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Student Comments

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I. Constitutional Law

CONSTITUTIONAL LAW—EQUAL PROTECTION—HOUSING DISCRIMINATION—VILLAGE REFUSAL TO REZONE TO PERMIT CONSTRUCTION OF LOW INCOME HOUSING DEVELOPMENT HELD VIOLATIVE OF EQUAL PROTECTION WHERE REFUSAL OPERATED TO PERPETUATE VILLAGE’S SEGREGATED CHARACTER

Metropolitan Housing Development Corp. v. Village of Arlington Heights

Metropolitan Housing Development Corporation, a nonprofit corporation organized for the purpose of developing low and moderate income housing in the Chicago area, entered into an agreement with a Catholic religious order to purchase 15 acres of land in the Village of Arlington Heights. The agreement provided that the land was to be developed for low-income housing with financing arranged under § 236 of the National Housing and Urban Development Act of 1968. These 15 acres and all of the land surrounding the property was zoned R-3, for single family residences; accordingly, the property would have to be rezoned R-5, for multi-family residences. The existing “comprehensive plan” of Arlington Heights provided that an area should be zoned R-5 only if it represents a “buffer zone” between single family areas and commercial, industrial, or other high intensity uses.

Metropolitan Housing prepared studies showing what it conceived to be the benefits of the project, such as an increased tax base and, in response to objections, made several changes in its proposals in an attempt to obtain rezoning from the Board of Trustees of the Village. After public hearings, however, the Plan Commission recommended against the zoning change and the Board of Trustees followed this recommendation, maintaining that permitting this use would violate the buffer zone policy by placing the project in the middle of a completely single family area.

† The Supreme Court recently gave a strong indication of its sentiments toward Arlington Heights. In Washington v. Davis, 44 U.S.L.W. 4789 (U.S. June 7, 1976), the Court upheld a test of verbal skills used by the Washington, D.C., police department which 57% of black applicants failed as opposed to only 13% of white applicants, on the basis that, standing alone, a showing of a discriminatory effect on blacks does not warrant a conclusion that a hiring test was discriminatory. Rather, a discriminatory intent or purpose must also be indicated. In so holding, the Supreme Court cited with disapproval a number of contrary lower court decisions, including Arlington Heights. Id. at 4793 n.12. The propriety of the inclusion was challenged by Justice Brennan who stated in his dissent that “[i]f the Court regarded this case only a few months ago as worthy of full briefing and argument, it ought not to be effectively reversed merely by its inclusion in a laundry list of lower court decisions.” Id. at 4796 n.1. Cf. Justice in Arrears, Time, June 21, 1976, at 48, 49.
2 12 U.S.C. § 1715z et seq. (1970). In January of 1973 both § 236 (which provided for low income rental housing) and § 235 (providing for low income home ownership) programs were suspended, and have since been effectively terminated.
3 See telegraphic message from George Romney, Secretary of Housing and Urban Development, to all regional administrators, all area directors, and all insuring office directors, January 8, 1973 (copy on file at Notre Dame Center for Civil Rights, Notre Dame Law School).
4 See Metropolitan Housing Development Corporation v. Village of Arlington Heights, 517 F.2d 409, 411 (7th Cir. 1975).
5 Id. at 411.
Metropolitan Housing then instituted suit on behalf of itself and "individual plaintiffs who seek to represent moderate income minority members who work or desire to work in Arlington Heights but cannot find decent housing there that they can afford." The complaint alleged that the refusal to rezone had the effect of perpetuating segregation and prevented Metropolitan Housing from using its property in a reasonable manner in violation of the Fourteenth Amendment, § 1981 and § 1982 of the 1866 Civil Rights Act, § 1983 of the 1871 Civil Rights Act, and the Fair Housing Act of 1968. The complaint requested a declaratory judgment invalidating the zoning ordinance as applied to the plaintiffs' property, and an injunction preventing the individual trustees of Arlington Heights, as defendants, from interfering with the development of the proposed project. The district court held for the defendants, finding that good faith reasons existed for the rezoning refusal and that the action did not have a racially discriminatory effect. The Court of Appeals for the Seventh Circuit reversed, finding that assessing the Board action in "its historical context and ultimate effect," the action had "the effect of perpetuating both... residential segregation and Arlington Heights' failure to accept any responsibility for helping to solve this problem." Arlington Heights has appealed the case to the United States Supreme Court, where a decision should be rendered later this term. The appeal gives the Supreme Court its first opportunity to examine a variety of issues in recent housing discrimination cases, which were presented by plaintiffs before the Seventh Circuit.

Plaintiffs submitted three arguments, the first being that they had been denied equal protection in that the Arlington Heights zoning policy had been administered in a discriminatory manner. Relying on *Yick Wo v. Hopkins*, they maintained that had the project been one which would not have brought low income minority groups into the area, the requested zoning change would have been granted. A similar contention was recently accepted in *United Farmworkers of Florida Housing Project, Inc. v. City of Delray Beach*. Delray Beach involved a refusal by city officials to give permission to a proposed housing project planned for black, Puerto Rican, and Mexican-American farmworkers to tie into the city's existing water and sewer systems. City officials had claimed this would have violated the city's annexation and land use plans. The Fifth Circuit Court of Appeals found that the facts clearly indicated that the Delray Beach city officials had made previous exceptions to both its annexation and land use plans for whites, yet refused to make such exceptions for the black or brown farmworkers. Thus the court concluded that although the city was under no initial

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5 Id.
9 517 F.2d at 411.
11 Id. at 210.
12 517 F.2d at 413.
13 Id. at 414.
15 118 U.S. 356 (1886).
16 493 F.2d 799 (5th Cir. 1974).
obligation to make exceptions to its established policies, "once it begins to do so, it must do so in a racially non-discriminatory manner." Delray Beach is one of the few housing cases applying the "discriminatory as administered" standard of Yick Wo. Generally the level of proof required for such a finding is extremely difficult to obtain, and most courts, as did the Seventh Circuit in Arlington Heights, turn to other arguments.

In Arlington Heights the Seventh Circuit concluded from the facts that the Village "buffer zone" policy had not been administered in a racially discriminatory fashion. Although the record indicated several instances where the "buffer zone" policy may have been violated, the court declined to find clearly erroneous the district court's holding that in acting on the request, the defendants were concerned with "the integrity of the Village's zoning plan." Relying on the Supreme Court decision in Burton v. Wilmington Parking Authority, the Seventh Circuit noted that "regardless of the Village board's motivation, if this alleged discriminatory effect exists, the decision violates the equal protection clause unless the Village can justify it by showing a compelling interest."

The principle of requiring a finding of a racially discriminatory effect rather than a racially discriminatory motive has been generally accepted by the courts. Due both to the reluctance of courts to find such a motive or purpose, and to the difficulty in proving such a claim, courts have typically adopted the reasoning of the Supreme Court in Burton and required a showing only of a racially discriminatory result in order to gain relief from local actions.

In United States v. City of Black Jack, Missouri, an originally unincorporated community reacted to the proposed construction of a low income housing project by incorporating and enacting a zoning ordinance banning the construction of multiple family dwellings. In discussing the plaintiffs' burden of proof

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17 Id. at 808.
18 517 F.2d at 412.
19 An expert witness for the plaintiffs had testified that of 60 zoning changes, 15 violated the buffer zone policy. The Seventh Circuit found that only four of these claimed violations were genuinely violative of the policy. Defendants' evidence further indicated that prior to the Metropolitan Housing rezoning request, at least two proposed changes were denied on the basis of the buffer zone policy and several other denials partially grounded on this basis, thus indicating that the buffer zone policy was a viable part of the Village's program.
20 517 F.2d at 412.
21 Id. at 412-413.
23 Id. at 725.
24 See United States v. City of Black Jack, 508 F.2d 1179, 1185 (8th Cir. 1974); Hawkins v. Town of Shaw, 437 F.2d 1286, 1292 (5th Cir. 1971); Dailey v. City of Lawton, 425 F.2d 1037 (10th Cir. 1970); SASSO v. Union City, 424 F.2d 291 (9th Cir. 1970); Norwalk Gore v. Norwalk Redevelopment Agency, 395 F.2d 920, 931 (2d Cir. 1968).
25 See note 21 supra.
26 508 F.2d 1179 (8th Cir. 1974).
in the case, the Eighth Circuit maintained that no showing of a racially discriminatory motive was necessary. Expressing their concern about the ease with which racially discriminatory motives may be concealed, and the fact that harm can result from simple thoughtlessness as well as intent, the court concluded that “effect, and not motivation, is the touchstone.”

Although less of a burden than that of establishing a racially discriminatory motive, the use of the effect principle has not avoided other procedural difficulties in situations where housing projects have been blocked by local community action. Government sponsored housing projects are of course mainly for low income groups, which inevitably contain a disproportionate number of racial and ethnic minorities. Courts have, however, generally viewed these community actions as related to wealth classifications, and held that although “traditionally disfavored,” classifications based upon wealth do not rise to the same level of constitutional significance as do those based upon race or ethnic origin. Thus the burden on fair housing advocates has remained that of showing a discriminatory effect on minorities, not the lesser burden of proving a discriminatory impact on the poor generally.

Repeated attempts to broaden the scope of “suspect criteria” to include classifications based upon distinctions in wealth, and efforts to include housing as a “fundamental right” protected under the Constitution have thus far failed, largely as a result of two Supreme Court decisions. In Lindsay v. Normet, the plaintiffs attempted to elevate the desire for particular housing to the status of a “fundamental right” under the Constitution, thus subjecting actions affecting this right to “strict scrutiny” by the courts in ruling upon equal protection violation claims. The Supreme Court rejected this contention, stating that “…the Constitution does not provide judicial remedies for every social and economic ill. We are unable to perceive in that document any constitutional guarantee of access to dwellings of a particular quality.” Although Lindsay dealt with the rights of a tenant under the Oregon Forcible Entry Statute, and is thus distinguishable from the typical housing discrimination case, lower courts have generally accepted the Supreme Court’s analysis and have declined to extend the list of fundamental rights to include housing.

In James v. Valtierra it was argued that the provision of the California Constitution singling out housing projects for low income groups and requiring

\[\text{Id. at 1185.}\]
\[\text{Id. at 1077.}\]
\[\text{Id. at 1185.}\]
\[\text{Id. at 76.}\]
\[\text{See note 36 infra.}\]
\[\text{See note 36 infra.}\]
\[\text{See Citizens Committee for Faraday Wood v. Lindsay, 507 F.2d 1065 (2d Cir. 1970).}\]
\[\text{Lindsay v. Normet contains language to the effect that there is no constitutionally protected right to a certain quality of housing, but this case does not involve racially discriminatory site selection (or non-selection). Lindsay v. Normet, moreover, is essentially a case dealing with procedural due process..., rather than the equal protection claim here.}\]
\[\text{402 U.S. 137 (1971).}\]
them to be approved by a local referendum violated the equal protection clause of the Fourteenth Amendment by discriminating against the potential residents of the housing project. Although relying on specific factors present in the case such as a long history of referendums in California on a variety of subjects, the Supreme Court indicated that classifications based upon wealth do not rise to the level of "suspect criteria," and thus are not subject to "strict scrutiny" by the courts. Most courts, including the Seventh Circuit in Arlington Heights, have interpreted James to mean this, and have instructed plaintiffs in housing cases they must show a racially discriminatory effect and not merely an economically discriminatory effect.

Failing in direct efforts to have wealth distinctions declared constitutionally suspect, attempts have been made to show that actions which affect low income groups are in effect actions against racial minorities, since low income groups are generally composed of a high proportion of racial and ethnic minorities. Although perhaps more successful in the equal employment area, this argument has been recognized as valid in at least one housing case. In Citizens for Faraday Wood v. Lindsay, the Second Circuit found that termination of a housing project for low and middle income families "did not have an unconstitutionally racially discriminatory effect because 80 percent of the units in the project were reserved for middle income families and thus the brunt of the project's termination was borne by those families." The court suggested, however, that this conclusion would be altered if the composition of the group involved changed. "Unlike the case where low income families are involved, there is no reason to assume that a disproportionate number of the middle income families affected would be non-white." Thus the court indicated that had the project been strictly for low income persons, this might have been sufficient to declare the action violative of the fourteenth amendment's equal protection clause.

In Arlington Heights the Seventh Circuit ruled that the fact racial minorities make up a large percentage of low income groups does not make decisions which

35 The Article requires referendum approval for any low-rent housing project, not only for projects which will be occupied by a racial minority, and the record here would not support any claim that a law seemingly neutral on its face is in fact aimed at a racial minority.

Id. at 141.


37 517 F.2d at 413.


39 507 F.2d 1065 (2d Cir. 1974).

40 Id. at 1067-68.

41 Id.

42 Several courts have, however, explicitly rejected efforts to show income discrimination is actually racial discrimination. In Ybarra v. Town of Los Altos Hills, the Ninth Circuit denied a challenge to the constitutionality of a large lot zoning ordinance and stated that, "... discrimination against the poor does not become discrimination against an ethnic minority merely because there is a statistical correlation between poverty and ethnic background." 503 F.2d 250, 253 (9th Cir. 1974). See also English v. Town of Huntington, 448 F.2d 319, 324 (2d Cir. 1971).
affect these groups racially discriminatory governmental actions. They did indicate, however, that at some undefined point the correlation between being poor and being black or brown would be so great that courts could no longer ignore it. Stating a tentative principle, however, that "governmental actions having a disproportionate impact on a class composed of an extremely high percentage of racial minorities might be classified as discriminatory. . . .", the court then proceeded to nullify this suggested approach. Relying on *James v. Valtierra*, the court said that even though in that case the briefs indicated that the rejected housing projects would likely have been inhabited by a disproportionately high minority population, the Supreme Court nevertheless "explicitly rejected the contention that the provision created a racial distinction that is subject to strictest scrutiny." This may constitute an unwarranted extension of the Supreme Court's opinion in *James*, particularly in light of the fact that the "disproportionate impact" argument was never specifically discussed in that decision, and additionally, the implicit recognition of this argument by the Supreme Court in *Griggs v. Duke Power Co.*

Although the Seventh Circuit concluded that the Arlington Heights zoning policy had not been administered in a racially discriminatory manner, and further, that the probability that a higher percentage of minority groups than others would be adversely affected does not constitute a racially discriminatory effect for equal protection purposes, the court argued that the analysis of racial discrimination must "extend further." Relying on previous decisions, the court stated that the effect of the refusal to rezone "must be assessed not only in its immediate objective but its historical context and ultimate effect." This standard was first expressed in *Kennedy Park Homes Association v. City of Lackawanna* and subsequently expanded upon in later decisions.

In *United Farmworkers of Florida Housing Project, Inc. v. City of Delray Beach*, the Fifth Circuit found that the city had discriminated in the administration of its annexation policy and master land use plan. The Fifth Circuit then continued its analysis with an examination of the "historical context and

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43 517 F.2d at 413.
44 Id.
45 Id.
46 401 U.S. 424 (1971). *Griggs* involved a company policy requiring a high school education or the passing of a general intelligence test as a condition of employment. The Court of Appeals had ruled that although these requirements operated to exclude a disproportionate number of blacks from employment, this did not make the tests unlawful under Title VII of the Civil Rights Act of 1964.

The Supreme Court stated that the Act proscribes "Practices that are fair in form, but discriminatory in operation." *Id.* at 431. Although relying in part upon the fact past discriminatory practices existed in the company, the court did recognize that black people were adversely affected by the company policy in holding for the plaintiffs.

47 See notes 14-19 & accompanying text supra.
48 See notes 39-42 & accompanying text supra.
49 517 F.2d at 413.
51 517 F.2d at 413.
52 436 F.2d 108, 112 (2d Cir. 1970).
53 493 F.2d 799 (5th Cir. 1974).
54 Id. at 808.
the ultimate effect of the city's action. . . .” Examination of Delray Beach's past practices with respect to low income housing revealed not only that an extremely small number of housing units were presently available for low income persons, but also that on at least one previous occasion the city council had blocked a housing project similar to the farmworkers' present effort. The court further concluded that the “ultimate effect” of the city action was highly discriminatory:

First, the confinement of low income housing construction to the segregated area of the city; second, a further reinforcement of segregation in the city because minority citizens in disproportionate numbers live in low income housing; and third, a frustration of efforts to construct housing which farmworkers can afford.

The Fifth Circuit's analysis is significant because it looks beyond the circumstances of the specific action taken by the city and complained of by the plaintiffs, and examines in broader terms past practices and attitudes of the community and what the action means for the future development of the area.

In Arlington Heights, the Seventh Circuit examined the history of housing patterns in Chicago and concluded that there had existed “a high degree of racial residential segregation.” Citing statistics showing that of 64,884 residents in Arlington Heights, only 27 were black, the court concluded that Arlington Heights was racially segregated, even though “no direct action attributable to Arlington Heights” causing this result could be pointed to.

The ultimate effect of the refusal to rezone, said the court, was that no low income housing would probably be built in Arlington Heights, thus denying blacks an opportunity to live in the area. The court found that there was no other feasible site for the project in Arlington Heights, and that the Village had no other plans ongoing or planned for the future which would aid in “easing the problem of de facto segregated housing.” The court concluded that the refusal to rezone to permit the project to be built had the effect of “perpetuating both this residential segregation and Arlington Heights' failure to accept any responsibility for helping to solve this problem.”

55 Id. at 810.
56 Id.
57 Id.
58 Id. at 810-811.
59 517 F.2d at 413. See also Clark v. Universal Builders, Inc. 501 F.2d 324, 334-35 (7th Cir. 1974).
60 Id. at 413-14. The use of statistics in housing discrimination cases has been increasingly relied on. See Mahaley v. Cuyahoga Metropolitan Housing Authority, 355 F. Supp. 1257, 1263 (N.D. Ohio 1973), rev'd on other grounds, 500 F.2d 1087 (6th Cir. 1974). See also Bogen and Falcon, The Use of Racial Statistics in Fair Housing Cases, 34 Mo. L. Rev. 59 (1974).
61 517 F.2d at 414.
62 Id.
63 In his dissenting opinion, Judge Fairchild disputed the finding by the court that no other site was available for the project. Noting that the district court found that some properly zoned land was still available to the plaintiffs (373 F. Supp. at 211), Judge Fairchild declined to hold this finding clearly erroneous. 517 F.2d at 461 (Fairchild, J., dissenting).
64 Id. at 414.
65 Id.
In specifically pointing out the lack of efforts on the part of the Village to bring in low income residents, the Seventh Circuit went beyond other courts applying the "historical context and ultimate effect" analysis. In Delray Beach the Fifth Circuit had made a finding that on at least one other occasion the City had acted to block construction of a low income housing project for racial reasons. No such finding was made in Arlington Heights by the Seventh Circuit. Rather the court concluded that even though the Village had not taken positive actions to keep out low income groups prior to this refusal to rezone, neither had it acted affirmatively to bring them in. The Seventh Circuit relied heavily on one of its own earlier decisions, Clark v. Universal Builders, Inc. In Clark the court held it was a violation of § 1982 for a seller of new housing to take advantage of a racially segregated housing market situation by demanding from black buyers "prices and terms unreasonably in excess of prices and terms available to white citizens for comparable housing." The builder could not exploit the situation even though he was in no way responsible for the discrimination that created the problem. Clark marked a break from the "traditional" view of racial discrimination which held liable only those directly responsible for discrimination. This "new" theory expressed in Clark holds liable parties who may not themselves discriminate in the traditional sense, but who "exploit" a situation created by "social or economic forces tainted by racial discrimination."

In Arlington Heights the Seventh Circuit extended its holding in Clark and held that a community not only cannot exploit or even ignore a racially discriminatory situation created by others, but must act affirmatively to end this situation. Arlington Heights, stated the court, has been "exploiting" a situation similar to the way the builders did in Clark. By refusing to rezone to permit low income groups to reside in Arlington Heights, the Village rejected an opportunity to reverse the trend of residential racial segregation. The court therefore held that "under the facts of this case Arlington Heights rejection . . . has racially discriminatory effects."

Although never expressed before in such specific terms, other decisions have spoken of an "affirmative duty" to act in a manner which will alleviate residential segregation. It has been the opinion of several courts that the fair housing legis-

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66 See note 53 supra.
67 501 F.2d 324 (7th Cir. 1974).
68 Id. at 334.
69 517 F.2d at 414.
70 In Clark it was shown that the defendant builders charged both blacks and whites the same amount when either race attempted to purchase in a particular market. Thus the builders maintained they were not guilty of any form of racial discrimination, but rather that their pricing policies merely reflected the relative availability of housing in different areas of the city.
72 517 F.2d 414-15.
73 Id. at 415.
lation imposes an affirmative duty on federal\textsuperscript{74} and local\textsuperscript{75} housing authorities to act to eliminate residential racial segregation. In \textit{Otero v. New York City Housing Authority},\textsuperscript{76} the court stated that the legislation requires housing authorities “not merely to follow a policy of color blindness, but literally to act affirmatively to achieve fair housing, that is not merely to desegregate, but to integrate housing.”\textsuperscript{77} In \textit{SASSO v. Union City}\textsuperscript{78} the Ninth Circuit believed this affirmative duty to integrate housing extends at least to a community’s own residents:

Given the recognized importance of equal opportunities in housing, it may well be, as a matter of law, that it is the responsibility of a city and its planning officials to see that the city’s plan as initiated or as it develops accommodates the needs of its low income families, who usually—if not always—are members of minority groups.\textsuperscript{79}

As mentioned, the court’s language appears to extend only to a community’s own residents, and not to groups wishing to move in.

It should be no surprise that not all courts have felt comfortable imposing an “affirmative action” program upon an entire community. In \textit{Acevedo v. Nassau County},\textsuperscript{80} plans for the construction of low income housing on an Air Force base were abandoned by the county in favor of the construction of a federal office building. In rejecting plaintiffs’ demand that the housing plans be reinstated, the court stated that:

Here appellants seek not to remove governmental obstacles to proposed housing but rather to impose on appellees an affirmative duty to construct housing. This is clearly not required by any provision of the Constitution.\textsuperscript{81}

Although distinguishable from \textit{Arlington Heights}, since \textit{Acevedo} involved what was essentially the county’s own project, while \textit{Arlington Heights} concerned a refusal to permit an independent housing contractor to construct the project, the principle of an affirmative duty to act in some manner to bring in minority groups is the same in both cases. This presents a question as to the broadness of ‘the

\footnotesize{\textsuperscript{74} See \textit{Shannon v. HUD}, 436 F.2d 809 (1970).
\textsuperscript{77} Id. at 943.
\textsuperscript{78} 424 F.2d 291 (9th Cir. 1970).
\textsuperscript{79} Id. at 295-96.
\textsuperscript{80} 500 F.2d 1078 (2d Cir. 1974).
\textsuperscript{81} Id. at 1081.}
“affirmative duty.” Did the Seventh Circuit intend for it to extend, as in Arlington Heights, only to the situation in which a community is presented with an opportunity to permit low income housing to be built, or does it extend further, as in Acevedo, to actually requiring a community to construct such housing? Should the Seventh Circuit be upheld in Arlington Heights by the Supreme Court, this distinction would offer a basis for limiting the holding.

It should be apparent that Arlington Heights is the most explicit statement yet by any court of an affirmative duty to correct a racially discriminatory situation which may exist in a community. Not only does Arlington Heights extend the “historical context and ultimate effect” standard beyond simply looking for past discriminatory practices to examining whether the community had ever acted affirmatively to correct de facto segregation, but further imposes this duty not merely upon local housing authorities, but also upon the entire community through its local elected zoning officials.

The finding by the Seventh Circuit that the Village’s action had a racially discriminatory effect led the court to the final step in its equal protection analysis. Having such an effect, the action could be upheld only if a “compelling state interest” could be shown to have required the action. The Village argued that at least two interests rose to the level of compelling state interest: the desire to maintain the integrity of the zoning plan, and the desire to protect surrounding property values. In dismissing the first of these contentions the court noted that changes in the zoning policy had previously been adopted by the Village, and more importantly, that the project was to consist of townhouses very similar to the neighboring single family residences. Thus the court found that the “planning rationale behind the buffer zone policy has only a minimal applicability to this type of . . . development.” As to the contention that property values would be decreased as a result of the housing project, the court questioned whether a purely monetary consideration could ever be a compelling state interest, and further stated that the property owners who may suffer a loss in the value of their property due to the variance should not have expected that no changes would ever be made in the zoning plan.

Since on only one occasion has the Supreme Court ever found a state interest compelling enough to justify action having a discriminatory effect, it seems a mere formality for the Seventh Circuit to even address the Village’s claims. It may be suggested, however, at least in the area of zoning policy, that as communities continue to grow and expand in ill-planned and often haphazard fashions, pressure will grow for courts to look upon zoning ordinances which are truly for

83 517 F.2d at 415.
84 Id.
85 Id.
86 Id.
88 517 F.2d at 415.
legitimate purposes with more favor. Certainly a zoning policy which attempts to order growth and preserve legitimate facets of a community should not immediately be declared suspect. As the Supreme Court stated in *Village of Belle Terre v. Borass*:

A quiet place where yards are wide, people few, and motor vehicles restricted are legitimate guidelines in a land use project addressed to family needs. . . . The police power is not confined to elimination of filth, stench, and unhealthy places. It is ample to lay out zones where family values, youth values, and the blessings of quiet seclusion, and clean air make the place a sanctuary for people.

This serves to point out the growing conflict between two social policies; open housing programs and environmental concerns expressed through zoning regulations. As communities adopt zoning ordinances designed to slow and order growth in neighborhoods the result is often an increase in the cost of housing in those neighborhoods, thus effectively shutting out lower income persons. This of course has been the background for numerous lawsuits, including cases previously discussed in this comment. *Ybarra v. Town of Los Altos Hills* involved a challenge to the constitutionality of a large-lot zoning ordinance which, plaintiffs alleged, discriminated against low income and minority groups. The Ninth Circuit rejected the contention that there was a racially discriminatory effect and further declined to find wealth a suspect criterion. Thus the court held that the town need only show that the ordinance bore a rational relationship to a legitimate governmental interest. The court concluded that on the facts "the ordinance is rationally related to preserving the town's rural environment," and thus did not violate the fourteenth amendment.

Both *Belle Terre* and *Ybarra* provide examples of objectives courts have held to be legitimate governmental interests: "the preservation of quiet family neighborhoods (*Belle Terre*) and the preservation of a rural environment (*Los Altos Hills*)." Although it is unlikely these objectives will be viewed by courts in the near future as state interests compelling enough to permit discriminatory actions of a racial or ethnic nature, the recognition of such objectives as legitimate governmental goals at least suggests the increased importance aesthetic and environmental concerns are playing in judicial decision-making.

A further example of this growing importance was provided by the Ninth Circuit in *Construction Industry Association of Sonoma County v. City of Petaluma*. The city of Petaluma had instituted a plan designed to limit the growth

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90 See *Construction Industry Association of Sonoma County v. City of Petaluma*, 522 F.2d 897 (9th Cir. 1975); *Ybarra v. Town of Los Altos Hills*, 503 F.2d 250 (9th Cir. 1974).


92 Id. at 9.


94 503 F.2d 250 (9th Cir. 1974).

95 Id. at 254.

96 Id.

97 *Construction Industry Association of Sonoma County v. City of Petaluma*, 522 F.2d 897, 907-08 (9th Cir. 1975).

98 Id.
of the city by placing a ceiling on the number of dwelling units to be constructed in a single year, and by requiring a 200 foot "greenbelt" around the City which would serve as a boundary for expansion. Although denying the plaintiffs' standing to present possibly their strongest argument, that of interference with the right to travel, the court concluded that "the concept of the public welfare is sufficiently broad to uphold Petaluma's desire to preserve its small town character, its open spaces and low density of population, and to grow at an orderly and deliberate pace."

Although recognizing the possible rise in housing costs the Petaluma Plan might result in, the court suggested that such a plan need not necessarily result in the exclusion of low income persons. Indeed, noted the court, Petaluma's plan was designed in such a manner as to possibly result in increased numbers of low income persons moving into the area. Since the plan required housing permits to be evenly distributed between single family and multiple family units, and additionally required that 8 to 12 percent of the units be constructed for low and moderate income persons (as contrasted with the pre-plan practice of issuing permits mainly for middle income groups), the court noted that the plan could even be termed "inclusionary."

Balancing the desires of a community to grow in an orderly fashion and yet avoid excluding low cost housing in areas of job availability is one of the most urgent problems facing metropolitan areas today. Although revitalizing the inner city where minority members are heavily concentrated should be of great concern, minority groups cannot simply be told to stay where they are and wait for downtown areas to be rebuilt and jobs to reappear. A chance to move outside the inner city areas where opportunities appear greater and more immediate must be provided. Although to speak of an "affirmative duty" on the part of communities to bring in these minority groups seems an overstatement of what a community's responsibility should be, care certainly must be taken to avoid metropolitan areas with "... the racial shape of a donut, with the Negroes in the hole and with mostly whites occupying the ring."

Jon R. Robinson

CONSTITUTIONAL LAW—SEX DISCRIMINATION—CLASSIFICATION BASED SOLELY ON SEX VIOLATES EQUAL PROTECTION ABSENT A RATIONAL JUSTIFICATION ALTHOUGH IN CONTEXT OF TWENTY-FIRST AMENDMENT REGULATION OF LIQUOR DISPENSING ESTABLISHMENTS

White v. Fleming

Section 90-25 of the Milwaukee Code of Ordinances prohibits female employees, except members of the immediate family or household of the licensee, of Class "B" taverns from standing or sitting at or behind the bar or from sitting

99 Id. at 904-05.
100 Id. at 908-09.
101 Id. at 908, n.16.
with any male patron anywhere on the premises. Following her arrest by the Milwaukee Police Department for violation of § 90-25, Dorothy Ann White brought suit in the United States District Court, Eastern District of Wisconsin, against the Milwaukee Police Department, the Milwaukee City Attorney, and the state judge before whom her prosecution was pending, alleging that the gender classification contained in the ordinance rendered it invalid on its face as a violation of the fourteenth amendment equal protection clause. Although the charge against Mrs. White was subsequently dismissed on the testimony of the arresting officer, the district court retained jurisdiction over the claim for injunctive and declaratory relief, denying defendants' motion for summary judgment based on mootness. Ruling on the merits, the court then granted summary judgment in favor of Mrs. White, declaring the ordinance in question unconstitutional and enjoining its enforcement against her.

The Court of Appeals for the Seventh Circuit, Tone, Circuit Judge, affirmed the district court's holding that the Milwaukee ordinance violated the equal protection clause since its classification was based solely upon sex.

While the result in White v. Fleming was dictated by the Constitution's equal protection clause, the decision represents a victory over a historical acquiescence to legislation and governmental action which has denied the women of the United States the equal protection of the laws. The case must be considered in light of the judiciary's traditional acceptance of sex-based classifications, an acceptance resulting from its protective attitude toward women in general and its particularly paternal approach when ruling upon discriminatory regulations affecting women in the context of liquor dispensing establishments, the twenty-first amendment providing the justification. White v. Fleming will therefore be examined first in its historical setting. Inquiry into the appropriate constitutional standard applicable to sex-based classifications and the Seventh Circuit's approach to this problem will then be made.

Historical Acquiescence to Sex-based Classifications

The fourteenth amendment to the United States Constitution, adopted in 1868, provides that no State "shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States... nor deny to any person within its jurisdiction the equal protection of the laws." Five years later,

1 90-25. FEMALE EMPLOYEES BEHIND BARS. Any female entertainer, waitress, or female employee of any Class "B" intoxicating liquor licensed premises who shall at any time stand or sit at or behind the bar, except for the specific purpose of receiving food or drink orders for delivery to patrons who are not at the bar, or any female entertainer, waitress, or female employee who shall sit at any table or in any booth or elsewhere on the premises with any male patron, shall be punished by a fine not to exceed twenty-five dollars, or in default of payment thereof be committed to the county jail or house of correction of Milwaukee county for not to exceed sixty days or until such fine and costs shall be paid. ... The provisions of this section shall not apply to female employees who are members of the immediate family and household of the licensee.

3 Id.
4 A motion to dismiss as to the Milwaukee Police Department was also granted.
5 White v. Fleming, 522 F.2d 730 (7th Cir. 1975).
6 U.S. Const., amend. XIV, § 1.
however, the celebrated opinion of Justice Bradley in Bradwell v. State\(^7\) reflected an attitude toward women which for many years effectively denied them the status of “persons” for purposes of fourteenth amendment protections.

Man is, or should be, woman’s protector and defender. The natural and proper timidity and delicacy which belongs to the female sex evidently unfits it for many of the occupations of civil life. The constitution of the family organization, which is founded in the divine ordinance, as well as in the nature of things, indicates the domestic sphere as that which properly belongs to the domain and functions of womanhood. The harmony, not to say identity, of interests and views which belong, or should belong, to the family institution is repugnant to the idea of a woman adopting a distinct and independent career from that of her husband.

... The paramount destiny and mission of woman are to fulfill the noble and benign offices of wife and mother. This is the law of the Creator.\(^8\)

While this outspoken paternalism is no longer popular, the sexual discrimination resulting therefrom persists.\(^9\) Indeed, until 1971\(^10\) the Supreme Court had never held that discrimination against women violated the equal protection clause.\(^1\) In a 1973 opinion joined by Justices Douglas, White, and Marshall, Justice Brennan noted the pervasive nature of sexual discrimination throughout the history of the United States:

As a result of notions such as these [e.g., “romantic paternalism”], our statute books gradually became laden with gross, stereotypical distinctions between the sexes and, indeed, throughout much of the 19th century the position of women in our society was, in many respects, comparable to that of blacks under the pre-Civil War slave codes. Neither slaves nor women could hold office, serve on juries, or bring suit in their own names, and married women traditionally were denied the legal capacity to hold or convey property or to serve as legal guardians of their own children. And although blacks were guaranteed the right to vote in 1870, women were denied even that right ... until adoption of the Nineteenth Amendment half a century later.\(^12\)

A popular rationale for approval of sex discrimination developed in the context of liquor dispensing establishments,\(^13\) courts relying on the twenty-first

\(7\) 83 U.S. (16 Wall.) 130 (1873) (Bradley, J., concurring).
\(8\) Id. at 141.
\(9\) See Frontiero v. Richardson, 411 U.S. 677, 685-86 (1972) [footnotes omitted]:
It is true, of course, that the position of women in America has improved markedly in recent decades. Nevertheless, it can hardly be doubted that, in part because of the high visibility of the sex characteristic, women still face pervasive, although at times more subtle, discrimination in our educational institutions, in the job market and, perhaps most conspicuously, in the political arena.
\(10\) See Reed v. Reed, 404 U.S. 71 (1971).
\(12\) Frontiero v. Richardson, 411 U.S. 677, 685 (1973).
\(13\) The Court has not limited its approval of sex discrimination to situations involving liquor dispensing establishments. As recently as 1961, the Supreme Court condoned unequal treatment based on sex when it sustained a law which placed women on jury lists only if they made special requests, noting that women were “still regarded as the center of home and family life.” Hoyt v. Florida, 366 U.S. 57 (1961). Hoyt has been effectively overruled, however, by Taylor v. Louisiana, 419 U.S. 522 (1975), which held that a similar statute deprived the defendant of the right to a fair and impartial jury. While the decision was not based on equal protection grounds, the Court noted that “It is untenable to suggest these days that it would be a special hardship for each and every woman to perform jury service or that society cannot spare any women from their present duties.” 419 U.S. at 534-35.
amendment to support the validity of statutes which afforded unequal treatment to women. In 1948, the constitutionality of a Michigan statute which required bartenders to be licensed in cities having populations of 50,000 or more, but which prohibited females from being so licensed unless "the wife or daughter of the male owner" of a licensed liquor establishment was upheld. In the majority opinion written by Justice Frankfurter, the power of a state to treat men and women differently was accepted without question, particularly in matters involving liquor traffic regulation, an area to which fourteenth amendment protections were not believed to extend:

The Fourteenth Amendment did not tear history up by the roots, and the regulation of the liquor traffic is one of the oldest and most untrammeled of legislative powers. Michigan could, beyond question, forbid all women from working behind a bar. This is so despite the vast changes in the social and legal position of women. The fact that women may now indulge in vices that men have long practiced, does not preclude the States from drawing a sharp line between the sexes, certainly, in such matters as the regulation of the liquor traffic, ... The Constitution does not require legislatures to reflect sociological insight, or shifting social standards, any more than it requires them to keep abreast of the latest scientific standards.

Yet, while recognizing that the Milwaukee ordinance challenged in White v. Fleming also involved a liquor dispensing establishment, the Seventh Circuit Court of Appeals further recognized that society's recently changed attitude toward women has been reflected in both court decisions and Congressional action.

While the Supreme Court has not yet overruled Goesaert v. Cleary, the judicial and social climate has changed since that case was decided. ... Thus, while we would not be free to disregard Goesaert in a case from which it was indistinguishable, ... neither do we feel bound to extend its holding in light of the developments of recent years in the law of equal protection.

14 See White v. Fleming, 522 F.2d 730, 732 (7th Cir. 1975):
State courts and lower federal courts before and after Goesaert v. Cleary sustained without much critical examination and usually based upon the traditional sex-role of women (see Women's Liberation Union of Rhode Island v. Israel, 379 F. Supp. 44, 50-51 (D.R.I. 1974)), statutes which forbade the sale of liquor to women, the employment of women, and even the presence of women in liquor dispensing establishments.

16 Id. at 465-66.
17 Indeed, in 1963, the same Milwaukee ordinance was upheld by the Wisconsin Supreme Court. City of Milwaukee v. Piscune, 18 Wis. 2d 599, 119 N.W.2d 442 (1963).
20 522 F.2d at 732-33.
Acknowledging that the Supreme Court in *California v. LaRue*\(^{21}\) had reaffirmed the state's broad power under the twenty-first amendment to regulate traffic in liquor, Judge Tone pointed out that *LaRue* had not held that all other constitutional provisions were thereby superseded in that area.\(^{22}\) Indeed, Justice Stewart's concurring opinion in *LaRue* specifically addressed this issue:

> This is not to say that the Twenty-first Amendment empowers a State to act with total irrationality or invidious discrimination in controlling the distribution and dispensation of liquor within its borders. And it most assuredly is not to say that the Twenty-first Amendment necessarily overrides in its allotted area any other relevant provision of the Constitution.\(^{23}\)

Thus, the Seventh Circuit Court of Appeals relied upon *LaRue* in noting that while the Milwaukee ordinance under review involved liquor dispensing establishments, this was only one circumstance entitled to weight in determining the constitutional validity of the ordinance: "It is still necessary to consider and apply the appropriate equal protection test. . . ."\(^{24}\)

**The Appropriate Standard of Review: Rational Basis, Strict Scrutiny, or an Intermediate Test?**

The "appropriate equal protection test" to be applied in a situation involving gender classification, however, is problematic. The Supreme Court has traditionally made use of two separate standards for determining the constitutionality of a state's actions under the equal protection clause. The older standard, expounded in *McGowan v. Maryland*,\(^{25}\) requires that a rational relationship exist between the state's legitimate objective and the classification used to attain such objective.

Although no precise formula has been developed, the Court has held that the Fourteenth Amendment permits the States a wide scope of discretion in enacting laws which affect some groups of citizens differently than others. The constitutional safeguard is offended only if the classification rests on grounds wholly irrelevant to the achievement of the State's objective. State legislatures are presumed to have acted within their constitutional power despite the fact that, in practice, their laws result in some inequality. A statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it.\(^{26}\)

Thus, development of the "rational basis" standard was largely a result of the Court's belief that substantial deference should be given to legislative judgment even in those areas in which fourteenth amendment protections were at stake. The burden was placed on the "one who assails the classification" to show that it was essentially arbitrary, with no rational relationship to any legitimate

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\(^{22}\) 522 F.2d at 733.

\(^{23}\) 409 U.S. at 120.

\(^{24}\) 522 F.2d at 733.


\(^{26}\) Id. at 425-26.
governmental purpose, whether or not articulated.\textsuperscript{27} If a permissible purpose could be hypothesized, and if the classifications drawn bore some rational relation to such purpose, the statute in question would survive attack under the equal protection clause.

Alternatively, the Court has applied a "strict scrutiny" test whenever an alleged discrimination interferes with the exercise of "fundamental rights,"\textsuperscript{28} or in situations in which the government has employed a "suspect classification," that is, a classification based upon a person's status resulting from accident of birth.\textsuperscript{29} Application of the strict scrutiny test requires the state to show a compelling interest to justify its use of the inherently suspect classification.\textsuperscript{30} The classification must be necessary and not merely reasonably related to the accomplishment of the statute's purpose, a purpose which must be so compelling as to outweigh the constitutionally protected rights thereby impinged.\textsuperscript{31}

Classifications which have been recognized as inherently suspect by the Supreme Court include those based on race,\textsuperscript{32} alienage,\textsuperscript{33} and national origin.\textsuperscript{34} Although a person's gender is also an accident of birth and is equally immutable as the aforementioned characteristics, the Court has been reluctant to categorize gender classifications as suspect. In view of the Court's long-held aversion to recognizing sex discrimination as violative of equal protection under any standard,\textsuperscript{35} such reluctance is not surprising. It has, however, caused considerable confusion in the lower courts when issues involving gender classifications arise.\textsuperscript{36}

Until 1971, the lower courts could safely have held such classifications valid, since there was no Supreme Court precedent to the contrary. In 1971, in \textit{Reed v. Reed},\textsuperscript{37} the Court held invalid an Idaho statute which gave preference to male applicants over female applicants for appointment as administrators of decedents' estates. Discarding the contention that the statute was a reasonable measure aimed at reducing the workload of probate courts by eliminating one class of contests—those resulting when persons of equal qualification but of different sex applied for the appointment—and implicitly rejecting the rationale that "men [are] as a rule more conversant with business affairs than women," the Court held that administrative convenience, even though a legitimate interest, did not justify discrimination between the sexes.\textsuperscript{38} The Court thereby reversed the Idaho Supreme Court's holding and departed from the ten-year-old \textit{McGowan} formulation that "a statutory discrimination will not be set aside if any state of facts

\textsuperscript{29} See notes 32-34.
\textsuperscript{31} Id.
\textsuperscript{34} See Oyama v. California, 332 U.S. 633 (1948); Korematsu v. United States, 323 U.S. 214 (1944); Hirabayashi v. United States, 320 U.S. 81 (1943).
\textsuperscript{35} See text accompanying notes 7-15 supra.
\textsuperscript{36} See text accompanying notes 48-52 infra.
\textsuperscript{37} 404 U.S. 71 (1971).
reasonably may be conceived to justify it." The Reed Court recognized that the Idaho statute "provides that different treatment be accorded to the applicants on the basis of their sex; it thus establishes a classification subject to scrutiny under the Equal Protection Clause." So, while the Court acknowledged that the statute "established a classification subject to scrutiny," it did not characterize the classification as "suspect" or the scrutiny as "strict." The Court did not say that strict scrutiny was an inappropriate test to apply to sex-based classifications, but neither did it approve such a standard. Moreover, since the more lenient rational basis test, as modified, was not even satisfied, the Idaho statute's validity under the strict scrutiny—compelling state interest test was never addressed. It was the Court's determination that unless a statute's objective, in that case administrative convenience, was advanced in accordance with the command of the equal protection clause, the relationship between the legitimate objective and the statutory classification could not be considered "rational."

The Equal Protection Clause of that amendment does, however, deny to States the power to legislate that different treatment be accorded to persons placed by a statute into different classes on the basis of criteria wholly unrelated to the objective of that statute. A classification "must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike." Royster Guano Co. v. Virginia. [253 U.S. 412, 415 (1920).]

The Court's use of a standard more stringent than the traditional rational basis test when reviewing a sex-based classification laid the foundation for the second major Supreme Court decision involving sex discrimination, Frontiero v. Richardson. The Court there considered a statute which allowed a serviceman to claim his wife as a "dependent" for purposes of increased housing, medical and dental benefits whether or not she was in fact dependent on him for support, while a servicewoman could not claim her husband as a dependent unless he was in fact dependent upon her for over one-half of his support. The statute was held unconstitutional, a plurality of the Court agreeing that classifications based upon sex were inherently suspect and required application of the strict scrutiny test.

Moreover, since sex, like race and national origin, is an immutable characteristic determined solely by accident of birth, the imposition of special disabilities upon the members of a particular sex because of their sex would seem to violate "the basic concept of our system that legal burdens should bear some relationship to individual responsibility...." According to the plurality, the Court's unanimous decision in Reed v. Reed lent implicit support to its decision, the plurality's reasoning apparently progress-

40 404 U.S. at 75.
41 Id. at 75-76.
43 Justice Brennan's opinion was joined by Justices Douglas, White, and Marshall.
44 411 U.S. at 686-87.
ing in the following manner: Because the Court in Reed recognized a legitimate legislative purpose and because the classification utilized would rationally promote such purpose, the Court must have been applying something other than the rational basis test as traditionally espoused; until Reed, the only other standard by which to measure statutes for equal protection purposes had been the strict scrutiny test. Moreover, the plurality’s reasoning continued, an intermediate approach had not explicitly been adopted in Reed. If, then, a strict scrutiny standard had not been expressly sanctioned in Reed, neither had it been rejected, leaving open the possibility of its application in an appropriate case.

While the concurring justices agreed with the plurality that the result in Frontiero was controlled by Reed, they did not agree that Reed had, implicitly or otherwise, categorized sex as a suspect criterion. Justice Powell, joined by Chief Justice Burger and Justice Blackmun, noted that because the Equal Rights Amendment, if adopted, would “resolve the substance of this precise question,” the Court should defer to the state legislatures for resolution of the issue. Thus, Justice Powell would apparently prefer to continue, at least for the several years necessary to determine the success or failure of the Equal Rights Amendment, this country’s checkered history of sexual discrimination. To categorize a constitutional right as a “political” issue to be deferred to the legislature is at best an anomalous approach.

Following the Supreme Court’s decisions in Reed and Frontiero, a number of lower courts began to apply an intermediate standard in sex discrimination cases. The “fair and substantial relation” language of Reed, coupled with the willingness of four members of the Court to consider gender classifications “inherently suspect,” seemed to support a less deferential approach. The Fourth Circuit, for example, postulated that “[a] classification based upon sex is less than suspect; a validating relationship must be more than minimal.” Similarly, the Ninth Circuit viewed Reed and Frontiero as employing “an alternative to both strict and minimal scrutiny.”

The Court there indicated that sex classifications are to be tested on the basis of strict rationality, a standard of review requiring the government (state or federal) to produce evidence that the challenged classification furthers the central purpose of the classifier.

Accordingly, the Second Circuit, ruling on a mandatory maternity leave require-

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45 Justice Powell’s concurring opinion was joined by Chief Justice Burger and Justice Blackmun. Justice Stewart concurred in the judgment in a separate opinion.
46 411 U.S. at 692 (Powell, J., concurring).
47 Id.
48 After Reed and before Frontiero, the First Circuit upheld a statute which imposed different prison sentences for men than for women, but noted that “the state must do more than allow a court to speculate and must in fact demonstrate a substantial relation to a legitimate state objective.” Wark v. Robbins, 458 F.2d 1295, 1297 n.4 (1st Cir. 1972).
49 Eslinger v. Thomas, 476 F.2d 225, 230-31 (4th Cir. 1973) (South Carolina senate resolution permitting females to be employed as clerical assistants but not as pages held unconstitutional).
50 Berkelman v. San Francisco Unified School Dist., 501 F.2d 1264, 1269 (9th Cir. 1974) (use of higher admission standards for female than for male applicants to Lowell High School held violative of equal protection).
51 Id.
ment, noted that "the Court's definition of what constitutes the necessary rational relationship between a classification and a legitimate governmental interest seems to have become slightly, but perceptibly, more rigorous. . ."52

A majority of the Supreme Court has not, however, explicitly supported an intermediate standard. Yet its use of the rational relationship test has not always led to reasonable results. In Cleveland Board of Education v. La Fleur53 the Court found no rational relationship between the valid state interest of preserving the continuity of education and the mandatory maternity leave policies of the public schools. The Court subsequently held, however, that California's disability insurance program which exempted work loss resulting from pregnancy was not violative of equal protection.54 Exempting coverage for pregnancy was thought to be a rational means of maintaining the solvency of the disability fund at a one percent level of contribution. The dissenters noted the invidious nature of the discrimination so practiced:

[B]y singling out for less favorable treatment a gender-linked disability peculiar to women, the State has created a double standard for disability compensation: a limitation is imposed upon the disabilities for which women workers may recover, while men receive full compensation for all disabilities suffered, including those that affect only or primarily their sex, such as prostatectomies, circumcision, hemophilia and gout.55

Comparing Geduldig with Reed, one finds a legitimate government interest in both situations as well as an effective method of promoting such interest. In Reed, the method employed, although effective, was held irrational because it was inconsistent with the equal protection clause, while in Geduldig, California's legitimate interest apparently outweighed the obvious fact that the method employed was discriminatory against one sex. Perhaps the Court is engaged in an unarticulated balancing test by which it characterizes the government action as "rational" when the interest it promotes outweighs the resulting harm, and "irrational" when the discrimination suffered is so invidious that the action causing it is considered insubstantial by comparison. While such a "sliding scale" approach may be the most viable escape from the present judicial quandary, the wisdom of the Court's determination in Geduldig, that the state's interest outweighed that of the persons denied insurance benefits solely on the basis of their sex, is questionable. Surely a less objectionable alternative method of controlling the cost of California's disability insurance program could have been devised.56

In the face of the relative state of confusion in this area of the law, the Seventh Circuit in White v. Fleming noted that

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55 Id. at 501 (Brennan, J., dissenting, joined by Douglas and Marshall, J.J.).
56 The Court's most recent decisions dealing with gender classifications reveal a willingness to find such classifications unconstitutional when rationalized by generalizations of the typical or stereotypical roles of either sex in our society. Weinberger v. Wiesenfeld, 420 U.S. 636 (1975) (struck down Soc. Sec. Act § 402(g), which allowed payment of benefits to the wife, but not to the husband, of a deceased wage earner with minor children); Stanton v. Stanton, 421 U.S. 7, (1975) ("nothing rational" in Utah law which extended period of minority for males to age 21, but for females only to age 18, for purposes of child support).
whatever formulation the Court may ultimately adopt, it can at least be
divined ... that we may not accept a classification based solely on sex with-
out further inquiry as to whether the differences between men and women
rationally justify the classification.\textsuperscript{57}

The interest sought to be promoted by the statute being the "protection of em-
ployees, customers and society generally against promiscuous sexual activity that
is thought likely to follow from contacts between men and women where liquor
is sold by the drink,"\textsuperscript{58} the gender classification could be justified as promoting
such interest only if it were shown that a female employee would be more likely
than a male employee to engage in promiscuous sexual activity with persons of
the opposite sex. The court found no support for such broad assumptions about
all or most women who work in bars or "the relative proclivities of men and
women who work in, or are patrons of, bars."\textsuperscript{59} The court concluded that "it is
impermissible under the equal protection clause to classify on the basis of stereo-
typed assumptions concerning propensities thought to exist in some members of a
given sex."\textsuperscript{60}

Pointing out that the Supreme Court had not yet decided whether sex is an
inherently suspect classification, the Seventh Circuit declined to make such a
determination. It did, however, feel justified in applying an intermediate test:
the result in this case certainly would have been different had the original rational
basis test been used. Moreover, other courts have found similar classifications to
bear a "fair and substantial relationship" to the state's interest.\textsuperscript{61} The Seventh
Circuit commendably held otherwise, notwithstanding the inadequate guidance
provided by the Supreme Court.

It is unfortunate, however, that the court did not elaborate on its final
passage:

There are anatomical and physiological differences between the sexes that
may justify classification for certain purposes. But these differences hardly
include a greater or lesser propensity for a given kind of conduct.\textsuperscript{62}

While this may be a valid statement, its validity cannot satisfactorily be analyzed
without an explanation of which "anatomical and physiological differences" and
which "purposes" the court may have had in mind. Indeed, according to the
dissent in Geduldig, "dissimilar treatment of men and women, on the basis of
physical characteristics inextricably linked to one sex, inevitably constitutes sex
discrimination."\textsuperscript{63} The statement in \textit{White} that there may be differences between

\begin{itemize}
\item \textsuperscript{57} 522 F.2d at 736.
\item \textsuperscript{58} \textit{Id.} at 736-37.
\item \textsuperscript{59} \textit{Id.} at 737.
\item \textsuperscript{60} \textit{Id.}
\item \textsuperscript{61} \textit{See} Ochchina v. Ill. Liquor Control Comm., 28 Ill. App. 3d 967, 329 N.E.2d 353, 355
  (1975), in which a statute and local ordinance permitting revocation of liquor licenses for the
  solicitation of beverages by female employees was upheld:

  A classification based upon sex will suffice as a basis for legislation if that classification
  is based upon a rational difference of situation or condition found to exist in the
  persons or objects upon which the classification rests.

  \item \textsuperscript{62} 522 F.2d at 737 (emphasis added).
\item \textsuperscript{63} 417 U.S. at 501.
\end{itemize}
the sexes which justify sex-based classifications is restricted only by the subsequent sentence asserting that propensity for a given conduct is not one of the justifying differences. A lower court less rational than the Seventh Circuit Court of Appeals could conceivably rely on this final passage in *White v. Fleming* in upholding government action resulting in invidious sex discrimination.

Leslie L. Clune

CONSTITUTIONAL LAW—MINIMUM DUE PROCESS REQUIRES A STATEMENT OF REASONS FOR DENIAL OF PAROLE

*United States ex rel. Richerson v. Wolff*

The Seventh Circuit in *United States ex rel. Richerson v. Wolff* joined the ranks of an increasing number of courts which impose minimum due process requirements upon parole release proceedings. In *Richerson* the court concluded that the due process clause of the fourteenth amendment requires, at a minimum, a written statement of reasons for denial of parole. The *Richerson* court also examined the sufficiency of the statement of reasons given to the petitioner for denial of his application for parole, and concluded that the minimum due process standard was satisfied.

The application of due process protections to parole hearings is a relatively recent development. Until recently, the courts endorsed a "hands off" approach to all types of parole proceedings. Several policy reasons were consistently advanced in support of the judiciary's refusal to review parole procedures. First, it was contended that the complexity of factors entering into the parole decisional process required the courts to totally defer to the expertise of parole boards. The courts feared that judicial review would unduly inhibit the parole board's necessary exercise of its unfettered discretion. Secondly, the courts characterized

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1. 525 F.2d 797 (7th Cir. 1975).
4. 525 F.2d 797, 800 (7th Cir. 1975).
5. Id. at 805.
7. Parole and Sentencing, supra note 8, at 815-21.
parole as a "privilege" or "act of legislative grace." Judicial refusal to review parole decisions was grounded on the belief that the parole board could grant or withhold the privilege of parole at will.8

The availability of judicial review in parole matters was initiated by the Supreme Court in *Morrissey v. Brewer.*9 There, the Court held that minimum due process requirements apply to parole revocation hearings.10 The Court noted that the right/privilege distinction is no longer viable as a method of analysis in the area of constitutional protections.11 The proper test for determining whether due process applies is the extent to which an individual will suffer "grievous loss" as a result of governmental action.12 The Court concluded that since revocation of parole inflicts a grievous loss terminating a parolee's continued liberty, minimal due process protections are applicable.13 The Court acknowledged that the full panoply of procedural rights are not constitutionally required because revocation of parole is not part of a criminal prosecution.14 However, the Court employed a more flexible concept of due process which allows balancing of an individual's interests against the government's interests in determining the procedural protections that are required in a particular situation.15 In a parole revocation hearing, the Court balanced a parolee's interest in his continued liberty against the government's interest in returning the individual to prison without the burden of a new adversary trial if in fact he has violated the conditions of his parole.16

Although the *Morrissey* decision brought the general area of parole within the ambit of judicial review, the applicability of due process requirements to parole release procedures remained undetermined; the *Morrissey* holding extended due process protections only to parole revocation hearings. Initially, the applicability of the *Morrissey* due process requirements was narrowly limited to parole revocation hearings by the Fifth Circuit Court of Appeals in *Scarpa v. United States Board of Parole.*17 The *Scarpa* court held that due process requirements...
do not apply to parole release proceedings. The court in *Scarpa* applied the "grievous loss" test of *Morrissey* and concluded that the denial of parole works no deprivation upon the prisoner since it simply continues the sentence originally imposed. The *Scarpa* decision rejected the application of due process requirements to parole release proceedings on two additional grounds. First, the court observed that denial of parole results in the loss of only the possibility of conditional freedom. The court contrasted this with parole revocation which results in the loss of the right to conditional freedom. Therefore, the court concluded that there was no "liberty" or "property" right to which due process rights could attach. Secondly, the court found that the granting of parole is not an adversary proceeding; consequently, due process rights do not apply.

The Seventh Circuit refused to follow the *Scarpa* decision, finding an alternate basis to infuse procedural protections into parole release hearings. In *King v. United States*, the Seventh Circuit Court of Appeals held that the requirements of the Administrative Procedure Act were applicable to the United States Board of Parole proceedings for the granting or denial of parole. Under § 555(e) of the APA, the Board was required to furnish a brief statement of the grounds for denial of parole. Although the *King* court succeeded in circumventing *Scarpa*, and in bringing minimum procedural protections to parole release hearings, its effectiveness was limited. Since the APA is a federal statute, the brief statement requirement adopted by *King* is applicable only to federal parole boards, leaving the vast number of state parole proceedings without procedural protection requirements. Another shortcoming of the *King* approach is that the precise nature of the "brief statement" requirement of §

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**Footnotes:**

18 477 F.2d 278, 282 (5th Cir. 1973).
19 *Id.*
20 *Id.* at 282-83.
21 492 F.2d 1337 (7th Cir. 1974).

The *King* decision was the first to disregard the long-standing holding of *Hyser v. Reed*, in which the court held that the APA was not applicable to parole boards because of their unique functions. 318 F.2d 225 (D.D.C.), *cert. denied*, 375 U.S. 957 (1965). As the *Richardson* opinion notes, a number of courts followed the *King* decisions: Mower v. Britton, 504 F.2d 396, 397 (9th Cir. 1974); See also, Childs v. United States Bd. of Parole, 511 F.2d 1270, 1286 (D.C. Cir. 1974) (Levanthal, J., concurring); Beard v. Johnson, 391 F. Supp. 748 (E.D. Ill. 1975); Mitchell v. Sigler, 389 F. Supp. 1012 (N.D. Ga. 1975); Reed v. United States, 388 F. Supp. 725 (D. Kan. 1975); Snyder v. United States Bd. of Parole, 383 F. Supp. 1153 (D. Colo. 1974).

In *Pickus v. United States Bd. of Parole*, 507 F.2d 1107 (D.C. Cir. 1974), the Court of Appeals for the District of Columbia held that the United States Board of Parole is an "agency" within the meaning of the APA. The court held that the board is subject to the APA requirement that its informal rulemaking be accompanied by advance notice to the public and opportunity for comment by interested persons. In compliance with the court's holding, the United States Board of Parole followed the notice and comment procedures of § 553(c) of the APA, and were adopted in their final form at 40 Fed. Reg. 41332 (1975). 24 U.S.C.A. § 555(e) (1967) (presently codified as 5 U.S.C. § 555(e) (1970)).

25 492 F.2d 1337, 1345 (7th Cir. 1974).
26 The *Richardson* court noted this limitation at 525 F.2d 797 (7th Cir. 1975). The preferable of a due process approach over an APA approach because of this limitation on *King* is discussed in *Parole Release-Conflict*, supra note 6, at 1273-74.
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555(e) of the APA is unclear. The King court did not clarify the requirement except for its reference to the recommendation of the Administrative Conference of the United States that there should be "at least a sentence or two of particularized explanation." Although the King decision was based upon the APA, the court's dictum provides the framework for the Richerson decision. The King court stated that "... a substantial argument can be made that some modicum of due process should attend the denial of the expectation of conditional freedom on parole inasmuch as its termination inflicts a 'grievous loss' of a 'valuable liberty.' ..." Finally, in United States ex rel. Richerson v. Wolff, the Seventh Circuit squarely faced the issue and held that minimum due process requirements in the form of supplying reasons for a denial of parole attended the Parole Board's release hearings.

The Richerson Court's Analysis: Minimum Due Process Is Applicable to Parole Release Proceedings

In the Richerson case, the petitioner had been sentenced to a term of six to twelve years for three counts of attempted murder and one count of aggravated assault. Approximately twenty-eight months later, the Illinois Parole and Pardon Board denied the petitioner's application for parole. In accordance with Illinois Code of Corrections § 1003-3-5(f), the Board gave the following written statement of the reasons for the denial:

It is the opinion of the Board that an early parole on this offense where police officers were wounded while doing their duty, would depreciate the seriousness of such an offense and would not deter others from committing such crimes. The Board recognizes your excellent institutional adjustment and well conceived parole plans and recommends that you continue in your excellent adjustment in the institution.

The petitioner on a writ of habeas corpus contended that the statement of reasons for denial of his application for parole was "vague and uninformative," and did

27 Comment, Applying the Administrative Procedure Act to Federal Parole Decision Making, 6 St. Mary's L. J. 478, 489 (1974) [hereinafter cited as Federal Parole Decision Making]. Another major criticism of the use of the APA is that the APA could deprive the Parole Board of its desirable administrative flexibility in decision making, and that other requirements of the APA such as the right to counsel in all agency hearings, or a right to public examination of all Board files, could unduly burden the Parole Board's administrative system. Parole Release-Conflict, supra note 6, at 1271-73. The King approach has also been criticized because the "brief statement" requirement of the APA may be satisfied by such a short and general statement that without further elaboration could result in an ineffectual and summary hearing. Furthermore, since § 555(e) does not even require a "brief statement" when the denial is "self-explanatory," it is possible that most parole decisions could be characterized as such, and no reasons at all for denial would be required under the APA. Written Reasons, supra note 6, at 122-23.
28 492 F.2d 1337, 1340 (7th Cir. 1974). The full text of the recommendations of the Administrative Conference of the United States in the area of parole denial is found at 25 ADMIN. L. REV. 459 (1973).
29 492 F.2d 1337, 1343 (7th Cir. 1974).
30 525 F.2d 797 (7th Cir. 1975).
31 Id. at 798.
32 Id. at 800.
34 525 F. 2d 797, 801 (7th Cir. 1975).
not satisfy requirements of the due process clause of the fourteenth amendment. The Richerson decision initially resolved two major issues: Whether minimum due process requirements are applicable to parole release proceedings; and if the due process clause applies, then what procedural protections are required. The court affirmatively resolved the first issue, holding due process protections applicable to the parole release hearings in question. Since the case involved a state board of parole, the court was unable to rely directly upon the King rationale, although the court did cite King’s supporting dicta. Instead, the Seventh Circuit found support for its position in two leading cases: United States ex rel. Johnson v. Chairman of New York State Board of Parole, and Childs v. United States Board of Parole.

The Richerson court merely relied upon the holdings in these cases that due process is applicable to parole release hearings, but did not elaborate upon the rationales of those decisions. Yet the reasoning which underlies Johnson and Childs and is implicitly adopted by the Richerson court is significant because it refutes one of the central propositions relied upon by the Scarpa court. Both Johnson and Childs rejected the contention of the Scarpa court that a prisoner has no liberty or property interest to protect in a parole release hearing. The district court in Childs agreed with the Scarpa court’s contention that the Morrissey decision concerning parole revocation hearings presents a different situation: there is a difference between one’s justifiable reliance in maintaining freedom on parole so long as the parolee does not violate its terms and the mere anticipation of parole status. However the Childs court asserted that:

When we examine the nature of the interest of the parolee facing revocation and that of the parole applicant in light of the Parole Board’s determination, it appears obvious that the difference is not enough to exclude the applicant from due process protections. This is simply because the stakes are the same, incarceration or conditional liberty.

Both the Johnson and the Childs courts disagreed with the Scarpa court’s assertion that a prisoner suffers no “grievous loss,” as defined in Morrissey, when parole is denied. The Court of Appeals for the District of Columbia, affirming

35 Id. at 797.
36 Id. at 800.
37 Id. at 799.
40 525 F.2d 797, 799 (7th Cir. 1975).
41 466 F.2d 31 (5th Cir. 1972); rev’d, 477 F.2d 278 (5th Cir. 1973). See text accompanying note 17 supra.
43 Id. (emphasis added). In the Second Circuit’s opinion in Johnson the court similarly rejects the contention that a prisoner does not have an interest protected by due process. The Johnson court remarked that it viewed this contention as having been superseded by the Supreme Court’s rejection of similar reasoning in its recent decision in Morrissey v. Brewer, 408 U.S. 471 (1972). The Johnson court added that the fact that parole involves only a possibility of conditional liberty it does not preclude due process application because “... the average prisoner, having better than 50% chance of being granted parole before the expiration of his maximum sentence, has a substantial ‘interest’ in the outcome.” United States ex rel. Johnson v. New York St. Bd. of Parole, 500 F.2d 925, 927-28 (2d Cir. 1974).
44 Childs v. United Bd. of Parole, 511 F.2d 1270, 1278 (D.C. Cir. 1974); United States ex rel. Johnson v. New York St. Bd. of Parole, 500 F.2d 925, 926 (2d Cir. 1974).
in part the district court’s decision in Childs, observed:

The Board holds the key to the lock of the prison. It possesses the power to grant or deny conditional liberty. . . . The result of the Board’s exercise of discretion is that an applicant either suffers “grievous loss” or gains a substantial liberty.\textsuperscript{45}

Thus the Richerson court, in implicitly affirming the reasoning of Johnson and Childs, effectively refutes the central contentions of the Scarpa decision.

The Richerson court also explicitly rejects the Scarpa court’s reasoning by citing from the Childs court of appeal’s opinion. The Richerson court specifically recognized the existence of prisoners’ substantial rights in parole release hearings which are protected by the due process clause. The Richerson court quoted from the Childs opinion and affirmed the right of a prisoner to equal treatment with all other prisoners in determinations of parole, and to protections from arbitrary or capricious parole decisions by the Board.\textsuperscript{46}

The district court in Johnson asserted further that a prisoner’s conditional right to parole becomes a legally cognizable right when there is a “manifest correspondence between the prisoner’s situation and the parole statute.”\textsuperscript{47} Therefore, the Seventh Circuit Court of Appeals in Richerson, in its implicit as well as explicit reliance upon Johnson and Childs, clearly rejected Scarpa by holding that minimum due process protections attach to these substantial rights of prisoners in parole release proceedings.

The Richerson court found further support for its position in a recent Supreme Court decision, Wolff v. McDonnell.\textsuperscript{48} In Wolff, the Court held minimum due process requirements applicable to prison disciplinary proceedings in which charges of serious misconduct resulted in a forfeiture of prisoners’ good-time credits. The Wolff Court rejected the proposition that prisoners in state institutions are wholly without protection of the Constitution.

But though his rights may be diminished by the needs and exigencies of the institutional environment, a prisoner is not wholly stripped of constitutional protections when he is imprisoned for crime. There is no iron curtain drawn between the Constitution and the prisoners of this country.\textsuperscript{49}

Although the Wolff decision applied due process in the context of prison disciplinary proceedings, the Richerson court found much of the Court’s language applicable by analogy to parole release hearings.\textsuperscript{50} The Wolff Court acknowledged a quantitative and qualitative difference between the Morrissey situation,

\textsuperscript{45} 511 F.2d 1270, 1278 (D.C. Cir. 1974).
\textsuperscript{46} 525 F.2d 797, 800 (7th Cir. 1975). The Richerson court cited the following excerpt from the Childs circuit court opinion:

\begin{quotation}
Just as the [Supreme] Court found in Wolff that the State, having created the valuable right to good time, must act according to constitutional safeguards when it withdraws the right, so here, where the federal government has made parole an integral part of the penological system, I believe it is also essential that authority to deny parole not be arbitrarily exercised.
\end{quotation}

511 F.2d 1270, 1280 (D.C. Cir. 1974).
\textsuperscript{48} 418 U.S. 539 (1974).
\textsuperscript{49} Id. at 555-56.
\textsuperscript{50} 525 F.2d 797, 799-800 (7th Cir. 1975).
parole revocation, and disciplinary procedures. However, the Supreme Court determined that a prisoner is entitled to protection against arbitrary action in withholding good-time credits, and due process is necessary to provide such protection. The *Richerson* court’s reliance upon this language from *Wolff* is well founded since protection against arbitrary governmental action is equally applicable in the parole release context. Certainly the necessity of protections against arbitrariness is actually *more* important in a parole release situation such as *Richerson*, where the denial of parole has an immediate and direct impact upon the prisoner. In a disciplinary situation such as *Wolff*, the prison authority’s action results in the possible future postponement of release on parole. While denial of release on parole immediately results in the prisoner serving a longer term in prison, forfeiture of good-time credits does not necessarily lengthen the amount of time served. Thus, arguments in favor of procedural protections required in *Wolff* are substantially more compelling in a parole release context.

The *Richerson* court’s reliance upon the *Wolff* decision is also analytically consistent with the Supreme Court’s reasoning in *Morrissey*; there the Court premised its application of due process protections on the belief that the whole process of parole is critically important since “the practice of releasing prisoners on parole before the end of their sentence has become an integral part of the penological system.”

**Required Procedural Protections: A Written Statement of Reasons**

The *Richerson* court, having properly determined that due process is applicable to parole release hearings, next resolved the issue of what procedural protections are required in the parole release context. However, the *Richerson* court did not actually divide its analysis into two separate issues, but rather came to the simultaneous conclusion that due process was applicable and required a statement of written reasons by the board for denial of parole. Although the *Richerson* court noted preliminarily that the petitioner’s *pro se* brief sought to broaden the scope of his due process argument to include issues of a right to a hearing, right to counsel, right to access to the parole file, and the right to rehabilitation, the court never considered these contentions. The *Richerson* court addressed itself instead to the more limited issue of whether due process requires the giving of reasons for denial of state parole release, which was raised in the district court and was discussed in amicus curiae briefs by the Prisoners Legal Assistance, and the American Civil Liberties Union. The *Richerson* court prob-

52 *Id.* at 557-58.
53 Childs v. United States Bd. of Parole, 511 F.2d 1270, 1280 (D.C. Cir. 1974).
54 *Parole Release-Conflict,* supra note 6, at 1274.
56 525 F.2d 797, 800 (7th Cir. 1975).
57 *Id.* at 797-98.
58 *Id.* at 798.
59 It must be noted that it was not strictly necessary for the *Richerson* court to address this issue of whether due process required a statement of reasons for the denial of parole. A statement of reasons was actually given to the petitioner pursuant to an Illinois statute. *ILL. REV. STATS.* ch. 38, § 1003-3-5(f) (Smith-Hurd 1973).
ably viewed the case as an opportunity to extend the *King* decision and firmly establish that the written reasons requirement should rest upon due process grounds, and is therefore applicable to state parole board decisions.\(^6\)

While the *Richerson* court never explicitly rejected the possibility that due process may impose additional requirements on parole release proceedings, the court seemed to exclude all other forms of protection by implication. Throughout its opinion, the *Richerson* court consistently equated due process with a written statement of reasons requirement. Presumably, the *Richerson* court's exclusion of these other due process issues is a result of the court's reliance upon *Johnson* and *Childs* for its holding due process applicable in the first instance. In *Johnson*, the Second Circuit concluded that due process requirements are satisfied by a statement of reasons for the board's denial of parole.\(^6\) The *Johnson* court elaborated on the content of the written statement requirement but did not consider any additional due process requirements. This is probably due to the fact that the petitioner applied only for limited relief in the form of an order directing the parole board to inform the petitioner of the reasons for denial of parole; the petitioner did not raise any additional issues of due process.\(^6\)

In *Childs*\(^6\) the petitioner did raise additional issues of due process. In a memorandum opinion, the district court ordered: (1) a written statement of reasons for the denial of parole by the board; (2) the board's promulgation of regulations governing prisoner access to information used by the board in its determination; and (3) the board's promulgation of explanatory guidelines specifically indicating criteria used by the board in its evaluations which must be conveyed to the prisoners.\(^6\) The District of Columbia Circuit Court of Appeals in *Childs* modified the lower court's decision by affirming orders one and three but vacating order number two.\(^6\) The circuit court noted that the recent decision of *Pickus v. United States Board of Parole*,\(^6\) which held the United States Board of Parole to be an "agency" under the APA, could result in the application of the Freedom of Information Act provisions of the APA to parole release proceedings. The *Childs* court stated that it would await further developments from *Pickus*, since the applicability of the APA could moot any requirements under the *Childs* court's second order with respect to access by prisoners to information in the board's files.\(^6\)

The *Johnson* court, then, focused primarily upon the written statement of reasons aspect of due process, to the exclusion of any consideration to other procedural protections. However, the *Richerson* court's refusal to entertain the petitioner's additional due process contentions was not similarly justified. Unlike the *Johnson* case, the *Richerson* case contained a broad petition for relief which included additional due process protection claims.\(^6\) The *Richerson* case also

\(^{60}\) See text accompanying notes 26-28 *supra*, which discuss the limitations of the *King* approach in contrast to a due process approach.

\(^{61}\) 500 F.2d 925, 934 (2d Cir. 1974).


\(^{64}\) Id. at 1247-48.

\(^{65}\) 511 F.2d 1270, 1281 (D.C. Cir. 1974).

\(^{66}\) 525 F.2d 797, 798 (7th Cir. 1975).
could not dismiss the petitioner's claim to a right of access to the parole board's files on the basis of the *Pickus* decision, as did the *Childs* court, since the APA is inapplicable to state parole board decisions. Thus, the *Richerson* court's failure to address the petitioner's other due process claims cannot be justified on the basis of the *Johnson* or *Childs* decisions.

Other courts which have extended the due process clause to the area of parole procedures have considered a number of procedural protections in addition to a requirement of a written statement of reasons. The most extensive requirements in the area of parole to date were established by the Supreme Court in *Morrissey*. The Court held that minimum due process requirements for parole revocation procedures included: a) written notice of the claimed violations of parole; b) disclosure to the parolee of evidence against him; c) an opportunity to be heard in person and to present witnesses and documentary evidence; d) the right to confrontation and cross-examination of adverse witnesses, unless the hearing officer specifies good cause for not allowing confrontation; e) a "neutral and detached" hearing body such as a traditional parole board, members of which need not be judicial officers; and f) a written statement by the fact-finders as to the evidence relied upon and reasons for revoking parole. The *Morrissey* Court did not rule on the issue of representation by counsel, but in a subsequent case, *Gagnon v. Scarpelli*, the Supreme Court stated that presumptively counsel should be provided for every parole revocation hearing. This requirement applies where the parolee, after being informed of his right, requests counsel, based on either a timely and colorable claim that he has not committed the alleged violation, or a contention that there are substantial reasons in justification or mitigation that make revocation of parole inappropriate.

Clearly all of these procedural protections have not been adopted by courts in the area of parole release proceedings. The *Richerson* court cites the *Wolff* opinion for the proposition that the full range of procedures suggested by *Morrissey* are not required in circumstances other than parole revocation. In *Wolff* the Court endorsed a balancing test of the private individual's interests against the governmental concerns in arriving at a determination of what procedural protections are required. "... [T]here must be mutual accommodation between the institutional objectives and the provisions of the Constitution that are of general protection." The *Wolff* Court applied the right to advance notice of the claimed violation, a written statement of fact-finding as to the evidence relied upon and the reasons for the action, and the right to present testimonial and documentary evidence within reasonable administrative limits to prisoner disciplinary proceedings. The *Wolff* Court refused to apply the right to cross-exami-

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69 Id. at 799.
70 408 U.S. 271 (1972).
71 Id. at 489.
72 Id.
74 Id. at 783-91.
75 525 F.2d 797, 799 (7th Cir. 1975).
77 Id. at 556.
78 Id. at 563-65.
nation and the right to representation by counsel.\textsuperscript{79}

A majority of courts have followed the \textit{Wolff} Court in refusing to apply the full procedural requirements of \textit{Morissette} to parole release proceedings.\textsuperscript{80} But a number of courts have gone beyond the bare minimum of a written statement of reasons requirement adopted by the \textit{Richerson} court. A substantial number of courts require the Parole Board to formulate and make available to prisoners written standards which explain the general criteria used by the board in evaluating parole applications.\textsuperscript{81} Other court requirements include a personal hearing before the prisoner,\textsuperscript{82} access to board files by the prisoner,\textsuperscript{83} and the establishment of an institutional appeal mechanism for adverse parole decisions.\textsuperscript{84} Most courts squarely rejected the applicability of a right to produce evidence,\textsuperscript{85} a right to cross-examine,\textsuperscript{86} and a right to counsel.\textsuperscript{87} The principal objection to these latter procedural protections is that they will unduly burden the parole administrative process, and the resulting delays will not be in the best interests of either the prisoners or the prison authorities.\textsuperscript{88}

Thus, although the \textit{Richerson} court's adherence to a written statement of reasons requirement is not substantially inconsistent with most other judicial decisions on the subject, this limited approach has met with considerable criticism from courts and commentators. In particular, the absence of articulated standards or guidelines for parole board decisions has been singled out as a major

\textsuperscript{79} \textit{Id.} at 567-70.


\textsuperscript{83} \textit{Id.}


\textsuperscript{88} One commentator stated that since the United States Board of Parole makes over 12,000 parole release decisions annually, reform of procedural protections must take into account its potential administrative burden.

\ldots  \text{[I]mposition of due process rights that could overturn the Board's administrative machinery may prove counterproductive by resulting in serious delays in delivery of parole decisions. Therefore, recognition of mandatory rights of counsel, confrontation, and cross-examination, compulsory attendance of witnesses, or complete discovery of Board files would seem problematic in the administrative burdens they would impose.}

\textit{Parole Release-Conflict, supra} note 6, at 1277.
cause of the inconsistency and apparent unfairness in parole release decisions. As the District Court for the Northern District of Georgia noted in Stassi v. Hogan, "... if there is to be respect for the parole system, the appearance of fairness is second in importance only to fairness in fact." This apparent lack of standards and consistency in parole decisions has also been cited as a major cause of prisoner anxiety and frustration, which serves to defeat the rehabilitative purposes of the correctional system.

A second major criticism of Richerson can be based upon its failure to provide the prisoner access to information in parole board files which is used in making parole release determinations. Without this protection, the prisoner is subject to the danger that parole decisions may be based upon untrue, inaccurate, or outdated information contained in the Board files. Access to such information would give the prisoners an opportunity to rebut untrue or misleading information, or to present evidence in mitigation of the data on file. In Franklin v. Shields, the District Court for the Western District of Virginia imposed the requirement that prisoners have access to parole board files. Although the Franklin court recognized that such a requirement would impose a substantial administrative burden upon prison authorities, the court concluded that, on balance, the interests of the prisoner in receiving such protection outweighed the burden on the government.

How Detailed a Statement of Reasons Does Minimum Due Process Require?

The Richerson court's holding due process applicable to parole release hearings represents a substantial step forward by the seventh circuit. But the significance of its holding is limited by the fact that a written statement of reasons requirement was the only procedural protection that was even considered by the Richerson court in its analysis of due process requirements. The Richerson holding is further limited by the court's resolution of a third issue in its decision, the sufficiency of the reasons given to the petitioner for denial of parole. The Richerson court's analysis of this issue illustrates that the written statement of reasons requirement is easily satisfied by little more than pro forma language, diluting further the protection which due process provides in parole release hearings.

The Richerson court held that the reasons given to the petitioner for denial of parole satisfied minimum due process requirements. The Board's statement of reasons for the denial rested on three major observations: (1) that petitioner's offense resulted in the wounding of police officers who were doing their duty, (2)

89 Parole Release-Conflict, supra note 6, at 1276.
91 Id. at 145.
92 United States ex rel. Johnson v. New York St. Bd. of Parole, 500 F.2d 925, 932 (2d Cir. 1974).
94 Id.
96 Id. at 317.
97 525 F.2d 797, 805 (7th Cir. 1975).
that early parole would "deprecate the seriousness of such an offense and would not deter others from committing such crimes," and (3) that petitioner is commended for his excellent institutional adjustment and is encouraged to continue such conduct.98

The Richerson court began its analysis of the sufficiency of these reasons by noting that both the Illinois Code of Corrections and the Rules of the United States Board of Parole specifically authorize denial of parole on the ground that release at that time would deprecate the seriousness of the offense.99 The court then attempted to distinguish a series of cases in which the board's stated reason for denial of parole, that it would deprecate the seriousness of the offense, was held to be insufficient by the courts.100 The Richerson court stated that these decisions had turned upon the fact that the United States Board of Parole had failed to follow its own statutory guidelines and that due process requirements were not even considered.101 The United States Board of Parole had enacted an elaborate set of guidelines and procedures which governed the board's decisional process.102 Since the parole board in the instant case was subject to quite different

98 Id. at 801. See text accompanying note 34 supra.
99 525 F.2d 797, 800-01 (7th Cir. 1975). The Illinois Code of Corrections provides in § 1003-3-5(c) that the Parole Board shall not grant parole if it determines that: "(3) his release at that time would deprecate the seriousness of his offense or promote disrespect for the law. . . ."

100 Section 2.13 of the Rules of the United States Board of Parole similarly provides for denial of parole where: "(1) Release at this time would deprecate the seriousness of the offense committed and would thus be incompatible with the welfare of society." 40 Fed. Reg. 41332 (1975).

101 The provisions of the Illinois Correctional Code and the United States Board of Parole are nearly identical, although Illinois uses the word "deprecate," while the U.S. Board Rules use "depreciate." The Richerson court noted this distinction and commented:

Whereas Illinois seeks to avoid deprecating the seriousness of the offense, the Federal Parole Board seeks to avoid depreciating the seriousness of the offense. In the sense used, "deprecate" and "depreciate" have come to be synonymous. The Richerson court notes further that the correct definition of "deprecate" is to pray against or disapprove (rather than to lessen in value which is the correct meaning of depreciate); however, the meaning of "deprecate" has been corrupted to mean "depreciate." 525 F.2d 797, 802 (7th Cir. 1975).

102 In response to severe criticism of its procedures, the United States Board of Parole began a series of Pilot Programs in parts of its regions, in which new guidelines were established for parole decision making. The first of these Pilot Programs was begun in the Northeast region in October of 1972. The cases cited in footnote 100 supra were decided under the guidelines imposed in that first pilot program. Ultimately the board adopted these guidelines which are no longer experimental, and which apply to all five of the board's regions.

These rules which govern federal parole decision making are very complex, and differ sharply from most state parole board rules. Essentially, the rules require the use of a "Guideline Table." The Guideline Table is composed of two basic indices on which prisoners are scored: the "Offense Severity Index," and the "Salient Factor" index. The Offense Severity Index indicates the parole board's subjective evaluation of the gravity of the prisoner's prior criminal behavior. The Salient Factor Index attempts to predict the likelihood of a prisoner's success on parole in taking into account nine personal characteristics of the inmate. These two indexes form the axes of a matrix which is used to locate the appropriate range for a prisoner. The range represents the prisoner's expected incarceration period. Although the board generally follows the guideline tables in making parole decisions, the rules provide for release at an earlier or later time than the guideline time indicated where a number of discretionary factors are present. An excellent discussion of the intricacies of this system is found in Parole and Sentencing, supra note 6, at 817-39. The guidelines and rules governing their use are published at 38 Fed. Reg. 31942-45 (1973), as amended, 39 Fed. Reg. 20028 (1974).
Illinois Correctional Code procedures which had been followed in the Richerson case, the court concluded that the cited cases were inapplicable.103

The Richerson court is correct in its conclusion that these decisions are not relevant in the sense that the court was determining the sufficiency of the reasons given under a federal statutory standard; these cases adhered to the position that due process is not applicable to parole release hearings.104 However, while these decisions were based upon different statutory grounds, the courts acknowledged the actual inadequacy of the reasons given for denial of parole. In Battle v. Norton, the District Court for the District of Connecticut stated:

Obviously, specification of the single reason given to the petitioner is not satisfactory. It is neither a complete representation of the Board's decision nor a stimulus to further rehabilitation on the part of the petitioner. . . . It would be helpful insofar as practicable, to have the inmate understand how his offender characteristics are rated.105

Thus while these cases are not controlling on the issue of minimum due process requirements, they indicate a strong policy argument in favor of a more detailed statement of reasons for denial of parole. Although the courts in these decisions limited their holdings to bare statutory requirements, it noted that as a matter of general policy, a more detailed statement of reasons would produce a more accurate explanation of the board's decision and would further rehabilitation by giving a prisoner a greater understanding of the bases of the denial.

