for the past sixteen years.[32] In the commercial-industrial world of labor unions, periodic elections are so intertwined with continuous performance of executive functions that segmenting them seems to be an artificial delineation without substantive justification. Any test that purports to set the limits of an income tax deduction should be in accord with the broad purpose of income tax deductions to ensure that the income tax is restricted to net income[33] and should thereby serve the economic function of encouraging the production of income. As a consequence of this underlying purpose, the validity of any deduction, particularly a business deduction under section 162(a), should be a question of economic proximate cause. Does the claimed expense result from efforts sufficiently related to the production of income to permit the deduction of this expense from income before taxation? By not drawing an arbitrary distinction between performance and seeking the opportunity to perform, the breadth of the *Primuth* interpretation of section 162(a) permits consideration of economic proximate cause. Regrettably, however, the position taken by the instant court suggests that *Primuth* could be limited strictly to its facts.[34]

Since the invocation of public policy to refuse a deduction presupposes an otherwise allowable deduction, the instant court's treatment of policy must be treated as dicta. It nonetheless is disturbing dicta for it

30. 54 T.C. at 379.

31. 323 U.S. at 60.

32. *See* note 1 *supra.*

33. 323 U.S. at 66-67 (Black, J., dissenting).

34. *See* notes 13 & 28 *supra.* In view of the fact that the judges who concurred on narrower grounds in *Primuth* concur also in the instant decision, as does the dissent in *Primuth,* it seems likely that the present Tax Court will limit *Primuth* to its facts even if it does not retreat from that position.

suggests an unprecedented broadening of the policy against allowing deductions for the expenses of a campaign for *public* office. The characterization of a labor union presidency as a public office should not be made without a full examination of the reasons behind the disallowance of deductions of public-office campaign expenses. The policy against deduction of personal campaign expenses[35] is predicated in part on the view that allowing a deduction would discriminate against the poorer candidate by giving his wealthier opponent a bigger tax break.[36] This reasoning, however, is not wholly satisfactory since it merely recognizes the impact of all deductions in a progressive system. Moreover, this argument assumes that office seekers consider tax consequences of significant importance when determining their expenditures; it is equally reasonable to assume that the less wealthy may be encouraged to seek an elective office by a deduction while the more wealthy are unlikely to be deterred in any event. Perhaps the best argument against allowing the deduction of personal campaign expenses derives from the fact that elections conceivably can be bought, and although it may be difficult to prevent this, there is no reason for encouraging it. The question in the case of union elections, however, is whether the same danger of buying elections is such a threat to the public that courts should apply the same public policy against deductions of union campaign expenses. The instant court looked to the Labor-Management Reporting and Disclosure Act of 1959[37] and its legislative history[38] and concluded that there existed a strong public interest in unions and that, therefore, union elections bore the same relation to the public as public elections. At least one judge, however, upon examination of the legislative history of the Tax Reform Act of 1969, arrived at the opposite conclusion. When these conflicting interpretations of legislative intent are considered in the light of the *Tellier*[39] requirement that the deduction must be shown to thwart a specified public policy before it will be disallowed, the wisdom of invoking public policy in the instant case is questionable. Moreover, if the concern of the policy is to eliminate discrimination between candidates, use of the policy to deny union campaign expenses introduces an equally indefensible discrimination between corporate and union activi-

35. There is also a policy against deductions of political campaign contributions, reflecting the fear of individual influence over public officials; of course this does not apply to personal expenditures. *See* note 21 *supra.*

36. Mays v. Bowers, 201 F.2d 401 (4th Cir. 1953).

37. 29 U.S.C. § 401 (1964).

38. H.R. REP. No. 741, 86th Cong., 1st Sess. (1959).

39. 383 U.S. 687 (1966).

ties; although employer changes[40] and proxy fights[41] are deductible for the corporate executive, analogous activities intrinsic to the operation of unions, such as elections, now must be considered nondeductible.

40. David J. Primuth, 54 T.C. 374 (1970).

41. Graham v. Commissioner, 326 F.2d 878 (4th Cir. 1964) (deduction of expenses of proxy fight and attempted election to board of directors allowed).