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RECENT CASES

Conflict of Laws—Divorce—Minimum Contacts Doctrine Extended to Non-Resident in Alimony Award

Petitioner and his wife maintained their matrimonial domicile for eighteen years in California before they separated and petitioner moved to Nevada. The petitioner commenced an action for divorce in Nevada, and within a month his wife filed a similar suit in California on the grounds of cruelty. Personal service of process was made upon the defendant husband at his residence in Nevada pursuant to a California statute authorizing extraterritorial personal service where the defendant was a resident of that state when the cause of action arose.[1] The husband did not appear, and the California court awarded the wife an interlocutory judgment of divorce, certain property in California, and $300.00 per month alimony. She then sued on the California decree in Nevada where the trial court granted her motion for partial summary judgment on the issues of property and alimony on the ground that the California judgement was entitled to full faith and credit.[2] On appeal to the Supreme Court of Nevada, *held*, affirmed. Where a statute of the forum state authorizes extraterritorial personal service of process over a non-resident, and where there exist sufficient contacts between the defendant and the forum relevant to the cause of action to satisfy due process, an in personam judgment in a divorce action based on the extraterritorial personal service is entitled to full faith and credit.[3] *Mizner v. Mizner*, 439 P.2d 679 (Nev. 1968).

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1. CAL. CIV. PROC. CODE § 417 (Supp. 1967). "Where jurisdiction is acquired over a person who is outside of this State by publication of summons in accordance with Sections 412 and 413 [personal service out of state], the court shall have the power to render a personal judgment against such person only if he was personally served with a copy of the summons and complaint, and was a resident of this State (a) at the time of the commencement of the action, or (b) at the time that the cause of action arose, or (c) at the time of service."

2. Petitioner's attack was directed solely at the validity of that part of the judgment awarding alimony, contending that the California court was without jurisdiction to enter an in personam judgment based on extraterritorial personal service of process. 439 P.2d at 680.

3. It is settled that the full faith and credit clause of the Constitution requires that a judgment of a state which had jurisdiction over the parties and the subject matter in suit shall be given the same validity in the courts of every other state which it has in the state where it was rendered. Roche v. McDonald, 275 U.S. 449 (1928). *See* Cheatham, *Res Judicata and the Full Faith and Credit Clause: Magnolia Petroleum Co. v. Hunt*, 44 COLUM. L. REV. 330 (1944); Sumner, *Full Faith and Credit for Judicial Proceedings*, 2 U.C.L.A. L. REV. 441 (1955); 107 U. PA. L. REV. 261 (1958). Thus, the only real issue in this case is whether the California court had jurisdiction to render the in personam judgment against the defendant.

In *Williams v. North Carolina*[4] the Supreme Court of the United States held that full faith and credit must be given divorce decrees when one of the parties was domiciled in the state where the decree was granted. On a second appeal after retrial, the Court ruled in *Williams II*[5] that a state requested to recognize a foreign divorce decree may decide for itself whether one of the spouses was domiciled in the foreign state, and may refuse recognition if it finds he was not.[6] But the *Williams* cases dealt only with the termination of the marital relationship and did not consider the personal jurisdiction necessary to decide questions of alimony, property rights, and child custody.[7] In *May v. Anderson*[8] the Supreme Court ruled that Ohio was not required to give full faith and credit to a Wisconsin award of child custody, since the mother was not personally served with process within the territory of the forum state. The Court relied on *Pennoyer v. Neff*,[9] which established the rule that a court may take personal jurisdiction over a defendant only if process was served upon him personally within the forum state. The *Pennoyer* rule has been substantially modified, however, and nondomiciliaries of the forum state who are not served personally within its boundaries may now be subjected to the personal jurisdiction of that state without offending the requirements of substantive or procedural due process.[10] In *International Shoe Co. v. Washington*[11] the Court held that due process requires only that a defendant who is absent from the territory of the forum not be subjected to in personam jurisdiction unless he has certain minimum contacts with it such that the procedure does not offend "traditional notions of fair play and substantial justice."[12] Although the Supreme Court has never extended the minimum contacts doctrine to matrimonial support cases, California has enacted a statute to support personal jurisdiction over an absent defendant personally served outside

4. 317 U.S. 287 (1942).

5. 325 U.S. 226 (1945).

6. "All the world is not party to a divorce proceeding. What is true is that all the world need not be present before a court granting the decree and yet it must be respected by the other forty-seven States provided—and it is a big proviso—the conditions for the exercise of power by the divorce-decreeing court are validly established whenever the judgment is elsewhere called into question." *Id.* at 232.

7. *See* H. CLARK, LAW OF DOMESTIC RELATIONS § 11.2 at 287 (1968).

8. 345 U.S. 528 (1953).

9. 95 U.S. 714 (1877).

10. *See, e.g.*, Hanson v. Denckla, 357 U.S. 235 (1958); McGee v. International Life Ins. Co., 355 U.S. 220 (1957); Perkins v. Benguet Consol. Mining Co., 342 U.S. 437 (1952); Travelers Health Ass'n v. Commonwealth, 339 U.S. 643 (1950); International Shoe Co. v. Washington, 326 U.S. 310 (1945).

11. 326 U.S. 310 (1945).

12. *Id.* at 316.

the state, if he was a domiciliary of California at the time the cause of action arose,[13] and has interpreted this statute to include divorce proceedings. In the California divorce proceeding of *Soule v. Soule*,[14] a husband and wife lived together in California before the husband moved permanently to Montana prior to the commencement of the suit. He was personally served with process in Montana but did not appear, and the wife was granted an interlocutory judgment of divorce and alimony. The husband then appeared specially in an attempt to have the alimony provision set aside, but the California Supreme Court upheld the award.[15] Prior to the instant case, however, no state has granted full faith and credit to an alimony award where a non-resident defendant neither appeared in the case nor was personally served within the territory of the forum. But where it is determined that the forum state has personal jurisdiction over the defendant to render such an award, it is clear that the judgment is entitled to full faith and credit.[16]

In the instant case the court concluded that the minimum contacts concept of in personam jurisdiction is peculiarly suited to matrimonial support cases, since the state of matrimonial domicile "has a deep interest in its citizens and a legitimate purpose in taking steps to preclude their impoverishment."[17] The court found that the demands of due process were met in this case, since the extraterritorial personal service of process was authorized by a statute of the forum state, and there existed contacts between the defendant and the forum which were relevant to the cause of action and sufficient to satisfy the "traditional notions of fair play and substantial justice."[18] The court distinguished the Supreme Court's ruling in *May v. Anderson* on the grounds that there was no statute in Wisconsin authorizing the extraterritorial personal service for child custody cases, nor was there any consideration in that case of whether jurisdiction could be based on the defendant's past contacts with the forum state. The court noted that the procedure here was calculated to give adequate notice to the defendant, and the majority concluded that it was only reasonable to require a defendant to litigate his responsibility for his conduct at the place where it occurred. Since the defendant was domiciled in California when the activities which provided grounds for a divorce occurred, the court decided that California could subject the

13. *See* note 1 *supra.*
14. 193 Cal. App. 2d 208, 14 Cal. Rptr. 417 (1961).
15. *Id.*
16. *See* note 3 *supra.*
17. 439 P.2d at 681.
18. *Id.*

defendant to its personal jurisdiction. Finally the court concluded that since the California court had personal jurisdiction over the defendant, its judgment carried the presumption of validity and was entitled to full faith and credit.[19]

The instant court has taken a significant step in the search for fundamental fairness in divorce litigation. The extension of *International Shoe* to matrimonial support is significant for two reasons. First, the court has entered an area of family law in great need of liberalization of the jurisdictional requirements in the interest of fairness; and second, the court has supplied a new example of the extension of the minimum contacts basis for personal jurisdiction. The decision is correct in finding that matrimonial support cases are particularly suited for the minimum contacts doctrine. Where a husband and wife have maintained their domicile in one state up to the time that a cause of action arose, it is only fair that litigation over economic maintenance and child custody be held to be within the jurisdiction of that state. The plaintiff in an action for divorce should not be required to follow the defendant from state to state in order to obtain an award of alimony or child custody when the dispute could be equitably settled in the home state. Due process is concerned with reasonable notice and fundamental fairness, and where these goals can be achieved in the state of the matrimonial domicile, it seems only logical that the courts should encourage the parties to litigate in that state. It should be remembered that in such cases a court must decide whether the defendant has sufficient minimum contacts with the forum to be subjected to the personal jurisdiction of that state, and that every foreign state which is then asked to grant full faith and credit to the judgment may decide for itself the sufficiency of those contacts.[20] A similar step was taken with respect to divorce decrees in the *Williams* cases,[21] and now it is time to liberalize as well the jurisdictional requirements for alimony and child custody while maintaining the due process safeguards of the minimum contacts doctrine. Other states are

19. Two dissenting opinions argued that Nevada was not bound to give full faith and credit to the California judgment. Justice Collins distinguished the instant case from earlier cases that have followed the minimum contacts concept on the ground that domestic support cases involve continuing liability, whereas contract or personal injury actions involve only a single judgment which is ended when satisfied. Both Justice Collins and Justice Batjer felt that *May v. Anderson* precluded the extension of full faith and credit in this case. 439 P.2d 679, 682-86. *See* Lynde v. Lynde, 181 U.S. 183 (1901).

20. Since minimum contacts are essential to personal jurisdiction over a non-resident not served within the state, the question of jurisdiction may be litigated again in a foreign forum whenever the judgment is questioned. *See* Williams v. North Carolina, 325 U.S. 226 (1945); note 3 *supra*.

21. *See* text accompanying notes 4-7 *supra*.

taking steps to enact legislation similar to the California law employed in the instant case,[22] and it is hoped that the Supreme Court will affirm this application so as to resolve the question of the constitutional requirement of granting full faith and credit for all the states.

Conflict of Laws—Torts—Law of Forum Applies to Accident Involving Only Out-of-State Motorists

While in Wisconsin on a trip which began and was to end in Illinois, defendant driver negligently injured plaintiff guest passengers. The parties were all residents of Illinois; the car was maintained, garaged, and insured in that state. In an action brought in Wisconsin, plaintiffs demurred to defendant's plea, based on an Illinois statute,[1] that he owed no duty to guest passengers except to refrain from willful or wanton misconduct. The trial court sustained the demurrer, holding that the Wisconsin law allowing recovery for ordinary negligence applied. On appeal to the Supreme Court of Wisconsin, *held*, affirmed. Illinois lacks sufficient concern with a Wisconsin accident to justify its replacing the forum's "better rule of law" which protects Wisconsin's legitimate interests. *Conklin v. Horner*, 38 Wis. 2d 468, 157 N.W.2d 579 (1968).

Traditionally, the law of the place of the wrong, lex loci delicti, determined the substantive rights of the parties in a tort action.[2] This choice-of-law rule was historically tied to the "vested rights" theory by which the right to recover for a foreign tort depended on the law of the place of the injury. Thus, rights and duties vested in the parties at the time of the tort and followed them unchanged into whatever jurisdiction they might go.[3] Although this simple, certain rule discouraged forum shopping, its rigid application failed to consider the social desirability of the outcome in the individual case.[4] For these reasons, in the field of contracts, dissatisfaction with a similar mechanical approach based on

22. *See* 16 DE PAUL L. REV. 45 (1966); 13 U. KAN. L. REV. 554 (1964).

1. ILL. ANN. STAT. ch. 95½, § 9-201 (Smith-Hurd 1957).

2. "If a cause of action in tort is created at the place of wrong, a cause of action will be recognized in other states. If no cause of action is created at the place of wrong, no recovery in tort can be had in any other state." RESTATEMENT OF CONFLICTS OF LAWS § 384 (1934).

3. *See, e.g.*, Slater v. Mexican Nat'l R.R., 194 U.S. 120 (1904); Loucks v. Standard Oil Co., 224 N.Y. 99, 120 N.E. 198 (1918); Bain v. Northern Pac. Ry., 120 Wis. 412, 98 N.W. 241 (1904); STUMBERG, PRINCIPLES OF CONFLICTS OF LAWS (3d ed. 1963).