The Richerson court also attempted to distinguish a number of cases in which the court applied a standard of minimum due process and found the stated reason, that release would depreciate the seriousness of the offense, to be insufficient.106 The court in Richerson interpreted these cases as holding that while mere pro forma language that release would depreciate the seriousness of the offense is clearly insufficient, the specification of additional factors peculiar to the petitioner's case satisfies minimum due process requirements. The Richerson court pointed out that the petitioner was given two additional facts beyond the seriousness of the offense and deterrence of further offenses:

First, he was told . . . that it was the seriousness of his commission of the particular crime, not the seriousness of the attempted murder generally which was delaying his parole. He was also told to continue his "excellent institutional adjustment and well conceived parole plans."107

103 525 F.2d 797, 802 (7th Cir. 1975).
105 365 F. Supp. 925, 930 (D. Conn. 1973). The court further noted that since the statutory guidelines were only imposed as part of a pilot program, the project is subject to less judicial scrutiny since the board is entitled to wide latitude in developing and applying its new procedures. Id. at 981. This explains why the court, although obviously dissatisfied with the actual inadequacy of the reasons given for denial of parole, was reluctant to hold that the board had acted unlawfully.
107 525 F.2d 797, 803 (7th Cir. 1975).
Although the statement given to the petitioner in *Richerson* did not literally contain a “boilerplate” reason for denial, it actually contained very little meaningful or useful information. The *Richerson* court asserted that the two additional facts given petitioner were sufficient to satisfy the requirements of due process. However, this conclusion is not supported by the language of the cases relied upon in *Richerson*. In *Candarini v. Attorney General of the United States*, the District Court for the Eastern District of New York enunciated a minimum due process standard for the sufficiency of reasons given for denial of parole. The court stated:

What is required is that the Board set forth sufficient facts and reasons to enable a reviewing court to determine whether an abuse of discretion has been committed and to enable the inmate to know why he has been denied parole and what he can do to better regulate his future conduct.

The *Candarini* court then added that the format now used by the New Jersey State Parole Board, an example of which appears in *Beckworth v. New Jersey*, should serve as a guide. The written statement of reasons for denial of parole in the exemplary *Beckworth* case is considerably more comprehensive and detailed than the statement given to the petitioner in *Richerson*. The Parole Board’s statement in *Beckworth*, which was six paragraphs, noted specific psychological findings made on the basis of enumerated facts from the prisoner’s life history, specific events during the prisoner’s history of imprisonment, as well as details of the prisoner’s specific offense to support the denial of parole.

The statement given to the prisoner for denial of parole in *Beckworth* was as follows:

After consideration of the circumstances of your present offense, and in the absence of any statement by the sentencing court tending to indicate the contrary, the Board has concluded that there are certain punitive and deterrent aspects to your sentence. In the absence of any special or equitable circumstances or any affirmative evidence that you can avoid criminal behavior, and since your minimum sentence has not yet expired, the Board feels that the punitive and deterrent aspects of your sentence have not been fulfilled and that, therefore, your release would not be compatible with the community welfare.

After consideration of all records relevant to your confinement, treatment and efforts towards self-improvement while in the N.J. State Prison System, the Board is unable to conclude that there is reasonable probability that you will return to society without violation of law.

The Board feels that you have had an excellent institutional adjustment with the exception of your escape from Leesburg in May of 1970. Your receipt of a BED certificate is also noted, as is the fact that you have served almost 8 years in prison.

The Board would note certain elements which might be construed as "situational" in your murder of a friend’s wife with whom you were emotionally involved. However, the Board finds strong indications of a longstanding hostility to females in your history and a potential for violence or aggressive reaction. These indications include your attempted suicide in 1950, your unstable marriages to three different women, your continuing projections of blame on them for marriage failures and the various reports of professional treatment staff.

Moreover, your escape from prison, your prior attempt at self-destruction, your reported excessive use of alcohol and the circumstances of the present murder, cause
statement given to the petitioner in *Richerson* is devoid of any specific details about the offense committed, the prisoner’s personal history, or his psychological analysis. Certainly if the *Beckworth* statement is the applicable standard for due process, the statement given to the petitioner in *Richerson* is fatally deficient.

The *Richerson* court rejected the standard adopted by the *Candarini* court by asserting that no detailed statement of reasons for denial of parole is constitutionally required. The *Richerson* court relied upon excerpts from three district court opinions to support this conclusion. However, such reliance is misplaced. The decision in *Wiley v. United States Board of Parole* provides little support for *Richerson* since the *Wiley* court seemed to suggest that due process is not applicable at all to parole release proceedings. The *Wiley* court specifically relied upon *Scarpa v. United States Board of Parole* in rejecting the applicability of a number of due process protections to parole release hearings, although the court stated that it would not consider whether there was a right to a written statement of reasons for denial of parole. The *Wiley* court also indicated that it adhered to the right/privilege doctrine rejected by the Supreme Court in *Morrissey v. Brewer,* the *Wiley* court stated that release on parole is a matter of legislative grace not of right. These statements indicate that the *Wiley* court implicitly rejected the applicability of due process to parole release hearings. Since the *Richerson* court explicitly holds minimum due process applicable to parole release hearings in an earlier part of its opinion, its later reliance upon the reasoning of the *Wiley* court appears inappropriate.

The *Richerson* court’s reliance upon the other two district court opinions, *deVyver v. Warden* and *Franklin v. Shields* is similarly inappropriate because the factual circumstances of those cases are significantly different. In *deVyver,* the District Court for the Middle District of Pennsylvania was considering the sufficiency of the reasons for denial of parole in terms of statutory guidelines. The *deVyver* court was addressing the specific question of whether the reasons given were sufficient to support confinement beyond the maximum period suggested by the parole board’s guidelines. Since the parole board in the *Rich-*
erson case is not subject to the exact same complicated guideline rules followed by the United States Board of Parole, deVyver is not applicable. The Franklin case is also distinguishable from Richerson on a factual basis. Under the procedures applicable to the parole board in Franklin, a prisoner who is denied parole is entitled upon request to a fuller explanation from the parole board of the reasons for denial of parole. In the Richerson case, the petitioner was not entitled to this additional mechanism but was only entitled to the brief statement which was before the court. Therefore, the deVyver and Franklin cases are factually dissimilar to Richerson since they involve a greater amount of procedural protections which are guaranteed to prisoners upon denial of parole.

The Richerson court’s approach in analyzing the sufficiency of the reasons given to the petitioner is largely negative. The court rejected the necessity of a detailed statement and added: “[W]e believe that the measure of how much due process is required may very well be made by the APA standard of a 'brief statement.'” A better approach would focus on the policy reasons behind a requirement of a written statement of reasons. A minimum standard of the sufficiency of reasons must implement the purposes which underlie the imposition of the requirement. The Richerson court, in evolving a standard, should attempt to achieve two primary purposes behind a written statement of reasons requirement: furnishing an adequate record for judicial review to ensure that the parole board does not abuse its discretion in making its determination, and fostering rehabilitation by informing the prisoner of the reasons for the decision and what if anything he can do to adjust his conduct in the future.

The court in King v. United States articulated the first of these policy reasons:

From a legislative standpoint, requiring a statement of reasons makes it possible to check abuse of error. There is no way to discover if the Board is denying parole for an unconstitutional or improper reason if it never gives reasons.

Thus, in part, the sufficiency of a parole board’s statement of reasons should depend upon the extent to which it will permit a reviewing court to determine

124 See note 102 supra.
126 525 F.2d 797, 804 (7th Cir. 1975).
127 See, e.g., United States ex rel. Johnson v. New York St. Bd. of Parole, 500 F.2d 925, 930 (2d Cir. 1974); King v. United States, 492 F.2d 1337, 1340 (7th Cir. 1974); Craft v. Attorney General of the United States, 379 F. Supp. 309 (W.D. Va. 1975); Written Reasons, supra note 6, at 122; Federal Parole Decision Making, supra note 27, at 486; Parole Release-Conflict, supra note 6, at 1276.
129 492 F.2d 1337 (7th Cir. 1974).
130 Id. at 1340.
whether the board followed proper criteria, and did not decide arbitrarily, capriciously, or on impermissible grounds.\footnote{131} Certainly a very brief or uninformative statement of reasons will not serve this purpose. The \textit{Richerson} court should have determined whether, on the basis of the parole board's statement, it could have concluded that the board considered all relevant and no irrelevant factors, and followed appropriate, rational, and consistent criteria in reaching its decision.\footnote{132} The parole board's statement in \textit{Richerson} suggests that the decision to deny parole may have been based upon an impermissible consideration; the board based its decision primarily upon the fact that release would deprecate the seriousness of the prisoner's offense. The Second Circuit Court of Appeals in \textit{United States ex rel. Johnson v. New York State Board of Parole}\footnote{133} (a decision which the \textit{Richerson} court relies upon in the first part of its decision) labeled the following reason for denial of parole as highly questionable, if not impermissible:

(4) denying parole where, because of the type of the offense for which he has committed, the prisoner has not yet served an "appropriate period" of incarceration that satisfies unarticulated and possibly inconsistent views of Board members regarding community retribution, incapacitation, or general deterrence, despite the prisoner's readiness for the community and lack of need for further institutional control.\footnote{134}

The statement of reasons for denial of parole by the board in \textit{Richerson} indicates that the decision could have been made upon such a questionable consideration. The board's statement may well have been based upon completely proper considerations and all relevant factors if, in fact, the board's decision was based upon a consideration of the individual factors of the prisoner's case and not just the general offense for which he was convicted. However, the board's brief statement is insufficient to enable a reviewing court to make that determination. Thus, the court in \textit{Richerson} should not have held such reasons to be sufficient to satisfy due process.

The second policy reason behind a written statement of reasons requirement relates to the rehabilitative purpose of the correctional system. A statement of reasons is designed to relieve the chronic frustration suffered by inmates which results from a lack of knowledge of how they are being evaluated.\footnote{135} It is also intended to communicate to the inmate how he might, by improving his institutional conduct or by taking steps with respect to some other factor in doubt (such as prospective employment or housing), better his chances for release on parole.\footnote{136} The \textit{Richerson} court did recognize the rehabilitative purpose behind a written reasons requirement. The court articulated this policy by quoting from Professor

\footnotesize{\begin{itemize}
  \item[131] United States \textit{ex rel.} Johnson v. New York St. Bd. of Parole, 500 F.2d 925, 929 (2d Cir. 1974).
  \item[132] \textit{Id.} at 929-30.
  \item[133] 500 F.2d 925 (2d Cir. 1974).
  \item[134] \textit{Id.} at 931.
  \item[135] \textit{Federal Parole Decision Making}, supra note 27, at 486.
\end{itemize}}
Johnson's report to the Administrative Conference of the United States, which identified one of the pitfalls inherent in a written reasons requirement: 137

The reasons must be reasonably specific. It does no good to tell a prisoner he is being denied parole because he is a danger to society unless he is told why he is so regarded, and whether there is anything he can do to convince the Board otherwise. 138

The Richerson court concluded that this standard was met in the case at hand because the petitioner was told "why he is so regarded and whether there is anything he can do..." 139 However the brief statement provided by the board in Richerson does not actually further the rehabilitative purpose. The only reason given to the petitioner for being regarded as a danger to society was the fact that police officers were wounded during the commission of his offense. 140

That is not reasonably specific, and it leaves the petitioner to speculate as to why he was denied parole. As the Second Circuit in Johnson noted, "[d]ue to the apparent inconsistencies in Parole Board decisions 'corruption and chance are among the favorite inmate speculations.'" 141 This in turn may breed despondency and hopelessness, leading the prisoner to abandon any further efforts to improve his institutional conduct. 142

The King court asserted that a prisoner may feel less resentful of a negative decision if he clearly understands the reasons for it. 143 In Richerson, the petitioner was given very little information in the board's statement. He may well have been confused since the board commended him for his excellent institutional conduct, but did not sufficiently elaborate on the negative factors which resulted in a denial of parole. 144 A fuller explanation of the reasons for the denial in the Richerson case would avoid this uncertainty and hopefully prevent a hostile reaction on the part of the prisoner. 145

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137 525 F.2d 797, 804 (7th Cir. 1975).
139 525 F.2d 797, 804 (7th Cir. 1975).
140 Id. at 801.
141 500 F.2d 925, 932 (2d Cir. 1974). See also Written Reasons, supra note 6, at 122.
142 United States ex rel. Johnson v. New York St. Bd. of Parole, 500 F.2d 925, 933 (2d Cir. 1974).
143 492 F.2d 1337, 1340 (7th Cir. 1974).
144 525 F.2d 797, 801 (7th Cir. 1975).
145 The Richerson court advanced one last argument in support of its conclusion that minimum due process does not require a detailed statement of the reasons for denial of parole. The Richerson court said that the petitioner was in effect seeking reasons explaining reasons already given. Id. at 804. The Richerson court cited Dorzsynski v. United States, 418 U.S. 424 (1974), in which the Supreme Court held that a district court is not required to give supporting reasons for its "finding" under the Federal Youth Correctional Act that the offender would not benefit from treatment under the Act. The Richerson court analogized the Dorzsynski case to the present case; in Dorzsynski situations, the Richerson court noted, the "finding" was not required to be supported by reasons. Likewise the "finding" of the parole board in Richerson that release would deprecate the seriousness of the offense need not be supported by additional reasons. 525 F.2d at 805.

However, the Richerson court's analogy is inappropriate. The Court of Appeals for the District of Columbia rejected a similar argument in Childs v. United States Bd. of Parole, 511 F.2d 1270 (D.C. Cir. 1974). The Childs court concluded that "the ruling in Dorzsynski is not to be taken as a constitutional precedent for rejecting the need, under the Due Process Clause, of a written statement of reasons for Board denial of parole." Id. at 1289-84. The Childs court distinguished Dorzsynski because it involved a sentencing, rather than a parole question. The court observed that sentencing is made by a judicial officer who is presented with legislatively delineated alternatives within which to exercise his discretion. In contrast,
Finally, the court’s decision in Richerson must be viewed in the context of its overall effect. The Seventh Circuit took a commendable and significant step forward in applying minimum due process requirements to parole release hearings. The court’s reasoning is entirely in accordance with the spirit of the recent decisions of the Supreme Court in the area of parole; the Richerson court’s decision is also in line with an increasing number of federal circuit and district court opinions. The Richerson court’s use of due process to afford protections in parole release hearings is an improvement over the Seventh Circuit’s prior use of the “brief statement” requirement of the APA. However, the Richerson court unnecessarily restricted its consideration of due process to a written reasons requirement. While the full panoply of procedural rights is not appropriate in a post-conviction proceeding, many courts have applied minimally burdensome protections such as a right of access to the parole board’s files in parole release proceedings. The Richerson court was also unduly narrow in its evaluation of the sufficiency of the reasons given to the petitioner for denial of parole. Although the court was properly concerned with preventing an unreasonable administrative burden on the parole board, it gave insufficient consideration to the policy reasons behind the requirement itself. Hopefully in future cases, the Seventh Circuit will develop a broader standard for evaluating due process requirements which focuses on the goals of effective judicial review to prevent the board’s abuse of discretion, and rehabilitative guidance for the inmate denied parole.

Joanne M. Frasca

CONSTITUTIONAL LAW—DUE PROCESS—SCHOOLS—A PROBATIONARY CONTRACT WITH A PUBLIC EMPLOYEE GIVES HIM A PROPERTY INTEREST IN CONTINUED EMPLOYMENT DURING THE TERM OF HIS CONTRACT REQUIRING FOURTEENTH AMENDMENT PROCEDURAL DUE PROCESS PROTECTIONS BEFORE TERMINATION OF EMPLOYMENT.

Hostrop v. Board of Jr. College Dist. No. 515

While plaintiff Hostrop was serving under contract as president of the defendant junior college, he circulated a memorandum on the school’s ethnic studies program which made recommendations for changes in the program and was critical of the administration. When he was discharged without a hearing shortly thereafter, he brought a civil rights action alleging that the termination of his contract violated his contract, free speech, and procedural due process rights. The parole considerations are made by a board possessing broad but legislatively undefined discretion. In order for the Board to function properly, it must exercise its discretion fairly and knowledgeably, and rational means and considerations must attend its functioning. The Childs court observed that: “By requiring the Board to advise the applicant in writing of the reasons his application is denied, due process goes a way to ensure rationality. . . .” Id. at 1284. The Childs court acknowledged that although the same argument could prevail under sentencing under the Youth Correctional Act since it also involves rehabilitative factors, Congress specifically indicated that such a statement was not required. However, in the context of parole, Congress left open the question of whether the due process clause may require a statement of reasons. Id. Therefore, the Richerson court’s reliance upon Doroszynski is improper to support the conclusion that a further explanation of reasons for denial of parole cannot be required.
district court found no constitutional infirmities, particularly from the standpoint of the first or fourteenth amendment, and dismissed the complaint for failure to state a claim upon which relief could be granted. On appeal to the Seventh Circuit, the court in Hostrop I found that the plaintiff's allegations that dismissal was predicated upon his expression of views in the ethnic studies memo stated a first amendment cause of action, and that he had also shown potential fourteenth amendment deprivations of liberty and property as proscribed by Board of Regents v. Roth and Perry v. Sindermann. On remand, the district court found no actionable constitutional violations. In Hostrop II, the Seventh Circuit agreed with the lower court's conclusion that the facts would not ground a first amendment violation nor a deprivation of liberty claim. It did find, however, that the Board's failure to accord the plaintiff procedural due process protections by providing him a fair hearing on termination amounted to a deprivation of a property interest within Roth and Sindermann. For this fourteenth amendment violation, the court held that the plaintiff was entitled to recover damages against the Board, but not against the individual member defendants who were protected by the doctrine of official immunity.

Roth and Sindermann

In Hostrop I, the Seventh Circuit held that the procedural due process rights traditionally accorded public school teachers were equally applicable to college presidents such as Dr. Hostrop. The court in Hostrop II agreed but reached a different conclusion as to the thrust of Roth and Sindermann, the premier 1972 decisions in this area. While Hostrop II is adequately grounded on these two cases, a more effective understanding of the Seventh Circuit's decision can be gained through a brief analysis of the law as it existed before 1972.

In 1952, the United States Supreme Court, in Weiman v. Updegraff, 1

3 Id. at 491-94.
4 Id. at 494.
5 Id.
6 408 U.S. 564 (1972).
7 408 U.S. 593 (1972).
8 Hostrop v. Board of Jr. College Dist. No. 515, 399 F. Supp. 609 (N.D. Ill. 1974). Even assuming arguendo that the facts showed a deprivation of liberty or property sufficient to require a fourteenth amendment procedural due process hearing, the district court found that the plaintiff had waived his rights by his failure to attend the July 23, 1970, board meeting at which he was discharged. Id. at 610. This is discussed further in the text accompanying notes 61-64 infra.
10 Id. at 573.
11 Id. at 573-74.
12 Id. at 574-75.
14 471 F.2d at 491-93.
SEVENTH CIRCUIT REVIEW

dealt with the constitutionality of the summary dismissal of state college teachers during the term of their contracts for refusals to take a loyalty oath. While the Court did not specifically classify the interest of the teachers in continued state employment, it did state that their summary exclusion during the term of their contracts violated their fourteenth amendment rights.16

In a 1956 decision, *Slochower v. Board of Education*,7 the Court again considered the character of a teacher's interest in continued state employment. There the Court voided the summary dismissal of a tenured professor for his invocation of the fifth amendment in response to questions regarding his membership in the Communist Party. Justice Clark, writing the majority opinion for a sharply divided Court, noted that the professor did not have a "right" to public employment, but found that the professor had tenure under state law and that this interest could not be destroyed by arbitrary state action. Since this interest was entitled to procedural due process protections,18 the Court ordered the case remanded for a hearing at which both sides could present their arguments.19

*Weiman* and *Slochower* have been uniformly interpreted to require a procedural due process hearing before removing a teacher whose relationship with the state is supported by either tenure20 or contract.21 These decisions were, however, subject to conflicting interpretations by the lower courts regarding the extent to which a hearing was required when the employment relationship was ended through mere expiration of the contract.22 In 1972 the *Roth* and *Sindermann* decisions largely resolved this particular conflict. Those cases provided that an aggrieved party was entitled to a procedural due process hearing only if his dismissal or nonretention deprived him of his interest in liberty,23 deprived him of his interest in property,24 or was predicated upon the exercise of a constitutionally protected right.25

In *Roth* the plaintiff received a statement that his appointment to the state university as an assistant professor of political science covered the period from September 1, 1968, through June 20, 1969, but he had no formal contract.26 When informed in February of 1969 that his appointment would not be renewed upon its expiration, he brought suit in federal court claiming, *inter alia*, that the Board's failure to provide him with a pretermination hearing violated his fourteenth amendment procedural due process rights.27 The Supreme Court succinctly

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16 "It is sufficient to say that constitutional protection does extend to the public servant whose exclusion pursuant to a statute is patently arbitrary or discriminatory." *Id.* at 192.

17 350 U.S. 551 (1956).

18 *Id.* at 555.

19 *Id.* at 559.

20 For an analysis of the different types of tenure, see *Developments in the Law—Academic Freedom*, 81 HARV. L. REV. 1045, 1096-1105 (1968).


23 *See* text accompanying notes 26-35 *infra*.

24 *Id.*

25 *Id.*

26 408 U.S. at 566.

phrased both the issue and its answer:

The only question presented to us at this stage in the case is whether the respondent had a constitutional right to a statement of reasons and a hearing on the University's decision not to rehire him for another year. We hold that he did not.28

In defining the parameters of a claim based upon a deprivation of liberty, the Court noted that the college made no charge against the plaintiff:

that might seriously damage his standing and associations in the community. It did not base the non-renewal of his contract on a charge, for example, that he had been guilty of dishonesty or immorality. Had it done so, this would be a different case. For "[w]here a person's good name, reputation, honor or integrity is at stake because of what the government is doing to him, notice and an opportunity to be heard are essential." . . . In such a case, due process would accord an opportunity to refute the charge before University officials.29

In similarly defining the property interest in continued state employment requisite for a claim to a hearing, the Court made clear that the complaint was insufficient:

To have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it. It is the purpose of the ancient institution of property to protect those claims upon which people rely in their daily lives, reliance that must not be arbitrarily undermined. . . . [R]espondent surely had an abstract concern in being rehired, but he did not have a property interest sufficient to require the University authorities to give him a hearing when they declined to renew his contract of employment.30

The Court in Sindermann elaborated upon this notion of a property interest or expectancy of reemployment and enunciated the third situation triggering procedural due process. The plaintiff, a professor of government and social science, had been employed for four years at a state college under a series of one-year contracts. During his employment, the plaintiff had been a frequent critic of the college administration. When his contract was not renewed, he brought suit in federal court claiming that the Board's failure to provide him with a pretermination hearing violated procedural due process, and further, that the decision not to renew his contract was based on his criticism of the college administration and therefore sanctioned his exercise of first amendment rights. In its opinion ordering a remand, the Court enunciated the third general set of circumstances under which a party is entitled to procedural due process protections. Justice Stewart, writing for a five-man majority, stated that the question of whether a

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28 408 U.S. at 569.
29 Id. at 573. The Court points out in footnote 12 of its opinion that the purpose of this hearing is to provide the person an opportunity to clear his name and that once this has been done, the employer remains free to deny future employment for other reasons.
30 Id. at 577.
party has been penalized for the exercise of his constitutional rights is independent from consideration of a party’s liberty or property interest in reemployment:

[E]ven though a person has no “right” to a valuable governmental benefit and even though the government may deny him the benefit for any number of reasons, there are some reasons upon which the government may not act. It may not deny a benefit to a person on a basis that infringes his constitutionally protected interests—especially, his interest in freedom of speech. For if the government could deny a benefit to a person because of his constitutionally protected speech or associations, his exercise of those freedoms would in effect be penalized and inhibited. This would allow the government to “produce a result which [it] could not command directly.”

In finding that the summary judgment against the plaintiff was improper, the Court elaborated upon the concept of a property interest in continued employment requisite for due process protection. While maintaining that a mere expectancy of reemployment was insufficient, the Court found that the plaintiff had alleged facts which, if proven, would constitute a property interest. The fact that there was nothing specific in the plaintiff’s contract to justify his claim of entitlement to reemployment was not considered dispositive. The plaintiff argued that in view of his long period of service as a teacher in the Texas school system and in light of “the policies and practices of the institution,” he had a “de facto tenure”; this claim was predicated upon a provision in the faculty handbook:

Teacher Tenure: Odessa College has no tenure system. The administration of the college wishes the faculty member to feel that he has permanent tenure so long as his teaching services are satisfactory and as long as he displays a cooperative attitude toward his co-workers and his superiors, and as long as he is happy in his work.

In view of the plaintiff’s legitimate expectations, the Court ruled that he should be given the opportunity to show that his interest in reemployment was a property interest. To further guide the district court and to clarify what had been said in Roth, the Court stated that property interests subject to procedural due process protection are not limited by a few rigid, technical forms. Rather, “property” denotes a broad range of interests that are secured by “existing rules or understandings . . . ” A person’s interest in a benefit is a “property” interest for due process purposes if there are such rules or mutually explicit understandings that support his claim of entitlement to the benefit and that he may invoke at a hearing.

31 408 U.S. at 597. The Court stated that the plaintiff’s allegations presented a bona fide constitutional claim which precluded summary judgment, but was quick to point out that the mere assertion that college officials based their decision on constitutionally impermissible grounds was insufficient to require a due process hearing. Id. at 509 n.5.
32 508 U.S. at 600.
33 Id.
34 Id. at 602-03.
35 Id. at 605. Again, the Court was quick to point out that proof of such a property interest would not entitle the plaintiff to reinstatement, but merely obligate the college officials to grant a hearing at his request where he could be informed of the grounds for his nonretention and challenge their sufficiency. Id. at 603.
With these cases and the principles they enunciate as a backdrop, disposition of the procedural due process issues in Hostrop II was routine.

**Procedural Due Process in Hostrop II**

As discussed above Roth, Sindermann, and their progeny require that removal of school personnel be accompanied by a due process hearing if any of the following conditions are met: (1) the removal is predicated upon the exercise of constitutionally protected activity; (2) the removal will in some manner impinge upon the party’s good name or reputation (his interest in liberty); or (3) the party has a property interest in continued employment. While the plaintiff in Hostrop II was ultimately successful on only one of these, the court considered each factor.

1. The First Amendment Claim

In the trial court, the plaintiff alleged that he was fired because of the memorandum he wrote on the ethnic studies program which criticized his superiors.\(^{36}\) In discussing his case, the district court assumed arguendo that his dismissal was motivated by Hostrop’s views as expressed in the memorandum, but interpreted *Pickering v. Board of Education*\(^{37}\) so as to insulate the Board from liability.\(^{38}\) The Seventh Circuit in Hostrop I, however, stated that the district court drew too great a distinction between teachers and administrative personnel.\(^{39}\) While acknowledging that under *Pickering* an employee’s first amendment rights may be restricted if their exercise substantially impedes the functioning of the public entity, the court nevertheless found that Hostrop’s remarks did not so interfere with his working relationship with the Board.\(^{40}\) When the district court considered this issue on remand, it concluded that there were seven other factors which accounted for Hostrop’s dismissal; therefore, there was no first amendment violation.\(^{41}\) On appeal the Seventh Circuit in Hostrop II routinely upheld these findings as not clearly erroneous.\(^{42}\)

2. Interest in Liberty

Hostrop’s amended complaint also alleged that he was deprived of his liberty by reason of the attacks made upon his character by the Board in its list of charges justifying the dismissal. The Board had accused him, *inter alia*, of making mis-

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\(^{36}\) 337 F. Supp. at 978.
\(^{37}\) 391 U.S. 563 (1968). In *Pickering* the Court held that the teacher’s interest as a citizen in making public comments must be balanced against the state’s interest in promoting the efficiency of its employees’ public services. *Id.* at 568.

The court quoted extensively from *Pickering* in determining that it did not require full first amendment protection when the party had a close working relationship with those he criticized. 337 F. Supp. at 978-79.

\(^{39}\) 471 F.2d at 491-93.
\(^{40}\) *Id.* at 492-93.

\(^{41}\) 399 F. Supp. at 611. *See also*, Fragier v. Curators of Univ. of Mo., 495 F.2d 1149 (8th Cir. 1974).

\(^{42}\) 523 F.2d at 573.
representations and false statements regarding his non-college activities, and withholding certain financial reports from the Board.

Inasmuch as the trial court's decision was pre-Roth and pre-Sindermann, it did not have the previously described analytical framework within which to make its decision. While it did note that Hostrop's career could be harmed by the dismissal, it found that his interest was outweighed by the Board's interest in harmonious operation. In remanding, the Seventh Circuit assumed without discussion that Hostrop had stated a cause of action for a deprivation of liberty within Roth. In Hostrop II, however, the circuit court agreed with the findings of the lower court that the Board itself had done nothing to damage Hostrop's reputation in the community. Since it was the plaintiff who had publicized the dismissal charges, this decision was entirely proper. In answer to the plaintiff's claim that he had to disclose the reasons to quell the rumors that were circulating, the court replied that the Board could in no way be deemed responsible for Hostrop's own decision to publish the Board's reasons for dismissal.

Other decisions support the propriety of this determination. Judge, now Justice, John Paul Stevens, in Shriek v. Thomas, dealt with a similar claim and reached the same result. The teacher involved in Shriek claimed that the stated reasons for her nonretention deprived her of liberty by imposing a "stigma" which made her less attractive to prospective employers. Judge Stevens acknowledged that nonretention might make one less attractive to other employers, but cited Roth for the proposition that nonretention alone is not a sufficient deprivation of liberty to merit due process protections. Furthermore, the adverse impact of the nonretention is not aggravated by the fact that a statement of reasons is given to the teacher involved, in contrast to the public at large: "There was no public 'posting' of plaintiff's name which might have created the kind of 'stigma' upon her 'good name, reputation, honor or integrity' such as the Court condemned in Wisconsin v. Constantineau.... The holding in Hostrop II is clearly in accord. The Board attempted to prevent injury to Hostrop's reputation by maintaining silence as to its reasons for dismissal with reference to all but Hostrop himself. 3. Property Interest

To understand the court's holding in Hostrop II that the requisite property interest in continued employment was established, one need only appreciate that

43 471 F.2d at 494.
44 337 F. Supp. at 980. Relying again on Pickering, the court found that the fourteenth amendment had only a limited application to Dr. Hostrop's situation. Id.
45 471 F.2d at 494.
46 399 F. Supp. at 610.
47 523 F.2d at 574-75.
48 Id.
50 486 F.2d 691 (7th Cir. 1973).
51 Id. at 493.
52 Id.
53 Id. at 492. In note 3, Stevens points out that the liberty portion of the Roth opinion is largely based upon Wisconsin v. Constantineau, 400 U.S. 433 (1971). At the end of his opinion, Stevens states that even if the reasons were divulged to the public, there would have been no deprivation of liberty because of the nature of the reasons given. Id. at 693.
54 523 F.2d at 573.
Hostrop had a contract with the state at the time of his termination. The original contract covered the period from July 1, 1969, through June 30, 1971. Prior to the new board election in April of 1970, the existing Board purported to extend this contract until June 30, 1972 (from July 1, 1970). While the discharge on July 23, 1970 would appear to be a clear breach of contract, the Board offered two arguments to justify a finding that no contractual relationship existed between the parties.\(^{55}\)

First, the Board argued that the second contract was void because Hostrop had deleted from the renewal form which he submitted a clause contained in the earlier contract requiring him to devote full time to his position as president. The court, however, stated that even if the renewal contract had not been made, the earlier contract covering the period from July 1, 1969, through June 30, 1971 would have been in existence.\(^{56}\) Alternatively, the court found that the new contract was not void, but at most voidable for fraud.\(^{57}\) Hostrop's contractual right to continued employment was a claim of entitlement amounting to a property interest within Roth and Sindermann.\(^{58}\)

The court devoted more analysis to the Board's second claim that the contracts were void because their terms exceeded one year. Even if there were a one-year limitation, the court indicated that a contract entered into for a longer period would not be void in its entirety, but only for the period in excess of one year.\(^{59}\) In any case, the court ultimately determined that a one-year limitation did not exist under Illinois law.\(^{60}\)

In short, the court in Hostrop II found that the plaintiff's contract gave him a property interest which could not be infringed without a procedural due process hearing.

Anticipating such a finding, the district court had previously found on remand from Hostrop I that even if Hostrop did possess interests requiring a hearing, he had waived his rights by his refusal to attend the July 23, 1970 hearing at which he was discharged.\(^{61}\) It also expressly found that the Board was prepared at that time to undertake an impartial hearing into its complaints against him.\(^{62}\) After reading the record, the court in Hostrop II upset this finding because it determined that the Board had already decided to terminate Hostrop on July 23, 1970, and had in fact made a commitment to another person to hire him as interim president.\(^{63}\) Since the Board had prejudged the plaintiff's case before the July 23, 1970 hearing, it was not "a tribunal possessing apparent impartiality" as required in Hostrop I; the plaintiff therefore did not waive his right to a fair hearing by absenting himself from that meeting.\(^{64}\)

\(^{55}\) 523 F.2d at 574.

\(^{56}\) Id.

\(^{57}\) Id.

\(^{58}\) Id.

\(^{59}\) Id.

\(^{60}\) Id. at 574-75.

\(^{61}\) 300 F. Supp. at 610-11. In support of its position, the district court cited Birdwell v. Hazelwood School Dist., 491 F.2d 490 (8th Cir. 1974). Birdwell, however, contains no finding that the board lacked impartiality, as here.

\(^{62}\) Id. at 611.

\(^{63}\) 523 F.2d at 575-76. Regarding impartiality, see Withrow v. Larkin, 421 U.S. 35 (1975).

\(^{64}\) Id.
Hostrop's cause of action withstood a dismissal judgment solely by reason of his contractual relationship with the state. *Roth* and *Sindermann* unquestionably contemplate the existence of such a contractually established property interest, and, to this extent, the disposition in *Hostrop II* is consistent with precedent.

In view of the court's finding that Hostrop's dismissal was justified, it is clear that the only harm done him was the deprivation of his procedural due process right to notice and a hearing. This was expressly recognized in both *Hostrop I* and *Hostrop II*. As cogently stated in the earlier decision:

The fact that plaintiff relies upon his employment contract to establish a property interest worthy of protection through the due process clause does not mean that his only remedy is a contract action in state court. A civil rights action based on the deprivation of due process and a contract action to recover damages for a breach are independent remedies. The civil rights action . . . seeks vindication for the arbitrary manner in which the contract was breached. A "garden variety" contract action seeks damages only for the losses caused by the breach . . . *There will be occasions when one action will lie but the other will not, as when the state has grounds to break an employment contract, but does so by violating an employee's due process rights to notice and a hearing.*

A procedural due process hearing must accompany the removal of a teacher whose relationship is grounded in either tenure or contract; if there was any doubt as to this position after *Weiman* and *Slochower*, it was removed with the definitive holdings in *Roth* and *Sindermann*. At the other extreme are "removals" which involve the mere nonretention of a teacher after the expiration of his contractual term. It is here where *Roth* and *Sindermann* are most vigorously argued, albeit usually unsuccessfully, for the finding of a property interest in continued employment. One can be reasonably certain, for example, that Hostrop could have been removed without a hearing and without any apparent reason, if the Board had awaited the end of his contractual term. This assumes, of course, that the school had a fairly predictable tenure system which was grounded on written rules and regulations.

Finally, *Hostrop II*’s treatment of fourteenth amendment liberty interests only confirms the policies laid down in *Roth* and *Sindermann*. These cases contain no general mandate requiring explanation for nonretention; rather, they require a procedural due process hearing only if the reasons given damage the teacher’s reputation in the community. Accordingly, and as noted in *Hostrop II*, the best course legally available to colleges and universities is to give no reason at all for the dismissal. Alternatively, a school which decides to give the reasons for its decision should restrict them to the faculty member involved.

*Timothy J. McDevitt*

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65 471 F.2d at 494 n.16 (emphasis added).
66 A Judge Stevens opinion, Jeffries v. Turkey Run Consol. School Dist., 492 F.2d 1, 4 (7th Cir. 1974), supports the claim that *Hostrop II* could have been grounded on *Weiman* and *Slochower* alone.
67 See, e.g., Cusmano v. Ratchford, 507 F.2d 980 (8th Cir. 1974), cert. denied, 96 S. Ct. 48 (1975).
68 Jeffries v. Turkey Run Consol. School Dist., 492 F.2d 1 (7th Cir. 1974).
69 523 F.2d at 474.

Kimbrough v. O'Neil

On March 9, 1972, Cleveland Kimbrough, while awaiting trial on federal charges, was placed under the custody of the Sheriff of St. Clair County, Illinois, and committed to the county jail for a period of 25 days. On March 25th, according to Kimbrough's complaint, he was placed in solitary confinement for a period of three days after demanding the use of a telephone to contact his attorney concerning an emergency situation. The court's opinion best portrays the alleged subsequent, 72-hour ordeal:

Plaintiff alleges that the cell had "no toilet; no water for drinking or washing; and no mattress, bedding, or blankets." He further claims that for that period of time he was "forced to eliminate on the floor, and water was brought at the whim of the guard, which was infrequent." He states that he was denied "rudimentary implements of personal hygiene such as toilet paper, soap, washing water and towels"; and that "[t]hroughout the nights the Plaintiff was subjected to water being thrown upon him by unknown guards after requesting drinking water, and did eventually cause Plaintiff to suffer a severe cold and fever and denial of any semblance of medical treatment." He alleges that during this period of confinement he was denied the right to communicate with his attorney, family and friends by mail or visits.

Kimbrough further averred that upon his release to federal authorities, his diamond ring, self-appraised at approximately $2,500, was not returned to him.

Basing jurisdiction on 28 U.S.C. §§ 1331 and 1343, Kimbrough filed a civil rights action under 42 U.S.C. § 1983 in the District Court for the Eastern District of Illinois, seeking injunctive and pecuniary relief against the sheriff and his two deputies. The complaint claimed that the defendants had "acted deliberately, maliciously and with the motive and intent of punishing Plaintiff be-

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1 On April 3, 1972, the prisoner was released to federal custody.
2 Kimbrough v. O'Neil, 523 F.2d 1057, 1058 (7th Cir. 1975).
3 28 U.S.C. § 1331 (a) (1970) states:
The district court shall have original jurisdiction of all civil actions wherein the matter controversy exceeds the sum or value of $10,000, exclusive of interest and costs, and arises under the Constitution, laws, or treaties of the United States.
4 28 U.S.C. § 1343 (3) (1970) provides:
To redress the deprivation, under color of any State law, statute, ordinance, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States.
Every person who, under color of any statute, ordinance, regulations, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.
cause of his Race, social, political, religious and moral views” in violation of the eighth and fourteenth amendments. The district court, however, granted the defendant’s motion to dismiss for failure to state a claim upon which relief can be granted. It held that the “restrictive” conditions encountered by the plaintiff during solitary confinement, even if proven, could not offend the eighth amendment’s prohibition of cruel and unusual punishment, since they had lasted only three days. The court further noted that the loss of the ring was not a deprivation of “property” within the meaning and protection of the fourteenth amendment. The district court later denied the plaintiff’s motion to vacate the prior judgment; on appeal, the Seventh Circuit unanimously reversed citation.

In an opinion written by Judge Cummings, the court summarily concluded that based upon its prior decision in Haines v. Kerner, the transfer of Kimbrough to solitary confinement without just cause could be so disproportionate in severity as to constitute cruel and unusual punishment. Furthermore, the court held that the harshness of the conditions which allegedly existed within the “isolation” cell satisfied the eighth amendment standard as established by the court’s earlier decision in Adams v. Pate; it added that exposure to those conditions for a period of three days could be violative of the Constitution, citing for support the decision of the Second Circuit in LaReau v. MacDougall. Finally, the court reversed the lower court’s finding that the defendant’s failure to return the prisoner’s diamond ring was outside the fourteenth amendment’s scope of protection. Although the court based its decision here on the rationale it had recently expressed in Carroll v. Sielaff, its succinct disposition of the inmate’s property claim prompted Judges Swygert and Stevens to file separate concurring opinions dealing with this developing area of federal tort jurisdiction.

Cruel and Unusual Punishment

1. Prison Conditions

The court first addressed Kimbrough’s contention that the conditions of solitary confinement he encountered for a three day period violated the eighth amendment’s prohibition against cruel and unusual punishment. The scope of

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6 523 F.2d at 1058.
7 U.S. Const., amend. VIII states: Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted.
8 U.S. Const., amend. XIV provides in part: [Nor shall any State deprive any person of life, liberty, or property without due process of law.
9 492 F.2d 937 (7th Cir. 1974). In this case, a prisoner was placed in solitary confinement for 15 days after hitting a fellow-inmate over the head with a shovel. The court held that the punishment was not disproportional to the conduct for which it was imposed.
10 445 F.2d 105 (7th Cir. 1971). Here the court held that a cell equipped with a radiator, running water, commode, and artificial light, although it may have been dirty and dusty, did not constitute conditions so foul and inhuman as to violate basic concepts of decency.
11 473 F.2d 974 (2d Cir. 1972). In this case a prisoner was placed in an isolation cell for a period of five days and was exposed to the following conditions: absence of running water, a hole for human waste, total darkness except at meals, silence and inability to communicate with others except by letter, and inability to exercise. But the cell was heated, a mattress was available, and prisoner was properly clothed. These conditions were held to be unconstitutional.
12 514 F.2d 415 (7th Cir. 1975). Here, state prison officials failed to return a typewriter and currency belonging to an inmate. The Seventh Circuit held that this intentional deprivation of personal property stated a cause of action under 42 U.S.C. § 1983. Cf. note 5 supra.
this clause has been at issue ever since its adoption by the first Congress in 1789.\textsuperscript{13} The Supreme Court, although never precisely deciding what constitutes an unconstitutional form of punishment, has provided a conceptual framework which lower courts can use when faced with eighth amendment claims.

The basis concept underlying the eighth amendment is nothing less than the dignity of man. . . . The amendment must draw its meaning from the evolving standards of human decency that mark the progress of a maturing society.\textsuperscript{14}

While the Seventh Circuit has frequently been asked to determine whether the eighth amendment is violated by a trial court imposing a sentence authorized by statute upon a criminal defendant,\textsuperscript{15} only recently has it been faced with determining what protection is afforded by that amendment with regard to prison conditions.\textsuperscript{16} These prior cases, however, do not provide an adequate

\textsuperscript{13} The debate surrounding the adoption of the cruel and unusual punishment clause, although brief, focused upon the ambiguity of that clause. The entire discussion follows:

Mr. Smith, of South Carolina, objected to the words “nor cruel and unusual punishment;” the import of them being too indefinite.

Mr. Livermore: The clause seems to express a great deal of humanity, on which account I have no objection to it; but as it seems to have no meaning in it, I do not think it necessary. What is meant by the terms excessive bail? Who are to be the judges? What is understood by excessive fines? It lies with the court to determine.

No cruel or unusual punishment is to be inflicted; it is sometimes necessary to hang a man, villains often deserve whippings, and perhaps having their ears cut off; but are we in future to be prevented from inflicting these punishments because they are cruel? If a more lenient mode of correcting vice and deterring others from the commission of it could be invented, it would be very prudent in the Legislature to adopt it; but until we have some security that this will be done, we ought not to be restrained from making necessary laws by any declaration of this kind.

\textsuperscript{14} Tropp v. Dulles, 356 U.S. 86, 100-01 (1958).

\textsuperscript{15} See, e.g., United States v. Sahli, 216 F.2d 33 (7th Cir. 1954) (deportation of alien not punishment within meaning of eighth amendment); United States v. Sorcey, 151 F.2d 899 (7th Cir. 1946) (defendant sentenced to seven years for each of three counts of possessing, selling, and transferring counterfeit reserve notes, not cruel and unusual); United States v. Ragen, 146 F.2d 349 (7th Cir. 1945) (199 year sentence for murder not cruel and unusual).

\textsuperscript{16} Federal judicial intervention into state prison disciplinary procedures via the eighth amendment is a relatively recent development. Historically, that amendment, originally aimed at prohibiting such punishments as pillorying, decapitation, disemboweling, and drawing and quartering, remained lifeless and ineffective until the beginning of the twentieth century. See Note, The Cruel and Unusual Punishment Clause and the Substantive Criminal Law, 79 Harv. L. Rev. 635, 636-37 (1966). In 1910, the Supreme Court held in Weems v. United States, 217 U.S. 349 (1910), that a sentence imposing 15 years of hard labor, civil interdiction, and surveillance for life, all for the crime of falsifying an official public document, was cruel and unusual punishment. The Court stated: “It is vital, [the eighth amendment] must be capable of wider application than the mischief that gave it birth.” \textit{Id.} at 378. For approximately the next 50 years, convicted felons unsuccessfully attacked the constitutionality of the statutes under which they were sentenced. In response, courts paid little attention to these arguments, developing a rule—still viable today—that a sentence imposed by a legislative enactment for an offense will ordinarily not be regarded as cruel and unusual punishment. See Aker v. United States, 280 F.2d 198 (6th Cir. 1960); Martin v. United States, 100 F.2d 490 (10th Cir. 1939). But see Hart v. Goiner, 483 F.2d 136 (4th Cir. 1973).

Then in 1958, the Supreme Court decided Tropp v. Dulles, 356 U.S. 86 (1958), wherein it held that a statute requiring the loss of citizenship for desertion from the armed services in time of war to be an unconstitutional form of punishment. The Court expanded somewhat on the nature of the eighth amendment, stating that its underlying purpose is the preservation of human dignity as defined by contemporary society. This concept of human dignity, however, is not limited to the eighth amendment’s prohibition against cruel and unusual punishment. It is a value which the Supreme Court has implicitly protected in other constitutional contexts. See, e.g., Furman v. Georgia, 408 U.S. 238 (1972) (eighth amendment—cruel and unusual punishment); Rochin v. California, 342 U.S. 165 (1952) (fourteenth amendment—due pro-
guideline for resolving the prison-related issues. The sentencing decisions, unlike the prison cases, do not involve independent judicial determinations of the current standards of human dignity. Rather, the court in those cases yielded to the Legislature's perception of those standards by focusing merely upon whether or not the punishment was within the prescriptions of the statute. This analysis is of no value where the constitutionality of prison conditions is at issue, since a court must determine for itself the meaning of human dignity without the assistance of a Legislature.

In 1971, the Seventh Circuit in *Adams v. Pate* examined for the first time the sufficiency of a prisoner's complaint alleging unconstitutional living conditions in an isolation cell at the Illinois State Penitentiary in Joliet, Illinois. The plaintiffs, unable to buttress their claim for relief with authority from the Seventh Circuit, maintained that the Second Circuit's decision in *Wright v. McMann* and the Tenth Circuit district court decision in *Jordan v. Fitzharris* supported their contention that conditions within their cells violated the Eighth Amendment. Speaking for the court in *Adams*, Judge Casle distinguished the cases relied upon by the plaintiffs on the basis of the relative severity of conditions encountered by

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17 445 F.2d 105 (7th Cir. 1971).
18 387 F.2d 519 (2d Cir. 1967). In this case, a state prisoner at the Clinton State Prison in Dannemora, New York, was twice confined to a punitive "strip cell," the first time for a period of 33 days and the second for a period of 21 days. It was alleged that each day from 7:30 a.m. to 10:00 p.m. the prisoner was forced to stand at military attention in the front of his cell, which contained a broken sink and commode covered with the human wastes of prior occupants. The inmate also stated he was forced to eliminate on the floor and was denied toilet paper, soap, and a toothbrush. Furthermore, during winter nights the windows of Wright's cell were opened, thereby exposing him to subfreezing temperatures with no clothing or blankets to protect himself. The conditions were held to be violative of the Eighth Amendment.
19 257 F. Supp. 674 (N.D. Cal. 1966). Here, the plaintiff alleged that upon his arrival to an isolation cell, the floors and walls were covered with the bodily wastes of previous inmates. There being no commode or running water in the cell, the plaintiff was forced to eliminate on the concrete floor. Further, he averred that he was denied a toothbrush, toothpaste, and toilet paper, and was forced to sleep absolutely naked on a stiff canvas mat approximately 4.5 by 5.5 feet during his entire 15-day stay in the cell. Although the confinement was held to be unconstitutional, the court refused to grant the plaintiff's demand for monetary relief.
the prisoners in each case. The court held that, unlike the facts presented in Wright and Jordan, the allegations of plaintiffs in Adams—10 to 15 days of confinement in a cell equipped with a properly functioning radiator, sink, and commode—neither offended the human dignity of the inmates nor posed a threat to their health. Thus, although the Adams plaintiffs alleged the cell to be “inhuman, filthy and foul,” the conditions were held not to be “so foul, so inhuman, and so violative of basic concepts of decency” as to constitute cruel and unusual punishment.

Approximately three years later, the court in Thomas v. Pate applied the Adams standard to conditions of confinement allegedly existing at the same Illinois prison. The prisoner Thomas maintained that:

[H]e was confined in cells housing ten to eleven prisoners with dimensions of 21' x 10'; that the cells are made of rough, cold and damp concrete, that the cells have no hot water and only one toilet; that in winter it is so cold that ice forms on the cell's inner walls; that there are “roaches, ticks, millipedes, spiders, silverfish, centipedes, louses, and mice in the cells; . . . and that the cell is enclosed by both a steel gate door and a wooden window shutting out air and light.

The court held that, based upon these allegations, Thomas might be able to show a set of facts supporting his claim that conditions in these cells were violative of the eighth amendment. Judge Fairchild, writing for the Thomas majority, distinguished the case from Adams on the basis of the relative harshness of the circumstances alleged by the plaintiffs. In Thomas, the specific averments of degrading and unhealthy conditions went beyond the mere unpleasantness and inconvenience experienced in Adams. These particularized allegations were sufficient to allow Thomas an opportunity to show that the conditions may have been offensive to contemporary standards of decency and potentially injurious to the mental and physical well-being of the inmates.

A reading of the Seventh Circuit's holding in Thomas and the Second Circuit's decision in Wright reveals some of the determinative factors of a valid eighth amendment claim. The courts have interpreted the mandates of that amendment to require penal institutions to provide inmates with those basic elements of personal hygiene which are consistent with current standards of human decency. Thus a heated cell containing a properly functioning commode and sink, and which provides adequate space, light, and sleeping accommodations will not infringe upon a prisoner's eighth amendment rights. The absence of these factors, or any combination which sufficiently offends contemporary standards of decency, will allow an aggrieved party the opportunity to present his claim in a federal forum.

The Seventh Circuit, on the basis of these cases has expressly recognized that human dignity is the value being ensured by the eighth amendment, yet the court has not specifically addressed the “time” factor in an eighth amendment claim: How long must a prisoner be exposed to degrading conditions before the confine-

20 387 F.2d at 526.
21 493 F.2d 151 (7th Cir. 1974).
22 Id. at 159.
ment impinges constitutional protections? The 15 days of exposure to the conditions encountered in *Thomas* represent the shortest time interval from which the court has had an opportunity to examine the relationship of duration of contact to conditions existing within a cell. The time element in that case, however, drew no discussion from the court; it proceeded on the assumption that approximately two weeks of exposure to the allegedly debasing conditions were sufficient under then-current standard of human decency to state a claim for relief under 42 U.S.C. § 1983. Although in a less punitive context, the Seventh Circuit has also recognized that 77.5 hours of exposure to conditions which offend contemporary concepts of decency were sufficient to state a cause of action under the 1871 Civil Rights Act. In *Wheeler v. Glass*, a parent and a next friend of two mentally retarded youths, institutionalized at the Children and Adolescent Unit at the Elgin State Hospital in Elgin, Illinois, brought a class action in the United States District Court for the Northern District of Illinois, alleging cruel and unusual punishment by hospital officials in their treatment of the children. The complaint specifically averred that the children were summarily bound to their beds in a spread-eagle fashion and placed in a public area of the hospital for 77.5 hours following allegedly homosexual acts. The court focused its attention upon the nature and severity of the hospital practice and current public opinion regarding that form of punishment; the length of time the children were bound to their beds received only passing mention. The court found the hospital’s method of discipline to be “unusual” and inconsistent with the “‘evolving standard of decency’ in a humane society.” Since contemporary society would disapprove of the utilization of this form of punishment upon defenseless retarded children, the *Wheeler* court found it unnecessary to elaborate upon the time element.

It can be drawn from *Wheeler* that time of exposure to impermissible conditions cannot be determinative of an eighth amendment claim without an examination of the conditions themselves. *Wheeler* intimated that shocking conditions encountered for a brief period of time may be as violative of the eighth amendment as less shocking conditions endured for a long period of time. Thus, the shorter the duration the more closely will courts scrutinize the conditions of confinement; but clearly it cannot be said that a limited exposure to conditions—regardless of their nature—will automatically preclude an eighth amendment violation.

The district court in *Kimbrough* apparently determined that it was governed by precedent and could not extend the eighth amendment to a time period shorter than those encountered in prior cases. The lower court, however, erroneously construed the precedents when it viewed “exposure time” as an automatic “cut-off” date to be mechanically applied to every eighth amendment claim, irrespective of the nature or severity of the alleged punishment. The district court applied a bifurcated approach, first looking at “exposure time,” and then at the conditions of confinement. Since the plaintiff had not endured those conditions for the requisite period of time, the complaint was dismissed without examination.

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23 473 F.2d 983 (7th Cir. 1973).
24 *Id.* at 987.
of the underlying basis for complaint. However, the Seventh Circuit, in reversing
the decision, reaffirmed the approach taken in Wheeler and other cases that time
is but one factor which must be considered in relationship with the nature and
gravity of the alleged unconstitutional activity.

Other circuit courts have also perceived the eighth amendment to require
the protection of human dignity from unwarranted governmental action, and
have utilized a "totality of the circumstances" approach similar to the Seventh
Circuit's in Kimbrough to determine the sufficiency of a claim alleging an im-
permissible form of punishment. However, a review of these decisions reveals
that although courts have encountered periods of confinement ranging from 2.5
to 55 days, the primary focus has been placed not upon the time element but
upon the gravity of the conditions alleged by the prisoner.

The first case to hold unconstitutional the conditions obtaining in the use
of a punitive cell in a state prison was the 1966 Tenth Circuit district court deci-
sion in Jordan v. Fitzharris. There, a prisoner at the California Correctional
Training Facility at Soledad was placed in solitary confinement and exposed to
inhuman conditions for a period of 11 days. The court, while mentioning the
period of confinement, was predominately concerned with the nature of the con-
ditions, stating, "When . . . it appears . . . prison authorities . . . have abandoned
elemental concepts of decency by permitting conditions to prevail of a shocking
and debased nature, then courts must interfere." The following year, the Second Circuit decided Wright v. McMann, where
in it was held that conditions encountered by an inmate in an isolation cell for a
period of 55 days constituted cruel and unusual punishment. The court here
elaborated somewhat on the time element, stating, "Civilized standards of human
decency do not permit a man for a substantial period of time to be denuded and
exposed to the bitter cold of northern New York State and to be deprived of the
basic elements of hygiene. . . ." The court's approach in Wright makes it clear
that the length of time an individual withstands a degrading environment is not
by itself determinative of the eighth amendment claim. Rather, what constitutes
a "substantial period of time" must be defined in relation to the nature and
severity of the conditions to which the prisoner is exposed. In Wright, the time
of confinement, 55 days, was definitely substantial, since the complainant was
adversely affected both physically and mentally by the segregation confinement.

Two years later, in Hancock v. Avery, a Sixth Circuit district court exam-
ined the conditions within a punitive isolation cell at the Tennessee State Peni-
tentiary at Nashville. The court held the conditions to be unconstitutional with-
out even stating the duration of confinement. Hancock's eighth amendment
formulation of the time element was as follows: "Confinement under the condi-

25 257 F. Supp. 674 (N.D. Cal. 1966). For the facts of this case see note 19 supra.
26 26 Id. at 680.
27 27 387 F.2d 519 (2d Cir. 1967). For the facts of this case see note 18 supra.
28 28 Id. at 526 (emphasis supplied).
29 29 301 F. Supp. 786 (M.D. Tenn. 1969). In this case, the prisoner was placed in a con-
crete cell which measured 5 x 8 feet. At the rear of the cell there was a hole for bodily wastes
which only a guard on the outside of the unit could operate. The prisoner was denied the
use of soap, towels, toilet paper, and other essential elements of hygiene, and was forced to
sleep on a bare concrete floor without any clothing or blankets. These conditions were held
to be violative of the eighth amendment.
tions of harshness and cruelty reflected by the present record should not be toler-
ated for any length of time, however brief.\textsuperscript{30}  

Consistent with this view is \textit{Knuckles v. Prasse},\textsuperscript{31} decided in 1969 by a district
court in the Fourth Circuit. The court held there that confinement within a
primitive-type cell for a period of 2.5 days was cruel and unusual punishment.
The court referred to the passage in \textit{Wright} that an individual should not be
exposed to degrading conditions for a "substantial period of time," and concluded
that 60 hours of confinement in a damp, foul smelling cell without soap, towels,
or toilet paper was a length of time sufficient to deprive an individual of his per-
sonal dignity within the meaning of the eighth amendment.

In 1972, the Second Circuit, which had earlier denounced the prison con-
ditions in \textit{Wright} (55 days), held in \textit{LaReau v. MacDougall}\textsuperscript{32} that exposure for
a period of five days to conditions which offend contemporary standards of
human decency was within the proscription of the eighth amendment. Although
the time of exposure was substantially less and the gravity of the conditions did
not approach the level of severity encountered in \textit{Wright}, the court held never-
theless that "[C]ausing a man to live, eat and perhaps sleep in close confines with
his own human waste is too debasing and degrading to be permitted. . . . In
order to preserve human dignity of inmates and the standards of humanity em-
braced by our society, we cannot sanction such punishment.\textsuperscript{33}  Thus the harshness
of the conditions encountered by the inmate in \textit{LaReau} foreclosed any need for
the discussion of time. The \textit{LaReau} court's approach is entirely consistent with
its earlier application of the eighth amendment in \textit{Wright}. The time element
remains as a factor in the court's formulation, which must be considered together
with surrounding facts and circumstances; it cannot be viewed as the sole deter-
minative criterion of an eighth amendment claim.

This review of the applicable case law reveals that, in \textit{Kimbrough}, the
Seventh Circuit has expressly recognized the prevailing view among the circuit
courts that the parameters of the protection afforded by the eighth amendment
are not static, but are rather continually evolving. This perception is crucial to
the continued viability of the eighth amendment's underlying purpose of pro-
tecting the ever-developing concept of human dignity.

2. Solitary Confinement

Besides examining the conditions the prisoner was exposed to, the Seventh
Circuit also considered the constitutionality of Kimbrough's transfer to solitary
confinement. It concluded that the imposition of this punishment, which fol-

\textsuperscript{30} Id. at 792.
\textsuperscript{31} 302 F. Supp. 1036 (E.D. Pa. 1969). Here, the two plaintiffs were confined to a punitive
cell which had no windows or artificial light, only one bed, and a commode which overflowed
when it was used. The prisoners were also denied the use of soap, towels, toilet paper, and
other hygienic elements.

Although the court concluded that 2.5 days of exposure to these conditions was cruel and
unusual punishment, it limited the plaintiffs' remedy to injunctive relief, denying the prisoners' demand for monetary damages.
\textsuperscript{32} 473 F.2d 974 (2d Cir. 1972).
\textsuperscript{33} Id. at 978.
owed the plaintiff's repeated demands for permission to contact his attorney, could also constitute punishment so cruel and unusual as to violate the eighth amendment. The court stated, "Such allegations would permit the plaintiff to prove that his confinement violated the Eighth Amendment... for being grossly out of proportion to the conduct for which punishment was imposed." This standard of "proportionality" was expressly approved by the Supreme Court in Weems v. United States as a permissible means by which to define the nebulous terms "cruel" and "unusual."

The cases which have adopted and applied this "proportionality" standard can be classified into two broad categories. The first includes cases which focus upon whether state prison officials had any justification to impose punishment; the second includes cases where the inquiry is directed towards the severity of the punishment imposed where some justification for the official's action originally existed. The distinction is important, since courts will not tolerate the imposition of any punishment upon a prisoner who has not encroached upon a prison regulation. However, where wrongful conduct has occurred, courts will generally yield to the discretion of prison officials unless the disciplinary measures are grossly disproportionate to the misconduct, a finding which is quite infrequent.

Kimbrough falls within the former category of cases; it represents the first decision in which the Seventh Circuit has applied the "proportionality" standard to a factual setting wherein prison officials have taken disciplinary action against an inmate known to be innocent of any prison violation. The standard itself, however, had been previously adopted and applied by the court to the second category of cases involving inmate misbehavior.

In 1973, Adams v. Carlson expressly recognized the rule that punishment must not be disproportionate to the conduct for which it is imposed. Judge Swynge, writing for the majority, commented:

Disproportionality... is partly a question of fact and wholly one of degree. An inmate who refuses to shave his beard does not ordinarily deserve solitary confinement. Conversely, a mastermind of a large-scale escape attempt... may justly receive more than a few days in isolation.

The court was cognizant that prison officials must be accorded a wide degree of latitude in the administration of prison affairs and that prisoners are subject to reasonable rules and regulations. However, where prison officials exercise their power and discretion in an arbitrary or capricious manner, the prisoner's eighth amendment guarantees will allow him to seek redress in federal court under 42 U.S.C. § 1983. In Adams, however, the court was unable to apply the standard because state prison officials had not precisely stated the violations allegedly committed by each prisoner which had given rise to the imposition of the disciplinary measures.

34 523 F.2d at 1059.
35 217 U.S. 349 (1910).
36 See, e.g., Sostre v. McGinnis, 442 F.2d 178 (2d Cir. 1971) (indefinite isolation); Graham v. Willingham, 384 F.2d 367 (10th Cir. 1967) (isolation for more than two years); Knuckles v. Prasse, 302 F. Supp. 1036 (E.D. Pa. 1969) (over 400 days of isolation, no visitation rights).
37 488 F.2d 619 (7th Cir. 1973).
38 Id. at 636.
The first case to determine the merits of a prisoner’s claim alleging disproportionality between conduct and punishment and to apply the “proportionality” standard was *Nelson v. Heyne*. This case was a class action instituted by the next friends of two children incarcerated at the Indiana Boys School in Plainfield, Indiana, alleging that certain practices employed by school officials amounted to cruel and unusual punishment. Specifically, the complaint stated that as a means of corporal punishment the defendants had beaten the children on the buttocks with a “fraternity paddle,” causing bleeding and great pain. The record revealed several instances wherein 160-pound juveniles had been hit five times with the paddle by a 285-pound man (in one case with such force that it had caused a child to sleep on his face for three days). Another child reported that, although he was suffering from blisters on his buttocks from prior beatings, the guards persisted in using the paddle on him. The plaintiffs alleged that as another means of corporal punishment the officials had employed the use of dangerous tranquilizing drugs. Expert medical testimony given before the district court revealed that the drugs could cause...

... the collapse of the cardiovascular system, the closing of the patient's throat with consequent asphyxiation, a depressant effect on the production of bone marrow, jaundice from an affected liver, and drowsiness. ...  

The children, while admitting they were guilty of escaping from the school and assaulting other children, maintained that the severity of the punishment was disproportional to the offenses committed. Both the district and appellate courts agreed. The Seventh Circuit stated that the beatings had the result of producing animosity between the boys and the school, thereby frustrating the rehabilitative purpose of the institution. As for the administration of the drugs, the court held that their use was “punishment” within the meaning of the eighth amendment which attained the degree of severity offensive to the Constitution. It noted that the potential danger flowing from the use of the drugs went beyond the school’s authority to promulgate and enforce regulations which rationally relate to the permissible state interest of returning maladjusted juveniles to society.

In 1974, the Seventh Circuit again faced the question of “proportionality” between conduct and punishment in *Haines v. Kerner*; however, it disallowed the prisoner’s complaint. The prisoner in *Haines* had been confined to “isolation” at the Illinois State Penitentiary for 15 days after he had hit a fellow-inmate over the head with a shovel. His complaint alleged that the disciplinary action constituted cruel and unusual punishment. The court upheld the dismissal of the complaint, saying that the use of solitary confinement was not per se unconstitutional, but rather a legitimate and permissible means of maintaining order within the prison. Since the plaintiff had engaged in conduct “which had a substantial likelihood of causing serious bodily harm,” the 15 days of confinement imposed by prison officials was held not to be an abuse of their authority to maintain peace and order within the prison.

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39 491 F.2d 352 (7th Cir. 1974).
40 Id. at 357.
41 492 F.2d 937 (7th Cir. 1974).
42 Id. at 942.
Thus, *Nelson, Adams, and Haines*, represent the extent of the court's discussion of "proportionality" as a means of giving substance to the words of the eighth amendment. They fall, however, into the second group of cases where the punished party was involved in some wrongdoing. In such cases, the complainant must show that prison authorities have abused their discretion by employing a form of punishment which constitutes an unreasonable means of reprimanding certain misbehavior. Prisoner Kimbrough, on the other hand, was transferred to a punitive cell for attempting to exercise his constitutional right to communicate with counsel. There was no indication that his conduct was unreasonable, destructive, or potentially harmful to anyone. Under such circumstances, the plaintiff need merely show that some form of disciplinary action was taken against him.

Although the Seventh Circuit had never before encountered such wholly arbitrary action on the part of state officials, other circuit courts have had occasion to examine such allegations. For example, in *Thomas v. Brierly* a state prisoner filed a claim alleging that the defendant's denial of visitation rights was an impermissible form of punishment under the eighth amendment as well as a violation of the equal protection clause of the fourteenth amendment. The Third Circuit reversed the dismissal of the complaint by the district court, which had found the complaint to be "frivolous." The court stated: "It is conceivable that the denial of visitation privileges without a reasonable justification might amount to cruel and unusual punishment." To support this conclusion, the court cited the Fourth Circuit's 1973 decision in *Almond v. Kent*. There, a prisoner at the Augusta County Jail in Virginia filed a complaint under 42 U.S.C. § 1983 alleging that the sheriff and guards at the prison had arbitrarily placed him in "isolation" and denied him visits from his wife and family. The plaintiff, claiming to be innocent of any wrongdoing, believed that the punishment imposed upon him was both in contravention of the eighth amendment and sufficient to state a cause of action under the 1871 Civil Rights Act. Although the district court disagreed, on appeal it was held that the allegations were sufficient to deny the defendant's motion to dismiss.

Thus *Kimbrough* can be added to a growing list of cases which have held that punishment without justification may be cruel and unusual. The severity of the disciplinary action need not be great where state officials act in a totally arbitrary and capricious manner. The circuit courts are not willing to tolerate any intentional and discriminatory action on the part of governmental authorities directed against innocent prisoners which serves to deprive them of any rights or privileges enjoyed by the general prison community.

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43 In *Potter v. Cloch*, 497 F.2d 1206 (7th Cir. 1974), the court, although not expressly mentioning "proportionality," held that where a prisoner was placed in isolation on four different occasions totaling eight days for damaging security cameras within the prison, the action was administrative in nature and not a form of punishment.
44 461 F.2d 660 (3d Cir. 1972).
45 Id. at 661.
46 459 F.2d 200 (4th Cir. 1972).
Having resolved the eighth amendment issues in favor of the plaintiff, the court then addressed Kimbrough's final contention—that the defendant's failure to return his diamond ring was a deprivation of property without due process as mandated by the fourteenth amendment. Judge Cummings, with Judges Swygert and Stevens agreeing only in the result, 47 summarily concluded that the allegation was both sufficient to state a claim for relief under Illinois tort law and, relying on the recent Seventh Circuit decision in Carroll, 48 sufficient to state a cause of action under 42 U.S.C. § 1983.

The majority's brief disposition of the plaintiff's claim accurately reflects the current approach being taken by other circuit courts confronted with similar claims. 49 Under the prevailing rule, the inquiry is directed towards the nature of the defendant's conduct. If the loss of property is the result of the intentional or grossly negligent behavior of prison officials, as opposed to their mere negligence, the prisoner's claim will (1) satisfy the jurisdictional requirement of 28 U.S.C. § 1343, 50 and (2) constitute a deprivation of property without due process of law in violation of the fourteenth amendment. This rule applies without regard to the property's value. Thus, the action may be brought in federal court pursuant to § 1983.

This principle, fashioned at the appellate level, has met with considerable disapproval by district court judges who have found themselves adjudicating prisoners' complaints demanding the return of, or reimbursement for, seven packages of cigarettes, 51 a pair of shoes, 52 $3.52, 53 $4.00, 54 $206.00, 55 and

47 The entire court agreed that on remand the district court should exercise pendent jurisdiction over the state property claim. Judges Cummings and Swygert believed that the claim presented a cause of action under § 1983. Judge Stevens, on the other hand, found that the claim failed under that section, but concluded that it was pendent to the eighth amendment issues presented by the plaintiff.

48 514 F.2d 415 (7th Cir. 1975).

49 See cases cited in notes 50-55 supra.

50 Before 1972, however, such property claims would have been dismissed on jurisdictional grounds if they did not satisfy the $10,000 requirement of 28 U.S.C. § 1331 (1970). To illustrate, the Fourth Circuit in Weddle v. Director, Patuxent Institution, 436 F.2d 342 (4th Cir. 1972), denied a complaint by a state prisoner which sought the return of, or reimbursement for, certain personal property valued at $3.52. The court, noting an apparent overlap between 28 U.S.C. §§ 1331 and 1343 (3) (1970), adopted the rationale of Justice Stone in Hague v. CIO, 307 U.S. 496 (1939), that § 1343(3) applied to fourteenth amendment deprivations of "liberty," and § 1331 to deprivations of "property." Since the claim in Weddle failed to satisfy the jurisdictional amount of the latter statute, it was dismissed.


In that case, Household Finance garnished a consumer's savings account upon her failure to make payments on a promissory note. Lynch brought an action in federal district court under § 1983, alleging that the state's garnishment procedure was unconstitutional. The court dismissed for want of jurisdiction under 28 U.S.C. § 1343(3) (1970); the Supreme Court reversed.

The Court held that there is no distinction between personal liberties and proprietary rights under the jurisdictional statute of § 1343(3), and that the jurisdictional amount of § 1331 need not be satisfied in a civil rights action.


53 Weddle v. Director, Patuxent Institution, 436 F.2d 342 (4th Cir. 1972).

54 Montana v. Harrelson, 519 F.2d 1136 (5th Cir. 1975).

55 Cruz v. Cardwell, 486 F.2d 550 (8th Cir. 1973).
The lower courts' initial response to this demand on their judicial resources was to dismiss such actions on jurisdictional grounds. However, this effort proved fruitless as circuit courts, bound by the Supreme Court's decision in *Lynch v. Household Finance Corp.*, would reverse, at times reluctantly, the dismissals.

The district court in *Kimbrough*, recognizing the futility of dismissing on jurisdictional grounds, took a more novel approach. It held that although the loss of the ring was arguably a deprivation of property without due process of law, the fourteenth amendment was not designed to protect such a loss. Although this holding was reversed, it had the effect of shifting the focus of Judges Swygert and Stevens from the firmly established jurisdictional issue to the due process clause of the fourteenth amendment. Their concurring opinions argued that an inherent weakness with the prevailing rule is its failure to explain why a state which provides an inmate with a means of postdeprivation relief can still deny the plaintiff the due process of law. The concurring opinions sought to provide that answer. Judge Swygert, agreeing that the plaintiff had been denied due process, sought to resolve the constitutional ambiguity in terms of substantive due process. Conversely, Judge Stevens concluded that the availability of a state procedure allowing for recovery of property damage against state authorities satisfied due process requirements.

In his concurring opinion, Judge Swygert expressed the belief that a person acting under the color of state law who intentionally confiscates, damages, or destroys the personal property of a prisoner violates the fourteenth amendment's guarantee of substantive due process, regardless of the procedural safeguards made available by the state. He concluded, "[I]f under all the circumstances, the State could not possibly justify the action taken by its agent, the action violates due process and the agent is liable under section 1983." Thus, in *Kimbrough*, since the state could not justify the continued deprivation of the ring by the sheriff and his deputies, the misconduct was a denial of substantive due process, sufficient to state a cause of action under § 1983.

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56 Demps v. Wainwright, 522 F.2d 13 (5th Cir. 1975).
57 405 U.S. 538 (1972). For the factual setting of *Lynch* see note 50 supra.
58 Judge Adams of the Third Circuit expressed bewilderment in the *Russell* court's reversal of the district court, stating:
"This result may well be expected to come as a surprise to the district court judge who dismissed the complaint. It will also no doubt generate a certain amount of disbelief in those taxpayers and citizens generally, not to mention judges and lawyers, who will ask how federal courts have come to be concerned with a case in which a state prisoner alleges simply that his constitutional rights were violated when a prison guard took his seven packages of cigarettes from him. I have yet to answer the question satisfactorily for myself.
489 F.2d at 282.
59 Substantive due process may be defined as the guarantee that no person shall be deprived of his life, liberty, or property by arbitrary or capricious legislative action. See *Flemming v. Nestor*, 363 U.S. 603 (1960); *Nebbia v. New York*, 291 U.S. 502 (1934).
60 Judge Swygert found it necessary to distinguish *Kimbrough* from the Seventh Circuit decision in *Bonner v. Coughlin*, 517 F.2d 1311 (7th Cir. 1975). In that case, state prison guards allegedly had left the plaintiff's cell door open, allowing others to enter and remove his trial transcript. In writing for the court, Judge Stevens held that the misconduct, although attributable to the state, was not without due process of law since the state provided a means of adequately compensating the plaintiff for his loss. Thus, since the court in *Kimbrough* did not overrule or limit its prior decision in *Bonner*, Judge Swygert reconciled the two cases by limiting the rationale expressed in *Bonner* to negligence actions.
61 523 F.2d at 1062.
However, Judge Stevens cautioned that adoption of the notion of substantive due process in civil rights actions "may have two different meanings."\(^{62}\) It may mean that deprivations of property motivated by the defendant's racial, social, political, religious, or moral prejudices will be violative of due process, or it may refer to deprivations of property by state authorities which the state cannot adequately justify. The distinction is important, since both the burden of proof and the doctrine of federalism will be significantly affected by the interpretation ultimately chosen. First, under the "motivational" theory, the plaintiff will have the onerous burden of establishing the defendant's motive and intent; however, the burden is transferred to the defendant under the "justification" theory. Under this latter theory, the plaintiff need simply allege a deprivation of property by an agent of the state. The defendant will then have the burden of establishing sufficient justification for his conduct; otherwise, liability will arise.

Furthermore, under the "justification" theory, whenever a state does not adequately justify the reasons for its conduct, the federal court would have authority to interfere. It would appear that damage to or loss of property resulting from the simple negligence of state authorities would then have constitutional ramifications. Such an interpretation would seriously undercut the prevailing general rule among the circuit courts that mere negligence by state public officials is insufficient to bring a claim within § 1983.\(^{63}\) Moreover, as Judge Stevens observed, "It is this . . . version of substantive due process that has . . . generated criticism that the federal judiciary is wont to arrogate to itself powers not granted by statute or by the federal Constitution."\(^{64}\)

Hence, the ambiguity and the potentially adverse consequences surrounding the use of the substantive due process approach appear to outweigh its utility as a guide to establishing the parameters of § 1983. The doctrine, although supplying an underlying constitutional theory, actually provides more form than substance. It places a "denial of due process" label upon each intentional deprivation of property caused by the state, but it fails to satisfactorily explain the due process clause in relation to the availability of state remedies. Judge Stevens, on the other hand, directly faced this issue in his concurring opinion; he concluded that the availability of a state procedure which allows the plaintiff full compensation for the negligent or intentional harm to his property by state officials does satisfy due process requirements. Thus, he would have dismissed the prisoner's cause of action based on the 1871 Civil Rights Act.

Judge Stevens recognized that the conduct of the defendants in Kimbrough may have violated the prisoner's property rights guaranteed by the fourteenth

\(^{62}\) Id. at 1063.

\(^{63}\) Complaints alleging inadequate medical treatment have drawn most of the discussion that mere negligence is insufficient to state a cause of action under the § 1983. See, e.g., Robinson v. Jordan, 494 F.2d 793 (8th Cir. 1974); Thomas v. Pate, 493 F.2d 151 (7th Cir. 1974); Jones v. Lochhart, 484 F.2d 793 (5th Cir. 1974); Campbell v. Patterson, 377 F. Supp. 71 (S.D.N.Y. 1974). See also 523 F.2d at 1057.

\(^{64}\) Id. at 1064.

\(^{65}\) In Bonner, Judge Stevens expressed his belief that where the negligent harm to property may be redressed in a state court, the deprivation is not without due process of law. See also Nahmod, Section 1983 and the "Background" of Tort Liability, 50 IND. L.J. 5, 23 (1974).
amendment. There being no question that the loss of the ring was a deprivation of property attributable to the sovereign under that amendment, his opinion, then, was primarily focused upon whether or not the deprivation was "without due process of law." The inquiry began with a review of some "elementary" aspects of the due process clause. Without citing authority, Judge Stevens recognized that due process is not an inflexible or static concept, but is rather a safeguard, the protection of which varies according to the nature and gravity of the deprivation suffered. Thus, where an individual is deprived solely of property, under the fourteenth amendment it is well-established that due process merely requires "a meaningful hearing at an appropriate time." Although notice and hearing prior to the state's taking of property are generally required, the Supreme Court has held on several occasions that, under certain circumstances, a citizen may be constitutionally denied a prior hearing.

Applying these principles to the facts in *Kimbrough*, Judge Stevens concluded that the state provided the prisoner with due process of law. It was first recognized that, as a practical matter, a hearing subsequent to the taking was the only "appropriate time" in which the merits of the case could have been adjudicated. Since the state could not have anticipated the alleged unauthorized misconduct of the sheriff and his deputies, it could not have provided the plaintiff with any form of procedural safeguards prior to his loss.

Judge Stevens then turned to the question of whether a state procedure allowing full recovery for property damage is a "meaningful hearing" within the ambit of the due process clause. This determination involved not only a review of the adequacy of the state remedy available to the plaintiff, but also a determination of the standard of care the Constitution requires of the defendant. Assuming that Illinois would permit full recovery by the plaintiff, Judge Stevens advanced the proposition that the phrase "without due process of law" should be then analyzed in terms of the precise constitutional obligation allegedly breached by the defendant. In other words, Judge Stevens incorporated into actions brought under § 1983 the notion that the protection afforded by the due process clause is directly related to the nature and gravity of the deprivation suffered by the plaintiff. Thus, the standard of care required of the defendant is not a constant, as is generally assumed by federal courts today, but rather is a variable which depends upon the particular harm suffered by the plaintiff.

In order to develop this system of constitutional standards, Judge Stevens

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66 It was also recognized that the defendant's conduct may have been violative of the plaintiff's first, fourth, thirteenth, and fourteenth (equal protection) amendment rights. The discussion, however, was limited to deprivations of property under the fourteenth amendment, in order to provide an alternative to Judge Swygert's suggestion that substantive due process be utilized in such cases.


68 523 F.2d at 1066. See also *Armstrong v. Manzo*, 380 U.S. 545 (1965) ("meaningful hearing at a meaningful time").

suggested that a variety of federal interests must be considered and judicially balanced. In *Kimbrough*, he believed that the availability of a state remedy ensured the federal interests in redressing deprivations of property and preserving federal judicial resources for significant issues of law, and that the importance of these two concerns outweighed the federal interest in preventing intentional harm by state authorities. As a result, Judge Stevens would hold that a state that adequately compensates an intentional deprivation of property by its agent, absent a fourth amendment violation, provides the plaintiff with due process of law.\(^7\)

It is important to note that the approach taken by Judge Stevens was not an attempt to establish a system of hard and fast rules in civil rights litigation. For example, he did not discount or limit the continued viability of *Carroll v. Sielaff*\(^7\) a Seventh Circuit decision which also involved an intentional deprivation of property. Recognizing the balance to be a fine one, he noted that other federal courts may place more significance upon the prevention of intentional misconduct by prison guards and may thus conclude that such misconduct will be actionable under § 1983. Furthermore, there may be situations in which federal interests already secured by a state remedy will be overridden by other federal concerns,\(^7\)

\(^7\) Judge Stevens concluded, however, that the property claim was pendent to the plaintiff's eighth amendment contentions, and thus agreed with the majority's decision that the district court should entertain the property claim on remand. Without citing authority, he stated:

> Our interest in efficient judicial administration, as well as petitioner's interest in having his right to compensation for the loss of his ring adjudicated in a straightforward manner, both dictate that his property claim be tried in the same proceeding as his claim based on the conditions of his confinement.

523 F.2d at 1057.

Judge Swygert, however, disagreed with this conclusion. He referred to the Supreme Court's analysis of pendent jurisdiction in *United Mineworkers v. Gibbs*, 383 U.S. 715 (1966). In that case, the Court held that where the state and federal claims evolve from a "common nucleus of operative facts" at 728, such that the claims present one constitutional "case," the federal court may exercise jurisdiction over the state claim.

Applying this language to the facts in *Kimbrough*, Judge Swygert concluded:

> I simply do not see such a relationship between the claim under the Eighth Amendment relating to conditions . . . of solitary confinement, and a state cause of action based on the unlawful conversion of a diamond ring. Proof of the federal claim will do virtually nothing towards establishing the state claim, which has an entirely separate factual basis.

523 F.2d at 1062 n.9.

Such a restrictive application of *Gibbs*, however, would fail to effectuate the underlying purposes of pendent jurisdiction. In *Gibbs*, the Supreme Court enumerated the purposes of that doctrine, stating:

> It has consistently been recognized that pendent jurisdiction is a doctrine of discretion. . . . Its justification lies in considerations of judicial economy, convenience, and fairness to litigants; if these are not present a federal court should hesitate to exercise jurisdiction over state claims.

383 U.S. at 726. Furthermore, the *Gibbs* Court observed that the federal policy embraced by the state claim and the likelihood of jury confusion are additional factors a court should consider in basing its determination. Id. at 727.

Cognizant of this inconvenience to the litigants, the absence of substantial problems of proof accompanying the state claim, the federal interest in redressing deprivations of civil rights, and the unlikelihood of a jury confusing the underlying legal theories of the eighth and fourteenth amendments, Judge Stevens decided to apply the doctrine of pendent jurisdiction. The decision does not appear to be an incorrect application of *Gibbs*, nor an abuse of judicial discretion as suggested by Judge Swygert.

\[^{71}\] *Carroll v. Sielaff*, 514 F.2d 415 (7th Cir. 1975).
such as the protection of liberty, the prevention of unreasonable searches and seizures, the prohibition on cruel and unusual punishment, and the protection of the freedoms of speech and religion. This approach would help reconcile and provide a sound justification for cases which have allowed plaintiffs, alleging negligent deprivations of liberty\textsuperscript{72} and exposure to cruel and unusual punishment,\textsuperscript{73} to proceed in federal court under § 1983.

Hence, Judge Stevens maintained that whether or not the availability of an adequate state remedy satisfies due process should depend not merely upon the nature of the defendant's conduct, but also upon both the constitutional right which has been allegedly impinged and the accompanying standard of care mandated by the Constitution. This approach appears to be more appropriate than that of substantive due process as a guide to establishing the parameters of § 1983. The former protects the ability of a prisoner to recover damages from the state and its agents, and helps to conserve federal judicial resources for cases presenting substantial federal questions. The application of substantive due process maintains the current discontent of district court judges who must adjudicate every claim of intentional deprivation of property by state officials. Under Judge Stevens' formulation, this burden would be transferred to the state courts. Moreover, unlike substantive due process, Judge Stevens' suggested alternative is based upon the firmly established constitutional premise that the protection afforded by the due process clause is commensurate with the nature and severity of the harm incurred.