4. *See* Cavers, *A Critique of the Choice-of-Law Problems*, 47 HARV. L. REV. 173 (1933); Cheatham & Reese, *Choice of the Applicable Law*, 52 COLUM. L. REV. 949 (1952).

the "vested rights" theory led the courts to adopt a "center of gravity," or "grouping of contacts," doctrine according to which the court would apply the law of the state which had the most significant contact with the matter in dispute.[5] In tort cases, however, the courts were slower to deviate from the familiar rule and merely mitigated its harshness by creating exceptions on a case by case basis.[6] Finally, in the landmark case of *Babcock v. Jackson*, the New York Court of Appeals openly repudiated the lex loci delicti choice of law rule.[7] Although speaking in terms of relative contacts, the court went beyond the "center of gravity" approach of contracts to hold that the law of the jurisdiction having the greatest concern or interest with each specific issue raised in the litigation will have controlling effect on that issue.[8] The Supreme Court

5. *E.g.*, Jansson v. Swedish Amer. Line, 185 F.2d 212 (1st Cir. 1950); Kievit v. Loyal Protective Life Ins. Co., 34 N.J. 475, 170 A.2d 22 (1961); Auten v. Auten, 308 N.Y. 155, 124 N.E.2d 99 (1954); *see* RESTATEMENT (SECOND) OF CONFLICTS OF LAWS § 332b (Tent. Draft No. 5, 1956). *But cf.* UNIFORM COMMERCIAL CODE § 1-105.

6. *See, e.g.*, Dale System, Inc. v. Time, Inc., 116 F. Supp. 527 (D. Conn. 1953); Gorden v. Parker, 83 F. Supp. 40 (D. Mass. 1949); Grant v. McAuliffe, 41 Cal.2d 859, 264 P.2d 944 (1953); Kilberg v. Northeast Airlines, Inc., 9 N.Y.2d 34, 172 N.E.2d 526, 211 N.Y.S.2d 133 (1961); Haumschild v. Continental Gas Co., 7 Wis. 2d 130, 95 N.W.2d 814 (1959); Paulsen & Sovern, *"Public Policy" in the Conflicts of Laws*, 56 COLUM. L. REV. 969 (1956). Several jurisdictions still find this traditional rule controlling. *E.g.*, Gorenson v. Capital Airlines, Inc., 345 F.2d 750 (6th Cir. 1965); Landers v. Landers, 153 Conn. 303, 216 A.2d 183 (1966); Friday v. Smoot, 211 A.2d 594 (Del. 1965); McDaniel v. Sinn, 194 Kan. 625, 400 P.2d 1018 (1965); White v. King, 244 Md. 348, 223 A.2d 763 (1966); Cherokee Lab., Inc. v. Rogers, 398 P.2d 520 (Okla. 1965); Marmon v. Mustang Aviation, Inc., 416 S.W.2d 58 (Tex. Civ. App. 1967).

7. 12 N.Y.2d 473, 191 N.E.2d 279, 240 N.Y.S. 743 (1963). Miss Babcock, a passenger in Mr. Jackson's car, was injured in an accident in Ontario, a jurisdiction which had an automobile guest statute. All the parties were residents of New York, the car was maintained and insured in New York, and the trip began and was to end in that state. New York allowed the passengers recovery on proof of ordinary negligence. An earlier Minnesota decision, Schmidt v. Discoll Hotel, 249 Minn. 376, 82 N.W.2d 365 (1957), had refused to follow the traditional rule although it did not repudiate it.

8. To determine this, a court balances the interests or concerns of the competing jurisdictions. The line between the "center of gravity" approach and the "interests" approach is fine. The "center of gravity" relates to the number and weight of the contacts that an event has with a particular jurisdiction; the "interests" are the manner in which the event would affect that jurisdiction. For example, the domicile of a party is a "contact," but the effect of a judgment upon his solvency is an "interest," because his state has a valid concern in preventing pauperism and bankruptcies; the place of the wrong has a "contact," while the state in which the tort was committed has an "interest" in preventing wrongful conduct within its borders. Understandably, the courts have not always distinguished between these approaches. *E.g.*, Dym v. Gorden, 16 N.Y.2d 120, 209 N.E.2d 792 (1965); Wilcox v. Wilcox, 26 Wis. 2d 617, 133 N.W.2d 408 (1965). Furthermore, other courts have adopted the language of RESTATEMENT (SECOND) OF CONFLICTS OF LAWS § 379 (Tent. Draft No. 9, 1964) (the "contacts" approach) while in fact using the "interests" approach. *E.g.*, Wessling v. Paris, 417 S.W.2d 259 (Ky. 1967); Casey v. Mason Const. & Eng'r Co., 428 P.2d 898 (Ore. 1967); *see* Ehrenzweig, *The "Most Significant Relationship" in the Conflict Laws of Torts*, 28 LAW & CONTEMP. PROB. 700 (1963).

of California in *Reich v. Purcell*[9] clarified the methodology of the "interest" approach for determining which law should govern a particular issue:[10] understanding that it is applying its own law and not enforcing foreign rights,[11] a court should consider all foreign and domestic elements and interests involved and then seek to choose the law for each issue which would tend to reflect the policies of the jurisdictions which have legitimate concern.[12] In 1965, Wisconsin abandoned the lex loci delicti rule[13] and then proceeded in two subsequent decisions[14] to base its conclusions, whatever the conflicts-of-law problem, solely on the following guidelines: (1) predictability of results; (2) maintenance of interstate order; (3) simplification of judicial task; (4) advancement of the forum's governmental interest; and (5) the "better rule of law".[15] The Wisconsin courts consider these guides for each case, but attach relative importance to each criterion according to the precise issue involved.

In the instant case, the court examined the policies behind Wisconsin's allowing recovery in a host-guest situation and concluded that they were as follows: (1) to provide compensation for the injured; (2) to place the cost of the injury on the wrongdoer who caused the harm; and (3) to deter negligent conduct. The court then determined that

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9. 67 Cal. 2d 551, 432 P.2d 727, 63 Cal. Rptr. 31 (1967).

10. The confusion following *Babcock* can be seen in Dym v. Gorden, 16 N.Y.2d 120, 209 N.E.2d 792 (1965), where the majority of the New York Court of Appeals failed to examine how policies behind the different jurisdictions' laws would be affected by its decision before it determined which rule of law to follow.

11. *See* Grant v. McAuliffe, 41 Cal. 2d 859, 264 P.2d 944 (1953). The law of the forum includes its rules for conflicts of laws. Subject only to the limitations of due process and full faith and credit, the court may apply whichever law seems appropriate. *See* Leflar, *Constitutional Limits on Free Choice of Law*, 28 LAW & COMTEMP. PROB. 706 (1963); *cf.* Home Ins. Co. v. Dick, 281 U.S. 397 (1930).

12. The court, finding that only one state had substantial interest in applying its law, gave no rule when several jurisdictions with varying legitimate policies have considerable interest. Presumably, the court would have to determine which state had the "predominant interest."

13. Wilcox v. Wilcox, 35 Wis. 2d 98, 56 N.W.2d 664 (1967).

14. Zelinger v. State Sand & Gravel Co., 38 Wis. 2d 98, 156 N.W.2d 466 (1968); Heath v. Zellmer, 35 Wis. 2d 578, 151 N.W.2d 664 (1967); In *Zelinger*, defendant, a Wisconsin resident, negligently injured plaintiff's wife and daughter, Illinois residents, in an automobile accident in Wisconsin. Although not a passenger in the car, plaintiff sued to recover for medical expenses and the loss of aid, comfort, and society of his wife and daughter. The court allowed defendant's counterclaim for contribution, against plaintiff's wife even though interspousal immunity existed in Illinois. Following the guidelines set out in *Heath*, the court concluded that considerations concerning predictability, maintenance of interstate order, and judicial simplicity were minimal, but that the forum had a legitimate interest in spreading risk in tort and placing liability on a moral basis. It also thought that the Wisconsin policy of denying interspousal immunity was the "better rule of law."

15. *Accord*, Clark v. Clark, 107 N.H. 351, 222 A.2d 205 (1966); *see* Leflar, *Choice Influencing Considerations in Conflicts Law*, 41 N.Y.U.L. REV. 267 (1966).

application of the Illinois statute, with its policy of protecting the host, would in effect undermine the deterrent effect of Wisconsin's negligence laws by sanctioning wrongful conduct on the latter's highways. The court then decided between these competing interests using its five conflicts of law guidelines. It dismissed, as minimal, concerns with predictability, maintenance of interstate order, and judicial simplification by arguing that first, a tort is obviously not preplanned with reference to state law; second, the choice of neither law would impede the free flow of persons across the state line, nor provoke retaliatory conduct by Illinois;[16] and third, the Wisconsin courts can easily try the case with either rule of law. Noting, however, the number of accidents involving out-of-state vehicles each year,[17] the Court determined that the forum had a legitimate interest in applying those laws which require motorists to refrain from ordinary negligence. Finally, the court concluded that since Illinois law did not reflect current socio-economic conditions, Wisconsin had the "better rule of law." Chief Justice Hallows, dissenting,[18] argued that Illinois had substantially greater interest in the host-guest issue, because the case involved no Wisconsin resident. Since the occurrence of the accident in Wisconsin was fortuitous, he maintained that consistency with prior decision required application of Illinois law.[19] In the opinion of the Chief Justice, the decision could adversely affect interstate order, since application of Wisconsin's law to Illinois residents only on the ground that the Wisconsin court considers its law to be the "better rule" could well offend that state.[20] The dissent thus concluded that the majority's overemphasis on the concerns of the forum would allow it to apply its own law in any case in which it thought the forum had the "better rule of law."

Solely on the basis of the five guidelines enumerated above, the

16. The court implied that the Supreme Court of Illinois had deliberately emasculated the host-guest statute by allowing recovery for less than "willful and wanton misconduct."

17. 4,129 Illinois vehicles were involved in accidents on Wisconsin highways in 1965; 3,655 in 1966.

18. A month and a half before the instant case the Chief Justice wrote the majority opinion in Zelinger v. State Sand & Gravel Co., 38 Wis. 2d 98, 156 N.W.2d 466 (1968), in which a unanimous court clarified its five guidelines. *See* note 14 *supra*.

19. Wilcox v. Wilcox, 26 Wis. 2d 617, 133 N.W.2d 408 (1965). The majority distinguished this case on the ground that in the instant case Wisconsin was the forum as well as the place of the tort.

20. The dissent indicated that predictability may also have some importance; for example, by insuring Illinois residents, the insurance company did not anticipate Wisconsin law. *See* Ehrenzweig, *Guest Statutes in the Conflict of Laws—Towards a Theory of Enterprise Liability Under "Forseeable and Insurable Laws,"* 69 YALE L.J. 595 (1960).

majority's analysis is sound,[21] provided that Wisconsin has sufficient interest in the issue of liability to justify application of the guidelines at all. While Wisconsin's interests should control the resolution of issues dealing with conduct within her borders, the right to recover is directed towards compensation of the harmed.[22] Since the parties are all Illinois residents, this is particularly an Illinois concern. Likewise, under the older "contacts" approach, Illinois is clearly the "center of gravity."[23] In a case such as this, examination of the forum's interests with the guidelines without regard to other states' legitimate concerns (except where the maintenance of interstate order might be affected) permits application of the rule of lex fori in any tort case in which the value judgment of the court finds local law more attractive. The guidelines, thus, enable a judge's subjective choice of "the better rule of law" to be the deciding factor in a conflict of laws problem. While this may at times lead to greater justice in the individual case, it does not lead to certainty. The progressive steps away from a mechanical resolution of conflict problems are marked by the creation of exceptions to the rule of lex loci delicti, then the balancing of interests, and in this case, a determination of the "better rule of law." Such an approach as that of these guidelines not only reopens the door to forum shopping,[24] but also creates greater difficulty in determining what law to apply. It is submitted that the guideline approach grants the judges excessive discretion and that the methodology of *Reich v. Purcell*, while providing the forum with sufficient protection for its particular interests, would still promote a measure of certainty and consistency.

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21. Professor Leflar, the creator of these guidelines, in a hypothetical with very similar facts, used the same reasoning to reach the majority's conclusion. Leflar, *Conflicts Law: More on Choice Influencing Considerations*, 54 CALIF. L. REV. 1584, 1593 (1966).

22. The majority also argued that its laws were directed toward deterring negligent conduct. It is questionable, however, if a driver, except perhaps an occasional lawyer or insurance underwriter, would vary his conduct upon crossing the state line because Wisconsin allows his guest recovery, even assuming that he knew of that law. *But cf.* Kell v. Henderson, 47 Misc. 2d 992, 263 N.Y.S.2d 647 (1965), *aff'd* 26 A.D. 595, 270 N.Y.S.2d 552 (1966).

23. Conklin v. Horner, 38 Wis. 2d 468, 486, 157 N.W.2d 579, 588 (dissenting opinion); RESTATEMENT (SECOND) OF CONFLICTS OF LAWS § 379 L, comment f at 80 (Tent. Draft No. 9, 1964). Wisconsin had only two contacts, the forum and the place of the injury. If the state's only contact were that of the forum, it could not constitutionally apply its law. *See* note 11 *supra*. The court had previously argued that the place of an automobile accident was "merely fortuitous." Wilcox v. Wilcox, 26 Wis. 2d 617, 633, 133 N.W.2d 408, 416 (1965).

24. While the majority argued that the plaintiffs did not choose Wisconsin as a forum because of any variation in the host-guest law, it conceded that the plaintiffs did engage in forum shopping to take advantage of Wisconsin's rule permitting direct action against insurance companies.

Constitutional Law—Desegregation—States Are Required To Take Affirmative Action To Desegregate Higher Edncation Facilities

A Negro teacher and a Negro student[1] at a predominately Negro state college in Nashville brought a class action seeking injunctive relief[2] to halt construction of the University of Tennessee Nashville Center,[3] a predominantly white school, claiming that perpetuation of a dual higher educational system violated their rights under the equal protection clause of the fourteenth amendment[4] and titles IV and VI of the Civil Rights Act of 1964.[5] Plaintiffs contended that, even though students could exercise free choice in the selection of a college and attendance was not compulsory, since racial segregation was begun by operation of law, the defendants[6] were under an affirmative duty to dismantle the dual educational system and were perpetuating racial imbalance by expanding the Nashville Center in the same city in which Tennessee Agricultural and Industrial State University for Negroes is located. Defendants responded that the institutions would be complementary, since the Nashville Center would be devoted primarily to evening classes.[7] Since the two schools are separate institutions[8] and neither

1. Other plaintiffs included: a white teacher at the University of Tennessee Nashville Center (hereinafter referred to as Nashville Center); a Negro high school senior as a potential student at Tennessee Agricultural and Industrial State University for Negroes (hereinafter referred to as A&I) and his father.

2. Plaintiffs also sought a declaratory judgment that the enabling section for A&I in the Tennessee Code be declared null and void on its face as violative of the Constitution. This section, TENN. CODE ANN. § 49-3206 (1966), provides: "The function of [A&I] shall be to train Negro students . . . . Negro persons, residents of the state, who are not under sixteen (16) years of age, may be admitted to the university."

3. Funds were provided by the federal and state governments.

4. Plaintiffs assert that defendants have failed to implement the mandate declaring separate but equal schools unconstitutional under the equal protection clause of the fourteenth amendment. *E.g.*, Brown v. Board of Education, 349 U.S. 294, 301 (1955).

5. 42 U.S.C. §§ 2000c, 2000d-4 (1964). Title IV defines terms and authorizes aid to schools attempting to desegregate. Title VI denies federal aid to schools practicing segregation.

6. The Governor; Commissioner of Education; Tennessee State Board of Education; Tennessee Higher Education Commission and its chairman; the University of Tennessee, its President, Board of Trustees, and Vice Chairman; A&I, its President, Interim Committee and members; HEW and Secretary Cohen; OEO and its Commissioner. By court order the action was dismissed as to federal defendants; the United States then intervened as party plaintiff under the Civil Rights Act of 1964, 42 U.S.C. § 2000h2 (1964).

7. The Nashville Center would offer evening degree granting programs in the areas of engineering, business administration, liberal arts, and education. During the day, the Center would be used for a Graduate School of Social Work, an Associate of Arts program in nursing, and in-service training of government employees. A&I presently offers daytime courses in business administration, liberal arts, education, and an unaccreditated engineering school.

8. A&I is administered under the Tennessee State Board of Education, while the University of Tennessee is a corporation administered by its Board of Trustees.

denies admission to qualified individuals on the basis of race,[9] defendants contended that they had no affirmative duty to eradicate the racial imbalance at the schools.[10] The court denied the injunction, finding that expansion of the Nashville Center alone would not perpetuate a dual system of education;[11] but in ordering a desegregation plan, *held,* that when in institutions which are historically segregated there has been no genuine progress toward desegregation and no genuine prospect of progress, the state has an affirmative duty imposed by the Constitution to devise a plan for substantial desegregation of public higher educational facilities. *Sanders v. Ellington*, Civil No. 5077 (M.D. Tenn., August 21, 1968).

To date, the great majority of desegregation cases have dealt with primary and secondary public schools. The Supreme Court declared in 1955 in *Brown v. Board of Education*[12] that public school authorities have the primary responsibility for good faith implementation of governing constitutional principles. Nearly a decade later, Congress, in response to the minute progress in the integration of primary and secondary schools,[13] enacted titles IV and VI of the Civil Rights Act of 1964.[14] Provisions for federal aid to local schools were made dependent upon non-discriminatory practices, and the United States Attorney General was empowered to institute desegregation suits. Regulations[15] promulgated by the Department of Health, Education and Welfare were supplemented by specific guidelines[16] for the integration of elementary and secondary schools,[17] including "freedom of choice" plans. One provision of the HEW guidelines allowed a school system to use a court-

9. Fifty-seven thousand students attend Tennessee's public universities. About 6,000, or 11%, of the total are Negroes. In the traditionally white institutions, the percentages of Negro enrollment range from 0.6% to 7.0%. A&I has a Negro enrollment in excess of 99%.

10. Defendants admitted that the enabling legislation would be unconstitutional if it were being utilized.

11. The court did not order a halt to the expansion of the Nashville Center, because it found a need in Nashville for an evening educational unit operated on an integrated basis. The court also found that the schools would not be competing, but rather would complement each other. The court specifically did not follow the reasoning of Alabama State Teachers Ass'n v. Alabama Pub. School & College Authority, 289 F. Supp. 784 (M.D. Ala. 1968) (discussed in text accompanying note 24 *infra*).

12. 349 U.S. 294, 299 (1955).

13. *See* HOUSE COMM. ON THE JUDICIARY REP. No. 914, 88th Cong., 2d Sess. (1964), 2 U.S. CODE CONG. & AD. NEWS 2391, 2508 (1964).

14. 42 U.S.C. §§ 2000c, 2000d-2000-4 (1964).

15. 45 C.F.R. § 80.4(a)(1) (1968): "Every application for Federal financial assistance to carry out a program to which this part applies . . . shall . . . contain . . . an assurance that the program will be conducted . . . in compliance with all requirements imposed by or pursuant to this part."

16. 45 C.F.R. § 181 (1968).

17. The present and, in some cases, future HEW guidelines have been adopted as obligatory on

approved integration plan in lieu of the guidelines and still retain federal aid.[18] However in 1967, in *United States v. Jefferson County Board of Education*,[19] the Fifth Circuit Court of Appeals held that school authorities have an affirmative duty to integrate public schools formerly segregated and that the HEW guidelines constitute the minimum standard to be applied by the courts in achieving integration. In 1968, in *Green v. County School Board of New Kent County*[20] and its companion cases,[21] the Supreme Court added that "freedom of choice" plans are not acceptable where in actual operation they have not achieved any substantial degree of desegregation and that school officials in such situations must "fashion steps which promise realistically to convert promptly to a system without a 'white' school and a 'Negro' school, but just schools."[22] Until very recently, litigation in the realm of higher education was aimed at assuring Negro students the right to attend state-supported colleges and universities which had been maintained exclusively for white students; the principle had been firmly established that applicants could not be excluded from such schools on the basis of race.[23] Shortly before the decision in the instant case, a federal court in Alabama denied injunctive relief in a similar situation.[24] That court agreed that the state is under an affirmative duty to dismantle the dual system on the college level, but ruled that in doing so no more is required than good faith admission of students and employment of faculty and staff personnel on a non-discriminatory basis.

In the instant case, the court relied on *Green* to hold that there is an affirmative duty imposed upon the state by the fourteenth amendment to dismantle the dual system of higher education. The court then found that a substantially segregated higher educational system still existed in

local authorities. *See, e.g.*, Moses v. Washington Parish School Bd., Civil No. 15973 (E.D. La., Oct. 13, 1965), *cited in* 11 RACE REL. L. REP. 171 (1966).

18. 45 C.F.R. § 80.4(c) (1968): "The requirements . . . with respect to any elementary or seeondary school or school system shall be deemed to be satisfied if such school or school system . . . is subject to a final order of a court of the United States . . . ."

19. United States v. Jefferson County Bd. of Educ., 380 F.2d 385 (5th Cir.), *cert. denied*, 389 U.S. 840 (1967), *noted in* 20 VAND. L. REV. 1336 (1967).

20. 391 U.S. 430 (1968), *noted in* 21 VAND. L. REV. 1093 (1968).

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

22. 391 U.S. at 442.

23. *See, e.g.*, Lucy v. Adams, 350 U.S. 1 (1955); Sipuel v. Board of Regents of Univ. of Okla., 332 U.S. 631 (1948). *See also* Jamieson v. Louisiana State Bd. of Educ., Civil No. 3173 (E.D. La., May 6, 1965), *cited in* 10 RACE REL. L. REP. 1004 (1965) (white woman seeking admission to Negro college).

24. Alabama State Teacher's Ass'n v. Alabama Pub. School & College Authority, 289 F. Supp. 784 (M.D. Ala. 1968).

Tennessee[25] and that the naked fact of an open-door policy is not enough to satisfy constitutional requirements, since it has not, in this situation, accomplished desegregation. In directing the defendants to devise a plan which would effectively eliminate the dual system at the college level, the court avoided making a detailed stipulation, but asserted generally that the success of any proposed program must necessarily depend on "whether it makes the institution attractive to the students who will exercise a free choice as to where they attend college."[26]

This case represents a logical extension of the pragmatic approach announced in *Green*. The court order is unique, because it is the first to be issued to an institution of higher education. While primary and secondary school districts have the alternative of compulsory geographical zoning laws to eliminate a dual system, the defendants in the present case must devise a plan to stimulate the free choice of both Negro and white students. In providing stimulation, however, such a plan must avoid any consideration of race, for to do so would contravene the civil right sought to be protected—the right to be admitted without regard to race. Aside from requiring improvement of the academic posture of Tennessee A & I to make it competitive with predominantly white schools, an effective free choice plan could conceivably involve redevelopment of the area surrounding the school to make it attractive to white students. Since Negro public universities are in widespread existence in the South, the impact of this decision will be primarily directed at that section of the county. While the opinion could be limited to the peculiar situation of Negro public universities, the court did not emphasize that the situation involved in the present case was formerly de jure segregation,[27] and treated it as an instance of de facto segregation, because socio-economic factors, rather than the law, are now the reasons that Tennessee A & I is 99 per cent Negro.[28] Consequently, this

25. *See* note 9 *supra*.

26. Because of differences between higher education and primary or secondary education, in that attendance at the college level is neither compulsory nor free, the court concluded that defendants must be given an extended time to divise a plan for the substantial desegregation of the state's system of higher education, in particular A&I.

27. Courts have struggled with the distinction between de facto segregation, which exists primarily due to socio-economic factors, and de jure segregation, which is produced under color of law. Courts have ruled that the operation of a de facto segregated public school system does not violate the equal protection clause. Downs v. Board of Educ., 336 F.2d 988 (10th Cir. 1964), *cert. denied*, 377 U.S. 924 (1964). De jure segregation has been struck down. Taylor v. Board of Educ., 191 F. Supp. 181 (S.D.N.Y.), *aff'd*, 294 F.2d 36 (2d Cir.), *cert. denied*, 368 U.S. 940 (1961).

28. A clear-cut de jure—de facto distinction is made in Hobson v. Hansen, 269 F. Supp. 401 (D.D.C. 1967), where the court, faced with an essentially de facto segregation situation, characterized elements under color of law, such as teacher assignment based partially on the racial proportions of the schools, as de jure to order a cessation of such practices.

case could be authority for the application of the pragmatic approach of *Green* to the de facto situation in that a free choice desegregation plan must work effectively in order to be constitutionally acceptable. There are, however, de jure elements present in the instant situation.[29] Courts that would hesitate to act in the de facto situation could characterize this, and similar situations, as de jure, since both the origin and administration of the present system were under color of law.[30] The real significance of this decision is that for the first time a state has been required to dismantle a dual higher educational system which formerly existed by force of law, but now exists due to socio-economic factors.