\textit{Conclusion}

In summarizing the Seventh Circuit's disposition of the constitutional issues presented in \textit{Kimbrough}, it is clear that the court soundly resolved the eighth amendment questions, but failed to adequately justify its handling of the prisoner's property claim under the fourteenth amendment.

The eighth and fourteenth amendments require a balancing of several competing interests in order to ascertain the outer limits of their protections. The eighth amendment necessitates that a balance be achieved which recognizes the state's concern of autonomy, the legitimate discretion and expertise of penal authorities, and the constitutional mandate prohibiting cruel and unusual punishment.

Although the court in \textit{Kimbrough} rendered its decision in a summary fashion, its brevity in no way detracts from its sound underlying policy. The court went no further than to interpret the eighth amendment to require the protection of an inmate's dignity and physical well-being from the gross indifference and intentional misconduct of prison guards and officials. The holding is thus entirely consistent with other courts which have recognized and expressed appreciation for the delicate balance which must be preserved under the eighth amendment.

However, the maintenance of this balance is dependent upon the ability of federal courts to accurately determine and apply "current standards of

\textsuperscript{72} Whirl v. Kern, 407 F.2d 781 (5th Cir. 1968) (prolonged detention in prison).
\textsuperscript{73} Gutierrez v. Department of Pub. Safety, 479 F.2d 701 (7th Cir. 1973) (failure to prevent one inmate from harming another).
decency." But is it likely to presume that a federal judge is capable of such a determination? Although there is no clear answer to this question, there appears to be no reason to conclude that federal judges as a whole are not cognizant of the current thoughts and trends of society. To date, the slow maturing and sophistication of society and its accompanying concern for prison reform have been reflected in the opinions of the federal courts. Thus, the problem may only be tangential and remote.

Similarly, the protection afforded by the due process clause of the fourteenth amendment also involves a balancing of personal and governmental interests. However, the federal courts have failed to utilize this approach in civil rights actions. As a result, their opinions have created both theoretical and practical difficulties. First, the federal courts have failed to explain why a state providing an aggrieved party with an adequate hearing subsequent to official misconduct has denied the party due process, even though the Supreme Court has stated that in certain situations such a procedure satisfies the fourteenth amendment. Moreover, the practical problem now faced is that district courts must adjudicate every intentional deprivation of property, regardless of its value.

In Kimbrough, although Judge Cummings ignored these problems, Judges Swygert and Stevens attempted to provide the answers. Judge Swygert's utilization of substantive due process provides a solution for the theoretical problem, but fails to alleviate the increasing "small-claims" litigation in federal court. However, under Judge Stevens' formulation of the due process clause, both the theoretical and the practical difficulties would be effectively eliminated.

Although it is uncertain if either of these approaches will eventually become an acceptable principle of law, it is clear that as the number of property claims under § 1983 increases in the federal courts, the divergent viewpoints expressed in the Kimbrough decision will receive the attention of other courts, and will hopefully offer a starting point for the resolution of the inherent difficulties presented in civil rights litigation.

Thomas Stalzer

CONSTITUTIONAL LAW—APPLICATION OF FIRST AMENDMENT PROTECTION TO THE DISCHARGE OF PATRONAGE EMPLOYEES

Burns v. Elrod

The Seventh Circuit in Burns v. Elrod ruled that patronage dismissals can violate the first amendment's protection of an individual's freedom of association. This holding resulted even though the Seventh Circuit did not find any of the traditional elements of a first amendment violation of freedom of association.

1 509 F.2d 1133 (7th Cir.), cert. granted, 96 S. Ct. 33 (1975).
2 Id.
The plaintiffs in *Burns*, members of the Republican Party who worked in the Office of the Sheriff of Cook County, Illinois, until December 7, 1970, held non-civil service, patronage jobs and, therefore, had no statutory protection from summary dismissal. Richard J. Elrod, a Democrat, took office as Sheriff of Cook County, Illinois, on December 7, 1970 and immediately dismissed the plaintiffs from their jobs.

In the United States District Court, the dismissed employees sought a declaratory judgment as to their rights, compensatory and punitive damages, and injunctive relief restraining Sheriff Elrod and others from "... conditioning plaintiffs' employment on constitutionally impermissible grounds, restraining further dismissals on such grounds and ordering reinstatement. ..." The gravamen of the complaint alleged that dismissal was predicated upon party affiliation, and upon refusal to pledge work for the Democratic Party. The district court dismissed the plaintiffs' petition for failure to state a claim upon which relief could be granted. The injunction was also denied on the theory, "... that loss of employment did not constitute a sufficient showing of irreparable injury and plaintiffs had an adequate remedy at law."

Yet *Burns* was reversed by the Seventh Circuit based on a prior unique decision rendered by that same court in *Illinois State Employees Union v. Lewis*.6

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4 In *Illinois State Employees Union v. Lewis*, 473 F.2d 561 (7th Cir. 1975) cert. denied, 410 U.S. 943 (1973), the Seventh Circuit explained that the General Assembly had provided an elaborate system regulating the appointment to specified positions solely on the basis of merit and fitness, the grounds for termination of such employment, and the procedures which must be followed in connection with hiring, firing, promotion, and retirement. *Id.* at 567. The Civil Service Code of employment for Illinois is embodied in Illinois Personal Code, ILL. ANN. STAT. ch. 127, §§ 63b101-63b119 (1967). Patronage employees are not protected in this Code, and they serve at the "will" of their superiors. Bailey v. Richardson, 182 F.2d 46 (1951).

5 The defendants included Richard J. Elrod, Sheriff of Cook County, at whose direction the dismissals are claimed to have been made, and Richard J. Daley, President of the Democratic Organization of Cook County and Chairman of the Democratic County Central Committee of Cook County. Plaintiffs charged that Mr. Daley and the Democratic Party organizations were also responsible for the dismissals of plaintiffs, alleging that Mr. Elrod effected the dismissals "under the direction and control of and in conspiracy with these defendants." 509 F.2d at 1135.

6 509 F.2d at 1135.

7 Sheriff Elrod, a Democrat, dismissed the plaintiffs who were members of the Republican Party.

8 The district court relied upon the decision in *Alomar v. Dwyer*, 447 F.2d 482 (2d Cir. 1971), which held that there were no constitutional problems involved in the dismissal of patronage employees because of their political affiliation. This holding in *Alomar* is followed by a majority of the Circuit Courts of Appeals. See note 10 infra.

9 509 F.2d at 1135.

10 The Seventh Circuit had held in *Illinois State Employees Union v. Lewis*, 473 F.2d 561 (7th Cir. 1972), cert. denied, 410 U.S. 943 (1973), that the dismissal of a non-civil service employee based on political affiliation was violative of the first amendment. This holding is diametrically opposed to the position of the majority of the Circuit Courts of Appeals. See Nunnery v. Barber, 503 F.2d 1349 (4th Cir. 1974); Alomar v. Dwyer, 447 F.2d 492 (2d Cir. 1971), cert. denied, 404 U.S. 1020 (1972). Norton v. Blaylock, 490 F.2d 772 (8th Cir. 1969). *See Patronage Dismissals: Constitutional Limits and Political Justifications*, 41 U. CHI. L. REV. 257, 307 (1974). The author of this note recognizes that:

Challenges to dismissal from public employment are not new. The courts, however, generally have refused to treat the patronage dismissal as a problem of free expression or equal protection. Their decisions instead either hold that the patronage employee has no constitutionally protected interest or conclude that whatever protection the First Amendment affords against dismissal for reasons of political affiliation is waived by acceptance of a patronage job.
The court in reversing *Burns*, held, per Judge Campbell, that the plaintiffs had stated "... a legally cognizable claim entitling them to an opportunity to prove their case." Indeed, the broad holding in *Burns* was that: "... dismissal of a public employee, not otherwise protected by civil service, because of his or her political association or beliefs violated the First ... Amendment of the United States Constitution." Thus, a Democratic government official could not dismiss patronage underlings simply because they were Republicans. Such a dismissal, according to the Seventh Circuit, resulted in punishing an individual because of his choice of political affiliation and therefore violated the first amendment's guarantee of freedom of association. The court did not elaborate on the rationale for this holding, but rather deferred to the "scholarly and persuasive reasons articulated [in *Lewis*]."

This comment will maintain that: (1) neither the purpose nor effect of a mere dismissal of a patronage employee curtails, inhibits or infringes first amendment rights of association, but rather rewards individuals who have worked assiduously for the election of an official with patronage power; and (2) the discharge of a patronage employee even when based on political affiliation is constitutionally permissible if it is motivated by a desire to change personnel and is not intended to destroy or to curtail, through economic reprisal, first amendment associational rights. Accordingly, petitioners in *Burns* failed to allege a claim upon which relief could be granted, and the Seventh Circuit, in reversing the lower court, misapplied first amendment protection to these petitioners.

*Bailey v. Richardson: Previous Challenges to the Patronage System*

The patronage system has endured a long history of challenges brought by displaced officeholders. As early as 1838, the United States Supreme Court, confronted with the question of whether a United States District Court judge had the authority to remove one clerk and appoint another, held:

All offices, the tenure of which is not fixed by the Constitution or limited by law, must be held either during good behavior, or (which is the same thing in contemplation of law) during the life of the incumbent or must be held at the will and discretion of some department of the government, and subject to removal at pleasure. It cannot for a moment be admitted that it was the intention of the Constitution that those offices denominated inferior offices should be held during life. And if removable at pleasure, by whom is such removal to be made? In the absence of all constitutional provision or statutory regulation, it would seem to be a sound and necessary rule to consider the power of removal as incident to the power of appointment.\(^{16}\)

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11 509 F.2d at 1135.
12 *Id.*
13 *Id.*
14 *See Bailey v. Richardson, 341 U.S. 918 (1951); Blake v. United States, 103 U.S. 227 (1880); Ex parte Hennan 38 U.S. (13 Pet.) 223 (1839); Nunnery v. Barber, 503 F.2d 1349 (4th Cir. 1974); Illinois State Employees Union v. Lewis, 473 F.2d 561 (7th Cir. 1972), cert. denied, 410 U.S. 928 (1973); Alomar v. Dwyer, 447 F.2d 482 (2d Cir. 1971), cert. denied, 404 U.S. 1020; Norton v. Blaylock, 409 F.2d 772 (8th Cir. 1969).*
15 *Ex parte Hennan, 38 U.S. (13 Pet.) 223 (1839).*
16 *Id.* at 259 (emphasis supplied).
This position was reaffirmed per curiam by the Supreme Court in *Bailey v. Richardson*, where a discharged *non-civil service* employee claimed that her *...* dismissal impinged upon the rights of free speech and assembly protected by the First Amendment, since her dismissal was premised upon alleged political activity. The Supreme Court approved the lower court’s position, that:

*...* so far as the Constitution is concerned there is no prohibition against dismissal of Government employees because of their political beliefs, activities or affiliations. That document standing alone does not prevent Republican Presidents from dismissing Democrats or Democratic Presidents from dismissing Republicans.

The lower court as well as the Supreme Court did not believe it to be the proper province of the judicial system to determine job criteria. Indeed, it is clear from political reality that the state legislature’s approval is necessary for the continuance or creation of all state agencies and departments, and that consequently the function, responsibilities and duties of the myriad governmental agencies are within the peculiar knowledge and understanding of the legislature. Armed with this reality, it is apparent, as the lower court proffered and the Supreme Court concurred in *Bailey*, that the political branches of government (the executive and legislative) are better suited for determinations of which jobs should or should not be civil service positions.

The Seventh Circuit, however, stated its belief that the theory of public employment expressed in *Bailey* had been “universally rejected.” Yet there is no support for this contention, since no case decided by the United States Supreme Court expressly overrules *Bailey*. It is true, as the Seventh Circuit noted, that the right-privilege distinction in government benefits has met its demise, and that the government is charged with the duty of fairly administering

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17 341 U.S. 918 (1951).
19 *Id.*
20 The Constitution did not write political miscellany into the structure of the executive branch; Congress has done that. The first amendment guarantees free speech and assembly, but it does not guarantee government employ. *Id.*
21 Judge Campbell in the instant case does not proffer any reasoning for the Seventh Circuit’s belief that the dismissal of patronage employees based on political affiliation infringes first amendment rights, but rather relies upon the reasoning of a prior Seventh Circuit case of Illinois State Employees Union v. Lewis, 473 F.2d 561 (7th Cir. 1972), cert. denied, 410 U.S. 928 (1973). Therefore, the discussion of the instant case necessitates analyzing the reasoning posited in *Lewis*.
22 341 U.S. 918 (1951).
25 *See* Bruff, *Unconstitutional Conditions Upon Public Employment: New Departures in the Protection of First Amendment Rights*, 21 *HASTINGS L. J.* 129 (1969); Van Alstyne, *The Demise of the Right—Privilege Distinction in Constitutional Law*, 81 *HARV. L. REV.* 1439 (1968). Originally, in determining the rights of an individual, the courts undertook to determine whether the individual was enjoying a right or a privilege dispensed by the stated. Justice Holmes carried in “store” the distinction between right and privilege in *McAuliffe v. Mayor*, 155 Mass. 216, 220, 29 N.E. 517, 517 (1872) by stating: “The petitioner may have a con-
its largesse. However, continued acceptance of Bailey does not turn upon the adoption of the old right-privilege distinction but rather upon adopting Bailey’s definition of the term and scope of non-civil service patronage employment.

Unlike the qualifications required for state certification of a doctor, lawyer, teacher or mechanic, under Bailey the patronage employee only brings his party affiliation to his employment. He serves at the discretion of the appointing authority, individual, or department. As long as the exercise of that discretionary power to remove is not abusive, the patronage employee cannot be heard to complain, no matter who exercises that discretion in discharging him. Indeed, it would be unthinkable to impose stricter standards upon an incoming officeholder than required for the original appointing officer. The power of removal is properly only an incident of any job; an instrument primarily designed to effect changes in personnel and not to curtail associational ties.

Thus, contrary to the announced belief of the Seventh Circuit, the purpose of the dismissal of the patronage employee is not necessarily to restrain the political affiliation of that employee, but rather to enable the incoming executive to surround himself with those with whom he believes he can work.

Moreover, it is unlikely that the discharged patronage employee would prevent removal even if he were to refrain from participating in the activities of his political party or to change his party affiliation since the patronage system is a mechanism used to reward party workers who have already contributed money or effort to a successful candidate or where some personal or professional connection exists between the patronage employee and the appointing official.

Finally, although patronage employment has no statutory protection, the Seventh Circuit’s position that public employment cannot and should not be

stitutional right to talk politics, but he has no constitutional right to be a policeman.” This position has since receded and the U.S. Supreme Court has held that constitutional protections are available to individuals irrespective of right or privilege. The Court has imposed upon government the duty to administer its largesse fairly.


27 See note 14, supra.

28 See Pickering v. Board of Education, 391 U.S. 563 (1968); McLaughlin v. Tilendis, 398 F.2d 287 (7th Cir. 1968); Birnbaum v. Trusel, 371 F.2d 672 (2d Cir. 1966); Johnson v. Branch, 364 F.2d 177 (4th Cir. 1966); Bomar v. Keyes, 162 F.2d 136 (2d Cir. 1947).

29 See note 14, supra.

30 Even the Seventh Circuit recognizes the constitutional permissibility of “the public executive’s right to use political philosophy as one criterion in the selection of policy-making officials.” Illinois State Employees Union v. Lewis, 473 F.2d 561, 567 (1972). The permissibility of using political affiliation as the basis of hiring and firing turns upon whether an individual holds a policymaking job or a non-policymaking job. This court, however, has great difficulty in making the necessary determinations concerning job criteria to apply its remedy.

31 The dismissed petitioners in the instant case did not allege that they were promised continued employment if they changed their political party. The petitioning employees alleged only that they were fired because they were either members of the Republican rather than the Democratic Party, did not have the requisite political sponsorship from the Democratic Party or because they failed to pledge their political allegiance to work for or contribute to the Democratic Party.

509 F.2d at 1135.

32 Non-civil service employees are not protected against discharge for patronage reasons by any state or federal statutory provision. Civil service employees are governed by state or federal law outlining the procedures and grounds for a dismissal. See note 4, supra.
conditioned by *unconstitutional conditions* applies equally to patronage and civil service jobs; clearly, public employees do not shed their constitutional right to freedom of association at the gates of public employment. However, in the Seventh Circuit's analysis, the first amendment's protection to the discharge of these Republican employees in *Burns* was too readily applied, especially since the complaint did not allege any attempt by the state to restrict or to inhibit the freedom to join or to continue in the Republican Party. The United States Supreme Court has determined that there must be evidence of official inhibition or inducement to surrender an individual's exercise of the right of association in order to constitute an infringement of a first amendment right necessitating protection. Thus, the discharge alone is not of a constitutional dimension, nor is it proof of an effort to deter the employees from engaging in any constitutionally protected conduct of association.

**United Public Workers v. Mitchell: Some Restriction on First Amendment Activity**

Indeed, public employees must bear an additional burden in establishing a first amendment violation since it is recognized that in the sphere of public employment not all rights enjoyed by ordinary citizens are enjoyed in the same manner by public employees. In *United Public Workers v. Mitchell*, which upheld the constitutionality of the Hatch Act's proscription on active partisan political activity by federal civil service employees, the Supreme Court stated that "... Congress may regulate the political conduct of government employees ... even though the regulation touches to some extent upon unfettered political action." Likewise, the discharge of a Republican patronage employee by his Democratic superior may touch obliquely upon the political association of that Republican, but the motivation of that discharge is not a constitutionally impermissible desire to control or influence the political association of the displaced Republican. Significantly, the Court in *Mitchell* upheld this objective of political

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33 The doctrine of unconstitutional conditions was best stated by Justice Sutherland: It would be palpable incongruity to strike down an act of State legislation which, by words of express divestment, seeks to strip the citizen of rights guaranteed by the federal Constitution, but to uphold an act by which the same result is accomplished under the guise of a surrender of a right in exchange for a valuable privilege which the state threatens otherwise to withhold. ... If the state may compel the surrender of one constitutional right as a condition of its favor, it may, in like manner, compel a surrender of all. It is inconceivable that guarantees embedded in the Constitution of the United States may thus be manipulated out of existence. *Frost & Frost Trucking Co. v. Railroad Comm'n*, 217 U.S. 583, 593-94 (1926). This doctrine has much judicial support. See *Perry v. Sindermann*, 408 U.S. 593 (1972); *Shapiro v. Thompson*, 394 U.S. 618 (1969); *Pickering v. Board of Education*, 391 U.S. 563 (1968); *Sherbert v. Verner*, 374 U.S. 398 (1963); *Shelton v. Tucker*, 364 U.S. 479 (1960); *Speiser v. Randall*, 357 U.S. 513 (1958).


35 The petitioners simply alleged that they were fired because they were either members of the Republican rather than the Democratic Party, did not have the requisite political sponsorship from the Democratic Party or because they failed to pledge their political allegiance to work for or contribute to the Democratic Party.

36 *Id.* See note 30 *supra.*

37 See *note 3 *supra.*

38 330 U.S. 75 (1947).

39 *Id.* at 77.
neutrality, a desired end of a statutory enactment in a civil service context. In Burns, on the other hand, there was no statutory enactment mandating political neutrality; the petitioners were non-civil service employees. Thus, while public employees already run the risk of suffering some political infringement, it is at least arguable that this risk is greater in situations where there is no legislative mandate of political neutrality of the employment, as with patronage.

Bolstering this concept that there are some political overtones in public employment is the principle that the choice between political neutrality and political partisanship is truly a matter of legislative designation and not judicial fiat. As previously noted, the legislative branch is better able to determine what is acceptable or permissible job criteria for the various positions within state government; it is the legislature which authorizes and establishes the various employments within the state. Mitchell clearly indicates that political partisanship is the norm. Therefore, in the absence of a legislative mandate of political neutrality, as with a patronage situation, it must be presumed that political partisanship would be sanctioned.

Despite these considerations the Seventh Circuit attempted to bolster its determination by offering dicta from Mitchell as proof:

Appellants urge that federal employees are protected by the Bill of Rights and Congress may not enact a regulation providing that no Republican, Jew or Negro shall be appointed to federal office. . . . None would deny such a limitation on Congressional power . . . .

However, this use of dicta actually obfuscates Mitchell's meaning of the patronage system. That system does not prohibit all Republicans or all Democrats from holding public employment. While the Seventh Circuit may have found that these non-civil service employees lost their jobs at the hands of a state official, that loss, in itself, is not of constitutional dimension. The government may constitutionally discharge individuals from their employment for a number of reasons. Moreover, since the discharge was from only one job within the government it did not carry with it an attendant foreclosure of all other employment possibilities with the government. Plaintiffs were not precluded from immediately obtaining other similar government employment. Indeed, if, in the future, the Republican Party is successful in an election, the displaced employees may again occupy their former positions.

The Hatch Act was again upheld in 1973. The Supreme Court reasoned similarly as in *Mitchell*:

> The restrictions so far imposed on federal employees are *not aimed at particular parties*, groups or points of view, but *apply equally to all partisan activities*. . . . Nor do they seek to control political opinion or beliefs, or to interfere with or influence anyone’s vote at the polls.50

This is equally true in the *patronage* situation, in general, and in the *Burns* situation in particular. The patronage system applied to the petitioners in the case at bar did not impose restrictions or consequences *aimed at only a particular political party*. The rewards and burdens of the patronage system “. . . apply equally to all partisan . . .” groups. This element of shared enjoyment and shared responsibility of the “spoils” is ignored by the Seventh Circuit's analysis.52 The court contended that the discharge here resulted in punishing the constitutionally protected conduct of the petitioners and, therefore, was impermissible.53 Nowhere, however, did the court develop or explain how the constitutional right of freedom of association was infringed. The court invoked the phraseology of the “right of association” and “political affiliation” without focusing on any prior Supreme Court cases which had proclaimed and charted that right.54

*The Supreme Court's Application of the First Amendment's Right of Association*

The circumstances in *Burns* did not reveal that the dismissals had any adverse effect upon the discharged employees or upon their political party. The ability of both to engage in collective activities to promote their political beliefs remained unchanged. Apparently the dismissals did not intimidate or dissuade others from joining the Republican Party.55 An individual’s ability to engage in concerted activities has been an integral part of our democratic society. The

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50 413 U.S. at 564 (emphasis added).
51 *Id.*
52 See note 10 supra.
53 This finding is despite the fact that the allegations of record do not indicate any curtailment, infringement, or state-induced surrender of the right of association. The allegations of the petitioners in the instant case are simply that they were fired because: . . . they were members of the Republican rather than the Democratic Party, did not have the requisite political sponsorship from the Democratic Party or because they failed to pledge their political allegiance to work for or contribute to the Democratic Party.
509 F.2d at 1135.
54 See note 3 supra. The Seventh Circuit relied upon Supreme Court cases which did not directly involve the first amendment right of association: Perry v. Sindermann, 408 U.S. 593 (1972) (untenured teacher charged that his dismissal was based on his vocal criticism of the school administration); Pickering v. Board of Education, 391 U.S. 563 (1968), (a teacher dismissed for speaking out on a matter of public concern was an infringement of the first amendment).
55 See note 34 supra.
underlying rationale for protecting an individual's freedom of association is the desire to provide a "market place of ideas"\textsuperscript{56} in a free society.

Effective advocacy of both public and private points of view, particularly controversial ones, is undeniably enhanced by group association. . . . It is beyond debate that freedom to engage in association for the advancement of beliefs and ideas is an inseparable aspect of the liberty assured by the Due Process Clause of the Fourteenth Amendment.\textsuperscript{57}

Cases best demonstrating attempts at infringement of the first amendment's freedom of association are those taking the form of loyalty oaths,\textsuperscript{58} or statutes requiring disclosure of membership lists,\textsuperscript{59} or state requirements compelling individuals to reveal previous associational ties as a condition of public employment,\textsuperscript{60} all of which tended to intimidate the individual from exercising the first amendment right of association.

1. The Loyalty Oath and Infringement on the Right of Association

The loyalty oath mechanism is really a prior restraint to compel individuals to pledge they will not cleave unto certain "subversive ideas"\textsuperscript{61} which are traditionally espoused by groups such as the Communist Party\textsuperscript{62} or the Ku Klux Klan.\textsuperscript{63} One such attempt to control the political association of Arkansas teachers was illustrated in \textit{Shelton v. Tucker}.\textsuperscript{64} There a statutory requirement compelled every Arkansas teacher, as a condition of employment in any state-supported school, to file annually an affidavit which listed every organization to which the affiant teacher had belonged or regularly contributed to within the preceding five years. The petitioner teachers contended that this provision deprived them of their rights to personal, associational, and academic liberty, protected from invasion by state action by the due process clause of the fourteenth amendment.

The Supreme Court, in analyzing the situation, found there were two countervailing interests which required balancing: The legitimate government interest in insuring that those teaching within the State of Arkansas were fit and competent, and the individual teacher's right to free association. Here, the Court had no difficulty in finding for the teachers since "... even though the governmental purpose be legitimate and substantial, that purpose cannot be pursued by means that broadly \textit{stifle} fundamental personal liberties where the end can be more narrowly achieved."\textsuperscript{65}

The Supreme Court noted that requiring a teacher to list "... every con-
ceivable associational tie—social, professional, political, associational, or religious...” was too extensive because “many such relationships could have no possible bearing upon the teacher’s occupational competence or fitness.” Substantial fear of public disclosure and state action of stifling and restraining personal liberty were significantly present. On the other hand, Burns presented no situation in which the dismissed employees were required through compulsion to reveal their political associational ties. There was no evidence of fear of public disclosure. There was no attempt by Sheriff Elrod or the Democratic Party to stifle or to control the associational ties of the petitioners.

Loyalty oaths have also been used to control and restrict the political associational ties of public employees. The impact of such a loyalty oath required of state employees as a condition of employment was examined by the United States Supreme Court in Weiman v. Updegraff. In Weiman, Oklahoma labelled individuals, desirous of state employment, “disloyal” if they failed to take the state loyalty oath. On the basis of this characterization of disloyalty, the individuals so labelled were denied all state employment. The Supreme Court held that such a denial of all state employment, with an attendant pinning of an “unsavory label” on an individual by the state, violated the formal requisites of procedural due process.

The Seventh Circuit read the decision in Weiman to suggest that the United States Supreme Court would be unlikely to consider the interests of patronage employees, openly associating with members of the political party of their choice, “less worthy of protection than the Oklahoma employees’ interest in associating with Communists or former Communists.” Again though, the petitioners in Burns were not hindered in openly associating with the Republican Party. They had the ability to engage in all political activity with impunity. They have not been labelled with an “unsavory label” and on the basis of that characterization denied state employment. The petitioning employees in Burns remained constitutionally whole. Oklahoma’s loyalty oath in Weiman was used as a means of discouraging public employees from joining or continuing in association with the Communist Party; whereas, the patronage employees in Burns were not threatened with discharge or discharged in order to discourage their associational habits. The discharge of these Republican employees in the instant case did not have as its purpose, nor did it have as its result, the abridgment of the associational rights of the dismissed employees.

65 Id.
66 See note 34 supra.
67 Id.
68 344 U.S. 183 (1952). The Oklahoma loyalty oath required all state employees to swear that they had not and would not subscribe or pledge allegiance to any group espousing the violent overthrow of the government.
69 344 U.S. 183 (1952).
70 See note 21 supra.
71 Illinois State Employees Union v. Lewis, 473 F.2d 561 at 570 (7th Cir. 1972), cert. denied, 410 U.S. 943 (1973).
2. Compulsory Disclosure of Associational Ties: An Infringement of
The First Amendment

The United States Supreme Court has hammered out the fundamental right
of association in contexts other than loyalty oath situations, but again none are
similar to the type attempted by the Seventh Circuit.\(^\text{72}\) The landmark disclosure
case decided by the United States Supreme Court, *NAACP v. Alabama*,\(^\text{78}\) pre-
sented the issue of whether the State of Alabama, consistent with the due process
clause of the fourteenth amendment which embraces freedom of association, could
compel the NAACP to reveal to the Alabama Attorney General the names and
addresses of all its Alabama agents and members. The United States Supreme
Court answered in the negative and emphasized that disclosure here was an in-
fringement of freedom of association.

Petitioner has made an *uncontroverted* showing that on past occasions reve-
lation of the identity of its rank and file members has exposed these members
to *economic reprisal, loss of employment, threat of physical coercion, and*
other manifestations of *public hostility*. Under these circumstances, we think
it apparent that *compelled* disclosure of petitioner's Alabama membership is
likely to *affect adversely the ability of petitioner and its members to pursue*
their collective effort to foster beliefs which they admittedly have the right
to *advocate*, in that it may induce members to withdraw from the Association
and dissuade others from joining it because of fear of exposure of their be-
liefs shown through their association and the consequences of this exposure.\(^\text{74}\)

The plaintiffs in *Burns* failed to present similar evidence or allegations.\(^\text{75}\)
The dismissals of the Republican patronage employees did not "affect adversely"
their ability to pursue "their collective effort to foster beliefs which they admitted-
ly have the right to advocate."\(^\text{76}\) The displaced employees were not faced with
threats, public hostility, physical coercion, or economic reprisals because of their
political affiliation. The power of a patronage discharge is an incident of the
office\(^\text{77}\) and not a weapon of destruction wielded arbitrarily and maliciously by
one political party against another, attempting to eliminate the latter from effec-
tive participation in the advocacy of ideas.

Again, while it is true that these *non-civil service* employees in *Burns* were
no longer employed in their former capacities, they were not precluded from
seeking similar employment within the state government.\(^\text{78}\) Their employment
was concluded at the natural end of their terms of employment. There was not
an unconstitutional summary discharge\(^\text{79}\) aimed at hindering or discouraging these
petitioners in the exercise of their first amendment rights. Not all deprivations
suffered by an individual at the hands of the state can be raised to a constitutional

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\(^{72}\) See note \(3\) supra.

\(^{73}\) 357 U.S. 449 (1958).

\(^{74}\) Id. at 462 (emphasis supplied).

\(^{75}\) See note \(34\) supra.


\(^{77}\) See note \(14\) supra.


\(^{79}\) See note \(14\) supra.
level. In the areas of individual action, these petitioners remained entirely free of any governmental regulation or interference or threat of interference. Access to the political arena was readily available to the Republican Party and its members. The employees in Burns were not compelled to do or to relinquish anything. They were not denied employment as the Seventh Circuit suggested because they were Republicans, but rather because their right to employment terminated with the change of administration. These patronage agents had no more right to their employment than their principal's right to his. Their dismissal was certainly not a designed effort undertaken by state officers to thwart the advocacy of ideas or to destroy a political group from influencing people and their votes. Without the elements of restraint, compulsion, or control exerted by the state over associational ties, there can be no valid claim that first amendment rights of association have been violated.

80 See Cafeteria Workers v. McElroy, supra.
81 See note 14 supra.
85 See note 34 supra.
86 The inviolateness of political association was upheld once again by the Supreme Court when evidence was presented of: compulsion, harassment and public hostility directed against a particular group with the design of obviating that group's existence, of making that political association a nonfunctioning entity within a particular state. Bates v. City of Little Rock, 361 U.S. 516 (1960), involved two municipal ordinances. One imposed a vocational or occupational tax on all firms, persons, or corporations engaging in any trade, business, or calling within the city limits. The other ordinance required that all those entities subject to this occupational tax had to submit a membership list to the city clerk which was open to public inspection. The petitioners in this case were the custodians of the records of two local branches of the NAACP who refused to supply these membership lists. They were convicted of violating the city ordinance. The Supreme Court found this compulsory disclosure of membership had no nexus to the collection of the occupational tax and concluded that:

... compulsory disclosure of membership lists of local branches of N.A.A.C.P. would work a significant interference with freedom of association of their members. There was substantial uncontroverted evidence that public identification of persons in the community as members of the organizations had been followed by harassment and threats of bodily harm... evidence that fear of community hostility and economic reprisals that would follow public disclosure of the membership lists had discouraged new members from joining the organizations... This repressive effect, while in part the result of private attitudes and pressures, was brought to bear only after the exercise of governmental power had threatened to force disclosure of the members' names. N.A.A.C.P. v. Ala., 357 U.S., at 463. Thus, the threat of substantial governmental encroachment upon important and traditional aspects of individual freedom is neither speculative nor remote.


The record in the instant case does not present any evidence of substantial, uncontroverted evidence of harassment or threat of bodily harm or community hostility. There was no repressive effect reported. There was no official discouragement of their political affiliation or encroachment upon traditional aspects of individual freedom. In discharging the Republican patronage employees, the newly elected Elrod did not accomplish a significant interference with the freedom of association of those employees. Sheriff Elrod exercised the same power which his predecessor Sheriff had the power to use. The power of discharge is an incident of the office and not a weapon of destruction wielded arbitrarily and maliciously by one political party against another political party with the aim of eliminating that party from effective participation in the advocacy of ideas. Unlike the petitioners in Bates and NAACP, the petitioners in Burns did not allege: (1) that community harassment has been directed at them or their party by state officials; (2) that public threats of bodily harm have been hurled at them...
Certainly, then, the constitutional protection of freedom of association does not undertake to safeguard all individuals from all harm or adverse consequences which might befall them because of their associational ties. The Supreme Court did not intend the invocation or incantation of the phrase “freedom of association” as a talisman or panacea for all possible wrongs. The Seventh Circuit’s application of the first amendment lacks support and should have yielded before the precedents of the Supreme Court.

Burns v. Elrod: A Misapplication of the First Amendment

It would be incorrect to state that the Seventh Circuit believed that the first amendment could always be invoked in the dismissal of any patronage employee. Political affiliation, according to the Circuit, could be validly used in determining the fitness of individuals filling policymaking patronage positions. Judge Campbell in Burns stated that the defendants could defeat the petitioners’ claim if the former could factually prove that the dismissed petitioners held policymaking positions.

The Court of Appeals, therefore, created a distinction in treatment between policymaking and non-policy making patronage employees. Yet such a differentiation raises murky definitional problems as well as more unsettled issues than it supposedly resolves. Litigation could greatly increase and the courts, absent any legislative guidelines, would have to fashion a case by case determination. Inherent in such a judicially fashioned approach is a lack of uniformity with its implicit inequality of treatment. Judge Campbell appreciated the difficulty of imposing this dual standard upon the courts: “It is simple enough to say that

as a result of their political association; (3) that they have been prosecuted or threatened with prosecution because of their political affiliation; (4) that they have in any way been prevented from promoting ideas in association with a political group, or (5) that the viability of their political association has been threatened with destruction because of state action. Having failed to allege any of the enumerated infringements of association, these petitioning employees have failed to state a claim upon which relief can be granted for the curtailment of the first amendment right of freedom of association.

The Seventh Circuit in Burns points to no situation in which the dismissed employees of the instant case are required or compelled to reveal their associational ties in order to enable state officials to manipulate hostile public sentiment against them. There was no evidence in the record of fear of public disclosure, nor was there an attempt by Sheriff Elrod or the Democratic Party to stifle the petitioners in their associational ties. There were no state prohibitions imposed upon petitioners from engaging in any kind of traditional political behavior or in associating with the Republican Party for the advancement of their political ideology. In fact, in the areas of individual action, these petitioners remained entirely free of any governmental regulation or interference or threat of interference. Access to the political arena was readily available to the Republican Party and its members. None of the traditional elements of restraint, compulsion, curtailment, reprisal, or attempts to hinder the effective advocacy of an association were present in Burns. Certainly, the constitutional protection of freedom of association does not undertake to safeguard all individuals from all harm or adverse consequences which might befall them because of their associational ties. The Supreme Court did not intend the invocation or incantation of the phrase “freedom of association” as a talisman or panacea for all possible wrongs. The Seventh Circuit’s application of the first amendment lacks support and must yield before these precedents of the United States Supreme Court.

87 See note 5 supra.

88 Judge Campbell stated: “The issue of whether plaintiffs were policy-making employees who may be dismissed for partisan political reasons is a matter of factual defense. . . .” 509 F.2d at 1336.

89 This distinction was first enunciated by the Seventh Circuit in Illinois State Employees Union v. Lewis, 473 F.2d 561 (7th Cir. 1972), cert. denied, 410 U.S. 943 (1973).
janitors, clerk-typists and elevator operators are 'non-policy making' employees, but how far up in the bureaucratic echelon can the distinction be judicially drawn? 

The Seventh Circuit's treatment would compel the courts to become mini-civil service commissions, a matter clearly not appropriate for judicial determination. This issue of patronage employees suggests some of the elements of a political question, unfit for judicial determination. It lacks judicially discoverable and manageable standards for reaching a decision. On the one hand the Seventh Circuit has difficulty in "... justifying the validity of political association as a criterion for a janitor, school teacher or elevator operator," but on the other hand, admits:

We cannot properly differentiate between teachers and highway maintenance workers, pilots, law clerks, driver's license examiners or janitors on the basis of mere judicial assumptions about the circumstances attending their respective employment.

If any distinctions about patronage jobs are to be made, it would seem more prudent to commit those determinations to the legislature which is better able to make these internal policy decisions. These distinctions are better left to non-judicial forums as witnessed by the civil service statutes now in force in Illinois and throughout the United States.

The concurring opinion in Burns illuminated an additional problem with the Seventh Circuit's encouragement of judicially assuming this responsibility:

If we must judge whether or not an employee may be discharged for exercising his First Amendment rights of free political association on the basis of his job classification, we are not saying that some employments are entitled to greater protection than others. Are the constitutional rights of an individual to be defined solely with reference to the nature of his employment? I know of no precedent in our system for imposing a "sliding scale" of importance upon the constitutional rights of individuals according to their rank, title, job, description or duties, whether in or out of government.

This sliding scale effect is the necessary consequence of the Seventh Circuit's finding of an infringement of first amendment association rights in the discharge of a Republican patronage employee by his Democratic superior. No such elusive and discriminatory practice is needed if the court viewed the patronage dismissal as a means of encouraging political association rather than discouraging political association. The objective of dismissing the Republican patronage employees was to reward Democratic Party contributors. The result of dismissing the Republican patronage employees did not diminish their ability to associate

90 Id. at 578 (concurring opinion).
92 See Illinois State Employees Union v. Lewis, 473 F.2d 561, 566-67 (7th Cir. 1972).
94 Id.
95 Illinois State Employees Union v. Lewis, 473 F.2d at 573.
96 Id.
98 Illinois State Employees Union v. Lewis, 473 F.2d 561, 578 (n4).
with the Republican Party and to engage in all of the activities connected with political party association. They were unfettered and unencumbered in pursuing their political beliefs through association with the Republican Party in hopes of being successful at the voting polls. The discharge of the patronge employees was not used as a weapon to compel individuals to relinquish or to refrain from the exercise of their first amendment rights. There were no efforts by the state or its agents to destroy the effectiveness of a political organization or to focus community harassment on a political group or to prohibit the existence of a particular political group altogether. The first amendment protects individuals from any state action which abridges, restricts, constrains or demands relinquishment of the right to exercise freedom of association, a situation not present in Burns.

Susan Finneran

CONSTITUTIONAL LAW — SPEEDY TRIAL RIGHT — AVAILABILITY OF A CONFESSION IS TO BE CONSIDERED IN DETERMINING THE LENGTH OF THE CONSTITUTIONALLY PERMISSIBLE PRETRIAL DELAY

United States v. Lockett

In United States v. Lockett, the Seventh Circuit encountered a fundamental constitutional right the scope of which has been difficult to delineate; the sixth amendment right to a speedy trial. Lockett, in expanding the current Supreme Court test for evaluating violations of this right, represents a departure from past Seventh Circuit adherence to the basic Supreme Court test, as exemplified by United States v. Fairchild. Curiously, this dichotomy in the approach taken by the Seventh Circuit developed on the same day. To understand the Lockett fork of the dichotomy, it is necessary to understand the traditional approach of Fairchild, and requisite to understanding both approaches is an examination of the recent history of the speedy trial right. Additionally, such an examination is useful in implementing the main tenet of this comment; evaluating the desirability of an adoption of the Lockett corollary.

History of Speedy Trial Determination

The Supreme Court first enunciated the current test for exposing speedy trial violations in Barker v. Wingo. The comparatively late development of a


1 526 F.2d 1110 (7th Cir. 1975).
2 526 F.2d 185, 187 (7th Cir. 1975).
3 Both cases were decided Nov. 25, 1975. 526 F.2d 1110 (7th Cir. 1975), 526 F.2d 185 (7th Cir. 1975). In fact, in his opinion in Fairchild, Justice Stevens referred to the fact that Lockett had been decided the same day. Curiously, Stevens went on to cite Lockett for identifying the four factors set forth by Barker v. Wingo, 407 U.S. 514 (1972) relevant to the adjudication of the speedy trial right. U.S. v. Fairchild, 526 F.2d 185, 187 n.2 (1975).
Supreme Court test for such a right is explained by the tardy recognition by the Supreme Court of the fundamental constitutional nature of the speedy trial right. Only as recently as 1967 has the speedy trial right been recognized as a fundamental constitutional right, applicable to the states through the fourteenth amendment. Between 1967 and the 1972 Supreme Court delineation of guidelines for guaranteeing the speedy trial right, the judiciary was in an uncomfortable position. While they were charged by *Klopfer v. North Carolina* to recognize and protect the fundamental constitutional nature of this right, they were bereft of any corresponding Supreme Court guidance as to what means were to be used to discern violations. Considering the desperate nature of the courts charged with protecting this right, it is remarkable that only two tests were formulated to fill the void of Supreme Court leadership. Both approaches were characterized by their rigidity of application; neither made provision for the exigencies of each specific case.

The first, commonly known as the “specified time period” approach, literally required that the defendant be brought to trial within a specified period of time. This approach was formalized by either state statutes or court rules. As a test, it had the advantage of simplicity of application. If a defendant were held past the specified time limit without being brought to trial, his right to a speedy trial was deemed to have been violated. The difficulty with the approach was its attempt to quantify an amorphous guarantee. More specifically, in one case, a longer length of prosecutorial delay might be justified by the difficulty in obtaining evidence. Conversely, a period of time shorter than the specified time limit might be unduly arduous to a defendant in a particular factual setting. In short, the specific time limit was deemed too rigid by the Supreme Court; it failed to provide for the exigencies of each individual case.

The second approach was the so-called “demand rule.” This test resulted in an automatic waiver of the right to a speedy trial for the period prior to a defendant’s demand for a speedy trial. Once again, the test for speedy trial violation was easy to apply; the court merely need look for a defense demand for prompt prosecution. Failure to find such a demand would relieve the court from considering any claim of speedy trial violation raised by the defense for the period of time prior to a demand. This approach was in turn rejected by the Supreme Court. Again, the Court cited the rigidity of application. There was no provision accommodating the defendant who had a justifiable reason for

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6 *Id.*
9 See, e.g., CAL. PEN. CODE § 1382 (West Supp. 1975) (15 days from date held to answer to filing of information; 60 days from filing of information to trial); ILL. REV. STAT. ch. 38, § 103-5(a) (Smith-Hurd 1965) (120 days from arrest); PA. STAT. ANN. tit. 19, § 781 (1964) (6 months from commitment). Source: *ABA, Project on Minimum Standards for Criminal Justice, Standards Relating to Speedy Trial* 14 (1968).
11 “The States, of course, are free to prescribe a reasonable period consistent with constitutional standards, but our approach must be less precise.” *Id.* at 523.
12 *Id.* at 524.
13 *Id.* at 525.
14 The Court referred to the approach as “... this rigid approach.” *Id.* at 525.
failing to demand the guarantee of a speedy trial. More importantly, the Court declared the demand-waiver rule to be inconsistent with prior constitutional doctrine concerning the waiver of fundamental constitutional rights. In prior cases, the Court required waiver of fundamental constitutional rights to be intentional; given freely with an understanding of what the defendant was waiving. Every presumption was to be directed away from the waiver of such a fundamental right. The Court refused to presume the acquiescence of a defendant to loss of such an important and fundamental right.

Thus, the Court dismissed both the existing guidelines for discerning speedy trial violations because of their rigid natures. In failing to quantify or clearly define such a fundamental right as that to a speedy trial, the Court, with consternation, noted: "It is . . . impossible to determine with precision when the right has been denied. We cannot definitely say how long is too long in a system where justice is supposed to be swift but deliberate." Consistent with the recognition of the vague outlines of this guarantee, the Court advanced a new approach which took the nature of a balancing test that attempted to recognize and weigh conflicting factors related to the nature of the speedy trial right. In this weighing process, the Court specifically mentioned four factors to be considered: length of the delay, reason for the delay, assertion by the defendant of his right to a speedy trial, and prejudice arising from the delay. In enunciating these factors, the Court rejected any talismanic qualities for the four, noting:

We regard none of the four factors identified above as either a necessary or sufficient condition to the finding of a deprivation of the right of a speedy trial. Rather, they are related factors and must be considered together with such other circumstances as may be relevant.

Despite this reservation by the Court, these four factors were seized upon by lower courts and used as the sole criteria for determining a violation. However, a minority of courts did employ the "such other relevant circumstances" phrase as a fifth factor in the Barker weighing process.

This minority can be further divided into two schools. The first cites Barker language describing the weighing process in its entirety, then decides the case in contention on the four basic Barker factors. That is to say, these courts cite "such other relevant circumstances" as a perfunctory requirement for applying

15 "Such an approach, by presuming waiver of a fundamental right from inaction, is inconsistent with this Court's pronouncements on waiver of constitutional rights." Id. at 525 (footnote omitted).
18 "We, therefore, reject both of the inflexible approaches. . . ." 407 U.S. 514, 529 (1972).
19 Id. at 521 (footnote omitted).
20 Id. at 530.
21 Id. at 530.
22 Id. at 533 (emphasis added).
23 Case comments and law review articles reflect this attitude on the part of these courts by describing the Barker weighing test exclusively by its four elements without regard to the "such other relevant circumstances" phrase. See, e.g., Uviller, note 7 supra; Young, How to Decide Whether a Trial Is Speedy, 58 A.B.A.J. 1095 (1972); Comment, 51 N.C. L. Rev. 310 (1972).
24 See, e.g., United States v. Morse, 491 F.2d 149, 157 (1st Cir. 1974); United States v. Cabral, 475 F.2d 715, 717 (1st Cir. 1973).
the four *Barker* factors. In substance, this school is the same as the majority, in that both decide speedy trial violation by utilizing the four *Barker* factors as the sole criteria by which such a violation is to be determined.\textsuperscript{25} It is only in phraseology that this minority differs from the majority view, insomuch as it pays lip service to "such other relevant circumstances" as a fifth factor to be weighed in determining violations of the speedy trial right. The only explanation for such an approach would seem to be that such courts see a pro forma citation of the entire *Barker* phraseology as a requisite to applying the four basic *Barker* factors.

The second minority school employs the "such other relevant circumstances" phrase as a vehicle for expanding the factors to be considered in the weighing process.\textsuperscript{26} This trend originated in the Fifth Circuit and is confined in application to that circuit.\textsuperscript{27} Within the auspices of the "such other relevant circumstances" vehicle, the Fifth Circuit has enumerated several factors, including: "The gravity of the charged offense and the likelihood of repetition, the number and complexity of legal and factual issues involved, the availability of evidence. . . ."\textsuperscript{28} Despite this verbal commitment by the Fifth Circuit to develop the *Barker* catch-all phrase into an effective vehicle for expanding the weighing process, the Fifth Circuit has failed to exercise this vehicle in practice. Cases purportedly expanding the *Barker* weighing test predicate their decisions on only the four considerations specifically enumerated in *Barker*.\textsuperscript{29} Thus prior to *Lockett*, no court had actually applied any factors other than the four of *Barker*. Therefore, *Lockett* will be examined for evidence of an effective expansion of the constitutional test laid down by the Supreme Court in *Barker*.

Lockett was arrested on January 18, 1973, for possession of checks stolen from the mail.\textsuperscript{30} Subsequent to receiving his *Miranda* warnings, Lockett voluntarily confessed to the crime.\textsuperscript{31} On January 23, 1975, the grand jury returned an indictment against him.\textsuperscript{32} In February, Lockett moved for a dismissal of the indictment, alleging a violation of his sixth amendment right to a speedy trial.\textsuperscript{33} This motion was denied on April 8, 1975, by the district court.\textsuperscript{34} Lockett waived a jury trial, and the case was tried on a written stipulation of the facts.\textsuperscript{35} The only error that Lockett raised on appeal was that of an improper denial of his speedy

\begin{itemize}
\item \textsuperscript{25} After mentioning and discussing the four *Barker* factors, the *Cabral* court stated: "In balancing all of the factors discussed above in this case, we conclude that the trial court did not err in denying the appellant's motion to quash the indictment." United States v. Cabral, 475 F.2d 715, 717-20 (1st Cir. 1973). The *Morse* court, after examining the defendant's claims of prejudice and undue delay stated: "Taking all these factors into consideration, we conclude that the taxpayers' sixth amendment claim must fail." United States v. Morse, 491 F.2d 149, 157 (1st Cir. 1974).
\item \textsuperscript{26} "Several other considerations are also inherent in the ad hoc approach which the *Barker* decision requires. . . ." United States v. Dyson, 469 F.2d 735, 739 (5th Cir. 1972).
\item \textsuperscript{27} United States v. Palmer, 502 F.2d 1233 (5th Cir. 1974); United States v. Perez, 489 F.2d 51 (5th Cir. 1973); United States v. Dyson, 469 F.2d 735 (5th Cir. 1972).
\item \textsuperscript{28} United States v. Dyson, 469 F.2d 735, 739 (5th Cir. 1972) (emphasis added).
\item \textsuperscript{29} United States v. Palmer, 502 F.2d 1233, 1237-38 (5th Cir. 1974); United States v. Perez, 489 F.2d 51, 71-72 (5th Cir. 1973); United States v. Dyson, 469 F.2d 735, 739-41 (5th Cir. 1972).
\item \textsuperscript{30} United States v. Lockett, 526 F.2d 1110, 1111 (7th Cir. 1975).
\item \textsuperscript{31} Id.
\item \textsuperscript{32} Id.
\item \textsuperscript{33} Id.
\item \textsuperscript{34} Id.
\item \textsuperscript{35} Id.
\end{itemize}
Despite an application of the four-pronged test of *Barker* which indicated that Lockett has been denied his speedy trial right, the Seventh Circuit affirmed the conviction. The court felt that Lockett’s voluntary confession constituted such other relevant circumstances as to determine that Lockett’s right to a speedy trial had not been abridged. In so holding, the Seventh Circuit became the first court to give substance to the Supreme Court’s language of “such other relevant circumstances” as a factor to be weighed in determining violations of the right to a speedy trial; heretofore this Supreme Court terminology had only been treated in a perfunctory fashion. The post-*Barker* cases had weighed only the four factors definitively enumerated in *Barker*. In evaluating Lockett’s interpretation of the *Barker* guidelines, it is necessary to determine whether Lockett truly stands as a corollary or whether it disregards Lockett’s speedy trial right because of the evidentiary circumstances of the case.

**Analysis and Criticism of Lockett**

In *Lockett*, the Seventh Circuit determined that an application of the four *Barker* factors would indicate a denial of the defendant’s speedy trial right. However, the Court found Lockett’s voluntary confession to be an additional relevant factor permissible of consideration under the “such other relevant circumstances” phraseology.

Initially, this approach would appear consistent with the Fifth Circuit’s determination that “other relevant circumstances” included the “availability of evidence.” Since a confession is but a peculiar specie of evidence, the Seventh Circuit in taking notice of the availability of the confession was in fact echoing the Fifth Circuit and taking note of the availability of evidence. However, two distinctions can be drawn between the series of Fifth Circuit cases and *Lockett*. These distinctions serve to destroy the applicability of the Fifth Circuit decisions as precedent for the decision in *Lockett*.

The first distinction has been alluded to in a previous section. As noted, the Fifth Circuit, though espousing attention to other relevant factors, has in practice applied only those factors specifically prescribed in *Barker*. *Lockett* not only recognized but applied a fifth factor; *Lockett* has, in practice, expanded the *Barker* weighing process.

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36 Id.
37 Id. at 1112.
38 In short, the weight we have given the first three factors (delay, failure to explain, and no reason to require assertion of the right) would tend to favor defendant’s position. Normally, defendant’s failure to show prejudice, standing alone, might be insufficient to overcome the other factors. However, in this case, there is the added point that defendant has voluntarily confessed to the crime of which he stands convicted. This compels the conclusion that his Sixth Amendment, speedy trial right has not been violated. As the Supreme Court stated in *Barker*, “[the four factors] are related . . . and must be considered together with such other circumstances as may be relevant.” *Barker v. Wingo*, supra, 407 U.S. at 533, 92 S. Ct. at 2193. Lockett’s confession is such a “relevant circumstance.” We are persuaded that no constitutional rights have been violated in this case.

40 See text accompanying note 28 supra.
41 See note 29 supra.
More important is the second distinction between Lockett and the Fifth Circuit cases. The Fifth Circuit noted availability of the evidence as an additional factor, while Lockett focuses on the weight of the evidence. This Fifth Circuit reference to available evidence is consonant with the accepted nature of the speedy trial right; one reason for requiring a speedy trial is to preserve evidence. Additionally, the length of the permissible pretrial delay is judged in light of the time required to collect the evidence. Restated simply, the availability of evidence is to be considered in what constitutes a permissible delay. Thus, the Fifth Circuit's additional factor is merely a recognition of a factor already understood to be involved in the weighing process; that of the prejudice arising from the delay resulting from the possible destruction of evidence.

Lockett, on the other hand, actually does introduce a new factor—that of the weight of the evidence. By emphasizing the availability of a confession, the court is not emphasizing the availability of evidence as related to preservation of evidence and permissible time delay. A confession is a type of evidence whose preservation is not at all linked to permissible pretrial delay. Rather, it seems that the court is citing the existence of the voluntary confession because of the enormous weight that this specie of evidence carries. That Lockett is truly espousing a "weight of the evidence" approach is noted by the court's declaration: "Defendant voluntarily (after receiving Miranda warnings) confessed to the crime. He has never repudiated this confession." This emphasis by the court on the existence of the confession indicates the importance that the court places on this confession. As noted before, the significance of a confession when compared to other evidence is its weight. Upon the establishment of the corpus delicti, that is, the fact that a crime has been committed by someone, a confession is sufficient for a conviction. Therefore, when the court emphasized the existence of a confession, it was undoubtedly commenting on the factor that distinguishes a confession from other evidence; the evidentiary weight of a confession.

With its reliance on this important specie of evidence, Lockett arguably declares that the constitutionally allowable period of pretrial delay is longer for defendants who are opposed by a heavy amount of evidence. Under the rationale employed in Lockett, the length of permissible delay increases correspondingly with the probability of the defendant's guilt. It is with this prospect that issue must be taken.

To link the constitutionally allowable pretrial delay with the amount of evidence confronting the defendant emasculates the presumption of innocence. By introducing the weight of the evidence as a relevant factor, the court is arguing that the drastic remedy of dismissal is decreasingly called for where there is increasing certainty of the defendant's guilt. This is effectually a pretrial adjudication of the defendant's guilt. Regardless of the subsequent determination of guilt, at the time of the abridgement of his speedy trial right, Lockett was presumed to

43 526 F.2d at 1111 (emphasis supplied).
44 W. LAFAVE & A. SCOTT, HANDBOOK ON CRIMINAL LAW, § 4, at 17 (1972).
be innocent of any wrongdoing. By allowing a longer delay for Lockett because of his voluntary confession, the court was calculating the odds of his subsequent conviction; such would appear completely inconsistent with the presumption of innocence. The court should be viewing the alleged speedy trial violation in light of a defendant's contemporary presumption of innocence rather than the likelihood of subsequent conviction.

But had Lockett not confessed to the crime, he would not now be criminally incarcerated.\(^6\) The Seventh Circuit distinguished among defendants on the type and weight of evidence available against an indicted party. In so doing, the court not only disregards the presumption of innocence, but also creates two classes of defendants. The classes are distinguishable only by the court's decision that the weight and type of evidence in cases similar to Lockett warrant a longer pretrial delay. These two classes are accorded different degrees of protection with regard to a fundamental constitutional right; a difference permissible only when there is a compelling state interest.\(^47\) It is difficult to see that such an overriding interest is present.

This classification of defendants according to probability of conviction denies those in Lockett's classification equal protection. At least in those cases where the defendant has made a confession, the prosecutor is now afforded an extended period of time within which he can commence his action without denying the defendant his constitutional right to a speedy trial. This classification is necessarily arbitrary since there are no standards by which the members of the two classes are to be differentiated. The determination of a sufficient probability of conviction to warrant longer pretrial delay than allowable under \(\text{Barker}\) rests upon the individual discretion of the trial court judge. This distinction will naturally vary with each trial and each judge, resulting in little more than an ad hoc surmise of the probability of conviction. Therefore, \(\text{Lockett}\) discounts the speedy trial right accorded the class of the more probably guilty defendants rather than ensuring a uniform guarantee, extraneous of any considerations of conviction.

Thus, the classifications created interfere with a fundamental constitutional right bereft of a compelling state interest. As noted above the only reasons for such an interference, the requirement of additional preparation time for the prosecutor or the interest of the prosecutor in trying the "easy" cases at his leisure, hardly constitutes a compelling state interest. Lacking a more compelling state interest the classification violates a fundamental constitutional right.\(^48\)

\(^{46}\) 526 F.2d at 1112.


\(^{48}\) State regulation or interference either with a fundamental constitutional right or through a suspect criteria triggers a strict scrutiny of that interference by the courts. Graham v. Richardson, 403 U.S. 365 (1971) (suspect criteria); Shapiro v. Thompson, 394 U.S. 618 (1969) (fundamental right). Strict scrutiny demands cessation of the state's regulation or interference unless there is a compelling state interest. Shapiro v. Thompson, 394 U.S. 618 (1969).

Some of the rights that have been determined by the Court to be fundamental constitutional rights include: the right to a jury in criminal cases, Duncan v. Louisiana, 391 U.S. 145 (1968); the right to a speedy trial, Klopfer v. North Carolina, 386 U.S. 213 (1967); the right to vote in a state election, Harper v. Virginia Bd. of Elections, 383 U.S. 663 (1966); the right of privacy, Griswold v. Connecticut, 381 U.S. 479 (1965); right to travel, Aptheker v. Secretary of State, 378 U.S. 500 (1964); the right to counsel in a criminal trial, Gideon
In support of the Seventh Circuit test, it may be argued that a confession of guilt divides defendants into classifications no more than any of the other four Barker factors. However, there is a distinction in the nature of the Barker elements and that factor proposed by Lockett. The Barker factors are procedural in nature, that of Lockett is substantive in nature. Barker determines whether the circumstances, the procedure involved in bringing the case to trial, deny the defendant his constitutional right. Lockett, based on the substance of the case, i.e., the probability of conviction, determines if the constitutional guarantee of a speedy trial is to be adjusted to allow a longer period of pretrial delay.

The Barker factors do not declare that because of the circumstances of the case the defendant is to be afforded a different degree of constitutional protection; rather, these circumstances determine the criteria by which to determine a constitutional violation. Lockett takes those cases that have breached the constitutional guarantee as determined by the Barker factors and determines if the violation should be allowed because of the substance of the case. In short, the Barker factors classify defendants by the procedural aspects of their case. Violations of a procedurally based constitutional right necessarily involve evaluating the procedural circumstances of each case. Lockett seeks to evaluate violations of this procedural constitutional right by the substance, the amount of evidence, against the defendant. Such an approach is not an application of a uniform constitutional right to each case; rather, it is a variance of this constitutional right extended to each defendant.

**Speedy Trial Act of 1974**

Although it is clear that Lockett is viewed in this quarter as dangerous precedent, it is necessary to ask, in light of recent legislation, the practical effect of this precedent. The Speedy Trial Act of 1974 was enacted by Congress for the purpose of reducing crime and recidivism by requiring speedy trials and by increasing the supervision over persons released pending trial. The focus of the Act was to establish a time limit within which a criminal prosecution had to be commenced. Contemplating a five-year acclimation process, the time allowed the prosecution to commence the trial is reduced each year to an ultimate time
limit of 100 days after arrest.\footnote{53} In short, this Act implements an administrative standard that must be met if a case is not to be dismissed for tardiness of disposition. It is not a standard that, if breached, would result in dismissal upon constitutional grounds. The defendant may still raise constitutional objections even if the trial is brought within the legislatively prescribed period for prosecution, since § 3173 of the Act provides: “No provision of this chapter shall be interpreted as a bar to any claim of denial of speedy trial as required by amendment VI of the Constitution.”\footnote{54}

Consistent with this provision, the act should have no effect on \textit{Barker} and its interpretive progeny. The \textit{Barker} standard remains the gauge for constitutional violations of the right to a speedy trial. In practice, however, the Speedy Trial Act may supplant the \textit{Barker} test in cases of federal prosecution. The additional guarantee extended to the defendants in a federal prosecution makes it doubtful that a defendant will be constitutionally denied a speedy trial by the delay administratively allowed prior to trial by the Act. By past examples of unconstitutionally long pretrial delays,\footnote{55} it is unlikely that a delay of less than 100 days would be considered violative of constitutional standards. Still, a defendant is free to allege a denial of his speedy trial right even where the prosecution has complied with the legislative timetable. In such an event, the \textit{Barker} standard is to be utilized.

In state prosecutions, the \textit{Barker} standard is also the governing constitutional test. However, the states are free to follow the example of Congress and extend to the defendant a shorter allowable period of pretrial delay. Such a provision, like the Speedy Trial Act of 1974, is an administrative test; it does not pre-empt the constitutional test. However, it may have the practical effect of conferring even more obsolescence on the constitutional test. Consequently, while cases interpreting the constitutional test retain considerable theoretical applicability, it remains to be seen how much these administrative codes will diminish the vitality of \textit{Barker} and its progeny.

It may well be that justice would be better served by an expansion of the \textit{Barker} balancing test for the speedy trial right. Indeed, it is clear that the Supreme Court has left an avenue open for an expansion with the use of its “such other relevant circumstances” phraseology. It is just as clear that such a suggestion has not, prior to \textit{Lockett}, been adopted. Nevertheless, it is the tenet of this comment that the \textit{Lockett} expansion was neither required, nor justified. The inclusion of a voluntary confession as a relevant factor results in a judicial determination of the likelihood of conviction in regard to preference of cases for trial. Such a pretrial determination challenges the presumption of innocence.

\footnote{53} The effective date of this phase in program is July 1, 1976. In the interim, each district court is required to institute an interim plan offering priority in trial dates for: (1) detained persons held in custody awaiting trial and (2) released persons awaiting trial designated as high risk by the attorney for the government. 18 U.S.C.A. §§ 3163, 3164 (Supp. 1976).


\footnote{55} United States v. Rosenstein, 474 F.2d 705 (2d Cir. 1973) (3-year delay not excessive); United States v. Jones, 472 F.2d 322 (1st Cir. 1973) (25-month delay not excessive); United States v. Cabral, 475 F.2d 715 (1st Cir. 1973) (23-month delay not excessive); United States v. Phillips, 477 F.2d 913 (5th Cir. 1973) (2-year delay not excessive); United States v. Saglimbene, 471 F.2d 16 (2d Cir. 1972) (6-year delay not excessive).
Additionally, it categorizes defendants by an arbitrary standard and improperly distinguishes the fundamental constitutional rights to be afforded two classes of defendants. Such categorization is improper because of its interference with a fundamental constitutional right without a compelling state interest. This categorization denies equal protection to those defendants whose substantive circumstances fail the *Lockett* test.

Thus it appears that *Lockett* is a dangerous precedent; varying as it does the degree of constitutional protection to be afforded a defendant because of the probability of conviction. An expansion of this doctrine to other procedural constitutional rights could render this guarantee responsive to an individual judge’s surmise of the probability of a particular defendant’s conviction. It is hoped that *Lockett* will remain isolated to the particular facts of this case.

*William J. Brooks, III*

**II. Federal Jurisdiction and Procedure**

**FEDERAL CIVIL PROCEDURE—ABSTENTION—RULE OF CONSTITUTIONAL CONSTRUCTION USED AS GROUNDS FOR ABSTENTION IN CASE INVOLVING UNCONSTRUED STATE STATUTE—Younger ABSTENTION EXTENDED TO PENDING CIVIL LITIGATION**

*Boehning v. Indiana State Employees Association, Inc.*

*Horvath v. City of Chicago*

Indiana State Employees Association, Inc. and Phyllis A. Musgrave, individually and on behalf of all others similarly situated, brought an action under 42 U.S.C. § 1983 challenging the termination of her employment. Musgrave had been dismissed for cause from her position with the highway commission after her request for a pretermination hearing had been denied.

Plaintiffs alleged that they had been denied due process of law under the fourteenth amendment by the policy and practice of the Indiana Highway Commission of discharging employees summarily and denying them a prior hearing to determine whether such employees were being discharged in accordance with the provisions of the Bipartisan Personnel System Act.¹ They contended that § 6 of the Act gave Musgrave a due process right to a predischarge hearing to determine whether cause for her dismissal existed.²

The district court noted that the Act was silent on the question of whether a hearing was required before dismissal for cause, and that no Indiana court had previously had the opportunity to construe the Act in order to resolve the uncertainty.³ The court further noted that no Indiana court had previously considered whether the Indiana Administrative Adjudication and Court Review

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¹ *Ind. Code* § 8-13-1.5-1 (Burns 1971) [hereinafter cited as the Bipartisan Act].
² *Ind. Code* § 8-13-1.5-6 (Burns 1971).
Act, establishing not only the right to a predischarge hearing but also setting forth the procedures for such administrative hearings and providing for judicial review in the Indiana courts, was applicable to the Bipartisan Act. The court held that if the Administrative Act was construed as applicable to the Bipartisan Act, the plaintiff would have a right to a predischarge hearing as a matter of Indiana law. It therefore abstained until construction of the Indiana statutes had been sought in the state courts.

The Court of Appeals for the Seventh Circuit reversed, holding that abstention was not appropriate where the state statutes involved were not arguably subject to a construction that would support a claim for a pretermination hearing and thereby avoid the federal due process question. The court held that the motion and hearing provisions of the Administrative Act did not apply to the Bipartisan Act; therefore, an employee discharged for cause under the Bipartisan Act was not entitled, as a matter of state law, to a hearing or a remedy for lack of one. In reaching this conclusion, the court reasoned:

If the action were brought in an Indiana court, that court would presumably address the question whether the due process clause of the Fourteenth Amendment would require a hearing, but that would be adjudication of the same claim of federal right advanced in this action, and not a resolution of any real question of state common, statutory or constitutional law...

"Abstention cannot be ordered simply to give state courts the first opportunity to vindicate the federal claim."

Thus, finding abstention improper, the court proceeded to decide the case on the merits; it resolved the federal constitutional question in favor of appellant Musgrave.

The Supreme Court of the United States in a per curiam opinion, Justice Douglas dissenting, reversed the Seventh Circuit, holding that:

the relevant [Indiana] statutory provisions may fairly be read to extend pretermination hearing rights to respondent [Musgrave]. [Therefore,] the district court was right to abstain from deciding the federal constitutional issue pending resolution of the state law question in the state courts.

The Abstention Doctrine in Perspective

The doctrine of abstention, under which a federal court may decline to exercise its subject matter jurisdiction, is an extraordinary and narrowly drawn

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4 Ind. Code § 4-22-1-1 et seq. (1971) [hereinafter cited as the Administrative Act]. Section 1 of the Administrative Act provides:

It is the intent to establish a uniform method of administrative adjudication by all agencies of the state of Indiana, to provide for due notice and an opportunity to be heard and present evidence before such agency and to establish a uniform method of court review of all such administrative adjudication.


5 357 F. Supp. at 1375.

6 Id. at 1375-76.

7 Indiana State Employees Ass'n, Inc. v. Boehning, 511 F.2d 834 (7th Cir. 1975).

8 Id. at 836.

9 Id.

exception to the duty of a federal court to adjudicate a controversy properly brought before it. Abstention is justified only in those special circumstances where remitting the parties to the state court will serve an important countervailing interest. This doctrine, generally accorded to have been established in Railroad Commission v. Pullman, and now commonly referred to as "Pullman abstention," has been consistently used by the Supreme Court as a means to allow state courts to resolve state law issues in particular types of cases, since, when federal courts decide questions of state law, there is no possibility of review of their determinations within the authoritative state judicial system.

As a result of the Supreme Court's 1964 decision in England v. Louisiana Board of Medical Examiners, the abstention doctrine allows a case to be divided, so that federal tribunals make the final decision on the federal issues and the facts on which they are based, and state tribunals make the final decision on state issues. Such a division satisfies two of the major policy considerations upon which Pullman abstention is based: (1) the avoidance of interfering with a legitimate state program, thereby causing unnecessary federal-state friction, and (2) the avoidance of unnecessary decision of federal constitutional issues.

The advantages of abstention, however, are obtained at a high cost. Parties who have chosen to litigate in federal court are sent to the state court to obtain a decision on state law issues, involving them in considerable delay and expense. Furthermore, the heavy burden that abstention places on the litigants raises the question of whether transferring jurisdiction from federal to state court is consistent with federal jurisdictional statutes. This challenge has been met by the traditional justification for Pullman abstention that it "does not . . . involve the abdication of federal jurisdiction, but only the postponement of its exercise."

While the England procedure theoretically provides for the eventual resolution of federal questions by federal tribunals, in practice the result is often different. The delay and expense that abstention entails, along with its requirement that the parties undergo two trials, could effectively deter litigants from exercising their right to federal jurisdiction. In some cases the path of least resistance has been for parties to present all claims, state and federal, to the state court for resolution, with the federal system used only for appeal to the Supreme Court. Despite these burdens, federal courts, nevertheless, do deem it within their power to "restrain their [jurisdictional] authority because of 'scrupulous regard for the rightful independence of the state government' and for the smooth working of the federal judiciary."

Thus, abstention is an accepted compromise of important competing interests.

11 312 U.S. 496 (1941).
14 312 U.S. 496 (1941).
16 Id. at 177, quoted with approval in England v. Louisiana State Bd. of Medical Examiners, 375 U.S. 411, 416 (1964).
17 The NAACP followed this path in NAACP v. Button, 371 U.S. 415 (1963), after abstention was ordered in Harrison v. NAACP, 360 U.S. 167 (1959).
And since it requires the balancing of an individual's right of access to federal adjudication with considerations of comity and federalism, federal courts are presented with the delicate and difficult task of defining the doctrine's scope.9

The Supreme Court's standards, adopted to define the scope of Pullman abstention, require that the state law must be unclear and that it must be subject to an interpretation that will avoid a federal constitutional question.20 There is little judicial analysis of how "unclear" state law must be or how probable that the federal constitutional question will be avoided.21 Nevertheless, it is clear that the likelihood of avoiding the constitutional question in Pullman abstention cases increases as the state issue becomes more and more ambiguous. The verbal formulations of the abstention prerequisites utilized by the Supreme Court indicate that a minimal lack of clarity is sufficient to order abstention.22

Abstention and Boehning in General

Consistent with its past formulations, the Supreme Court in Boehning ordered abstention because "the relevant [Indiana] statutory provisions may fairly be construed to extend pretermination hearing rights to respondent."23 Under such circumstances abstention was proper to avoid deciding the federal constitutional issue until the state law question was resolved by the state courts.24 Accordingly, Boehning would seem to revolve around how "unclear" state law must be before Pullman abstention is appropriate.25 However, the actual reasoning employed by the Court indicates that while in theory Pullman abstention standards were followed in Boehning, the Court, for all practical purposes, adopted a rule that the state law issue need not be ambiguous to justify federal abstention in cases involving unconstrued state enactments. Support for this assertion can be found in the dissents of Chief Justice Burger and Justice Black in Wisconsin v. Constantineau.26

In Constantineau the police chief, pursuant to a state statute, caused to be posted a notice to all retail liquor outlets in Hartford, Wisconsin, that sales or gifts of liquor to appellee, a resident of that city, were forbidden for one year. The statute provided for such "posting" without notice or hearing. A three-judge federal court held the statute 'unconstitutional as violative of procedural due process. While the Supreme Court affirmed, Chief Justice Burger argued in dissent that state courts should have the first opportunity to construe a chal-

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21 For excellent analysis of this judicial shortcoming, see Field, Abstention In Constitutional Cases: The Scope of the Pullman Abstention Doctrine, 122 U. Penn. L. Rev. 1071 (1974).
22 See text accompanying notes 42-59 infra.
23 96 S.Ct. at 169.
24 Id.
25 See Field, supra note 21, for an analysis of this aspect of Pullman abstention. It is contended that the Supreme Court is moving away from the indefinite and seemingly undefinable standard of "unclear" state law in ordering abstention in certain types of cases. If this is so, the need to precisely define the lack of clarity standard will be limited or even unnecessary.
26 400 U.S. 433 (1971).
lenged state statute regardless of the degree of ambiguity of the statute. Justice Black, indicating fealty to *Pullman* abstention standards, contended that the clear unconstitutionality of the statute made it "uncertain" and therefore abstention was proper. The majority in *Constantineau* held that the unconstrued state statute was not ambiguous and therefore abstention was not proper. However, the Supreme Court in *Boehning*, on facts analogous to those in *Constantineau*, held that abstention was proper. Thus, it appears that *Boehning* formulates a rule of abstention based in part on the reasoning of the *Constantineau* dissenters.

Additionally, however, *Boehning* may foreshadow a much greater movement by the Supreme Court in the area of abstention. It is basic to *Pullman* abstention that the presumption is in favor of federal jurisdiction, and that it takes "special circumstances" to justify referring state law issues to state courts. The Supreme Court in *Boehning* appears to be asserting that a federal court should abstain even if it finds the state law issue clear, *i.e.*, the challenged state enactment is unambiguous, but that upon deciding it, the court would find the statute to violate the federal constitution. In such a case, the state courts should be given an opportunity to construe the statute to give it a constitutional construction. From this reading of *Boehning* it is only a short theoretical step to a presumption in favor of state jurisdiction, which is the basis of another type of abstention known as *Younger* abstention. In contrast to *Pullman* abstention, *Younger* abstention requires the federal plaintiff to show "special circumstances" to justify the exercise of federal jurisdiction.

*Pullman* and *Younger* abstention doctrines have been applied to fairly distinct categories of cases in the past. *Pullman* abstention was (and still is) applied in civil cases, whereas *Younger* abstention was applied in pending criminal cases, whenever appropriate. This distinction, however, has been eroded by the Supreme Court's more recent applications of *Younger* abstention. In *Huffman v. Pursue, Ltd.*, the Supreme Court, following the lead of many lower federal courts, applied *Younger* abstention to pending civil cases. This caused Justice Brennan, in his dissenting opinion, to remark: "This is obviously only the first step toward extending to state civil proceedings generally the holding of *Younger v. Harris*..."

In light of *Younger's* extension to pending civil cases, it is arguable that the policies upon which *Younger* abstention is based, comity and federalism, may have had an indirect, or possibly a direct, effect on the Court's decision to abstain in *Boehning*, although the Court did not mention *Younger* in its decision.

[27] Id. at 440 (Burger, C.J., dissenting, Blackmun, J., concurring).
[28] Id. at 444 (Black, J., dissenting).
[29] Id. at 439.
[31] This type of abstention was propounded in *Younger v. Harris*, 401 U.S. 37 (1971).
[34] Id. at 613, (Brennan, J., dissenting).
[35] The propriety of advancing the argument that *Younger* abstention may have influenced the Court's decision in *Boehning* is partially based on the fact that *Boehning* was decided by relying on a *per curiam* reversal. Justice Brennan, dissenting in *Paris Adult Theatre v. Slaton*, [July 1976]}
Furthermore, there appears to be another significant factor which not only influenced the Court's decision to abstain in *Boehning*, but which is also contributing to the erosion of the distinction between *Pullman* and *Younger* abstention. That factor is 42 U.S.C. § 1983, which embodies part of the Civil Rights Act of 1871. Section 1983 has been a primary means for enforcing constitutional limitations and protecting individual constitutional rights in both civil and criminal cases. It has made it possible for an individual to seek relief in federal court without first seeking vindication of his federal constitutional rights in state courts. However, § 1983 is based upon a premise that an apparent majority of the Supreme Court now consider invalid: distrust of state courts in handling federal constitutional issues. Therefore, it appears that *Boehning*, an action brought under 42 U.S.C. § 1983, indicates that where the challenged state enactment has not been construed by state courts, exhaustion of state judicial remedies is required although the basis of the suit is under 42 U.S.C. § 1983.

Thus, while *Boehning* appears to have been decided according to *Pullman* abstention standards, two other factors, the *Younger* abstention doctrine and the Supreme Court's changing attitude toward 42 U.S.C. § 1983, seem to have had a significant influence on the decision to abstain. Therefore, *Boehning* will be more fully analyzed in light of three major factors: (1) the apparent abandonment of the "lack of clarity" requirement for *Pullman* abstention in cases involving unconstrued state enactments; (2) the extension of *Younger* abstention to civil cases; and (3) the increasing curtailment of direct relief in federal courts for plaintiffs seeking vindication of constitutional rights under 42 U.S.C. § 1983.

**Boehning and Pullman Abstention**

In *Boehning* the Supreme Court was faced with an unambiguous state statute which had never been construed by state courts but was clearly unconstitutional on its face. Rather than deciding the state law issue (whether the statute provided for a hearing for an employee discharged for cause), which is proper under *Pullman* abstention when the state law issue is clear, the Court looked to the body of other state law and found a state statute that if applied to the challenged statute might "fairly be read to extend such hearing rights to the respondent." The Court, "finding" the requisite ambiguity in this unique fashion, abstained.

The Court of Appeals for the Seventh Circuit used the same approach as the Supreme Court but reached the opposite result. The Seventh Circuit, finding the state law issue clear, held that even in applying other state law to the chal-
lenged statute, the challenged statute still could not be read to entitle plaintiff Musgrave to a hearing or a remedy for lack of one. Therefore, the question presented would be the same in state or federal court; whether plaintiff was entitled to a hearing under the due process clause of the fourteenth amendment. Thus, abstention would be improper.\textsuperscript{40}

Thus, the difference between the position taken by the Supreme Court and that of the seventh circuit in \textit{Boehning} relates not to the test to be used, but rather the deference which is to be paid to state statutes. In a footnote to its decision, the Supreme Court in \textit{Boehning} reasoned that:

\begin{quote}
The possibility that the Indiana state courts would adopt the construction contrary to that of the Seventh Circuit Court of Appeals is somewhat enhanced by the fact that the construction adopted by the Seventh Circuit may fairly be said to raise federal constitutional problems under recent procedural due process decisions of this Court. . . . \textsuperscript{43}
\end{quote}

The Court further reasoned that “[t]he state courts may be reluctant to attribute to their legislature an intention to pass a statute raising constitutional problems. . . .”\textsuperscript{42} The Court noted that the respondent’s federal constitutional right to a hearing in connection with a discharge for cause might have already been resolved in her favor.\textsuperscript{43} The Court’s preoccupation with preserving the state statute rather than providing an individual with an immediate remedy for the violation of her constitutional right to a hearing is clear.

Before it is possible to understand the impact \textit{Boehning} may have on the doctrine of abstention, in terms of the Court’s unique reasoning and the inquiry federal courts are now to make when confronted with actions involving unconstrued state civil enactments, it is necessary to place \textit{Boehning} in its proper context by briefly examining prior Supreme Court decisions involving unconstrued, and relatively unambiguous, state enactments.

1. \textit{Pullman} Abstention and Cases Involving Unconstrued State Enactments
   Prior to \textit{Boehning}

   In \textit{Harrison v. NAACP}\textsuperscript{44} plaintiffs sought a declaratory judgment that five Virginia statutes, which had never been construed by the Virginia courts, were unconstitutional and an injunction restraining their enforcement. The district court found two of the statutes vague and ambiguous and withheld judgment on them, retaining jurisdiction, pending construction by the state courts. It declared the other three unconstitutional and enjoined their enforcement. The Supreme Court ruled that as to the three statutes held unconstitutional, the district court should have abstained, retaining jurisdiction until the Virginia courts had been afforded a reasonable opportunity to construe them. The Court ordered abstention because it was

\begin{itemize}
\item \textsuperscript{40} 511 F.2d at 836.
\item \textsuperscript{41} 96 S.Gt. at 169.
\item \textsuperscript{42} \textit{Id.}
\item \textsuperscript{43} \textit{Id.} at 170.
\item \textsuperscript{44} 360 U.S. 167 (1959).
\end{itemize}
unable to agree that the terms of these three statutes leave no reasonable room for a construction by the [state] courts which might avoid in whole or in part the necessity for federal constitutional adjudication, or at least materially change the nature of the problem.\textsuperscript{45}

The Court made it clear in Harmon v. Forssenius\textsuperscript{48} that there was no special rule for unconstrued state enactments. Forssenius involved suits attacking the constitutionality of Virginia statutes conditioning federal voter qualification on payment of a poll tax or filing of a certificate of residence six months before the election. The district court refused to abstain to afford the Virginia courts an opportunity to pass on underlying issues of state law. The Supreme Court held that the district court did not abuse its discretion in refusing to abstain, finding the statutes to be clear and unambiguous. The Court stated that:

[T]he [Pullman] doctrine . . . contemplates that deference to state court adjudication only be made where the issue of state law is uncertain. If the state statute in question, although never interpreted by a state tribunal, is not fairly subject to an interpretation which will render unnecessary or substantially modify the federal constitutional question, it is the duty of the federal court to exercise its properly invoked jurisdiction.\textsuperscript{47}

In Reetz v. Bozanich,\textsuperscript{48} plaintiffs brought an action challenging the constitutionality of an Alaska statute and regulations limiting commercial salmon fishing licenses to defined groups of persons. Although the same had never been interpreted by an Alaska court, the district court refused to abstain. The Supreme Court, while citing Forssenius, vacated the judgment of the district court, holding that the federal court should abstain because “a state decision here . . . could conceivably” avoid the necessity for the federal courts to decide the federal constitutional question.\textsuperscript{49}

Using language similar to that in Reetz, the Supreme Court in Fornaris v. Ridge Tool Co.\textsuperscript{50} ordered abstention because it was “conceivable” that the unconstrued Puerto Rican statute “might be judicially confined to a more narrow ambit which would avoid all constitutional questions.”\textsuperscript{51}

In 1971 the Court was confronted with Wisconsin v. Constantineau.\textsuperscript{52} The majority of the Court found that there was no ambiguity in the state statute and that “[t]here were no provisions which could fairly be taken to mean that notice and hearing might be given under some circumstance or under some construction but not under others.”\textsuperscript{53} Although the Court was faced with a state statute unconstrued by state courts, it found “the naked question, uncomplicated by an unresolved state law [to be] whether that Act on its face is unconstitutional.”\textsuperscript{54} The Court cited with approval Zwickler v. Koota, where it said that:

\begin{itemize}
\item \textsuperscript{45} Id. at 177 (emphasis added).
\item \textsuperscript{46} 380 U.S. 528 (1965).
\item \textsuperscript{47} Id. at 534-55 (emphasis added).
\item \textsuperscript{48} 397 U.S. 82 (1970).
\item \textsuperscript{49} Id. at 86-87 (emphasis added).
\item \textsuperscript{50} 400 U.S. 41 (1970).
\item \textsuperscript{51} Id. at 44 (emphasis added).
\item \textsuperscript{52} 400 U.S. 433 (1971).
\item \textsuperscript{53} Id. at 439 (emphasis added).
\item \textsuperscript{54} Id.
\end{itemize}
Abstention should not be ordered merely to await an attempt to vindicate the claim in a state court. Where there is no ambiguity in the state statute, the federal court should not abstain but should proceed to decide the federal constitutional claim.\textsuperscript{55}

The Court distinguished \textit{Reetz} by stating that it and other abstention cases “dealt with unresolved questions of state law which only a state tribunal could authoritatively construe.”\textsuperscript{56}

Chief Justice Burger, in a vigorous dissent, found the majority’s distinction of \textit{Reetz} unpersuasive and indicated that he favored a departure from current standards for abstention. He pointed out that the Alaska statute in \textit{Reetz} could not have been more clear or less susceptible to a limiting construction than the Wisconsin statute. He viewed the \textit{Reetz} decision as a furtherance of the Court’s policy of avoiding interference with the states by avoiding unnecessary constitutional decision-making. Noting that \textit{Reetz} could not fairly be distinguished, Burger argued that ambiguity in state law should not be required to order abstention and that state courts be allowed to pass first on federal issues. He found the fact that the Wisconsin statute was \textit{not} ambiguous did not support a decision not to abstain.\textsuperscript{57} Burger, while agreeing that the Wisconsin statute appeared, on its face and in its application, to be in conflict with accepted concepts of due process, contended that the Court should not strike down a state statute without affording the Wisconsin state courts an opportunity to dispose of the problem.\textsuperscript{58} He reasoned that “[s]ince no one could reasonably think that the judges of Wisconsin have less fidelity to due process requirements of the Federal Constitution than [the Supreme Court, the Court should abstain] until resort to state court has been exhausted.”\textsuperscript{59}

Justice Black’s dissent in \textit{Constantineau} offered a new and unusual approach to abstention. While the ambiguity was not evident on the face of the challenged statute, Justice Black found it in other state law. He reasoned that since “no state court appears to have passed on this Act at all, a state decision might well apply the body of other State law to require notice, hearing and other necessary provisions to render the challenged Act constitutional.”\textsuperscript{60} The fact that the Act was clearly unconstitutional on its face made it “wholly uncertain that the state law has the meaning it purports to have.”\textsuperscript{61} In other words, Black felt that since the challenged statute was blatantly unconstitutional that the Wisconsin courts should be given the opportunity to construe the statute so as to avoid both state and federal defects. The ends to which Black was willing to go to find “uncertainty” in the state law would seem to place him practically close to Burger, who would not require any ambiguity in state law to order

\textsuperscript{56} Id. at 438.
\textsuperscript{57} Id. at 442.
\textsuperscript{58} Id. at 440.
\textsuperscript{59} Id. This statement represents a fundamental change in the Court’s attitude toward state courts’ ability to deal with federal constitutional issues and is a major reason for the curtailment of 42 U.S.C. \textsection{} 1983 (1970). \textit{See text} accompanying notes 112-32 infra.
\textsuperscript{60} Id. at 444.
\textsuperscript{61} Id.
abstention in cases involving unconstrued state enactments.

Before analyzing *Boehning* in light of these decisions, it is necessary to mention a case which points up the Supreme Court's indecision on how ambiguous state law must be to order abstention. In *Lake Carriers' Association v. MacMullan*, owners of Great Lakes bulk cargo vessels brought suit to enjoin various sections of Michigan's Watercraft Pollution Control Act. The Supreme Court noted that the Act had not been construed by any Michigan court and that "its terms are far from clear in particulars that go to the foundation of [plaintiff]'s grievance." In ordering abstention, the Court stated it was "satisfied that authoritative resolution of the ambiguities in the Michigan law is sufficiently likely to avoid or significantly modify the federal questions appellants raise to warrant abstention." The Court's decision would seem to satisfy Chief Justice Burger's argument in *Constantineau*; however he joined in an opinion dissenting from the Court's decision to abstain on the grounds that the Michigan law, though unconstrued was not ambiguous, that the plaintiffs have a right to choose a federal forum, and that they would be hurt by delay. The dissenting opinion appears to be directly inconsistent with the Chief Justice's earlier pronouncement in *Constantineau*, where he advocated that the state courts should have the first opportunity to pass on its statutes.

In the decisions prior to *Boehning*, the Court has consistently failed to provide any judicial analysis of how "unclear" state law must be for a federal court to order abstention. The verbal formulations of the abstention prerequisites that the Court has used appear to indicate that the lack of clarity required in state law is slight. Since it is almost always "possible" that a state court, in a Pullman-type case, might construe state law to affect or avoid the federal constitutional issue, the language of these prior cases apparently imposes exhaustion of state remedies on state law issues. However, the *Forssenius* and *Constantineau* opinions and the *Constantineau* and *Lake Carriers'* dissents indicate that exhaustion of state remedies is not an absolute rule. While the statutes in *Constantineau* and *Reetz* both appeared to be unambiguous and unconstitutional on their face, the Court reached opposite decisions regarding abstention. Chief Justice Burger's joining in the dissent in *Lake Carriers'* appears directly inconsistent with his dissenting opinion in *Constantineau*. The most plausible explanation for these inconsistencies would seem to be the individual Justices' views on the merits of the particular case. Proceeding on this assumption, the *Constantineau* dissents

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63 Id. at 511.
64 Id. at 512.
65 Id. at 515-17.
66 See text accompanying notes 57-59 *supra*.
67 While this is difficult to prove, a case which lends support to this assertion is *Procunier v. Marinez*, 416 U.S. 396 (1974). In *Procunier* appellees, prison inmates, brought a class action challenging prisoner mail censorship regulations issued by the appellant, Director of the California Department of Corrections, and the ban against the use of law students and legal paraprofessionals to conduct attorney-client interviews with inmates. The district court held the regulations unconstitutional and enjoined enforcement of the ban on the use of law students and legal paraprofessionals. On appeal to the Supreme Court, appellants argued that the district court should have abstained from deciding the constitutionality of the mail censorship regulations on the basis of comity. The Court affirmed the district court's decision not to abstain noting the district court's reasoning that "the mere possibility that a state court might
clearly signaled a desire on the part of some Justices to depart from the long-standing Supreme Court standards, that state law be "unclear" before *Pullman* abstention can be ordered. The *Constantineau* dissenters appear to be advocating abstention when the state law issue is clear due to the clear unconstitutionality of the unconstrued statute, on the theory that state courts should have the first opportunity to construe their statutes to cure any constitutional defects.

It is within this context of uncertainty and activism in dealing with abstention that *Boehning* was decided. *Boehning* represents the first time the Black rationale, from his dissent in *Constantineau*, has been endorsed by a majority of the Supreme Court. It is not fair to say, however, that the Seventh Circuit erred in refusing to abstain, even after following Black's approach of looking to the body of other state law, because such an approach does not mandate abstention in every case. Furthermore, the *Constantineau* majority opinion is strong authority for the Seventh Circuit's refusal to abstain. Thus, the Seventh Circuit cannot be faulted for the exercise of its well-reasoned discretion in *Boehning*. It seems apparent that the Supreme Court recognized this fact and therefore offered an additional rationale for its reversal of the Seventh Circuit.

2. *Boehning* and the Adoption of a Constitutional Rule of Construction as a Grounds for Abstention

Initially *Boehning* would appear to be another abstention case decided consistent with the vague verbal formulation reminiscent of prior cases. The Supreme Court cited *Reetz*, *Forssenius*, *Fornaris*, and *Pullman* for its authority. However, the fact that the Court looked to other state law in determining whether the "uncertainty" requirement for *Pullman* abstention was present indicates that it adopted Justice Black's suggestion as stated in his dissent in *Constantineau*.5 It appears, though, that the Court recognized the tenuousness of resting its decision to abstain upon the finding of ambiguity in a clear state law on the basis of other state law. Consequently, the Court looked for a more solid rationale on which to rest its decision. It noted that there was a serious constitutional problem if the clear meaning of the challenged Indiana statute were adopted and no constitutional problem if other state law was found to apply to the statute. Relying on their belief that state courts would, if given the opportunity to declare the prison regulations unconstitutional is no grounds for abstention." *Id.* at 400-01, citing Wisconsin v. *Constantineau*, 400 U.S. 433, 439 (1971).

The appellants also asserted as a ground for abstention that *CAL. P.ENAL CODE* § 2600 (4) (West Supp. 1975) assured prisoners the right to receive books, magazines, and periodicals, therefore an interpretation of the statute by the state courts and its application to the regulations might avoid or modify the constitutional question. The Supreme Court viewed this as an attempt to "establish the essential prerequisite for abstention—'an uncertain issue of state law . . . .' " 416 U.S. at 402-03, citing *Harmon v. Forssenius*, 380 U.S. 528, 534 (1965). The Court was not persuaded and held that "A state court interpretation of § 2600(4) would not avoid or substantially modify the constitutional question. . . ." 416 U.S. at 403.

Thus, while the similarity of *Procunier* to *Boehning* is evident, the Court using reasoning emphasizing the second requirement of *Pullman* abstention, namely avoiding the constitutional question, rather than the lack of clarity requirement as emphasized in *Boehning*, held that would be improper. It cannot be doubted that the regulations were clearly unconstitutional and the state court would have held as such. Therefore, it would seem that the real reason for not ordering abstention in *Procunier* was the Justices' views of the merits of the case.

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58 See text accompanying notes 60-61 supra.
portunity, afford the statute a constitutional construction, the Court reasoned that the Indiana state courts would likely adopt a construction of the statute to provide for a hearing, for if they did not adopt such a construction the statute would clearly raise federal constitutional problems. The possibility that the Indiana state courts would adopt a constitutional construction of the statute was enhanced by the fact that Indiana had a statute which if applied to the challenged statute would cure all procedural due process problems. Thus, the Court's decision to abstain was based on two major factors: (1) the patent unconstitutionality of the challenged Act, and (2) the availability of other state law which, if applied, would obviate decision of the federal constitutional question.

Thus, even though clear federal unconstitutionality is not a proper ground for ordering abstention under traditional *Pullman* standards, the *Boehning* opinion indicates that the Supreme Court has adopted such a ground in cases involving unconstrued state enactments. If a federal court correctly predicts that the clear unconstitutionality of one construction of the state enactment will lead the state court to adopt the other construction, abstention would appear to serve the interests of saving a statute that would otherwise be ruled in violation of the Federal Constitution. It is this reasoning that the Supreme Court appears to have adopted in *Boehning*.

While the reasoning behind the Court's conclusion is sound and in line with current abstention policies, it represents a new approach to abstention in action involving unconstrued state enactments. The Court's decision to abstain is based in part on a long standing rule of constitutional construction frequently articulated when the validity of a statute is drawn into question. The rule provides that where a statute is reasonably susceptible to two interpretations, one constitutional and the other unconstitutional, it is the duty of a court to adopt that construction which will save the statute from constitutional infirmity. The application of this rule to situations where a federal court is determining the constitutionality of a state enactment appears to be consistent with the policy considerations which underlie *Pullman* abstention, namely avoiding both interference with a legitimate state program and unnecessary decision of federal constitutional questions. However, this rule had never previously been used to support a decision to abstain. The rule was applied in one case where it was necessary for the Supreme Court to interpret a state enactment, but it was not applied for purposes of determining whether the Court should abstain. In *Presser v. Illinois*, the petitioner had been indicted for a violation of the state Military Code. He contended that the Code violated the second and fourteenth amendments of the Federal Constitution. The Court in sustaining the constitutionality of the Code stated:

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69 96 S.Ct. at 169.
70 While not articulating this rule, the Court clearly adopted it. The Court, in reasoning that state courts would give the challenged statute a constitutional construction, cited for its authority *Kent v. Dulles*, 357 U.S. 116 (1958), and *Johnson v. Robison*, 415 U.S. 361 (1974), both of which applied this rule of constitutional construction.
71 See Field, supra note 21, at 1093-98, 1113-1116.
72 116 U.S. 252 (1886).
We cannot attribute to the legislature, unless compelled to do so by its plain words, a purpose to pass an act in conflict with an act of Congress on a subject over which Congress is given authority by the Constitution of the United States. We are therefore of [the] opinion that fairly construed the sections of the Military Code referred to do not conflict with the laws of Congress on the subject of the militia.\(^{73}\)

Thus, faced with a state statute susceptible to two interpretations, one constitutional and one not, the Court construed the statute to be constitutional. It is important to note that the Court, when applying the rule, did not even consider which meaning a state court might adopt. The rule is based on the presumption that a state legislature will not intentionally enact an unconstitutional law. Therefore, the question of whether or not to abstain for state court decisions is not even relevant. The rule is one of construction, not one of abstention.

Yet strict application of this constructional rule to considerations presented in *Pullman* abstention cases would seem to require the following results: (1) if the statute is clearly unconstitutional, the rule does not apply and the federal court would hold the state enactment unconstitutional; (2) if the statute is susceptible to two meanings, one constitutional and one unconstitutional, the rule applies and the federal court adopts the constitutional meaning and proceeds to the merits of the case; and (3) if the state statute is susceptible to more than two meanings, the rule does not apply and the federal court is presented with the question of whether or not to abstain based on *Pullman* standards. It is clear that the construction rule is not meant to be applicable in the abstention context. Nevertheless, in *Boehning* the Court used the rule to support its decision to abstain. The Court took a clearly unconstitutional statute, found it to be susceptible of two meanings, using Justice Black's approach from *Constantineau*, and abstained.

It should be noted that the Court could not apply the rule in its strict sense and obtain the desired result, that of saving the statute. Strict application of the rule would require the Court to adopt a constitutional meaning for the statute. However, it could not do so in *Boehning* because the statute was susceptible to only one meaning and therefore the rule would not apply. However, by modifying the rule and applying it in the abstention context, the Court was able to adopt Black's approach of looking to other state law that could be applied to the challenged statute to give it the necessary constitutional dimension. Accordingly, the Court not only avoided decision of the federal constitutional issue, but it also allowed the state courts the opportunity to save a statute that would otherwise have been ruled unconstitutional.

Thus, *Boehning* represents a new approach to abstention by allowing a federal court to order abstention when a state statute is clearly unconstitutional. The constitutional rule of construction is usually applied when a statute is susceptible of two meanings, one constitutional and one unconstitutional. In its attempt to mold the rule into a basis upon which to order abstention, the Court was forced to modify the rule to cover those instances where there is clearly only

\(^{73}\) Id. at 268-69.
one possible construction for a challenged statute which construction renders the statute unconstitutional. In such cases, the Court, to meet the constructional rule's requirements, found the requisite second construction, which would make the statute constitutional, by either looking to other state law which if applied would give the statute a constitutional construction or believing that the clear unconstitutionality of the statute would cause state courts to adopt a constitutional construction of the statute. But, instead of adopting the constitutional construction of the statute, the Court then abstains and allows the state court to do so. *Boehning*, then, stands for the proposition that in either case a federal court should abstain and give state courts the opportunity to cure any constitutional infirmities in the statute. It is obvious that there will be "special circumstances" when abstention should not be ordered. This is a necessary exception even in cases involving unconstrued state statutes. It will provide federal judges the flexibility to refuse to abstain in cases where they believe the merits of the case warrant immediate attention. However, it remains to be seen which violations of constitutional rights the Supreme Court will deem important enough to warrant immediate attention of the federal courts. In other words, what "special circumstances" will warrant federal jurisdiction where the state statute has not been construed by state courts.

The Influence of Younger and 42 U.S.C. § 1983 on *Boehning*

While *Boehning* clearly sanctions a new ground on which to order *Pullman* abstention, two other factors appear to have influenced the Court's decision to abstain. They are the *Younger* abstention doctrine and 42 U.S.C. § 1983. The analysis of these two factors in relation to *Boehning* is undertaken not only for the purpose of understanding *Boehning*, but also to analyze what appears to be a trend of the Supreme Court in ordering abstention. It is hoped that this analysis will serve not only as a guidepost for federal court judges that are confronted with actions involving unconstrued state enactments, but also for practitioners who are contemplating bringing such actions into federal court.

1. *Younger* Abstention

It will be remembered that *Pullman* abstention is based on a presumption in favor of federal jurisdiction, and that it takes "special circumstances" to justify referring state law issues to the state courts. 74 There is, however, a category of cases falling within federal jurisdictional grants in which the presumption is in favor of state jurisdiction, and the federal plaintiff must show "special circumstances" to justify the exercise of federal jurisdiction. 75 The type of abstention applicable to this category of cases is called *Younger* abstention. It further differs from *Pullman* abstention in that a federal court decision to stay its hand

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results in a state proceeding wherein federal issues are adjudicated along with state ones.  

Younger abstention was established in Younger v. Harris and its companion cases, which were replete with references to federalism and the need for comity between federal and state courts. Younger was, in part, a reaction against lower federal court response to the Supreme Court's decision in Dombrowski v. Pfister. On the authority of Dombrowski, federal courts enjoined numerous state criminal proceedings on the basis of first amendment claims.  

In Dombrowski, the plaintiffs brought a suit under 42 U.S.C. § 1983 seeking relief and an injunction restraining enforcement of a statute allegedly in violation of the first amendment because of its overbreadth. They also alleged that the threatened prosecutions were not bona fide with the intent to secure valid convictions, but were part of a harassment campaign. The district court held that even if the plaintiff's constitutional allegations had merit, an injunction against state prosecution was not warranted. The Supreme Court reversed, finding special circumstances justifying the exercise of federal jurisdiction: defense of the state criminal prosecution was not adequate to protect the plaintiff's constitutional rights.

In Younger the plaintiff sought to enjoin the defendant Los Angeles district attorney from prosecuting him under the California Criminal Syndicalism Act. He claimed that "the prosecution and even the presence of the Act inhibited him in the exercise of his rights of free speech and press." At the time the plaintiff's request for injunctive relief was filed in federal court a criminal proceeding was then pending against him in state court. The district court held in plaintiff's favor, finding the Act void for vagueness and overbreadth. The Supreme Court reversed, stating that the plaintiff had not shown bad faith on the part of the state prosecutors or that the challenged statute was flagrantly and patently unconstitutional and that the state criminal prosecution was an adequate forum for raising the constitutional issue.

76 Younger v. Harris, 401 U.S. 37, 52-54 (1971). See also Field, note 21 supra, 1164.

This underlying reason for restraining courts of equity from interfering with criminal prosecutions is reinforced by an even more vital consideration, the notion of "comity," that is, a proper respect for state functions, a recognition of the fact that the entire country is made up of a Union of separate state governments, and a continuance of the belief that the National Government will fare best if the States and their institutions are left free to perform their separate functions in their separate ways. This . . . is referred to by many as "Our Federalism," and one familiar with the profound debates that ushered our Federal Constitution into existence is bound to respect those who remain loyal to the ideals and dreams of "Our Federalism."

Id. at 44.

78 380 U.S. 479 (1965).
79 Those who objected to what they termed the "faddish trend of irritating interventions in State action that for a while threatened to become an avalanche of constitutional fetishism" have received Younger and its companion cases with enthusiasm.

80 380 U.S. at 486.
81 401 U.S. at 39.
82 Id. at 49-54.
While federal jurisdiction was exercised in Dombrowski and declined in Younger, both cases started from the premise that the federal courts should defer in favor of state jurisdiction if the contemplated state proceeding was adequate to protect the plaintiff's rights. However, dicta in these two decisions strike a fundamental difference. Dombrowski emphasized the importance of protecting individual rights, reacting to the "chilling effect" which bad faith prosecutions and overbroad statutes have upon individuals. In contrast, Younger emphasized the importance of avoiding needless friction between federal and state courts. This need for comity, the Younger Court said, is required by the very nature of federalism.

One of the questions left open by Younger was whether abstention should apply to noncriminal cases. The Supreme Court recently answered this question in Huffman v. Pursue, Ltd. where it considered the "seriousness of federal judicial interference with state civil functions." Defendant state officials instituted civil proceedings under the state public nuisance statute against the plaintiff's predecessor as operator of a theater displaying pornographic films. The state trial court rendered a judgment in the defendant's favor and ordered the theater closed for a year and the seizure and sale of the personal property used in its operation. Rather than appealing within the state system, the plaintiff, which had taken over operation of the theater prior to the judgment, filed suit in federal district court under 42 U.S.C. § 1983. The court declared the nuisance statute unconstitutional and enjoined the execution of the state court's judgment. The Supreme Court reversed and remanded, applying the principles of Younger, even though the state proceeding was civil in nature. The Court stated that the district court should have applied the tests laid down in Younger in determining whether to proceed to the merits and should not have entertained the action unless appellee established that early intervention was justified under the exceptions recognized in Younger.

Prior to Huffman the holding and rationale of Younger had been thought to apply only to criminal prosecutions. The concurring opinion of Justices Stewart and Harlan in Younger indicated that the distinction between civil and criminal actions had been based upon the notions that equity courts are less reluctant to intervene in civil proceedings and that interference with a civil suit is less offensive to state interests because the state is not a party.

The Huffman Court was reluctant to directly repudiate this civil-criminal distinction. The state nuisance proceeding was described as "more akin to a criminal prosecution than are most civil cases." The Court noted that the civil action in question was closely related to the state's criminal statutes prohibiting dissemination of obscene materials. Federal intervention, therefore, would
disrupt the state’s efforts to protect the very interests underlying its criminal laws.\(^{91}\)

Despite the Court’s disclaimer that “[f]or the purposes of [Huffman] we need make no general pronouncements upon the applicability of Younger to all civil litigation,”\(^{92}\) the opinion suggests that federal restraint may be appropriate in any state proceeding, civil or criminal, depending upon the circumstances of the case. The Court emphasized the capability of state appellate courts to rule adequately and fairly on federal constitutional issues.\(^{93}\)

Significantly, the Court favorably cited a few of the many Federal Court of Appeals’ decisions which have applied Younger when the pending state proceedings were civil in nature. The various reasons those cases offered for extending Younger may be summarized as follows: First, a state civil statute which is used for the enforcement of the state’s criminal laws can be as effective a tool for regulation or prohibition as the sanctions imposed by criminal statutes;\(^{94}\) second, since the state is usually a party, the proceeding is of paramount interest to the state’s judicial process and abstention is thus required to avoid needless federal-state friction;\(^{95}\) third, federal intervention in any pending state proceeding implies that the state courts are incapable of vindicating federal rights;\(^{96}\) fourth, evaluating the merits of a plaintiff’s federal constitutional claims often results in duplication of effort and cost;\(^{97}\) and fifth, civil proceedings are less serious to the individual and therefore less reason for federal intervention.\(^{98}\) An important factor to note is that all cases extending Younger to pending, noncriminal proceedings, were brought under 42 U.S.C. § 1983.

For purposes of understanding the connection between Boehning and Younger abstention it is necessary to consider the application of Younger abstention to purely civil proceedings. The most well-known case where Younger abstention was applied in a purely civil proceeding is Lynch v. Snepp.\(^{99}\) In Lynch a state court had enjoined nonschool members from entering the grounds of a high school which had experienced violence due to racial tension. Plaintiffs filed suit in federal court under 42 U.S.C. § 1983 seeking to enjoin the state court order. The federal district court granted plaintiff’s request for an injunction. The Court of Appeals for the Fourth Circuit reversed, stating that abstention was not warranted because the element of bad faith, required by Younger, was not present, and because plaintiffs had not shown any irreparable harm would occur if they presented their constitutional claims in a state court. As an explanation

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\(^{91}\) Id. at 604-05.

\(^{92}\) Id. at 607.

\(^{93}\) Id. at 609. The Court found this to be “especially true when . . . the constitutional issue involves a statute which is capable of judicial narrowing.” Id. The Supreme Court’s growing confidence in the ability of state court judges to fairly handle constitutional questions is the major factor contributing to 42 U.S.C. § 1983’s decline. See notes 112-32 infra.

\(^{94}\) Henkel v. Bradshaw, 483 F.2d 1386 (9th Cir. 1973); Lynch v. Snepp, 472 F.2d 769 (4th Cir. 1973); Palaio v. McAuliffe, 466 F.2d 1230 (5th Cir. 1972).

\(^{95}\) Henkel v. Bradshaw, 483 F.2d 1386 (9th Cir. 1973).


\(^{97}\) Lynch v. Snepp, 472 F.2d 769 (4th Cir. 1973); Wulp v. Corcoran, 454 F.2d 826 (1st Cir. 1972); Maraist, Federal Intervention in State Criminal Proceedings: Dombrowski, Younger, and Beyond, 50 Tex. L. Rev. 1324 (1972).


\(^{99}\) Id.
for its extension of the *Younger* test to this noncriminal case, the Fourth Circuit stated:

While the offense to a state interest may be less in a civil proceeding than in a criminal proceeding, . . . also the burden on the individual if left to his state court remedies is less severe in the civil context. In requiring a federal plaintiff to defend a state civil action there is no exposure to criminal penalties which could culminate during the pendency of the action. . . . Moreover, when coordinate courts are on collision course the disruptive effect on federalism is not likely to be dissipated by assurance that only civil jurisdiction is involved.\(^\text{100}\)

The court cited *Cousins v. Wigoda*\(^\text{101}\) to support its rationale.

In *Cousins*, a state court had enjoined plaintiffs from attempting to oust state court-determined delegates to the 1972 Democratic National Convention. Plaintiffs filed suit in federal district court under 42 U.S.C. § 1983 and sought an injunction against the state court order. The district court granted the injunction. The Court of Appeals for the Seventh Circuit reversed stating that the district court should have abstained, having found neither bad faith nor "special circumstances," and held that plaintiffs should appeal the state court order against them in the state appellate courts. On the issue of applying *Younger* in this civil proceeding, the court stated that "special respect for the state judicial process [is required] if federal jurisdiction is not invoked until after state litigation is commenced."\(^\text{102}\) On appeal to the Supreme Court, Justice Rehnquist denied a stay, relying on the principles of comity between federal and state courts as enunciated in *Younger*.\(^\text{103}\)

In addition to the reasons enunciated by the lower federal courts in their decisions extending *Younger* to noncriminal cases, support for the extension of *Younger* to such cases can be found in dicta of Supreme Court opinions. For example, Chief Justice Burger (joined by Justices White and Blackmun) concurring in *Mitchum v. Foster*\(^\text{104}\) stated:

We have not yet reached or decided exactly how great a restraint imposed by these principles on a federal court asked to enjoin state civil proceedings. Therefore, on remand in this case, it seems to me the District Court, before reaching a decision on the merits of appellant's claim, should properly consider whether general notions of equity or principles of federalism, similar to those invoked in *Younger*, prevent the issuance of an injunction against the state "nuisance abatement" proceedings in the circumstances of this case.\(^\text{105}\)

Justice White made a more assertive statement on the issue in his dissent (joined by Blackmun and Burger) in *Lynch v. Household Finance Corp.*\(^\text{106}\)

\(^{100}\) *Id.* at 777n. 5.

\(^{101}\) 463 F.2d 603 (7th Cir. 1972).

\(^{102}\) *Id.* at 606.

\(^{103}\) 409 U.S. 1201, 1205 (1972).

\(^{104}\) 407 U.S. 225 (1972).

\(^{105}\) *Id.* at 244.

\(^{106}\) 405 U.S. 538 (1972).
Appellee . . . invokes Younger and companion cases as a ground for affirming the judgment of the District Court. Of course, those cases involved federal injunctions against state criminal proceedings, but the relevant considerations, in my view, are equally applicable where state civil litigation is in progress.\textsuperscript{107}

It would appear that from the above analysis of Younger and its extension into the civil law area, as evidenced by Huffman and the Court's approval of lower court decisions so extending Younger, that Younger's underlying policy considerations of comity and federalism are becoming the dominant force behind abstention.

Indeed, the extremes to which the Supreme Court is willing to go to find "uncertainty" in state law and its new use of a constitutional rule of construction to support its decision to abstain in Boehning, are clear evidence of the Court's desire to defer to state courts. A presumption in favor of state law is fast becoming an unarticulated rule of the Supreme Court for cases previously thought to be subject to Pullman abstention. The correctness of this prediction is supported by another recent Seventh Circuit decision.

In Horvath v. City of Chicago\textsuperscript{108} plaintiffs, operators of massage parlors, sought declaratory and injunctive relief against defendant's threatened civil proceedings in state court to enjoin plaintiffs' business practices as a nuisance prohibited by a city ordinance. Plaintiffs contended that the ordinance was unconstitutionally vague and overbroad. Even though no state litigation was pending against most of the plaintiffs when their federal action was commenced, the Court of Appeals for the Seventh Circuit was "satisfied that [the district court] correctly refused to grant plaintiffs any federal relief."\textsuperscript{109} The Seventh Circuit held that plaintiffs' claim, which rested on the due process requirement that a citizen must be given fair notice that his conduct is proscribed before it may provide a basis for punishment, did not provide a proper basis for federal interference with state civil litigation which, if allowed to run its course, would presumably eliminate whatever ambiguity existed with respect to the application of the ordinance to plaintiffs' commercial activities.\textsuperscript{110}

Judge Swygert, disagreeing with the reasoning of Judge, now Justice, Stevens, asserted in a concurring opinion that:

If one in attempting to protect a property interest from state interference can arguably assert that his conduct is not included within the prohibitory terms of a vague statute, he ought not have to await the finality of a state proceeding against him before asserting his constitutional right to procedural due process. To require him to do so is an impermissible form of abstention.\textsuperscript{111}

While Horvath was not decided on abstention grounds, Judge Swygert's

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107 & \textit{Id.} at 561. \\
108 & 510 F.2d 594 (1975). \\
109 & \textit{Id.} at 595. \\
110 & \textit{Id.} at 595-96. \\
111 & \textit{Id.} at 597. \\
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statement clearly points up the abstention aspects of the court's decision. The court's decision required plaintiffs to litigate their federal constitutional claim along with state law issues in state courts. Thus, the court's decision had the same effect that a decision to abstain under Younger would have had. Since no state litigation was pending against several of the plaintiffs, Horvath clearly has overtones favorable to an extension of Younger abstention to civil cases where no action is pending. This extension is not surprising since it is the next logical step beyond Huffman which extended Younger to pending civil cases.

Horvath is similar to Boehning in three important respects: (1) both are civil cases: (2) no state civil proceeding was pending in either case; and (3) plaintiffs in both cases asserted federal constitutional due process rights. The fact that Horvath is akin to Younger abstention and Boehning was decided using Pullman abstention, taken together with their similarity in such important respects, points to the eroding distinction between Pullman and Younger abstention.

The seeming inconsistency in the Seventh Circuit's decisions in Horvath and Boehning can initially be explained on a ground pointed out by Judge Swygert: Judge, now Justice, Stevens' failure to understand the abstention implications of his reasoning. However, the decisions can be further reconciled by the merits of each case. Obscenity is an intensely local issue and the avoidance of federal-state friction may weigh heavily in favor of allowing states to control such matters, especially since such matters reach well beyond the individual involved. Whereas the providing of a hearing prior to discharge from one's employment is clearly an issue of immediate individual concern rather than a community concern. Thus, the Seventh Circuit was acting within its discretion by not ordering abstention in Boehning and refusing declaratory or injunctive relief in Horvath.

There is another factor which is contributing to the erosion of the distinction between Pullman and Younger abstention, and which was present in Boehning. That factor is 42 U.S.C. § 1983. Many actions in which Younger or Pullman abstention is ordered are brought under § 1983. Section 1983 embodies part of the Civil Rights Act of 1871112 and emphasizes individual rights, a concern reiterated by the Supreme Court in Dombrowski v. Pfister. However, the Court in Younger was quick to point out that the considerations of comity and federalism are paramount in pending criminal cases, except in "special circumstances." Since Huffman recently extended the reasoning of Younger to pending civil cases the vindication of an individual's federal constitutional rights

112 42 U.S.C. § 1983 (1970), which is derived from the Civil Rights Act of 1871, is entitled "Civil action for deprivation of rights." The statute provides:
Every person who, under color of any statute, ordinance, regulation, custom or usage, of any state or territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proceeding for redress.
NOTRE DAME LAWYER [July 1976]

is arguably being forced to take a backseat to the considerations of comity and federalism in an increasing number of cases. As Justice Douglas stated in his dissenting opinion in *Boehning*: "The position of the Court continues the strangu-
lation of 42 U.S.C. § 1983 that has recently been evident [in] *Huffman v. Pursue, [Ltd.]*. . . ."113

The reason § 1983 is being curtailed, and thus contributing to the merging of the *Younger* and *Pullman* abstention doctrines, is due to Supreme Court's increasing confidence in state courts' ability to fairly handle constitutional claims.

Although its importance went unrecognized for many years, § 1983 has been used with increasing frequency in the past several years114 as a basic tool for enforcing constitutional limitations and protecting constitutional rights.116 While the Supreme Court frequently commented that state courts share with the federal courts the responsibility of interpreting and applying the Constitution,116 § 1983 reflects the countervailing sentiment that in certain cases federal courts may be more suitable for adjudication of federal constitutional issues. The most frequently cited reason for committing § 1983 cases to the federal courts is that federal judges have an expertise that state courts cannot match, in that they deal primarily with federal constitutional law and thus are more likely to insure that legitimate federal interests are vindicated.117 Thus, in recognition of the importance of adjudicating certain constitutional claims in federal courts, Congress deliberately fashioned § 1983 as a supplementary remedy to assure that civil rights would not be nullified by state courts.118 As Justice Brennan has stated, "Federal court abstention is particularly inappropriate in cases brought under [§ 1983, which is] designed specifically to authorize federal protection of civil rights." 119 Further, in *Mitchum v. Foster*, the Supreme Court held § 1983 to be an exception to the anti-injunction statute, while also paying lip service to *Younger*.120

113 96 S.Ct. at 170 (Douglas, J., dissenting).
120 The Supreme Court stated that it would not "question or qualify in any way the principles of equity, comity, and federalism that must restrain a federal court when asked to enjoin a state court proceeding." 407 U.S. 225, 243 (1972).
The very purpose of § 1983 was to interpose the federal courts between the states and the people, as guardians of the people's federal rights—to protect the people from unconstitutional action under color of state law, "whether that action be executive, legislative or judicial."\(^{121}\)

Implicit in the *Mitchum* holding is a determination that state courts are not as competent as the federal courts to determine federally created rights.

A factor present in each expansion of § 1983, as represented by cases such as *Monroe v. Pape,\(^ {122}\) Lynch v. Household Finance Corp,\(^ {123}\) Mitchum v. Foster,\(^ {124}\) and District of Columbia v. Carter,\(^ {125}\) is that each of the opinion writers has referred to the legislative history of the Civil Rights Act of 1871. "The Court's constant recourse to the Act's legislative history is significant for it suggests the Court has used legislative history to justify a result based on an invalid premise: distrust of the state courts."\(^ {126}\)

Section 1983 was passed in the post-Civil War era when a new structure of law was emerging. This structure established the role of the federal government as a "guarantor of basic federal rights against state power."\(^ {127}\) The legislators believed that state courts, particularly in the South, were not enforcing these rights, and were even being used to harass and injure individuals.\(^ {128}\) While the legislators had the Ku Klux Klan particularly in mind,\(^ {129}\) the legislative debates surrounding passage of § 1983 indicate a concern for the general needs of all citizens to have their federal rights enforced in a neutral and detached forum.\(^ {130}\) This rationalization, based on events occurring over 100 years ago, cannot be sustained if one considers it in the context of state criminal courts.

In reality, state judges have had to become federal constitutional experts since the criminal law revolution began with *Mapp, Miranda, and Gideon*; yet, if state judges are competent to handle federal constitutional issues in criminal cases, they are also worthy of being entrusted with other constitutional claims. . . .\(^ {131}\)

Judge Aldisert, writing in 1973, recommended that some statutory limitations be placed on § 1983. He suggested that a statutory format should recognize distinctions:

(a) Between constitutional issues where state interests predominate and where they are minimal; (b) between newly enacted and previously interpreted state legislation and regulations; (c) between settled principles of state law and principles that are yet unsettled. . . . Alternatively, such statute

\(^{121}\) *Id.* at 242, quoting in part from *Ex parte Virginia*, 100 U.S. 339, 346 (1879).

\(^{122}\) 365 U.S. 167 (1961).

\(^{123}\) 405 U.S. 538 (1972).

\(^{124}\) 407 U.S. 225 (1972).

\(^{125}\) 409 U.S. 418 (1973).

\(^{126}\) Aldisert, *supra* note 117, at 572.


\(^{130}\) *Id.* at 180-81.

\(^{131}\) Aldisert, *supra* note 117, at 572.
could provide for abstention: (a) When no state law is challenged or when the law challenged can be given a saving construction in state courts; or (b) when state remedies are in fact adequate; ... or (d) when no irreparable harm will follow from declining federal jurisdiction. Additionally, some statutory limitation should prohibit federal interference in certain on-going state civil proceedings. In civil cases where state interest is paramount, a statute embodying the Younger v. Harris doctrine should be applied.132

While Congress has failed to take note of any of Judge Aldisert’s recommendations, the Supreme Court has not. The many recent abstention decisions by the Supreme Court indicate that a majority of the Justices are well aware of the invalidity of the premise upon which § 1983 is based and, consequently, the Court has taken it upon itself, rightly or wrongly, to decide cases using reasoning and language evincing many of Judge Aldisert’s recommendations. As a consequence, Younger abstention, which requires an aggrieved party to show “special circumstances” for a federal court to exercise federal jurisdiction, is quickly coming to the fore, while Pullman abstention is declining because of § 1983’s decline. Indeed, it is probably the fact that Supreme Court Justices supporting § 1983 have failed to justify it on a basis other than a distrust of state courts in handling constitutional cases that has led to its recent decline. Boehning, with its adoption of a constitutional rule of construction as a grounds for abstention and its disregard that the action was brought under 42 U.S.C. § 1983, clearly represents a major step in this direction.

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It would not be fair to conclude that either the Seventh Circuit or the Supreme Court decided Boehning incorrectly. Rather, Boehning is the result of a coalescing of two major abstention doctrines that have conflicting considerations. This coalescence seems to be largely due to the Supreme Court’s renewed confidence in the ability of state courts to deal with federal constitutional rights. It seems likely that this confidence will not be limited to cases involving unconstrued state enactments, as in Boehning, and is a trend of which the lower federal courts must be cognizant.

Richard James Annen

FEDERAL CIVIL PROCEDURE—Political Question and Standing—Individuals and Organizations May Obtain Mandatory Injunctive Relief Against a Municipality and Its Officials Under 42 U.S.C. § 1983.

Calvin v. Conlisk

In 1973 seven individual plaintiffs and three organizations—the Afro-American Patrolmen’s League, Concerned Citizens for Police Reform, and the

132 Id. at 577-78.
Chicago Urban League—brought a civil rights action under 42 U.S.C. § 1983 seeking an injunction to remedy the alleged failure of the Chicago Police Department to enforce constitutional standards of conduct among its police officers. The seven individual plaintiffs alleged several incidents of police brutality, and the three organizations stated that they received complaints of misconduct from hundreds of persons. The organizations charged the city, the Superintendent of Police, and Police Board members with failure to maintain an effective police disciplinary system and that such failure served to condone unconstitutional actions by police officers. The plaintiffs charged the police with violations of their first, fourth, fifth, and fourteenth amendment rights.

The United States District Court for the Northern District of Illinois granted the defendants' motion to dismiss for failure to state a cause of action. The court stated that it would not consider a case in which the relief sought would involve the court in the administration of a city police department. The lower court, relying on Gilligan v. Morgan, determined that this type of injunctive relief contemplated "inappropriate action" under the Gilligan rationale. In Gilligan, the Supreme Court had held that no justiciable controversy existed where the plaintiffs sought to restrain the Governor of Ohio from prematurely ordering National Guard troops to duty and to restrain Guard leaders from committing future violations of students' constitutional rights. The injunction sought there would have required judicial supervision over training procedures and the ordering of the National Guard. The Supreme Court concluded that this supervision would thrust the judicial branch into the area of military authority and responsibility which is constitutionally placed in the hands of the legislative and executive branches.

Thus, on appeal the Seventh Circuit encountered several important yet problematic constitutional and public policy issues. Accordingly, before analyzing the court's decision in Calvin it is important that these issues be examined. First, the principle of justiciability was involved. It posits that even though a court has the power to consider a case, it still may be deemed inappropriate for judicial consideration. A further aspect of justiciability is the political question doctrine, which is designed to restrain the federal courts from entering into areas that are assigned by the Constitution to the control of the legislative and executive branches of the federal government.

Second, notions of federalism were involved in Calvin; federal courts are reluctant to interfere with matters within the authority of state governments, such as the administration of a city police department.

1 42 U.S.C. § 1983 (1970) provides in part:
   . . . [E]very person who, under color of [law] subjects or causes to be subjected any . . . person [within the jurisdiction of the United States] to the deprivation of any rights secured by the Constitution and laws, shall be liable to the party injured in an action at law (or) suit in equity . . .
2 Calvin v. Conlisk, 520 F.2d 1 (7th Cir. 1975).
4 413 U.S. 1 (1973).
5 Id. at 3.
6 Id.
7 Id. at 4.
Third was whether an actual “case or controversy” existed, an issue which devolved into a question of standing. In Calvin, since plaintiffs sought injunctive relief for possible future misconduct, the standing question arose because of the possibility that none of the plaintiffs had suffered harm sufficient to constitute a case or controversy.

Although the foregoing are significant impediments to the granting of injunctive relief in cases of unconstitutional police conduct, the Seventh Circuit looked beyond strict legal doctrines to the realities underlying the civil rights action in Calvin. The court was cognizant of the lack of alternative avenues of redress available to the victims of police misconduct. These alternatives—civil damage suits or criminal prosecution against individual police officers—were found to be expensive, time-consuming, and thus inadequate. The court reasoned that general considerations of public policy militated toward the establishment of an effective civilian complaint mechanism.

Thus, the Seventh Circuit reversed the district court’s holding in Calvin on two grounds. The court first held that plaintiffs’ claim for equitable relief was justiciable and did not involve a political question as in Gilligan. The court distinguished Gilligan on its facts, finding that although the Constitution expressly vested authority in military matters with the legislative and executive branches, no constitutional provision exempted municipal agencies from judicial review. Second, the court stated that the plaintiffs in Calvin met the traditional criteria for issuance of mandatory injunctive relief: proof that the remedy at law is inadequate and that irreparable injury would occur if the injunction was not issued.

Yet to fully understand the questions presented in Calvin it is necessary to examine the Seventh Circuit’s holding in light of the recent Supreme Court decision in Rizzo v. Goode. Rizzo, a case involving facts substantially similar to Calvin, casts considerable doubt on the validity of the Seventh Circuit’s analysis, since the Supreme Court vacated and remanded the Calvin decision in light of Rizzo.

Rizzo arose out of two class action suits brought under 42 U.S.C. § 1983, alleging a pervasive pattern of illegal and unconstitutional police mistreatment of minority citizens in Philadelphia. The United States District Court for the

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9 U.S. Const., art. III, § 2, cl. 1.
10 “Without interfering with police discretion in their normal routines, the district court could, if appropriate, formulate relief that would establish procedures to assure proper processing of citizen complaints concerning police misconduct.” 520 F.2d at 7. See also Rizzo v. Goode, 96 S. Ct. 598, 603 (1976).
11 The Seventh Circuit addressed two additional issues in its holding. First, it found that federal jurisdiction was established under 28 U.S.C. § 1331 (1970), as to the city of Chicago. The court relied on Gautreaux v. Romney, 448 F.2d 730 (7th Cir. 1971), in holding that plaintiffs’ claim for injunctive relief put the amount in controversy over the $10,000 jurisdictional amount. Faced with the difficulty of placing a monetary value on the constitutional rights involved, the Seventh Circuit found that allegations in plaintiffs’ complaint of false imprisonment, fourth amendment violations, lost wages, or legal fees incurred as a result of police misconduct satisfied the jurisdictional amount requirement.
12 96 S. Ct. 598 (1976).
Eastern District of Pennsylvania made findings of fact that the conduct of two individual police officers violated citizens' constitutional rights in three out of 40 alleged incidents. The facts indicated that citizens' complaints to the Police Board of Inquiry resulted in a five-day suspension in one case and no disciplinary action in another. The district court concluded that neither the city nor the police officials had endorsed a policy of violation of minority citizens' constitutional rights. But the court did find convincing evidence of departmental discouragement of civilian complaints.

The city and police officials named as defendants in *Rizzo* were instructed to draft and submit for the court's approval "a comprehensive program for dealing adequately with civilian complaints, containing detailed suggestions for revising police manuals and procedural rules for dealing with citizens and for changing procedures for handling complaints." The Court of Appeals for the Third Circuit affirmed this order.

The Supreme Court reversed on two grounds. First, the Court stated that there was no case or controversy between the respondent citizens and the city and police officials. The Court explained that the respondents' claim of real and immediate injury rests "not upon what the named petitioners might do to them in the future but upon what one small, unnamed minority of policemen might do to them." Therefore, the citizens lacked a personal stake in the modification of the police disciplinary system and thus the outcome of the case.

Secondly, the Supreme Court held that the injunctive relief granted by the district court constituted an unwarranted intrusion by the federal courts into the authority of the city and police officials' functions. The Court stated that the lower court exceeded the bounds of its authority under § 1983 because it granted the injunction without a showing that the petitioners were directly linked to the actions of a small number of policemen. The Supreme Court was thus unpersuaded by the lower court's finding that the city's failure to act was equally enjoinable under § 1983 as was active participation by city or police officials in alleged deprivations of constitutional rights. The Court bolstered its reversal by emphasizing that the concept of federalism does not contemplate that federal equity procedures be used to regulate the conduct of state employees.

Finally then, against this background of conflicting interpretation of case law and policy considerations, it is necessary to examine the questions raised by the Seventh Circuit's holding in *Calvin* from three perspectives. First, would an injunctive decree such as the one sought in *Calvin* violate the well-settled principles of justiciability and federalism? Secondly, was there a sufficient showing of a case or controversy to allow the court to decide the case? Third, what role do public policy considerations play in resolving this case?

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15 96 S. Ct. at 603-04.
16 506 F.2d 542 (3d Cir. 1974).
17 96 S. Ct. at 605.
The Seventh Circuit dealt directly with the political question issue. As previously indicated, the district court based its dismissal of the plaintiffs' complaint on the Supreme Court decision in *Gilligan v. Morgan*. The Seventh Circuit, however, correctly distinguished *Gilligan* on its facts. In *Gilligan*, Kent State students brought an action to restrain the Governor of Ohio from prematurely ordering the National Guard to duty in civil disturbances and to restrain Guard commanders from violating students' constitutional rights of free speech and assembly. The Supreme Court held that the issues presented in the case were nonjusticiable. The Court explained that the relief sought by plaintiffs required "continuing surveillance over the training and weaponry and ordering of the National Guard," and thus went beyond the scope of the court's power. Further, the court held that the Constitution vests this responsibility in the legislative and executive branches of the federal government. The *Gilligan* Court stated:

> It would be difficult to think of a clearer example of the type of governmental action that was intended by the Constitution to be left to the political branches directly responsible ... to the electoral process. Moreover, it is difficult to conceive of an area of governmental activity in which the courts have less competence.

Accordingly, the Seventh Circuit narrowly interpreted *Gilligan* to apply only in situations where the federal courts were asked to interfere with military matters, clearly designated by the Constitution to come within the authority of the legislative and executive branches of the government.

Although *Gilligan* is factually distinguishable, that court further emphasized two significant points. First, the court correctly noted that federal courts are inappropriate government agencies to take over such activities as the training of the National Guard. Likewise, it may be difficult to imagine the effectiveness of a federal court overseeing the day-to-day operations of a police department. The *Calvin* court recognized this problem and stated in dicta that federal courts should only issue injunctions sparingly and by drawing them as narrowly as possible. Even a narrowly drawn injunction, however, brings the federal courts into a supervisory role over city police departments. The dissenting justices in *Rizzo*, however, pointed out that the injunctive remedy formed by the district court "was one evolved with the defendant official's assent, reluctant though that assent may have been, and it was one that the Police Department concededly could live with."

Another significant aspect of the *Gilligan* holding is its deference to the electoral process. Under the Constitution, both the judiciary and the electorate exercise a check on the power of the executive and legislative branches of government.

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18 413 U.S. 1 (1971).
19 Id. at 3.
20 Id.
21 Id.
22 520 F.2d at 7.
23 96 S. Ct. at 609 (Blackmun, J., dissenting) (emphasis supplied).
The denial of judicial relief in a case such as *Calvin* does not preclude the removal from office of officials who condone illegal conduct, nor does it preclude public pressure for revised police disciplinary procedures. This argument fails, however, to take into consideration the fact that the persons who are most often the victims of unconstitutional police conduct have the least political clout and ability to effectively use the electoral process.

Although the Seventh Circuit did not face the issue of the propriety of federal court interference in state government, the Supreme Court in *Rizzo* emphasized the recent relevance of this issue.

Where, as here, the exercise of authority by state officials is attacked, federal courts must be constantly mindful of the special delicacy of the adjustment to be preserved between federal equity power and state administration of its own law.24

Moreover, the Supreme Court and the Congress have previously considered this issue. The Supreme Court in the seminal case of *Younger v. Harris*25 struck down federal court interference in state criminal proceedings.26 In addition, Congress passed legislation, now codified in 28 U.S.C. § 2283, denying district courts the authority to issue injunctions in special circumstances.27 Although actions under § 1983 are exempted from the operation of § 2283,28 the *Rizzo* Court declared that principles of federalism should apply not only where injunctive relief is sought against the judicial branch of state government but also against officials in charge of an executive branch of state or local government.

Applying the doctrine of federalism to cases such as *Calvin* and *Rizzo*, however, may leave important federal law and constitutional considerations unprotected. Surely, the guarantees of § 1983 would become meaningless if federal courts were to adhere to a broad extension of federalist principles. Often state governments may find it politically unwise to investigate or take corrective measures to reform police procedures. Indeed, Justice Blackmun29 in his dissenting opinion in *Rizzo* stated: "[T]here must be federal relief available against persistent deprivation of federal constitutional rights even by [or, . . . particularly by] constituted authority on the state side."30 Certainly the nation's experience with school desegregation cases has indicated the occasional necessity for federal court intervention in areas of state and local government concern. This conclusion is equally applicable in other cases where there are allegations of a widespread policy of endorsing unconstitutional conduct, as was arguably the case in *Calvin*.

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24 96 S. Ct. at 607.
26 Huffman v. Pursue, 420 U.S. 592 (1975), extended the *Younger* doctrine to federal interference in state civil actions.
27 28 U.S.C. § 2283 (1970) provides:
A court of the United States may not grant an injunction to stay proceedings in a state court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments.
30 Id. at 609.
The Supreme Court in *Rizzo* held that § 1983 did not provide for relief against the city and police department because no connection was established between isolated incidents of police misconduct and a city or police department policy assenting to the misconduct. The Supreme Court thus rejected the lower court's rationale that unless there were changes made in police department disciplinary procedures, incidents of unconstitutional conduct were likely to continue, not necessarily with regard to the complainants as individuals, but with regard to minority citizens in the city. The Court explained that the lawsuit:

"[E]volved into an attempt by the federal judiciary to resolve a controversy between the entire citizenry of Philadelphia and elected and appointed officials over what steps might, in the [Court's judgment] appear to have the potential for prevention of future police misconduct."31

In addition to the requirement that the plaintiffs establish an affirmative link between police misconduct and its approval by the city or police department officials, the Supreme Court stated that these actions will fail unless the plaintiff can show an imminent threat of injury. Past incidents of misconduct are insufficient. The Court's decision in *O'Shea v. Littleton*32 demonstrated the application of this rationale. In *O'Shea*, plaintiffs brought a civil rights action against a county magistrate and circuit court judge alleging that the defendants, under color of state law, engaged in a practice of illegal bond setting, sentencing and jury fee practices. In this case, the Supreme Court concluded that past incidents of illegal conduct that are not accompanied by a showing of the likelihood of present or future misconduct do not form an adequate basis for injunctive relief. Citing *O'Shea*, the *Rizzo* Court stated that the plaintiffs' claim

"... to real and immediate injury rests not upon what [the city and police department] might do to them in the future but upon what one of a small, unnamed minority of policemen might do to them in the future. ..."33

In both *Rizzo* and *Calvin*, the Supreme Court thus found that the threat of future harm was too speculative and therefore that the facts did not present a case or controversy between the plaintiffs and the city and police department officials. However, the Court did not rule out the availability of injunctive relief under § 1983 against individual police officers if the plaintiff could show a threat of imminent harm.

Similarly, the Supreme Court did not find a sufficient link between alleged incidents of police misconduct and active knowledge and approval of the misconduct by city and police department officials. The Seventh Circuit in *Calvin* recognized that injunctive relief has traditionally been applied "where warranted by a pattern of police misconduct."34 Injunctive relief based on an illegal pattern

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31 Id. at 604.
33 96 S. Ct. at 605.
34 520 F.2d at 6.
or practice of conduct was first recognized in *Hague v. CIO.*\(^{35}\) In *Hague* an injunction was issued after the court found that the police adopted a deliberate policy of forbidding plaintiffs' labor organizers from communicating their views on the National Labor Relations Act. Here, the police used force and violence to exclude labor organizers; conduct which the plaintiffs were able to convince the court that the police planned to continue.

Two recent cases have bolstered *Hague.* In *Allee v. Medrano\(^{36}\)* and *Lankford v. Gelston\(^{37}\)* the plaintiffs were able to show a pervasive pattern of police intimidation and violation of constitutional rights; equitable relief was therefore obtained. From these cases, it is clear that injunctive relief under § 1983 is contingent on two factors. First, there must be a showing of a repeated pattern or practice of misconduct which can be traced to the upper echelons of the police department. Second, the plaintiff must prove that there was active participation by such officials.

However, the Supreme Court in *Rizzo* did not find an instance in which city or police officials actively deprived the plaintiffs of their constitutional rights. The Court was thus able to distinguish school desegregation cases\(^{38}\) in which injunctive relief was granted on a showing of active participation by school authorities in implementing policies of racial segregation.

Although the Seventh Circuit in *Calvin* did not directly address the case or controversy question, the court recognized the *Allee* and *Gelston* holdings as the basis for its decision to allow injunctive relief. It is questionable, however, whether these cases supply an adequate basis for the court's holding. In each of these cases, as in *Hague,* the plaintiffs showed a pervasive pattern of unconstitutional conduct present throughout the police departments. Although the Seventh Circuit made no findings of fact in *Calvin,* the allegations quoted in the opinion do not specifically indicate any wrongdoing on the part of the city or police officials.

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35 307 U.S. 496 (1939). In *Hague,* labor organizers brought suit for injunctive relief against the Mayor, the Director of Public Safety, and the Chief of Police of Jersey City alleging that these officials denied plaintiffs the right to hold public meetings in the city for the purpose of organizing labor. The plaintiffs also alleged they were arrested and subjected to unlawful searches and seizures pursuant to a deliberate plan adopted by the city and police officials. The Supreme Court held that plaintiffs were entitled to injunctive relief on the basis of their showing deprivation of constitutional rights and threat of continuing violations.

36 416 U.S. 802 (1974). In *Medrano,* union organizers brought suit under 42 U.S.C. §§ 1983 and 1985, alleging that law enforcement officials had conspired to deprive plaintiffs of their first and fourteenth amendment rights. They also challenged the constitutionality of Texas statutes under which a state court had issued an injunction against the plaintiffs forbidding their picketing on or near the farms which they were attempting to organize. The Supreme Court held, inter alia, that injunctive relief was properly granted against the law enforcement officers where plaintiffs had shown a persistent pattern of police misconduct, inadequacy of remedies at law, and a threat of irreparable injury.

37 364 F.2d 197 (4th Cir. 1966). In *Lankford,* plaintiffs sought injunctive relief against the Police Commissioner of the city of Baltimore to prevent further invasions of their fourth and fourteenth amendment rights. Plaintiffs alleged that during a 19-day search for two murder suspects, Baltimore police searched more than 300 private homes. The searches were based on anonymous tips and occurred at all hours of the day and night. The district court hearing the case denied relief on the basis that the federal judiciary could not use its injunctive power to oversee police practices. The Court of Appeals for the Fourth Circuit reversed, finding that the unconstitutional conduct was part of an overall plan drawn up by police officials and that actions at law for money damages were inadequate to repair the injuries suffered by the plaintiffs.

The complaint merely alleges facts similar to those in *Rizzo* which, of course, the Supreme Court found insufficient.

However, the dissent in *Rizzo* strenuously emphasized the lower court's factual finding in its conclusion that the active-inactive distinction is without merit. Four findings were cited as relevant: (1) actual violations of citizens' constitutional rights; (2) a pattern of such incidents; (3) their likely recurrence; and (4) official indifference to taking any action to stop the misconduct. The dissent found that "the case, accordingly plainly fits into the mold of *Allee* ... and *Hague* ..." The dissent made a convincing observation that passive tolerance of police misconduct should be afforded the same protection as active participation in the deprivation of constitutional rights. The dissent also stated that § 1983 must be read to reach not only the acts of an official, but also acts of persons under the official.

It is clear that an official may be enjoined from consciously permitting his subordinates, in the course of their duties, to violate the constitutional rights of persons with whom they deal. In rejecting the concept that the official may be responsible under § 1983, the Court today casts aside reasoned conclusions to the contrary reached by the courts of appeals of 10 circuits.

A survey of the circuit court cases cited by the dissent shows that most lower courts have given § 1983 a liberal interpretation with respect to holding superiors liable for the unconstitutional conducts of their subordinates.

### Public Policy and Political Reality

The principal foundation for the Seventh Circuit's holding in *Calvin* rests on considerations of public policy and what may be termed political reality. After discussing applicable case law, the court announced that:

39 96 S. Ct. at 609.
40 Id.
41 96 S. Ct. at 611.
42 See, e.g., Dewell v. Lawson, 489 F.2d 877, 881 (10th Cir. 1974) (court reversed dismissal of complaint where police failed to provide proper medication in light of arrestee's diabetic condition); Inmates of the Suffolk County Jail v. Eisenstadt, 494 F.2d 1196, 1199 (1st Cir.), cert. denied, 419 U.S. 977 (1974) (court refused to distinguish between an official's misfeasance and nonfeasance); Jennings v. Davis, 476 F.2d 1271, 1275 (6th Cir. 1973) (Although the court upheld the dismissal of a complaint in a civil rights action against police officers because of insufficient allegations, the court stated: "Where ... one has an affirmative duty to act and fails to act accordingly he may be held liable for his nonfeasance if his omission is unreasonable under the circumstances."); Smith v. Ross, 482 F.2d 33, 36 (6th Cir. 1973) (Dicta); Byrd v. Briske, 466 F.2d 6, 10-11 (7th Cir. 1972) (overturned a motion to dismiss granted in an action against police officers who allegedly stood by and did nothing while the plaintiff was beaten); Jennings v. Patterson, 460 F.2d 1021, 1022 (5th Cir. 1972) (city councilmen who had full knowledge of and acquiesced in the erection of a fence across a street thereby denying black residents access from their homes were proper defendants in a civil rights class action); Lewis v. Kugler, 446 F.2d 1343, 1351 (3d Cir. 1971) (held that if plaintiffs could show a deliberate pattern and practice of constitutional violations by state police, they were entitled to an injunction under the Civil Rights Act); Wright v. McMann, 460 F.2d 126, 134-135 (2d Cir. 1971) cert. denied, 409 U.S. 685 (1972) (upheld an injunction prohibiting prison officials from confining inmates to psychiatric cells without justification; state prison warden, having the ultimate responsibility for operation of segregated cells, was deemed to have had knowledge of the conditions complained of); Schnell v. City of Chicago, 407 F.2d 1084 (7th Cir. 1969) (class action by newspaper photographers seeking injunction against police interference with coverage of the 1968 National Democratic Convention allowed); Lankford v. Gelston, 364 F.2d 197 (4th Cir. 1966) (holding discussed in note 37 supra).
To hold that suits seeking injunctions against the police are non-justiciable would erect a permanent bar to relief, no matter how egregious and persistent the violations of the constitutional rights of citizens. Such a bar would not be wise public policy, especially where less absolute restrictions will serve to protect the police from undue court interference.43

It is evident that the Seventh Circuit was cognizant of the impediments facing an individual who seeks redress for a policeman’s violation of his constitutional rights. The problems associated with injunctive relief have been discussed; yet two alternatives remain—the exclusionary rule and a civil damage action.

The exclusionary rule was adopted by federal and state courts as a means to deter unconstitutional public searches and seizures under the fourth amendment.44 A defendant in a criminal proceeding may have the fruits of an unlawful search or seizure excluded from evidence in court proceedings. This alternative, of course, is of little use to the innocent citizen who does not come to trial but who was the victim of unconstitutional police conduct.

The civil damage action brought against an individual police officer is also fraught with impediments. It is unlikely that citizen juries will return a verdict against individual police officers,45 especially where the plaintiff belongs to a racial or ethnic minority group. Moreover, if the plaintiff should win, he may have difficulty satisfying his judgment because of the policeman’s limited financial resources and the lack of compensation from public funds.46 In addition, it is a defense in a civil action that the officer “believed in good faith, that his conduct was lawful [and] his belief was reasonable.”47

Furthermore, even though the Seventh Circuit permitted injunctive relief, in so doing it may have rendered it practically impossible for plaintiffs to obtain relief. The court emphasized that plaintiffs must satisfy the traditional criteria for the issuance of mandatory relief and that the district court must design a decree “to stop deprivations of constitutional rights without unnecessary encroachment upon local government functions.”48 Although plaintiffs in Calvin may be able to show the inadequacy of various actions at law available to protect constitutional rights, they may not be able to show that irreparable harm will occur if the injunction is not issued. The Supreme Court in Rizzo stated that the statistical prevalence of past police misconduct in Philadelphia was not a sufficient showing of future harm to bring the case within the actual case or controversy requirement for federal court jurisdiction.49 Thus, the Seventh Circuit in its holding may be cutting off the very relief it acknowledged to be necessary as a matter of public policy.

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43 520 F.2d at 6.
46 Id. at 100.
47 Id.
48 520 F.2d at 7.
49 96 S. Ct. at 606.
The analysis of recent case law and policy considerations inherent in determining whether and how federal injunctive relief should be granted in cases such as *Calvin* indicates that the law in this matter is in a developing stage. Consideration of the scope of § 1983 and the case or controversy requirement further indicates that plaintiffs carry a heavy burden in civil rights actions against a city and its police department. Not only must the plaintiff show an affirmative link between police misconduct and its approval by the city and the police officials, but he must show active approval rather than mere passivity with regard to the misconduct. The examination of the justiciability doctrine and principle of federalism demonstrated that federal courts are reluctant and perhaps incompetent to interfere in areas of governmental authority allotted to the state executive and legislative branches of government. Finally, the public policy concerns announced in *Calvin* compel a closer scrutiny of the role federal courts should play in protecting citizens' constitutional rights from abuse by city police departments.

*Patricia S. Higgins*

III. Federal Statutes and Government Regulation

### ANTITRUST—RELEVANT PRODUCT MARKET IS TO BE NARROWLY DEFINED TO BETTER REFLECT MONOPOLY POWER IN COMPLEX ECONOMIC MARKETS

*Avnet, Inc. v. FTC*


The determination of the relevant product market of an alleged violator of the antitrust laws has long been a necessary first step in the process by which courts decide the existence of anticompetitive activity.¹ Violations of the antitrust laws can occur when one or more companies obtain monopoly power in such a way as to inhibit competition.² Monopoly power has been defined as the power to control prices or to exclude competition from a relevant market.³ This market concept is divided into two considerations: the product market and the geographic market. Therefore, in order to determine whether a company wields the prohibited monopoly power, a court must first determine the market over which the alleged violator has control.⁴

The definition of relevant product market is basically a factual question, heavily dependent on the special characteristics of the industry involved.⁵ However, guidelines by which the courts can make such a determination have been enunciated by the Supreme Court. These guidelines were examined by the Seventh Circuit and used to narrowly define product markets in two recent cases,

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¹ See, e.g., Bernard Food Indus. v. Dietene Co., 415 F.2d 1279 (7th Cir. 1969).
⁴ *Id.* at 380.
⁵ Sulmeyer v. Coca-Cola Co., 515 F.2d 835 (5th Cir. 1975).

The case that sets the standards for the determination of relevant product market in antitrust cases is United States v. E.I. Du Pont de Nemours & Co., commonly known as the Cellophane case. A Government suit was brought under § 2 of the Sherman Act against Du Pont for monopolistic activity in the area of cellophane production; Du Pont produced 75 percent of the cellophane sold in the United States. However, cellophane itself constituted less than 20 percent of all the flexible packaging materials used in the United States. Thus, the question devolved into a determination of which relevant product market should be considered in measuring monopoly power.

The Supreme Court held that the larger flexible packaging materials market, and not the cellophane market as urged by the Government, was the relevant product market. The Court found that illegal monopoly power must be established in terms of the competitive market for the product, which is determined by the similarity of products in their character and use and by the cross-elasticity of demand between one product and others which are alleged to be in the same market.

Cross-elasticity of demand is the extent to which one product can be substituted for another for the same use, taking into consideration price, characteristics, and adaptability of the competing products. A high cross-elasticity indicates a high degree of interchangeability between the products, while a low cross-elasticity suggests the reverse. Thus, commodities reasonably interchangeable by the consumer for the same purpose constitute the relevant product market by which monopoly power is determined. In the Cellophane case, the Court found that cellophane, while possessing unique characteristics, was not so discrete from other flexible packaging materials to constitute a separate market. Other materials could be used in place of cellophane with no appreciable disadvantage.

Although the Cellophane case dealt with Sherman Act violations, the importance of the relevant product market in actions brought under the Clayton Act was soon established. In United States v. E.I. Du Pont de Nemours & Co., a case involving an attempt by General Motors to purchase a large amount of Du Pont stock, the Supreme Court concluded that the determination of the relevant market is also a necessary predicate to finding a Clayton Act violation. The Court argued that since the Clayton Act prohibited mergers or acquisitions that would substantially lessen competition within an area of effective competition, substantiality could be determined only in terms of the affected market.

6 511 F.2d 70 (7th Cir. 1975).
7 516 F.2d 1092 (7th Cir. 1975).
8 See note 3 supra.
9 See note 2 supra.
11 Id. at 393.
12 Id.
13 Id. at 380.
14 Id. at 395.
15 Id.
16 See note 2 supra.
18 Id. at 593.
fore, the market must again be defined in order for the courts to determine the impact of the alleged anticompetitive activity.\textsuperscript{19}

Yet, having decided that the relevant product market's determination is a necessary prerequisite in examining antitrust behavior, the Supreme Court soon recognized that within any broad product market, well-defined submarkets which in themselves constitute relevant product markets for antitrust purposes may exist. In \textit{Brown Shoe Co. v. United States},\textsuperscript{20} the Court divided the shoe market into separate and distinct submarkets of men's, women's, and children's shoes.\textsuperscript{21} In so doing, the Court held that the boundaries of a product market must be drawn with sufficient breadth to include competing products, but that the limits set should also be narrow enough to reflect the realistic market where competition in fact exists.\textsuperscript{22}

The criteria used by the Court in determining submarkets focused on the industry's or the public's recognition of the submarket as a separate economic entity, the product's peculiar characteristics and/or use, unique production facilities, and specialized vendors.\textsuperscript{23} A distinctive price was also considered an indication of a submarket's independent existence, with products which compete with one another being placed in separate submarkets because of a large discrepancy in their prices.\textsuperscript{24}

Once the court has established the submarket, anticompetitive action therein could be sufficient to constitute an antitrust violation, even though the activity involved only a small portion of the broader market.\textsuperscript{25} Accordingly, alleged antitrust violations are examined in a narrower, more sensitive context. The promotion of championship boxing contests as opposed to all professional boxing contests,\textsuperscript{26} aluminum conductors in contrast to all metal conductors,\textsuperscript{27} or commercial banks as distinguished from all savings banks\textsuperscript{28} have been held to be separate submarkets for antitrust purposes.

The most recent development in the relevant product market's determination was \textit{United States v. Grinnell Corp.},\textsuperscript{29} where the Supreme Court held that a central station alarm system, whether for fire or burglar protection, was itself a single submarket, distinct from the general market of property protection devices.\textsuperscript{30} The Court determined that a number of \textit{different products} could be combined in a single market where such combination reflected commercial reality.\textsuperscript{31} While the product provided by Grinnell differed from customer to customer depending on specific needs, the same basic service, a central station alarm, was provided to all. The central station alarm system, no matter what type of protection it provided, was held to be the relevant product market there. Other types

\textsuperscript{19} \textit{Id.}
\textsuperscript{20} \textit{370 U.S. 294} (1962).
\textsuperscript{21} \textit{Id.} at 298-99.
\textsuperscript{22} \textit{Id.} at 326.
\textsuperscript{23} \textit{Id.} at 325.
\textsuperscript{24} \textit{United States v. Aluminum Co. of America}, \textit{377 U.S. 271}, \textit{276-77} (1964).
\textsuperscript{26} \textit{International Boxing Club v. United States}, \textit{358 U.S. 242} (1939).
\textsuperscript{27} \textit{United States v. Aluminum Co. of America}, \textit{377 U.S. 271}, \textit{276-77} (1964).
\textsuperscript{29} \textit{384 U.S. 563} (1966).
\textsuperscript{30} \textit{Id.} at 572.
\textsuperscript{31} \textit{Id.}
of property protection services were excluded from the submarket by the Court because the quality and operation of the other devices were sufficiently different from the central station alarm system to preclude their use as reasonable substitutes. The Court used the principles of the Cellophane case and Brown Shoe to define a limited relevant product market.

Recent decisions of the Seventh Circuit have also narrowly defined relevant product market. A narrow relevant product market can be either an aid or a hindrance to an alleged antitrust violator in defending against actions brought under the antitrust laws. In some cases the market is drawn so narrowly so as to preclude a finding of monopoly power. For example, in United States v. Aluminum Co. of America, the Supreme Court held that the relevant product market was limited to aluminum conductors as opposed to all-metal conductors. This allowed Alcoa, a major producer of aluminum conductors, to acquire a company which produced copper conductors without acquiring with it an impermissible market share under the Clayton Act. Had the Government’s argument for the broader market been accepted by the Court, Alcoa would have violated the antitrust laws through its acquisition.

A narrow relevant product market, however, more often results in the courts finding that an alleged antitrust violator does in fact wield monopoly power within the designated market. This was the result reached in both recent Seventh Circuit cases. Avnet, Inc. v. Federal Trade Commission dealt with the acquisition by Avnet of two companies which provided parts to rebuilders of automotive electrical units. The rebuilding industry consists of two types of rebuilders of these units. One group operates on a mass production scale, rebuilding the units which are then sold in large quantities to jobbers for distribution to the retail trade. They are known in the industry as “production-line rebuilders.” The other type of rebuilders, “custom rebuilders,” operate out of repair shops where one unit at a time is rebuilt for an individual customer. The two companies acquired by Avnet controlled approximately two-thirds of the sales to production-line rebuilders. The Federal Trade Commission’s contention that the relevant product market should be limited only to these rebuilders was upheld by the Seventh Circuit.

Avnet, arguing that the custom rebuilders also should have been included in the relevant market, claimed that its acquired companies, as well as their competitors, made significant sales to custom rebuilders as well as to production-line rebuilders. Therefore, it claimed that there was no industry recognition of the two classes of rebuilders as separate economic submarkets.

The court disagreed, holding that Avnet had not demonstrated that sales were being made by the parts manufacturers to custom rebuilders. The FTC,
on the other hand, had introduced sufficient evidence to limit the market to production-line rebuilders. The court concluded that the custom rebuilders and the production-line rebuilders performed significantly different functions and operated at significantly different levels of distribution within the overall market. The custom rebuilders operated on the retail level and sold what is primarily a service to an individual customer. The production-line rebuilder, however, sold the finished product on a wholesale level and the product was then distributed by others. There was also a significant price difference between what the custom rebuilder charged its customers and what the production-line rebuilder charged his. These differences in customers, distribution levels, and price were sufficient for the court to place the two groups of rebuilders into separate submarkets for antitrust purposes.41

The Seventh Circuit analyzed the definition of relevant product in greater depth in Cass Student Advertising, Inc. v. National Educational Advertising Service, Inc.42 In that case, Cass instituted a private antitrust action against NEAS under the Sherman Act. Cass alleged that NEAS had obtained illegal monopoly power in representing college newspapers to national advertisers.43 The student newspapers would contract with NEAS to represent them in soliciting advertisers on the national level. NEAS held contracts with college newspapers which reached 87 percent of the college students in the United States.44 The district court had defined the relevant product market in this case to include all modes of competition used to present national advertising to college students.45 This included other publications and media which would also reach college students, such as national magazines with a large college readership. Within this market, concluded, the district court, NEAS possessed no illegal monopoly power.46

The Seventh Circuit held on appeal that the district court had misapplied the appropriate legal standards in determining the relevant product market.47 The court analyzed the lower court's decision in light of the Cellophane case and Brown Shoe, and determined that the relevant market was the service of representing college newspapers throughout the United States in the placement of national advertising.48 The Seventh Circuit found that the district court had defined the relevant market by considering the service afforded by NEAS as being offered only to national advertisers. The court reasoned that NEAS operated rather in two separate markets, offering two separate services. It did in fact provide a service to the national advertisers by providing them with college newspapers in which they could place their advertisement, but NEAS also provided a service to the college newspapers by soliciting national advertisement for them. Since these markets were separate and distinct, each one was by itself a relevant

41 Id. at 78 n.21.
42 516 F.2d 1092 (1975).
43 Id. at 1093.
44 Id. at 1096.
46 Id.
47 516 F.2d at 1093.
48 Id. at 1095.
product market. If NEAS dominated either market, it would then have violated the antitrust laws.\textsuperscript{49}

The Seventh Circuit agreed with the district court that NEAS did not have illegal control over the market in which the national advertisers were the consumers.\textsuperscript{50} There were far too many ways these advertisers could reach college students other than through college newspapers for there to be monopoly power here.\textsuperscript{51} However, the court determined that the other market containing the newspapers had not been adequately examined by the lower court.\textsuperscript{52}

In examining this submarket, the Seventh Circuit noted that college newspapers used specialized vendors who differed from those used by other publications.\textsuperscript{53} The newspapers serviced by NEAS were also distinct customers, in that they could be considered a specific communications medium in themselves.\textsuperscript{54} Moreover, the advertising industry recognized the representation of college newspapers as a specialized business.\textsuperscript{55} Finally, the newspapers were affected by any price change by NEAS, since they could not efficiently solicit on their own advertising on the national level. They were dependent on NEAS or someone like NEAS to perform this service for them.\textsuperscript{56}

All of the above considerations conformed with the tests enunciated in \textit{Brown Shoe} to determine relevant product market. The Seventh Circuit concluded, then, that the submarket of representing college newspapers in the solicitation of national advertising was in itself a relevant product market for antitrust purposes. Since NEAS controlled a significant part of this market, it had violated the antitrust laws.\textsuperscript{57}

The Seventh Circuit's narrow definition of relevant product market in these cases does not necessarily indicate a court policy to draw limited boundary lines in determining what constitutes a relevant market. A relevant product market is by its nature defined in terms of the particular industry before the court and is limited only by the standards set out in the \textit{Cellophane} case and \textit{Brown Shoe}. If the Seventh Circuit had been faced with different facts, it may have used the same standards applied in \textit{Avnet} and \textit{Cass Student Advertising} to find a broader market. The standards remain the same; only the facts, and therefore the result reached by application of the standards, will differ.

Yet the Seventh Circuit seems to favor a narrow definition of relevant product market. In the earlier case of \textit{L.G. Balfour Co. v. Federal Trade Commission},\textsuperscript{58} the Seventh Circuit had also drawn a narrow relevant product market. That case involved a manufacturer of goods which bore college and fraternity insignias. The Federal Trade Commission contended that Balfour held illegal

\textsuperscript{49} \textit{Id.} at 1097-99.
\textsuperscript{50} \textit{Id.} at 1098.
\textsuperscript{51} These include television, radio, commercial newspapers, magazines, billboards, direct mail advertisements, posters, student directory advertisements, and advertising samples. \textit{Id.} at 1097.
\textsuperscript{52} \textit{Id.} at 1099.
\textsuperscript{53} \textit{Id.}
\textsuperscript{54} \textit{Id.}
\textsuperscript{55} \textit{Id.}
\textsuperscript{56} \textit{Id.} at 1100.
\textsuperscript{57} \textit{Id.}
\textsuperscript{58} 442 F.2d 1 (7th Cir. 1971).
monopoly power in the production of goods bearing fraternity insignias. Balfour argued that the relevant market should be more broadly defined to include all insignia-bearing goods. The Seventh Circuit upheld the FTC as to relevant market.\(^5\) Again applying the *Brown Shoe* standards, the court found that the relevant product market should be delineated to conform with areas of effective competition, that is, where competition does in fact exist.\(^6\) A submarket which is a separate economic entity does not interact with the broader market as a true competitor. Rather, only those products within the submarket compete with each other.\(^7\)

Where a relevant product market is narrowly defined, the likelihood of finding monopoly power increases. A submarket can be so limited as to include a product offered by only one manufacturer.\(^8\) It is conceivable that a manufacturer could violate the antitrust laws by being the only supplier of a needed product. On the other hand, a broadly defined market could include products which really do not compete effectively with one another, but whose inclusion dilutes the monopoly power to those within the market. A tendency to limit the relevant market, as seen in recent Seventh Circuit cases, indicates a strong concern about containing anticompetitive behavior. The Seventh Circuit seems to demand a strict determination of relevant product market in conformity with the economic realities of today's industries.

*Jane M. Grote*

**ANTITRUST—SHERMAN ACT JURISDICTION REQUIREMENTS—PURCHASE OF SUPPLIES IN INTERSTATE COMMERCE IN PERFORMANCE OF A CONTRACT OBTAINED BY MEANS OF RIGGED BIDS AND PAYMENT WITH FUNDS PROVIDED BY HUD HELD TO SATISFY SHERMAN ACT JURISDICTIONAL REQUIREMENTS — POTENTIAL RESTRAINT UPON INTERSTATE COMMERCE FOUND.**

*United States v. Finis P. Ernest, Inc.*

Finis P. Ernest, Inc. and Modern Asphalt Paving and Construction Co. were indicted under §1 of the Sherman Act for conspiring to submit rigged bids to the city of East St. Louis, Illinois, in order to obtain a city sanitary sewer contract. The city awarded the contract to Finis P. Ernest, which in performance of the contract purchased materials worth $9,307 from out-of-state suppliers. The city paid for the work with funds provided by the United States Department of Housing and Urban Development (HUD), part of which were secured after the contract had been awarded in order to meet Ernest's price which was in excess of the engineer's original estimate.

The case was tried before a jury in the United States District Court for the Eastern District of Illinois; the defendants were found guilty of the Sherman

\(^{59}\) *Id.* at 9-10.

\(^{60}\) *Id.* at 10-11.

\(^{61}\) *Id.* at 11.

Act offense. Upon appeal to the Seventh Circuit Court of Appeals, Finis P. Ernest contended, inter alia, that the Government's evidence was insufficient to prove a restraint upon interstate commerce—the jurisdictional requirement of the Sherman Act. The Seventh Circuit disagreed, holding that the $9,307 spent in interstate commerce to further a per se violation of the Sherman Act, and the use of HUD funds to pay for the artificially increased contract price, were enough to warrant application of the Sherman Act. The court stated that a potential restraint on interstate commerce, if that was used as a test of Sherman Act jurisdictional reach, could be inferred from the bid-rigging.

The Finis P. Ernest court's holding was reached through application of two "differing approaches" to the jurisdictional requirements of the Sherman Act. The contours of these approaches were set out when the court initially stated that

[our problem of interpretation is whether the elements of restraint and interstate commerce may be satisfied separately or whether jurisdiction requires the restraint be upon interstate commerce.]

From this, the court defined the two approaches to Sherman Act jurisdictional analysis: (1) jurisdiction can be had over a restraint—especially if it is of a per se nature—as long as it is sufficiently related to interstate commerce to permit federal regulation; and (2) jurisdiction can be had only if a restraint is upon interstate commerce itself. These two theories of Sherman Act jurisdictional requirements—what may be termed the "sufficient relationship" approach and the "nexus" approach—were seen by the Finis P. Ernest court to be used by courts when confronted with the issue of Sherman Act jurisdictional reach. The court expressed no preference for one approach or the other, and since the bid-rigging here met the jurisdictional requirements of either approach, the court was not compelled to choose between them. Yet the court implied that either would have been sufficient to allow the Sherman Act to be applied.

If the Finis P. Ernest holding establishes two independent and equally tenable approaches to the jurisdictional requirements of the Sherman Act, analysis of both is necessary to determine if, in light of the judicial development of the Sherman Act, separate grounds for each approach exist.

1 The defendants also contended that (1) the evidence was insufficient to prove a conspiracy to rig their bids to the city, and (2) the trial court erred in admitting evidence that Modern did not have enough money in its checking account to cover the price it bid to the city. The Seventh Circuit dismissed both contentions. United States v. Finis P. Ernest, Inc., 509 F.2d 1256, 1261-63 (7th Cir.), cert. denied, 96 S. Ct. 191 (1975).
3 Id. at 1258.
4 Id.
5 Thus, there is substantial support for both responses to the question of whether Sherman Act jurisdiction requires proof of a restraint on interstate commerce. We need not resolve that issue here however, because we are convinced that there is sufficient evidence in this case to support a finding of jurisdiction under either approach.

Id. at 1260-61.
Development of the Jurisdictional Requirements of the Sherman Act

Grounded on the power of Congress to regulate interstate commerce, the Sherman Act prohibits restraints and monopolies of “trade or commerce among the several States. . . .” Since the Sherman Act’s purpose is directly related to the power of Congress to regulate interstate commerce, the reach of the Sherman Act is said to be coextensive with that of the commerce power.

The past 40 years have witnessed the steady expansion of the reach of federal power under the commerce clause. Returning to the spirit of the early case of Gibbons v. Ogden, courts have consistently upheld the use of the commerce power to extend far beyond direct commerce between the states. See United States v. E. C. Knight Co., 156 U.S. 1 (1895) (manufacture of goods later shipped in interstate commerce held an indirect effect on that commerce and thus not within the reach of the Sherman Act). This line of cases continued into the 1930’s. See, e.g., Carter v. Carter Coal Co., 298 U.S. 238 (1936); Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935); Hammer v. Dagenhart, 247 U.S. 251 (1918).

Starting in 1937, however, with NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937), the commerce power began to be interpreted expansively to allow Congress not only to regulate interstate commerce, but also to regulate those activities that could obstruct or burden it. United States v. Darby, 312 U.S. 100 (1941), continued the trend, and Wickard v. Filburn, 317 U.S. 111, 125 (1942), which allowed federal regulation of local activities that exerted a “substantial economic effect” on interstate commerce, brought the commerce power to full maturation.

Recent cases supporting federal regulation under the commerce power include: Perez v. United States, 402 U.S. 146 (1971); Shapiro v. Thompson, 394 U.S. 618 (1969); Daniel v. Paul, 395 U.S. 298 (1969); Katzenbach v. McGoo, 379 U.S. 294 (1964); Heart of Atlanta Motel v. United States, 379 U.S. 241 (1964). All of these cases represented a congressional intention to go the fullest extent of the commerce power.

When such is not the case, the result is not always the same. See United States v. Bass, 404 U.S. 336 (1971) (neither customers of nor operator of gambling operation frequented by out-of-state bettors are covered by the Travel Act); Rewis v. United States, 401 U.S. 808 (1971) (possession of firearms in violation of § 1202(a)(1) of the Omnibus Crime Control and Safe Streets Act of 1968 must be related to interstate commerce to be regulated by Act).

22 U.S. (9 Wheat.) 1 (1824). Remarkably, Marshall, C.J., delivered an opinion on the federal power over commerce which only recently has been given full approval. See Wickard v. Filburn, 317 U.S. 111 (1942) (“cases call[ing] forth broad interpretations of the Commerce Clause brought about a return to the principles first enunciated . . . in Gibbons v. Ogden. . . .”; id. at 122). In Gibbons, Marshall laid down the principle that federal regulation was properly had over states’ internal concerns which affect the states generally and which it was necessary to interfere with in order to execute the general powers of government. 22 U.S. (9 Wheat.) at 195. Courts now use Gibbons as the source for their understanding of the commerce power’s reach.
power in a variety of contexts not directly related to commercial activity, and with only a potential impact upon interstate commerce. Certain classes of activities, even if entirely intrastate in character, have likewise come under congressional regulation.