Constitutional Law—Selective Service Act—Fifth Amendment Reqnires Civil Judicial Review of Draft Board Classification and Induction Orders

Plaintiff was ordered to report for induction pursuant to the Military Selective Service Act of 1967. Upon learning of a recent Supreme Court decision[1] which had a possible bearing on his case, plaintiff requested renewed consideration of his conscientious objector claim. His draft board, relying on section 460(b)(3) of the Act,[2] refused this request, as well as an additional request for appeal. Plaintiff filed a declaratory judgment action claiming that due process guarantees a right to civil judicial review of a selective service classification and induction order by an article III court prior to criminal prosecution. Thus, plaintiff contended that section 460(b)(3) was an unconstitutional denial of due process under the fifth amendment as it prohibited such a

29. The court specifically found in the present case, however, that the defendants were not guilty of any constitutionally impermissible acts and had acted in good faith in the administration of the "open door" policy.

30. For a similar approach see Hobson v. Hansen, 269 F. Supp. 401 (D.D.C. 1967) (discussed in note 28 *supra*).

1. United States v. Seeger, 380 U.S. 163 (1965). This decision formulated a test for a conscientious objector to military service: such a person must have a sincere and meaningful belief which occupies in the life of its possessor a place parallel to that filled by God.

2. 50 U.S.C.A. App. § 460(b)(3) (Supp. 1967). This section provides: "No judicial review shall be made of the classification or processing of any registrant by local boards, appeal boards, or the President, except as a defense to a criminal prosecution instituted under § 12 of this title . . . after the registrant has responded either affirmatively or negatively to an order to report for induction. . . ."

review except in defense to a criminal prosecution for draft evasion. The government argued that since section 460(b)(3) provides for judicial review in a criminal proceeding, the due process requirement is satisfied. The United States District Court for the Northern District of California upheld the constitutionality of the Act.[3] Two days later plaintiff refused to submit to induction, and shortly thereafter the court amended its opinion and ruled that plaintiff's complaint raised a substantial federal question.[4] On the government's motion to dismiss, *held*, denied.[5] The denial by section 460(b)(3) of the civil judicial review of selective service classification and induction orders prior to compliance or criminal prosecution is unconstitutional under the due process clause of the fifth amendment. *Petersen v. Clark*, 285 F. Supp. 700 (N.D. Cal. 1968).

The Selective Training and Service Act of 1940[6] provided that the decisions of local boards classifying registrants "shall be final."[7] Courts have interpreted this language as a clear indication of congressional intent to isolate draft board decisions from judicial review. The broad issue of right of review was presented first to the Supreme Court in *Falbo v. United States*.[8] Avoiding the constitutional issue, the Supreme Court held that Falbo was not entitled to judicial review because he had failed to exhaust his administrative remedies.[9] The practical result was that

3. Petersen v. Clark, 285 F. Supp. 693 (N.D. Cal. 1968).

4. The district court thought a determination of the constitutionality of § 460(b)(3) was appropriate for resolution by a three-judge court pursuant to 28 U.S.C. § 2282 (1964). However, the three-judge court remanded the case to the original forum, holding that "[A] three-judge court is not required where the constitutionality of a congressional statute is merely drawn in question and is required only where an injunction against the statute's enforcement, operation or execution is sought." Peterson v. Clark, 285 F. Supp. 698, 699 (N.D. Cal. 1968). During this time, the district court approved a stipulation of the parties staying further proceedings in the case. It was believed by the parties that Oestereich v. Selective Service System Local Board No. 11, 390 F.2d 100 (10th Cir. 1968), in which certiorari was being sought, would raise the issue of the constitutionality of § 460(b)(3). However, both parties learned that the precise question might not be decided by the Supreme Court. Therefore, on April 3, 1968, the government asked to be released from the stipulation and moved to dismiss.

5. The court stayed proceedings in the nature of an order to show cause why the order to submit to induction should not be declared invalid and why prosecution for failure to comply therewith should not be enjoined. Petersen v. Clark, 285 F. Supp. 700 (N.D. Cal. 1968). Clearly, the court stayed these proceedings in order that the sole issue on appeal would be the constitutionality of 50 U.S.C.A. App. § 460(b)(3) (Supp. 1967).

6. Selective Training and Service Act of 1940, ch. 720, 54 Stat. 885 (now Military Selective Service Act of 1967, 50 U.S.C.A. App. § 460(b)(3) (Supp. 1967)).

7. 54 Stat. 893. The Military Selective Service Act of 1967 retains similar language: "The decisions of such local board shall be final, except where an appeal is authorized and is taken in accordance with such rules and regulations as the President may prescribe." 50 U.S.C.A. App. § 460(b)(3) (Supp. 1967).

8. 320 U.S. 549 (1944).

9. Falbo v. United States, 320 U.S. 549, 553 (1944). The Court reasoned that since the

many courts refused to interfere with the induction of registrants.[10] Shortly after the end of World War II in the case of *Estep v. United States*,[11] the Supreme Court was squarely presented with the issue of a registrant's right to judicial review prior to induction. The Court concluded that a draftee who exhausts his administrative remedies and reports but does not submit to induction may then introduce evidence as to the impropriety of his classification as a defense to a criminal prosecution for draft evasion.[12] Thus, in order to challenge induction, a draftee was forced to accept induction and raise the issue by habeas corpus, or to refuse induction and claim procedural irregularities as a defense to the subsequent criminal prosecution. The Military Training Act of 1950[13] continued the same basic policies. Despite this general trend, the Second Circuit, in *Wolff v. Selective Service Local Board No. 16*,[14] fashioned a first amendment exception to judicial non-interference with draft classifications.[15] In that case, although lacking jurisdiction,[16] a local board had revoked plaintiff's student deferment as a punitive measure following his participation in a sit-in demonstration on the premises of a Selective Service office. The court held that such arbitrary action was a threat to the first amendment right of free speech and, thus, justified prompt judicial review of the classification without exhaustion of administrative remedies.[17] In response to growing concern over this

inductee may be rejected at the induction center, a refusal to appear at the center does not complete the process. This idea was drawn from the exhaustion of remedies doctrine in administrative law. *See generally* Layton & Fine, *The Draft and Exhaustion of Administrative Remedies*, 56 GEO. L.J. 315, 322-28 (1967); Note, *Fairness and Due Process under the Selective Service System*, 114 U. PA. L. REV. 1014, 1016 (1966).

10. *E.g.*, Koch v. United States, 150 F.2d 762 (4th Cir. 1945); Klopp v. United States, 148 F.2d 659 (6th Cir. 1945). *But see* Chih Chung Tung v. United States, 142 F.2d 919 (1st Cir. 1944); United States v. Peterson, 53 F. Supp. 760 (N.D. Cal. 1944).

11. 327 U.S. 114 (1946). Estep reported to the induction center, but refused to be inducted. Therefore, the Court could not avoid the constitutional issue on the grounds that the registrant failed to exhaust all his administrative remedies. *Id.* at 123.

12. Mr. Justice Murphy, in a concurring opinion, dealt directly with the problem of judicial review and administrative law: "Before a person may be punished for violating an administrative order, due process of law requires that the order be within the authority of the administrative agency and that it not be issued in such a way as to deprive the person of his constitutional rights." Estep v. United States, 327 U.S. 114, 126-27 (1946).

13. Universal Military Training and Service Act, ch. 144, 65 Stat. 75 [1951] (now Military Selective Service Act of 1967, 50 U.S.C.A. App. § 451 (Supp. 1967)).

14. 372 F.2d 817 (2d Cir. 1967).

15. *See* 81 HARV. L. REV. 685, 687 (1968).

16. There should have been no reclassification by the board in *Wolff*: The prosecution of persons who "hinder" or "interfere" with the administration of the board shall lie in "any district court in the United States." 50 U.S.C.A. App. § 462(a) (Supp. 1967). *See* Note, *supra* note 9, at 1043-48.

17. *Wolff* would have been less noteworthy had the court relied exclusively upon the board's

action,[18] Congress provided in section 460(b)(3) of the Military Selective Service Act of 1967 that no judicial review be made of a registrant's draft classification prior to criminal proceedings.[19]

While case law and statutory response to judicial review were accumulating, the article III[20] powers of Congress to restrict jurisdiction of the lower federal courts inspired continuing debate.[21] The controversy centered about the power of Congress to abolish judicial review of the validity of an administrative order. There is considerable authority to the effect that Congress is free to restrict judicial power in this manner,[22] but some doubts have persisted,[23] engendered by dicta in *Yakus v. United States*,[24] where the Supreme Court approved a method of appeal by which a party aggrieved by an administrative order could directly petition the Supreme Court for review. This was the exclusive means of appeal provided by Congress, and if ignored, was lost even as a defense to a criminal prosecution. The Court concluded that there is no constitutional requirement as to which tribunal must hear an appeal, so long as there is an opportunity for judicial review which satisfies due process.[25] A reading of *Yakus* suggested that due process imposed some restriction on congressional power to limit judicial review. The Second Circuit, in *Battaglia v. General Motors*,[26] has reinforced this reading of *Yakus* by holding that congressional power to restrict judicial jurisdiction is bordered by due process limitations.[27] An eminent authority has suggested that if there is any limitation on congressional

lack of jurisdiction for its determination. Rather, the policies in support of the protection of first amendment rights were used as a basis for decision. For an interesting discussion of *Wolff* by plaintiff's counsel, see Layton & Fine, *supra* note 9.

18. H.R. REP. NO. 267, 90th Cong., 1st Sess. 30-31 (1967): "The [House Armed Services] Committee was disturbed by the apparent inclination of some courts to review the classification action of local or appeal boards before the registrant had exhausted his administrative decisions."

19. 50 U.S.C.A. App. § 460(b)(3) (Supp. 1967).

20. U.S. CONST. art. III, § 1: "The judicial Power of the United States shall be vested in one Supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish."

21. *See* WRIGHT, FEDERAL COURTS §§ 1, 10 (1963).

22. *See, e.g.*, Lockerty v. Phillips, 319 U.S. 182, 187 (1943): "The Congressional power to ordain and establish inferior courts includes the power of 'investing them with jurisdiction either limited, concurrent, or exclusive, and of withholding jurisdiction from them in the exact degrees and character which to Congress may seem proper for the public good.' "

23. *E.g.*, Hart, *The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic*, 66 HARV. L. REV. 1362 (1953).

24. 321 U.S. 414 (1944). The Court held the Emergency Price Control Act of 1942 not to be an unconstitutional delegation to the Price Administrator of the legislative power of Congress to control commodity prices in time of war. *Id.* at 423.

25. 321 U.S. 414, 444 (1944).

26. 169 F.2d 254 (2d Cir. 1948).

27. "[W]hile Congress has the undoubted power to give, withhold, and restrict the jurisdiction

doubts, the court sought analogy in several administrative rate-making power to restrict jurisdiction of article III courts, *Battaglia* probably represents the maximum limit.[28]

In the instant case, the court acknowledged congressional power to regulate jurisdiction of the lower federal courts. However, the court found precedent construing the due process clause of the fifth amendment as implying a right of judicial review.[29] Examining due process limitations on the elimination of judicial review, the court noted support for the idea that some review of administrative action which operates in a coercive manner upon individuals is essential to due process.[30] If "fundamentals were violated,"[31] some judicial review, at least of the procedural regularity of administrative determinations, is necessary to protect basic individual rights. Turning to the question of judicial review in the selective service context, the instant court found that although review in *Estep* was limited to criminal cases, the Supreme Court in that case did not interpret the statutory language involved to mean that no judicial review was permitted.[32] Looking to Mr. Justice Murphy's concurring opinion in *Estep*,[33] the instant court took the position that judicial review is required by the Constitution, and thus, that Congress cannot make selective service induction orders unreviewable. Having concluded that some review is necessary, the court examined the constitutionality of section 460(b)(3) in deferring review until criminal prosecution. Although section 460(b)(3) did provide for judicial review in a limited sense, the court determined that prohibiting all civil review prior to criminal prosecution presented serious questions as to the individual's right to due process. In order to resolve these

of courts other than the Supreme Court, it must not so exercise that power as to deprive any person of life, liberty, or property without due process of law. . . ." Battaglia v. General Motors, 169 F.2d 254, 257 (2d Cir. 1948).

28. WRIGHT, FEDERAL COURTS § 10 (1963).

29. 285 F. Supp. 700, 703-05 (N.D. Cal. 1968). *See* Yakus v. United States, 321 U.S. 414 (1944); Lockerty v. Phillips, 319 U.S. 182 (1943); Battaglia v. General Motors, 169 F.2d 254 (2d Cir. 1948).