This expansive reach of the commerce power is due to the courts' acquiescence to congressional determinations that specific activities are in or affect interstate commerce. Courts now generally allow Congress to fix the scope of the commerce power. However, since the Sherman Act is phrased in broad, general terms, and since its scope has not been delimited by Congress, it has been concluded that Congress meant for the courts themselves to arrive at the proper jurisdictional reach of the Sherman Act.

The courts in determining those activities that can be reached by the Sherman Act treat the jurisdictional requirements of that Act differently than they do other statutes similarly based on the commerce power. This treatment, as the

11 The need for federal regulation over a wide range of activities has led to reliance upon the commerce power as the constitutional justification for such regulation, even though "commerce" was not involved. See, e.g., Perez v. United States, 402 U.S. 146 (1971) (extortionate credit transactions); Katzenbach v. McClung, 379 U.S. 294 (1964) (food-service); Heart of Atlanta Motel v. United States, 379 U.S. 241 (1964) (rational discrimination in accommodations); United States v. Darby, 312 U.S. 100 (1941) (wage and hours of employees).

12 Wickard v. Filburn, 317 U.S. 111 (1942), established that a wholly intrastate activity can still be federally regulated if it exerts a "substantial economic effect on interstate commerce." Id. at 125. Defendant, an Ohio farmer, grew 239 bushels of wheat in excess of what he was allowed to grow under the Agricultural Adjustment Act of 1938. The Act was intended to regulate the amount of wheat in the market and to restrict the amount of wheat a farmer could keep out of the market. The farmer there grew his excess wheat for home-consumption. Nevertheless, the Court held that this wheat affected interstate commerce.

That appellee's own contribution to the demand for wheat may be trivial by itself is not enough to remove him from the scope of federal regulation where, as here, his contribution, taken together with that of many others similarly situated, is far from trivial. Id. at 127-28. The impact upon interstate commerce in Wickard was obviously de minimis, but even a potential impact was thought to be reached by the 1938 Act. This reasoning was also evident in other cases finding a valid congressional regulation. See, e.g., United States v. Sullivan, 332 U.S. 689 (1948) (branding of drugs already shipped in interstate commerce); United States v. Darby, 312 U.S. 100 (1941) (branding of drugs already shipped in interstate commerce); Kentucky Whip & Collar Co. v. Illinois Cent. R.R. Co., 299 U.S. 334 (1937) (convict-made goods shipped into a state whose law forbids receipt, sale, or possession of such goods).

13 In Perez v. United States, 402 U.S. 146 (1971), defendant was a "loan shark" in the habit of threatening violence as a way to collect on his loans. This made him a "member of the class which engages in 'extortionate credit transactions' as defined by Congress." Id. at 153 (emphasis supplied) (footnote omitted). The Court affirmed the defendant's conviction for this practice without requiring proof that his crime in any way affected interstate commerce. The Court was content to let Congress decide that it did. "Exortionate credit transactions, though purely intrastate, may in the judgment of Congress affect interstate commerce." Id. at 154. See also Maryland v. Wirtz, 392 U.S. 183 (1968); United States v. Darby, 312 U.S. 100 (1941).

14 By this date, the question concerning congressional use of the commerce power amounts to one of congressional discretion, not constitutional limitation. The courts' function thus becomes one of finding a rational basis for a regulation's protection of interstate commerce. [Where we find that the legislators . . . have a rational basis for finding a chosen regulatory scheme necessary to the protection of commerce, our investigation is at an end. Katzenbach v. McClung, 379 U.S. 294, 303-04 (1964). However, if a court finds that Congress has not used the commerce power to its fullest extent, a more careful—and critical—review of a regulation will be made. See United States v. Bass, 404 U.S. 336 (1971); Rewis v. United States, 401 U.S. 808 (1971).

15 "Congress has . . . left it to the courts to determine whether the intrastate activities have the prohibited effect on the commerce . . . in the Sherman Act." United States v. Darby, 312 U.S. 100, 120 (1941).
Supreme Court recently noted,
turning as it does on the circumstances presented in each case and requiring
a particularized judicial determination, differs significantly from that re-
quired when Congress itself has defined the specific persons and activities
that affect commerce and therefore require federal regulation.  

This “particularized judicial determination” is concerned not with “abstract or
mechanistic formulae,” but rather with “a practical, case-by-case economic
judgment” as to the impact an activity has upon interstate commerce.

From this method of judicial determination of Sherman Act jurisdictional
requirements, the rule has been established that for the Act to apply there must
be a showing that an alleged restraint occurred in interstate commerce or, if intra-
state, that it substantially affected interstate commerce.  

The rule requiring a restraint to be in or substantially affecting interstate
commerce has not been without its difficulties. While necessarily flexible in order
to allow courts to undertake a particular economic judgment of an alleged re-
straint, the rule’s flexibility has sometimes produced unpredictable results.

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17 Rasmussen v. American Dairy Ass’n, 472 F.2d 517, 527 n.20 (9th Cir. 1972), cert.
effects in the application of the Commerce Clause... has made the mechanical application
18 472 F.2d at 527 n.20. This principle was recognized as early as Swift & Co. v. United
States, 196 U.S. 375 (1905). Holmes, J., there said: “Commerce among the States is not a
technical legal conception, but a practical one, drawn from the course of business.” Id. at 398.
19 This rule stems directly from Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1 (1824), and
has been followed in innumerable Sherman Act cases. See, e.g., Burke v. Ford, 389 U.S. 320
(1967); Northern Pac. Ry. Co. v. United States, 356 U.S. 1 (1958); Mandeville Island
Farms, Inc. v. American Crystal Sugar Co., 334 U.S. 219 (1948); Swift & Co. v. United
States, 196 U.S. 375 (1905). This rule received its most recent affirmation in Goldfarb v.
Virginia State Bar, 421 U.S. 773 (1975), where the Court, viewing local title examination to
be inseparable from the interstate aspects of real estate transactions, held that it affected
interstate commerce.

Where, as a matter of law or practical necessity, legal services are an integral
part of an interstate transaction, a restraint on those services may substantially affect
commerce for Sherman Act purposes.  

Id. at 785.

That the Goldfarb Court saw such an effect to be necessary for the Sherman Act to apply
is clear from its statement that “there may be legal services that have no nexus with interstate
commerce and thus are beyond the reach of the Sherman Act.”  

21 A de minimis impact upon interstate commerce—where the effect, if any, is determined
to be so insubstantial that federal regulation is considered unwarranted—is usually not reached
by the Sherman Act. See Sun Valley Disposal Co. v. Silver State Disposal Co., 420 F.2d 341
(9th Cir. 1969); Page v. Work, 290 F.2d 323 (9th Cir. 1961).
22 Flexibility leading to unpredictability occurs when courts determine that certain activ-
ities are inherently “local” or not the kind of activity that Congress meant to regulate with
the Sherman Act. Perhaps the most famous example of this is professional baseball’s exemption
(Holmes, J.), laid the foundation for this by stating that “personal effort, not related to produ-
duction, is not a subject of commerce.” Id. at 209. This was followed in Toolson v. New
alleviate this situation it has been suggested that Sherman Act jurisdictional analysis should be simplified into easily applicable standards similar to those found with other statutes based on the commerce power. However, this suggestion may be unrealistic, since "the real-world business nature of the Sherman Act's purpose and subject matter permits no easy solutions."

The Two Approaches of the Seventh Circuit

From the development of Sherman Act jurisdictional requirements the Seventh Circuit in *Finis P. Ernest* extracted two approaches to the jurisdictional reach of the Sherman Act. The court found the "sufficient relationship" approach in recent decisions of the Ninth Circuit Court of Appeals and in Supreme Court


The exemption of professional baseball from the Sherman Act is in stark—and conceptually insupportable—contrast to other professional sports, which have not received similar treatment. See *Radovich v. National Football League*, 352 U.S. 445 (1957); *United States v. International Boxing Club*, 348 U.S. 236 (1955).

However, there is indication that such broad exemptions from Sherman Act coverage are no longer acceptable. The Supreme Court recently held that minimum fee schedules for title examinations performed by lawyers violated § 1 of the Sherman Act. *Goldfarb v. Virginia State Bar*, 421 U.S. 773 (1975) (Burger, C.J.). The defendant argued there that title examination was (1) a local activity performed by persons engaged in (2) a "learned profession"; both elements were urged as valid exceptions to the Sherman Act. The Court thought otherwise, stating first that "a title examination is an integral part of an interstate transaction" in real estate. *Id.* at 784. The Court viewed a title examination as inseparable from the interstate aspects of a real estate transaction. Secondly, the Court refused to give a complete exemption to learned professions from the Sherman Act. "The nature of an occupation, standing alone, does not provide sanctuary from the Sherman Act..." *Id.* at 787 (citation omitted). The professional activity in *Goldfarb* was held to be within the scope of the Sherman Act's substantive reach.

Whatever else it may be, the examination of a land title is a service; the exchange of such a service for money is "commerce" in the most common usage of that word. In the modern world it cannot be denied that the activities of lawyers play an important part in commercial intercourse, and that anticompetitive activities by lawyers may exert a restraint on commerce. *Id.* at 787-88. However, the Court was careful to limit the extension of its holding in *Goldfarb*. It recognized that for the purpose of the Sherman Act it was relevant to distinguish a "profession" from a "business." *Id.* at 788 n.17. The Court noted:

The public service aspect, and other features of the professions, may require that a particular practice, which could properly be viewed as a violation of the Sherman Act in another context, be treated differently. We intimate no view on any other situation than the one with which we are confronted today.

*Id.*

23 See Note, Portrait of the Sherman Act as a Commerce Clause Statute, 49 N.Y.U.L. Rev. 325 (1974). The writer, disagreeing with what was called a "narrow, ad hoc approach" to the reach of the Sherman Act, advocates the abandonment of the notion that the Sherman Act is different from any other commerce power-based statute.


dicta. From the majority of courts of appeals and other Supreme Court cases the Seventh Circuit found the “nexus” approach.

The “sufficient relationship” approach appears to significantly widen the scope of Sherman Act application by not requiring—as does the “nexus” approach—that a restraint be upon interstate commerce. But further analysis reveals that the “nexus” approach can reach all restraints that the “sufficient relationship” approach can permissably reach; taken by itself, however, the “sufficient relationship” approach is ultimately inconsistent with case precedent and congressional intention.

1. The “Sufficient Relationship” Approach

From several recent decisions of the Ninth Circuit that contained the term “sufficient relationship” in their phrasing of the jurisdictional test of the Sherman Act, the Finis P. Ernest court constructed an approach to Sherman Act jurisdictional analysis that did not require a restraint to be upon interstate commerce. In the court’s judgment, the Ninth Circuit viewed the question of jurisdiction under the Sherman Act as entirely one of constitutional power: whether defendants’ conduct had a sufficient relationship to interstate commerce to be subject to regulation by Congress.

Applying the facts presented in Finis P. Ernest to this definition of Sherman Act jurisdictional reach, the court found a sufficient relationship between the defendants’ conduct and interstate commerce.

This “sufficient relationship” approach, as applied in Finis P. Ernest, demanded only that interstate commerce be somehow involved in the restraint for the Sherman Act to apply. It was sufficient for interstate commerce to be present;
it did not have to be restrained. This conclusion is evident from the *Finis P. Ernest* court's treatment of the facts in the case. The court, using the "sufficient relationship" approach, held that the $9,307 spent in interstate commerce in performance of a contract obtained in violation of the Sherman Act was enough to meet the jurisdictional requirements of the Sherman Act. The court stated that "[t]his relationship is sufficient to assure that application of the Sherman Act to this case is not beyond the constitutional authority of Congress."

The per se nature of the restraint entered into the court's use of the "sufficient relationship" approach, but to an extent that is unclear. The court determined that a per se Sherman Act offense did not require "proof of an adverse impact on interstate commerce to satisfy the jurisdictional requirements." From this, it held that "[w]here a per se restraint is involved, the quantity of interstate commerce is unimportant." It is apparent that the court viewed per se Sherman Act offenses to be a class of activity which can be reached by federal power without an initial determination that interstate commerce was adversely affected.

What is not clear, however, is the significance a per se offense has in the "sufficient relationship" approach. The court in one place called the per se offense in *Finis P. Ernest* an "additional reason" for not requiring the restraint to be upon interstate commerce, implying that it was not a necessary element in the "sufficient relationship" approach. Yet the court's holding relied on the per se nature of the bid-rigging to dismiss any argument that the small fraction of interstate commerce involved in the local construction project made the restraint's relationship with interstate commerce insufficient to warrant application of the Sherman Act. It is uncertain, then, whether the "sufficient relationship" approach would find any interstate involvement—no matter how minimal—to be enough to meet the jurisdictional requirements of the Sherman Act, or whether this finding depends on the presence of a per se Sherman Act violation. Since the court did not make mention of this distinction, it can be said that the "suf-

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30 *Id.* at 1261.
31 *Id.* at 1259. Per se violations of the Sherman Act have been established to alleviate courts from complex analyses of economic statistics meant to determine if a restraint was "unreasonable." A per se violation is "conclusively presumed to be unreasonable and therefore illegal without elaborate inquiry as to the precise harm they have caused or the business excuse for their use." *Northern Pac. Ry. Co. v. United States*, 356 U.S. 1, 5 (1958) (tying arrangement held per se offense). See also, e.g., *United States v. Container Corp. of America*, 332 U.S. 390 (1947) (tying arrangement); *Fashion Originators' Guild of America v. FTC*, 312 U.S. 457 (1941) (group boycott); *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150 (1940) (price-fixing).
33 *Cf.* *Perez v. United States*, 402 U.S. 146 (1971) (extortionate credit transactions held within interstate commerce without proof that a particular case involved that commerce because Congress had labelled it a class of activity that it meant to regulate).
34 509 F.2d at 1259.
35 In support of this contention the court cited *United States v. McKesson & Robbins, Inc.*, 351 U.S. 305 (1956); *United States v. Bensinger Co.*, 430 F.2d 584 (8th Cir. 1970). These cases held that when a per se Sherman Act offense is present, the amount of interstate commerce affected is unimportant; however, interstate commerce was still required to have been affected for the Sherman Act to apply. In *Bensinger*, for instance, the alleged restraint concerned only one dishwasher. The Eighth Circuit held that, since the dishwasher had been shipped in interstate commerce, the Sherman Act reached the restraint because it had affected interstate commerce. Neither case, therefore, supports the "sufficient relationship" approach, which would not require a restraint to affect interstate commerce.
ficient relationship” approach is not dependent upon a per se Sherman Act violation.

The Finis P. Ernest court’s inclusion of per se offenses into Sherman Act jurisdictional analysis also raises the objection that it has mixed together two separate issues: the jurisdictional reach of the Act, and its substantive prohibitions. Though some courts have treated both issues as one, the better view is that each must be dealt with separately. If this is so, there does not seem to be a place in the jurisdictional analysis of the Sherman Act for any mention of per se offenses, which bear solely on the Act’s substantive provisions. The Finis P. Ernest court, however, was apparently struck by the seeming inconsistency involved in demanding that a showing of a restraint upon interstate commerce be made to satisfy the jurisdictional requirements of the Sherman Act in a per se case, when such a showing was not needed to establish the substantive violation of the Act. The court stated: “It may be anomalous to require proof of effects to satisfy jurisdiction in those cases where proof of effects is not necessary to establish the substantive offense.”

The view that jurisdiction and the substantive offense are different issues requiring different criteria for their determination was not accepted by the court. The court’s attitude indicates that it was dissatisfied with an approach that would treat a per se Sherman Act offense differently than it would a serious violation of another commerce power-based statute.

The Finis P. Ernest court’s “sufficient relationship” approach relied upon recent decisions of the Ninth Circuit for its authority. Those cases indeed used the term “sufficient relationship” in defining the test of the jurisdictional reach of the Sherman Act; however, the Ninth Circuit never expressly stated that a restraint need not be upon interstate commerce for the Sherman Act to apply. Analysis of those cases leads, in fact, to the opposite conclusion.

In Gough v. Rossmoor Corp., one Ninth Circuit decision relied upon by the Finis P. Ernest court, plaintiff, engaged in the retail sale of carpeting, alleged that the defendant residential developer had restrained his business by refusing to allow his advertisements in the “house” newspaper of one of its developments.

36 Las Vegas Merchant Plumbers Ass’n v. United States, 210 F.2d 732 (9th Cir.), cert. denied, 348 U.S. 817 (1954), treated the substantive and jurisdictional aspects of the Sherman Act as indistinguishable. This position has not been followed. The Ninth Circuit, in Uniform Oil Co. v. Phillips Petroleum Co., 400 F.2d 267 (9th Cir. 1968), stressed that the two parts of the Sherman Act are different concerns to be treated separately. A restraint—whether conclusively unreasonable or not—must have substantial interstate impact to satisfy the Sherman Act’s jurisdictional requirements. See also Gough v. Rossmoor Corp., 487 F.2d 373 (9th Cir. 1973); Rasmussen v. American Dairy Ass’n, 472 F.2d 517 (9th Cir. 1972), cert. denied, 412 U.S. 950 (1973); Evans v. S.S. Kresge Co., 394 F. Supp. 817 (W.D. Pa. 1975). Since jurisdiction is essentially a question of power to adjudicate a legal claim, its difference from the legal claim itself—in the Sherman Act context whether an alleged restraint violates the Act—is apparent.

37 509 F.2d at 1259. The court relied on P. AREEDA, ANTITRUST ANALYSIS § 183 (2d ed. 1974). The author there asks: “If certain conduct be held within the antitrust ban because of its potential for harm, regardless of demonstrated harm in any particular case, is it inconsistent simultaneously to require proof of effects to satisfy the statute’s jurisdictional test?” Id. at 122 (footnote omitted). The simple answer is that it is not. “Interstate effects” is a confusing term if it is not clear which aspect of the Sherman Act—jurisdictional reach or substantive violation—is under discussion. Inconsistency would arise if both were subject to the same analysis and different results were reached. However, since the reach of the Sherman Act is analyzed differently than its substantive prohibitions, proof of interstate effect for jurisdictional purposes, but not for substantive purposes, is clearly not inconsistent. See note 36 supra.

38 487 F.2d 373 (9th Cir. 1973).
The Ninth Circuit put the jurisdictional question there in terms of "whether defendant's conduct had a sufficient relationship to interstate commerce to be subject to regulation by Congress. ..." The court quickly added, however, that

"[t]his in turn depends upon whether the defendant's conduct has a "substantial economic effect" upon interstate commerce or, "concerns more states than one" and has a real and substantial relation to the national interest." 40

The focus of the Gough court was clearly upon the interstate impact of the alleged restraint: "[T]he issue is ... whether the defendant's conduct ... has a sufficient impact on interstate commerce to justify regulation under the Commerce Clause." 41 The court held that because all the carpeting used in plaintiff's business was obtained in interstate commerce, a "substantial economic effect" upon interstate commerce resulted in the elimination of plaintiff's competition. 42 The court added: "The relationship between the restraint and the national interest in the distribution of carpeting in a free competitive economy is not so tenuous as to bar federal interference." 43

The Gough decision is significant for the broad interpretation it gave the relationship between a restraint and interstate commerce. However, the court found the Sherman Act applicable not because of the mere presence of goods shipped in interstate commerce but because the restraint was precisely upon those interstate goods. The elimination of competition in interstate carpeting had an "inevitable affect" upon interstate commerce.

Another Ninth Circuit decision relied upon by the Finis P. Ernest court was In re Liquid Asphalt Cases. 45 The defendants there, producers of asphaltic oil, were accused of restraining competition by plaintiff producers of asphaltic concrete. The restraint occurred in connection with roadway construction that was part of an interstate highway system. However, the great majority of the products involved were produced, sold, and delivered intrastate. The Liquid Asphalt court held that "the production of asphalt for use in interstate highway rendered the producers 'instrumentalities' of interstate commerce and placed them 'in' commerce as a matter of law." 46 This conclusion was reached by analogizing

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39 Id. at 376.  
40 Id.  
41 Id.  
42 Id. This term "substantial economic effect" comes from Wickard v. Filburn, 317 U.S. 111 (1942): "[e]ven if ... activity local and ... not regarded as commerce, it may still ... be reached by Congress if it exerts a substantial economic effect on interstate commerce. ..." Id. at 125.  
43 487 F.2d at 378.  
44 The phrase is the Supreme Court's, used to describe the effect upon interstate commerce in Burke v. Ford, 389 U.S. 320, 322 (1967).  
46 Id. at 204.
from the Fair Labor Standards Act, a statute based on the commerce power. The *Finis P. Ernest* court read this holding to mean that interstate commerce and a restraint could exist separately and still meet the jurisdictional requirements of the Sherman Act. "The *Liquid Asphalt* court's bifurcated analysis made it unnecessary in deciding the question of jurisdiction to consider whether any interstate commerce was allegedly restrained." The *Liquid Asphalt* court was careful to point out, however, that there was a connection between the restraint and interstate commerce. The restraint, said the court, was the "illegal manipulation of the very costs and products which put the defendants' business 'in' interstate commerce. . . ."

The Supreme Court's disposition of *Liquid Asphalt* upon appeal sheds further light on the precedential value of the Ninth Circuit's analysis. While the Supreme Court's review did not extend to the Sherman Act jurisdictional issue, the Court's unfavorable treatment of the Ninth Circuit's holding, which had placed the defendant in interstate commerce as a matter of law, calls into question the appellate court's Sherman Act analysis as well. In any case, the re-

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47 The Fair Labor Standards Act, 29 U.S.C. § 201 et seq. (1970), is meant to reach wage earners who work under substandard labor conditions. For constitutional reasons, the Act is applicable to those employed in an enterprise engaged in commerce or the production of goods for interstate commerce. Maryland v. Wirtz, 392 U.S. 183 (1968), established the extensive reach of the Act's provisions. In a telling commentary on the reach of the commerce power in *Wirtz*, Harlan, J., stated:

> Neither here nor in *Wickard* has the Court declared that Congress may use a relatively trivial impact on commerce as an excuse for broad general regulation of state or private activities. The Court has said only that where a general regulatory statute bears a substantial relation to commerce, the *de minimis* character of individual instances arising under that statute is of no consequence.

*Id.* at 197 n.27. Though this statement was specifically addressed to the issue of state autonomy raised in Douglas, J.,'s dissent, *id.* at 201, 204, it has relevance in a broader area. It first establishes the need for something more than a "trivial impact on commerce" to justify congressional regulation. Secondly, it implies that Congress has intended different jurisdictional requirements for statutes based on the commerce power. While the Fair Labor Standards Act might be unconcerned with the *de minimis* character of individual cases, this is clearly not the case with the Sherman Act. See *Lieberthal* v. North Country Lanes, Inc., 332 F.2d 269 (2d Cir. 1964); *Page v. Work*, 290 F.2d 323 (9th Cir. 1961). Thirdly, the use of the phrase "substantial relation" here indicates that it is equivalent to an effect upon interstate commerce. Especially when a "trivial impact" is rejected as a basis for federal regulation, it seems clear that "relation" and "effect" are interchangeable words. At a minimum, nothing in the language of the *Wirtz* Court indicates that there can be more than one permissible approach to commerce power analysis.

48 509 F.2d at 1259.

49 487 F.2d at 204.


51 The Court limited its grant of certiorari to issues raised under § 2(a) of the Robinson-Patman Act and §§ 3 and 7 of the Clayton Act. The Court held that the "in commerce" requirement of § 2(a) demanded that allegedly prohibited activity must be directly in interstate commerce. The Clayton Act requires that such activity must at least "affect commerce," but respondents presented no evidence on this point; the Court thus held that their Clayton Act contention failed for want of proof.

52 The Court disagreed with the Ninth Circuit's analogizing from the Fair Labor Standards Act, 29 U.S.C. § 201 et seq. (1970), to the Robinson-Patman and Clayton Acts. To the argument that the concept of "in commerce" should be expanded to include categories of activities that are perceptibly connected to the instrumentalities of interstate commerce—here interstate highways—the Court said: "The chain of connection has no logical endpoint. The universe of arguably included activities would be broad and its limits nebulous in the extreme." 419 U.S. at 198.

53 Considering how little the Court thought of the argument that "in commerce" should be expanded to reach activities only tangentially connected with interstate commerce, the language of the Sherman Act—requiring a "substantial effect" upon interstate commerce—would seemed to have barely met the Court's approval. In his dissent, Douglas, J., said as much.

The decision of the Court of Appeals on the Sherman Act issue . . . held that
petitioners and their alleged activities were sufficiently "in commerce" to support Sherman Act jurisdiction. . . . The majority now holds, however, that petitioners and their alleged activities were not sufficiently "in commerce" to support Clayton and Robinson-Patman coverage. In light of the latter holding, it is difficult to imagine the reception that Copp's Sherman Act claims will receive on remand. 128 A key to future interpretations of the Sherman Act appears in the Court's statement that, in determining whether a local activity is harmful to the national marketplace, courts are required "to look to practical consequences, not to apparent and perhaps nominal connections between commerce and activities that may have no significant economic effect on interstate markets." 129 Id. at 208 n.6 (emphasis supplied). A key to future interpretations of the Sherman Act appears in the Court's statement that, in determining whether a local activity is harmful to the national marketplace, courts are required "to look to practical consequences, not to apparent and perhaps nominal connections between commerce and activities that may have no significant economic effect on interstate markets." 129 Id. at 199.

54 Id. at 194.
56 Specifically, the Ninth Circuit has indicated that it will accept a potential affect upon interstate commerce as sufficient without the need for proof that such effect has occurred. See Gough v. Rossmoor Corp., 487 F.2d 373 (9th Cir. 1973); Rasmussen v. American Dairy Ass'n, 472 F.2d 517 (9th Cir. 1972), cert. denied, 412 U.S. 950 (1973).
57 In Page v. Work, 290 F.2d 323 (9th Cir. 1961), defendant newspapers banded together into a bureau to better serve the legal advertising market in Los Angeles County, California. Plaintiff newspaper was not among those included in the bureau, and as a result was soon forced to terminate publication. Surviving newspapers picked up most of the plaintiff's former subscribers, but 13 were not. Plaintiff had purchased newspaper, ink, and other supplies in interstate commerce.

On these facts, the Ninth Circuit held that the requirements of the Sherman Act had not been met, notwithstanding the lessening of interstate commerce. Id. at 333-34. The Page court reasoned that the decrease in interstate commerce was too insubstantial to bring the Sherman Act to bear on what was essentially a local restraint. The market for legal advertising was in the court's judgment local, and the defendants' conduct was in only that market, and did not sufficiently affect interstate commerce to justify federal prohibition.

The Page decision stands for the principle that a de minimis effect upon interstate commerce is insufficient to require application of the Sherman Act. See Rasmussen v. American Dairy Ass'n, 472 F.2d 517, 526-27 (9th Cir. 1972), cert. denied, 412 U.S. 950 (1973). See also Sun Valley Disposal Co. v. Silver State Disposal Co., 420 F.2d 341 (9th Cir. 1969) (interstate effect called "incidental" to local restraint; Sherman Act held not applicable).

To the Finis P. Ernest court, Page seemed "inconsistent with the Ninth Circuit's most recent decisions, yet Page continues to be cited with approval in those cases." 509 F.2d at 1259. Page is inconsistent with Gough, Liquid Asphalt, and Rasmussen only if the latter cases are taken to hold that even a trivial connection with interstate commerce is enough to meet the jurisdictional requirements of the Sherman Act. That these cases do not so hold is apparent from the fact—which the Finis P. Ernest court admitted—that they expressly limit Sherman Act jurisdictional reach to those restraints upon interstate commerce that are not de minimis.
2. The "Nexus" Approach

Along with the "sufficient relationship" approach, the Seventh Circuit analyzed the jurisdictional issue in *Finis P. Ernest* by use of the "nexus" approach. This approach requires that a restraint be upon interstate commerce for the Sherman Act to apply. A restraint that is in interstate commerce or substantially affects that commerce has the requisite connection to meet the jurisdictional requirements of the "nexus" approach.

The "nexus" approach is the traditional method courts have used to determine Sherman Act coverage, and is thus well-established in case law. Its most recent judicial affirmation was in *Goldfarb v. Virginia State Bar*, where the Supreme Court held that title examination was such an integral part of the interstate aspects of real estate transactions that it substantially affected interstate commerce. The Court clearly relied on a "nexus" approach to reach its conclusion.

Where, as a matter of law or practical necessity, legal services are an integral part of an interstate transaction, a restraint on those services may substantially affect commerce for Sherman Act purposes. Of course, there may be legal services that involve interstate commerce in other fashions, just as there may be legal services that have no nexus with interstate commerce and thus are beyond the reach of the Sherman Act.

As is apparent from *Goldfarb*, the "nexus" approach is capable of an expansive interpretation of what is in or affects interstate commerce. For example, in *Burke v. Ford* the Court held that a horizontal territorial division of the Oklahoma wholesale liquor market was a restraint upon interstate commerce, even though the liquor "came to rest" in the wholesalers' warehouses before distribution and even though all sales were made intrastate. The *Burke* Court indicated that the liquor retained its interstate character throughout the chain of distribution; more than this, the Court saw in the wholesalers' division of the Oklahoma liquor market an "inevitable effect" upon interstate commerce, although there was no proof of such effect. The Court stated:

The wholesalers' territorial division here almost surely resulted in fewer sales

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59 Id. at 785 (emphasis added).
60 389 U.S. 320 (1967) (per curiam).
61 The "come to rest" doctrine is a conceptual explanation of the point at which interstate commerce ends. While the doctrine has some bearing on the issue of when a restraint is "in" interstate commerce for Sherman Act purposes, it has no relevance to the issue of a restraint's effect upon interstate commerce. As the *Burke* Court said in response to the argument that the Sherman Act could not apply where the restraint occurred after the liquor had "come to rest" in defendants' warehouses: "Whatever the validity of that conclusion, it does not end the matter. For it is well established that an activity which does not itself occur in interstate commerce comes within the scope of the Sherman Act if it substantially affects interstate commerce." 389 U.S. at 321 (emphasis supplied).
62 389 U.S. at 322.
to retailers—hence fewer purchases from out-of-state distillers—than would have occurred had free competition prevailed among the wholesalers.\textsuperscript{63}

The \textit{Burke} holding stemmed from the Court's determination that the economic realities of the territorial division inevitably had an effect upon interstate commerce. Thus a potential effect was sufficient to justify application of the Sherman Act; there was a nexus here between the restraint and interstate commerce.\textsuperscript{64}

A Ninth Circuit decision which followed the rationale of \textit{Burke} is \textit{Rasmussen v. American Dairy Ass'n.}\textsuperscript{65} In that case the defendant associations were accused of engaging in anticompetitive practices to drive the plaintiff out of the Phoenix, Arizona, milk market. Plaintiff sold a "filled milk" product, "Go," in competition with the fluid milk offered by the associations. The product was composed of ingredients obtained, all except for water, in interstate commerce. The \textit{Rasmussen} court held that "a sufficient relationship appears... between the restraint allegedly imposed by defendants and interstate commerce in 'Go' and its ingredients to establish jurisdiction under the Sherman Act."\textsuperscript{66} It is significant that the court used the term "sufficient relationship" but tied it directly to a restraint upon interstate commerce; this would indicate the \textit{Rasmussen} court was also using a "nexus" approach.

The fact that the restraint took place only in the local Phoenix market did not convince the \textit{Rasmussen} court that there was no effect upon interstate commerce. Admitting that "[t]here is no bright line dividing cases in which the effect upon interstate commerce is sufficient to permit Congress [to regulate]... from cases in which it is not sufficient,"\textsuperscript{67} the court indicated that determining the jurisdictional reach of the Sherman Act "becomes a matter of degree."\textsuperscript{68} The court found the Sherman Act reached the restraint there because the "ingredients that move in interstate commerce represent the greater part of the value of 'Go.'"\textsuperscript{69} The court explained that

\begin{quote}
[\textit{t}he fact that the conduct to be prohibited is directed against the distribution of "Go" itself, and that all of "Go"'s economically significant ingredients derive from a line of interstate commerce, makes the prohibition of that conduct more clearly reasonable as a means of protecting the particular line of commerce of interstate commerce.]
\end{quote}

The \textit{Rasmussen} court was thus engaged in line-drawing between restraints which affect "economically significant" lines of interstate commerce and those which are only incidental to interstate commerce. It determined that the degree of

\textsuperscript{63} Id.

\textsuperscript{64} The effect upon interstate commerce was "potential" to the extent that it could not be readily demonstrated. A substantial—if conjectural—impact upon interstate commerce can thus be judged within the reach of the Sherman Act. \textit{See also} Gough v. Rossmoor Corp., 487 F.2d 517 (9th Cir. 1973).

\textsuperscript{65} 472 F.2d 517 (9th Cir. 1972), \textit{cert. denied}, 412 U.S. 950 (1973).

\textsuperscript{66} Id. at 528.

\textsuperscript{67} Id. at 526.

\textsuperscript{68} Id. at 527.

\textsuperscript{69} Id.

\textsuperscript{70} Id.
interstate commerce affected by the associations was sufficient to find the Sherman Act applicable.

The Seventh Circuit's use of the "nexus" approach in Finis P. Ernest implicitly relied upon cases like Goldfarb, Burke, and Rasmussen to find a restraint upon interstate commerce. Unlike those cases, however, there was no line of commerce in Finis P. Ernest that was the object of the restraint. Interstate commerce was related only indirectly to the bid-rigging. The court found, nevertheless, that a potential restraint upon interstate commerce resulted from the purchase of interstate supplies and from the use of HUD funds to pay for the contract.

Concerning the $9,307 spent in interstate commerce, the Finis P. Ernest court held that an inference could be drawn that the defendants' conduct restrained interstate commerce by "potentially reduc[ing] competition in materials in interstate commerce." The court stated that "[i]f there had been genuine competitive bidding, each contractor, in an effort to make the lowest bid, would have obtained competitive prices from materials suppliers." The court further held that the bid-rigging had artificially increased the city's cost for the project "in at least two ways." First, HUD funds, transferred in interstate commerce, had to be increased after the bid in order to pay for the higher contract price. This increase "would inevitably mean that there would be less money available for HUD projects elsewhere in the United States." Second, "where the city must use more of its available funds to complete the sewer project it will have less money to expend for other projects requiring use of goods shipped in interstate commerce."

The Seventh Circuit's finding of a restraint upon interstate commerce here was conjectural, but persuasive nonetheless. A "significant, if unpredictable, impact upon interstate commerce" is enough to warrant application of the Sherman Act. As the Rasmussen court noted: "The specific consequences may be speculative, but the reality of the economic impact is not." Prohibition of conduct which reduces competition in interstate sales of materials and which increases the Government's expenditure of funds for urban redevelopment can legitimately be said to be substantially related to the national interest, and thus within the reach of the Sherman Act.

The effect upon interstate commerce here was as inevitable as it was in Burke or Rasmussen.

71 509 F.2d at 1261.
72 Id.
73 Id.
74 Id.
75 Id.
77 Id.
78 The argument could be made that HUD funds are not "commerce" and that there was no real competition restrained in the division of those funds between the states. However, it is clear that federal money provided for state and local redevelopment projects stimulates commerce, and no doubt interstate commerce, in goods and labor. That this federal money should not be artificially channeled into one project more than another, especially when caused by an anticompetitive practice such as bid-rigging, is beyond dispute. The commerce power can reach activities which have substantial relation to the national interest. See Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 196-97 (1824).
3. The Two Approaches Compared

Both approaches used by the Seventh Circuit in *Finis P. Ernest* to determine the Sherman Act jurisdictional issue led to the conclusion that the defendants' conduct came within the reach of the Act. It is clear, however, that in a different factual setting the two approaches would produce different results.

The "sufficient relationship" approach found the Sherman Act applicable because the bid-rigging led to interstate involvement with the purchase of out-of-state supplies. Because bid-rigging is a per se violation of the Sherman Act, it did not matter how small the proportion of interstate commerce was to the total contract expenditures. It is not clear if the *Finis P. Ernest* court would have found the Sherman Act applicable under this approach if there had not been a per se violation and the interstate commerce involved was minimal; the court's indication is that it would have.

If the defendants had not purchased supplies in interstate commerce, the "sufficient relationship" approach would apparently deny the applicability of the Sherman Act. Under that approach, the restraint need only be sufficiently related to interstate commerce to give Congress power to act, but the *Finis P. Ernest* court defined that relationship solely in terms of actual involvement of interstate commerce through an out-of-state purchase. Thus the "sufficient relationship" approach could not reach restraints that occurred wholly intrastate.

The "nexus" approach, by comparison, is not dependent upon the involvement of interstate commerce for a finding that the Sherman Act reaches an otherwise intrastate restraint. This approach is concerned with a restraint's effect upon interstate commerce, no matter how local the restraint's geographical scope might be. The "nexus" approach would have allowed the Sherman Act to reach the defendants' conduct in *Finis P. Ernest* even if there had not been the purchase of supplies in interstate commerce.

Thus, while the "sufficient relationship" approach extends the reach of the Sherman Act to restraints that only indirectly involve interstate commerce, the "nexus" approach is more pervasive, since it can find Sherman Act application in the most local of restraints, so long as it affects interstate commerce. The "nexus" approach can reach all restraints that the "sufficient relationship" approach can permissibly reach, as it did in *Finis P. Ernest*. But if the "nexus" approach were held not to reach a restraint—because of a de minimis effect upon interstate commerce—it is doubtful that the "sufficient relationship" approach could legitimately reach it. The mere involvement of interstate commerce in an anticompetitive practice cannot by itself justify application of the Sherman Act.

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79 See text accompanying notes 31-37 supra.
80 The court implicitly held that a per se violation was not a necessary element of the "sufficient relationship" approach. First, the court's analysis of that approach stemmed from other courts that had used the term, albeit in a different sense. Secondly, the court called the per se violation of the Sherman Act in *Finis P. Ernest* an "additional reason" for not requiring the restraint to be upon interstate commerce, 509 F.2d at 1259, indicating that a per se restraint was a supplement to—rather than an ingredient of—the "sufficient relationship" approach.
81 509 F.2d at 1261.
82 See Gough v. Rossmoor, Corp., 487 F.2d 373 (9th Cir. 1973); Rasmussen v. American Dairy Ass'n, 472 F.2d 517 (9th Cir. 1972), cert. denied, 412 U.S. 950 (1973).
More is required, and that means that the practice must restrain interstate commerce.

As defined by the Finis P. Ernest court and applied to the defendants' conduct there, it is clear that the "sufficient relationship" approach has no support in prior cases, and contradicts the congressional intention that courts make their own determination of the jurisdictional reach of the Sherman Act from a judgment of the economic realities of each alleged restraint. This congressional intention would presumably apply to all restraints, including those that are per se violations of the Sherman Act.

Conclusion

The Seventh Circuit's dual approaches to the reach of the Sherman Act in Finis P. Ernest indicates the court's doubts about the requirement that a restraint must be upon interstate commerce for the Sherman Act to apply. The court expressed no preference for one approach or the other; at the least, however, it viewed each approach to be as equally satisfactory as the other.

The court's "sufficient relationship" approach treated an alleged restraint and interstate commerce as separate issues; as long as interstate commerce was to some extent involved, the Sherman Act could reach a restraint that had no effect upon interstate commerce. The court's "nexus" approach, on the other hand, required the restraint to be upon interstate commerce, whether by being in interstate commerce or substantially affecting that commerce.

The "nexus" approach comports with the jurisdictional reach of the Sherman Act as defined by case precedent and congressional intention. However, the "sufficient relationship" approach does not have this support. It rests on an expansive reading of several recent Ninth Circuit decisions and the application of analogous statutes to the Sherman Act. But the Ninth Circuit, like other courts, continues to demand that interstate commerce be affected for the Sherman Act to apply. And while other statutes based on the commerce clause contain specific congressional indication that certain activities affect interstate commerce, it is Congress' intention that in a Sherman Act context it should be the courts who make such a determination. This determination, in turn, requires a court to make in each case a practical, economic judgment of an actual or potential effect upon interstate commerce.

The Finis P. Ernest court's "sufficient relationship" approach does not reflect this understanding of Sherman Act jurisdictional analysis. The Seventh Circuit, therefore, should forego this approach, and determine future questions of the Sherman Act's reach solely in terms of the "nexus" approach.

Martin J. Hagan

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84 See notes 17-18 & accompanying text supra.
85 See note 36 supra.
ENVIRONMENTAL LAW-FEDERAL PROCEDURE—THE CITIZENS SUIT SECTION (§ 304) OF THE CLEAN AIR ACT IS AN EXCLUSIVE SOURCE OF DISTRICT COURT JURISDICTION IN CIRCUMSTANCES WHERE IT IS DETERMINED TO BE AN ADEQUATE REMEDY TO REVIEW THE EPA ADMINISTRATOR'S ALLEGED FAILURE TO PERFORM A NONDISCRETIONARY DUTY; THE SECTION IS NARROWLY INTERPRETED AND CANNOT FORM A CONCURRENT BASE OF JURISDICTION WITH THE JUDICIAL REVIEW SECTION (§ 307) OF THE CLEAN AIR ACT.

City of Highland Park v. Train

The Cook County, Illinois, Highway Department developed plans in 1967 to expand the Lake-Cook Road in order to enable it to accommodate projected traffic levels for the following 20 or more years. In January 1973, developers submitted plans for the construction of a large shopping center which would be located in an area that would make Lake-Cook Road the only main thoroughfare providing access to the shopping center from the major arteries serving Chicago. The 1967 estimates for the road expansion had not taken into account the volume of traffic a shopping center of this size would produce. It was predicted that 90 percent of an estimated 28,400 vehicle trips per day generated by the proposed shopping center would have to use Lake-Cook Road.

Apart from the construction projects in the Chicago area, the Administrator of the Environmental Protection Agency (EPA) was reviewing implementation plans for national ambient air quality standards that had been prepared and submitted by the State of Illinois for EPA approval. The purpose of the implementation plans was to establish control procedures for various sources of air pollution in Illinois. Under the Clean Air Amendments of 1970, the EPA Administrator was required to review the Illinois plan to determine if it satisfied statutory requirements, and to approve or disapprove the plan in part or in whole. Having found the Illinois plan deficient in regard to regulations for indirect sources, the EPA Administrator incorporated a federal regulation that was considered to correct this deficiency. Under the established classification system, the shopping center and road expansion were regarded as indirect sources of air pollution. However, the federal regulation thus incorporated exempted construction projects that were begun before January 1, 1975. Since construction on both the shopping center and road expansion was begun before that date, and were therefore exempted from the requirements of the indirect source regulation, the local citizens, residents of Highland Park, would be subjected to increased pollution levels.

The city of Highland Park, without previously notifying the EPA Administrator of its intended action as the EPA alleged was required by the Clean Air Act, 42 U.S.C.A. § 1857 et seq. (Cum. Supp. 1976), filed suit against the Illinois Department of Transportation. The city's complaint alleged that traffic congestion and pollution problems would be increased as a result of the construction of the shopping center and expansion of the road. The city sought a declaratory judgment and an order enjoining the Department of Transportation from constructing the shopping center and expanding the road. The district court dismissed the complaint, finding that the Section 304 suit was an exclusive remedy. City of Highland Park v. Train, 360 F.Supp. 1362, 1370 (N.D.Ill.1973). On appeal, the district court's order was reversed.

The EPA Administrator was required to review the Illinois plan to determine if it satisfied statutory requirements, and to approve or disapprove the plan in part or in whole. Having found the Illinois plan deficient in regard to regulations for indirect sources, the EPA Administrator incorporated a federal regulation that was considered to correct this deficiency. Under the established classification system, the shopping center and road expansion were regarded as indirect sources of air pollution. However, the federal regulation thus incorporated exempted construction projects that were begun before January 1, 1975. Since construction on both the shopping center and road expansion was begun before that date, and were therefore exempted from the requirements of the indirect source regulation, the local citizens, residents of Highland Park, would be subjected to increased pollution levels.

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Act, commenced suit in the United States District Court for the Northern District of Illinois, alleging failure on the part of the EPA Administrator to perform certain nondiscretionary duties. The plaintiffs based their claim on the citizen enforcement provisions contained in § 304 of the Clean Air Act that allow parties to obtain judicial remedies when the EPA Administrator fails to perform a duty required by the Act. The plaintiffs defined the nondiscretionary duties here to be a failure to promulgate indirect source regulations for those sources exempted by the EPA's regulation incorporated in the Illinois implementation plan, and a failure to promulgate significant deterioration regulations in view of the Clean Air Act's nondegradation requirements. It was alleged that the expected traffic growth generated by the shopping center would increase traffic congestion to the extent that the concentration of carbon monoxide in the ambient air would increase by more than 66 percent over existing levels and would probably exceed the standards that the EPA Administrator would be directed to promulgate.

The district court found that § 304 of the Clean Air Act was applicable, but that the plaintiffs' failure to give the EPA 60 days' notice as required by § 304 was fatal to any claim based on the Clean Air Act. The court said that not only was strict adherence mandated by the statute, but it was supported by compelling practical and policy considerations. In considering other alternative sources of jurisdiction for the plaintiff's suit, it was determined that the Administrative Procedure Act (APA) did not constitute an independent jurisdictional basis, but that based on the allegations, general federal question jurisdiction did exist. After examining the Clean Air Act and a previous court order in another jurisdiction establishing a timetable for the EPA Administrator to promulgate indirect source regulations, the district court deemed the indirect source action premature, dismissed the significant deterioration action for failure to state a claim under the Clean Air Act, and found the showing insufficient to warrant an injunction.

Upon appeal, the United States Court of Appeals for the Seventh Circuit affirmed the result reached by the district court but did not entirely agree with the district court's reasoning. While the district court dismissed the significant deterioration claim on the merits, the Seventh Circuit found that a sufficient jurisdictional base was never established for any of the city's claims. The Seventh

7 "Significant deterioration" refers to situations where the level of pollution in a given area is lower than the secondary air pollution standard and is allowed to degrade to the level of the secondary standard.
8 In additional counts of the complaint, the plaintiffs sought (Count III) to enjoin the road expansion until an environmental impact statement pursuant to the National Environmental Protection Act of 1969 (NEPA), 42 U.S.C. § 4331 et seq. (1970), had been filed, and alleged (Count IV) that the Village of Northbrook had denied them equal protection of the laws by the adoption of a zoning ordinance which permitted the construction of the shopping center.
Circuit held in part that where air pollution regulations which had been issued by the EPA Administrator exempted from compliance indirect sources on which construction was commenced before January 1, 1975, the exemption provision was an integral part of the implementation plan which could be reviewed only by a petition for review under § 307,14 and not under § 304, of the Clean Air Act. The court refused to characterize the Administrator's action of inserting EPA regulations with an exemption provision in the Illinois implementation plan as a failure to promulgate indirect source regulations for the shopping center and road expansion. Since a § 307 action could be commenced only in a court of appeals, the plaintiffs were not permitted to litigate the indirect source question in the district court. In regard to the Administrator's failure to promulgate significant deterioration regulations, the court determined that the suit could not be maintained under the Clean Air Act because the 60-day notice provision under § 304 had not been given. The Seventh Circuit finally concluded that § 304 was an exclusive source of district court jurisdiction in this instance, and that no other jurisdictional statutes were applicable.

Thus the city's allegation that the EPA Administrator had failed to perform a nondiscretionary duty by not promulgating indirect source regulations was held properly dismissed by the district court because it is an action under § 307; the allegation that the EPA Administrator had failed to perform a nondiscretionary duty by not promulgating significant deterioration regulations was dismissed because it was barred by the 60-day notice requirement, and the contention that alternate sources of jurisdiction were available was unfounded because § 304 in this instance was the exclusive source of jurisdiction.15

Background of Federal Efforts in Pollution Control

The holding of the Seventh Circuit in Highland Park can best be understood by first investigating the evolution of federal pollution control policy. The history of federal efforts at air pollution control has been one of increasing involvement in terms of federal, state and citizen participation.

The Air Pollution Control Act of 195516 was the first federal effort dealing with air pollution control. Under this legislation, enforcement was left entirely to the states, with the federal government limiting its role to research, information, technical assistance, grants, and encouragement of interstate compacts. The Air Quality Act of 196717 attempted to provide more of a balance between federal and state responsibility. This effort failed, however, when the federal government neglected to designate air quality regions and the states did not establish their own air quality standards within a reasonable period of time.18 Several other air

15 The additional counts were dismissed because the court found (Count III) that there was no federal action to require NEPA, and (Count IV) that zoning legislation may be held unconstitutional only if no relation between the state's interest in protecting the health, safety, or general welfare of the public could be found.
quality laws were enacted and later amended to give the federal government more responsibility and power for the prevention and control of air pollution. For the most part, however, these early efforts met with either limited success or were totally unsuccessful.

The Clean Air Act Amendments of 1970 represent a complete revision of federal air pollution policy. The Clean Air Act Amendments were passed with the purpose that, rather than limit regulation to the current state of technical feasibility, the EPA would determine what air standards were necessary to protect public health and welfare and then require the technology to meet those standards. In establishing the procedural framework for the Clean Air Act Amendments, Congress utilized a collaborative federal-state approach that complicated what was already an elaborate administrative procedure. Under this collaborative approach, the states retain primary responsibility for the prevention and control of air pollution, while the federal government is left to develop national ambient air quality standards. Interested citizens are also given a significant role in the enforcement of the new standards. Under the new procedure, if a polluter violates air pollution standards and the state fails to act, both the federal government and interested citizens can seek a judicial remedy to enforce compliance.

To ensure meaningful citizen participation, the Clean Air Act Amendments establish, under §§ 304 and 307, two major provisions for access to the federal judicial system. Section 304 is specifically concerned with citizen suits, while § 307 is a general provision dealing with methods of obtaining judicial review. The dividing line between these two sections, however, has been determined to be narrow.

Section 304 provides for enforcement of the Clean Air Act by allowing “any person” to commence a civil action against the federal or local government or private polluter who is allegedly in violation of a federally approved or promulgated plan. The broad language used in § 304 referring to “any person” liberalizes even contemporary standards for standing to bring suit. Further, a civil action may be commenced against the EPA Administrator for failure to perform a nondiscretionary duty. However, the party bringing suit is required by statute to give the defendant party 60 days’ notice before the action is filed. Jurisdiction is conferred on the district court without regard to the amount in controversy or citizenship of the parties, as is normally required for jurisdiction in the district courts under the federal question statute. What has been called the savings clause, § 304(e), provides that nothing in § 304 shall restrict any right which a person may have under any statute or common law to seek enforcement of a standard or any other relief.

Section 307 is fundamentally different from § 304. Under § 304 a party must allege that the EPA Administrator has failed to do what he is required to do and request the court to issue appropriate orders to force action. Section 307 applies when the Administrator has already acted and a party is trying to seek judicial review in order to contest the action. However, § 307 provides for judicial review of only certain actions specified in § 307 and not all actions that are performed by the EPA Administrator. The purpose of § 307 is to channel judicial review into the United States Court of Appeals for the District of Columbia or an appropriate circuit court of appeals. Petitions to review promulgation or approval of an implementation plan (such as the Illinois plan in Highland Park) may be filed only in the circuit court covering the state in which the plan is being challenged. All petitions under this section must be filed within 30 days from the date of such promulgation or approval unless the petition is based solely on grounds arising after the 30-day period.

Since both §§ 304 and 307 refer to different jurisdictional forums, the time limits set for bringing a suit under either section are especially important, for if a suit is filed under the wrong provision, a dismissal might result. A party mistakenly filing suit under § 304 and waiting the required 60 days may later be precluded from refiling the action under § 307 because the action was started after the 30-day limit.

There have been relatively few circuit court decisions construing these sections, but the importance of these sections has been increasing due in part to restrictions on environmental class action suits. The distinctions between §§ 304 and 307 have been clarified neither by the language of the Clean Air Act nor the courts. There is a great disparity of opinion among the district court jurisdictions that have interpreted these provisions.

The Approach of the Seventh Circuit

In City of Highland Park v. Train, the Seventh Circuit was called upon to clarify some of the ambiguities concerning the scope and applicability of §§ 304 and 307. The Highland Park court focused on three separate aspects of the jurisdictional provisions under the Clean Air Act: (1) the relationship between §§ 304 and 307; (2) the 60-day notice requirement under § 304, specifically its purpose and the extent to which it should be strictly applied; and (3) the sources of federal district court jurisdiction outside of the Clean Air Act and to what degree § 304 would affect their availability. This last aspect of the case also focused on the exclusivity of § 304 in light of the savings clause.

22 Actions of the EPA Administrator reviewable in the District of Columbia Circuit Court include the promulgation of any national primary or secondary ambient air quality standard, any emission standard for hazardous substances, any performance standard in the new source performance section, and any standard or control measure relating to mobile sources of air pollution.

23 Until the Highland Park and NRDC v. Train, 510 F.2d 692 (D.C. Cir. 1975), decisions were rendered, all cases were decided at the district court level.

24 The class action has been an ideal method of seeking redress in environmental litigation, but since Zahn v. International Paper Co., 414 U.S. 291 (1973), and Eisen v. Carlisle & Jacquelin, 417 U.S. 156 (1974), have restricted use of this device, more dependence will be placed on §§ 304 and 307.
1. Scope and Applicability of §§ 304 and 307

The relationship between §§ 304 and 307 was of significance to the parties in Highland Park. Suit was commenced in federal district court, the appropriate forum to litigate an action under § 304. A § 307 action, however, can be started only in a circuit court of appeals. Thus, a finding that the review procedure for the indirect source regulation on question fell only under § 307 would have permitted the Seventh Circuit to find that the district court properly dismissed the city's claim.

The complaint in Highland Park alleged that the EPA Administrator had failed to perform a nondiscretionary duty by not promulating indirect source regulations for indirect air pollution sources with beginning construction dates prior to January 1, 1975. If this was the case, the plaintiffs would have been permitted to bring a citizen suit under § 304 and in district court. By contending that the EPA Administrator failed to perform this nondiscretionary duty, the plaintiffs in effect were challenging the exemption provision contained in the federally approved Illinois implementation plan for the Clean Air Act. Yet under § 110(c) of that Act,25 the EPA Administrator's incorporation of standards becomes a part of the implementation plan and is reviewed exclusively under § 307. Thus, the exemption of indirect sources with construction dates before January 1, 1975, could be classified as an integral part of the Illinois implementation plan. This finding required dismissal of a § 304 action in district court. Moreover, in its conclusion that the exemption provision was an integral part of the Illinois implementation plan,26 the Seventh Circuit determined that §§ 304 and 307 were mutually exclusive provisions, and that an action by the EPA Administrator could not fall under both provisions at the same time.

Several jurisdictions have been called upon to decide similar but not identical questions relating to §§ 304 and 307. These courts have weighed the factors differently in determining which section an action should fall under, but all courts have characterized the action as either one under § 304 or § 307 and not under both at the same time. The Highland Park court strongly relied on Getty Oil Co. v. Ruckelshaus27 to support its conclusion in what it considered were analogous circumstances. The plaintiff in Getty attacked an EPA-approved state implementation plan setting up sulfur dioxide standards for ambient air. The plaintiff in Getty challenged the merits of a sulfur dioxide standard but did not contend that the EPA Administrator had failed to promulgate an ambient standard for sulfur dioxide. The Third Circuit found that under such circumstances § 307 provided the exclusive method or review. Unlike Getty, however, the plaintiffs in Highland Park argued that the exemption provision could be considered a failure to promulgate regulations on the part of the EPA Administrator. The Highland Park court also cited other lower court decisions,28 but most of those

26 519 F.2d at 689.
also concerned an attack on the merits of standards, methods, or time schedules in implementation plans and not an exemption provision which could also be classified as a failure to include a provision.

A case factually similar to Highland Park was Pickney v. Ohio Environmental Protection Agency.\(^2^9\) The action by local residents there sought to compel the promulgation of indirect source regulations in an attempt to block construction of a shopping center. The citizens contended that the EPA Administrator abused his discretion in delaying for 180 days the effective date of federal regulations with respect to indirect sources of air pollution. The Pickney court held, however, that the Clean Air Act provided adequate provisions for judicial review of implementation plans. The court further held that the delay was an act under the implementation plan and therefore that § 307 was the exclusive method of review. Although similar to Highland Park in result, the Pickney decision was not squarely on point as stated by the Seventh Circuit because the plaintiffs in Highland Park contended that the EPA Administrator's duty was nondiscretionary. As previously mentioned, a failure to perform a nondiscretionary duty would permit plaintiffs to file an action under § 304.

By classifying the EPA Administrator's action as an act exclusively under § 307, the Seventh Circuit has to distinguish the purposes and effects of each section. Section 304 grants judicial relief that otherwise might not be available for a failure on the part of the EPA Administrator, while § 307 sets out requirements to obtain judicial review that already is guaranteed by the APA for an action by the EPA Administrator. The action of the EPA Administrator in Highland Park had been codified and was final agency action that could have been reviewed without express authorization in the Clean Air Act.\(^3^0\)

Yet while the Seventh Circuit decision did not further the concept of citizen suits that is an integral part of the Clean Air Act, it did further other factors that were important. Specifically, the ability of § 307 to channel review of the EPA Administrator's action would expedite environmental litigation to an appellate level and provide more uniformity for actions that require a consistent national application.\(^3^1\) Pollution sources are capable of causing damage far beyond their state or regional boundaries, and the need for consistent national application is apparent. Further, if §§ 304 and 307 were not found to be mutually exclusive, concurrent de novo jurisdiction would exist at the district court and appellate court levels which could result in an inefficient and cumbersome method of review.

2. The Notice Provision of § 304

Having determined that the district court properly dismissed the portion of the city's complaint relating to review of an action in the Illinois implementation plan, the Seventh Circuit next considered the alleged failure of the EPA Administrator to issue significant deterioration regulations for automobile related pollu-

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\(^3^0\) The Supreme Court established a presumption of judicial review under the APA in Abbott Laboratories v. Gardner, 387 U.S. 136 (1967).

\(^3^1\) S. REP. No. 91-1196, 91st Cong., 2d Sess. (1970).
This portion of the complaint related only to a failure to perform a non-discretionary duty, thus making § 304 the applicable jurisdictional provision. The Seventh Circuit, however, found that the notice requirement of § 304 had not been fulfilled and that this failure was decisive.

The Highland Park decision was the first decision where an appellate court, considering the 60-day notice issue, read the legislative history to require strict construction. The Seventh Circuit justified this strict construction as necessary to prevent frustration of the clear intent of Congress to provide adequate notice. According to the Seventh Circuit, Congress intended to provide for citizen suits in a manner least likely to additionally burden federal courts and most likely to trigger governmental action which would alleviate any need for judicial relief.

The court cited three district court decisions as apposite to its own ruling. The first, Pickney, found that only a strict interpretation would render the notice requirement meaningful, otherwise alleged violations of the Clean Air Act would be filed regularly without prior notice. Yet the court did not examine the legislative purpose behind the notice requirement but instead focused only on its literal meaning. In West Penn Power Co. v. Train another district court commented in dictum on the 60-day notice requirement. Since the EPA Administrator's duty in West Penn was determined to be discretionary, a finding under the notice provision of § 304 was not required. Yet the court reasoned that if Congress can specify the terms upon which the Government consents to be sued, then such terms must be strictly followed.

The Highland Park court also concluded that Metropolitan Washington Coalition for Clean Air v. District of Columbia was consistent with the strict construction standards accorded the 60-day notice requirement as set out in Pickney and West Penn. Although a formal 60-day notice was not given to the defendant there, the court did not dismiss the suit because it held that a prior complaint had in substance afforded the defendant the required notice. In Metropolitan it was emphasized that the notice requirement of § 304 was not intended to be a bar to suits, but at most a 60-day delay in order to allow ap-

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32 It was previously held in Sierra Club v. Ruckelshaus, 344 F. Supp. 253 (D.D.C), aff'd per curiam, 4 E.R.C. 1815 (D.C. Cir. 1972), aff'd by an equally divided Court, 412 U.S. 541 (1973), that the EPA Administrators had failed to perform a nondiscretionary duty by not promulgating significant deterioration regulations for automobile related pollutants. Prior to the Seventh Circuit decision, the EPA Administrator issued significant deterioration regulations for only two of the six air pollutants for which national ambient air standards had been established. The remaining pollutants — carbon monoxide, hydrocarbons, photochemical oxidants, and nitrogen dioxide — are especially important for mobile sources, including automobiles. 40 C.F.R. § 52.20 (1976).
33 Prior to the Seventh Circuit decision, the plaintiffs had filed a petition for review under § 307 in an effort to safeguard their jurisdictional grounds for the significant deterioration issue. The petition sought to review the EPA Administrator's action in regard to his failure to promulgate significant deterioration regulations. Finding that the petition only sought to review the EPA Administrator's failure to act and not the merits of the significant deterioration regulations, the Seventh Circuit dismissed the § 307 petition, holding that § 304 was the only jurisdictional authority available for this claim.
34 519 F.2d at 691.
35 375 F. Supp. at 308.
37 Id. at 944.
appropriate officials time to act. While the plaintiffs in Highland Park could not refer to a prior complaint that could have given constructive notice to the EPA Administrator, it is doubtful that the Metropolitan court would have taken the drastic action of dismissing the complaint altogether given the same circumstances.

Clearly contrary to the holding in Highland Park was Riverside v. Ruckelshaus, where the court ruled that a failure to give the 60-day notice would not absolutely bar suit. In this instance actual notice was held to have been given the EPA Administrator in the complaint, and because 60 days had elapsed between the date of filing of the complaint and the date of the hearing, the EPA Administrator was accorded the beneficial effect that the provision meant to accomplish. Both the Metropolitan and Riverside courts made a distinction between notice requirements where failure to comply bars suit forever, and those where the only consequence is at most a delay of 60 days in filing suit. Using its strict construction interpretation, however, the Seventh Circuit in Highland Park found no such distinction; it ruled that a violation of the notice requirement resulted in dismissal.

Although the Seventh Circuit was the first appellate court to consider the 60-day notice requirement in the Clean Air Act, a subsequent appellate decision declined to follow Highland Park. The Second Circuit, in National Resources Defense Council, Inc. v. Callaway, was called upon to interpret the 60-day notice provision of the Federal Water Pollution Control Act (FWPCA), which is similar to that in the Clean Air Act. The court found that the purpose of the 60-day notice provision—to give the agencies time to investigate and act on an alleged violation—had been served because the plaintiffs had been informed before suit was commenced that no action would be taken. The Second Circuit reiterated its stand that the 60-day notice provision is not an absolute bar to suits by private citizens. The 60-day delay in Callaway would have been useless in encouraging prompt agency action because the agency had already made a final decision. There were indications that the 60-day delay in Highland Park also would have been of little benefit, but the Seventh Circuit refused to consider this and found that the complaint was void on its face for not complying with the 60-day notice requirement.

It is not altogether clear whether the purposes of the statutory notice provision will be fulfilled by its strict construction. The legislative history indicates that the notice clause was meant to encourage prompt agency action, act as an opportunity for settlement, given the agency sufficient time to prepare for a complex suit, and to provide for minimal interference with the normal process of regulation. In light of the argument that § 304 is a provision designed to grant judicial relief that otherwise would be unavailable, the practicalities of an environmental suit would indicate that the delay and not the dismissal approach should be followed. In the end the harsh approach taken by the Seventh Circuit may only protect the violator and reduce the effectiveness of the Clean Air Act.

39 Id. at 1092.
41 8 E.R.C. 1273 (2d Cir. 1975).
42 Id. at 1276.
43 374 F. Supp. at 766.
3. Sources of Jurisdiction Outside of the Clean Air Act

After determining that § 304 of the Clean Air Act could not give the district court jurisdiction, the Seventh Circuit considered petitioners' contention that jurisdictional statutes outside the Clean Air Act were sufficient to give the court authority to consider the merits of the case. Alternatively, the petitioners argued that the statutory mandamus statute, the general federal question statute, and the APA were applicable.

The relationship between § 304 and other jurisdictional statutes outside the Clean Air Act has produced a difference of opinion among district and appellate courts. Section 304 provides an extensive jurisdictional basis for parties seeking access to the federal courts, but with limitations as to time and scope. But the APA and general federal question statute have been equally appealing to litigants in recent environmental actions. However, the availability of the latter two sources as concurrent bases of jurisdiction is open to question when § 304 is found to provide an adequate remedy.

In Highland Park the Seventh Circuit found that § 304 provided an adequate remedy for the city's claims and held that it was an exclusive remedy. This was so even though the suit was dismissed for failure to comply with § 304's notice requirement. The court in construing the APA found that its basic presumption of judicial review does not provide independent jurisdiction where there is an adequate statutory remedy already available to a party. Review under the APA would be permitted only when there is "no other adequate remedy in court." This conclusion would have had significant weight if the plaintiffs realistically had access to the judicial system under the Clean Air Act, but since the plaintiffs were denied jurisdiction under the Act, such a conclusion appears unduly strict.

The Seventh Circuit carried this principle of § 304's exclusivity to the jurisdictional claims under § 1331, and denied relief based upon that statute. The petitioners were thus put in the perplexing situation where jurisdiction under § 1331, § 1361, or the APA was denied because an adequate remedy was available under § 304, but § 304 could not be used because of failure to comply with its notice provision.

Although both the district and appellate courts dismissed the plaintiffs' complaint, they did so for different reasons. The courts agreed to the extent that the APA could not be used to establish jurisdiction. Like the appellate court, the district court found that where a statute such as the Clean Air Act "has established a review proceeding adequate to the subject matter, that proceeding is to control." The difference in reasoning occurred in considering the general federal question statute. The district court held that § 1331 gave it jurisdiction to hear the plaintiff's suit. The district court said that the allegations that the

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47 519 F.2d at 692.
48 374 F. Supp. at 767.
Administrator has breached a statutory duty owed to [the city] under the Clean Air Act Amendments clearly brings the complaint within the purview of the general federal question statute and requires an examination of the Clean Air Act to determine whether claims are well founded.49

In conferring jurisdiction under § 1331, the district court characterized § 304(e), which states that other rights were not restricted by § 304, as an "apparent savings clause." The only other appellate court that considered the exclusiveness question of § 304 before Highland Park also found that concurrent jurisdiction could exist not only with § 1331, but also with the APA. In National Resources Defense Council, Inc. v. Train,50 which cited the Highland Park district court decision, the savings clause was liberally construed in order to fit in with the overall purpose of § 304, which was held to widen citizen access to the courts and to specifically preserve existing rights. This indicated to the court the existence of concurrent jurisdiction. When this decision was made the Court of Appeals for the District of Columbia was dealing with a case of first impression at the circuit court level. Lower court opinions did exist, but these district court decisions were found to be in disarray. The court referred to an analogous situation involving impoundment cases, and found that if the exclusivity doctrine were accepted it would cover "far more than Congress really had in mind."51 While recognizing that its position was inconsistent with that of the District of Columbia Circuit, the Seventh Circuit nevertheless did not alter its interpretation of the legislative history as providing exclusive jurisdiction under § 304.

The interpretation of the savings clause has controlled any determination of whether or not the exclusivity doctrine should apply to § 304. The District of Columbia Circuit and Seventh Circuit have placed themselves at opposite ends of the spectrum in interpreting the savings clause; their positions are not readily reconcilable. A more recent Second Circuit decision, which considered the savings clause, chose to follow the District of Columbia Circuit. Citing NRDC v. Train with approval, Callaway found a concurrent jurisdictional basis that included the general federal question statute and the APA.

Conclusion

The questions presented in Highland Park involved procedural issues that are applicable to the major federal environmental laws concerning pollution control. Before courts will be able to concern themselves with the more substantive aspects of pollution laws they first will be required, out of necessity, to answer these initial procedural questions. An increased reliance by environmental groups on jurisdictional provisions within the pollution statutes will provide a constant source of pressure to resolve these ambiguities. It is clear that recent environmental laws are giving citizens and environmental groups a substantial and important role in the execution and enforcement of these statutes. Courts are thus

49 374 F. Supp. at 769.
50 510 F.2d 692 (D.C. Cir. 1975).
51 Id. at 703.
required to interpret this mandate to permit increased citizen participation without severely hampering the administrative functions of the agency involved.

The actions being taken by the federal agencies are national in scope and require consistent national application. To a certain extent citizen participation may well depend on how effective the EPA and other agencies are in carrying out their statutory duties. The Seventh Circuit restricted the citizen suit provision which was originally included to provide a check on governmental enforcement proceedings. The strict constructional interpretation taken by the court in Highland Park may be well suited for a functionally efficient and trustworthy system, but may be inappropriate for one that lacks those characteristics. It can only be hoped that this elaborate and complicated administrative process can become an efficient mechanism.

Roger P. Balog

ENVIRONMENTAL LAW—NATIONAL ENVIRONMENTAL POLICY ACT—THE FEDERAL HIGHWAY ADMINISTRATION MAY NOT DELEGATE RESPONSIBILITY FOR PREPARING ENVIRONMENTAL IMPACT STATEMENT FOR PROPOSED HIGHWAY TO STATE HIGHWAY COMMISSION

Swain v. Brinegar

In 1969, on the basis of a report forecasting highway needs for the state of Illinois, plans were developed for the construction of a freeway between the cities of Lincoln and Peoria. Following several years of extensive planning, a draft environmental impact statement (EIS) was prepared by the Illinois Department of Transportation and submitted to the Federal Highway Administration (FHWA) for approval. This draft was modeled after the § 102(2)(c)4

1 ILLINOIS DEPARTMENT OF PUBLIC WORKS AND BUILDINGS, ILLINOIS HIGHWAY NEEDS AND FISCAL STUDY.

2 Although the highway project was in progress prior to the date NEPA went into effect, the court held that pursuant to the language of the Act directing NEPA's provisions be complied with "to the fullest extent possible," the Act's requirements apply to some "ongoing" projects. The Seventh Circuit cited previous decisions holding that:

an ongoing project is subject to the requirements of Section 4332 until it has reached that stage of completion where the cost of abandoning or altering the proposed project clearly outweighs the benefits which could flow from compliance with Section 4332.


3 42 U.S.C. § 4332(2)(c) (1970). This section provides:

(2) all agencies of the federal government shall—

(c) include in every recommendation or report on proposals for legislation and other major federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official on—

(i) the environmental impact of the proposed action,

(ii) any adverse environmental effects which cannot be avoided should the proposal be implemented,

(iii) alternatives to the proposed action,

(iv) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and

(v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented.
requirements of the National Environmental Policy Act (NEPA), but was later criticized by plaintiff Swain as lacking sufficient detail to satisfy the NEPA requisites. Specifically, questions of alternative means of transportation, automotive pollution, and the effect on world food supplies resulting from the removal of farmland from production were either ignored or given superficial treatment.

This draft EIS was circulated among federal, state and local agencies for comment, and after receiving their views, the Illinois Department of Transportation prepared the final EIS. The final statement substantially mirrored the original, and was subject to the same criticisms as the draft.

Notwithstanding the criticisms of the EIS, in October of 1973 the FHWA gave final approval to the project. The only function performed by the FHWA in the development of the EIS was to suggest minor revisions in the “alternatives” discussion, and to give final approval to the statement. Such conduct markedly contrasts with the usual role played by other federal agencies who are responsible, under NEPA, for the preparation of an EIS. In most instances, the federal agency itself prepares the final EIS; the concerned state agency merely provides information of the project or at most prepares the EIS draft. Due to the enormous volume of federally aided highway construction in recent years, however, it has become the practice of the FHWA to delegate the task of preparing the EIS to the state highway commission.

As owner of a farm in the path of the freeway, plaintiff Swain brought an action challenging both the procedures followed by the FHWA in delegating the responsibility for preparation of the EIS to the state officials, and the lack of sufficient detail in the EIS itself. The District Court for the Southern District of Illinois found that the EIS was “sufficiently detailed to satisfy the requirements of NEPA,” and further concluded, relying on Policy and Procedure Memorandum 90-1 (PPM 90-1) issued by the federal Department of Transportation, that state agency preparation of the EIS was not in violation of the NEPA provision requiring the “responsible official” to provide an EIS. Although NEPA contains no specific authorization for the delegation process, the district court maintained it could find no violation of the Act if it was shown “that the federal agency com-

5 The Seventh Circuit, in attacking the “conclusory” nature of the EIS noted that in its initial review letter, the U.S. Department of Interior had raised similar objections to the EIS. “The statement itself contains many generalities, is lacking in specific information, and inadequately treats the natural environmental resources associated with the project.” 517 F.2d 766, 774 n.11 (7th Cir. 1975).
6 42 U.S.C. § 4332(2)(c) (1970) requires:
Prior to making any detailed statement, the responsible federal official shall consult with and obtain the comments of any federal agency which has jurisdiction by law or by special expertise with respect to any environmental impact involved. Copies of such statement and the comments and views of the appropriate Federal, State and local agencies, which are authorized to develop and enforce environmental standards, shall be made available to the President, the Council on Environmental Quality and to the public . . . and shall accompany the proposal through the existing agency review processes.
7 In 1973, the Federal Highway Administration expended $4,272,043,146 in federal-aid highway funds. UNITED STATES DEPARTMENT OF TRANSPORTATION, FEDERAL HIGHWAY ADMINISTRATION, HIGHWAY STATISTICS (1973).
10 See note 7, supra.
prehensively considers and reviews both the draft and the final EIS.\textsuperscript{11}

On appeal, the Seventh Circuit reversed the decision of the district court.\textsuperscript{12} Holding that the language of NEPA was clear in directing the appropriate federal agency to prepare the EIS, the court concluded that it was improper for the FHWA to delegate that responsibility to the Illinois State Department of Transportation.\textsuperscript{13} Additionally, the Seventh Circuit indicated that although the procedures followed by the FHWA included federal review and final approval of the EIS, any mere federal review process would be insufficient to satisfy the "detailed consideration of alternatives" required under § 102(2)(c). Indeed, the court stated that the failure of the FHWA to prepare the EIS inevitably led to the problems of inadequate detail and insufficient consideration of alternatives complained of by the plaintiffs.

**Federal Responsibility for Environmental Impact Statements**

The National Environmental Policy Act became law on January 1, 1970. The Act was designed to force federal agencies to incorporate into their decision-making processes the environment consequences of proposed actions. The heart of NEPA is § 102(2)(c) which requires that in reports on proposals for legislation and "... other major federal action significantly affecting the quality of the human environment, a detailed statement by the responsible official ..." be included. This statement must include five specific elements:

(i) the environmental impact of the proposed action;
(ii) any adverse environmental effects which cannot be avoided should the proposal be implemented;
(iii) alternatives to the proposed action;
(iv) the relationship between local short-term uses of man's environment and the enhancement of long-term productivity;
(v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented.\textsuperscript{14}

Section 102(2)(c) never explicitly states whether the "responsible official" can be other than a federal official, although the section clearly discusses federal duties and obligations.\textsuperscript{15}

NEPA also created the Council on Environmental Quality (CEQ)\textsuperscript{16} which, in addition to other functions, was to issue guidelines to federal agencies for the preparation of environmental impact statements.\textsuperscript{17} From these guidelines, it appears that the federal agency has final responsibility for the EIS but, like the act itself, no guidance is provided as to whether the duty of preparing the EIS may be delegated to a state agency.\textsuperscript{18}

\textsuperscript{11} 378 F. Supp. at 761.
\textsuperscript{12} 517 F.2d at 776-77.
\textsuperscript{13} Id. at 778-79.
\textsuperscript{15} See Iowa Citizens For Environmental Quality, Inc. v. Volpe, 487 F.2d 849, 855-56 (8th Cir. 1973) (dissenting opinion).
\textsuperscript{18} Id. at 7724(3).
NEPA and the CEQ guidelines are implemented in the FHWA through Policy and Procedures Memorandum 90-1 (PPM 90-1), issued by the Department of Transportation. This regulation, in cases involving the planning and construction of federally aided highways, authorizes the delegation of the responsibility for preparation of an EIS to the state highway commission. Accordingly, the FHWA has attempted to take advantage of the imprecise language of the statute and the CEQ guidelines by delegating the EIS responsibility to the state agency.

Most of the court decisions discussing the legitimacy of state highway commission EIS preparation have dealt with the validity of PPM 90-1. The basic criticism of the delegation process, however, came in a situation where an applicant for a license from the Federal Power Commission (FPC) was delegated the duty to prepare the EIS. Greene County Planning Board v. Federal Power Commission involved a request by the New York Power Authority to construct a 35-mile-long high-voltage transmission line. Consistent with FPC regulations, the applicant prepared and submitted the EIS to the FPC, which ratified the statement, maintaining that it fulfilled the requirements of NEPA. The Second Circuit held that the FPC "abdicated a significant part of its responsibility" by substituting the applicant's EIS for its own. Basing its decision on fears that the EIS would reflect the applicant's "self-serving assumptions," the court found that "the primary and non-delegable responsibility" for consideration of environmental values at every stage of a project lies with the federal agency.

Conservation Society of Southern Vermont v. Secretary of Transportation extended Greene County's reasoning to state highway department EIS preparation. This case involved an EIS prepared by the Vermont Highway Department for a proposed freeway. Although the highway department was clearly not an applicant for the proposed project, the district court still found a strong pos-

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20 Id. at 21810 § 3(e). This provision states that the agency with the duty of preparing the EIS is:
   ... The agency with the primary responsibility for initiating and carrying forward the planning, design and construction of the highway. For highway sections financed with Federal-aid highway funds, the HA (highway agency) will normally be the appropriate State highway department. For highway sections financed with other funds, such as Forest highways, Park roads, etc., the HA will be the appropriate Federal State highway agency.
22 455 F.2d 412 (2d Cir. 1972).
23 Id. at 419.
24 Id.
25 Id. at 419. The court quoted from an earlier decision:
   In this case... the commission has claimed to be the representative of the public interest. This role does not permit it to act as an umpire blandly calling balls and strikes for adversaries appearing before it; the right of the public must receive active and affirmative protection at the hands of the commission.
sibility that a "self-serving" EIS would result, relying on the fact that the highway department had the duty to proceed with legislatively mandated highway construction.\footnote{In Vermont... the Vermont Highway Department has the duty... to follow legislative mandate in regard to proposed highway construction, and the construction here contemplated was legislatively mandated in 1968. Thus it is impossible for the VHD not to be an advocate of legislatively mandated construction and still act consistently with its duty as a state agency. \textit{Id.} at 631.} The court conceded that state agency EIS preparation \textit{might} be a more feasible way of preparing a statement, "but it is not what is required by NEPA, the purpose of which is to insure that the federal agency making the decision consider environmental values, potential alternatives and the overall consequences of the proposed action.\footnote{\textit{Id.} at 632.}"

Notwithstanding the decisions in \textit{Greene County} and \textit{Conservation Society}, the majority of decisions have permitted the delegation of the responsibility for preparing environmental impact statements to state highway commissions. In \textit{Iowa Citizens for Environmental Quality, Inc. v. Volpe},\footnote{487 F.2d 849 (8th Cir. 1973).} the Eighth Circuit rejected a contention that this procedure amounted to a mere "rubber stamp"\footnote{In an earlier decision, the District Court for the Western District of Washington held an EIS prepared by the state to be inadequate, and attributed this at least partially to the FHWA review procedures. "The state's first draft environmental impact statement was inadequately considered by FHWA. ... The statute contemplates more deliberation than the time required to use a rubber stamp." \textit{Daly v. Volpe}, 350 F. Supp. 252, 259 (W.D. Wash. 1972).} and approved the delegation of the responsibility of preparing the EIS for a section of the interstate highway system to the Iowa State Highway Commission. The court distinguished \textit{Greene County} and \textit{Conservation Society} by noting that although the required procedures were the same, the evidence revealed much more federal participation in the Iowa situation.\footnote{487 F.2d at 854. "Review, modification, and adoption by the FHWA of the statement as its own occurred in this case."} Placing their confidence in federal \textit{review} procedures as opposed to independent federal appraisal of environmental effects, the court concluded that the procedures followed in this case were "in harmony with the purposes of the statutory requirements and goals of NEPA.\footnote{\textit{Id.} at 854.}"

The dissent in \textit{Iowa Citizens} raised the same objections to delegation which were made in \textit{Greene County} and \textit{Conservation Society}.\footnote{\textit{Id.} at 856 (Lays, J., dissenting).} In addition to noting the apparent intention of NEPA to require EIS preparation by the responsible federal official, the dissent also expressed concern about the objectivity of an EIS prepared and written by a state agency. Arguing that the state agency might act as an advocate of highway construction, because of its bureaucratic nature as well as a legislative mandate to build highways, the dissent maintained that it is always the concerned federal agency which must prepare the EIS.\footnote{If Congress had intended the federal agency to sit as a board of review it could simply have said so. It did not. It made clear that the federal agency has an affirmative obligation to make a detailed investigation and study. \textit{Id.} at 858.}

The majority of courts have followed the lead of the \textit{Iowa Citizens} majority and have not looked at who in fact prepared the final EIS but rather have chosen...
to examine the extent of federal participation in the EIS preparation process.\textsuperscript{35} In \textit{Fayetteville Area Chamber of Commerce v. Volpe},\textsuperscript{36} the Fourth Circuit confronted a situation in which the FHWA had delegated to the North Carolina Highway Commission the responsibility of preparing an EIS for a proposed freeway. Noting that federal officials periodically had reviewed the work done by state officials in preparing the EIS,\textsuperscript{37} the court concluded that the compliance test of "good faith objectivity"\textsuperscript{38} had not been violated because of state agency preparation of the EIS.\textsuperscript{39} Similarly, in \textit{Life of the Land v. Brinegar},\textsuperscript{40} the Ninth Circuit under similar circumstances concluded that where there had been "significant and active participation"\textsuperscript{41} by the federal agency in preparation of the EIS, there was no abdication of responsibility through an improper delegation.\textsuperscript{42}

The Second Circuit has also retreated from its strong position in \textit{Greene County} that the responsible federal agency must prepare the EIS in order to avoid the danger of "self-serving" assumptions. In \textit{I-291 Why? Association v. Burns},\textsuperscript{43} the court adopted the same manner of examining the delegation problem utilized by the majority of other courts,\textsuperscript{44} but concluded that "the amount of federal contact in the preparation of the I-291 EIS did not comport with the standard of primary and non-delegable responsibility placed on the federal agency. . . ."\textsuperscript{45} Disclaiming the district court's interpretation of its decision in \textit{Greene County}, the Second Circuit stated that that decision should not be viewed as "establishing a per se rule to the effect that state participation in the preparation of an EIS renders it invalid."\textsuperscript{46}

The majority position indicates that in instances of EIS delegation judicial attention must be directed primarily to the extent of federal involvement in the preparation of the statement. This of course can only serve to divert judicial attention away from what should constitute the real issue in these cases, i.e., whether the EIS reveals a full consideration of alternatives and environmental consequences of the proposed project. The type of analysis followed by these courts may therefore run the risk of validating environmental impact statements which inadequately examine the environmental consequences of a project, simply

\textsuperscript{36} 515 F.2d 1021 (4th Cir. 1975).
\textsuperscript{37} Id. at 1025.
\textsuperscript{38} "The test of compliance with § 102 then, is one of good faith objectivity rather than subjective impartiality." \textit{Environmental Defense Fund v. Corps of Engineers of the U.S. Army}, 470 F.2d 289, 296 (8th Cir. 1972).
\textsuperscript{39} 515 F.2d at 1026.
\textsuperscript{40} 485 F.2d 460 (9th Cir. 1973).
\textsuperscript{41} Id. at 468.
\textsuperscript{42} In \textit{Life of the Land} there was also evidence indicating that a private consulting firm with a financial interest in the outcome of the project assisted in preparing the EIS. Although possibly bringing the case within \textit{Greene County} and the fears of an applicant's "self-serving" assumptions, the Ninth Circuit nevertheless focused upon the extent of federal involvement in the preparation process and held this was sufficient to validate the EIS.
\textsuperscript{43} 517 F.2d 1077 (2d Cir. 1975).
\textsuperscript{44} See note 29 supra.
\textsuperscript{45} 517 F.2d at 1081.
\textsuperscript{46} Id.
because the court found a "significant" level of involvement on the part of the federal agency. The focus of the court should always be on whether the EIS represents a fair and comprehensive examination of alternatives and consequences. While a state agency may in some cases be capable of providing this, as Swain v. Brinegar\textsuperscript{47} indicates, in many instances they are not.

The Swain Rationale

In Swain v. Brinegar, the Seventh Circuit rejected the trend of decisions which permitted the delegation of the duty of EIS preparation to state officials if it was found that the federal agency played a "significant" role in the process of review and approval. Maintaining that the "delegation of the research and drafting of the initial EIS to . . . [a state agency] . . . precludes that impartial assessment of environmental consequences which lies at the heart of the National Environmental Policy Act,"\textsuperscript{48} the court held that "it is the federal official who is to make the detailed statement after consultation with other interested federal agencies."\textsuperscript{49}

The Seventh Circuit based its conclusion on considerations similar to those relied upon in Greene County and Conservation Society.\textsuperscript{50} Noting that the "need" for highway projects always appears greater to those responsible for the proposal and construction of such highways, the court cautioned that a sense of "loyalty" to these projects could develop within a state highway commission, thereby reducing the objectivity of a state-prepared EIS. This sense of loyalty could further lead to the danger that these state agencies would view the preparation as a mere "procedural hurdle" to be overcome in order to proceed with a project already decided upon, rather than as part of the decision-making process.\textsuperscript{51} This result would be directly in conflict with the purpose of NEPA. Previous decisions have made it clear that the EIS preparation process is to be an integral part of the initial decision-making procedures. The EIS is not to serve merely as further justification for a project already decided upon through traditional economic measurements. The Seventh Circuit feared in Swain that a state agency might be reluctant to view objectively the continuance of a project in which the state had made financial and administrative commitments.

It would appear that similar fears could be expressed regarding FHWA preparation of environmental impact statements. Similarly enthusiastic viewpoints on highway construction are as likely held by officials in the federal agency administering highway projects as within state agencies. Thus there is no reason to believe that FHWA officials would take a stance inconsistent with that advanced by state personnel. To this extent, however, NEPA affects all federal agencies in the same manner. NEPA's very purpose is to require federal agencies to examine the environmental consequences of projects which they propose or must adminis-

\textsuperscript{47} 517 F.2d 766 (7th Cir. 1975).
\textsuperscript{48} Id. at 779.
\textsuperscript{49} Id. at 777.
\textsuperscript{50} See notes 18-23 and accompanying text supra. See also Comment, The Preparation of Environmental Impact Statements By State Highway Commissions, 58 Iowa L. Rev. 1268 (1973).
\textsuperscript{51} 517 F.2d at 778.
notwithstanding that there always exists the danger that environmental impact statements will not reflect totally objective viewpoints. It was apparently hoped by the Seventh Circuit, however, that removal of the responsibility of EIS preparation from the states and placing that duty on the federal agency would minimize the "loyalty" problem by placing some distance between those most intimately connected with the project and those making the final decision to proceed.

More specific objections to state agency preparation of environmental impact statements were made by the Seventh Circuit with respect to the discussion of "alternatives" to the proposed action as required by § 102(2)(c) of NEPA. The court maintained that within a state highway commission there inevitably would be a great reluctance to evaluate objectively alternative transportation systems. In addition, there might also exist a lack of expertise on the part of a state agency to thoroughly examine different means of transportation. The Seventh Circuit contended that this problem could be eased if the federal agency, with its broader resources, were to prepare the EIS. It has also been suggested that having an impartial state agency, such as the state environmental protection agency, prepare the statement would substantially avoid these problems.

A final concern expressed with state EIS preparation was the belief that it resulted in inadequate consideration of national and worldwide environmental consequences. State agencies are primarily concerned with the interests of their own state, and are neither motivated to, nor usually in a position to, evaluate environmental effects of a wider scope. The Seventh Circuit felt that the cumulative impact of increased automotive pollution, and of taking farmland out of production were among concerns that state agencies are simply not able to evaluate, given their limited interests and resources.

This view that state EIS preparation inevitably results in deficiencies in the statement constitutes the basic difference between the Seventh Circuit and approaches taken by other courts to the delegation problem. Previous decisions had examined the facts surrounding the preparation of the EIS in determining

52 42 U.S.C. § 4332 (1970) provides:
   The Congress authorizes and directs that, to the fullest extent possible; . . . (2)
   all agencies of the federal government shall —
   (A) utilize a systematic, interdisciplinary approach which will insure the integrated use of the natural and social sciences and the environmental design arts in planning and in decision-making which may have an impact on man's environment;
   (B) identify and develop methods and procedures, in consultation with the Council on Environmental Quality . . . which will insure that presently unquantified environmental amenities and values may be given appropriate consideration in decision-making along with economic and technical considerations; . . .

53 42 U.S.C. § 4332(2)(c)(iii) (1970) requires that the EIS include consideration of "alternatives to the proposed action."


55 The Seventh Circuit noted also the widespread duplication of efforts by state agencies in preparing environmental impact statements which deal with problems of a nationwide character. "There is little to recommend a procedure whereby various officials and departments in each of the fifty states independently research and evaluate such problems." 517 F.2d at 778 n.18.

56 517 F.2d at 778.
whether "significant" federal participation was present.\textsuperscript{57} The Seventh Circuit noted that substantive review of an EIS is itself a difficult judicial task, and determined that a judicial review of a FHWA review of a state-prepared EIS was indeed too difficult a task for judicial resolution.\textsuperscript{58} Stating that "it is difficult for a court to determine when federal review amounts to a 'rubber stamp' within the context of an apparently 'detailed' and often sophisticated impact statement,"\textsuperscript{59} the Seventh Circuit held that it preferred an approach which always requires federal EIS preparation.\textsuperscript{60}

Maintaining that this would substantially avoid the problems of inadequate consideration of alternatives and insufficient detailing of environmental consequences, the court concluded that "the clear requirement that the 'responsible federal official' prepare the EIS for all major federal projects must be strictly enforced."\textsuperscript{61}

This conclusion is clearly justified in view of the shortcomings of state EIS preparation. By removing from court examination the issue of whether FHWA review procedures are sufficient not only leaves the court free to examine the substantive issue of the adequacy of the EIS, but should also aid in improving the thoroughness of the statement. When the principal concern is whether the environmental consequences of a proposed action were adequately considered, it serves no purpose to make an additional determination as to the significance of federal involvement in the preparation of the EIS. Thus, given the problems which arise from state EIS preparation, the Seventh Circuit's decision to require "rigorous adherence to the statutory procedures . . ." is well warranted.

Jon R. Robinson

FAIRNESS DOCTRINE — PERSONAL ATTACK RULE — POLISH AMERICANS NOT ENTITLED TO REPLY TIME TO RESPOND TO ABC TELECAST OF POLISH JOKES IN COMEDY SKIT. NO DEMONSTRATION THAT SUBJECT MATTER OF BROADCAST WAS CONTROVERSIAL ISSUE OF PUBLIC IMPORTANCE

Polish American Congress v. FCC

During the broadcast of ABC's \textit{The Dick Cavett Show} on August 10, 1972, comedian Bob Einstein, masquerading as "Gil Drabowski," president of an imaginary Polish Anti-Defamation League, told four "Polish jokes," all denigrating the intellectual or motor skills or the personal hygiene standards of Poles.

\textsuperscript{57} See note 29 infra.
\textsuperscript{58} See Citizens Environmental Council v. Volpe, 484 F.2d 870 (10th Cir. 1973), where the court concluded that if the EIS was adequate, the fact that it was prepared by state officials without significant federal involvement is irrelevant.
\textsuperscript{59} 517 F.2d at 779.
\textsuperscript{60} Id.
\textsuperscript{61} Id. The court quoted from \textit{Iowa Citizens} in stating its belief that NEPA requires more than a simple federal review procedure.

NEPA does not set up the responsible federal agency as a review board of the contemplated state action, simply making a suggestion here, modifying there, with the idea of either giving ultimate approval or rejection to the plan.

487 F.2d at 855.
As a result of a protest by the Polish American Congress and others, on the following evening Steve Allen, the show’s host on August 10th, explained that the “Polish joke” comedy sketch had been intended to amuse “just as the ‘All in the Family’ show, which is the number one show in the country, intends to amuse when it does jokes about the Polish, Italians, and every group in the world.” Allen then stated that he, Bob Einstein, and ABC apologized to those who were offended. Although Allen indicated that he had invited a spokesman for a protesting Polish-American organization to “speak his piece” during the August 11th show, no such spokesman appeared.

On October 4, 1972, Thaddeus Kowalski, on behalf of himself and the Polish American Congress, wrote a letter to ABC requesting “equal time” to reply “under Federal Communications Commission Regulations” to the August 10th telecast. In its response to the letter, ABC concluded that “equal time” under § 315 of the Communications Act was limited in scope to candidates for public office and accordingly declined the “equal time” request.

Eight months later the Polish American Congress filed a complaint with the Federal Communications Commission (FCC), requesting it to rule that under the fairness doctrine, as well as under the personal attack rule of that doctrine, it was entitled to “equal time” to respond free of charge on the ABC network “to the personal attacks on the character, intelligence, hygiene or appearance of members of the Polish American Community.” On September 26, 1973, the FCC’s Broadcast Bureau denied the complaint. Subsequently, the petitioners appealed to the full Commission for a review of the Broadcast Bureau’s ruling. The application for review was again denied.

Thereafter, the Polish American Congress filed a petition in the Seventh Circuit Court of Appeals for review of the FCC order denying the complaint. The Court, in an opinion by Judge Cummings, held in Polish American Congress v. FCC that the televised “Polish joke” material did not constitute a presentation of views on a controversial issue of public importance within the general fairness doctrine or the personal attack rule pertaining to the right to a reply.

The court initially indicated that the scope of its review was limited to an inquiry into the reasonableness and good faith of the FCC and ABC in determining whether a controversial issue of public importance was involved, stating that the court itself could not make a de novo determination. The court found no evidence indicating that ABC was acting unreasonably or in bad faith when it determined that the August 10th telecast contained no controversial issue of public importance.

That determination was fatal to the Polish American’s request, since in order to obtain the right to reply under either the fairness doctrine or the personal attack rule, the Polish Americans had to establish that the views stated in the

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3 520 F.2d at 1250.
6 Id. at 1253.
7 Id. at 1255.
telecast related to a controversial issue of public importance. The court stated that the Polish Americans had failed to meet this threshold burden because they had failed to allege anything that would have indicated that a true controversy existed as to the intelligence, cleanliness, or coordination of Poles, and also that they had failed to demonstrate the public importance of the alleged controversy. Thus the FCC order denying the Polish American's request for review was affirmed, since the Commission was held to have properly determined that ABC's conclusion that the broadcast did not involve a controversial issue of public importance was not unreasonable nor reached in bad faith.

The Fairness Doctrine and Equal Time Provisions

The fairness doctrine, the legal rule the Polish Americans based their claim upon, requires a broadcaster to devote a reasonable percentage of his broadcasts to coverage of public issues, and to provide along with that coverage an opportunity for the presentation of contrasting points of view. The roots of this doctrine stem from a 1949 FCC report that:

in the presentation of news and comment the public interest requires that the licensee must operate on a basis of overall fairness, making his facilities available for the expression of contrasting views of all responsible elements in the community on the various issues which arise.

This FCC report is widely recognized as the primary source of the fairness doctrine as it first emerged over 25 years ago. However, the fairness doctrine was not statutorily codified until 1959 when, almost as an afterthought, 47 U.S.C. § 315 was amended to read in part as follows:

(a) If any licensee shall permit any person who is a legally qualified candidate for any public office to use a broadcasting station, he shall afford equal opportunities to all other such candidates for that office in the use of such broadcasting station. . . . No obligation is imposed upon any licensee to allow the use of its station by any such candidate. . . . Nothing in the foregoing sentence shall be construed as relieving broadcasters, in connection with the presentation of newscasts, news interviews, news documentaries, and on-the-spot coverage of news events, from the obligation imposed upon them under this chapter to operate in the public interest and to afford reasonable opportunity for the discussion of conflicting views on issues of public importance.

Although § 315 indicates the licensee's duties with regard to both equal time and the fairness doctrine, it also makes clear that the two concepts are distinguishable. Section 315's equal time requirement applies only to those situations where a "legally qualified candidate for any public office [is] allowed to use a

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8 Id. at 1252-53.
9 Id. at 1253.
10 Id.
11 Id. at 1252.
12 In the Matter of Editorializing by Broadcast Licensees, 13 F.C.C. 1246, 1250 (1949).
broadcasting station. If such is the case, then the licensee allowing use of his facilities is compelled to "afford equal opportunities to all other such candidates for that office in the use of the broadcasting station."

The scope of the fairness doctrine is much broader than that of equal time; it is appropriate in any situation where a licensee has provided the use of his facilities to a person or group for the purpose of stating a position relative to a controversial issue of public importance. In these situations, the licensee is to make reasonable judgments in good faith as to whether a controversial issue of public importance exists, what opposing viewpoints should be presented, the format and spokesman to present these opposing viewpoints, and all other facets of such programming. The fairness doctrine thus involves far greater discretion for the licensee than does equal time. For example, under the fairness doctrine "identical treatment of both sides of the issue is not necessary" and the "licensees may exercise their judgment as to what material is presented and by whom." The fairness doctrine also includes the two related concepts, labelled the "personal attack rule" and the "political editorial rule." Essentially these doctrines require a licensee, under appropriate circumstances, to provide reply time to persons who have been personally or politically attacked.

This distinction between the fairness doctrine and equal time has received judicial affirmation. The Supreme Court, in Red Lion Broadcasting Co. v. FCC, held that:

17 Applicability of the Fairness Doctrine, 40 F.C.C. 598, 599 (1964).
18 Green v. FCC, 447 F.2d 323, 328 (D.C. Cir. 1971).
20 The pertinent provisions within these Regulations include:

§ 73.679 Personal attacks; political editorials.

(a) When, during the presentation of views on a controversial issue of public importance, an attack is made upon the honesty, character, integrity or like personal qualities of an identified person or group, the licensee shall, within a reasonable time and in no event later than 1 week after the attack, transmit to the person or group attacked (1) notification of the date, time and identification of the broadcast; (2) a script or tape (or an accurate summary if a script or tape is not available) of the attack; and (3) an offer of a reasonable opportunity to respond over the licensee's facilities.

(c) Where a licensee, in an editorial, (i) endorses or (ii) opposes a legally qualified candidate or candidates, the licensee shall, within 24 hours after the editorial, transmit to respectively (i) the other qualified candidate or candidates for the same office or (ii) the candidate opposed in the editorial (i) notification of the date and the time of the editorial; (2) a script or tape of the editorial; and (3) an offer of a reasonable opportunity for a candidate or a spokesman of the candidate to respond over the licensee's facilities.

47 C.F.R. § 73.679 applies to television licensees. There are identical provisions in 47 C.F.R. §§ 73.123, 73.300 and 73.598 (1975) which apply to standard broadcast stations, FM broadcasting stations, and noncommercial educational FM broadcasting stations. Subsection (b) in all of these sections indicates that the personal attack rule is not applicable where a legally qualified candidate, or his or her associates, attacks other qualified candidates. 47 C.F.R. § 73.679(b) (1975). Subsection (b) has been inserted into these regulations because the equal time provisions of § 315, and not the personal attack rule under the fairness doctrine, apply when candidates are involved. In the matter of Amendment of Part 73 of the Rules to Provide Procedures in the Event of a Personal Attack or where a Station Editorializes as to Political Candidates, 8 F.C.C.2d 721, 726 (1967). This is a further reason why it is important to distinguish between equal time and the fairness doctrine.

stated that the fairness doctrine was distinct from § 315's requirement that equal time be allotted to all qualified candidates for public office.\textsuperscript{22} The Court held that the personal attack and political editorial regulations\textsuperscript{23} of the fairness doctrine were authorized both by statute and the Constitution.\textsuperscript{24} Yet in the \textit{Polish American Congress} case, the Seventh Circuit failed to mention this distinction between equal time and the fairness doctrine when apparently the distinction was appropriate.\textsuperscript{25} In so doing, the court risks its opinion being read as an equal time case when the fairness doctrine was clearly at issue. Although this did not have an impact on the ultimate result, it is important in accurately understanding what the case represents.

\textit{Personal Attack Rule}

Since no qualified candidate for public office was involved in \textit{Polish American Congress}, neither the equal time provision of § 315 nor the political editorial rule of the fairness doctrine was applicable. Therefore, the only real issue before the Seventh Circuit was whether the personal attack rule of the fairness doctrine would justify giving the Polish Americans access to ABC's broadcasting facilities.

The court noted that the personal attack rule is triggered only when the attack occurs during the discussion of a controversial issue of public importance.\textsuperscript{26} A concise FCC statement of the personal attack rule's application is found in a 1964 report on the fairness doctrine: "The personal attack principle is applicable where there are statements in connection with a controversial issue of public importance, attacking an individual's or group's integrity, character or honesty or like personal qualities."\textsuperscript{27}

It is important to note, however, that the basis of the personal attack rule, the existence of a controversial issue of public importance, has never been specifically defined by the FCC or the courts. In 1974, the FCC made the following general comments about "controversial issues of public importance":

\begin{quote}
It has frequently been suggested that the Commission set forth comprehensive guidelines to aid interested parties in recognizing whether an issue is "controversial" and of "public importance." However, given the limitless number of potential controversial issues and the varying circumstances in which they might arise, we have not been able to develop detailed criteria which would be appropriate in all cases.\textsuperscript{28}
\end{quote}

\textsuperscript{22} \textit{Id.} at 369-70.
\textsuperscript{23} 47 C.F.R. §§ 73.123, 73.300, 73.598, 73.679 (1975).
\textsuperscript{24} 395 U.S. at 400-01.
\textsuperscript{25} The Polish group had originally asked for "equal time" from ABC. In denying the request ABC ignored the possibility that the Polish group may have used the term in its generic sense and responded only in terms of the narrowly defined meaning of equal time within § 315. The court could have stated that the equal time doctrine did not apply because a qualified candidate was not involved. However, the court did not comment on the inappropriateness of ABC's reply. 520 F.2d at 1250.
\textsuperscript{26} 520 F.2d at 1252-3. \textit{See also} 47 C.F.R. § 73.679(a) (1975).
\textsuperscript{27} Applicability of the Fairness Doctrine, 40 F.G.C.C. 598, 612 n.5 (1964). Although this statement was contained in a footnote, there is a close similarity with the language in 47 C.F.R. § 73.679 (1975).
\textsuperscript{28} Handling Public Issues Under the Fairness Doctrine, 48 F.G.C.C.2d 1, 11 (1974).
Although the FCC has yet to explicitly define a "controversial issue of public importance," it has set some standards concerning its character. For example, an issue is not laden with public importance merely because it has received broadcast or newspaper coverage. Among the factors the FCC deems significant in determining the existence of a controversial issue of public importance are: (1) the degree of media coverage; (2) the degree of attention the issue has received from governmental officials and other community leaders; and (3) as the "principle test," a subjective evaluation of the impact the issue is likely to have on the community at large. Consistent with other courts, the Seventh Circuit declined to define "controversial issue of public importance" in this case. Indeed, the court viewed its role of judicial review quite narrowly, following the practice of approaching fairness doctrine cases by substituting the licensee's discretion for its own definition of a controversial issue of public importance.

The Seventh Circuit's Analysis in Polish American Congress

1. Failure to State a Proper Issue

In holding that the Polish Americans had failed to show that ABC was unreasonable in determining that the television program did not involve a controversial issue of public importance, the Seventh Circuit stated that the burden of defining the issue is placed on the complainant. This not only comports with the general rules of evidence, but also affords the complainant the opportunity to frame the issue in a manner favorable to himself. The licensee is then forced to use good faith in determining whether the issue so defined is controversial and of public importance.

The Seventh Circuit concluded that the Polish Americans had not met their burden of proof. The court indicated that it could find "no clear statement of a question that could serve as an issue around which an important public con-

29 Id. at 11. See Healey v. FCC, 460 F.2d 917 (D.C. Cir. 1972). In this case the court held that "merely because a story is newsworthy does not mean that it contains a controversial issue of public importance." Id. at 922. The Los Angeles Times had featured an article stating that, although Dorothy Healey was a Marxist and a Communist, she was a good American. The following day George Putnam of KTTV criticized the Times article and Mrs. Healey. The court of appeals sustained an FCC ruling that KTTV had not violated the fairness doctrine by denying Mrs. Healey's request for reply time, even though both radio and television had covered the issue. The fact that this issue was mentioned in the press did not make it a controversial issue of public importance. 460 F.2d at 922.

30 48 F.C.C.2d at 11-12. It is of major significance to keep in mind that the subjective evaluation the FCC is referring to is that of the licensee.

31 520 F.2d at 1253. The reluctance to look into the facts of each case and attempt to define a controversial issue of public importance is shared by all of the courts handling "personal attack" cases. The Fourth Circuit, in M. Goldseker Real Estate Co. v. FCC, 456 F.2d 919, 921 (4th Cir. 1972), stated that it would only inquire into the reasonableness of the FCC's decision. The District of Columbia Circuit Court, in Democratic Nat'l Comm. v. FCC, 460 F.2d 891, 901 (D.C. Cir. 1972), indicated that the FCC (and presumably a court) is not to substitute its judgment for that of the licensee.

32 Id. at 1253. At this point the court cited Green v. FCC, 447 F.2d 323 (D.C. Cir. 1971). In this case Green requested the court to reverse an FCC ruling denying his request for free time to rebut recruitment announcements appealing for volunteers to join the various branches of the military. In its analysis of the facts, the court noted that "it is not only necessary to define a controversial issue of public importance, but implicitly it is first necessary to define the issue." 447 F.2d at 329. A similar requirement was mentioned in Healey v. FCC, 460 F.2d 917, 921 (D.C. Cir. 1972).
trovery could form.\textsuperscript{33} The court also stated that "nowhere in the complaint or application for review before the Commission is there a clear statement of the issue which is alleged to be both controversial and of public importance."\textsuperscript{34} The language the court was referring to was that employed by the Polish American Congress in its complaint to the FCC. The complaint read in part:

Under the Fairness Doctrine, the broadcasting of personal attacks, the depiction of Polish persons or culture in a demeaning manner, the broadcasting of ethnic "humor" that is insulting to the intelligence, character, hygiene, or appearances of these persons is a controversial issue of public importance because such programming represents a single warped and negative point of view which has an enormous influence on the viewing audience. The televising of so-called "Polack jokes" is per se a controversial issue of public importance, harmful and insulting to a considerable segment of the American population.\textsuperscript{35}

Since the court criticized the Polish Americans for failing to state a legally cognizable issue,\textsuperscript{36} it is regrettable that the court did not more fully explain its reasons finding a deficiency. By stating only the bald conclusion that the issue was inadequately defined, the court leaves open the question of which elements are necessary for a cause of action to be made out. Presently, the deficiency in the Polish Americans' case is difficult to determine; the court's silence on this point leaves its decision less than complete.

2. Failure to Establish the Controversialness and Public Importance of the Skit

The \textit{Polish American Congress} court further indicated that it did not have to rely on the complainant's failure to clearly state a legally cognizable issue to find against the Polish American Congress because, assuming that such issues were contained in the complaint, the FCC would still be upheld in its ruling that ABC had acted reasonably in determining that a controversial issue of public importance was not involved.

Nevertheless the Seventh Circuit, after criticizing the Polish American Congress for failing to state an issue, somewhat inconsistently read the Polish American's complaint as possibly containing two controversial issues of public importance: (1) are Polish Americans inferior to other human beings in terms of intelligence, personal hygiene, etc. ?; and (2) is the promulgation of Polish jokes by television broadcast desirable? The court proceeded to discuss the issues that it construed from the complaint with regard to their alleged controversial nature and public importance.\textsuperscript{37}

\begin{thebibliography}{9}
\bibitem{33} 520 F.2d at 1254.
\bibitem{34} \textit{Id.}
\bibitem{35} \textit{Id.}
\bibitem{36} \textit{Id.} The court criticized the Polish Americans for failing to define the issue at two points in the opinion. The court first stated "[w]e have found no clear statement of a question that could serve as an issue around which an important public controversy could form." \textit{Id.} at 1254. The court later reemphasized the point by stating "[n]owhere in the complaint or application for review before the Commission is there a clear statement of the issue which is alleged to be both controversial and of public importance." \textit{Id.}
\bibitem{37} \textit{Id.} at 1254. The complainant's burden of proof has been clearly set out by the FCC. It has stated that "where the complaint is made to the Commission, the Commission expects a
a. Inferiority of Polish Americans

The Polish American Congress court stated that the first issue possibly raised in the Polish American’s complaint, the inferiority of Polish Americans, was required to be both controversial and of public importance in order to warrant application of the personal attack rule. The court held, however, that the complainant had failed to meet this requirement in the first issue, because it “allege[d] nothing that would support a contention that there is a controversy over the issue whether Poles or Polish Americans are less intelligent, less clean, less coordinated, etc. than other people.”

Here the court was justified in requiring the Polish Americans to demonstrate that the issue contained both controversy and public importance. This requirement allows the licensee to retain maximum control and discretion in its choice of programming, while at the same time compelling it to provide access to its facilities only when more than “hurt feelings” are involved. The court’s reasoning is particularly persuasive in light of the context in which the issue arose—a comedy skit. Since ABC was ostensibly making an attempt at humor, however lame that attempt might have been, the Polish Americans should have been obligated to demonstrate the seriousness of the issue—to explain why it was an attack on the qualities of Polish people.

b. Desirability of Broadcasting Polish Jokes

The second issue the court considered was whether the desirability of broadcasting Polish jokes was a controversial issue of public importance. The court indicated that this issue was not present. The court reached this conclusion based on its reasoning (1) that the newsworthiness of the event did not render it controversial, and that in any case the news coverage was not timely, since it had occurred 11 months after the broadcast; (2) that legislative resolutions denouncing Polish jokes to illustrate the controversialness of the issue were deficient because no contrary resolutions or disagreements were evident, and (3) that an apology by the licensee was not tantamount to an admission that the desirability of broadcasting Polish jokes was controversial.

The court first determined that the Polish Americans failed to demonstrate that the newsworthiness of the television broadcast created a controversial issue

complainant to submit specific information indicating (1) the particular station involved; (2) the particular issue of a controversial nature discussed over the air; (3) the date and time when the program was carried; (4) the basis for the claim that the station has presented only one side of the question; and (5) whether the station had afforded, or plans to afford, an opportunity for the presentation of contrasting viewpoints. Applicability of the Fairness Doctrine, 40 F.C.C. 598, 600 (1964).

38 Id. at 1234.
39 Id. at 1255.
40 Id.
41 Id.
42 Id.
of public importance over the issue of whether broadcasting Polish jokes was desirable. The court, citing *Healey v. FCC,* stated that "all newsworthy events do not constitute controversial issues of public importance." Thus the court prevented the petitioner from using the fact that many newspapers across the country had carried a wire service story describing the action the Polish Americans had filed with the FCC. The court was perhaps inaccurate in its citing of *Healey,* because in that case only one newspaper and one television station had provided coverage of Healey's Marxist affiliation, the claimed controversial issue. It is not difficult to distinguish a situation where nationwide wire service coverage is given to an issue from one where only two local media sources provide exposure. This is not to suggest that nationwide wire service coverage makes an issue per se controversial and of public importance; rather it illustrates that the court should have offered further justification for its position on this issue.

Another reason for the court's dismissal of the impact of the news stories was that they were carried 11 months after the broadcast. As the fairness doctrine requires a current judgment, the court thought the FCC may have determined that the news stories lacked relevancy. The court implied that timeliness was not the critical issue; it indicated that the newsworthy event was not the skit but the filing of the complaint. The court's treatment of the timeliness problem was less than complete, but apparently if the petitioner's could have shown that the coverage was concerned with the skit as well as with the filing of a complaint, the court would have allowed them to use these factors in support of their contention.

The court next considered the allegation that various legislative resolutions had created a controversial issue of public importance. The court held that the Polish Americans could not use resolutions denouncing Polish jokes passed by the city of Hartford, Connecticut, and the United States House of Representatives, because there was no evidence of contrary resolutions or other disagreements with the resolutions from which ABC or the FCC could have surmised that a controversy existed over the desirability of broadcasting Polish jokes. Apparently the court felt the Polish Americans had to establish that opposing resolutions had been passed advocating the broadcasting of Polish jokes in order to establish that a controversial issue of public importance existed. The court's reasoning in this regard is suspect. The mere fact that the House of Representatives felt called upon to pass a resolution denouncing attacks on Polish Americans indicates that there existed some controversy. Further, it is difficult to imagine that any unit of government, or some other group, would advocate by resolution the use of Polish

43 Id.
44 460 F.2d 917 (D.C. Cir. 1972).
45 520 F.2d at 1255. In the *Healey* case the D.C. Circuit stated that merely because a story is newsworthy does not mean it contains a controversial issue of public importance. *Healey v. FCC,* 460 F.2d 917, 922 (D.C. Cir. 1972).
46 Id. at 1255.
47 *Healey v. FCC,* 460 F.2d at 918 (D.C. Cir. 1972).
48 520 F.2d at 1255. Here the court cited Larus & Brother Co. v. FCC, 447 F.2d 876 (4th Cir. 1971), where the Fourth Circuit mentioned on two occasions that the fairness doctrine requires a current judgment. Id. at 881, 883.
49 Id. at 1255.
50 Id.
jokes. The court placed such an unrealistic burden on the Polish Americans that it must have known that it would be virtually impossible for the Polish Americans to meet it.

Apparently even the Seventh Circuit was not convinced of the soundness of its logic, as it later stated:

\[\text{[E]ven if we assume that the skit constituted a statement favoring the broadcasting of Polish jokes, it was reasonable to conclude that such an endorsement does not create a public issue requiring a response, where nothing suggests that such an issue existed before the broadcast.}\]

Thus the court's handling of this issue leads to some confusion.

The third allegation considered by the Seventh Circuit was that an apology in this case was an implied admission that the desirability of Polish jokes is a controversial issue of public importance. The court, however, also rejected this contention. The court noted that issuing an apology was "not the same as acknowledging that a controversial public issue was discussed." Making such a distinction between an apology and acknowledgment is surely valid, especially for reasons of practicality. Equating these terms with the triggering of the right to reply would create a situation where licensees would be reluctant to apologize for merely offensive broadcasts where the fairness doctrine would not otherwise apply.

**First Amendment Considerations and the Scope of Review**

Underlying the Polish American Congress decision was the Seventh Circuit's regard for first amendment implications in curtailing the freedom of a broadcaster to use his facilities as he sees fit. This concern led the court to exercise a rather limited scope of review over the actions of the broadcaster. The Seventh Circuit's approach in *Polish American Congress* is consistent with the approach

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51 Id. This statement is significant in two respects. First, exactly why the court was forced to assume that the skit was a statement favoring Polish jokes is unclear. It would be illogical to conclude that the skit was a statement opposing Polish jokes and it would be almost as illogical to say that the skit represented a neutral posture. Secondly, the court was apparently reducing the burden of proof it had earlier placed on the Polish Americans if it was suggesting that they must merely establish that the skit was equivalent to a statement advocating Polish jokes. Until the court made this statement, it had apparently required the petitioner to prove that a group had, in so many words, approved of the policy of telling Polish jokes.

52 The court's analysis can be summarized as follows: the resolutions did not cause the skit to become a controversial issue because no contrary resolutions or disagreements were cited; however, even if the skit was such a disagreement no controversy existed because nothing suggested that such an issue existed before the skit. The confused analysis suggests two equally unsatisfactory rationales. The court may have felt that the broadcast itself could not be used to create the controversy. If the Seventh Circuit was seriously interested in enforcing the fairness doctrine, the policy was unsound, since it gave licensees the ability to launch an initial personal attack without having the commensurate responsibility of providing time to reply. Such a situation is precisely what the fairness doctrine, and more particularly the personal attack rule, were designed to prevent. On the other hand, the court may have been suggesting that the resolutions did not indicate that a controversy existed concerning the issue of Polish jokes. It seems ridiculous to suggest that the United States House of Representatives would pass a resolution denouncing Polish jokes if there were no controversy over their value. Perhaps the court had another rationale for its conclusion which would be more satisfactory but it is not readily discernible from the opinion.

53 Id.
other courts have taken in the past when faced with similar issues.\(^54\)

The procedure employed under the fairness doctrine requires a complainant to request reply time from the licensee before going to the FCC or the courts.\(^55\) The licensee in turn is obliged to make a good faith judgment as to the existence of a controversial issue of public importance.\(^58\) This method ensures the protection of first amendment rights from undue government censorship.\(^57\) Likewise, a court in reviewing a fairness doctrine complaint is limited in its scope of review; it can only pass on the reasonableness of the licensee's judgement.\(^58\) The court in fact is two steps removed from the actual issue, for it reviews the FCC's initial review of the licensee's use of discretion.\(^59\)

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\(^56\) The FCC has clearly stated its position on this matter. "[T]he licensee, in applying the fairness doctrine, is called upon to make reasonable judgments in good faith on the facts of each situation—as to whether a controversial issue of public importance is involved." Applicability of the Fairness Doctrine, 40 F.C.C. 598, 599 (1964). The FCC further emphasized this point in a case where it stated, "It is the initial responsibility of the licensee to determine whether a controversial issue of public importance has been presented." In re Port of New York Authority, 25 F.C.C.2d 417, 419 (1972).

\(^57\) The concept of the possible government censorship is reflected in 47 U.S.C. § 326 (1970) which reads: "Nothing in this chapter shall be understood or construed to give the [Federal Communications] Commission the power of censorship over the radio communications or signals transmitted by any radio station, and no regulation or condition shall be promulgated or fixed by the Commission which shall interfere with the right of free speech by means of radio communication."

\(^58\) In a 1974 fairness report the FCC said it was its belief that the public need to be informed was best served through a system in which the licensees exercised wide discretion. The FCC indicated that it was convinced that there was no formula which could be established to deal with the problem and concluded by stating, "It is obvious that under this method of handling fairness, many questionable decisions by broadcast editors may go uncorrected. But, in our judgment, this approach represents the most appropriate way to achieve 'robust, wide open debate' on the one hand, while avoiding the dangers of censorship and pervasive supervision by the government on the other." Handling Public Issues Under the Fairness Doctrine, 48 F.C.C.2d 1, 9 (1974). The quoted portions were taken from Banzhaf v. FCC, 405 F.2d 1082, 1095 (D.C. Cir. 1968), cert. denied sub. nom. Tobacco Institute v. FCC, 396 U.S. 842 (1969). The Supreme Court also has noted that "Congress appears to have concluded, however, that of the two choices—private or official censorship—Government censorship would be the most pervasive, the most self-serving, the most difficult to restrain and hence the one most to be avoided." CBS v. Democratic Nat'l Comm., 412 U.S. 94, 105 (1973).

\(^59\) The court made two basic points concerning its role in the reviewing process. First, it stated that it could not make a de novo determination. Secondly, the court indicated that it reviewed FCC orders only in terms of good faith and reasonableness considerations. Recently the D.C. Circuit made a revealing comment as to the role of the FCC in reviewing the licensee's decision. "The Commission's reference to 'patently unreasonable exercise of discretion by the licensee, as the standard that warrants agency intervention, captures the spirit
This is not to minimize the role of the court's review. While the policy is to allow the licensee wide discretion in fairness doctrine matters so as to ensure first amendment protection, in practice this could permit the party who is accused of violating the fairness doctrine to stand in judgment over its own actions. Thus the licensee will not be allowed unfettered discretion. Indeed, the Supreme Court has stated: "It is the right of the viewers and listeners, not the right of broadcasters, which is paramount." 60

In *Polish American Congress* the Seventh Circuit indicated that it was following the precedent established by the Supreme Court and other courts of appeal. Moreover, its approach to the Polish American's complaint, which placed great weight on the licensee's initial judgment and its own limited scope of review, is consistent with the approaches it has taken in the past concerning similar issues. In fact, the Seventh Circuit has had a history of placing perhaps too much emphasis on the licensee's first amendment rights. In 1968, for instance, the court had held certain FCC regulations 61 to be unconstitutional because they contravened the first amendment. 62 The court at that time expressed the fear that the personal attack rule would cause the Government to unreasonably burden the freedom of the press in disseminating views on controversial issues of public importance, since the regulations would inhibit licensees from providing coverage of controversial issues. 63 The court also mentioned that the vagueness of regulations would contribute to the reluctance of licensees to discuss controversial issues of public importance. 64

of the scope of discretion entitled to the licensee." *NBC v. FCC*, 516 F.2d 1101, 1120 (D.C. Cir. 1974). The FCC has itself acknowledged that its role in reviewing a licensee's decision is limited. In 1974 the FCC indicated that "governments [sic] role is limited to a determination of whether the licensee acted reasonably and in good faith." *Handling Public Issues Under the Fairness Doctrine*, 48 F.C.C.2d 1, 9 (1974). The D.C. Circuit has described the procedure by stating "the FCC's function becomes that of correcting the licensee for abuse of discretion, as our function on judicial review is that of correcting the agency for abuse of discretion." *NBC v. FCC*, 516 F.2d at 1120 (D.C. Cir. 1974) (emphasis supplied). The Ninth Circuit concurred with the Seventh Circuit as well, stating: a court's role is limited to deciding whether the Commission's order is unreasonable or in contravention of statutory purpose. In making such a determination a court is not at liberty to substitute its own discretion for that of the administrative officers who have kept within the bounds of their administrative powers. *Neckritz v. FCC*, 446 F.2d 501, 502-03 (9th Cir. 1971), citing *American Tel. & Tel. v. United States*, 299 U.S. 232, 236 (1936).

60 *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 390 (1969). The Court went on to say that "[t]he purpose of the First Amendment to preserve an uninhibited market place of ideas in which truth will ultimately prevail, rather than to countenance monopolization of that market, whether it be by the Government itself or a private licensee." *Id.* at 390. This suggests that the courts should not allow the licensees too much discretion.

61 47 C.F.R. § 73.678 (1975).

62 *Radio & Television News Directors' Ass'n v. United States*, 400 F.2d 1002, 1020 (7th Cir. 1968).

63 *Id.* at 1012. The court stated that "[t]he rules pose[d] a substantial likelihood of inhibiting a broadcast licensees' dissemination of views on political candidates and controversial issues of public importance." *Id.* The court indicated that the inhibition stemmed, in part, from the substantial economic and practical burdens of complying with the requirements of the regulations.

64 *Id.* at 1016. The court stated that the FCC's rules were too vague because they lacked standards precise enough to enable a licensee to ascertain whether he is subject to the rules' obligations. That court concluded that "[W]hen a license considers the vagueness of the rules, the mandatory and pervasive requirements of the rules, and the threat of suffering serious sanctions for noncompliance with them, it is likely that he will become far more hesitant to engage in controversial issue programming or political editorializing." *Id.*
On appeal, the Supreme Court reversed the Seventh Circuit in *Red Lion Broadcasting Co. v. FCC*. The Court held that "the fairness doctrine and its component personal attack and editorializing regulations were a legitimate exercise of congressionally delegated authority." The Court felt that the possibility of stifling debate was speculative and for that reason rejected the rationale of the Seventh Circuit. The Supreme Court responded to the first amendment challenges to the regulations by stating:

> Where there are substantially more individuals who want to broadcast than there are frequencies to allocate it is idle to posit an unabridgeable First Amendment right to broadcast comparable to the right of every individual to speak, write, or publish.

With *Red Lion*, the fairness doctrine has received constitutional validity. The Seventh Circuit’s decision in *Polish American Congress* indicates that it will now uphold the fairness doctrine without reservation.

**Conclusion**

Although the Seventh Circuit refused in *Polish American Congress* to overturn the decision of the licensee to deny his facilities to the Polish Americans for the purpose of replying to an alleged controversial issue of public importance, this does not imply that the court is insensitive to claims raised under the fairness doctrine. The court stated that its holding in *Polish American Congress* “should not be read to preclude the future success of a similar petition.” Indeed the court speculated that if a future controversy did arise over the desirability of broadcasting Polish jokes, then a complainant might well be successful.

The Polish American’s complaint was deficient in the Seventh Circuit’s view because it did not contain a controversial issue of public importance; therefore, the licensee’s good faith determination to deny reply time was upheld. While the court did not adequately explain why it found the complaint deficient, its opinion reveals several areas where, given certain factual situations, the court might hold for the complainant. If a change in the nation's social climate produces more intense ethnic hostility, the desirability of broadcasting Polish jokes might trigger application of the fairness doctrine. Less dramatically, legislative resolutions might become grounds for proving the existence of a controversial issue of public importance, especially if the legislative history indicates that substantial public debate existed. Thirdly, an apology by a licensee coupled with an invitation to reply might be interpreted as the licensee’s recognition that the fairness doctrine has been triggered. While the *Polish American Congress* court held that an apology by itself did not raise a fairness doctrine issue, it did not...
comment upon what effect an invitation to reply might have. It would be at least difficult for a future licensee who had originally offered reply time to assert later that no controversial issue of public importance was present.

Beyond the merits of a fairness doctrine complaint, however, the procedural aspects of such a complaint have significance. Both the FCC and the courts allow themselves only a circumspect role; theirs is essentially a reviewing function. The licensee’s abuse of discretion becomes, therefore, the core issue in these forums. A fairness doctrine complaint must be keyed to this issue in order to have the FCC or the courts fully entertain it.

Bruce Meagher

FEDERAL INCOME TAXATION — SECTION 404 — DELIVERY BY AN ACCRUAL BASIS TAXPAYER OF A SECURED INTEREST-BEARING DEMAND PROMISSORY NOTE TO THE TRUSTEES OF A QUALIFIED EMPLOYEE PROFIT-SHARING PLAN DOES NOT CONSTITUTE PAYMENT WITHIN THE MEANING OF § 404 (A) (6) OF THE INTERNAL REVENUE CODE.

Don E. Williams Company v. Commissioner

Section 404(a)(3) of the Internal Revenue Code permits a deduction, within limitations, for employer contributions to a qualified employee profit-sharing plan. Yet § 404(a) (6) states that contributions by accrual basis taxpayers are deductible only if payment occurs by the last day of the taxable year, or not later than the tax return filing deadline for the taxable year. Presently, defining the word “payment” for purposes of § 404(a)(6) has proved problematic. Specifically, controversy is centered on whether delivery of a promissory note to an employee benefit trust by an accrual basis employer constitutes payment within the meaning of § 404(a)(6). The Tax Court has consistently denied the deduction for this form of contribution, essentially because a promissory note is not a cash equivalent, while the Third, Ninth, and Tenth Circuit United States Courts of Appeals have allowed deductions for promissory notes contributions. Recently, however, the Seventh Circuit, in Don E. Williams Co. v. Commissioner, reversed this more liberal trend among the United States Courts of Appeals by disallowing a deduction for a contribution in the form of a secured promissory note.

1 INT. REV. CODE OF 1954, § 404(a) (6) provides:
   TIME WHEN CONTRIBUTIONS DEEMED MADE.—For purposes of paragraphs (1), (2), and (3), a taxpayer shall be deemed to have made a payment on the last day of the preceding taxable year if the payment is on account of such taxable year and is made not later than the time prescribed by law for filing the return for such taxable year (including extensions thereof).
4 Sachs v. Commissioner, 208 F.2d 313 (3d Cir. 1953).
5 Time Oil Co. v. Commissioner, 258 F.2d 237 (9th Cir. 1958).
6 Wasatch Chem. Co. v. Commissioner, 313 F.2d 843 (10th Cir. 1963).
7 527 F.2d 649 (7th Cir. 1975).
The Seventh Circuit's decision is significant not merely because it differs with three other circuits, but also because its effect may be contrary to one of the primary purposes of § 404(a). The denial of a § 404(a) deduction under these circumstances may decrease the amount of contributions to employee benefit plans. If the policy sought to be accomplished by allowing deductions for contributions to employee plans is to encourage contributions, this result is obviously undesirable.

Furthermore, the court's reasoning may be suspect. First, the court did not deal with the apparent similarities between the practical effects of a cash payment and payment by the delivery of a promissory note. Second, a more astute rationale for the decision in Williams could be that the court should not encourage the practice of an employer borrowing from an employee benefit trust that lacks a truly independent trustee.8

Don E. Williams Company is an accrual basis taxpayer. The trustees of its profit-sharing plan are its bank and its three principal shareholders-officers.9 Within the taxable year, it accrued a liability on its books for a contribution to its qualified plan. Within the allowable time for filing the return, the company delivered an interest-bearing secured demand note to the trustees of the profit-sharing fund in satisfaction of this liability. Secured by collateral consisting of stock in the company and the interests of two of the shareholders in the profit-sharing plan, the note was additionally guaranteed by the officers and principal shareholders of the company.10 The value of the collateral, combined with the net worth of one of the guarantors, was stipulated to exceed the face value of the note.

Prior Case Law

Logan Engineering Co.11 represents the Tax Court's initial reluctance, in 1949, to allow a profit-sharing contribution deduction for the delivery of a promissory note to an employee trust. The delivery of unsecured interest-bearing negotiable time and demand notes to the trust by Logan Engineering Co., an accrual basis taxpayer, was argued to constitute payment for purposes of § 23(p) of the 1939 Code12 because the notes were essentially indistinguishable from a check, and thus effectively a cash equivalent. The court, however, rejected this argument by formulating a tenuous distinction between the natures of a check and a promissory note. Payment by check, the court said, is "a conditional payment" which, upon the presentment and payment, became absolute and related back to the time when the checks were delivered;13 on the other hand, the court stated that a promissory note was "a mere promise to pay."14

The Logan court also concentrated on the particular phraseology employed by Congress in § 23(p) as compared to other deduction provisions of § 23. The

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8 See text accompanying notes 60-61 infra.
9 52 T.C. 166, 167.
10 Id.
11 12 T.C. 860 (1949).
12 Section 23(p) of the 1939 Code is the statutory predecessor of § 404 of the 1954 Code.
13 12 T.C. at 867. See also Estate of Modie J. Spiegel, 12 T.C. 524 (1949).
14 Id.
court employed what can be termed a “restrictive language” rationale. It stated that when the broader scope of a deduction was intended in § 23, the words “paid or incurred” and “paid or accrued” were used. Accordingly, the court held that since § 23(p) used merely the word “paid” rather than “paid or incurred” or “paid or accrued,” the section was more restrictive and only allowed a deduction for contributions actually paid in cash.

Supporting this conclusion is the legislative history of § 23(p). The report of the Ways and Means Committee on the Revenue Revision Act of 1948 states with respect to § 23(p)(1)(E): “An employer on the accrual basis of accounting may under existing law deduct contributions actually paid within the first 60 days of the subsequent year.” This language, the court reasoned, placed cash and accrual basis taxpayers on an equal footing with regard to contributions to employee trusts. Hence, the court held that a deduction is not permitted unless an actual cash payment is made within the prescribed time period, notwithstanding the accounting method used by the taxpayer.

In 1952, the Tax Court, in Slaymaker Lock Co., reinforced its Logan Engineering decision. It held that the delivery of a negotiable unsecured demand promissory note to a profit-sharing trust again did not constitute payment for § 23(p) purposes. The court cited Logan Engineering and employed essentially the identical rationale.

Intending to bolster the Logan rule, the Slaymaker court created an additional distinction between a check and a promissory note. The court stated that a check requires “no further affirmative action” on the part of the drawer, while a promissory note does require further effort by the promissor before payment is consummated. Moreover, the court noted that the promissor may not have sufficient funds to make payment when requested.

These apparently sound rationales, however, are suspect for three reasons. First, since the note was negotiable in Slaymaker, the trust may have been able to secure cash with the same ease it takes to cash a check. All the holder would be required to do is sell the note to a third party. Second, the demand feature of the note also makes it simple to obtain cash payment; the holder must only request payment from the drawer. Third, because of this ease in obtaining cash due to the note’s negotiability and demand features, the concept of “further affirmative action” is not apposite.

The Third Circuit Court of Appeals was similarly unpersuaded by the Tax...
Court's reasoning when it reversed Slaymaker in Sachs v. Commissioner. Relying on several analogous areas, the court discussed the application of its decision in Anthony P. Miller, Inc. v. Commissioner. In Miller, the taxpayer was deemed to have "paid" its president's salary by the delivery of its negotiable demand notes; thus, the corporation was entitled to deduct the face amount of the notes from its gross income pursuant to §24(c)(1) of the 1939 Code. The Sachs court also considered decisions holding that the delivery of a check within the taxable year constituted payment for the purpose of various other Code sections. Significantly, this portion of the court's analysis lies not in discussing the form of the payment, but rather the timeliness of the payment.

More importantly, the Third Circuit clearly stated that the words "payment" or "paid" as used in the statute do not mean "in cash." The court equated the delivery of a check with the delivery of a negotiable demand note payable at a bank. The rationale for its conclusion ostensibly is that a check and this type of promissory note are functional equivalents because each can be reduced to cash with the same amount of effort—presentment to a bank.

Finally, the Sachs court found the Logan Engineering restrictive language rationale to be without merit. The court held that although §23(p)(1)(E) was limited to the word "paid," as opposed to "paid or incurred" or "paid or accrued," the Miller decision indicates that cash is not the only acceptable form of payment when merely the word "paid" is used in a statute. The court stated: "The asserted distinction does not avoid the sweep of the Miller case, however, since there, too (24(c)(1)), the single word 'paid' was used."

Time Oil Co. and Wasatch Chemical Co. respectively, represent the Tax Court's continued adherence to the Logan Engineering rationale. In Time Oil, the taxpayer contributed two promissory notes, payable on demand, to its profit-sharing trust; the court, nonetheless, summarily disallowed a deduction pursuant to §23(p) based on its decisions in Logan Engineering and Slaymaker Lock. Similarly, in Wasatch Chemical, the taxpayer delivered its five-year promissory notes to its profit-sharing trust and was also denied a §404(a) deduction on the strength of Logan Engineering and Slaymaker Lock. Yet in Wasatch, the Tax Court placed considerable emphasis on the fact that the promissory notes were not demand notes but were five-year notes. It concluded that time notes were more disparate to cash than demand

26 208 F.2d 313 (3d Cir. 1953).
28 This section is the predecessor of §267 of the 1954 Code. The Second and Sixth Circuits similarly construed the word "paid" within the meaning of §24(c)(1). Commissioner v. Mundet Cork Corp., 173 F.2d 757 (3d Cir. 1949); Celina Mfg. Co. v. Commissioner, 142 F.2d 449 (6th Cir. 1944); Musselman Hub-Brake Co. v. Commissioner, 139 F.2d 65 (6th Cir. 1943).
29 208 F.2d at 315. See Dick Brothers, Inc. v. Commissioner, 205 F.2d 64 (3d Cir. 1953) (contributions to employees pension trust); International Bedaux Co., Inc., 17 T.C. 612 (1951) (dividends paid credit); Estelle Broussard, 16 T.C. 23 (1951) (charitable contributions); Estate of Modie J. Spiegel, 12 T.C. 524 (1949) (charitable contributions).
31 208 F.2d at 316.
32 26 T.C. 1061 (1956).
33 37 T.C. 817 (1962).
34 Id. at 820.
notes because time notes are more dissimilar to checks than demand notes.

The Ninth and Tenth Circuit Courts of Appeals adopted positions entirely consistent with the Third Circuit’s *Sachs* decision in reversing *Time Oil* and *Wasatch Chemical*. The *Wasatch Chemical* decision, however, significantly supplemented the *Sachs* rationale in its discussion of *Colorado National Bank of Denver*. There, the Tax Court had held that a contribution to a pension trust under § 404 may be paid by a conveyance of real estate to its trustees. The court stated:

A payment need not be cash and even a debt can be paid in property if the debtor is willing to accept the property as payment. There is no reason why a contribution to a pension trust could not be made in property and still be deductible.

The Court of Appeals in *Wasatch* construed the *Colorado National Bank* case and the above statement to mean that a transfer of something of value is recognized as payment for § 404 purposes. Therefore, the court held that since the time note in *Wasatch* had a definite value and its delivery brought about a significant change in the legal relationship of the parties, it constituted payment for purposes of § 404.

Don E. Williams Company

Neither the Seventh Circuit nor the Tax Court in *Don E. Williams* considered the *Sachs, Time Oil, or Wasatch Chemical* cases to be persuasive. Essentially the Court of Appeals, with Chief Judge Fairchild writing for the court, relied on the rationales of *Logan* and its progeny. The court stated that cash and accrual basis taxpayers are to be treated the same for the purpose of § 404(a). In support of this conclusion, the court cited Treas. Reg. § 1.404(a)-1(c):

Deductions under section 404(a) are generally allowable only for the year in which the contribution or compensation is paid, regardless of the fact that the taxpayer may make his returns on the accrual method of accounting. ... This latter provision is intended to permit a taxpayer on the accrual method to deduct such accrued contribution or compensation in the year of accrual, provided payment is actually made not later than the time prescribed by law for filing the return for the taxable year of accrual (including extensions thereof), ...
The portion of this section of the regulations that provides for deductions of payments "actually made" is similar to the excerpt from the Ways and Means Committee report cited in the _Logan_ case. Indeed, the court in _Williams_ also cited that report and its "actually paid" language in support of this position. The Court of Appeals and the Tax Court also distinguished the _Sachs_ decision based on a peculiarity of commercial law. Under Pennsylvania law, at issue in _Sachs_, the bank at which a note is payable is required to pay the note upon presentment. Payment must be made automatically out of the maker's account. Pennsylvania thus adopted a version of Uniform Commercial Code § 3-121, Alternative A (hereinafter referred to as UCC):

A note or acceptance which states that it is payable at a bank is the equivalent of a draft drawn on the bank payable when it falls due out of any funds of the maker or acceptor in current account or otherwise available for such payment.

On the other hand, under Illinois law, at issue in _Don E. Williams_, a note that states it is payable at a bank does not authorize the bank to make payment; Illinois adopted a version of UCC § 3-121, Alternative B: "A note of acceptance which states that it is payable at a bank is not of itself an order or authorization to the bank to pay it." In jurisdictions that have adopted Alternative B, the note is treated as merely designating a place of payment, as if the instrument were made payable at the office of an attorney. The bank's only function is to notify the maker that the instrument has been presented and to ask for instructions; in the absence of instructions, the bank is still not authorized to pay. Therefore, the Court of Appeals and Tax Court reasoned that such a note is not a cash or check equivalent.

It is questionable whether the court's reliance on its interpretation of § 3-121 is persuasive. Since neither the Tax Court nor the Ninth or Tenth

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44 See text accompanying notes 17-20 supra.
47 UNIFORM COMMERCIAL CODE § 3-121, Alternative A [hereinafter cited as UCC].
48 ILL. ANN. STAT. ch. 26, § 3-121 (Smith-Hurd 1963).
49 UCC § 3-121, Alternative B.
50 The following 29 jurisdictions have adopted Alternative B or slight variations of it: Alabama, Arizona, Arkansas, California, Colorado, Florida, Georgia, Idaho, Illinois, Indiana, Iowa, Kansas, Louisiana, Maryland, Michigan, Minnesota, Mississippi, Montana, Nebraska, New Mexico, North Carolina, Oklahoma, Oregon, South Carolina, South Dakota, Utah, Virginia, Washington, and Wisconsin. UCC REP. SERV. (State Correlation).
51 The following 23 jurisdictions have adopted Alternative A or slight variations of it: Alaska, Connecticut, Delaware, District of Columbia, Hawaii, Kentucky, Maine, Massachusetts, Missouri, Nevada, New Hampshire, New Jersey, New York, North Dakota, Ohio, Pennsylvania, Rhode Island, Tennessee, Texas, Vermont, Virgin Islands, West Virginia, and Wyoming. Id.
52 Id.
Circuits in *Time Oil* and *Wasatch* considered it, they contribute to the doubt about using § 3-121 as a salient factor for disallowing a deduction. Moreover, additional criticism is found in Tax Court Judge Irwin's dissent in *Williams*; he clearly indicated that the UCC should not be applied. Most importantly, § 3-121 is arguably not relevant to the question because it does not weaken the contention that a promissory note, under certain circumstances, may be a cash equivalent. This is true notwithstanding the fact that the jurisdiction in question may have adopted Alternative B, or that the note is not payable at a bank. For example, the note may be readily convertible into cash because it is negotiable, payable on demand, secured, or guaranteed.

The Seventh Circuit also cited "practical considerations" for its narrow construction of the § 404(a) payment requirement. It stated that one advantage to their holding is that valuations of the notes would not be required. At the same time, however, the court admitted that such valuations are required when property is contributed to a profit-sharing trust. Yet no justification was offered by the court for allowing deductions for property contributions, which also require valuations, and prohibiting deductions for promissory note contributions. The court might respond by stating that such a rule of administrative convenience is justified because of its interest in the prevention of entangling the federal courts with difficult and imperfect valuation decisions. This response, however, will provide little solace to a company believing that the delivery of a promissory note constitutes payment for purposes of § 404(a)(6).

Perhaps a better rationale for the *Williams* decision is one that focuses on the trustees' lack of independence. As noted, three of the four trustees of Don E. Williams Co. were the principal shareholders of the company. In addition, some of these shareholders had interests in the collateral and each personally guaranteed the note. Although the court's reasoning did not indicate that significance was given to these facts, they may nevertheless have had an effect on the court's decision. Due to this assimilation of the company's shareholders and the fund's trustees, the possibility existed that the trustee shareholders might not have been ready, willing, or able to demand payment or otherwise transform the note to cash. Therefore, the essential cash equivalence and the deduction were effectively destroyed.

It is also noteworthy that two Tax Court judges dissented in *Williams*, thus marking the first break by the Tax Court from its adherence to the *Logan* rule. Judge Quealy dissented on the ground that since three Courts of Appeals have reversed the Tax Court, the Tax Court should acquiesce on this issue. Judge

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53 Neither court considered § 3-121 or pre-UCC statutory counterparts, although the *Wasatch* Tax Court opinion did give some significance to the fact that the note was not payable at a bank. 37 T.C. at 820.
54 62 T.C. at 172-73.
55 See text accompanying notes 62-64 infra.
56 See text accompanying notes 65-67 infra.
57 Id.
58 Id.
59 Id.
60 See text accompanying notes 9-10 supra.
61 Id.
62 62 T.C. at 173.
Irwin, on the other hand, offered four reasons for his dissent. First, he believed that the delivery of the notes constituted a cash equivalence. Second, he stated that the notes are property in the hands of the holders and, thus, such a contribution is deductible under the Colorado National Bank of Denver rationale. Third, as previously indicated, he wrote that the UCC should have no application in federal income tax questions because it traditionally deals with only state law matters. Fourth, and possibly most persuasive, he narrowly construed the payment requirement of § 404(a): The legislative history of the section only requires payment, not cash payment.

Conclusion

The Seventh Circuit's decision in Don E. Williams and the Tax Court's position in Logan, Slaymaker, Time Oil, and Wasatch are problematical primarily because they fail to recognize that a promissory note may take on many of the important characteristics of a check. Depending on the circumstances and the terms of the note, the obligations may very well be a cash equivalent. The validity of this conclusion is especially genuine when the note is negotiable, or as in Williams, is payable on demand. Assuming there are no questions with respect to the maker's solvency, the delivery of a negotiable or demand note may be readily transformed into cash: the holder merely need sell the note or immediately demand payment.

Further, if the note is secured or guaranteed, it is more likely that the note should be construed as a cash equivalent. UCC § 9-503 provides in part:

> Unless otherwise agreed a secured party has on default the right to take possession of the collateral. In taking possession a secured party may proceed without judicial process if this can be done without breach of the peace or may proceed by action. If the security agreement so provides the secured party may require the debtor to assemble the collateral and make it available to the secured party at a place to be designated by the secured party which is reasonably convenient to both parties.

Thus, if a secured note is delivered and the maker defaults, under this self-help provision the trustee may be readily able to obtain possession of the collateral and transform it to cash. Arguably then, the effect of § 9-503 is to make such a note a functional equivalent to cash. In addition, if the note is guaranteed, it may likewise be a cash equivalent because the guarantor would be liable, depending on the guaranty terms, to satisfy the obligation upon default of the employer maker.

Finally, the property argument advanced in the Tax Court dissent by Judge

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63 Id. at 172-73. Cf. Cowden v. Commissioner, 289 F.2d 20 (5th Cir. 1961).
64 Id. at 172.
65 It is noteworthy that this reasoning has been used for some time in the constructive receipt of income area. See, e.g., Lavery v. Commissioner, 158 F.2d 859 (7th Cir. 1966); Charles F. Kahler, 18 T.C. 31 (1952); Rev. Rul. 68-126, 1968-1 CUM. BULL. 194; J. Crommie, The Law of Federal Income Taxation § 82, at 229 (2d ed. 1973).
66 UCC § 9-503.
Irwin in *Williams* is also well considered. As stated above, Judge Irwin considered the delivery of a note to be property in the hands of the holder of the note and thus a deductible contribution because the delivery of property to a profit-sharing trust is sufficient payment for purposes of § 404(a).\(^{68}\) This assertion is persuasive because, if the policy of § 404(a) is to have the trust receive an item of value, it makes no difference whether a note, check, cash, or tangible property is delivered to the trust. Simply stated, if a note has a definite value, there is no consequence to allowing the deduction.

*Joseph L. Baldino*

**FEDERAL INCOME TAXATION—SECTION 7805—AN OUTSTANDING IRS ACQUIESCENCE DOES NOT PRECLUDE THE IRS FROM ACTING IN CONTRAVENTION OF THE ACQUIESCENCE; SECTION 451—THE CLAIM OF RIGHT DOCTRINE IS APPLICABLE EVEN THOUGH THE TAXPAYER EXECUTES AN OBLIGATION TO REPAY THE FUNDS RECEIVED UNDER A CLAIM OF RIGHT.**

*Quinn v. Commissioner*

Howard Quinn was chairman of the board of directors of Beverly Savings & Loan Association (Beverly). His wife, Charlotte, was also a director and the senior vice-president. Mr. Quinn leased real property to Beverly, and he suggested to the directors that Beverly prepay rent in order to take advantage of his 5% discount offer. Before the directors decided the matter, Howard fraudulently obtained a check in the amount of $553,166 from Beverly for the rent prepayment.\(^1\) The directors demanded repayment from Howard by a certain date, yet Howard had repaid only $53,166 by the date; he gave a $500,000 note, secured by his personal shares in Beverly for the remainder. The Quinns, cash basis taxpayers, filed a joint return for the year 1973. None of the rent prepayments were included in their taxable income. However, they did acknowledge the transactions on their return, stating that they believed the prepayments, fraudulently secured, constituted a loan, and were thus not includible in gross income.

The IRS disagreed with this contention. The Service relied on the "claim of right" doctrine, which requires that any amount received by a taxpayer under a legitimate claim of ownership is includible in gross income. The Service viewed the subsequent surrender of the claim and the simultaneous recognition of the obligation to repay the funds as inconsequential.

The Tax Court, in affirming the IRS,\(^2\) only briefly discussed the Service’s claim of right doctrine argument. This was due to Howard’s concession that he was taxable on the $500,000 received from Beverly. Consequently, the Tax

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68 See text accompanying notes 62-64 supra.

1 Howard was later indicted and convicted of fraud under 18 U.S.C. § 657 (1970) as a result of these transactions. United States v. Quinn, 398 F.2d 298 (7th Cir.), cert. denied, 393 U.S. 983 (1968).

Court focused instead on Charlotte's claim of protection under the innocent spouse provisions of § 6013 of the Internal Revenue Code. Relying on that provision, Mrs. Quinn attempted to avoid liability for the tax due on the $500,000 by claiming that she signed the joint return totally ignorant of the transactions between Howard and Beverly. The Tax Court, however, similarly found this contention to be without merit and ruled that the $500,000 was includible.

Although the Court of Appeals for the Seventh Circuit affirmed the Tax Court, it focused on different issues. The court summarily dismissed Charlotte's appeal of the Tax Court's ruling with respect to § 6013. It concentrated instead on two different questions, the first of which was not initially raised by the Quinns in the Tax Court. The two issues before the Seventh Circuit were: (1) whether the Commissioner is precluded from asserting that the advance prepayment is taxable because of an acquiescence in an opinion contrary to his present position; and (2) whether the claim of right doctrine requires the recognition of the rent prepayment as income in the year received even though Howard Quinn executed a note documenting his obligation to repay the funds. As regards the first issue, the Quinns argued that Willis W. Clark was controlling since the IRS never withdrew its acquiescence to that decision. On the second issue, the Quinns contended that the recognition of the obligation to repay exempted the funds from inclusion in gross income.

Neither contention persuaded the appellate court. The Seventh Circuit held that the prior IRS acquiescence was not a bar to allowing its claim of taxability of the rent prepayments in the year the note was executed. Moreover, the court applied the claim of right doctrine in finding that the $500,000 was taxable in the year received.

Reliance on Outstanding IRS Acquiscences

The Seventh Circuit correctly determined that the IRS's practice of stating their acquiescence or nonacquiescence to a Tax Court decision is designed to aid their own officers and agents in dealing with similar issues. This practice is not intended to aid taxpayers in planning prospective transactions. Indeed, the sole function of an acquiescence is to offer guidelines for Service personnel. Thus, as publications intended for internal use only, acquiscences are not binding on either the taxpayer or the Commissioner.

As indicated previously, the Quinns' reliance on the Service acquiescence to

3 INT. REV. CODE OF 1954, § 6013(e) provides that a spouse who signs a joint return may be relieved of liability for an amount which was omitted from the return if she establishes that she did not know of, and had no reason to know of, the omission. Since Howard conceded the includibility of the funds, the Quinns argued the applicability of § 6013.
4 Quinn v. Commissioner, 524 F.2d 617 (7th Cir. 1975).
5 Id. at 621.
6 Willis W. Clark, 11 T.C. 672 (1948), nonacq. 1949-1 CUM. BULL. 5; acq. 1953-1 CUM. BULL. 3.
7 524 F.2d at 621.
8 A warning to this effect is published at the beginning of each Cumulative Bulletin. See, e.g., 1974-2 CUM. BULL. 3.
9 5 P-H 1976 FED. TAXES ¶ 41,361.
Willis W. Clark proved unpersuasive to the Seventh Circuit. Clark; a case involving facts similar to Quinn, held that the taxpayer was entitled to exclude the amounts received under the claim of right. Since this acquiescence was neither modified nor rescinded by the Service at the time of the Quinn transactions, the Quinns reasoned that the Service was barred from acting in contravention of its previous acquiescence. The Seventh Circuit found this reasoning unpersuasive and permitted the Service to litigate the issue of includibility despite the Quinns’ claim of detrimental reliance.

The court was persuaded by the Service’s argument that § 7805 of the Code authorizes Service action in contravention of previous acquiescences. Section 7805 empowers the Commissioner to prescribe any rule or regulation including acquiescences needed for enforcement of internal revenue laws. These positions may be executed or repealed retroactively without public notice. Nor does § 7805 provide for the protection of good-faith taxpayers who have relied on retroactively withdrawn Service statements. Thus, the Seventh Circuit properly concluded that the Service acted within the scope of its § 7805 authority in retroactively revoking its acquiescence to the Clark decision.

Although the Seventh Circuit adhered to the majority rule on this question, the court recognized the possibility of circumstances that could make it unconscionable for the Commissioner to prevail. Indeed, the court suggested that there are circumstances which make it advisable for the Service to make formal withdrawals of acquiescences. However, the Quinns simply failed to show that their situation warranted the application of the unconscionability exception. Noting that the Quinns failed to raise the detrimental reliance argument in the Tax Court, the Seventh Circuit presumably believed that the taxpayers were not aware of the IRS acquiescence in Clark until the appeal of their case.

The Seventh Circuit also properly recognized the nonbinding character of acquiescences by emphasizing that the tax laws are established by the legislature and not by administrative action. The Commissioner’s acquiescence in an erroneous decision of the Tax Court, such as the Seventh Circuit considered
Clark, cannot by itself bar the United States from collecting a tax due under a proper interpretation of the law. If this were permitted, federal tax legislation would be subordinated to administrative procedure.

There are two additional reasons supporting the Quinn court's rationale that the acquiescence is not binding. First, congressional intent and the likely resolution by the courts of questions regarding the Commissioner's discretion in retroactively revoking acquiescences is clearly stated in the Supreme Court's decision in Dixon v. United States. In ruling that the Commissioner did not abuse his discretion by retroactively revoking an acquiescence, the Supreme Court stated:

This principle is no more than a reflection of the fact that Congress, not the Commissioner, prescribes the tax laws. The Commissioner's rulings have only such force as Congress chooses to give them, and Congress has not given them the force of law.

Clearly, then, an expression of the Commissioner's assent or nonassent does not supersede congressional legislation. Secondly, taxpayers are provided with notice of the exact nature of an acquiescence sufficient to apprise them of the likelihood of retroactive retraction. Judicial decisions and the introductions to the Cumulative Bulletins within which IRS acquiescences appear admonish taxpayers of the impropriety of relying on outstanding acquiescences. Hence, taxpayer contentions of equitable estoppel are seldom persuasive.

Thus, Quinn stands for the proposition that it is unsafe to rely on IRS acquiescences. Moreover, private letter rulings are available to alert taxpayers of the Service's position. Since these rulings are expressly intended for that

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15 By refuting Clark's leading offspring, United States v. Merrill, 211 F.2d 297 (9th Cir. 1954), the Seventh Circuit presumably found Clark incorrectly reasoned. See note 10, supra.
16 Id.
17 381 U.S. 68 (1965).
18 Id. at 73.
19 See note 8, supra.
20 4 P-H 1976 FED. TAXES ¶¶ 33,933, 33,949, and 33,952. This discussion should not, however, lead to the conclusion that the Commissioner's discretion on this point is unlimited. The Seventh Circuit recognized that there may be circumstances which would make it unconscionable for the Commissioner to prevail. 524 F.2d at 623. Further, numerous cases demonstrate the judicial willingness to delimit the Commissioner's discretion when used discriminatorily. See, e.g., United States v. Kaiser, 363 U.S. 299 (1960), and International Business Machines Corp. v. United States, 343 F.2d 914 (Ct. Cl. 1965).
21 Acquiescences and letter rulings are only two types of publications issued by the Service. Other pronouncements, such as Treasury Regulations and Treasury Decisions, have been given the force of law. But unlike acquiescences and letter rulings, they are not issued to individual taxpayers; instead, they are published in the Federal Register. J. CHOMMIE, FEDERAL INCOME TAXATION § 4 (1968).

The function of an acquiescence is explained in the text accompanying notes 14-20 supra. Letter rulings, as described in Rev. Proc. 67-1, 1967-1 CUM. BULL. 5, are issued by the National Office in response to individual taxpayers' requests for a decision on past or contemplated transactions. "Determination Letters" are issued by District Directors in response to taxpayers' requests for a ruling. These letters, however, are generally limited to rulings based on principles and precedents previously announced by the National Office. J. CHOMMIE, FEDERAL INCOME TAXATION § 4 (1968). The National Office retains exclusive jurisdiction over prospective transactions and novel issues.

The Quins neglected to request either a private letter ruling or a determination letter, and chose to rely on an outstanding acquiescence. In view of the nature of Service acquiescences and the availability of Service opinions through other types of pronouncements, this was not a prudent election.
purpose, and outstanding acquiescences are not so intended, it is advisable for taxpayers to seek rulings in all questionable situations. If the IRS still intends to acquiesce in the matter then the taxpayer will have current support for acting accordingly.

Claim of Right Doctrine

Although Quinn restates the prevailing view with respect to the acquiescence question, it conflicts with other circuits in its ruling on the claim of right issue. The Seventh Circuit chose not to follow previous decisions dealing with this matter in the Second, Sixth, and Ninth Circuits. Instead, the court ruled that under the claim of right doctrine the recognition of an obligation to repay a sum of money received under a claim of ownership does not render the receipt excludible from gross income.

The claim of right doctrine requires that any funds received under a claim of right without restriction as to their disposition are includible in gross income: it is only necessary that the taxpayer have a bona fide claim to the funds at the time of receipt. Thus, Quinn’s application of the doctrine so as to include the funds in gross income at the time of receipt is proper even though the claim to the funds was subsequently determined to be invalid.

Yet there is disagreement among the courts of appeals concerning the effect of a renunciation of the claim in the same year the funds were received. Decisions conflicting with Quinn hold that a renunciation within the same taxable year in which the funds were received renders the amount excludible from gross income. Quinn, however, presents a minority view on this issue. The court maintained that a renunciation has no effect on includibility because the existence of a bona fide claim at the time of receipt is the determinative factor; the claim’s existence for the entire tax period is inconsequential.

To best understand the Quinn rationale, it is essential to understand the difference between the cash and accrual methods of accounting. The accrual basis of accounting requires the recognition of income at the time the right to receive the funds is secured; it requires the recognition of liabilities when the obligation to repay arises. The cash basis, on the other hand, requires the recognition of income only when there is actual or constructive receipt of funds; expenses are deductible only when an actual cash distribution is made.

The Quinn court’s recognition of the difference between the cash and accrual methods distinguishes that case from other cases that have decided the question. United States v. Merrill, the leading case in opposition to Quinn, is

22 Frelbro Corporation v. Commissioner, 315 F.2d 784, 787 (2d Cir. 1963).
23 Lashell’s Estate v. Commissioner, 208 F.2d 430 (6th Cir. 1953).
24 United States v. Merrill, 211 F.2d 297 (9th Cir. 1954).
26 Id. at 424.
27 See notes 22-24, supra.
30 Treas. Reg. § 1.446-1(c) (1973).
31 United States v. Merrill, 211 F.2d 297.
suspect because it ignores that distinction. In Merrill, the taxpayer, as the executor of his wife's estate, erroneously made overpayments of executor's fees to himself in two consecutive tax years. Prior to the close of the second tax year, the erroneous overpayments were discovered and the taxpayer recognized a liability on his books for both amounts. The Ninth Circuit held that the original payment was received under a claim of right and was properly taxed in the first year. With respect to the second overpayment, the court held that the recognition during the second year of the obligation to repay exempted the funds from inclusion in gross income in that year. The fact that the taxpayer was on the cash basis was ignored by the court. Instead, the Ninth Circuit improperly reasoned that since the purpose of the claim of right doctrine is the avoidance of the necessity of IRS mediation of conflicting claims between taxpayers, the doctrine is not applicable when the taxpayers solve the dispute themselves. This reasoning is incorrect since North American Oil, the Supreme Court decision creating the claim of right doctrine, did not state that the avoidance of Service mediation of taxpayer claims was the reason for the doctrine. Hence, it was improper for the Ninth Circuit to create an exception to the claim of right doctrine simply because that circumstance did not exist.

Nevertheless, subsequent decisions have bolstered the Merrill rationale. The common thread running through those cases is the recognition that within the tax year the taxpayer's net worth has not increased due to the accrual of a corresponding liability. Therefore, the circumstances existing during the entire tax period, rather than the mere existence of the claim of right at the time of receipt, is the relevant consideration in those cases. Thus, since the taxpayer increased his liabilities by an amount equal to the increase in his assets, these courts were reluctant to tax him on the full amount.

Despite the acceptance of the Merrill rationale by those courts, the Seventh Circuit in Quinn, finding Merrill to be incorrectly decided, refused to adopt its exception to the claim of right doctrine. Quinn persuasively refutes Merrill by attacking the two authorities on which the Ninth Circuit relied. The first was a questionable 1924 Board of Tax Appeals ruling, Carey Van Fleet. The application of that case is curious since it was decided prior to the Supreme Court decision in North American Oil. The facts in Van Fleet suggest that it would be decided differently under the claim of right doctrine as previously described.

In Van Fleet, a cash basis taxpayer received funds as a result of a mutual mistake for services he never rendered. Both parties recognized the mistake, but they agreed that the funds would be repaid only if the services were not sub-

32 Id. at 304.
33 286 U.S. 417 (1932).
34 See, e.g., J.W. Gaddy, 38 T.C. 943 (1962), in which the Tax Court recognized the legitimacy of the Merrill exception but did not apply it to those facts. See also Charles Kay Bishop, 25 T.C. 969 (1956).
35 The Tax Court in Gaddy stated: "The claim of right doctrine and the exception...in the Merrill case are both in essence predicated upon the principle of requiring taxpayers to account on the basis of an annual accounting period." 38 T.C. at 949.
36 524 F.2d at 624.
37 Id.
38 2 B.T.A. 825 (1925).
39 See discussion of the claim of right doctrine at text accompanying notes 22-26 supra.
sequently rendered. The Board of Tax Appeals recognized that funds received by a cash basis taxpayer are normally includible in gross income in the year of receipt. However, the court concluded that the existence of a mistake of fact exempted the funds from inclusion under normal cash basis principles. In contrast, the claim of right doctrine would require the inclusion of the funds. A factual determination that the funds were received under a claim of ownership and without restriction as to their disposition supports the applicability of the doctrine. Subsequent recognition of a mistake of fact and of an obligation to repay are inconsequential.\footnote{40}

The second authority cited by Merrill was Curran Realty Co., Inc. v. Commissioner.\footnote{41} Quinn found Curran equally unpersuasive because Curran focused on the accounting procedures used by the taxpayer and did not address the same issues that North American Oil decided. Curran dealt merely with the proper method of making adjusting entries to accrual basis accounts and ignored the issue of includibility.\footnote{42} A closer scrutiny of Curran suggests that it was properly disregarded by the Seventh Circuit in Quinn. In Curran, the taxpayer and his wife owned all the stock of a lessor corporation and of the lessee corporation. The lessor operated on the accrual basis, and made adjusting entries in its accounts to record a reduction in rent payments received from the lessee. The court's opinion focuses only on the propriety of those accrual adjustments,\footnote{43} and thus gives little support for Merrill's exception to the claim of right doctrine.

Quinn proffers a stricter interpretation of the claim of right doctrine than Merrill. In Quinn, the court held that any amount received during the year under a claim of right and without restriction as to its disposition is includible in gross income. Thus, the Seventh Circuit placed emphasis on the existence of a claim of right at the time of receipt rather than on the subsequent recognition of the obligation to repay the rent overpayment. For this reason, Quinn better comports with the policy of the claim of right doctrine that all funds received under a claim of ownership are includible in gross income in the year received. The execution of the note by the Quinns was not the equivalent of a cash basis disbursement. Therefore, the mere signing of a promissory note was not sufficient to constitute a cash basis expense; consequently, the recognition by the Quinns of their obligation to repay did not create a legitimate exclusion. To the extent that Merrill holds to the contrary, the Seventh Circuit found it incorrectly reasoned.

Additional support for the Quinn rationale is provided by § 446(a) of the Internal Revenue Code.\footnote{44} This section requires that income shall be computed

\footnote{40} 286 U.S. 424.
\footnote{41} 15 T.C. 341 (1950).
\footnote{42} Indeed, the one-page opinion provides only a brief discussion of this question and does not provide the support inferred by Merrill.
\footnote{43} 15 T.C. 341.
\footnote{44} INT. REV. CODE OF 1954, § 446 provides in part:

(a) General Rule.—Taxable income shall be computed under the method of accounting on the basis of which the taxpayer regularly computes his income in keeping his books.

(b) Exceptions.—If no method of accounting has been regularly used by the taxpayer, or if the method used does not clearly reflect income, the computation of taxable income shall be made under such method as, in the opinion of the Secretary
under the method of accounting on which the taxpayer regularly computes his income. Since the Quinns were on the cash basis, and the cash basis records income at the time of receipt of the funds, the rent prepayment that they received was includible. To allow them to exclude the funds because of a subsequent accrued liability is abhorrent to the principles of cash basis accounting.

Further support for this conclusion is found in § 451(a). This section requires that any item of gross income is includible in the year in which it is received, unless under the method of accounting used, such amount is to be properly accounted for in a different period. Clearly, proper cash basis accounting does not permit this; it requires inclusion in the year in which the funds were received. Hence, since the Quinns were cash basis taxpayers, the Seventh Circuit correctly applied this concept and held the rent payments includible.

Despite its satisfactory resolution of the claim of right question, Quinn appears problematic. Since the taxpayer is taxable on funds received under a claim of right even though he recognized an obligation to repay them, he may be required to pay tax on money over which he does not have dominion and control. Thus, under the Quinn rationale, it is possible that a taxpayer may be taxed even though no economic benefit has accrued to him.

This problem is mitigated, however. There are decisions holding that amounts repaid are deductible in the year of repayment if the taxpayer is on the cash basis; or if the taxpayer is on the accrual basis, the amounts repaid are deductible in the year in which the liability becomes fixed. Thus, since the Quinns are cash basis taxpayers, they may deduct amounts actually repaid by them.

Moreover, § 1341 of the Code provides for a tax computation formula that alleviates the harshness of the claim of right doctrine by permitting the taxpayer who actually repays funds received under a claim of right to compute his tax on an alternative basis. This alternative computation may result in a significantly
reduced tax liability. As the *Quinn* court noted, this relief provision was not present in the 1939 Code under which *Merrill* was decided; and its inclusion in the 1954 Code mitigates the rigors of the doctrine, thus rendering the *Merrill* exception nugatory.50

**Conclusion**

There is little likelihood of a decision in contravention of *Quinn* with respect to the question of the taxpayer’s reliance on an outstanding acquiescence. All courts that have decided the issue are in agreement with *Quinn* on that point and there appears no valid reason to dispute its holding that a taxpayer is not entitled to rely on an outstanding acquiescence in planning prospective transactions.

However, it is not clear whether *Quinn* will affect decisions in other circuits with respect to the claim of right issue. At least three other circuits have already adopted the *Merrill* exception, even though the same principles of law and theories of accounting basis examined in *Quinn* were available for consideration by those courts. Nevertheless, it is submitted that the interpretation of the claim of right doctrine expressed in *Quinn* should be adopted by all courts deciding the question.

John E. Glennon

FEDERAL STATUTES—HOBBS ACT—EXTENSION OF HOBBS ACT TO PURELY INTRASTATE EXTORTION ACTIVITIES

**United States v. Staszcuk**

In late 1970, William Harris planned to construct an animal hospital on property he owned within the thirteenth ward of Chicago. At that time, however, the intended site for the hospital was zoned so as not to permit such construction. As a result Harris approached Al C. Allen, known as the “zoning man,” and sought his help in effectuating the required zoning changes; in so doing, Harris paid Allen $5,500.00. In turn, Allen approached the then alderman for the thirteenth ward, Casimir Staszcuk; shortly thereafter a rezoning

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50 524 F.2d at 625.
51 Id.
proposal for the questioned piece of property went before the City Council. Several months after the initial meeting between Staszcuk and Allen, the latter paid Staszcuk $3,000.00. On that same day the rezoning proposal was subjected to a public hearing at which Staszcuk, at least impliedly, manifested support for the change. A short time after the hearing the Council announced its decision in favor of the proposed change, thus affording Harris the opportunity to construct his hospital as planned. Although advancing to the point of accepting construction bids from several contractors, Harris, for some reason, failed to go through with the hospital construction. Instead, Harris improved his property in a manner that did not require the zoning change. Nevertheless, Staszcuk was indicted for a violation of the Hobbs Act for extortion involving interstate commerce.1

At the trial, testimony was presented which sought to prove that had the hospital been built according to plan, it would have required construction materials obtainable only from out-of-state. It was on this testimony that the Government sought to provide the basis for a nexus between defendant's conduct and interstate commerce. Based on this connection the jury was able to find Staszcuk guilty of violating the Hobbs Act. A three-judge panel of the Seventh Circuit Court of Appeals, originally hearing the appeal, reversed the conviction, concluding that the relation between the extortioneer's activity and interstate commerce was too tenuous. Finally, the Seventh Circuit, sitting en banc, reheard the case, and reversed the decision of the panel, affirming the District Court's conviction.2

The Hobbs Act, under which Staszcuk was convicted, is an amended version of the Federal Anti-Racketeering Act of 1934.3 Essentially, this amended version provides that "[w]hoever in any way or degree obstructs, delays or affects commerce"4 by extortion "shall be fined not more than $10,000 or imprisoned not more than twenty years, or both."5 Extortion is defined as "the obtaining of property from another,"6 with his consent "either through the use of actual or threatened force or fear, or under color of official rights."7 While the existence of extortion was obviously essential to Staszcuk's conviction, the facts clearly supported the jury's finding on that issue. However, the more significant issue raised by this case was whether extortion was properly within the ambit of federal control. As is common among federal criminal statutes, the definition of the substantive offense incorporates a jurisdictional provision requiring a connection between the extortion and interstate commerce; thus, absent such an interstate commerce nexus, the extortion would be purely local in character and only within the prohibitory power of the state.