30. 285 F. Supp. at 706. *See* St. Joseph Stock Yards Co. v. United States, 298 U.S. 38, 52 (1936): "Under our system there is no warrant for the view that the judicial power of a competent court can be circumscribed by any legislative arrangement designed to give effect to administrative action going beyond the limits of constitutional authority." *See also* American School of Magnetic Healing v. McAnnulty, 187 U.S. 94 (1902).

31. 285 F. Supp. at 706. *See also* Bustos-Ovalle v. Landon, 225 F.2d 878, 880 (9th Cir. 1955) (dictum).

32. *See* text accompanying note 7 *supra* for the statutory language applied in *Estep*. The requirement that a local board's decision is "final" is retained in the present draft law. *See* note 7 *supra*.

33. Estep v. United States, 327 U.S. 114, 130 (1946): "[J]udicial review of some sort and at some time is required by the Constitution . . . ." *See also* note 12 *supra*.

cases[34] and relied heavily on *Reisman v. Caplin*,[35] which held judicial review provisions constitutional where they allowed a challenge which did not require a choice between compliance or penalty. Reasoning by analogy, the court concluded that due process is violated if the challenge is restricted to these alternatives. Applying this principle to the selective service situation, the instant court found one of the two alternatives to be submission to induction followed by a filing for a writ of habeas corpus. Although the government contended that habeas corpus satisfies due process, the court noted that this conclusion has been questioned.[36] The court pointed out that submitting to induction is the equivalent of compliance with the administrative order alleged to be invalid, and thus unsatisfactory in meeting the demands of due process. Turning to the second alternative of submitting to criminal proceedings, the court recognized the distinct possibility of imprisonment. After weighing the consequences of section 460(b)(3) upon the individual, the court held that due process demands a finding of unconstitutionality of a procedure which subjects a registrant to a criminal prosecution in order to raise the defense that his induction notice was invalid due to procedural errors committed by the local board. After dealing with these two alternatives, the court considered the strong governmental interest in the raising of armies. Recognizing the government's contention that civil review would merely be a "litigious interruption"[37] in the mobilization process, the court discarded the argument with the prediction that civil adjudication of the validity of induction orders will result in a net saving of time.[38]

The instant court, in dealing with the question of congressional power to restrict jurisdiction in article III courts, magnifies the "lingering doubts" as to the extent of congressional authority to grant or withhold judicial power. Unquestionably, Congress has considerable discretion in dealing with the jurisdiction of the lower federal courts.[39]

34. Reisman v. Caplin, 375 U.S. 440 (1964); St. Joseph Stock Yards Co. v. United States, 298 U.S. 38 (1936); Pacific Tel. & Tel. Co. v. Kuykendall, 265 U.S. 196 (1924); Oklahoma Operating Co. v. Love, 252 U.S. 331 (1920); Wadley Southern Ry. Co. v. Georgia, 235 U.S. 651 (1915); Missouri Pac. Ry. Co. v. Tucker, 230 U.S. 340 (1913); *Ex parte* Young, 209 U.S. 123 (1908).

35. 375 U.S. 440 (1964).

36. *See* 56 CALIF. L. REV. 448, 460 (1968).

37. 113 CONG. REC. S8052 (1967) (remarks of Senator Russell (D.Ga.)).

38. Petersen v. Clark, 285 F. Supp. 700, 712 (N.D. Cal. 1968): In the words of the court, civil adjudication will have the following effects: (1) "The need for a few trials will be obviated by voluntary compliance with orders which have been judicially declared valid," and (2) "some time will be saved at trial because the issue of the order's validity will not have to be litigated."

39. WRIGHT, FEDERAL COURTS § 10 (1963). Congress has the power to specify a particular court to hear certain questions. Lockerty v. Phillips, 319 U.S. 182 (1942). It can prescribe an exclusive method of judicial review, which if not followed, will prohibit the raising of defenses even in a criminal action. Yakus v. United States, 321 U.S. 414 (1944).

However, the *Petersen* court has found it necessary to read article III in conjunction with the due process requirement of the fifth amendment, thus limiting congressional power in this area. Significantly, the court was dealing with a statutory provision which expressly eliminated administrative decisions from civil review, but provided a method of review as a defense to criminal prosecution. If Congress had eliminated all review, the basis for decision would have been much stronger. However, the court chose to apply its interpretation of article III to the case at hand in order to determine whether the method of review satisfied an implicit fifth amendment due process requirement. The effect of this judicial methodology on past law will be to restrict congressional elimination of judicial review. Unquestionably, the court treats the Selective Service Bureau as an administrative agency which provides necessary manpower for national defense. By specific provision,[40] Congress has excluded the Bureau from the provisions of the Administrative Procedure Act,[41] which provides for judicial review. The basis for this exclusion rested on a congressional value judgment to the effect that the exigencies of national defense far outweigh an individual's right to an early contest of procedural irregularities in court. Obviously, the governmental interest in drafting manpower fluctuates markedly in direct relation to political crisis both at home and abroad and there is a strong argument in favor of non-interference with rapid mobilization to cope with a crisis. It is submitted, however, that it is at just such times of crisis that the courts should be most watchful of the individual's rights.

In recognizing this basic right, the *Petersen* decision should have a dual significance. The induction process will be scrutinized by the courts, thereby provoking the possibility of an initial slowdown in the drafting of manpower,[42] while extending due process protection in a civil court to registrants who contest the validity of their induction notices. Of perhaps greater significance, however, is the question of congressional power to limit federal court jurisdiction. Once given, such jurisdiction has produced a large body of law under the due process clause which would seem to relate back to limit Congress's article III power. Thus, the reasoning in *Petersen* could provide analogical precedent for judicial attack on title II of the Omnibus Crime bill,[43] which would appear to be an attempt to circumvent many recent federal decisions in the area of procedural due process.

40. 50 U.S.C.A. App. § 463(b) (Supp. 1967).

41. 5 U.S.C. § 1001(a) (1964).

42. *But see* note 41 *supra*.

43. Omnibus Crime Control & Safe Streets Act of 1968, Pub. L. No. 90-351, tit. II (June 6, 1968).

Public Welfare—Substitute Father Regulation Inconsistent with Social Security Act and Invalid Criterion for Denying AFDC Payments to Needy Children

Petitioners, a mother and her four legally fatherless children,[1] were removed from the list of persons eligible to receive financial aid under the Aid to Families with Dependent Children (AFDC) Program established by the Social Security Act of 1935,[2] on the ground that the mother had sexual relations with a male who was not her husband. Such conduct disqualified the children under Alabama's "substitute father" regulation.[3] Contending the regulation was inconsistent with the equal protection clause of the fourteenth amendment and with section 406(a) of the Social Security Act,[4] petitioners brought a class action in a federal district court seeking to enjoin the Alabama Board of Pensions and Security from enforcing the substitute father regulation. Alabama defended the regulation as a reasonable means to discourage immorality and illegitimacy and as consistent with the Social Security Act's policy of allowing the states to formulate their own guidelines for welfare eligibility.[5] The three-judge district court granted judgment for petitioners, holding the substitute father regulation unconstitutional as an arbitrary and discriminatory classification resulting in the denial of financial benefits to otherwise eligible children.[6] On direct appeal to the United States Supreme Court, *held*, affirmed, without reaching the constitutional issue. Denial of federally funded assistance to needy, legally fatherless children because their mother cohabits with a male who owes no legal duty of support to the children violates section 406(a) of the Social Security Act. *King v. Smith*, 392 U.S. 309 (1968).

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1. Used in this context, the term "legally fatherless child" is one who does not receive support or care from a father or a person legally obligated to provide support.

2. 49 Stat. 620 (1935), *as amended*, 42 U.S.C. §§ 301-1394 (1964). Applicable sections: 42 U.S.C. §§ 601-09 (1964).

3. Alabama Manual for Administration of Public Assistance Pt. I, ch. II, § VI ¶ V (1964). This regulation sets forth three situations in which needy dependent children, otherwise eligible, are to be denied financial assistance: when a man who is neither married to the mother nor the father of the children lives in, or visits in the home for the purpose of cohabitation, or cohabits with the mother outside the home.

4. 42 U.S.C. § 606(a) (1964). This section describes a "dependent child" as a "needy child . . . who has been deprived of parental support or care by reason of death, continued absence from the home, or physical or mental incapacity of a parent." *Id.*

5. *See* H.R. REP. NO. 615, 74th Cong., 1st Sess. 24 (1935); S. REP. NO. 628, 74th Cong., 1st Sess. 36 (1935); *see also* DEPT. HEALTH, ED. & WELFARE, HANDBOOK OF PUBLIC ASSISTANCE ADMINISTRATION Pt. IV, § 3120.

6. Smith v. King, 277 F. Supp. 31 (M.D. Ala. 1967). The trial court based its decision on the

During the first part of this century, public welfare policies were governed by the "worthy poor" doctrine, which viewed some poor people as worthy of public assistance and others as unworthy because of moral unfitness.[7] This idea continued to prevail during the depression when Congress enacted the Social Security Act of 1935, which included the AFDC program to aid needy children.[8] The AFDC program is financed largely by the federal government and administered by the states whose plans must conform to the Social Security Act and be approved by the Secretary of Health, Education, and Welfare. Section 406(a) of the Act defined the child who was intended to receive aid under the AFDC program as a "needy child . . . who has been deprived of parental support or care by reason of death, absence from the home, or physical or mental incapacity of a parent." States were permitted to determine a child's eligibility under the Act;[9] conditions not directly related to the child's financial needs, such as the moral character of the remaining parent,[10] were often considered in determining eligibility. Some state plans made children not living in "suitable homes" ineligible for assistance, while others embraced even more restrictive eligibility requirements by disqualifying illegitimate children and children who were declared to have a "substitute father." The substitute might meet neither a common-sense nor a conventional legal definition of "parent," but the presumption of his existence could disqualify needy children from public aid. Despite the inconsistent and sometimes inequitable administration of AFDC programs, the Department of Health, Education, and Welfare failed to move firmly until 1961 when Secretary Flemming stated that needy children could not be denied assistance on the basis of unsuitable home conditions while the child remained in the home.[11] Congress approved the Flemming Ruling by amending the Social

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fact that the Alabama substitute father regulation deprived children of equal protection of the laws in violation of the fourteenth amendment.

7. Wedemeyer & Moore, *The American Welfare System*. 54 CALIF. L. REV. 326, 327-28 (1966).

8. *See* H.R. REP. No. 615, 74th Cong., 1st Sess. 9-10 (1935), which characterized children as "the most tragic victims of the depression;" S. REP. No. 628, 74th Cong., 1st Sess., 16-17 (1935), which declared that the "heart of any program for social security must be the child." It should be noted that the plight of most children was caused by lack of employment for the family breadwinner, and Congress intended to solve this problem by providing employment for fathers.

9. *See* W. BELL, AID TO DEPENDENT CHILDREN 29 (1965); *see also* material cited note 5 *supra*.

10. Congressional reports and debates indicate that the moral character of the parents could be considered in determining eligibility. H.R. REP. No. 615, 74th Cong., 1st Sess. 24 (1935); S. REP. No. 628, 74th Cong., 1st Sess. 36 (1935).

11. State Letter No. 452, Bureau of Public Assistance, Social Security Administration, Department of Health, Education, and Welfare (1961): "[A] state plan . . . may not impose an

Security Act in 1961 and 1962.[12] The end result was AFDC assistance to children placed in foster homes and authorization for states to disqualify from AFDC children who live in unsuitable homes, provided they are granted adequate institutional care. Moving further from the idea of punishing needy children for the acts of their parents, Congress in 1967 amended the Social Security Act to require state plans to provide various rehabilitative programs aimed at improving home conditions.[13] Although state-imposed eligibility restrictions have not been judicially challenged as inconsistent with the Social Security Act, they have been overturned on the constitutional ground of denial of equal protection.[14]

In the instant case, the Supreme Court held Alabama's substitute father regulation invalid on the ground that it defined "parent" in a manner inconsistent with section 406(a) of the Social Security Act.[15] The Court stated that a child's natural father has a legal duty to support him, while in Alabama the unrelated substitute father does not,[16] adding that it was unreasonable to believe that Congress had intended that a man be regarded as a "parent" when he was not legally obligated to support the child. By reviewing other sections of the Social Security Act, the Court

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eligibility condition that would deny assistance with respect to a needy child on the basis that the home conditions in which the child lives are unsuitable, while the child continues to reside in the home."

12. 75 Stat. 77 (1961), *now* 42 U.S.C. § 604(6) (1964). The 1962 amendment modified the 1961 amendment by permitting states to disqualify from AFDC aid children who live in unsuitable homes, provided they are granted other "adequate care and assistance." 76 Stat. 189 (1962), 42 U.S.C. § 604(6) (1964). AFDC assistance was extended to children in foster homes and child-care institutions. 76 Stat. 180, 185, 193, 196, 207 (1962), 42 U.S.C. § 608 (1964). *See also* W. BELL, *supra* note 9, at 137-51.

13. State plans are required to provide for rehabilitative program of improving and correcting unsuitable homes, 42 U.S.C. § 602(a) (1964), *as amended*, 81 Stat. 877 (1968); to provide voluntary family planning services for the purpose of reducing illegitimate births, 42 U.S.C. § 602(a) (1964), *as amended*, 81 Stat. 878 (1968); and to provide a program for establishing the paternity of illegitimate children and securing support for them, 42 U.S.C. § 602(a) (1964), *as amended*, 81 Stat. 878 (1968).

14. *E.g.*, Levy v. Louisiana, 391 U.S. 68 (1968), holding that an illegitimate child is denied equal protection of the law if prohibited from recovering for the wrongful death of his mother; Harrell v. Tobriner, 279 F. Supp. 22 (D.D.C. 1967), holding invalid a one-year prior residence condition for public assistance as being without reasonable relation to purposes of legislation; Thompson v. Shapiro, 270 F. Supp 331 (D. Conn. 1967), *prob. juris. noted*, 389 U.S. 1032 (1968), holding invalid Connecticut's statute denying aid to needy persons until one-year residence requirement is met as violating the privileges and immunities and equal protection clauses; Collins v. State Bd. of Social Welfare, 248 Iowa 369, 81 N.W.2d 4 (1957), holding invalid a statute establishing a maximum payment per family regardless of the number of children on the ground that it fails to include and affect alike all persons of the same class.

15. Under this provision aid can be granted only if "a parent" of the needy child is continually absent from home. Alabama considered a substitute father to be a non-absent parent.

16. ALA. CODE tit. 34, §§ 89-90 (1958).

reinforced its interpretation of the term "parent"[17] and concluded that the pattern of legislation dictated that a "parent" could only be one who is under a legal duty to support a child. Rejecting Alabama's contention that its substitute father regulation was justified because it discouraged illicit sexual relationships and illegitimate births, the Court stated that the paramount goal of AFDC is the protection of needy children and that immorality and illegitimacy should be dealt with through rehabilitative measures.[18]

The immediate effect of the instant decision will be to restore to eligibility 20,000 persons previously disqualified from Alabama's AFDC rolls because of the substitute father regulation. An estimated 200,000 to 400,000 persons[19] in the District of Columbia and the eighteen other states[20] which have similar regulations should also have cause for reinstatement. There is widespread professional opinion supporting the Court's interpretation as likely to result in more enlightened administration, based on three principal arguments. First, under this decision, social workers' time will no longer be consumed attempting to catch "phantom" fathers, thus releasing workers' energies for more affirmative efforts in, for example, rehabilitation programs. Second, AFDC recipients should be able to enjoy more privacy, since they will no longer be harassed by investigators and "night raiders." Deserted mothers will be able to have social contacts which might lead to marriage, whereas previously any casual contact with a member of the opposite sex was suspect. One study which has been conducted on the subject indicates that illegitimacy and promiscuity increased when

17. Section 402(a)(10) requires that a state plan must "provide for prompt notice to appropriate law enforcement officials of the furnishing of aid to families with dependent children in respect of a child who has been deserted or abandoned by a parent." 42 U.S.C. § 602(a)(10) (1964). A 1967 amendment to the Social Security Act requires states to develop programs to establish the paternity of children born out of wedlock who are receiving AFDC and to secure support for them, and to secure support for abandoned children from their parents. 42 U.S.C. § 602(a), *as amended*, 81 Stat. 878 (1968). States must report to HEW any "parent . . . against whom an order for the support and maintenance of such dependent child or children has been issued" if payments are not being made. 42 U.S.C. § 602(a) (1964), *as amended*, 81 Stat. 896 (1968). Another amendment requires states to cooperate with HEW in locating any parent against whom a support petition has been filed in another state. 42 U.S.C. § 602(a) (1964), *as amended*, 81 Stat. 897 (1968).

18. The Court ignored the equal protection claim and based its decision entirely upon statutory interpretation. In his concurring opinion Mr. Justice Douglas came to the same conclusion by using the equal protection clause.

19. N.Y. Times, May 19, 1968, at 32, col. 1.

20. The following states had substitute father regulations in their AFDC plans: Alabama, Arizona, Arkansas, Florida, Georgia, Indiana, Kentucky, Louisiana, Michigan, Mississippi, Missouri, New Hampshire, New Mexico, North Carolina, Oklahoma, South Carolina, Tennessee, Texas, and Virginia. King v. Smith, 392 U.S. at 337-38.

welfare payments were withheld, since mothers with no other source of income were forced to turn to prostitution.[21] This reasoning suggests that states interested in combating immorality and illegitimacy should participate in rehabilitation programs rather than withdraw AFDC payments. Third, since a major effect of substitute father regulations was to disqualify many Negroes from financial assistance,[22] the instant decision has eliminated this means of racial discrimination, thus bringing AFDC administration into closer accord with other major federal programs.

The AFDC program is being challenged from all quarters. Funds are an acute problem, especially since the number of those added to AFDC rolls increased three times as fast in 1967 as it had in most previous years.[23] Although there is great need for financial assistance for these children, Congress has continued to give a larger proportion of assistance to the aged[24] despite the fact that among the poor the young outnumber the old.[25] Further, payments to the aged are larger than payments to children.[26] The size of assistance to the aged suggests the political utility of giving aid to those of voting age.[27] The instant case appears to be only the beginning of an onslaught of suits being filed to challenge various state AFDC administrative policies in order to increase, as did the instant case, the number of children eligible. At the same time Congress has recently limited federal participation in AFDC, an action popularly termed "the freeze."[28] As a result both the states and the needy children are suffering a shortage of funds.

Partly because of the need to provide assistance to more children from limited funds, and partly because there remain a large number of adherents to the philosophy underlying the substitute father regulation, many states may be expected to seek to circumvent the impact of the instant decision. One technique would be for a state to withdraw from the AFDC program. However, it is doubtful that any state would take

21. W. BELL, *supra* note 9, at 182-83, 194-95.

22. *Id.* at 181-86.

23. N.Y. Times, Feb. 20, 1968, at 38, col. 7.

24. In 1965, aid to the aged and aid to dependant children accounted for 71.2% of public assistance expenditures. 38.6% of the funds were used for the aged and 32.6% for dependent children. In the South the respective figures were 65.1% and 18.2%. SOUTHERN REGIONAL COUNCIL, PUBLIC ASSISTANCE IN THE SOUTH 11 (1966).

25. There are 15 million poor under age 18 in contrast to 1.5 million poor over age 65. B. WEISBROD, THE ECONOMICS OF POVERTY 11 (1965).

26. HEW, WELFARE IN REVIEW 52, 56 (May-June 1968).

27. SOUTHERN REGIONAL COUNCIL, *supra* note 24, at 10.

28. 42 U.S.C. § 603(d) (Supp. 1967), *as amended*, Pub. L. No. 90-364, tit. III, § 301 (June 28, 1968). The freeze is discussed in the text accompanying nn. 46-48 *infra*.

such a politically drastic step. Another technique which is presently employed by many states is the maximum grant. The typical maximum grant provision, whether administrative regulation or state statute, imposes an arbitrarily-fixed dollar ceiling on assistance payments per family, regardless of the number of children.[29] Recently, a number of suits have been filed challenging maximum grants on the grounds that they fail to conform to the stated purposes of the Social Security Act and are in violation of the equal protection clause of the fourteenth amendment.[30] In the only reported decision challenging the maximum grant, the Iowa Supreme Court voided that state's maximum grant as violative of equal protection.[31] If that court's well-reasoned opinion is followed in the pending suits, the future of the maximum grant is short lived.

Another technique utilized by some states is the awarding of decreasing amounts for each succeeding child in the family.[32] This has recently been challenged in the courts.[33] It should be pointed out that the Court in the instant decision casts doubt on the success of the decreasing-amount-per-child suits by a bit of dictum: "There is no question that States have considerable latitude in allocating their AFDC resources, since each State is free to set its own standard of need and to determine the level of benefits by the amount of funds it devotes to the program."[34]

29. *E.g.*, ARIZ. REV. STAT. ANN. § 46-294 (Supp. 1967): "In no event shall the total amount of assistance paid . . . to any recipient exceed eighty dollars for any calendar month for a family containing one dependent child, and twenty-seven dollars for each additional dependent child, but in no event shall any one family receive assistance in excess of two hundred and twenty dollars per month." Another type of maximum grant appears in a Tennessee statute which provides that any additional amount established by the state board of public welfare for AFDC payments may not be in excess of the maximum amounts established by the Social Security Act as the basis for reimbursement from the Federal Government. Tenn. Code Ann. § 14-305 (1955).

30. *E.g.*, Thomas v. Burson, Civ. No. 2381 (M.D. Ga., filed July 29, 1968); Kaiser v. Montgomery, Civ. No. 49613 (N.D. Cal., filed July 16, 1968); Blackmon v. Dept. of Pub. Welfare, Case No. 68-536 (S.D. Fla., filed May 8, 1968); Westberry v. Fisher, Civ. No. 10-80 (D. Me., filed April 17, 1968); Lindsey v. Smith, Civ. No. 7636 (W.D. Wash., filed April 3, 1968); Robinson v. Hackney, Civ. No. 68-4-2 (S.D. Tex., filed April 2, 1968); Purvis v. Washington, Civ. No. 722-68 (D.D.C., filed March 21, 1968); Dews v. Henry, Civ. No. 6417 (D. Ariz., filed August 10, 1967).

31. Collins v. State Bd. of Social Welfare, 248 Iowa 369, 81 N.W.2d 4 (1957). However, it can be argued that Congress approves of family unit maximum grants. 42 U.S.C. § 603(a)(1) (1958) limits the number of children for whom the Federal Government will provide matching grants. 42 U.S.C. § 602 (a)(23) (1968) which requires an increase in state maximum grants to reflect the rise of living costs is, at least, a concession that maximum grants do exist.

32. *E.g.*, MISS CODE ANN. § 7173 (Supp. 1966). This statute provides AFDC assistance at the rate of $25 for the first child, $15 for the second child, and $10 for each subsequent child, regardless of determined need.

33. Ward v. Winstead, No. 6C 6829 (N.D. Miss., filed July 12, 1968); Purvis v. Washington, Civ. No. 722-68 (D.D.C., filed March 21, 1968).

34. 392 U.S. at 318-19 (1968).

As long as a state can rationally justify its decreasing budgetary increment per child by setting its own standard of need as reflecting economics of scale in child rearing, it seems that the Court will defer to legislative judgment.[35] However, the equal protection issue would arise if the same percentage of unmet need, as determined by the state, is not paid in each of the public assistance categories. This common disparity used by some states[36] has been challenged on the ground that all poor should be treated equally, that poor children are entitled to have the same percentage of their need met as, for example, the aged. It is apparent from the Court's dictum that states can determine standards of need as well as benefits to be provided, as long as the standards are applied uniformly. In a letter spelling out acceptable state responses to the AFDC freeze, HEW has also approved the meeting of only a percentage of the state-determined need. The letter suggested that states either bear the total assistance costs for excess children, or spread available funds over the entire group by reductions in levels of assistance, or introduce "reasonable" eligibility restrictions equally applicable to all within the eligible group.[37] In view of these opinions by the Court and HEW it appears that a percentage reduction plan which gives all classes of the poor the same, although reduced, percentage of need should be upheld.