The issues presented in Staszcuk concerned both of the substantially different requirements found in the jurisdictional provision of the act: the first of the two

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2 United States v. Staszcuk, 517 F.2d 53 (7th Cir. 1975).
5 Id.
7 Id.
requirements is that the criminal activity "obstructs, delays, or affects" commerce; the second is that it must so obstruct, delay, or affect interstate commerce. The court in a somewhat confusing use of authority, failed to adequately distinguish and answer whether these jurisdictional requirements were satisfied. Instead, it appeared to express a novel extension of the Act so as to include extortion of noninterstate commerce, yet attempted to do so, at least partially, through traditional considerations.

A classical Hobbs Act violation would involve a demand for money, made with some threat of force or violence directed against someone engaged in interstate commerce. When the demand is not met, the threat is carried out with a resultant obstruction or delay in interstate commerce. For example, the destruction of an interstate transporter's carriers. Yet the facts of the present case reveal a different situation. Although clothed in more subtle circumstances, a demand and threat were present here. However, the demand was met, such that the threat never became a reality which could in turn obstruct or delay any aspect of commerce. Additionally, the commerce which was involved in this case, never reached the level of interstate. Despite this last fact, the court still managed to find a sufficient basis for applying the Act.

While the Act has traditionally been applied to situations in which the demand has been met, such that no actual obstruction or delay results, the Seventh Circuit's expansion of the Act's coverage to a completely intrastate transaction is unique. The court attempts to justify this expansion in two ways. First, the court applies traditional concepts associated with the Hobbs Act and is able to find a sufficient interstate connection, despite the true nature of the transaction. Secondly, and more importantly, the court is in fact expanding the meaning of the Act to coincide with the broadest scope of congressional power permissible under the commerce clause, despite limitations on such power which exist in the form of the jurisdictional provision of the Act itself. Thus the two major issues raised by this case are: the applicability of the Hobbs Act, as traditionally interpreted, to the actual situation presented here; and the general power of Congress to reach intrastate transactions such as those involved here, and further, whether the Hobbs Act was the appropriate vehicle for this novel expansion.

The first issue the court considered was the scope of the Hobbs Act with respect to activity that does not in fact obstruct or delay anything. Concentrating on the first element of "obstruct, delay, or affect," rather than the required presence of interstate commerce, it is clear the court correctly applied the statute. In Staszcuk there was no actual obstruction or delay of anything since timely payment was made by Harris; thus all his activity continued without obstruction. While the Hobbs Act speaks in terms of actuality—extortion which in fact obstructs or delays—it also prohibits those activities which only "affect" commerce. In other words, if the extortion involves activity which has the potential to obstruct or delay commerce, then such activity can be said to "affect" commerce within the meaning of the statute. The broad reading given the term

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“affect” by the court in this case, so as to include activity which only potentially obstructs or delays commerce can be justified in two ways. The court had the option of relying on the actual inference provided by the statutory language, or referring to prior courts’ interpretations of the Act’s historical purpose. The fact that the statute explicitly includes the substantive offense of extortion as well as attempted extortion supports reliance on the actual language. Extortion, by its very nature, usually results in no actual effect on commerce; the extortionist’s demands are met by the victim and the threat is never carried out. Attempted extortion, however, primarily involves a failure by the victim to meet the demands imposed upon him and, as a result, the threatened act becomes a reality; at that point commerce is actually obstructed or delayed. Thus by the statute’s inclusion of both offenses, as the court noted, the “inference is inescapable that Congress was as much concerned with the threatened impact of the prohibited conduct as with its actual effect.” It was the threat, therefore, as much as its physical manifestation which was the center of congressional attention.

The Seventh Circuit chose to rely, however, on prior judicial interpretations of the Act’s scope rather than on its own interpretation of the actual language of the statute. Earlier courts recognized, in considering this statute, that it was the intent of Congress to premise the Hobbs Act on the full extent of congressional authority under the commerce clause. From this recognition of the Act’s power base, courts have willingly interpreted the coverage of the Act so as to give full effect to the permissible scope of congressional power. Thus, it is universally recognized that “Congress has the power to deal with extortion or attempted extortion actually or potentially affecting interstate commerce.” In *United States v. Stirone*, the Supreme Court expressed its understanding of the scope of the Act in this regard as follows. If, as a result of carrying out the threats made against the victim’s business, that business (which was interstate in nature) had been interrupted, then interstate commerce would naturally have slackened. As a result, the jury was entitled to find that interstate commerce was saved from such a “blockage” by compliance with the extortionist demands; thus the very fact that interstate commerce needed to be “saved” was sufficient evidence of the effect of the activity. “It was to free commerce from such destructive burdens that the Hobbs Act was passed.”

Clearly then the Act extends its sanctions to any activity which has the potential to affect interstate commerce. However, the jurisdictional provision of the statute additionally requires that the effect, be it potential or actual, be on some element of interstate commerce, or at least have some relation thereto. The truly significant issue presented by *Staszcuk* evolves from the rather unusual factual situation presented; as a result of a voluntary discontinuance of plans to engage in a form of interstate commerce, no such actual commerce was ever

10 517 F.2d at 57.
12 *United States v. Pranno*, 385 F.2d 387 (7th Cir. 1967); *Hulahan v. United States*, 214 F.2d 441 (8th Cir. 1954); *Nick v. United States*, 122 F.2d 660 (8th Cir. 1941).
13 214 F.2d at 445.
14 561 U.S. 212.
15 *Id.* at 215.
16 *Id.*
involved. Thus the novel consideration is whether the Act's scope is so broad as to extend to a particular activity which, though itself intrastate in nature, because it is part of a larger class of activities which when considered as such a class are generally of an interstate character, or whether the Act is limited only to a particular act which is itself of an interstate nature. Although not expressly recognizing its decision as such, the court spoke in terms strongly intimating acceptance of this former proposition, yet it equally implicitly demonstrated its doubts as to such an approach. Thus the decision rests on an unclear doctrinal foundation.

Before continuing it is important to note that the "potential effect" cases which were previously discussed are not applicable to this issue, yet the Seventh Circuit failed to note this. Clearly, from the facts of those cases, though not from the court's opinion in Staszcuk, the "potentiality" by which the Act in the past has been extended is limited to the effect of the activity, and not the existence of an interstate commerce connection. In other words, while the courts have readily accepted the expansion of the Hobbs Act to include activities which only have the potential to affect interstate commerce, the Act has not, until now, been extended to situations in which intra, not inter, state commerce exists, on a similar rationale that the potential for interstate commerce was sufficient. Closest perhaps to the situation presented here is that found in United States v. Hyde.17 That case involved completed extortion of several companies, some of which were not actually engaged in interstate commerce at the time of the extortion. Addressing the need for interstate commerce, the Fifth Circuit noted:

Neither the statute nor the constitution requires that the company be engaged in an interstate transaction at the moment of the extortion to support federal jurisdiction. A reasonable reading of the statutory language "in any way or degree obstructs, delays or affects" interstate commerce is that it includes preventing the establishment of an organization that will engage in such commerce.18

However, the companies involved did in fact participate in some form of interstate commerce within a year of the extortion demands, a fact known to the court and presumably influencing its consideration of any factor of potential interstate commerce. The facts evolve similarly in each of the other cases cited by the Seventh Circuit dealing with potentiality under the Hobbs Act; in each instance some element of actual interstate commerce is involved and thus provides an adequate jurisdictional basis for application of the statute. Thus, while it may be presumed that the court is not relying on these cases for supporting an extension of the Act's scope, yet the court's position is unclear on the matter.

In another reference the court intimated the basis upon which it was apparently relying in an attempt to extend the application of the Hobbs Act so as to include intrastate activity. The court noted that since the activity which prompted the statute is marketwide, and not strictly of local character, its

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17 448 F.2d 815 (5th Cir. 1971).
18 Id. at 836.
evaluation of both the intent of Congress and its power to implement that intent, requires more than a consideration of a consequences of the particular transaction disclosed by this record; it requires an identification of the consequences of the class of transactions of which this is but one example.\textsuperscript{19}

Thus the language employed by the court indicates its application of the "class of activities"\textsuperscript{20} test, an offshoot of the cumulative effect doctrine, established by the Supreme Court in \textit{Wickard v. Filburn}.\textsuperscript{21} \textit{Wickard} involved the constitutionality of a marketing penalty imposed by the Agricultural Adjustment Act of 1938.\textsuperscript{22} The defendant in the case had sowed and harvested an amount of wheat in excess of his quota under the Act, and thus a penalty was imposed on him, despite the fact that the excess wheat was intended solely for private consumption. The defendant farmer's contention was that congressional power did not extend to purely intrastate activity where the effect on interstate commerce was, at best, minimal. In upholding the constitutionality of the statute, the Supreme Court found that congressional regulatory authority did extend to any local activity exerting a substantial effect on interstate commerce, and the mere fact that appellee's own contribution to the demand for wheat may be trivial by itself is not enough to remove him from the scope of federal regulation where, as here, his contribution, taken together with that of many others similarly situated, is far from trivial.\textsuperscript{23}

Therefore, although the defendant's retention of the excess wheat for personal consumption was by itself too trivial to "substantially effect" interstate commerce by lowering the overall demand for wheat in the market, federal jurisdiction was not completely foreclosed. The court found it sufficient that the combined effect of such actions by all persons similarly situated would result in the requisite substantial effect; each individual case brought before the court need not show substantiality, it was adequate the showing could be made with respect to the class as a whole.

On similar grounds the Supreme Court upheld civil rights legislation in the early 1960's. Most notable was the Court's conclusion affirming the constitutionality of Title II of the Civil Rights Act of 1964\textsuperscript{24} in \textit{Katzenbach v. McClung}.\textsuperscript{25} The Court reiterated the \textit{Wickard} doctrine to counter contentions that the individual actions prohibited by the Act had no substantial effect on interstate commerce. The only questions\textsuperscript{26} the Court need answer with respect to such congressional classifications are: (1) whether there was a rational basis for the congressional conclusion as to effect, and (2) whether the selected means were reasonably appropriate to attain the congressional purpose. If those questions are

\begin{itemize}
\item \textsuperscript{19} 517 F.2d at 58.
\item \textsuperscript{20} Atlanta Motel v. United States, 379 U.S. 241 (1964).
\item \textsuperscript{21} Wickard v. Filburn, 317 U.S. 111 (1942).
\item \textsuperscript{22} Agricultural Adjustment Act, ch. 30, 52 Stat. 31 (1938).
\item \textsuperscript{23} 317 U.S. at 127-28.
\item \textsuperscript{24} Civil Rights Act of 1964, 42 U.S.C. § 2000a (b) (2) (1970).
\item \textsuperscript{25} 379 U.S. 294 (1964).
\item \textsuperscript{26} 379 U.S. 241.
\end{itemize}
affirmatively answered, the Court need only determine whether the particular activity is part of that class. From this doctrinal basis there has evolved recognition of congressional regulatory power in instances where there is no effect on interstate commerce (as opposed to the de minimus situations in Wickard and Katzenbach) because no proof of an actual interstate relation is required.

This broader version of the doctrine, which is specifically alluded to by the Seventh Circuit in Staszczuk, is best exemplified by a recent Supreme Court case testing the constitutionality of the Consumer Credit Protection Act of 196827 (Loansharking Act). The emphasis under this formulation is not on a series of transactions combining to form a cumulative substantial effect on interstate commerce. Rather the concern is with establishing a class of activity as being within the ambit of federal control, since this is sufficient to eliminate the need for similar proof as to each particular transaction within that class. In Perez v. United States28 the defendant had been convicted under Title II of the Loansharking Act for his extortionate credit activities, although they were purely intrastate in nature. The thrust of the defense was the inadequacy of federal power to extend to a particular activity which was itself no way actually tied in with interstate commerce. Unlike the Hobbs Act, the Loansharking Act does not contain a jurisdictional provision requiring affirmative proof of a nexus between the activity involved and interstate commerce; rather the Act explicitly extends to all loansharking activity.29 Employing the "class of activities" rationale the Court upheld the Act. In so doing the Court referred to the standard in Wickard and a series of similar cases as support for its proposition that "[w]here the class of activities is regulated and that class is within the reach of federal power, the courts have no power to excuse as trivial, individual instances of the class."30

Thus, where the connection with interstate commerce exists in relation to the entire class of activities, there is no requirement for the particular transaction composing a part of that class to be so related to interstate activity. The nexus between the class as a whole and such commerce is transmitted to each element comprising that class. For proof of the class nexus the Supreme Court turned to the legislative findings and purpose set out in the Act. Basically these findings concluded that loansharking, as a whole, aids organized crime, and since organized crime affects interstate commerce, all loansharking must affect commerce as well, despite the lack of actual proof for each and every occasion.31 As a result of these legislative conclusions, the Court conceded congressional power over individual activities although purely intrastate in nature. A gap does exist in the congressional report in that there is no indication as how the purely local intrastate extortionate credit activity aids interstate crime or affects interstate commerce. But the gap is clearly not fatal since the Supreme Court adopted the same conclusory approach when it stated: "In the setting of the present case there is a

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31 See 49 Tex. L. Rev. 568 (1971).
tie-in between local loansharks and interstate commerce. Yet it too failed to divulge this tie-in.

It seems, however, that the Court's tolerance of this expansion of federal regulation into traditionally state concerns is based on more than just the explicit findings of the Congress as to the connection. As has been pointed out by several authors, the key to the Perez decision probably lies in the "inherent difficulty in establishing a connection between the loanshark and organized crime," thus necessitating the regulation of all loansharking in order to insure inclusions of that loansharking activity which is in fact a burden on interstate commerce. The acceptance of such over-inclusion is clearly established: "[W]hen it is necessary in order to prevent an evil to make the law embrace more than the precise thing to be prevented it may do so."

As noted previously, the Seventh Circuit makes reference to its consideration of a similar approach in defining the scope of the Hobbs Act. Although more implicit than explicit, it seems that such reasoning is the basis of the court's conclusion that "... the commerce element of a Hobbs Act violation—the federal jurisdictional fact—may be satisfied even if the record demonstrates that the extortion had no actual effect on commerce." Thus, the court stated that jurisdiction is satisfied by "showing a realistic probability that an extortionate transaction will have some effect on interstate commerce." Assuming that this is the thinking underlying the Seventh Circuit's decision, then clearly the commerce clause power attributed to Congress to control purely intrastate activities exists; the issue becomes whether the statute itself harnesses such power.

While the Perez case established the scope of congressional power in this regard, it is dependent upon each particular statute for implementation. It is the extent to which Congress manifested its intent as to the scope of the Hobbs Act in the jurisdictional provision that forms a basis for distinguishing it from the Consumer Credit Protection Act. The Loansharking Act is explicitly extended to intrastate activities, the result of congressional findings as to a sufficient class nexus with interstate commerce incorporated expressly into the act itself. The Hobbs Act, on the other hand, is similar to most older federal criminal statutes in that it incorporates into its provisions a jurisdictional element requiring specific proof in each case. Without proof of such an effect in each particular enforcement case under the act, all the elements of the crime are not present. Thus, despite various earlier court interpretations attributing to the Act the full scope of congressional power, application of the statute is limited as a result of the drafting technique. Concededly the legislative history of the Hobbs Act shows a purpose parallel to that of the Consumer Credit Protection Act since both are concerned

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32 402 U.S. at 155.
34 49 Tex. L. Rev. 568, 573 (1971).
36 517 F.2d at 58.
37 Id. at 59-60.
38 Id. at 60.
39 See note 22, supra.
with controlling racketeering.40 However, even if the court could base an extension of the Act on legislative history inconsistent with the face of the statute, there is no congressional finding supporting a nexus even between the class of regulated activities as a whole and interstate commerce. Doubtlessly this deficiency in the statute's drafting, as well as its supporting history, is due, at least in some part, to the narrower recognition given the scope of the commerce clause power at the time of the Act's creation, but the fact cannot change the Act's effect. Thus, any attempt to apply a "class of activities" test to the Hobbs Act to avoid the need for actual proof in particular instances is not only without justifiable support, but is also unanticipated.

Despite this apparent attempt by the court to apply the "class of activities" test, the court proceeded to review the actual evidence of the case to determine an actual interstate commerce connection.41 It is to this end the court points out that the jurisdictional inquiry "must focus on the situation at the time of the offense."42 On that basis the court held that the jury could find a sufficient interstate commerce connection if it determined that at the time of the extortion, there was a likelihood that interstate movement of goods would thereafter occur. The court said:

The evidence concerning the interstate parties' plans and expectations, and the contractors' testimony about the need to use out-of-state components to build an animal hospital in Illinois were all relevant to the commerce issue.43

Thus, the effect of the court's conclusion is that interstate commerce exists and therefore the Hobbs Act applies, if the victim merely intended to engage in some activity requiring interstate involvement; an intention to act is equivalent to the act itself and carries with it the identical consequences.

Criticism of this decision by the Seventh Circuit rests on the opinion itself, more so than on the Court's ultimate decision. Indeed, while it appears that the court itself recognized the importance of the intra/interstate commerce issue raised by the facts of this case,44 it failed to clearly support its approach to the problem. The court only intimates the possible applicability of "potential effect" cases on the second issue; at least it does nothing to dissuade an observer of its consideration of their applicability. Stronger though is the court's use of language reflecting the suitability of the "class of activities" test. Thus by intimating the applicability of this approach, the court is presumably extending the act so as to require no actual proof of an interstate conviction in each instance of enforcement under the Act. Then, adding to the confusion, is the court's finding of an actual interstate commerce conviction in this case—a finding totally unnecessary if the Perez standard does accurately apply. Perhaps the court, while intending such an extension of the act, was cautious and felt it necessary to employ both the traditional as well as the modern commerce formulations. In any

41 517 F.2d at 60.
42 Id.
43 Id.
44 517 F.2d at 55.
event the lack of a clear controlling basis for its ultimate conclusion renders the case of questionable precedential value.

Finally, a somewhat peripheral issue raised by this case is the desirability, apart from the rationale, of the ultimate conclusion. The "class of activities" test, as applied in Perez and as suggested in Staszcuk, represents perhaps the latest examples of federal encroachment on areas of traditionally state concern. Recent years have seen a considerable increase in the scope of federal power, particularly that premised upon the interstate commerce clause. Some of that has been undeniably necessary, such as governmental attempts to insure basic rights to all citizens; other extentions of power have been less so. It would appear that application of federal power under the Hobbs Act in the Staszcuk case falls into the latter category. Whether based on the "class of activities" approach, or on the actual nexus which the Seventh Circuit considered sufficient, the need, as well as the justification for federal control is severely strained. With this demise of effective constitutional limitations on congressional power, the only real check on further governmental encroachment is political. Perhaps Professor Stern was correct in noting: "Since Congressmen and Senators come from the state and are usually not anxious to impinge unduly on local prerogatives, there may be little reason to fear that Congress will undermine local authority without good cause." But, in any event, the latest interpretations of the scope of the commerce power render it practically limitless, and the burden is on Congress to exercise it wisely.

John Gaal

LABOR LAW—Exercise of an Exception to a No-strike Clause Prior to Arbitration Constitutes a Breach of a Union's Collective Bargaining Agreement.

*Western Publishing Co. v. Local 254, Graphic Arts Int'l Union*

In this decision, the Seventh Circuit has indirectly addressed the sensitive area of the labor injunction. While Western does not directly consider the injunction issue as it was not raised on appeal, it does implicitly sanction the ready availability of a labor injunction, in establishing a new procedure to promote labor arbitration. Western requires an arbitration hearing as a prerequisite to a union strike under an exception to a "no-strike" clause in a collective bargaining agreement. It is in the enforcement of this dictate that the Seventh Circuit becomes ensmeshed in the controversial area of the labor injunction. Without the availability of an injunction to prohibit work stoppage prior to arbitration, the Seventh Circuit's directive of preliminary arbitration is virtually ineffective. Yet, as will be shown, the ready availability of the injunction will, ironically, defeat the objective of the Western case, the promotion of arbitration. If the inference that the Seventh Circuit indirectly sanctions liberal use of the labor injunction is accurate,

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45 Stern, *supra* note 33, at 283.

1 522 F.2d. 530 (1975).
then the analysis and reasoning of the decision must be closely scrutinized.

The collective bargaining agreement controlling the conduct of Western and Local 254 contained both no-strike and arbitration provisions. An exception to the no-strike provisions allowed the union to refuse to handle struck work. On April 3, 1973, a strike at Western's Missouri plant forced Western to shift the publication of the magazine, Easyriders, to the Racine, Wisconsin, plant. Realizing that the publication of this magazine might arguably be considered struck work, the company delayed production for discussion with the union. These conversations, held between May 8 and May 14 of 1973, were deemed fruitless by the company, and on May 14, the Easyrider work was assigned. The union refused to handle the work, and on the afternoon of May 14 the company filed an action under § 301 of the Labor Management Relations Act, seeking injunctive relief and damages. The district court granted summary judgment in favor of the union on the damages issue, and correspondingly denied injunctive relief. On appeal, the company raised only the issue of damages. The Seventh Circuit reversed the district court, finding the union in breach of the arbitration clause of its collective bargaining agreement. The court ruled that before the union could exercise its right to refuse to handle "struck work," the disputed character of the work had to be arbitrated.

The court, however, could not grant damages to the company since damages were not ascertainable until the nature of the work at issue was resolved. The company would not have incurred any damage if arbitration determined that the union was authorized under the "no-strike" exception to cease work. Therefore, the Seventh Circuit remanded the case to the district court for a determination of whether the work stoppage was authorized.

Ostensibly then, Western held that an exception to a "no-strike" provision in a collective bargaining agreement may not be exercised prior to an arbitration concerning the validity of this exercise. The district court decision indicates that this is not an established principle. Indeed, the district court was so confident that the failure of the union to arbitrate prior to its work stoppage did not constitute a breach of the "no-strike" provision, that the court summarily dismissed the case against the union. In so ruling, the court declared: "It should be noted, . . . that employee members could refuse to perform the alleged struck work pending the outcome of a grievance arbitration test case without fear of violating the 'no-strike' provision."
Western seeks more than requiring a union to arbitrate. Union liability under § 301 of the Labor Management Relations Act already provides for specific performance or damages if a union wrongfully refuses to arbitrate. Thus, these sanctions provide some assurance that a union will eventually arbitrate. Western, however, seeks to enforce arbitration prior to a strike, prohibiting prearbitration strikes. In prohibiting strikes prior to arbitration, the courts have recourse to § 301 damages or injunctions, provided a narrow set of circumstances is met. Damages are awarded under § 301 only for actual loss incurred by the employer. Thus, by breaching its collective bargaining agreement by striking prior to arbitration, the union must pay for the damages caused by strikes not authorized under "no-strike" exceptions. However, subsequent arbitration must be pursued to determine if the exception was properly exercised. If the exercise was proper, then the employer has suffered no damage as the union was within its contractual rights to refuse to work. As noted by the Western court:

The Company has suffered no damage, however, unless it is also ascertained that "Easyriders" was not struck work, and therefore a job that members of the Union were required to perform. The district court did not reach that question and, consequently, we remand for a determination of that issue.9

Prior to Western the union was faced by the same possibilities; if subsequent arbitration proved that the union improperly stopped work, it had breached its collective bargaining agreement thereby incurring § 301 liability for strike damages. Naturally, prior to Western, unions would weigh the prospect of damages versus the probability of an arbitration victory in considering the viability of a strike. Unions would rarely order a strike unless they were confident of winning at arbitration, consequently incurring no damage liability. Inasmuch as the damage sanction is the same post-Western as it was pre-Western, i.e. liability for actual loss, it is difficult to see how § 301 damages will encourage preliminary arbitration. Post-Western, a union will still call a strike when it is confident of winning the arbitration.

Moreover, unions do have a substantial incentive to disobey preliminary arbitration orders. An immediate strike by the union will preserve its right to strike under the "no-strike" exception; these exceptions involve very specific issues, and the right to strike must be exercised immediately to prevent mootness. For example, in the Western case, the Easyrider work may have been completed before arbitration proceedings determined that the union had a right to strike. Thus, unions will exercise their "no-strike" exceptions prior to arbitration because, "... it would be too late to apply a decision in its favor to work already performed while awaiting the outcome of the arbitration process." Inasmuch as the union would not call the strike unless it was confident of arbitration success, it is difficult to see that Western's treatment of § 301 damages will create any new incentive for foregoing prearbitration strikes.

19 522 F.2d at 533.
20 Id.
An injunction, as opposed to damages, would compel prestrike arbitration. If its strike were enjoined, continued refusal by the union to arbitrate would mean continued work by the union without recognition of its “no-strike” exception. Because of the nature of the “no-strike” exceptions, the opportunity for exercise of the exception is fleeting; therefore, continued refusal to arbitrate by the union may effectively destroy the right to strike exception.

Despite the apparent necessity of a readily available injunction to implement the dictates of *Western*, the Seventh Circuit cites *Boys Markets, Inc. v. Retail Clerks Union, Local 770* to the effect that injunctive relief is not appropriate as a matter of course. *Boys Markets* held that an injunction will issue in a labor case only in a narrow set of circumstances. Thus, if *Western* follows the *Boys Markets* dictate, injunctions will rarely issue to prohibit strikes. Since *Boys Markets* was decided prior to *Western*’s directive of preliminary arbitration, the narrow circumstances in which *Boys Markets* would allow an injunction were not determined with regard to preliminary arbitration. *Boys Markets*, though, did clearly restrict the issuance of an injunction to instances of unions economically coercing employers to forego arbitration. Accordingly, if courts sympathetic to *Western*’s rationale faithfully follow *Boys Markets*, the few cases in which injunctions will be allowed will preclude effective implementation of *Western*’s expanded arbitration requirement.

The significance of *Western*, then, is found in the Seventh Circuit’s citation of *NAPA Pittsburgh, Inc. v. Automotive Chauffeurs, Parts and Garage Employees, Local 926* as precedent for requiring arbitration prior to an exercise of a right to strike exception. *Western* was explicit in its intention to cite *NAPA* solely for this proposition. Nonetheless, it is significant that *NAPA* enforced its preliminary arbitration dictate by issuing an injunction prohibiting prearbitration strikes. Since *Boys Markets* would allow an injunction only where the union was using the strike as an economic truncheon to dissuade the employer from pursuing arbitration, *NAPA* necessarily stands for an expansion of the grounds upon which an injunction may issue in a labor dispute. Thus, the citation of *NAPA* by *Western* raises the question of whether *Western* endorses *NAPA*’s expansion of the grounds for issuing a labor injunction. The fact that the adoption of *NAPA* would make *Western*’s arbitration requirement enforceable lends credence to the conclusion that *Western* endorses *NAPA*. To understand the nature and significance of this expansion, it is necessary to review the history of the injunction in labor law.

22 The Union’s arguments apparently do contain the underlying assumption that we must evaluate these equitable considerations because it follows from the fact that the contract first requires arbitration that an injunction to enjoin the work stoppage automatically follows. But that is not necessarily the case. As stated in *Boys Markets*, supra, at 253-254, 90 S. Ct. at 1594:
Nor does it follow from what we have said that injunctive relief is appropriate as a matter of course in every case of a strike over an arbitrable grievance.

522 F.2d at 533.
25 522 F.2d 530, 532 (1975).
Availability of Injunctions in Labor Disputes

Early in the history of the labor movement, injunctions served as an effective means for employers to blunt labor’s most effective weapon, the strike.\textsuperscript{27} Courts readily assented to these injunctions as the strikers were seen as a menace to society.\textsuperscript{28} With the advent of labor’s rise to respectability, the strike became recognized as a basic right of labor.\textsuperscript{29} Consonant with this recognition, injunctions became more difficult to obtain. Finally, this policy of restricting injunctions became codified with the passage of the Norris-LaGuardia Act.\textsuperscript{30} Section 104 of the Act strips the federal courts of the power to issue injunctions in labor disputes.\textsuperscript{31} This congressional policy to discourage injunctions soon clashed with another congressional policy. Section 301 of the Labor Management Relations Act of 1947 authorized suits in federal courts for violations of labor-management agreement.\textsuperscript{32} The policy behind this section of the Act was to support binding arbitration clauses in collective bargaining agreements.\textsuperscript{33} As damages for a breach of a binding arbitration clause are awarded only when and if the employer shows actual loss, it was inevitable that an employer would seek to enjoin a union from striking over an arbitrable issue.

\textsuperscript{27} \textit{Commerce Clearing House, Labor Law Course} § 501, at 1054 (23d ed. 1976).

\textsuperscript{28} \textit{Id.}


\textsuperscript{30} Issuance of restraining orders and injunctions; limitation; public policy.


\textsuperscript{32} Enumeration of specific acts not subject to restraining orders or injunctions.

\textsuperscript{33} Suits by and against labor organizations

(a) Venue, amount and citizenship

Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organization, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

\textsuperscript{34} Declaration of purpose and policy

It is the policy of the United States that —

(b) The settlement of issues between employers and employees through collective bargaining may be advanced by making available full and adequate government facilities for conciliation, mediation, and voluntary arbitration to aid and encourage employers and the representatives of their employees to reach and maintain agreements concerning rates of pay, hours, and working conditions, and to make all reasonable efforts to settle their differences by mutual agreement reached through conferences and collective bargaining or by such methods as may be provided for in any applicable agreement for the settlement of disputes; . . .
In *Sinclair Refining Co. v. Atkinson*, the Supreme Court was faced with this clash of congressional policy. On the employer’s side was the congressional policy favoring arbitration; on the union’s side was the congressional policy of prohibiting the use of injunctions in labor disputes. The Supreme Court ruled in favor of the policy resident in the Norris-LaGuardia Act. Although a court could find that a union had breached its collective bargaining agreement and compel specific performance of the arbitration clause, the Supreme Court held that a court could not enjoin a union from striking during the arbitration proceedings. Section 301 of the Labor Management Relations Act did not amend the Norris-LaGuardia Act so as to allow an injunction where a union had violated a binding arbitration clause.

This decision did not contemplate the misuse of the strike as a means of circumventing the arbitration process. With injunctions prohibited, a union could strike and exert sufficient economic coercion to dissuade management from seeking judicial compulsion of arbitration. In just such a case, the Supreme Court reviewed and overruled *Sinclair*. In *Boys Markets*, the Supreme Court allowed an injunction to issue only when a collective bargaining agreement contained a mandatory arbitration procedure, the strike to be enjoined was over an arbitrable grievance, and both parties were contractually bound to arbitrate the underlying grievance. *Boys Markets* expressly noted the unusual circumstances of its exception to the Norris-LaGuardia injunction prohibition.

Subsequent to *Boys Markets*, the courts were circumspect in the application of the *Boys Markets* exception. However, recent cases have sought to broaden the *Boys Markets* exception to increasingly favor arbitration, making injunctions more readily available in labor disputes. Typical language in these cases is exemplified by the following interpretation of *Boys Markets* in *NAPA*:

*Boys Markets* . . . holds in essence that where a matter has been made arbitrable by the terms of a contract between the union and the company, an injunction may be issued to enforce this method of settling controversies between the parties.

This interpretation of *Boys Markets* subtly expands the exception formulated by that case. The *NAPA* interpretation of *Boys Markets* would allow an injunction whenever, “. . . a matter has been made arbitrable by the terms of a contract . . .” rather than only where the union is seeking to coerce the employer to avoid arbitration.

In *NAPA*, the union had the right to honor primary picket lines. The

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35 At the most, what is involved is the question of whether the employer is to be allowed to enjoy the benefits of an injunction along with the right which Congress gave him in § 301 to sue for breach of a collective agreement. And as we have already pointed out, Congress was not willing to insure that enjoyment to an employer at the cost of putting the federal courts back into the business of enjoining strikes and other related peaceful union activities.
36 Id. at 214.
37 “Our holding in the present case is a narrow one.” Id. at 253.
39 Id. at 323.
company was struck by a different union from a plant affiliated with the company.\textsuperscript{40} The union refused to cross the second union's picket lines, declaring them to be "primary picket lines."\textsuperscript{41} The company sought injunctive relief under the \textit{Boys Markets} exception so as to end the work stoppage and force a crossing of the picket lines.\textsuperscript{42} In \textit{Boys Markets}, on the other hand, the dispute between the union and employer was whether specific work had to be performed by union personnel. Despite a mandatory arbitration clause and "no-strike" provision in the contract, the union struck. The strike was clearly illegal, as there was no applicable "no-strike" exception available. The distinction, then, between \textit{NAPA} and \textit{Boys Markets} is that in \textit{Boys Markets} the cause of the strike was an arbitrable issue; in \textit{NAPA}, the strike was not called because of the union's disagreement with the company over an arbitrable issue, but because of the existence of the picket line. The union was not applying economic coercion on the company to avoid arbitration, rather the union was merely exercising what it saw as its right to engage in a work stoppage. As noted in the dissent to \textit{NAPA}:

\begin{quote}
The work stoppage was not begun, nor was it continued because of the union's disagreement with the Company over the arbitrable issue; that is, over its right to engage in a work stoppage. As a result, no concession that the Company could have made on this issue would have helped end the walkout. That goal could be attained by the Company only if it resolved its dispute with Local 110 and thus caused that union to remove its picket line.\textsuperscript{43}
\end{quote}

The dissent continued by noting:

\begin{quote}
Since this is true, the work stoppage could have exerted no pressure upon the Company to give up its fight on the arbitrable issue and forego arbitration since resolution of the arbitrable dispute prior to arbitration would have brought nothing in return: the work stoppage would have continued in any event.\textsuperscript{44}
\end{quote}

In short, although the work stoppage in \textit{NAPA} involved an arbitrable issue, it was not the result of an arbitrable issue. Without the underlying policy of enhancing arbitration, it is difficult to see how \textit{NAPA} can justify the expansion of \textit{Boys Markets}. \textit{Boys Markets} sought to end circumvention of the arbitration process.\textsuperscript{45} \textit{NAPA} extends this exception to a situation where the arbitration process is not threatened by strike.

\textit{Western} is like \textit{NAPA} in that complete capitulation by the employer that the \textit{Easyrider} work was struck work would have only authorized the strike under

\begin{itemize}
\item \textsuperscript{40} \textit{Id}.
\item \textsuperscript{41} \textit{Id}.
\item \textsuperscript{42} \textit{Id}.
\item \textsuperscript{43} \textit{Id.} at 326 (dissenting opinion).
\item \textsuperscript{44} \textit{Id}.
\item \textsuperscript{45} The very purpose of arbitration procedures is to provide a mechanism for the expeditious settlement of industrial disputes without resort to strikes, lockouts, or other self-help measures. This basic purpose is obviously largely undercut if there is no immediate, effective remedy for those very tactics that arbitration is designed to obviate.
\end{itemize}

a "no-strike" exception. In no manner would it have halted the union's work stoppage. Therefore, Western could not allow an injunction under the original Boys Markets criterion but only under the expansion of this criterion as provided by NAPA.

This expansion of the criterion on which an injunction may be issued in a labor dispute may have the practical effect of destroying the right to strike as provided by an exception to a "no-strike" provision. Theoretically, an injunction prohibiting a work stoppage prior to arbitration would not destroy the right to strike, but would merely delay the exercise of that right until arbitration had been concluded. In actuality though, this injunction may, at times, result in management's hesitancy to bring the case to arbitration. Conceivably, an employer may have everything to gain from avoiding arbitration, as he has obtained everything he wants from the injunction; he only risks losing if he proceeds to arbitration.\[46\]

Of course, it might be argued that granting an injunction merely transposes the parties that seek to avoid arbitration. Prior to Western, a union would delay arbitration as long as it deemed a strike advantageous. Commencement of arbitration could mean a victory for the employer and a directive to go back to work. Now, rather than have the union reluctant to arbitrate, management is the party seeking to avoid arbitration. This transposition is precisely the problem with the NAPA approach, as it is less supportive of arbitration to have the employer rather than the union reluctant to arbitrate. Unions have the prospect of paying damages for their work stoppage every day prior to arbitration. Thus, there is some incentive for the unions to seek arbitration, while management has no corresponding incentive. Therefore, the management may be able to delay arbitration until the controversy at issue has been terminated.\[47\] In Western, for instance, an injunction would have the effect of forcing the union to complete the Easyrider magazine. By the time all the employer's subterfuges had been surmounted, the work may well have been completed. Even if the employer sought arbitration in good faith, the time consuming arbitration proceedings would preempt the "no-strike" exception. Arbitration could only award the union the empty right to strike against work that had already been completed.

Moreover, despite the ability of a district court to prohibit excessive delay with its equitable powers, the practical effectiveness of these powers is questionable. Because they are equitable powers, there is no firm standard by which they are to be applied in such situations. In short, though equitable powers are eventually effective, they are not expeditious. As noted by the dissent in NAPA: "... We do not feel that there is any reasonable way that a district court can use this power to prevent significant delay when that goal is sought by one of the parties."\[48\]
Therefore, the trend as exemplified by NAPA and similar cases⁴⁹ may, at times, have the practical effect of abrogating the Norris-LaGuardia prohibition against labor dispute injunctions, at least where "no-strike" exceptions are involved.

Readily available injunctions compromise the union's position. This is reminiscent of the early years of the labor movement and one might inquire into the cause of this setback. Nominally, the motivating factor for this reversal is the advancement of arbitration.⁵⁰ As has been demonstrated, the cause of arbitration may actually be retarded by the substitution of the employer for the union as the party reluctant to engage in arbitration. The result of NAPA and its expansion of Boys Markets is to rob the union of its ability to exercise its collective bargaining agreement no-strike exceptions, while discouraging the best hope for ending labor disputes, arbitration. It would seem a wiser decision to read Boys Markets as a truly narrow exception to the Norris-LaGuardia anti-injunction policy which only allows an injunction to issue where the dispute is over an arbitrable issue.⁶¹ Such an exception is intelligent: it prohibits unions from using economic coercion to bypass arbitration, forcing an employer to capitulate rather than properly submit the issue to binding arbitration.

**Impact of Western**

Western then, seeks to require a union to arbitrate an issue termed arbitrable by the collective bargaining agreement before it engages in a strike. Such a pre-arbitration strike, if the arbitration board eventually found for the company, would result in "... an unnecessary resort to force...."⁵² However, as a practical matter, this dictate of the Seventh Circuit means nothing unless it is enforceable by an injunction. Thus, there is good reason to believe that the Western court in realizing this fact intended to endorse NAPA and its brethren. In establishing its requirement of arbitration prior to strike, Western cites both NAPA and Wilmington Shipping Co. v. International Longshoremen's Assoc., Local 1426.⁵³ These cases conclude that if the basis of a "no-strike" exception is an arbitrable issue, the union must arbitrate prior to ceasing work. More importantly, however, both of these cases upheld the issuance of an injunction against the union,⁴ thus exemplifying the need for injunctions to support "prior arbitration" dictates.

Finally, in fairness to the Seventh Circuit, its citing of Boys Markets for the proposition that injunctive relief is not appropriate in every strike concerning an arbitrable issue⁵⁵ indicates that the court does not intend to totally disregard the

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⁵² 522 F.2d 530, 532 (1975).
⁵⁴ 522 F.2d 530, 532 n.6 (1975).
⁵⁵ See note 19 supra.
policies behind allowing injunctions only in limited circumstances. Nevertheless, assuming that the Seventh Circuit will seek to make Western an effective dictate, the Seventh Circuit will practically endorse an expansion of the grounds for issuing a labor dispute injunction. It is ironic that a case that seeks to promote prior arbitration may have the effect of discouraging that very policy.

William J. Brooks, III

SECURITIES REGULATION—SECTION 16(b) — 10 PERCENT BENEFICIAL OWNERSHIP MUST EXIST PRIOR TO AN INITIAL PURCHASE FOR LIABILITY TO ATTACH

Allis Chalmers Mfg. Co. v. Gulf & Western Industry, Inc.

Seeking to acquire a controlling interest in Allis Chalmers, Gulf & Western on May 7, 1968 publicly announced to all Allis shareholders that pursuant to a registered exchange offer, it would purchase 3,000,000 shares of Allis common stock, which comprised more than 10 percent of Allis' outstanding stock. This acquisition was completed in late July. Shortly thereafter, Gulf & Western purchased an additional 248,000 shares of Allis stock from Oppenheimer Fund, Inc. in exchange for 496,000 unregistered Gulf & Western warrants. The closing date for this transaction was September 30, 1968. On the very day the Oppenheimer exchange was closed, Gulf & Western met with White Consolidated Industries, Inc., to discuss the possible sale of Gulf & Western's Allis holdings. On December 6, 1968, Gulf & Western sold its entire Allis holdings to White for a considerable profit.

Allis quickly countered and brought suit to recover this profit, claiming that

2 Under the proposed offer, Allis shareholders would receive for each share of Allis common stock the following: (a) $11.50 in cash, (b) $12.50 principal amount of a 6 percent subordinate 20 year nonconvertible debenture, and (c) 9/10 of a 10 year registered warrant to purchase G&W common stock at $55.00 per share. Id. at 339.
4 Oppenheimer received a guaranteed warrant price. See 527 F.2d at 339.
5 The court noted:

On September 13, 1968 Allis-Chalmers chairman Stevenson had on his own initiative met with Bludhorn and Judelson of Gulf & Western and had, according to his recollection at trial, told them that things did not look good for Allis-Chalmers. He refused to quantify the bad news for the Gulf & Western representatives in response to their specific questions, but he clearly disclosed to them his personal negative evaluation of the situation at Allis Chalmers. Stevenson's notes for this meeting reflected his belief at that time that the Gulf & Western people were "getting nervous" about their block of stock in Allis-Chalmers. At trial, Stevenson testified that he "had the feeling right then [at the September 13, 1968 meeting] that they were thinking about disposing of it."

Id. at 339-40 n.4.
6 Gulf & Western received from White 250,000 unregistered shares of White common stock plus $20,000,000 in cash and 180 day promissory note at 8.5 percent interest in the face amount of $93,680,000. Id. at 340.
it resulted from the use of inside information. After the district court found Gulf & Western liable for the profits realized from its purchase and sale of all 3,248,000 shares, the Seventh Circuit, reversing in part, held that § 16(b) liability attaches only when a party has insider status prior to the initial purchase or sale. Since Gulf & Western lacked any § 16(b) insider status prior to its initial purchase, the profits realized from the sale of the 3,000,000 shares were considered beyond the reach of the statute. However, Gulf & Western was held liable for the profits realized from the sale of the additional 248,000 shares, since that purchase was made after Gulf & Western had achieved insider status.

The Seventh Circuit further held that in determining the profit realized under § 16(b), the unsecured corporate note received by Gulf & Western should have been valued at face amount rather than at the lower fair market value at the time of sale; therefore, the district court also erred in its damage computation.

To better understand Allis, an analysis of § 16(b) is in order. Section 16(b) seeks to deter short-swing speculation by corporate insiders with access to information concerning their corporation unavailable to the rest of the investing public. To lessen the burden of proving actual misuse, § 16(b) contains a conclusive presumption that any insider who bought and sold securities within a six month period traded on the basis of inside information. Thus, insiders may be divested of profits realized from a purchase and sale, or sale and purchase, of

7 15 U.S.C. § 78(P)(b) (1970) [hereinafter referred to as § 16(b)]. Section 16(b) provides:

For the purpose of preventing the unfair use of information which may have been obtained by [a] beneficial owner, director, or officer by reason of his relationship to the issuer, any profit realized by him from any purchase and sale, or any sale and purchase, of any equity security of such issuer (other than an exempted security) within any period of less than six months, . . . shall inure to and be recoverable by the issuer, irrespective of any intention on the part of such beneficial owner, director, or officer in entering into such transaction of holding the security purchased or of not repurchasing the security sold for a period exceeding six months. . . . This subsection shall not be construed to cover any transaction where such beneficial owner was not such both at the time of the purchase and sale, or the sale and purchase, of the security involved, or any transaction or transactions which the Commission by rules and regulations may exempt as not comprehended within the purpose of this subsection.

8 372 F. Supp. at 576.
9 527 F.2d at 349.
10 Id. at 351-52.
11 Id. at 352. This comment, while touching on the damages issue, will focus primarily on the court's analysis of the liability issue, i.e., the time when insider status is required.
12 See note 7, supra.
14 An insider within the coverage of § 16(b) can be defined as "[e]very person who is directly or indirectly the beneficial owner of more than 10 percent of any class of any equity, security (other than an exempted security) which is registered pursuant to section 78(g) of this title, or who is a director or an officer of the issuer of such security..." Securities and Exchange Act of 1934, 15 U.S.C. § 78(P)(a) (1970).
15 The courts have consistently followed a "lowest-in-highest-out" method of calculating profits realized under § 16(b). Smolowe v. Delendo Corp., 136 F.2d 231, 237 (2d Cir.), cert. denied, 320 U.S. 751 (1943). The lowest-in-highest-out method has been described as follows: "[A]ll such transactions producing profits result in recovery, and any transaction producing losses during the same period may be ignored subject only to the limitation that a purchase or
their issuer’s stock where both the purchase and sale took place within a six month period, notwithstanding the absence of actual possession or use of insider information. Yet while it is clear from the language of § 16(b) that its application is limited to three classes of individuals, problems have arisen regarding the time at which statutory insider status is necessary as a prerequisite to liability.

Most of the cases involving beneficial owners, as was the situation in Allis, involve the question of insider status at the time of the first of two transactions occurring within a six month period. The critical issue is whether § 16(b) takes into account the transaction that makes a person a 10 percent beneficial owner.

Cases have focused on the specific statutory exemption providing that “[t]his subsection shall not be construed to cover any transaction where such beneficial owner was not such both at the time of the purchase and sale, or the sale and purchase, of the security involved . . . .” The phrase “at the time of” is susceptible to at least two distinct interpretations—“prior to” and “simultaneously with”—both of which narrow the statute’s applicability by specifying the time of accrual of beneficial owner status in terms of the original purchase. Therefore, depending on the interpretation adopted, a purchaser must be a beneficial owner either “prior to” or “simultaneously with” the transaction in question. Since the statute imposes liability only where a statutory insider participates in a complete purchase-sale scheme, this distinction is crucial.

Stella v. Graham-Paige Motors was the first decision construing the language of § 16(b)’s exemptive provision. Graham-Paige disclaimed liability, arguing that the words “at the time of” meant “prior to” and not “simultaneously with” the purchase and sale, and thus liability attached only on trades made after a party became a 10 percent owner. A divided Second Circuit, rejecting this argument, held that simultaneously with a purchase of more than 10 percent to become an insider, 16(b) applies and any sale within six months of that date is subject to its coverage. Subsequent cases in the Second Circuit have uni-

sale of a given number of shares may be matched only once against a transaction of the opposite character.” R. JENNINGS & H. MARSH, SECURITIES REGULATION CASE AND MATERIALS 1312 (3d ed. 1972).


17 See notes 7, 14 supra.

18 Loss, supra, note 16 at 1060.

19 15 U.S.C. § 78 (F)(b) (1970). While § 16(b) is applicable to directors, officers, and beneficial owners, the exemption provision applies only to beneficial owners. See Adler v. Klawans, 267 F.2d 840 (2d Cir. 1958).

20 Although both interpretations narrow the statute’s applicability, the “simultaneously with” construction severely limits the impact of the exemptive provision. See JENNINGS & MARSH, supra, note 15 at 1265.


23 232 F.2d at 300-01.
formly followed Stella,\(^\text{24}\) and its rule was adopted by most of the cases in other circuits in which the question arose.\(^\text{25}\)

In Provident Securities Co. v. Foremost McKesson, Inc.,\(^\text{26}\) however, the Ninth Circuit rejected the Stella approach and held that the purchase by which an outsider first achieves 10 percent beneficial owner status may not be considered for purposes of § 16(b) liability.\(^\text{27}\) Basing its decision largely on legislative history, the court reasoned that Congress intended § 16(b) to reach only those beneficial owners who both bought and sold on the basis of inside information, which is presumptively available to them only after they become statutory insiders.\(^\text{28}\) Consequently, the "prior to" construction of the statutory exemption would not subvert the purpose of § 16(b) but would rather be in accord with it.\(^\text{29}\)

It was against this conflicting background of previous judicial interpretations, that the Allis court determined whether the purchase by which one becomes a 10 percent beneficial owner is within the scope of § 16(b). While agreeing with Provident that for liability to attach one must be a beneficial owner prior to the initial transaction, the Seventh Circuit rejected Provident's analysis as conceptually erroneous.\(^\text{30}\) Based on its own reading of the legislative history of § 16(b), the court determined that the statute was designed to prevent speculation based on abuse of inside information associated with a specific two-part unitary transaction\(^\text{31}\) consisting either of a purchase and subsequent sale or sale and sub-


\(^{26}\) 506 F.2d 601 (9th Cir. 1974), aff'd, 96 S. Ct. 508 (1976). The Supreme Court, in Provident, thus sets to rest the debate concerning the meaning of the exemption provision in § 16(b) in favor of the "prior to" construction.

\(^{27}\) Id. at 614.

\(^{28}\) Id. at 608-14.

\(^{29}\) The court went on to clarify its holding stating that the "prior to" interpretation should not be applied to a transaction which is not an initial purchase but in reality a repurchase or a closing transaction. Rather, in the context of such transactions, "at the time of" should be interpreted to mean "simultaneously with" (id. at 614-15); thus creating a "chameleonic" definition of the simple phrase "at the time of." See Allis Chalmers Mfg. Co. v. Gulf & Western Indus., Inc., 527 F.2d 335, 346 (7th Cir. 1975).

\(^{30}\) 527 F.2d at 346.

\(^{31}\) The initial draft of § 16(b) stated:

(1) To purchase any such registered security with the intention or expectation of selling the same security within six months; and any profit made by such person on any transaction in such a registered security extending over a period of less than six months shall inure to and be recoverable by the issuer, irrespective of any intention or expectation on his part in entering into such transaction of holding the security purchased for a period exceeding six months.

Hearings on S. Res. 56 and S. Res. 97, Before the Senate Comm. on Banking & Currency, 73d Cong., 1st Sess., Pt. 15, at 6430 (1934) (emphasis added).

Id. at 347.

The court then concluded that the differences between the initial draft of § 16(b) and
sequent repurchase, and that Congress did not intend § 16(b) to apply to every separate purchase or sale to which some use of inside information is a theoretical possibility. Accordingly, the court adopted the following method of determining the application of § 16(b):

The question is whether one in a position of presumed access to inside information, that is, a director, officer, or a 10 percent shareholder of a corporation, combined a purchase and sale of his company's stock, in any order, within a period of six months, thereby producing a profit. If the answer is yes, the profit is attributable to the short-swing transaction and must be returned to the corporation.

Thus, one who is an outsider prior to the initial stage of the two-part unitary transaction lacks the prerequisite preexisting position of presumed access to inside information necessary to trigger the conclusive presumption that a coordinated short-swing transaction based on inside information has taken place.

Although the court reached its result independently of the exemption clause, it made clear that its construction of § 16(b) is consistent with the clause. Indeed, since the language of the clause is that of limitation and not of expansion, it is unlikely that the clause was meant to extend coverage beyond that originally intended. Furthermore, since Congress has deemed a short-swing purchase and sale to be a single transaction, § 16(b) does not require a court to examine each component of the short-swing transaction separately. Thus, the exemption clause requires a determination of beneficial ownership only prior to the initial purchase or sale, a conclusion consistent with the court's interpretation.

the finalized version of the section indicate that Congress intended the entire transaction to be examined to determine if there existed a potential for speculative abuse. Thus, the purchase and sale transaction is deemed not to be two transactions, but two component parts of a single unitary transaction. Id. at 347.

32 Id. at 348.
33 Id. at 347.
34 Id.
35 15 U.S.C. § 78 (P) (b) (1970) provides in pertinent part:
   . . . This subsection shall not be construed to cover any transaction where such beneficial owner was not such both at the time of the purchase and sale, or the sale and purchase, of the security involved, or any transaction or transactions which the Commission by rules and regulations may exempt as not comprehended within the purpose of this subsection.
36 527 F.2d at 348.
37 See note 31 supra.
38 The court's rationale is as follows:

Nothing in the legislative history or the generally accepted purpose of section 16(b) would suggest a reason for requiring a beneficial interest at the time immediately before or after the closing component of a short-swing transaction. Possession of more than a 10% interest at this late stage could in no way relate to the possibility of speculative abuse, since any speculative plan would be formulated prior to the opening purchase or sale, as we have indicated. Furthermore, requiring a beneficial interest in connection with the closing component encourages a dual-meaning approach to the words "at the time of," as evidenced by the opinion of the Ninth Circuit in Provident. 506 F.2d at 614. Such a dual-meaning approach defies rational justification in terms of legislative intent, and makes the words themselves almost meaningless. Moreover, in a limited class of cases, such a requirement would allow a careful insider to speculate with 16(b) impunity. Thus, where a beneficial owner anticipated a downward market, he could sell his entire interest and buy back only 9.9% within six months. With regard to this transaction he would never have been a beneficial owner at the time of the repurchase regardless of how the words "at the time of" might be construed, and yet as to that transaction he would have satisfied
As Allis demonstrated, Congress intended § 16(b) to create a special remedy applicable only in a limited situation; it did not intend § 16(b) to provide a general remedy for all insider abuses. To prevent an unfair imposition of liability, the statute's harsh conclusive presumption of liability should be strictly construed to apply only to those who can reasonably be expected to be in a position to have access to inside information. By setting out the three classes of statutory insiders and referring to information obtained by virtue "his relationship," Congress has established access derived from insider status as the only relevant access for § 16(b) purposes. One can hardly have such access before achieving such status. Therefore, a court must focus on the time prior to the initial transaction in determining if a person is within the scope of § 16(b).

Additional support for this construction of § 16(b) is found in the recent Supreme Court case of Foremost-McKesson v. Provident Securities Co. In Foremost the Court held that, in a purchase-sale sequence, a beneficial owner must account for profits only if he was a beneficial owner before the purchase. As in Allis, the Court looked to the legislative intent behind § 16(b) for guidance in determining if the initial transaction was within the scope of the statute. Relying on the exemptive provision, the Court determined that the phrase "at the time of" must be construed to mean prior to the time when the decision to purchase is made; consequently, the initial purchase by Provident was beyond the scope of § 16(b). Thus, based on the legislative history of § 16(b) and on the both section 16(b) presumptions: a) he initiated the transaction when he was an insider, giving rise to a presumption of access to inside information; b) he completed the transaction within six months, giving rise to a presumption that he used inside information to coordinate the sale and repurchase.

Id. at 348 n.13.


The Commission is, of course, aware that section 16(b) is only a partial deterrent to breaches of trust by officers, directors, and principal shareholders. The potentialities of abuse of fiduciary obligations by these corporate insiders are infinite. No complete catalog could ever be made of all the ways in which confidential corporate information can be put to profitable use. It would be virtually impossible to draft a statute that would defuse and prohibit all the variations by which officers, directors, or principal shareholders can profit from their trust. It seems to the Commission that the Congress was eminently wise in seeking to deal with the problem by expressly prohibiting only the most prevalent form of the abuse of inside information—trading designed to take quick profits from short-term market fluctuations.

40 A more general remedy for insider abuses is provided by rule 10(b)-5, 17 C.F.R. 240. 10(b)-5 (1975). Rule 10(b)-5, however, requires a showing that the person has in fact misused inside information. See, e.g., Shapiro v. Merrill Lynch, Pierce, Fenner & Smith, Inc. 495 F.2d 228 (2d Cir. 1974); SEC v. Texas Gulf Sulphur Co., 401 F.2d 833 (2d Cir. 1968), cert. denied, 394 U.S. 976 (1969).


For purposes of preventing the unfair use of information which may have been obtained by such beneficial owner, director, or officer by reason of his relationship to the issuer . . .

43 96 S. Ct. 508 (1976), aff'g Provident Securities Co. v. Foremost-McKesson, Inc., 506 F.2d 601 (9th Cir. 1974).

44 Id. at 519.
Supreme Court's analysis, it would appear that *Allis* was correct in its holding.\(^\text{45}\)

Furthermore, the Seventh Circuit's conclusion that the exemption clause requires one to be a beneficial owner only prior to the initial transaction appears consistent with the language of the statute requiring a court to treat the short-swing purchase and sale as one transaction.\(^\text{46}\) Rather than viewing the components of the short-swing transaction as separate occurrences, § 16(b) requires the court to examine the total transaction to determine if the insider dealings involved a potential for speculative abuse. This construction of the exemption provision is superior to *Provident's* confusing bifurcated approach which provided a “simultaneously with” interpretation of “at the time of” as applied to the closing transaction.\(^\text{47}\)

*Allis*, then, is significant for two reasons. First, the result was reached independently of the exemption provision. Through its focus on the scope of § 16(b), the court has freed the analysis of the time when insider status is required from the strictures of the exemption clause, which is limited to beneficial owners. This shift in focus potentially narrows the application of § 16(b) by making it possible to argue that initial transactions by directors and officers should likewise be excluded from § 16(b).\(^\text{48}\) Second, the Seventh Circuit's reinterpretation of the exemption clause removes much of the confusion initiated by the *Provident* bifurcated approach.

The significance of *Allis* for future decisions, of course, must be judged in light of the recent Supreme Court ruling in *Foremost-McKesson v. Provident Securities Co.*\(^\text{49}\) *Allis* and *Foremost* are in general agreement in holding that “at the time of,” as used in the exemption, requires beneficial owner status prior to the initial step of a short-swing transaction. *Allis*’ broader implications concerning its application to a case where a director or officer makes an initial transaction before obtaining insider status, however, remain unanswered.

\(^{45}\) See Hecker, Section 16(b) of the Securities Exchange Act: An Analysis of the Time When Insider Status is Required, 24 Kan. L. Rev. 255 (1976); Note, Beneficial Owner's Liability for Short-Swing Profits: Judicial Construction of Section 16(b)'s Exemption Provision, 9 Loyola L. Rev. 175 (1976); Note, Is the Purchase by Which One Becomes a Ten Percent Beneficial Owner a Statutory Purchase Within the Meaning of Section 16(b)?, 7 Rutgers-Cam. L.J. 104 (1975).

\(^{46}\) This interpretation, however, was criticized by Judge Stevens who stated: Although I voted against a rehearing en banc because I agree with Judge Swygert's basic conclusion that the fact of critical importance is the controlling person's presumed access to inside information at the time of his decision either to buy or to sell, I do not agree with his reading of the clause making § 16(b) inapplicable to "any transaction where such beneficial owner was not such both at the time of the purchase and sale, or the sale and purchase, of the security involved." I think the word "both" refers to both times, that is, the time of purchase and the time of sale, rather than to both a purchase-sale and a sale-purchase. The word "or" in the clause, as well as the Supreme Court's holding in *Reliance Electric Co. v. Emerson Electric Co.*, 404 U.S. 418, require this reading. This reading is not contrary to Judge Swygert's holding because Gulf & Western was a controlling person both at the time of its purchase of the 348,000 [sic] shares and also at the time of its sale of those shares.

\(^{47}\) See also Hecker, supra note 45, at 278 n.128.

\(^{48}\) See, e.g., *Adler v. Klawans*, 267 F.2d 840 (2d Cir. 1959).

\(^{49}\) See 96 S. Ct. 508 (1976).
Court failed to intimate its view concerning the Seventh Circuit's broader analysis when deciding Provident, although it did expressly acknowledge the court's approach. Nevertheless, regardless of the category of the insider, no one could possess the prohibited intent unless he was an insider prior to the initial transaction. Based on this criterion, Allis' broader implications appear correct, and should be followed.

Joseph V. Rizzi

IV. Federal Statutes and Government Regulation

LEGAL PROFESSION — STANDARDS OF COMPETENCY REQUIRED TO SATISFY THE RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL

*United States ex rel. Williams v. Twomey*

*Matthews v. United States*

*United States v. Jeffers*

The sixth amendment provides that "[i]n all criminal prosecutions the accused shall enjoy the right to . . . have the Assistance of Counsel for his defence." In *Powell v. Alabama* the Supreme Court expanded the sixth amendment guarantee from the bare right to counsel to the right to effective assistance of counsel. Then in *Gideon v. Wainwright* the Supreme Court held that the sixth amendment was applicable to the states. An additional constitutional source of the right to effective assistance of counsel is the fourteenth amendment due process clause which was relied upon by the Court in *Avery v. Alabama*.

Although the Supreme Court has firmly established a constitutional right to effective assistance of counsel, it has only tangentially considered the appropriate standards for evaluating the effectiveness of counsel. Until recently the Seventh Circuit applied the "mockery of justice" standard in reviewing claims of incompetent counsel. Under the mockery standard, counsel was judged ineffective

50 Id. note 16 at 515.

1 U.S. Const. amend. VI.
2 287 U.S. 45, 71 (1932).
4 308 U.S. 444 (1940). In *Avery* the Court held that the defendant had not been denied his constitutional right of counsel with the accustomed incidents of consultation and opportunity of preparation at trial.
5 See, e.g., *United States v. Robinson*, 502 F.2d 894 (7th Cir. 1974); *United States v. Ingram*, 477 F.2d 236 (7th Cir. 1973); *United States v. Stevens*, 461 F.2d 317 (7th Cir. 1972); *Johnson v. United States*, 422 F.2d 555 (7th Cir. 1970); *United States v. Dilella*, 354 F.2d 584 (7th Cir. 1965); *United States v. Bella*, 353 F.2d 718 (7th Cir. 1965); *United States ex rel. Weber v. Ragan*, 176 F.2d 579 (7th Cir.), cert. denied, 338 U.S. 809 (1949); *United States ex rel. Feeley v. Ragan*, 166 F.2d 976 (7th Cir. 1948); *Achtien v. Dowd*, 117 F.2d 989 (7th Cir. 1941).

The United States Courts of Appeals have gradually shifted away from the "mockery of justice" standard just overturned in the Seventh Circuit by *United States ex rel. Williams v. Twomey*, 510 F.2d 634 (7th Cir. 1975). The first step was taken by the Fifth Circuit in *MacKenna v. Ellis*, 280 F.2d 592 (5th Cir. 1960), where the court said: "We interpret counsel to mean not errorless counsel, and not counsel judged ineffective by hindsight but counsel reasonably likely to render and rendering reasonably effective assistance." *Id.* at 599. The Fifth Circuit has occasionally reverted to the mockery standard, see *Brooks v. Texas*, 381
only if his performance rendered the trial a complete sham or mockery of justice. In *United States ex rel. Williams v. Twomey,* the Seventh Circuit adopted a new standard under which counsel was deemed incompetent if he failed to provide minimum professional representation. This new standard was applied and interpreted by the Seventh Circuit in two subsequent cases, *Matthews v. United States* and *United States v. Jeffers.* Although the new Seventh Circuit standard was stated in broader and more liberal language than the mockery of F.2d 619 (5th Cir. 1967), but the *MacKenna* opinion is still the leading Fifth Circuit case on the issue.

The District of Columbia Circuit Court in *Bruce v. United States,* 379 F.2d 113 (D.C. Cir. 1967), was the first circuit to adopt the minimum standards test. In *Bruce,* the court wrote that the test is whether counsel "lacked the minimum standards of competency necessary to satisfy appellants' constitutional rights to counsel." *Id.* at 116.

The Fourth Circuit has developed an even broader test for measuring ineffectiveness of counsel. In *Dunker v. Peyton,* 389 F.2d 224 (4th Cir. 1968), established stringent standards: (1) counsel should be appointed promptly, (2) counsel should be afforded reasonable time to prepare, (3) counsel must confer with his client without undue delay and as often as necessary to ascertain that potential defenses are unavailable, (4) counsel must conduct appropriate investigation. Additionally the court noted, "An omission or failure to abide by these requirements constitutes a denial of effective representation of counsel unless the state, on which is cast the burden of proof once a violation of the precepts is shown can establish a lack of prejudice thereby." *Id.* at 226.

The Sixth Circuit has most closely aligned with the Fourth Circuit. A dual standard was established by the Sixth Circuit in *Beasley v. United States,* 491 F.2d 687 (6th Cir. 1974). The court said firstly: "we hold that the assistance of counsel required under the Sixth Amendment is counsel reasonably likely to render and rendering effective assistance" and secondly, "defense counsel must perform at least as well as a lawyer with ordinary training and skill in the criminal law, and must conscientiously protect his client's interest." *Id.* at 696. Finally, *Beasley* held that, "defense counsel must investigate all apparently substantive defenses available to the defendant and must assert them in a proper and timely manner." *Id.* at 696.

The Third Circuit recently retreated from a broader standard like that of the Fourth and Sixth Circuits to a minimum standards test similar to that of the District of Columbia Circuit. In *Moore v. United States,* 432 F.2d 730 (3rd Cir. 1970), the court said: "the standards of adequacy of legal services as in other professions are the exercise of the customary skill and knowledge which normally prevail at the time and place." *Id.* at 736.

Of the remaining five circuits, some show strong adherence to the mockery standard, while others waiver. The Second, Ninth, and Tenth Circuits all continue to apply the mockery standard.

The Second Circuit, in *United States v. Yanishefsky,* 500 F.2d 1327 (2d Cir. 1974), articulated its standard: "the representation must be so woefully inadequate as to shock the conscience of the court and make the proceedings a farce and a mockery of justice." *Id.* at 1333. *Yanishefsky* was cited as controlling as recently as in *United States v. Ortega-Alvarez,* 506 F.2d 455 (2d Cir. 1974).

The Ninth Circuit has also continued to abide by the mockery standard. In a 1975 decision, *United States v. Stern,* 519 F.2d 521 (9th Cir. 1975), the court wrote: "This court will not reverse a judgment of conviction unless a defendant's representation has been so inadequate as to make his trial a farce, sham, or mockery of justice." *Id.* at 524.

Similarly, the Tenth Circuit wrote in *Johnson v. United States,* 485 F.2d 240 (10th Cir. 1973) that "it cannot be said that the representation was perfunctory, in bad faith, a sham, a pretense, or without adequate opportunity for conference or preparation." *Id.* at 242-43.

The First Circuit, while continuing to rely on the mockery standard, see *Moran v. Hogan,* 494 F.2d 1220 (1st Cir. 1974), indicated in a 1975 opinion, *Dunker v. Vinzani,* 505 F.2d 503 (1st Cir. 1975), that it may be considering a reassessment of the mockery standard. In *Dunker* the court was specifically asked to overturn the mockery standard, but rather than take such a step the First Circuit said the case could have been decided under either a mockery standard or a more liberal standard. Thus, by failing to base its holding on the current standard the First Circuit may have implicitly rejected it.

The Eighth Circuit continues to uphold the mockery standard, but in a 1974 case, *McQueen v. Swenson,* 498 F.2d 207 (8th Cir. 1974), there is language indicating that a reassessment is near. The court wrote: "It was not intended that the mockery of justice standard be taken literally, but rather that it be employed as an embodiment of the principle that a petitioner must shoulder a heavy burden in proving unfairness." *Id.* at 214.

6 510 F.2d 634 (7th Cir. 1975).
justice test, its future impact must be assessed in light of the *Matthews* and *Jeffers* opinions, and with reference to alternative standards which can provide the court with an opportunity to create more comprehensive and helpful guidelines.

**The New Seventh Circuit Standard: Minimum Professional Representation**

In *United States ex rel. Williams v. Twomey*, the Seventh Circuit broadened the rule governing the requirements of a criminal defendant's constitutional right to effective assistance of counsel. The new test, as enunciated by the *Williams* court, focuses on whether the defendant has been deprived of "legal assistance which meets a minimum standard of professional representation." The circuit court, in overturning the district court's finding that the fourteenth and sixth amendment guarantees had not been denied, noted that the lower court decision had been reached under the stricter "mockery of justice" standard.1 The circuit court held that the petitioner had alleged sufficient grounds to establish a denial of his right to effective assistance of counsel. Petitioner's specific allegations stated that trial counsel's inexperience, lack of sufficient time for investigation and preparation, failure to present any evidence suggesting a defense, and failure to warn him that in taking the stand his previous criminal record would become admissible as evidence denied him his sixth amendment guarantee.2 The circuit court acknowledged that under the prior "mockery of justice" standard, these allegations presented a "close case"; however, under the new test of minimum professional competency, the grounds were clearly sufficient to show a denial of petitioner's constitutional rights.4 Thus, the *Williams* decision on its face purports to liberalize the standard of legal competence, making it easier for a defendant to establish a denial of his constitutional right to competent counsel.

The *Williams* decision, in comparison to many earlier Seventh Circuit cases, is certainly more liberal in defining judicial standards for evaluating claims of incompetency of counsel. Under the "mockery of justice" standard, the court had indicated that even a sufficient showing of counsel's incompetency would not "vitiate the trial unless on the whole the representation is of such a low caliber as to amount to no representation."5

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9 510 F.2d 634 (7th Cir. 1975).
10 Id. at 640.
11 Id. at 641.
12 Id. at 637-38.
13 Id. at 638.
14 Id. at 640.
15 United States *ex rel* Feeley v. Ragan, 166 F.2d 976, 980-81 (7th Cir. 1948). The most extreme example of the impossible burden of proof which is placed upon a defendant to establish a denial of his constitutional rights is found in the court's opinion in Pelley v. United States, 214 F.2d 597 (7th Cir. 1954), *cert. denied*, 348 U.S. 915 (1955). Petitioner made a collateral attack on his conviction for violations of federal sedition laws. The petitioner cited 17 substantial errors and admissions to establish the incompetency of his trial counsels. *Id.* at 601. Petitioner further alleged the existence of a conspiracy between his chief counsel and the prosecutor to deprive the petitioner of a fair trial. Petitioner offered to prove the existence of the conspiracy through evidence that the prosecutor had threatened to deport the chief defense counsel's alien wife unless he cooperated in obtaining a conviction. The Seventh
These earlier cases suggest that an accordingly strict application of the "mockery of justice" standard would have precluded relief for the defendant in the factual context present in *Williams*.

However, an examination of more recent cases decided under the "mockery" standard indicates that *Williams* did not signal a sharp departure from current Seventh Circuit decisions on competency of counsel. Although based on a different standard, the *Williams* case is consistent with the 1974 Seventh Circuit "mockery" standard decision, *United States v. Miller*. The alleged incompetency in *Williams* and *Miller* was based upon trial counsel's lack of sufficient time for adequate investigation and preparation. Both courts found the allegations sufficient to establish a denial of petitioner's constitutional rights.

The petitioner in *Williams* had alleged several grounds of incompetency of his appointed counsel, but the Seventh Circuit's opinion emphasized the factor of counsel's insufficient time for preparation and investigation. In *Williams*, petitioner's initial counsel, Mr. Bradley, was appointed three days prior to trial. However, he was continually engaged in a different trial throughout the three-day period and was unable to interview the petitioner; on the first day of the petitioner's trial Mr. Bradley indicated that he would be unable to appear in court the following week. The court then appointed another attorney, Mr. Cohan, as substitute counsel. Despite this last minute change, the newly appointed counsel failed to request a continuance and the trial proceeded as scheduled. The petitioner cited the late appointment and counsel's conspicuous lack of sufficient preparation for trial as evidence of his denial of competent counsel. The Seventh Circuit in *Williams* refused to apply a general presumption of incompetency to all untimely appointments of counsel. The presumption of competency traditionally arises from the fact that the attorney is a member in good standing of the state or local bar; it is a rebuttable presumption which the defendant may overcome by a strong showing of specific evidence to the contrary.

Yet the actual impossibility of adequate preparation and investigation by petitioner's counsel troubled the court in this case.

The circuit court opinion indicated that the question of incompetency based upon allegations of untimely appointment is clearly dependent upon the specific factual context of the case. The court enumerated those factors which are relevant in assessing a claim of incompetency on the ground of untimely appointment: "Much depends on the nature of the charge, of the evidence susceptible of being produced at once or later by the defense, and of the experience and capacity of defense counsel." The court examined these factors and noted that the crime charged, burglary, was a felony, that trial counsel was completely sur-

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16 508 F.2d 444 (7th Cir. 1974).
17 510 F.2d 634, 639 (7th Cir. 1975).
18 *Id.* at 635-36.
19 *Id.* at 639.
20 See *United States ex rel. Weber v. Ragan*, 176 F.2d 579, 586 (7th Cir. 1949); *United States ex rel. Feeley v. Ragan*, 166 F.2d 976, 980 (7th Cir. 1948); *Achtien v. Dowd*, 117 F.2d 989, 992 (7th Cir. 1941).
21 *Id.*
prised by the appearance of the prosecutor’s two key witnesses, that trial counsel totally failed to pursue several obvious sources of information, and that counsel’s lack of experience was reflected by his performance. On the basis of these factors the court concluded that petitioner’s counsel’s actions were sufficiently below the expected professional standards of competence to constitute a denial of the petitioner’s constitutional right of effective assistance of counsel.

The defendant in United States v. Miller also argued untimely appointment of trial counsel. Defendant’s counsel had been appointed two days prior to trial, and the defendant had requested a continuance on the grounds that his attorney had not had sufficient time to prepare for trial or interview his client. The district court denied the motion but on appeal the Seventh Circuit court held that the untimely appointment of counsel and the failure to grant the continuance resulted in a denial of the defendant’s right to competent counsel.

The Miller opinion is consistent with Williams in focusing upon the actual impossibility of sufficient preparation and investigation by defendant’s attorney that resulted from the late appointment of counsel. The Miller court concluded that under the factual circumstances petitioner’s counsel could not be expected to perform the numerous tasks involving preparation and investigation that are necessary to ensure adequate representation of counsel between appointment and trial.

The court’s analysis in both Miller and Williams centered on the factual context that surrounded the untimely appointment of counsel. In both cases the court concluded that the late appointment had actually prevented trial counsel from having sufficient time to investigate and adequately prepare for trial. However, the Miller court applied a stricter standard than the Williams test of minimum professional competency in assessing the impact of the trial counsel’s inadequate investigation and preparation. The Miller court, quoting Supreme Court dictum from Avery v. Alabama as its authority, asserted that denial of opportunity for adequate consultation and preparation by appointed counsel could convert the appointment of counsel into a sham, or merely “formal compliance” with a defendant’s constitutional rights. The use of such a “sham” standard, in addition to the court’s finding of an abuse of discretion by the district court in denying the motion for a continuance, indicates that the Miller court placed a heavy burden of proof on the petitioner to establish the incompetency of his counsel. The Miller court’s standard of review seems to be a different albeit more progressive verbalization of the Seventh Circuit “mockery of justice” test. Certainly, the Miller court’s language suggests that the accused had to show substantially more than a denial of minimum professional competency in order to gain a reversal of the conviction.

Thus, the Miller and Williams courts reached the same conclusion of a denial of the right of effective assistance of counsel while applying substantially different standards of review to similar factual situations. This is significant, since it suggests that the result in Williams probably would not have been any

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22 508 F.2d 444 (7th Cir. 1974).
23 Id. at 451.
24 308 U.S. 444, 448 (1940).
25 United States v. Miller, 508 F.2d 444, 451-52 (7th Cir. 1975).
different if the stricter Miller standard of review had been applied. This casts
doubt upon the proposition that the new Seventh Circuit standard of minimum
professional competence as enunciated by Williams is substantially more liberal
than the previous standard; Miller suggests that petitioner's allegations in Wil-
liams may have produced a clear case of mockery under the more modern version
of the mockery standard as the circuit court had concluded.26 Although the
Williams standard is cast in broader language than the "mockery of justice" test,
it may not produce any radically different results in its actual application.

**Limitations on the Williams Standard of Minimum Professional Representation**

1. **Matthews v. United States**

The better measure of the future impact of the new Seventh Circuit standard
for evaluating competency of counsel as established by Williams is found in two
subsequent Seventh Circuit cases, Matthews v. United States27 and United States
v. Jeffers,28 which interpreted and applied the "minimum professional com-
petency" test. An examination of the court's holdings in Matthews and Jeffers
is necessary to determine the full scope of the presumably broader Williams
standard, and to identify those factors which the Seventh Circuit court may
employ as limitations on the Williams court's expanded concept of incompetency
of counsel.

In Matthews v. United States29 the petitioners alleged incompetency of
counsel in a collateral attack upon a conviction for conspiracy to engage in elec-
tion fraud. Petitioners' principal grounds for incompetency were that trial counsel
was overworked, represented too many clients at the same time, and lacked
adequate time for trial preparation. The circuit court gave but cursory attention
to the petitioners' specific claims: that their attorney interviewed each of them
for less than an hour, that 10 days in advance of trial he was unsure that he
would remain in the case, that he did not produce any evidence or call any wit-
nesses favorable to the petitioners since he had anticipated a guilty plea up to
the moment of trial, and that he was representing all five codefendants in pe-
titioners' trial as well as 25 other defendants in five separate similar cases at the
same time.30

The Matthews court concluded that none of these allegations were inconsis-
tent with the minimum standards of professional representation as required by
Williams.31 Although the Matthews court used the new Seventh Circuit standard
of competency, it did not follow the Williams opinion in its analysis of the pet-
titioners' allegations. In fact, Matthews placed a limitation upon the Williams
rationale by beginning its consideration of petitioners' charges with the pre-
sumption that trial counsel was competent; the burden of demonstrating the

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26 United States ex rel. Williams v. Twomey, 510 F.2d 634, 638 (7th Cir. 1975).
27 518 F.2d 1245 (7th Cir. 1975).
28 520 F.2d 1256 (7th Cir. 1975).
29 518 F.2d 1245 (7th Cir. 1975).
30 Id. at 1246.
31 Id.
contrary was placed on the petitioners.\textsuperscript{32}

The presumption of competency was used in earlier Seventh Circuit decisions as an essential element of the "mockery of justice" standard. But the more recent Seventh Circuit cases applying the mockery standard appeared to have abandoned the presumption, making no mention of it in their analysis.\textsuperscript{33} Instead, the circuit court automatically would make an independent examination of the record in light of the defendant's specific allegations, in order to arrive at its own determination on the issue of competency. Since the vitality of a presumption of competency had diminished under the stricter mockery standard, it is even less appropriate under the broader test of minimum professional competency.

The Williams court not only failed to assert a presumption of competence, but also suggested a contrary proposition. The court asserted that the facts alone in that case put the court on "inquiry" as to the effectiveness of the attorney there.\textsuperscript{34} The Williams court refused to follow the example of other circuits, such as the Fourth and Sixth, which presume incompetency in every case of untimely appointment of counsel.\textsuperscript{35} But the Williams court did concede that the particular facts of the case raised a duty on the part of the court to carefully scrutinize the record to determine the actual effectiveness of counsel.\textsuperscript{36} The Williams court, in acknowledging its affirmative duty of inquiry into the attorney's effectiveness, implicitly rejected a presumption of competency which would place a heavy burden of demonstrating incompetence on the accused. Thus, the Matthews court's use of a presumption of competency is inconsistent with and constitutes a limitation upon the liberal standard of competency as articulated in Williams. The heavy burden of proof which the presumption of competency places upon petitioners obviously undermines the less demanding standards established by the Williams court.

It can also be argued that the Matthews court's use of a presumption of competency is inconsistent with the very nature of the Constitution's guarantee of the effective assistance of counsel. This conclusion is suggested by the Supreme Court's unequivocal statement in Avery v. Alabama\textsuperscript{37} that "where denial of the Constitutional right to assistance of counsel is asserted, its peculiar sacredness demands that we scrupulously review the record."\textsuperscript{38}

A second limitation on the Williams court's rationale is implicit in the Matthews decision. The court in Matthews was careful to point out that petitioners' attorney was privately retained, in contrast to appointed counsel in

\begin{itemize}
\item 32 Id.
\item 33 See, e.g., United States v. Miller, 508 F.2d 444 (7th Cir. 1974); United States v. Robinson, 502 F.2d 892 (7th Cir. 1974); United States v. Ingram, 477 F.2d 236 (7th Cir. 1973); United States v. Stevens, 461 F.2d 317 (7th Cir. 1972); Calhoun v. United States, 454 F.2d 702 (7th Cir. 1971), cert. denied, 405 U.S. 1019 (1972); United States v. Radford, 452 F.2d 332 (7th Cir. 1971); United States v. Johnson, 422 F.2d 555 (7th Cir. 1970).
\item 34 510 F.2d 634, 639 (7th Cir. 1975).
\item 35 The Fourth and the Sixth Circuits apply a presumption of incompetency to every case of untimely appointment of counsel. See, e.g., Beasley v. United States, 491 F.2d 687 (6th Cir. 1974); Coles v. Peyton, 399 F.2d 224 (2d Cir. 1968).
\item 36 510 F.2d 634, 639 (7th Cir. 1975).
\item 37 308 U.S. 444 (1940).
\item 38 Id. at 447.
\end{itemize}
Although the *Matthews* court did not directly address this point; it is clear that the counsel was retained and not appointed bore heavily on the court’s conclusion that counsel was competent. The *Matthews* court professed that it was disturbed by petitioners’ allegations that counsel was too busy with other work to provide effective assistance of counsel. Yet the court peremptorily dismissed the validity of petitioners’ argument by taking judicial notice that the criminal bar is overworked and that many of the busiest attorneys are the most effective. This casual treatment of the petitioners’ serious allegation of counsel’s insufficient preparation suggests that, since counsel was of their own choosing, the court had little sympathy for petitioners’ complaints. Moreover, the *Matthews* court followed a number of earlier Seventh Circuit cases decided under the mockery of justice standard in stating that “an accused cannot proceed to trial with counsel of his own choice and then later claim a denial of due process chargeable to the state because of errors committed by counsel.” This rule, however, has been suspended where retained counsel is so inadequate and incompetent as to virtually deprive the defendant of representation and reduce the trial to a sham.

The propriety of the distinction made in *Matthews* between competency of retained and appointed counsel was squarely rejected by the *Williams* court when it stated that an accused, “whether represented by his chosen counsel, or a public agency, or a court appointed lawyer, has the constitutional right to an advocate whose performance meets minimum professional standard.” Thus, the distinction between retained and appointed counsel which the *Matthews* court at least implicitly recognized constitutes a second limitation on the broad scope of the *Williams* standard of competency.

A final limitation on the *Williams* standard that is imposed by the *Matthews* opinion concerns the weight that should be given to the actual merits of the defendant’s case in deciding a question of competency of counsel. The *Matthews* court rejected the allegation that counsel failed to produce any evidence or witnesses favorable to the defendants, since there had been no showing that such

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40. The *Williams* court made a similar observation that, “many lawyers have the facility, skill, and panache which makes them ready instanter to champion a defendant who summons them at the twelfth hour.” United States ex rel. Williams v. Twomey, 510 F.2d 634, 639 (7th Cir. 1975). However, the *Williams* court did not dismiss the petitioner’s allegations merely on the basis of this broad generalization, but proceeded to examine in detail the actual effectiveness of the attorney in that case. *Id.* at 639-41. The *Matthews* court, in contrast, never went beyond the generalization to examine the actual facts supporting the petitioners’ allegations.
41. Lunce v. Overlade, 244 F.2d 976, 979 (7th Cir. 1954). See also United States ex rel. Feeley v. Ragan, 166 F.2d 976, 979 (7th Cir. 1948); Achtien v. Dowd, 117 F.2d 989, 993 (7th Cir. 1941) (contra).
42. See United States v. Carr, 459 F.2d 16 (7th Cir. 1972); Wilson v. Phend, 417 F.2d 1197 (7th Cir. 1969); Lunce v. Overlade, 417 F.2d 108 (7th Cir. 1975); Pelley v. United States, 214 F.2d 597 (7th Cir. 1954); United States ex rel. Feeley v. Ragan, 166 F.2d 976 (7th Cir. 1948).
43. 510 F.2d 634, 640 (7th Cir. 1975).
evidence did exist or could have been discovered by an investigation. The court stated that the defendants had admitted to the attorney that they were indeed guilty as charged and that in such a case counsel would have no duty to prepare evidence for a defense. The court further stated that its conclusion that petitioners' claims of incompetence were insufficient to require an evidentiary hearing was buttressed by the court's independent familiarity with the record derived from prior appeal. In essence, the Matthews court evaluated the merits of the defendants' case on the basis of the evidence on the record and its prior knowledge of the case, and concluded that competency of counsel was not a concern since the prosecution's evidence strongly supported the defendants' guilt.