The threshold question of eligibility is a problem wholly different from and anterior to determining standards of need and levels of benefit. States are free to use their imagination in formulating eligibility rules as long as they show due regard to the Constitution and stated purposes of the Act. In Tennessee, for example, an otherwise eligible child is prohibited from receiving AFDC assistance if he is between the ages of 6 and 21 and not enrolled in school.[38] A regulation of this sort appears to

35. Although it is traditional to defer to legislative judgment, there are two cases which authorize judicial intervention in extreme situations. In striking down Oklahoma's law requiring sterilization of persons convicted of two or more felonies, the Court recognized that the equal protection clause required the Court to scrutinize carefully legislation which involves one of the basic civil rights of man. "Marriage and procreation are fundamental to the very existence and survival of the race." Skinner v. Oklahoma, 316 U.S. 535, 541 (1942). In Hobson v. Hansen, 269 F. Supp. 401, 517 (D.D.C. 1967) the court reluctantly entered the political arena "to assist in the solution [of problems of equal school opportunities for Negroes] where constitutional rights hang in the balance."

36. *E.g.*, Miss. Code Ann. §§ 7171-73 (Supp. 1966). In Mississippi AFDC children are allowed 27% of their determined need, while the aged get 100%. Miss. Manual, Vol. 111 at p. 5701. In his message on the Welfare of Children, Feb. 8, 1967, President Johnson said, "Thirty-three states do not even meet their own minimum standards for subsistence." HEW, *supra* note 26, at 4.

37. Letter from HEW to State Public Welfare Administrators, Jan. 22, 1968.

38. Tenn. Pub. Welfare Manual, Vol. 11 at 337 (1967). State eligibility requirements are printed in HEW, PUBLIC ASSISTANCE REPORT NO. 50, CHARACTERISTICS OF STATE PUBLIC ASSISTANCE PLANS UNDER THE SOCIAL SECURITY ACT (1964).

be acceptable, since it conforms to the constitutional and statutory requirements. For states which recognize common law marriages there appeared at first to be another eligibility device available to circumvent *King v. Smith*. A substitute father could be designated a step-father, and by statute made liable for the upkeep of the children. HEW foresaw this possibility and has foreclosed it by regulation.[39]

HEW has responded to *King v. Smith* by issuing new regulations.[40] In determining whether a child has been deprived of parental support, the regulations permit only a consideration of the child's natural or adoptive parent or a step-parent who is ceremonially married to the child's natural or adoptive parent and is legally obligated to support the child.[41] Going beyond the Court's holding on eligibility, HEW addressed itself to the problem of need by stressing that it shall not be presumed that a man or other person living in the household who is not legally obligated to support the persons in the household is providing income.[42] States which do not have substitute father restrictions on eligibility are likely to be affected because of their tendency to assume income from substitute fathers or stepfathers. Proof of actual contributions is now necessary. Any state which previously utilized a substitute father regulation must now give notice of its present policies to former and potential applicants for AFDC.[43]

Congress has not responded to the instant decision, and judging from a House Ways and Means Committee meeting with Wilbur J. Cohen, HEW Secretary, no affirmative action is planned.[44] If Congress were to attempt to frustrate the impact of *King v. Smith* by legislatively redefining "needy child" in 406(a) of the Social Security Act so as to exclude illegitimates, they would, it appears, be guilty of that invidious class discrimination against illegitimates condemned by the Court last term in *Levy v. Louisiana*.[45] Although passage came before the *King v. Smith* decision, Congress's AFDC freeze provision deserves mention. The provision requires a state to determine what proportion of its total AFDC disbursements were received by persons age eighteen and under during the first quarter of 1968.[46] After June 30, 1968 (now postponed

39. 33 Fed. Reg. 11290 (1968).
40. *Id. See* 14 WELFARE LAW BULLETIN 19-22 (Sept. 1968).
41. 33 Fed. Reg. § 203.1(a) (1968).
42. *Id.* at § 203.1(b).
43. *Id.* at 203.1(c).
44. Washington Post, July 16, 1968, at A3, col. 3.
45. 391 U.S. 68 (1968).
46. Social Security Act, 42 U.S.C. § 603(d) (Supp. 1967), *as amended*, Pub. L. No. 90-364, tit. III, § 301 (June 28, 1968).

until 1969)[47] the state will not be reimbursed by federal matching funds for payments to children in excess of this established proportion as applied to the then existing population.[48] This imposes a great hardship on the states which are faced with the normal increase in applicants in addition to the new eligibles created by the instant decisions. If maximum grant provisions are quashed, even more funds will be needed.[49] Of course, there is the possibility that the freeze provision will never become applicable, since it is more likely the result of a power struggle to cut the budget in exchange for a tax increase than an indication that Congress has become disaffected with the AFDC program. Nevertheless, there is an interesting partial solution to the problem. The amended freeze provision, which delayed the freeze for one year, retains the original base period. However, under the amendment, the number of children counted for the base period is increased by the average monthly number of children eligible for AFDC who receive aid during the April-June 1969 quarter, and who came on the rolls after March, 1968, pursuant to a policy which the Secretary determines to have been effectuated by the state "in compliance with or in reliance upon or in consideration of a judicial decision." The amendment defines "judicial decision" as a constitutional decision on the validity of a state law or rule which denies AFDC assistance because of a man-in-the-house policy or a durational residence requirement.[50] The instant Court held that Alabama's substitute father regulation was inconsistent with the Social Security Act, and, therefore, determined that it was unnecessary to decide the equal protection issue.[51] However, the Secretary has characterized the instant Court's resolution of the conflict between federal and state law as a reliance upon the supremacy clause of the United States Constitution. The Secretary thus argues that former "substitute father" states which have revised their regulations

47. Pub. L. No. 90-364, tit. III, § 301 (June 28, 1968).

48. 42 U.S.C. § 603(d) (Supp. 1967), *as amended*, Pub. L. No. 90-364, tit. III, § 301 (June 28, 1968). As H.R. 12080, it was debated on the House floor Aug. 16-17, 1967, under a closed rule which permitted no amendments other than Committee amendments. HEW, WELFARE IN REVIEW 11 (May-June 1968).

49. Note HEW's suggested methods of implementing the freeze in the text accompanying n.37 *supra*. In response to the freeze the state of Georgia submitted to HEW a plan whereby Georgia proposed a waiting list for AFDC children who exceeded the number which would be matched by Federal participation. HEW rejected the plan on the ground that it was inconsistent with the statutory requirement for plan approval. Matter of the Petition of the State of Georgia for Reconsideration of its Proposed Implementation of section 208(b) of Pub. Law 90-248 (Apr. 2, 1968).

50. Pub. L. No. 90-364, tit. III, § 301(3) (June 28, 1968).

51. 392 U.S. 309, 333 (1968).

subsequent to the instant decision have in fact acted on the basis of a "judicial decision," thereby increasing the number of children originally in the base period.[52]

The instant decision has moved the nation another step toward uniform application of public welfare, thus, hopefully, eradicating many of the inequities deriving from diversity among the states. As President Johnson said when he signed the 1968 Social Security Act amendments, "The welfare system today pleases no one. It is criticized by liberals and conservatives, by the poor and the wealthy, by social workers and politicians, by whites and by Negroes in every area of the nation."[53] If the Supreme Court decides any of the numerous pending suits in the field of public welfare, more federal standards will ensue, thereby moving the nation closer to a federalized public welfare program. HEW Secretary Cohen has already recommended federalizing public welfare as a step toward providing equal treatment within each class of recipients. Whatever the specific reforms, it seems certain that the public welfare system is headed for a drastic change.

Taxation—Corporate Income Tax—Pre-Sale Declaration of Dividend by Subsidiary in Amount Equal to Retained Earnings Held Tax-Exempt Inter-Corporate Dividend on Receipt by Pareut

The Commissioner of Internal Revenue determined a deficiency in petitioner's income tax return by disallowing an exclusion claimed as a tax-exempt inter-corporate dividend under section 243 of the Internal Revenue Code.[1] The claimed exclusion resulted from the following

52. Letter from Office of Gen. Coun., Soc. & Rehab. Serv. Div., HEW, to Commr., Assistance Payments Admin., July 18, 1968.

53. HEW, *supra* note 26, at 20. *See* REPORT OF THE NATIONAL ADVISORY COMMISSION ON CIVIL DISORDERS 26 (Bantam ed. 1968), where the Commission reported: "Our present system of public welfare is designed to save money instead of people, and tragically ends up doing neither." *See also* Raskin, *Negative Income Tax*, N.Y. Times, May 5, 1968 § 4 at 4, col. 1: "Public welfare is an $8 billion business without a friend. Everyone from George Wallace to Stokely Carmichael agrees that the programs, started on an 'emergency' basis to ease the hardships of mass unemployment in the nineteen-thirties, have become a disaster area for relief recipients and taxpayers alike."

1. Section 243 provides that "[i]n the case of a corporation, there shall be allowed as a deduction an amount equal to the following percentages of the amount received as dividends from a domestic corporation . . . (3) 100%, in the case of qualifying dividends . . . ." INT. REV. CODE of

transaction. After rejecting a purchase offer in the amount of the fair market value of its wholly-owned subsidiaries, petitioner proposed a counter offer to sell the stock for cash in an amount equal to its basis, such sale to occur after declaration by one subsidiary of a dividend in an amount equal to the excess over petitioner's basis. The combined total of dividend and purchase price received by petitioner was thus equal to the purchaser's original offering price.[2] The dividend was declared and paid by a note;[3] petitioner then signed the agreement consummating the sale. The note representing the dividend was then paid by the purchaser, and petitioner excluded the amount received from taxable income as a tax-exempt inter-corporate dividend.[4] Respondent contended that the transaction was a mere sham to avoid captial gain taxation,[5] that in substance no dividend was paid to petitioner, and that payment of the note was actually a part of the purchase price. In a determination of the issues by the Tax Court, *held*, for the petitioner. The distribution of earnings by a subsidiary to a parent corporation in the form of a dividend immediately prior to sale of the parent's stock in the subsidiary constitutes a tax-exempt inter-corporate dividend where no purchase agreement is signed until after the dividend has been declared and paid. *Waterman Steamship Corporation*, ¶ 50.63 P-H TAX CT. REP. & MEM. DEC. 448 (July 31, 1968).

Where the sole purpose of a transaction is tax avoidance the court will look behind the form to the substance of the arrangement,[6] and in

1954, § 243(b)(1). A qualifying dividend is one received from a corporation in an affiliated group, i.e., corporations related through stock ownership in which the parent possesses at least 80% of the voting stock of the subsidiary. *Id.* at §§ 243(b)(5), 1504(a). Petitioner Waterman was the sole owner of its subsidiary's stock.

2. The original cash offer made by purchaser was for $3,500,000 and petitioner counter-offered to sell for a total price of $3,500,000, but made up of $700,000 in cash (its basis in subsidiaries) and $2,800,000 in dividends to be paid by the subsidiary. This form of transaction was chosen to avoid payment of capital gains tax on the $2,800,000 realized above the adjusted basis of $700,000. In this way petitioner was able to avoid payment of any tax on the dividend.

3. A promissory note was issued because the subsidiaries did not have sufficient cash on hand to make cash payments.

4. Purchaser assumed the liabilities of the subsidiaries, including the promissory note for dividends owed petitioner. The cash for the transaction was obtained from a personal loan to purchaser and immediately passed on to petitioner.

5. Purchaser desired to acquire the stock or assets of the subsidiaries only if the acquisition could be made without the approval of the ICC. Petitioner admitted manipulating the transfer so as to realize $3,500,000, but contended that avoidance of ICC scrutiny, rather than tax avoidance, was his prime purpose.

6. "Although Gregory [v. Helvering, 293 U.S. 465 (1935)] may mean all things to all men, its essence is an instinctive judicial attitude that a transaction should not be given effect for tax purposes unless it serves a purpose other than tax avoidance. Thus, a transaction heavily laden with tax avoidance motives may be disregarded as a 'sham', or its form may be recast to reflect its

such a case the form will be disregarded and the tax benefit denied.[7] However, where tax avoidance is but an incident of an otherwise valid business purpose, the court will recognize the legitimacy of the taxpayer's manipulation and disregard the issue of tax avoidance.[8] Such a result is based on the recognition of congressional power to tax that which, for policy reasons, it had permitted to be deducted; tax avoidance, however, does not fall within such a policy.[9] Where it has been determined that tax avoidance is not the sole aim of the taxpayer, the time at which a dividend is declared and paid becomes a significant. Treasury Regulation 1.61-9(c) recognizes that dividends declared and paid before the sale of stock constitute income to the seller.[10] It has been held that where a dividend is declared and paid after the stockholder has contracted to sell the stock, but before conditions precedent to the sale have been met, the dividend is income to the seller.[11] There is, however, an apparent recognition for the need of an enforceable agreement between buyer and seller; where such an agreement is reached, the buyer becomes the beneficial owner of the stock and is entitled to any dividends paid.[12]

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economic 'substance' . . . in order to prevent overreaching taxpayers from doing indirectly what they cannot do directly." B. BITTKER & J. EUSTICE, FEDERAL INCOME TAXATION OF CORPORATIONS AND SHAREHOLDERS 555 (2d ed. 1966).

7. Helvering v. Clifford, 309 U.S. 331, 334 (1940). The Court there noted that the courts have little use for "[t]echnical considerations, niceties of the law . . ., or legal paraphernalia which inventive genius may construct . . . ." *See also* Gregory v. Helvering, 293 U.S. 465, 470 (1935); Lucas v. Earl, 281 U.S. 111 (1930).

8. *See, e.g.*, United States v. Cumberland Pub. Serv. Corp., 338 U.S. 451 (1950); *cf.* Commissioner v. Court Holding Co., 324 U.S. 331 (1945).

9. It cannot realistically be contended that Congress has provided deductions solely for purposes of tax avoidance, for to hold otherwise "would deprive the statutory provision in question of all serious purpose." Gregory v. Helvering, 293 U.S. 465, 470 (1935).

10. Treas. Reg. § 1.61-9(c) (1964): "When stock is sold, and a dividend is both declared and paid after the sale, such dividend is not gross income to the seller. When stock is sold after the declaration of a dividend and after the date as of which the seller becomes entitled to the dividend, the dividend ordinarily is income to the seller. When stock is sold between the time of declaration and the time of payment of the dividend, and the sale takes place at such time that the purchaser becomes entitled to the dividend, the dividend ordinarily is income to him. The fact that the purchaser may have included the amount of the dividend in his purchase price in contemplation of receiving the dividend does not exempt him from tax. Nor can the purchaser deduct the added amount he advanced to the seller in anticipation of the dividend. The added amount is merely part of the purchase price of the stock. In some cases, however, the purchaser may be considered to be the recipient of the dividend even though he has not received the legal title to the stock itself and does not himself receive the dividend. For example, if the seller retains the legal title to the stock as trustee solely for the purpose of securing the payment of the purchase price, with the understanding that he is to apply the dividends received from time to time in reduction of the purchase price, the dividends are considered to be income to the purchaser."

11. Joseph L. O'Brien Co., 35 T.C. 750 (1961), *aff'd*, 301 F.2d 813 (3d Cir. 1962); Sam E. Wilson, Jr., 27 T.C. 976 (1957), *aff'd per curiam*, 255 F.2d 702 (5th Cir. 1958).

12. Steel Improvement & Forge Co. v. Commissioner, 314 F.2d 96, 98 (6th Cir. 1963): "[The]

Conversely, until a binding agreement is signed, the owner has the legal, as well as the equitable, title and the dividend is income to him.[13] Payment of dividends by promissory note is sanctioned by courts, even when it has been shown that the corporation had no intention of paying the note.[14]

The instant court held that the note paid to petitioner by its subsidiaries prior to sale of their stock was properly deducted as a tax-exempt inter-corporate dividend. While granting that "the distinction is a shadowy one," the court differentiated between a dividend declared and paid subsequent to a written agreement for the sale of stock and one declared and paid subsequent to a "general understanding" not yet reduced to writing.[15] The court noted that in the absence of a legally enforceable agreement the purchaser had no right to the stock; the beneficial ownership remained in petitioner who was entitled, therefore, to any dividend paid.[16] To the Commissioner's argument that in substance no dividend was paid, the court replied that the facts showed clearly the parties' agreement that a dividend be paid to the taxpayer and that "the substance as well as the form of the transaction was a payment of a dividend to the taxpayer."[17] The court held the payment of the dividend to petitioner to be an integral part of this agreement concerning the sale of stock; this combined with the business purpose necessitated by compliance with ICC regulations[18] was held sufficient to distinguish other cases in which no substantial business purpose, other than tax

disputed dividend is properly taxable as ordinary income to the party having beneficial ownership of the stock at the time when the dividend is established . . . ." *See also* McKinley Corp. of Ohio, 36 T.C. 1182 (1961).

13. *See* note 8 *supra*.

14. *See, e.g.*, T.R. Miller Mills Co., 37 B.T.A. 43, *aff'd*, 102 F.2d 599 (5th Cir. 1939). Although the payment of the dividend by promissory note in the instant case was not contested ¶ 50.63 P-H TC 453 n.1) it seems to be an integral part of respondent's argument that in substance no dividend was paid.

15. Para. 50.63 P-H TC at 457.

16. Perhaps the court's distinction may be justified on the basis of the risk imposed on a seller that a purchaser will refuse to complete the transaction once the dividend has been declared. This would leave the seller with a dividend not wanted absent the sale, but the instant case demonstrates that the seller can arrange the transaction to provide such assurance without a written contract. In any event, the dividend is tax-exempt and could be plowed back into the subsidiary to increase the parent's basis in it.

17. Para. 50.63 P-H TC at 456. This was actually the same position respondent took in Steel Improvement & Forge Co., 36 T.C. 265 (1961) upon similar facts. The basis for reversal in Steel Improvement & Forge Co. v. Commissioner, 314 F.2d 96 (6th Cir. 1963) was not that in substance or form there was no dividend paid, but rather that the taxpayer was not the beneficial owner at the time the dividend was declared and paid. In that case the dividend was declared subsequent to a written agreement. The Tax Court's decision as to substance and form thus remains as precedent.

18. *See* note 5 *supra* and accompanying text.

avoidance, was involved.[19] The court recognized the right of taxpayers to reduce or eliminate taxable income in the course of business transactions where alternative courses of action yielded differing tax consequences.[20] On the facts of the case, petitioner had several alternative methods of selling the stock in which little or no taxable income would result; however, the method used was the only one acceptable for the purchaser's business purposes.[21] Since this tax-free treatment of an inter-corporate dividend is permitted by the Code, the court allowed petitioner to arrange its affairs so as to obtain the sactioned tax benefit. In dissent, three judges felt that the majority failed to face the question of whether a dividend was paid at all.[22] Citing *Gregory v. Helvering*, they concluded that the note issued by the subsidiary "served only a temporary purpose and disappeared,"[23] making the whole transaction a hollow form for the avoidance of taxation.[24]

Employing the method sanctioned by the instant court, a corporation could benefit substantially whenever it is able to sell a subsidiary's stock, so long as the subsidiary has accumulated earnings and profits. While the result reached does not conflict with congressional policy as expressed in the consolidated return provisions of section 243 of the Code,[25] it seems contrary to that expressed in the near penal accumulated earnings tax provisions of section 531.[26] Thus, while

19. *See* Gregory v. Helvering, 293 U.S. 465 (1935) and cases cited note 11 *supra*.

20. Para. 50.63 P-H TC at 457: "Where the transaction is carried out in a recognized form to accomplish its purpose and is not a sham or subterfuge, its substance should not he considered to differ from its form merely because the same result might have been accomplished by the parties by another method which would have produced a higher tax."

21. *Id.* at 454: "Petitioner points out that except for the fact that Pan-Atlantie and Gulf Florida each had an ICC certificate which could not be directly transferred without approval by the ICC, Pan-Atlantic could have declared a dividend in kind to Waterman and thereafter Waterman could have sold its assets . . ., or . . . could have directly sold its assets . . ., or could havc merged with Waterman and the assets which had previously belonged to Pan-Atlantic could have been sold. . . . Petitioner states that since Pan-Atlantic's basis in its assets exceeded $3,500,000 no taxable income would have resulted from a sale . . . under any one of these arrangements."

22. *Id.* at 458.

23. In Gregory v. Helvering, 293 U.S. 465 (1935), the taxpayer created a corporation for the sole purpose of receiving a transfer of stock. After the transfer the corporation was immediately liquidated and its proceeds distributed tax-free to the stockholder under § 332. The Court disallowed the claimed tax benefit.

24. When the transaction was complete, the subsidiaries were neither richer nor poorer than before. Para. 50.63 P-H TC at 459.

25. INT. REV. CODE of 1954, § 243 aims toward the simplification of parent-subsidiary tax returns. In return for the tax-exempt inter-corporate dividends of § 243(a)(3), Congress requires the affiliated group to be treated as one taxpayer. The result reached here is not in conflict with this policy.

26. Int. Rev. Code of 1954, § 531 provides that a tax will be imposed upon the accumulated

Congress frowns on the accumulation of earnings, the present decision favors it when the sale of stock is contemplated.[27] The dissent expressed the view that there was no substance to the dividend,[28] and this is substantiated by the fact that the "dividend" would not have been paid but for the contemplated sale. In this respect it resembles the "corporate reorganization" disallowed in *Gregory v. Helvering*. Although the court stated that payment by promissory note is permitted,[29] it remains a disturbing feature of the case,[30] since the corporate liability was subtracted from the purchase price and passed on to be paid by the purchaser. Since the note was paid by a personal loan secured by the purchaser (and not by the subsidiary), it appears that the subsidiary was used as a mere conduit for the payment of a portion of the purchase price. In view of the congressional policy favoring small accumulated earnings, payment by note is perhaps justifiable and necessary. While the question is momentarily settled, it would seem that a parent corporation should not be permitted to reduce its tax bill on the sale of stock in a wholly-owned subsidiary by means of a dividend declared only because of the sale and with no purpose other than tax avoidance.

The uniqueness of result reached in the instant case, due to the great disparity between the subsidiary's fair market value ($3,500,000) and the taxpayer's basis ($700,000), points to a more pressing issue; for had the dividend declared by the subsidiary been sufficiently large to overlap the basis, thereby enabling the taxpayer to claim a loss, the Commissioner may have had a stronger argument. Following this reasoning, had the taxpayer *purchased* the subsidiary at its fair market value and then received the dividend, the subsequent sale would have had the effect of skimming off the retained earnings and then claiming a loss. It is submitted that the taxpayer should not be permitted to claim a loss

earnings of a corporation. The 38½% rate imposed on accumulated taxable income in excess of $100,000 is substantially greater than the 25% rate imposed on capital gains, thus indicating a strong congressional policy against such accumulation. Sections 532 and 535 indicate that the proper method of handling income is distribution to stockholders; the policy of section 531 is that of strengthening the economy by reinvestment of income.

27. Perhaps this would constitute no more than a trap for the unwary where wholly-owned subsidiaries are involved; however, by declaring a yearly inter-corporate dividend payable by note (which in turn is plowed back into the subsidiary, thereby increasing the parent's basis) the corporation may escape the accumulated earnings tax. When sale of the subsidiary's assets occurs, the parent will be taxable only on the capital gain realized if its basis has appreciated in value.

28. *See* notes 21-23 *supra* and accompanying text.

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

30. *See, e.g.*, John R. West, 37 T.C. 684 (1962). Petitioner sold a corporation with outstanding claims against the government carried on its books as assets. Purchaser refused to purchase the claims and the asset was subtracted from the market value of the corporation and assigned to the petitioner. Petitioner claimed that the payment was part of the purchase price. The

sustained in such a transaction.[31] On the other hand, where, as in the instant case, the taxpayer is the *organizer* of a subsidiary which, after a contribution of $700,000 in capital, earns $2,800,000 after taxes, no more than the earnings may be stripped off without reducing the taxpayer's basis in the subsidiary.[32] It is thus possible for the taxpayer to equalize the value of the stock and assets by means of a dividend. The result in the latter hypothetical would not be unacceptable, since the taxpayer and its subsidiaries may be treated as an economic unit under section 243. Since the taxpayer could have corrected the disparity in basis and value by regular dividend payments which were then reinvested in the subsidiary, it seems unfair to say that it may not accomplish the same result by a single dividend and subsequent sale of stock. On the other hand, a corporation should not be permitted to reap a tax benefit by presale stripping of a *purchased* subsidiary with a resulting loss on the sale. In order to uphold the instant decision and at the same time prevent the hypothetical loss cited, legislation should necessarily distinguish the two possibilities, analogously to the policy of section 382,[33] and require non-recognition of loss in the latter case.

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claim was denied on the ground that the payment was made to the corporation and then passed on through the conduit to petitioner.

31. For example, had the taxpayer purchased the subsidiary for $3,500,000, which included $2,800,000 in retained earnings, caused the subsidiary to declare the sanctioned dividend, and sold subsidiary for $700,000, it could conceivably claim a $2,800,000 loss.

32. INT. REV. CODE of 1954, § 301.

33. INT. REV. CODE of 1954, § 382 limits net operating loss carryovers in purchased subsidiaries.