In assessing competency of counsel, earlier Seventh Circuit opinions have given considerable weight to the court's impression of the defendant's guilt. One opinion went so far as to say that when the known facts overwhelmingly point towards the defendant's guilt, the attorney has a duty to society not to seek to overthrow the facts by false testimony or by practices which are within the knowledge of the experienced lawyer but outside the ken of the novice. The Matthews court echoed this conclusion when it stated that if the defendants were guilty as charged, then counsel had no duty to investigate for witnesses or evidence to the contrary. Although the Matthews court was correct in its admonition against false and perjured testimony, its conclusion is still incorrect because it is premised upon pure speculation and inference that the defendants are guilty.

The Williams court exposed the danger that is inherent in such speculation when it discredited the district court's attempt to infer the petitioner's motives in seeking immediate trial, since such an inference was unsupported by evidence in the record. But the strongest rejection of the Matthews rationale is found in Powell v. Alabama, where the Supreme Court asserted:

> It is not enough to assume that counsel thus precipitated into the case thought there was no defense, and exercised their best judgment in proceeding to trial without preparation. Neither they nor the court could say what a prompt and thoroughgoing investigation might disclose as to facts.

In fairness to the Matthews court it must be admitted that there is substantial value in referring to the merits of a case in evaluating the quality of the legal

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44 518 F.2d 1245, 1246 (7th Cir. 1975). It is significant to note that the Williams court did place some emphasis upon the proven existence of evidence which would have been discoverable by the petitioner's attorney if sufficient time had been allowed for investigation. The court specifically referred to the fact that one of the petitioner's codefendants, Alonzo Brock, who was not interviewed by the petitioner's attorney, had a story exculpating the petitioner. 510 F.2d 634, 639 (7th Cir. 1975). It is hard to assess how much weight was given to this undiscovered evidence by the Williams court in reaching its conclusion that counsel was incompetent.

45 518 F.2d at 1246.

46 Id. at 1247.

47 See United States v. Robinson, 502 F.2d 894 (7th Cir. 1974); Calhoun v. United States, 454 F.2d 702 (7th Cir. 1971); Achtien v. Dowd, 117 F.2d 989 (7th Cir. 1941).

48 Achtien v. Dowd, 117 F.2d 989, 993 (7th Cir. 1941).

49 518 F.2d 1245, 1246 (7th Cir. 1975).

50 510 F.2d 634, 640-41 (7th Cir. 1975).


52 287 U.S. 45, 58 (1932).
representation that the defendant received. However, as Powell points out, a court's speculation on the merits is not an adequate substitute for a thorough investigation of the facts of a case—an essential aspect of the accused's right to effective assistance of counsel. The Matthews court's disposition of petitioners' claims seems on balance to be too perfunctory and not reflective of sufficient inquiry into the facts which surrounded the petitioners' allegations.

2. United States v. Jeffers

The Williams standard of professional competency was also interpreted and applied by the Seventh Circuit in United States v. Jeffers. The defendants, in an appeal from a conviction for conspiracy to distribute heroin and cocaine, claimed a violation of their sixth amendment right to effective assistance of counsel. The Jeffers case raised an unusual kind of competency issue since it was conceded that the defendants' retained counsel was competent in all respects except in his failure to cross-examine a key prosecution witness. It is difficult to extract the Jeffers court's analysis on the competency question, because it is inextricably linked to the pervading question of a conflict of interest on the part of defendants' counsel. In Jeffers the defendants' attorney failed to complete a thorough cross-examination of one of the prosecutor's key witnesses on the ground that there was a conflict of interest. Defendants' attorney asserted that the witness was a former client of his firm and he was thus restricted in his cross-examination by the possibility that it might involve privileged information. The trial court ruled that the information disclosed by the attorney revealed no conflict of interest; the attorney was directed to proceed with his cross-examination. The attorney's several motions for leave to withdraw from the case were denied. The attorney asked a few introductory questions of the witness, but then stated that he could not continue because of the conflict of interest. He thus failed to complete the cross-examination.

The Seventh Circuit affirmed the defendants' conviction, ruling that the trial court's determination that there was no conflict of interest was correct and that the attorney's failure to complete the cross-examination did not constitute a violation of the defendants' right to competent counsel. Since the question of a conflict of interest on the part of the defendants' attorney in Jeffers is a distinct aspect of competency, requiring separate treatment, it is not by itself relevant to a consideration of the meaning and application of the Williams standard of

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53 The court in United States v. Robinson, 502 F.2d 894 (7th Cir. 1974), convincingly stated the rationale supporting the consideration of the merits of a defendant's case in evaluating his claim of incompetency of counsel:

But where, as here, a defendant is represented by counsel, present and participating throughout the proceeding, the strength of the case may at least repel the temptation to conclude that the fact of conviction itself demonstrates that counsel was ineffective. The defensive strategy and its lack of success must be evaluated in the light of the strengths and weaknesses of the offense, and the "quality of legal representation cannot be abstractly measured without reference to the merits of a defendant's case . . . ."

United States ex rel. Testemark v. Vincent, 496 F.2d 641, 643 (2d Cir. 1974).

54 520 F.2d 1256 (7th Cir. 1975).

55 Id. at 1263.
But regardless of the correctness of the Jeffers court’s finding of no conflict of interest, the fact remains that a key prosecution witness was not effectively crossexamined. The question of whether the failure of the attorney, for whatever reason, to conduct a thorough cross-examination violated the defendants’ right to effective assistance of counsel is directly related to the court’s adherence to the standard of minimum professional competency established in Williams.

The problem with the Jeffers decision does not derive from the court’s conclusion that defendants were not deprived of their constitutional right to effective assistance of counsel. Under a proper application of the Williams standard of competency, this conclusion is probably correct. However, the Jeffers court’s reasoning and analysis in reaching that conclusion are troublesome. Initially, the Jeffers court acknowledged that a failure to cross-examine constituted an arguable ground for a denial of the right to effective assistance of counsel. Logically, the next step should have been a consideration of the sufficiency of the defendants’ claim in light of the court’s acknowledged adherence to the Williams standard of incompetency. However, the Jeffers court never reached this step; nor did it evaluate the attorney’s failure to cross-examine under the Williams standard of competency. The Jeffers court bypassed these central issues to make its determination entirely on the basis of waiver and lack of prejudice in the record. Thus the Jeffers court might have reached the correct conclusion, but it evaded the central issues of incompetency. It is unfortunate that the court chose to base its decision on alternate grounds which may serve to limit the liberalization of incompetency standards under the Williams decision. The Jeffers court refused to evaluate the effect of the attorney’s failure to fully cross-examine because the record did not show that such a failure prejudiced the rights of the defendants. This prejudice requirement seems to derive from earlier Seventh Circuit decisions applying the harmless error rule to cases where the alleged incompetency of counsel was based upon a violation of the due process clause of the fourteenth amendment. However, it is not clear under Supreme Court decisions that the prejudice requirement is appropriate where the defendant claims a denial of the right to competent counsel. Certainly the prejudice requirement places a heavier burden of proof on the defendant who claims incompetency of counsel. Jeffers suggests

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56 A number of cases have established that the defendant’s right to competent counsel includes the right to the undivided loyalty and faithful devoted service of his attorney. See Von Moltke v. Gillies, 332 U.S. 708 (1948); Glasser v. United States, 315 U.S. 60, 75 (1942); Wilson v. Phend, 417 F.2d 1197 (7th Cir. 1969), cert. denied, 409 U.S. 881 (1970).
57 520 F.2d at 1266.
58 The Jeffers court states at one point that “the fact that an attorney is unable to pursue one line of inquiry does not mean, however, that the defendant is receiving inadequate representation.” 520 F.2d at 1265. But the court never followed through on this thought since it never reached the issue of whether the defendants actually received inadequate representation.
59 520 F.2d 1245, 1266-67 (7th Cir. 1975).
60 The harmless error rule requires a showing that there is a reasonable possibility that the error complained of prejudiced the defendant by contributing to his conviction. Chapman v. California, 386 U.S. 18 (1967).
61 See, e.g., United States v. Robinson, 502 F.2d 894 (7th Cir. 1974); United States v. Ingram, 477 F.2d 236 (7th Cir. 1973); United States v. Dilella, 354 F.2d 584 (7th Cir. 1965); United States v. Bella, 353 F.2d 718 (7th Cir. 1948); United States ex rel. Feeley v. Ragan, 166 F.2d 976 (7th Cir. 1948).
that regardless of whether the Williams standard eases the defendant's burden of establishing a denial of the right to competent counsel, he still faces the onerous requirement of showing that he was prejudiced by such a denial. Despite the Supreme Court prescription of a general harmless error rule, the Court has intimated that certain constitutional rights are so fundamental that their denial is inherently prejudicial. Justice Stewart, concurring in *Chapman v. California*, specifically indicated that the right to counsel is an example of such a fundamental right; as support for this proposition he cited *Glasser v. United States*.

In *Glasser*, the defendant claimed a violation of his constitutional right to effective assistance of counsel. The specific grounds for the denial concerned a conflict of interest on the part of defendant's attorney which, *inter alia*, prevented the attorney from cross-examining one of the prosecution's witnesses. The Supreme Court held that the effect of the conflict of interest was to deny the defendant his right to assistance of counsel. The Court stated: "The right to have the assistance of counsel is too fundamental and absolute to allow courts to indulge in nice calculations as to the amount of prejudice arising from its denial." This language suggests that the prejudice requirement is not applicable where the constitutional denial is one of effective assistance of counsel.

Waiver was the second basis for the *Jeffers* court's conclusion that defendants' constitutional guarantee of competent counsel was unimpaired. The court found that the defendants' attorney waived their rights to further cross-examination by: (1) making no offer of proof as to the substance of the possible cross-examination; (2) making no further effort to get another attorney to cross-examine; and (3) making the statement—even if for incorrect reasons—that he had no further cross-examination. Although the *Jeffers* court was careful to say that defendants waived only the right to further cross-examination, the practical effect of the court's holding was to say that the defendants' attorney waived their right to effective assistance of counsel. Since the defendants' only basis for alleging incompetency was the attorney's failure to cross-examine, by waiving the basis of that allegation, the right to cross-examination, they actually waived their right to competent counsel. The *Jeffers* court affirmed this conclusion when it stated:

Arguably, therefore, his client's constitutional right to the effective assistance of counsel was violated when he [the attorney] declined to heed the courts [sic] directive to conduct a full cross-examination notwithstanding his partner's former relationship with Berry. We are persuaded, however, that the defendants waived their right to have Berry subjected to further cross-examination.

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62 386 U.S. 18, 43 (1967) (Stewart, J., concurring). This is also suggested in Justice Harlan's dissent in *Chapman*, *id.* at 52.
63 315 U.S. 60 (1942).
64 *Id.* at 76.
65 520 F.2d 1256, 1266-67 (7th Cir. 1975).
66 *Id.* at 1267.
67 *Id.* at 1265. The general topic of waiver and the right to counsel is discussed in Grana, *The Right to Counsel: Collateral Issues Affecting Due Process*, 54 MINN. L. REV. 1175, 1208 (1970).
68 520 F.2d 1256, 1266 (7th Cir. 1975).
The Jeffers court's use of waiver analysis is contrary to the Supreme Court's command in Glasser that "[t]o preserve the protection of the Bill of Rights for hard-pressed defendants, we indulge every reasonable presumption against the waiver of fundamental rights." In Glasser, the Court found that although the defendant had acquiesced to representation by his attorney throughout the trial, the defendant had never affirmatively waived the objection to his attorney's conflict of interest that he had initially advanced. This analysis is equally valid in the Jeffers case, since the defendants repeatedly advanced their initial objections, in the form of the attorney's motions for leave of court to withdraw as counsel, to further representation by their attorney. The Jeffers opinion indicated no evidence of any subsequent affirmative waiver of these objections by the defendants; therefore, under Glasser the defendants' mere acquiescence is insufficient to overcome the strong presumption against waiver of competent counsel.

The Jeffers finding of waiver, though squarely in conflict with the presumption against waiver of effective assistance of counsel, was not a crucial error in the case, since defendants' attorney probably would have been found competent under the Williams standard of minimum professional representation. However, a similar use of waiver by the courts could effectively frustrate the purposes behind the broader Williams standard of competency. If an allegedly incompetent attorney can waive all the specific grounds for a defendant's claim of incompetency on behalf of his clients, then the guarantee of effective assistance of counsel becomes meaningless. It is the very purpose of the presumption against waiver to protect the fundamental right to competent counsel from such invasions. Therefore, this protection of the constitutional right to effective assistance of counsel should not be defeated by the analysis utilized by the Jeffers court.

Both Matthews and Jeffers, in interpreting and applying the new Williams standard of competency, used a number of concepts to limit its broadening effect. An examination of other Seventh Circuit decisions suggests two other concepts which may further curtail the scope of the Williams standard. The first concept is that of trial tactics. Traditionally, Seventh Circuit courts have been reluctant to find incompetency where the defendant's allegations concerned the attorney's professional judgment in his use of trial strategy.

Unless a strong showing is made that conduct of counsel virtually deprived defendant of a trial, matters of trial conduct and tactics adopted pursuant to defendant's counsel's professional opinion on the merits of the case should not be subjected to a critique by a court of Appeals.

The court's deference to an attorney's professional judgment is based on a

69 Glasser v. United States, 315 U.S. 60, 70 (1942). This presumption against waiver of the right to effective assistance of counsel was also stated by the Supreme Court in Von Moltke v. Gillies, 332 U.S. 708 (1948).
70 315 U.S. 60, 71 (1942).
71 520 F.2d 1256, 1260-62 (7th Cir. 1975).
72 See, e.g., United States v. Robinson, 502 F.2d 894 (7th Cir. 1974); United States v. Radford, 452 F.2d 332 (7th Cir. 1971); United States v. Dilella, 354 F.2d 584 (7th Cir. 1965); United States v. Bella, 353 F.2d 718 (7th Cir. 1965); Pelley v. United States, 214 F.2d 597 (7th Cir. 1954); United States v. Ragan, 178 F.2d 894 (7th Cir. 1949); United States ex rel. Weber v. Ragan, 176 F.2d 597 (7th Cir. 1949).
73 United States v. Bella, 353 F.2d 718, 719 (7th Cir. 1965).
desire to avoid second-guessing counsel in an area where there are no objective standards. As one court noted, it is doubtful whether any attorney could mentally review his performance in a trial without finding a number of mistakes or omissions. Although this is a legitimate policy, it can be carried to an extreme. While a minimal number of tactical mistakes should not constitute incompetency, when the mistakes become so numerous that the counsel's performance falls below the minimal level of professional representation, then the attorney must be deemed incompetent. The difficulty is in recognizing when common errors turn into incompetence. Clearly the concept of trial tactics may be used to sanction a considerable amount of attorney misconduct which would otherwise be considered incompetence under the Williams standard.

A second concept that tends to limit Williams is the circuit court's practice of giving great deference to a trial court's finding of competency. This practice is premised on the legitimate assumption that the trial court, which had firsthand observation of the attorney's conduct, is in the better position to assess his competency. There is a danger that the circuit court may give the trial court's finding too much weight by ignoring any evidence on the record which may support a conclusion of incompetence. One Seventh Circuit decision remedied this problem by deferring to the trial court on matters of "historical fact," while making its own assessment, based on such facts, of the fundamental fairness of the petitioner's conviction with such counsel. This approach is a practical answer to the danger that circuit courts will give too much weight to a trial court's conclusion of competency.

Beyond Williams: Proposed Remedies in the Form of a New Comprehensive Standard

The new Seventh Circuit standard only addresses the question of whether or not counsel served effectively. This leaves unanswered the more fundamental questions of how to redress the wrong of incompetency and how to prevent its recurrence.

Traditional remedies have been available through direct appeal or collateral relief, primarily habeas corpus petitions. The effectiveness of these remedies is limited by the heavy burden of proof that accompanies them. A habeas corpus petition will not be granted unless the defendant can affirmatively demonstrate that the constitutional violation affected the outcome of his trial. Thus, not only must he overcome the burden of presumed competency cited in Matthews, but he must also show that because of incompetency the trial's outcome was affected.

The pressures of this dual burden indicate that the courts have been gener-

74 United States ex rel. Weber v. Ragan, 176 F.2d 579, 586 (7th Cir. 1949).
75 Pelley v. United States, 214 F.2d 597, 602 (7th Cir. 1954).
76 See United States ex rel. Weber v. Ragan, 176 F.2d 579 (7th Cir. 1949); Achtien v. Dowd, 117 F.2d 989 (7th Cir. 1941).
77 United States ex rel. Weber v. Ragan, 176 F.2d 579, 585 (7th Cir. 1949).
78 Lunce v. Overlade, 244 F.2d 108, 111 (7th Cir. 1957).
81 See text accompanying notes 32-34 supra.
ally unwilling to grant collateral relief when ineffective assistance of counsel is before them. Commentators suggest two reasons for this judicial reluctance: (1) a hesitancy to cite fellow lawyers for ineffective assistance, and (2) a concern over opening a floodgate of litigation from convicted defendants. This reasoning is far from convincing when it results in denying a remedy to a defendant whose constitutional rights have been abridged. Thus, a method for making the traditional remedies more responsive in ineffective counsel cases must be considered.

The traditional remedies could be more effective if a violation of the right to effective representation of counsel was deemed to be such a fundamental right that any violation of this guarantee would automatically allow a habeas corpus petition.

No case has suggested this, but the Supreme Court in Chapman v. California laid the foundation for such a rule by stating that “there are some constitutional rights so basic to a fair trial that their infraction can never be treated as harmless error.” The Chapman Court noted one such right that, when abridged, can never be harmless error is the right to counsel as enunciated in Gideon v. Wainwright. Since the right to effective counsel has been labelled as tantamount to the right to counsel, the Chapman holding could logically extend the proposition that denial of counsel cannot be harmless error to include the proposition that the denial of effective counsel cannot be harmless error. The Chapman reasoning supports such an enlargement, since a trial without effective counsel clearly impinges upon the fairness of the judicial process as much as a trial without counsel.

Unfortunately, the traditional remedies do not go to the questions of redress and prevention. Habeas corpus is a retrospective remedy which when granted months or even years later has little deterrent effect on an attorney who had rendered the ineffective assistance. Similarly, it does little to redress the defendant’s injury other than to offer him a new trial.

None of the 1975 Seventh Circuit cases which established a new standard for determining incompetency have taken any steps to propose additional relief. The only prospective attempt to eliminate ineffective assistance of counsel in the Seventh Circuit was in Achtien v. Dowd, where the court wrote: “We assume that a court in appointing counsel for one charged with a felony should take many things into consideration. He should consider the existence or absence of friends, the age and experience of the accused, and the seriousness of the charge...” The court there was attempting to suggest a formula for appointing counsel that would match counsel with client. Although the proposal may have been sound, it was never followed by the Seventh Circuit. The value of deterrence and the necessity for redress are clear; the Seventh Circuit should

83 386 U.S. 18 (1967).
84 Id. at 23.
86 See text accompanying notes 1-3 supra.
87 117 F.2d 989 (7th Cir. 1941).
88 Id. at 992.
therefore attempt to fashion relief that combines both features.

An initial step would be vigorous enforcement of the Canons of Professional Ethics. As Chief Judge Bazelon wrote: “Our vaunted Code of Professional Responsibility has not served as a means of policing the quality of defense counsel.” Generally, courts have refused to use the Canons except as a touchstone of criticism. An example is *Turner v. Maryland*, where the attorney did not confer with his clients until 10 minutes before trial. The court held that counsel was effective, but criticized him for not upholding the spirits of the Canons. If every petition for collateral relief that was granted based on ineffective representation of counsel was referred to the state grievance committee, the Canons would become an influential means of deterring incompetent assistance. If this procedure was initiated, lawyers who failed to meet the minimum standards of *Williams* might be subject to suspension, and even disbarment.

The second proposal which undoubtedly would have serious ramifications for the appointed criminal defense bar is the possibility of civil suits seeking damages for ineffective counsel. Traditionally these suits have been barred under the theory of governmental immunity. The best Seventh Circuit statement of the rationale for this prohibition is found in *Arensman v. Brown*. The court there cited three reasons why the immunity exists in the Seventh Circuit: (1) to satisfy the public, these officers must have freedom from civil suits; (2) to avoid a floodgate of litigation; and (3) to force defendants to seek the adequate remedy at law. Without explicitly so ruling, the Supreme Court in *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics* has begun to reject governmental immunity when constitutional rights have been violated.

The reasons for withdrawal from the strict concept of governmental immunity are clear when cast in the light of a defendant who is barred from suit. Governmental immunity precludes a defendant who has been convicted without the assistance of effective counsel and who may have suffered incalculable damages through years of imprisonment from asserting any claims for compensatory relief. It has been suggested that an expansion of the right to sue for damages when federal agents violate the fourth amendment, as proclaimed in *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*, should be extended to violations of the sixth and fourteenth amendments where ineffective counsel is at issue.

In *Bivens* the plaintiff filed a complaint alleging that federal narcotics agents had violated the fourth amendment by conducting an illegal search of his home. Plaintiff sought monetary damages for his resulting mental suffering, embarrass-

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90 318 F.2d 852 (4th Cir. 1963).
91 Id. at 854.
92 The referral would only apply if the ineffective assistance resulted from an attorney and was not the court's fault.
94 430 F.2d 190 (7th Cir. 1970).
95 403 U.S. 388 (1971).
96 Id.
97 See Bines, supra note 82.
ment, and humiliation. Both the district court and the circuit court dismissed the complaint for failure to state a cause of action; the Supreme Court reversed. The *Bivens* holding is limited to civil suits for violation of the fourth amendment, but some of the Court's reasoning is applicable by analogy to ineffective counsel cases. Justice Brennan's majority opinion suggests that any time a legal right is violated and there is a jurisdictional statute which allows the suit, then the federal courts may use *any remedy* available to correct the wrong. The sixth amendment, as amplified by *Powell v. Alabama*, includes a guarantee to defendants of the right to effective assistance of counsel. Therefore, if the right to effective representation of counsel is denied a defendant, he should be afforded every redress available, including damages.

One commentator has suggested that a damage action against an ineffective lawyer is even more compelling than one against an agent violating the fourth amendment.

The exclusionary rule, a conviction-oriented remedy for unlawful searches, operates more swiftly than habeas corpus, the conviction-oriented remedy for ineffective representation. The exclusionary rule operates at the outset of a trial rather than at its conclusion, and the earlier the sanction, the greater its deterrent effect. Thus, while there is some chance police investigators and prosecutors react personally to the sting of lost evidence, it is doubtful a lawyer feels anything but defensive when his conduct comes under attack months or years after the event.

Thus, the damage suit may provide the deterrent effect that is lacking in a petition for habeas corpus.

Although the traditional remedies, the ethical canons, and the civil damage suits all offer a degree of deterrence in developing remedies for ineffective representation of counsel, the courts should consider a more positive solution. Chief Judge Bazelon has made two such proposals: (1) certification for criminal lawyers, and (2) appointment of public defenders by an independent body.

Certification would ensure that every criminal lawyer would possess fundamental knowledge, training, and experience. Without this requirement the likelihood of uneven preparation for criminal defense work will continue. Of course, certification involves the provision of methods to achieve the required expertise. This can be accomplished through continuing legal education, service as cocounsel to provide experience, and an expanded role for law schools.

Appointment of attorneys by an independent body would ensure that pressure to relax the defense in the interests of time could not be exerted on a lawyer by the judge that selected him as defense counsel. This is especially crucial where lawyers depend on judicial appointments for their livelihood. An independent

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102 287 U.S. 18 (1932).
103 *See* *Bines*, *supra* note 82.
104 *See* *Bazelon*, *supra* note 89.
body offers the autonomy to develop certain standards for competency with the added leverage of future appointments to ensure their enforcement.

The most effective tool for preventing ineffective representation of counsel would be one that combines the deterrent effects of the traditional remedies and damage suits with the positive effects of licensing and special appointment. A comprehensive standard for determining ineffective counsel provides such a balance. The standards would be positive because they would inform counsel of the exact expectations of conducting effective criminal defense work. Likewise, the standards would serve as a deterrent because the courts would be more likely to enforce the existing deterrent measures when the enforcement process is directly related to the standard.

One recommendation made by the United States District Court for the District of Maryland proposes that each criminal defense attorney receive a checklist from the court reminding him of the steps necessary for preparation of an adequate defense. The list’s complexity, however, would make it difficult for attorneys to rely upon it and courts to administer it as an overall standard.

The highly respected ABA Standards Relating to the Administration of Criminal Justice offer a more complete and workable set of standards than any court has yet enunciated. These proposed standards are a refinement of relevant sections of the ABA Standards. Hopefully, these standards will offer more guidance to lawyers than Williams does now but without the complexity of the unrefined ABA Standards and the Maryland court’s proposal.

The ABA Standards include:

1) The accused’s counselor must serve his client to the utmost of his learning and ability.
2) The lawyer should seek to determine all relevant facts known to the accused.
3) It is the duty of the lawyer to conduct a prompt investigation of the circumstances of the case and explore all avenues leading to facts relevant to guilt and degree of guilt or penalty.
4) The lawyer has a duty to keep his client informed of the developments in the case and the progress of preparing the defense.
5) The lawyer should inform the accused of his rights forthwith and take all necessary action to vindicate such rights.

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105 This report was prepared by Judge Rosel C. Thomsen and is noted at 36 F.R.D. 277, 327 (1965).
106 Id. at 338-41 (1965).
107 The proposed plan by the United States District Court for the District of Maryland has over seventy specific checks that should be made by defense counsel.
109 ABA STANDARDS, THE DEFENSE FUNCTION 1.1(b) (1971).
110 Id. at 3.2(a).
111 Id. at 4.1.
112 Id. at 3.8.
113 Id. at 3.6(a).
6) The trial lawyer's responsibility includes presenting appropriate motions, after verdict and before sentence to protect the defendant's rights.114

7) The lawyer should take whatever steps are necessary to protect defendant's right of appeal.115

8) Once a lawyer has undertaken the representation of an accused his duties and obligations are the same whether he is privately retained, appointed by the court or serving in a legal aid and defender system.116

9) The lawyer should not accept more employment than he can within the spirit of the Constitution mandate for speedy trial and the limits of his capacity to give each client effective representation.117

This checklist can be weighed by a court against the relevant facts in each case. If a significant number of the provisions have been breached, it would be prima facie evidence that the defendant received ineffective representation of counsel. This is not to suggest that by violating a single provision an attorney would be deemed ineffective. Rather, the courts should use this standard as more an analytical tool and less a mechanical test for determining ineffectiveness.

If the ABA Standards had been applied in Williams it would point to a clear violation of the right to effective representation of counsel. The counsel there, by failing to inform his client of the consequences of taking the stand, did not serve his client to the utmost of his learning and ability.118 The ramifications of testifying are so fundamental that any lawyer who neglects to warn his client of them must be held to fall short of a standard of competence. Counsel failed to conduct investigations that would have produced all the relevant facts;119 nor did he take all the necessary actions (moving for a continuance) to vindicate his client's rights.120 Thus Williams demonstrates exactly how the new standard would work.

The Matthews case, like Williams, involved a number of clear violations of the ABA Standards. Certainly the attorney in Matthews could be cited for taking more work than he could effectively handle.121 Likewise he made no attempt to determine all the relevant facts through thorough investigation.122 The ABA Standards also note that counsel, whether retained or appointed, has the same duties and obligations.123 This standard would seem to suggest that retained counsel has no "immunity" from charges of ineffectiveness merely because he

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114 Id. at 7.10.
115 Id. at 8.2(b).
116 Id. at 3.9.
117 Id. at 1.2(a).
118 See text accompanying note 109 supra.
119 See text accompanying note 110 supra.
120 See text accompanying note 113 supra.
121 See text accompanying note 117 supra.
122 See text accompanying note 111 supra.
123 See text accompanying note 116 supra.
was hired by the defendant. The Matthews court was quick to note that
counsel was retained, which may have influenced the court to find his represen-
tation effective. Thus, if the more exacting ABA Standards are applied to Matthews the decision seems to be in error.

United States v. Jeffers offers the best test of the ABA Standards. As
noted, in Jeffers the Seventh Circuit seemed to be groping for reasons to explain
why counsel effectively represented his client. Initially the court stated: “The
record before us unambiguously demonstrates that Cohen satisfied these require-
ments.” But later, Judge Stevens wrote: “Cohen (the attorney) misjudged his
ethical responsibilities, but the fact remains that an important witness was not
thoroughly cross-examined. Arguably, therefore, his constitutional right to the
effective assistance of counsel was violated. . . .” This apparent contradiction
seems to leave the court in a quandary, searching for a solution. The court then
argued, unconvincingly, that the entire question was rendered moot by defen-
dant’s waiver of the right to effective counsel. This judicial hedging could have
been avoided by the application of the ABA Standards. The Standards suggest
that counsel served competently. The attorney kept his client informed by warn-
ing of the possible conflict of interest. Similarly, the attorney continued to cross-
examine despite his conviction that a conflict of interest existed. The attorney
did preserve the defendant’s right to appeal and, in fact, argued for him before
the Seventh Circuit. There is no suggestion in the Jeffers opinion that counsel
controverted any other standards. Therefore, if the ABA Standards are applied
the judicial machinations of Jeffers are avoided.

To suggest that the ABA Standards provide a panacea for the judicial con-
troversy surrounding the ineffective assistance of counsel is far too presumptuous.
However, the application of the ABA Standard to Williams, Jeffers, and Mat-
thews demonstrates that it is at least a hopeful suggestion to the problem and
worthy of judicial consideration.

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The establishment of a new standard for evaluating claims of incompetency
by the Williams court is a significant change for the Seventh Circuit. The Williams standard of minimum professional representation appears to lessen the
burden of proof on the defendant to establish counsel’s incompetency. The Williams language indicates that the defendant no longer needs to show that his
counsel was so totally incompetent as to constitute a mockery of justice. How-
ever, as the Matthews and Jeffers courts indicate, the effect of this broad and liberalized standard may be seriously confined through the use of a number of
traditional limiting factors, such as a presumption of competency and the harm-
less error rule.

Although the Williams decision attempted to effect needed change in the area of incompetent counsel, its approach did not involve remedying or prevent-

124 Earlier court decisions refused to cite retained counsel for incompetency reasoning that
the attorney served as the client’s agent and all the acts of the agent (attorney) were imputed
to the principal.
125 520 F.2d 1256 (7th Cir. 1975).
ing the problem. The traditional remedies of habeas corpus and direct appeal do not provide adequate deterrence against ineffective representation. The refined ABA standards offer attorneys thorough guidelines to aid them in providing the fullest measure of effective representation for their clients. In addition, they provide the courts a workable tool for realistically assessing an attorney's competency.

The Seventh Circuit's new standard reflects a concern for improving the quality of representation of criminal defendants. The proposed ABA Standards, which offer a more realistic and concrete set of guidelines for both courts and attorneys, would more effectively implement this concern.

**Michael T. Bierman and Joanne M. Frasca**

**LEGAL PROFESSION—SPEECH—ABA AND LOCAL COURT DISCIPLINARY RULE'S STANDARDS FOR PROHIBITING ATTORNEY COMMENTS ON PENDING INVESTIGATIONS OR LITIGATION VIOLATE FIRST AMENDMENT PROTECTIONS**

*Chicago Council of Lawyers v. Bauer*

The conflict between fair trial and free speech is not new to our legal system; yet, despite its traditional presence, it is an area in which many problems remain unresolved. The extent to which the right to a fair trial justifies restrictions, in the form of court and bar association disciplinary rules, on an attorney's speech concerning that trial until recently lacked a definite answer. Such a response was presented by the Court of Appeals for the Seventh Circuit in *Chicago Council of Lawyers v. Bauer.*

Plaintiff, the Chicago Council of Lawyers, and various individual attorneys, originally brought this action seeking injunctive and declaratory relief on behalf of themselves and all other attorneys practicing before the United States District Court for the Northern District of Illinois. They argued that Rule 1.07 of the District Court's Local Criminal Rules and Disciplinary Rule 7-107 of the ABA's

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1 522 F.2d 242 (7th Cir. 1975) (opinion by Swygert, J., with Wyzanski, J., concurring and Castle, J., dissenting in part).

2 Local Criminal Rules for the District Court for the Northern District of Illinois: 1.07 Public Discussion by Attorneys of Pending or Imminent Criminal Litigation (a) It is the duty of the United States Attorney, or a lawyer or law firm not to release or authorize the release of information or opinions which a reasonable person would expect to be disseminated by means of public communication, in connection with pending or imminent criminal litigation with which he or the firm is associated, if there is a reasonable likelihood that such dissemination will interfere with a fair trial or otherwise prejudice the due administration of justice.

(b) With respect to a grand jury or other pending investigation of any criminal matter, the United States Attorney or a lawyer participating in or associated with the investigation shall refrain from making any extrajudicial statement which a reasonable person would expect to be disseminated by means of public communication, that goes beyond the public record or that is not necessary to inform the public that the investigation is under way, to describe the general scope of the investigation, to obtain assistance in the apprehension of a suspect, to warn the public of any dangers, or otherwise to aid in the investigation.

(c) From the time of arrest, issuance of an arrest warrant, or the filing of a complaint, information, or indictment in any criminal matter until the commencement of trial or disposition without trial the United States Attorney, or a lawyer or law firm associated with the prosecution or defense shall not release or authorize the
Code of Professional Responsibility were, in addition to being unconstitutionally

release of any extrajudicial statement which a reasonable person would expect to be disseminated by means of public communication, relating to that matter and concerning:

(1) The prior criminal record (including arrests, indictments, or other charges of crime), or the character or reputation of the accused, except that the lawyer or law firm may make a factual statement of the accused's name, age, residence, occupation, and family status, and if the accused has not been apprehended, the United States Attorney may release any information necessary to aid in his apprehension or to warn the public of any dangers he may present;

(2) The existence or contents of any confession, admission, or statement given by the accused, or the refusal or failure of the accused to make any statement;

(3) The performance of any examinations or tests or the accused's refusal or failure to submit to an examination or test;

(4) The identity, testimony, or credibility of prospective witnesses, except that the lawyer or law firm may announce the identity of the victim if the announcement is not otherwise prohibited by law;

(5) The possibility of a plea of guilty to the offense charged or a lesser offense;

(6) Any opinion as to the accused's guilt or innocence or as to the merits of the case or the evidence in the case.

The foregoing shall not be construed to preclude the United States Attorney, or a lawyer or law firm during this period, in the proper discharge of his or its official or professional obligations, from announcing the fact and circumstances of arrest (including time and place of arrest, resistance, pursuit, and use of weapons), the identity of the investigating and arresting officer or agency, and the length of the investigation; from making an announcement, at the time of seizure of any physical evidence other than a confession, admission or statement, which is limited to a description of the evidence seized; from disclosing the nature, substance, or text of the charge, including a brief description of the offense charged; from quoting or referring without comment to public records of the court in the case; from announcing the scheduling or result of any stage in the judicial process; from requesting assistance in obtaining evidence; or from announcing without further comment that the accused denies the charges made against him.

(d) During the trial of any criminal matter including the period of selection of the jury, no United States Attorney or lawyer or law firm associated with the prosecution or defense shall give or authorize any extrajudicial statement or interview, relating to the trial or the parties or issues in the trial which a reasonable person would expect to be disseminated by means of public communication, except that the United States Attorney, or lawyer or law firm may quote from or refer without comment to public records of the court in the case.

(e) After the completion of a trial or disposition without trial of any criminal matter, and prior to the imposition of sentence, the United States Attorney, or a lawyer or law firm associated with the prosecution or defense shall refrain from making or authorizing any extrajudicial statement which a reasonable person would expect to be disseminated by means of public communication if there is a reasonable likelihood that such dissemination will affect the imposition of sentence. (Amended effective March 9th, 1971).

3 ABA Code of Professional Responsibility.

DR 7-107 Trial Publicity

(A) A lawyer participating in or associated with the investigation of a criminal matter shall not make or participate in making an extrajudicial statement that a reasonable person would expect to be disseminated by means of public communication and that does more than state without elaboration:

(1) Information contained in a public record.

(2) That the investigation is in progress.

(3) The general scope of the investigation including a description of the offense and, if permitted by law, the identity of the victim.

(4) A request for assistance in apprehending a suspect or assistance in other matters and the information necessary thereto.

(5) A warning to public of any dangers.

(B) A lawyer or law firm associated with the prosecution or defense of a criminal matter shall not, from the time of the filing of a complaint, information, or indictment, the issuance of an arrest warrant, or arrest until the commencement of the trial or disposition without trial, make or participate in making an extrajudicial statement that a reasonable person would expect to be disseminated by means of public communication and that relates to:

(1) The character, reputation, or prior criminal record (including arrests, indict-
vague and overbroad,\textsuperscript{4} unduly restrictive of an attorney's first amendment right to freedom of speech. The defendants consisted of two groups: those alleged to partake in the enforcement of these rules,\textsuperscript{5} and a class of intervening defendants composed of attorneys regularly engaged in the representation of criminal clients before the district court. After the Executive Committee of the district court

\begin{itemize}
  \item \textbf{(G) DR 7-107 (B)} does not preclude a lawyer during such period from announcing:
    \begin{enumerate}
      \item The name, age, residence, occupation, and family status of the accused.
      \item If the accused has not been apprehended, any information necessary to aid in his apprehension or to warn the public of any dangers he may present.
      \item A request for assistance in obtaining evidence.
      \item The identity of the victim of the crime.
      \item The fact, time, and place of arrest, resistance, pursuit, and use of weapons.
      \item The identity of investigating and arresting officers or agencies and the length of the investigation.
      \item At the time of seizure, a description of the physical evidence seized, other than a confession, admission or statement.
      \item The nature, substance, or text of the charge.
      \item Quotations from or references to public records of the court in the case.
      \item The scheduling or result of any step in the judicial proceedings.
      \item That the accused denies the charges made against him.
    \end{enumerate}
  \item \textbf{(D)} During the selection of a jury or the trial of a criminal matter, a lawyer or law firm associated with the prosecution or defense of a criminal matter shall not make or participate in making an extrajudicial statement that a reasonable person would expect to be disseminated by means of public communication and that relates to the trial, parties, or issues in the trial or other matters that are reasonably likely to interfere with a fair trial, except that he may quote from or refer without comment to public records of the court in the case.
  \item \textbf{(E) After the completion of a trial or disposition without trial of a criminal matter and prior to the imposition of sentence, a lawyer or law firm associated with the prosecution or defense shall not make or participate in making an extrajudicial statement that a reasonable person would expect to be disseminated by public communication and that is reasonably likely to affect the imposition of sentence.
  \item \textbf{4) Any other matters reasonably likely to interfere with a fair trial of the action.}
\end{itemize}

\textsuperscript{4} The constitutional principles concerning vagueness and overbreadth are so basic to any system of law that they warrant little discussion here. Generally, rules which restrict an individual's first amendment freedoms must be clear, precise and narrow. The purposes of such requirements are simply to ensure that each individual is able to easily identify his particular conduct in reference to the rule's proscriptions, and to guard against restrictions which extend beyond that which is essential to the interest sought to be protected. Further discussion on this issue is withheld until consideration of the specific provisions of each rule, and then appears as required.

\textsuperscript{5} This refers to the United States Attorney for the Northern District of Illinois, the Marshall for the District Court, and the Clerk of the District Court. 522 F.2d at 247.
granted the defendants' motion to dismiss for failure to state a cause of action,\(^6\) the Seventh Circuit reversed and remanded for relief consistent with its opinion.

**Search for a Constitutional Standard**

In reviewing the appellate court's holding, it is interesting to note the initial rejection of plaintiffs' argument refuting the notion of competition between these two basic rights. The court stated that while ideally, perhaps, the right to free speech and the right to a fair trial are capable of peaceful coexistence, pragmatically, some conflict between the two is inevitable.\(^7\) Referring to the Supreme Court decision in *Estes v. Texas*,\(^8\) where the right to a fair trial was recognized as "the most fundamental of all freedoms,"\(^9\) the seventh circuit noted that

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\text{[c]onsequently, when irreconcilable conflicts do arise, the right to a fair trial, guaranteed by the Sixth Amendment to criminal defendants and to all persons by the Due Process clause of the Fourteenth Amendment, must take precedence over the right to make comments about pending litigation by lawyers who are associated with that litigation if such comments are apt to seriously threaten the integrity of the judicial process.}^{10}
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These opening remarks appeared to indicate a preferred position for the sixth amendment right; however, the remainder of the opinion is not wholly supportive of this preference.

As a prerequisite to determining the position of these two rights in relation to each other, the court considered, and dismissed, the contention that the questioned court rules constituted prior restraints.\(^11\) The court then set about to

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7 522 F.2d at 248.
8 381 U.S. 532 (1965).
9 381 U.S. at 540.
10 522 F.2d at 248 (emphasis added).
11 As noted, the first substantive issue handled by the court was a rejection of the classification of the noncomment rules as prior restraints. The importance of such a classification lies in the fact that prior restraints, unlike other speech restrictions, are inherently suspect and thus come before the court with a "heavy presumption" against their validity. Organization for a Better Austin v. Keefe, 402 U.S. 415 (1971). In the process of this determination the court conceded the existence of an important similarity between the court rules and the notion of prior restraints: both are punishable by the court's contempt power. This permissible use of the contempt power, according to the Seventh Circuit, is an essential characteristic attributed to prior restraints and is cited as one of the basic factors which serve to distinguish these restraints from statutory enactments tending towards the same end. Despite this basic congruency, the court was able to find sufficient grounds on which to distinguish the court rules from prior restraints. In general, this court cited as the critical point of distinction the varying procedures available for challenging the two types of restrictions. More specifically, however, the court focused on the differing court functions which provided the underlying basis for each of those procedures.

Basically, a court can be perceived as functioning in two capacities: one adjudicative, the other legislative. *In re Oliver*, 452 F.2d 111, 115 (7th Cir. 1971). By the very nature of the former role, the court is restricted to a determination of the relative rights of the parties before it. Assuming the requisite power to adjudicate, the court makes its determination on the basis of facts currently relevant. The legislative role, on the other hand, is characterized by court adoption of much broader rules, in an attempt to control general, rather than specific situations. As such, these enactments are based primarily on anticipated facts and, consequently, are likely to have their greatest effect on persons not before the court at the time of their acceptance. Clearly, then, prior restraints which are premised on particular
investigate the substantive constitutional issue before it. However, to sufficiently analyze the adequacy of the Seventh Circuit's decision in Bauer, it is necessary to review the historical development of the clear and present danger standard and its relation to the exercise of free speech.

The clear and present danger test, as a standard for determining under what circumstances the first amendment guarantee of free speech might be impinged, was announced in Schenck v. United States.\(^\text{12}\) Schenck had been convicted of violating the Espionage Act of 1917 by urging resistance to the draft. In his appeal to the Supreme Court he claimed that his speech had been within the protective confines of the first amendment. Justice Holmes, speaking for the Court, stated that not all speech is constitutionally protected, and that

\[\text{[r]he question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent.}\(^\text{13}\)

facts confronting the court, are issued pursuant to the court's adjudicative role. Contrastingly, court rules of conduct, generated as preventative measures based on predicted situations, arise out of a court's legislative functioning.

The court views this distinction as a rational basis for requiring different challenge procedures for enactments formulated under each role. As a creation of its adjudicative function, a court issued prior restraint is not challengeable collaterally, but requires direct action. Walker v. City of Birmingham, 388 U.S. 307 (1967). In other words, the constitutionality of a prior restraint must be raised on an appeal directly contesting the issuance of the order; the unconstitutionality of the order is not itself a defense in a contempt proceeding for its violation. A different rule is reasonably applicable, however, with regards to general rules enacted pursuant to a court's legislative role. In paralleling the functions of a legislature, the court should receive treatment accordingly. In re Oliver, 452 F.2d at 114. Violations of its enactments, therefore, should be subject to the same manner of challenge available in situations involving statutory violations. Basically, this allows the assertion of a court rule's invalidity as a permissible defense in an action for its violation. In adopting this position, the Seventh Circuit apparently views the ability to collaterally challenge no-comment rules as a sufficient safeguard against the dangers inherent in summary contempt proceedings, thus warranting elimination of the "heavy presumption" against their validity. But even the Seventh Circuit limited the application of its parallelism argument. Although justifying removal of this particularly rigorous standard, the court did not feel the direct-collateral challenge distinction was sufficient to raise court rules to a position of total parity with statutory enactments. Thus, rather than accepting the extreme position of presuming their validity, the court indicated its intention to view the rules under a somewhat vague standard resting between these extreme positions. The court states: "Thus, while we do not begin our examination with a 'heavy presumption' against validity, we are aware of the fact that these court rules must endure even closer scrutiny than a legislative restriction." 522 F.2d at 249.

Noting that the Supreme Court has made it "abundantly clear" that review of contempt proceedings will differ from review of statutory violations, the district court went to the extreme of the Seventh Circuit and presumed the validity of the rules. According to the lower court, such a presumption was justified by the prior legislative deliberations. Thus, the court reasoned, "[i]n view of the extensive deliberations which preceded the promulgation of the challenged rules . . ., it is evident that they must be judged by standards analogous to those applied to legislative action." 371 F. Supp. at 693-94. The "extensive deliberations" mentioned by the court refer to the various studies preceding recommendation of the rules. See, Advisory Committee on Fair Trial and Free Press, ABA Project on Minimum Standards for Criminal Justice, Standards Relating to Fair Trial and Free Press, (Approved Draft, 1968) [hereinafter cited as ABA Advisory Committee]; Committee on the Operation of the Jury System, Judicial Conference of the United States, Report of the Committee on the Operation of the Jury System on the "Free Press-Fair Trial" Issue, 45 F.R.D. 391 (1968); Association of the Bar of the City of New York, Special Committee on Radio, Television, and the Administration of Justice, Freedom of Press and Fair Trial, Final Report with Recommendations (1967).

\(^{12}\) 249 U.S. 47 (1919).

\(^{13}\) 249 U.S. at 52.
While this standard has been repeated in a variety of cases, *Bridges v. California* has become the leading application of the clear and present danger standard at least in terms of its original formulation.

*Bridges* involved the conviction of a union official for contempt of court, based upon certain statements he made which were printed. Originally, Bridges telegraphed the Secretary of Labor sharply criticizing a federal court's handling of a major labor dispute. In effect, the telegram threatened a strike if any attempt were made to enforce the judgment of the court. While a motion for a new trial was pending, the contents of the telegram were published in a local newspaper, whereupon Bridges was convicted of contempt, the judge citing his speech for having "'tended' to interfere with justice." In reversing the conviction, the Court, per Justice Black, stated:

What finally emerges from the "clear and present danger" cases is a working principle that the substantive evil must be extremely serious and the degree of imminence extremely high before utterances can be punished. Those cases . . . do no more than recognize a minimum compulsion of the Bill of Rights. For the First Amendment does not speak equivocally. It prohibits any law "abridging the freedom of speech, or of the press." It must be taken as a command of the broadest scope that explicit language, read in the context of a liberty-loving society will allow.

Thus, the Court unequivocally stressed the value of free speech by erecting a standard prohibiting its restriction except in only the most critical situations.

Five years later, in *Pennekamp v. Florida*, the Supreme Court reiterated its reluctance over free speech limitations. Certain editorials, appearing in the Miami Herald, criticized the administration of criminal justice in certain cases then pending before the Circuit Court. Both the editor and the paper were found guilty of contemptuous behavior. The Supreme Court, relying primarily on *Bridges*, declared that only comments which presented a clear and present danger to some legitimate interest of government, in this case the administration of justice, could be curtailed or punished. The Court went on to note that the "essential right of the courts to be free of intimidation" did not exist in a vacuum and must be "consonant with a recognition that freedom of the press must be allowed in the broadest scope compatible with the supremacy of order." Thus while recognizing the importance of protecting a fair and orderly administration of justice, the Court concluded that freedom of public comment should "weigh heavily" against the mere tendency of such comment to interfere with this administration. Despite this decision's emergence in the midst of a period that rigorously applied the clear and present danger test, there was considerable recognition of the right to a fair trial. The Court's preference in this case for first amendment rights should be viewed against the contemporaneous...

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15 314 U.S. at 278.
16 314 U.S. at 263 (footnotes omitted).
17 328 U.S. 331 (1946).
18 328 U.S. at 334.
19 *Id.*
20 *Id.* at 347.
ous surfacing of the “preferred position” for free speech. While this preference dealt with the presumptive invalidity of legislation restrictive of first amendment rights, and therefore not directly related to the fair trial issue, the doctrine did reflect the general attitude of the Court towards the first amendment. Consequently, since the Court later shifted its preference to the fair trial right, it is reasonable to assume it lessened its restrictive standard concerning free speech accordingly.

The last case of the trilogy which seemed to firmly implant the clear and present danger test in constitutional law, presented an essentially identical situation. Again the controversy revolved around a contempt conviction resulting from published statements extremely critical of judicial action in a pending case. In Craig v. Harney, Justice Douglas not only reaffirmed the need for a clear and present danger test as applied in the earlier Bridges and Pennekamp cases, but clothed the standard in even stronger language:

The fires which [the language] kindles must constitute an imminent, not merely a likely, threat to the administration of justice. The danger must not be remote or even probable; it must immediately imperil.

The conviction was reversed; the comments, though false and sharp, failed to constitute the requisite danger to the fair administration of justice.

Although the cases discussed above concerned the interaction of free speech and the need for a fair and orderly administration of justice, their facts are broader than the narrow situation presented in Bauer. While these cases establish the general standard applicable to cases dealing with restrictions on the first amendment right, the more confined conflict between the attorney’s right of free speech and the right to an impartial trial (clearly within the broader notion of “fair administration of justice”) is a more difficult question. The

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21 The “preferred position” notion first appeared in United States v. Carolene Products Co., 304 U.S. 144, 152, n.4 (1938). It was first supported by a majority of the Court in Thomas v. Collins, 323 U.S. 516 (1945).

22 331 U.S. 367 (1947).

23 Id. at 376.

24 Despite the fact that a different factual situation is present here, it is in no way clear what the present status of the clear and present danger test is. In 1951 the court retreated, somewhat, from the hard-line approach it had “traditionally” taken with regards to the application of the clear and present danger standard. While retaining its name, the standard underwent a substantial transformation in Dennis v. United States, 341 U.S. 494 (1951). There the Court upheld the conviction of 11 Communist Party leaders for conspiring to teach and advocate the violent overthrow of government. Citing to the lower court’s formulation by Judge Learned Hand found in 183 F.2d at 212, Chief Justice Vinson repeated: "In each case . . . [courts] must ask whether the gravity of “evil,” discounted by its improbability, justifies such invasion of free speech as is necessary to avoid the danger.” 341 U.S. at 510. Thus, what was once condemned for its imminence was there allowed because of its improbability. That the danger might occur immediately is not in itself sufficient, but that it is probable to occur—at any time—is. For a more complete view of the development of the clear and present danger standard from Schenck to Dennis, see Garfinkel & Mark, Dennis v. United States and the Clear and Present Danger Rule, 39 Calif. L. Rev. 475 (1951); and Mendelson, Clear and Present Danger from Schenck to Dennis, 52 Colum. L. Rev. 312 (1952).

This was not the Supreme Court’s only divergence from the original rule in Schenck, or its only fluctuation in stating the appropriate standard. For a substantial list of cases noting other “offshoots” of the theory, see Brandenburg v. Ohio, 395 U.S. 444, 450 (1969) (Douglas, J., concurring); and the majority opinion in Younger v. Smith, 30 Cal. App. 3d 138, 106 Cal. Rptr. 235, 240-41 (1973).
Supreme Court dealt with this narrower issue, though somewhat indirectly, in the celebrated case of *Sheppard v. Maxwell.*

*Sheppard* stands as the prime example of the conflict which can result from the competing nature of first and sixth amendment rights. Confronted with a massive accumulation of prejudicial publicity, from the pretrial stage through the course of the trial, the Supreme Court was forced to reverse Sheppard's murder conviction. Apparent throughout the opinion was the Court's concern with the role of the trial judge in ensuring a fair and orderly trial. Of particular importance to the present issue was the Supreme Court's comment as to the specific need for court control over counsel as an available means of preventing prejudicial leaks:

> The courts must take such steps by rule and regulation that will protect their processes from prejudicial outside interferences. . . . Collaboration between counsel and the press as to information affecting the fairness of a criminal trial is not only subject to regulation, but is highly censurable and worthy of disciplinary measures.*

The problem's solution, according to Justice Clark, laid not in controlling the means of publicity, the news media, but in controlling the various sources. Although the Court in *Sheppard* failed to specify what speech limitations would be tolerated to protect the judicial process, the thrust of the Court's command was clear. And the Court did indicate its position indirectly, by citing approvingly to *State v. Van Duyne.*

In *Van Duyne,* the Supreme Court of New Jersey, in interpreting Canon 20, an ABA Canon of Professional Responsibility dealing with attorney comments, declared:

> The courtroom is the place to settle the issue and comments before or during the trial which have the capacity to influence potential or actual jurors to the possible prejudice of the State [or the defendant] are impermissible.*

It seems apparent that by incorporating the *Van Duyne* position in *Sheppard,* the Supreme Court was materially retreating from its former application of the clear and present danger test. At least where attorneys were involved, potential prejudice would be recognized as permissible grounds for speech restrictions. While this may not have signaled the death of this doctrine in general, it certainly attested to its inappropriateness in view of the particular circumstances. In light of this specific reference to *Van Duyne,* as well as its reversal of Dr. Sheppard's conviction, *Sheppard* arguably calls for a lesser standard than that enunciated

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26 The lower court's decision was reversed on due process grounds, 384 U.S. at 362, 363.
27 *Id.* at 365.
28 *Id.* at 361, 362.
29 43 N.J. 369, 204 A.2d 841 (1964).
30 ABA CANONS OF PROFESSIONAL ETHICS No. 20 provides that: "Newspaper publications by a lawyer as to pending or anticipated litigation may interfere with a fair trial in the Courts and otherwise prejudice the due administration of justice. Generally they are to be condemned."
31 43 N.J. at 389; 204 A.2d at 852 (emphasis added).
by *Bridges*, *Pennekamp* and *Craig*. The Court found, from both a constitutional and a practical viewpoint, that imposing greater restrictions on the press was unreasonable. Rather, the answer to the problem centered on the lower court’s ability to adequately control those persons standing in a fiduciary relationship to the court and thus charged with safeguarding its functions—the attorneys. It would be unlikely to conclude that the Court recognized the nature of the problem and the special relationship yet advocated a solution which historically had proven itself inadequate. The attitude of the Court recognized the need for more reasonable standards by which to safeguard the integrity of its work.

Consistent with this attitude is an approach implemented previously by several courts. In fact, the application of a different restriction standard for attorneys predates *Van Duyne* in re *Sawyer*, a Ninth Circuit decision, expressly rejected the appropriateness of the clear and present danger test. Commenting on the validity of this standard, the court declared:

> How could we accept the notion that before a lawyer in the very same case could be disciplined his voice would have to rise to a mighty cacophony reaching the point of causing the audience (a clear and present danger) to march on the courthouse, or to set up such a howl that the judge would be terrified? Maybe for others, but not for counsel of record.

Although the resulting conviction was reversed by the Supreme Court on other grounds, without ever reaching the applicability of the *Bridges* standard, Justice Frankfurter, in dissent, noted that:

> An attorney actively engaged in the conduct of a trial is not merely another citizen. He is an intimate and trusted and essential part of the machinery of justice, “an officer of the court” in the most compelling sense.

As such, the standards effecting the attorney’s speech will necessarily differ from those imposed upon others.

In more recent years, other courts have noted the applicability of a lesser standard in validating restrictions on extrajudicial comments by attorneys associated with pending trials. The clearest of these is the Tenth Circuit’s decision in *United States v. Tijerina*, involving two contempt convictions for violation of a pretrial order which prohibited a wide range of comments by counsel and witnesses of each side. The order rested on the existence of a “reasonable likelihood that [such comments] prior to trial” would hinder the

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32 ABA ADVISORY COMMITTEE, supra note 11, at 77.
33 260 F.2d 189 (9th Cir. 1958), rev’d on other grounds, 360 U.S. 622 (1959).
34 260 F.2d at 199.
35 360 U.S. 622, 668 (1959) (dissenting opinion).
37 The order prohibited comments relating to the jury or jurors in this case, prospective or selected, the merits of the case, the evidence, actual or anticipated, the witnesses or rulings of the court. This Order does not apply to statements made, evidence given, or pleadings filed in this action. Of course, all proceedings in the action are and will continue to be public and matters of public record.
38 *Id.* at 663.
impaneling of an impartial jury, thus tending to prevent a fair trial. The court rejected the defendant's contention that the order was constitutionally impermissible because it failed to observe the clear and present danger standard set forth in Bridges. After initially distinguishing the earlier "danger cases" on the fact that they were not directed to the issue of pretrial order violations, the court stated:

We believe that reasonable likelihood suffices. The Supreme Court has never said that a clear and present danger to the right of a fair trial must exist before a trial court can forbid extrajudicial statements about the trial. In support, the court referred to the clear dictate of Sheppard concerning the trial judge's responsibility to exercise that control necessary to assure a fair trial.

In Younger v. Smith, the California Court of Appeals also rejected the applicability of the clear and present danger test when juxtaposed to the right to a fair trial. In denying a writ of prohibition sought against a trial court order restricting attorney comment based on the "reasonable likelihood" that such comment would result in the denial of a fair trial, the appellate court indicated the practical inadequacy of the clear and present danger standard. The California court rejected the traditional standard due more to its irrelevancy than to its restrictiveness. The court noted that in approving the clear and present danger standard in Bridges, the Supreme Court had been impressed with the "practical guidance" afforded by this "working principle." However, the Younger court felt that the standard had ceased to be of "practical guidance." Since the responsibility of the court remained to restrain speech from impairing the right to a fair trial, "the test [was] irrelevant" and therefore warranted abandonment. The court acutely assessed the basic deficiency of the clear and present danger standard to be its requirement that trial judge "palm off guesswork as finding. Under the danger standard, the trial court is mandated to limit speech restrictions only to those situations where the threat of impartiality is serious and imminent. Since this is a time-consuming determination damage often occurs even though the restraint eventually issues. The absurdity of such a requirement is evident particularly at the pretrial stage, where to require a court to find that future publicity creates a clear and present danger before it even knows where the trial is to be held, is to "demand impossible feats of clairvoyant fact finding." In contrast, the "reasonable likelihood" standard adopted here allows the court to consider, as a totality, the varied contingencies—

39 Id. at 666.
40 Id. at 667.
42 Id. at 162, 106 Cal. Rptr. at 241.
43 Id.
44 Id. at 162, 163, 106 Cal. Rptr. at 241.
45 Id. at 164, 106 Cal. Rptr. at 242.
46 See Brandenburg v. Ohio, 395 U.S. 444 (1969) (Douglas, J., dissenting). Compliance with the standard as phrased there might realistically result in considerable prejudice in fact before any restraint would issue. That excerpt intimates restraint only on speech the prejudicial nature of which is without any doubt.
which by their very nature are not subject to recognition under the clear and present danger standard—that might adversely affect the fair administration of justice. A court is permitted to issue its order in accordance with the practical notion of preventative action mandated by Sheppard. 48

The Seventh Circuit faced in Bauer the dilemma of choosing between two arguably supportable positions. It could have followed the earlier danger cases, recognizing an almost unassailable position for freedom of speech. And although possibly tainted by the recent pronouncement in Estes regarding the primacy of the fair trial right, some contemporaneous support for this position does exist. Alternatively, the court could have chosen to reflect the more current trend of cases, attempting to implement the dictates of Sheppard. In either event, the court’s decision would clearly be important as an attempt at concrete formulation of the attorney’s role in the judicial process.

Ultimately, despite the broader recognition of the fair trial right by contemporary courts, the Seventh Circuit followed the Supreme Court cases requiring application of the clear and present danger standard. While Judge Swygert spoke only briefly on this important issue in the Bauer case, he referred, for substantive support of the court’s conclusion, to In re Oliver 49 and Chase v. Robson. 50 The earlier Chase case dealt with a pretrial court order 51 limiting permissible comments by the defendant and trial counsel on a “reasonable likelihood” standard. 52 In the Oliver case, the factual situation was more squarely on point with Bauer. At issue was a “Policy Statement” promulgated by the District Court for the Northern District of Illinois, requiring virtually a blanket prohibition on attorney comment on pending litigation. 53 Additionally, the restriction was absolute in that comments were prohibited without reference to any standard which might have limited its effect. In both instances the circuit court saw fit to demand the more stringent test, and as a result struck down the court enactments. 54 Each of these cases summarily accepted the Craig reason-

48 “But we must remember that reversals are but palliatives; the core lies in those remedial measures that will prevent the prejudice at its inception.” 384 U.S. at 363.
49 In re Oliver, 452 F.2d 111 (7th Cir. 1971).
50 Chase v. Robson, 435 F.2d 1059 (7th Cir. 1970).
51 The court order prohibited

. . . counsel for both the Government and the defendants, as well as each and every defendant herein [from making or issuing] statements, written or oral, either at a public meeting or occasion or for public reporting or dissemination in any fashion, regarding the jury or jurors in this case, prospective or selected, the merits of the case, the evidence, actual or anticipated, the witnesses, or the rulings of the court.

Id. at 1060.

52 (2) Public utterances by parties or counsel which a criminal matter is pending are not compatible with the concept of a fair trial since such conduct creates a reasonable likelihood of prejudicial outside influences upon the trial. . . .

Id.

53 The members of the bar of this court are reminded that they as well as Judges should, in accordance with the Canons of Judicial and Legal Ethics, refrain from commenting on and attempting to explain through any source of news media, action taken or anticipated in pending litigation . . . Violations of this policy by any member of the bar of this court would be subject to discipline . . .

452 F.2d at 112.

54 The opinion in the Chase case did not accurately represent the usual clear and present danger test. The court concluded that to be subject to restriction the speech must either create a clear and present danger of a serious or imminent threat to the administration of justice, or (a lesser standard) a reasonable likelihood of a serious and imminent threat. This conclusion by the court is apparently the result of confusion. The court cites Craig v. Harney,
ing; thus by implication, the Bridges-Pennekamp-Craig series of cases can be assumed to have been deemed controlling by the court in Bauer.

However, there are basic factual differences between the Bauer case (and Oliver) and the earlier danger decisions which the circuit court failed to recognize as warranting deviation from the stricter standard. Perhaps somewhat superficial is the distinction previously noted, under similar circumstances, by the Tenth Circuit in Tijerina. There the court pointed to the fact that the Bridges-Pennekamp-Craig cases were not directed towards the violation of pretrial orders, but rather dealt with contemptuous comments made absent specific restrictions. Although the Tenth Circuit did not make the attempt, it is conceivable to justify the application of a less protective test in the pretrial order cases, and similarly, where court rules exist, since specific notice of what is considered contemptuous behavior is available. Yet absent prior notice, the contempt citations become analogous to ex post facto enactments and the vagueness inherent in lack of notice situations warrants greater restrictions on the use of power to avoid judicial abuse.

A more substantial distinction, though, focuses on the class of persons sought to be restricted under each of the factual situations. The Bridges-Pennekamp-Craig line of cases dealt solely with situations involving "third party" contempts; the Court was delineating standards applicable to speech restrictions on individuals not intimately involved with the judicial process. On the other hand, the restrictions under consideration in Bauer were expressly limited to attorneys connected with the particular case.

Three reasons justify a distinction between attorney and nonattorney comments. The first, previously noted, is the special "fiduciary relationship" which exists between attorneys and the judicial process. Unlike private citizens, the attorney is expressly charged with safeguarding the administration of justice, and thus has a unique duty to see that its integrity is upheld, even at the expense of restrictions on his own, otherwise constitutional, conduct. The second reason can be attributed to the position accorded the legal profession by the remainder of the citizenry. Even the Seventh Circuit recognized this consideration in Bauer. The court noted that attorney comments are frequently the source of

331 U.S. 367 as authority for the former standard. However, that case does not create a new aspect of the traditional test; it merely rephrases the court's holding in Bridges. See text accompanying notes 14-20 supra. Thus clear and present danger is actually synonymous with a serious and imminent threat, and there is no reason to combine the two phrases. Similarly, the latter standard cited by the court is the result of a misunderstanding of United States v. Tijerina, 412 F.2d 661. That case stands for a total rejection of the clear and present danger test, not its combination with a reasonable likelihood standard. See text accompanying notes 36-40 supra. Despite this confusion, the thrust of the opinion is directed towards recognition of a traditional clear and present danger test, not its combination with a reasonable likelihood standard. See text accompanying notes 36-40 supra. Despite this confusion, the thrust of the opinion is directed towards recognition of a traditional clear and present danger test, not its combination with a reasonable likelihood standard. The misconception apparently continues to linger on the Seventh Circuit court, evidenced by the suggested resort to the "reasonable likelihood of a serious and imminent threat" standard by Judge Castle in his dissenting opinion in Bauer. 522 F.2d at 261.

55 In Oliver, the court noted the direct applicability of the Craig "serious and imminent" formulation to the case then at bar, and cited to Chase as added support for the acceptance of this doctrine in the Seventh Circuit. 452 F.2d 114.

56 As noted previously, see text accompanying notes 22-23 supra, Craig was directly based on the Supreme Court decisions in Bridges and Pennekamp; thus by adopting Craig, the court is impliedly adopting its authority.

57 See supra note 36.

58 See supra note 32.
prejudicial publicity because they are thought to emanate from a "wellspring of reliable information." Undue weight is accorded such pronouncements. Thus, the practical realities of the situation warrant the exercise of closer control to ensure fundamental fairness.

The final reason is perhaps the strongest justification for distinguishing the cases due to the parties involved. In nonattorney situations, the importance of public comment has been widely recognized as an effective check on judicial abuse of power, and the hesitancy to restrict this check is considerable. However, the rules in Bauer did not foreclose the only real forum available to the restricted party; public comment is but one method by which the attorney can contest what he believes to be injustice. By removing just one method of comment, rather than the sole effective method, the limitations imposed on the attorney are not as serious as similar restrictions on the rest of the public. As Justice Frankfurter noted:

[The attorney] does not lack for a forum in which to make his charges of unfairness or failure to adhere to principles of law; he has ample chance to make such claims to the courts in which he litigates.

Lacking definite Supreme Court pronouncements, the Seventh Circuit was free to choose either of the two alternatives discussed. Despite its verbal commitment to Estes in recognizing that fair trial-free speech conflicts be resolved in favor of the fair trial right, the court's use of the clear and present danger standard signifies an opposite commitment in fact. Recognizing its full potential, the clear and present danger standard can be fairly characterized as placing the right of free speech in a position second only to an absolute right. Cognizant of the importance of free speech, the court's decision in Bauer perpetuates its exalted position, but only at the potential expense of the right to a fair and impartial trial.

**Application of the Selected Standard**

In adopting the requirement of the clear and present danger test, the court necessarily found the reasonable likelihood standard of the rules to be inappropriate. However, the court recognized the general need for regulation in this area, and concluded that it would be constitutionally permissible to establish a set of "guidelines" to delineate those areas in which comments would be presumed to pose a "serious and imminent threat to the fair administration of justice." An individual charged with violating these guidelines could prove that the questioned comment did not in fact pose such a threat, but the presumption would be weighed against him. In an attempt to salvage some utility from the rules before it, the court stated that by replacing the reasonable likelihood standard with the clear and present danger test, the district court and ABA rules might adequately constitute such permissible presumptions. Yet before

59 522 F.2d at 250.
60 360 U.S. at 668.
61 522 F.2d at 251.
accepting the adequacy of these rules the court proceeded to examine each provision to ensure it represented a valid basis for speech limitation.

Both the district court and ABA rules consist of a criminal section in which various types of comments are restricted according to the stage of the criminal process which is involved. Additionally, the ABA rules contain a provision dealing with civil litigation. The various aspects of the criminal framework will be considered here in detail.62

Rule 1.07(b)63 deals with the investigatory stage of the process, including both grand jury and other pending investigations. Basically, extrajudicial comments which may reasonably be subject to dissemination by public communication are prohibited with the exception of statements in the public record; comments necessary to inform the public of the investigation, its scope, possible dangers, and similar comments necessary to aid in the investigation. This particular prohibition extends to all attorneys "participating in or associated with" the investigation. While the court appreciated the uniqueness of this particular stage of the criminal process,64 it was concerned with what it believed to be excessive restriction. The most acute problem was the confusion as to the scope of persons affected by Rule 1.07(b). With respect to nongovernment attorneys, the court found the "participating in or associated with" standard so vague as to make it virtually impossible to determine at what point of interaction with the investigation the restriction became effective.65

Similarly, the scope relative to subject matter was too broad; even such innocuous comments as denying any wrongdoing by the client were prohibited. The court accurately pointed out that when these scope considerations were coupled with the practical realities involved, it made this particular provision, at least as applied to nongovernment attorneys, of questionable validity. There is clearly less than a clear and present danger that any comments at this time

62 The court states: Local Rule 1.07 and DR 7-107(A)-(E) are substantially the same except that there is no counterpart to Rule 1.07(a) which is a general introductory section indicating that lawyers should make no public statements which would have a "reasonable likelihood" of interference with a fair trial or prejudice. We assume that this section or one like it would never be cited by itself as a basis for an alleged violation, since there are specific sections with particularized restrictions covering all phases of "pending or imminent criminal litigation."

522 F.2d at 252 n.9.

Thus, reference in the text will generally be made only to the local rules.

63 For the text see supra note 2.

64 The uniqueness of this stage is cited by the court:

While no one will have been formally charged with a crime, there may be great interest in the news media in the subject of the investigation. With new developments constantly occurring the potential for prejudicial publicity is considerable. Moreover, since these are no formal court proceedings pending there is no opportunity to obtain a specific pre-trial order limiting out-of-court statements, we can at least note that the mere statement that a particular individual is the subject of a grand jury investigation can have serious ramifications. The secrecy of grand jury proceedings must be strictly maintained.

522 F.2d at 252.

65 As to this issue the court poses 3 questions incapable of answer under the rule:

Does it cover attorneys representing witnesses before a grand jury? What about attorneys for individuals or corporations who are rumored to be the subject of an investigation? How much interchange with the prosecutors need they have before they become "associated with" the investigation?

Id.
would impair judicial administration. The reasoning is grounded on anticipation of those comments likely to be made by a defense attorney prior to formal changes being assessed against his client. Thus, this provision not only suffers from vagueness, but overbreadth as well.

The court, however, felt that the same infirmities did not plague the rule when applied to prosecuting attorneys. Understandably, practical considerations eliminate the vagueness problem. On the prosecutorial side due to the limited number of attorneys involved with each case, any contact usually signifies intimate association. Thus, from the prosecution's viewpoint, the vagueness question devolves to the existence of any involvement, rather than to its degree. As to overbreadth, the court first noted that prosecuting attorneys have superior access to and can more easily divulge prejudicial information. Moreover, in addition to their detailed knowledge of the specifics of the investigation, there is no client interest compelling prosecutorial silence as to their existence. Unlike the attorney representing nongovernmental interests, the prosecutor's risk of prejudicial impact from premature comment is slight. Therefore, some express regulation is necessary to curtail seriously prejudicial comments by the Government. While a need for a rule was not doubted in this case, the scope of the present one remained questioned. The court concluded that although the scope of this rule might cause problems for prosecutors by denying them the opportunity to publicly justify their actions, such is required by the "competing interests" of the first and sixth amendments. Despite the broad language employed, the ABA restriction was apparently intended to be limited in application to prosecuting attorneys. The ABA advisory committee which formulated the rule similarly recognized the unique position of the prosecutor's office, and stated that "the recommendation is designed to prevent prosecuting attorneys participating in the investigation" from making damaging remarks. 66

Subsection c of Rule 1.07 focuses on comments between arrest and the commencement of trial, or other disposition. Similar to Rule 1.07(b), these restrictions are placed on attorneys, "associated with" the prosecution or defense, making extrajudicial comments that may reasonably be expected to receive public dissemination. The problem with vagueness under subsection a is not present at this stage since the participants on either side have been narrowed to the point where their involvement is clearly established. At this stage, the possible prejudicial effects of the comments prohibited are so great as to clearly outweigh any public interest in being apprised of such information. The court envisaged a problem only with regards to 1.07(c)(6), due to its broadness.

In particular, that section prohibits opinions as to the "merits of the case." The court felt that this provision would conceivably prohibit general statements by an attorney as to the inequity of a particular statute or court rule or procedure, if they were in any way related to the case at bar. The court required, however, that abstract statements which refrain from reference to the pending case be excluded from prohibition; thus, only those opinions expressly connected to the trial were prohibited. The court justified this distinction by noting that at this

66 ABA ADVISORY COMMITTEE, supra note 11, at 85.
67 For text see supra note 2.
stage the attorney not only had a unique hold on the public’s attention but also enjoyed the unusual position of critically examining a rule or law. The combination of these two factors, to the Seventh Circuit’s way of thinking, offered an important opportunity for an attorney to effectuate constructive change, by drawing somewhat latent defects to the public’s attention. Yet by requiring that the statements be in the abstract, this benefit was felt to be at low cost to the impartiality of the trial. Thus, the court required for adoption of this rule “a gloss on the word ‘merit’ reflecting [its] concern.”

The basic problem with the court’s approach to this issue is its failure to adequately recognize the inherent difficulty in separating an attorney from his client. This is particularly true when the trial is one of such notoriety as to afford the attorney involved the public’s attention necessary to effectuate the useful purpose. The court does not go far enough in acknowledging that “it may not always be possible to differentiate the abstract from the specific.” It is naive to assume that statements made in the course of a criminal proceeding of such public importance to generate the anticipated attention will be regarded as made “in the abstract,” despite the general language used to frame them.

In similar form, Rule 1.07(d) prohibits comment during the trial, including the period of jury selection. The court determined that under application of the clear and present danger test, the speech restrictions were constitutionally sound. It is fairly clear that this is the stage most susceptible to prejudicial publicity and thus requires the most stringent control.

The last section dealing with criminal trials, Rule 1.07(e), prohibits comment from the time of trial completion until sentencing. Even based on a clear and present danger standard, the court felt that insulation of the judge from extrajudicial comments was an insufficient basis to support this restriction. At this stage, there is little need that any extrajudicial comments be made regarding factual matters from attorneys involved in the case since the judge, in his sentenc-

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68 522 F.2d at 255.
69 Id. at 253.
70 For text see supra note 2.
71 The court did consider two related arguments presented by plaintiffs. Initially, plaintiffs argued for an exception for cases in which the jury is sequestered. The predicate of this assertion was the isolation of the trier of fact. This assumes a preference in sequestration which is theoretical; the possibility always exists that unauthorized materials, in one form or another, may reach the sequestered jury. Additionally, the possibility exists that a trial judge may alter his decision in the course of a trial and subsequently release a sequestered jury. Thus the court correctly rejected that position. The second contention advanced argued that the rule should not be applied to bench trials for an out of court comment “could never be presumptively said to pose a serious and imminent threat of interference with a fair trial when the trier of fact is a life-tenured judge.” 522 F.2d at 256. In reply, the court first noted that while judges are “supposed to be men of fortitude, able to thrive in a hardy climate,” they are also human and may, consciously or unconsciously, be swayed by extrajudicial comments.

522 F.2d at 256, citing to Craig v. Harney, 331 U.S. 367, 376 (1947) (discussed in text accompanying notes 22 & 23 supra). A secondary influence on the court's decision to reject this contention was based on the state’s right to protect the reputation of the judicial process. Despite the lack of actual influence such comments might have on a judge, if independently the court’s conclusion coincides with the demands of the comments, the process is in the potential position of being seriously questioned.

A state may protect against the possibility of a conclusion by the public under these circumstances that the judge’s action was in part a product of intimidation and did not flow only from the fair and orderly working of the judicial process.

522 F.2d at 256.
72 For text see supra, note 2.
ing discretion, is able to consider most any factor they wish to bring to his attention, free of public pressure, the life-tenure of judges was considered a sufficient safeguard against the possibility of this particular interference. The court eliminated Rule 1.07(e) completely.

Chicago Council of Lawyers v. Bauer presented the Seventh Circuit with an ideal opportunity to resolve the basic conflict between free speech and fair trial. The court could have reviewed the questioned rules in a legislative manner similar to that under which they were originally evoked. However, the court was asked to treat the issues, despite the case's lack of concrete facts, as a "case" or "controversy." Perhaps recognizing the need for definitive action, the court complied by rendering a holding which will constitute precedents influencing future courts. The Seventh Circuit's invocation of the clear and present danger test under these circumstances indicates the relative weight attributed by this tribunal to the right of free speech. Concededly, the court did

73 522 F.2d at 257.
74 Id.
75 Local Rule 1.07 is expressly limited in scope to the various stages of the criminal process; Local General Rule 8, however, incorporates DR 7-107(G), and thus extends some similar prohibitions to civil litigation. For text of the rule, see supra note 3. The court initially notes that the import of this distinction between civil and criminal litigation results in the fact that "mere invocation of the phrase 'fair trial' does not as readily justify a restriction on speech when we are referring to civil trials." (The court elaborated on this notion by referring to the fact that the sixth amendment requires an impartial jury in criminal cases, while the seventh amendment merely guarantees a trial by jury in civil cases.) 522 F.2d at 258.

There was a second major factor which influenced the court's consideration of the rules pertaining to civil litigation: the time element. The civil trial restrictions apply to the entire process of "investigation or litigation." Because of the extent of permissible discovery, lengthy statutes of limitations, and extended appeals, such blanket restrictions have the potential to seriously limit speech for years. The Seventh Circuit also considered a third element—the very nature of certain civil litigation—as bearing heavily upon its ultimate determination. As to this point, the court noted that often civil litigation is commenced on behalf of the public, exposing "the need for governmental action or correction." 522 F.2d at 258. Therefore, the matters involved are such that they are of legitimate public concern, and frequently, the involved attorney is the only articulate voice available. In reviewing these rules then, the court felt it must be "extremely skeptical about any rule that silences that voice." 522 F.2d at 258.

In light of these three considerations the court concluded that to hold the five areas of comment set out in the rules as presumptively prohibited would be constitutionally impermissible. Subsection (1) of the rule deals with evidence relevant to the case. The court's concern here was that in the course of an investigation, an attorney might acquire information as to a less than acceptable level of government operations in certain areas. In such instances, revelation of such practices would be impermissible if possibly constituting evidence. As a hypothetical, the court cites to an airplane crash case in which the attorney discovers unsafe flight practices being condoned by a government regulatory agency. In balancing the various interests involved, the court holds that the need for public knowledge outweighs any interest in preserving the "laboratory conditions of a civil trial." 522 F.2d at 258.

Similarly with regards to the other areas covered by the rule, the court appears to be focusing primarily on those elements of time and nature. As to restrictions on comments concerning the "character, credibility or criminal record" of witnesses, the court points out that in many instances comments on such issues are of relevant concern to the public. In particular, where public officials are involved, the public's right to be informed outweighs the remoteness of impartiality which would require attorney silence for what could be years. The prohibition as to attorneys' comments on their "opinions of the merits" finds even less favor with the court. The concern here centers on the removal from the public forum of perhaps the most informed viewpoint on the subject until a time in the future when the issue involved may no longer be of great concern. The net result is a continuation of the double standard historically applied in the civil-criminal dichotomy into the area of conflict between free speech and fair trial.

76 See Judge Wyzanski's concurring opinion, 522 F.2d at 259.
express some recognition of preference for the fair trial right, but the practical effect of its holding was not so constructed. The restricted party's burden, inherent in the danger standard, makes one wonder whether it is a sufficient safeguard for the fair trial right. The last explicit major use of the clear and present danger standard by the Supreme Court was more than 14 years ago. Even then, the court noted that:

[I]t is important to emphasize that this case does not represent a situation where an individual is on trial; there was no "judicial proceeding pending" in the sense that prejudice might result to one litigant or the other by ill-considered misconduct aimed at influencing the outcome of a trial... Moreover, we need not pause here to consider the variant factors that would be present in a case involving a petit jury. Neither Bridges, Pennekamp nor Harney involved a trial by jury.7

Since that decision, several other courts faced with situations similar to Bauer have not found the application of the danger test constitutionally required. The controversy, clearly significant to the public and the profession, demands a current, authoritative ruling by the Supreme Court.

John Gaal

LEGAL PROFESSION—THE RIGHT TO RECOVER ATTORNEY FEES AND THE NEW SEVENTH CIRCUIT STANDARDS OF AN IDENTIFIABLE FUND AND A SMALL GROUP OF BENEFICIARIES.

Satoskar v. Indiana Real Estate Commission

Townsend v. Edleman

Burbank v. Twomey

Swanson v. American Consumer Industries Inc.

Historically, federal courts have denied successful litigants any recovery of attorney fees.1 Although continuing debate as to the evolution of this "American Rule"2 still exists, it was apparently fashioned from the attitude of rugged individualism that prevailed in the colonial courts, where legal disputes were to be handled by the individual himself. Since retaining a lawyer was considered a luxury, the courts were quick to hold that legal fees were not recoverable.

Yet as the legal system developed, the "American rule" posed a number of problems. With increasing social complexity lawyers became a necessity. Litigative

skills became recognized as essential for the securing of rights. Further, plaintiffs could not really be made whole if attorney fees were not included in their recovery. Finally, since the public was unable to recover attorney fees for promoting meaningful governmental reform or for redressing statutory or constitutional wrongs, such suits were discouraged under the "American rule." Accordingly, these historical changes forced the courts to develop a number of exceptions to the strictness of the traditional rule. These exceptions included: (1) the equitable powers exception; (2) the private attorney general exception; (3) the bad faith exception; and (4) the common benefit exception.

In 1975, the recovery of attorney fees through these exceptions underwent substantial reform. Specifically, the Supreme Court in *Alyeska Pipeline Service Co. v. Wilderness Society*3 rejected both the equitable powers and the private attorney general exceptions as impermissible limitations upon the "American rule." In *Alyeska*, a group of environmentalists had sought to enjoin construction of the Alaska pipeline. Once the merits of the case had been resolved, the plaintiffs sued for attorney fees. In reversing the Circuit Court for the District of Columbia,4 the Supreme Court held that recovery of attorney fees was controlled by Congress, and that the courts had no power to award attorney fees either through their own equitable powers or through the private attorney general exception.5

Thus in the wake of *Alyeska*, plaintiffs will be forced to rely upon the common benefit theory for recovery of attorney fees. Yet in five 1975 cases the Seventh Circuit accepted the common benefit exception only under limited circumstances. This conservative approach is exemplified by two new requirements for proving a common benefit exception: (1) there must be created a fund before a party can recover, and (2) the class of beneficiaries must be small and identifiable before any recovery of attorney fees will be allowed. An analysis of these Seventh Circuit cases will suggest that through the imposition of these two requirements the court has succeeded in confining, without full doctrinal development, the common benefit exception.

**The Necessity of a Fund**

The common benefit exception for recovery of attorney fees provides that the plaintiff who sues on behalf of a class of similarly situated persons and recovers either monetary or nonmonetary benefits can be reimbursed for his attorney fees from the class members who benefited from the success of his action.6 Although allowing the common benefit exception to operate without recovery

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5 421 U.S. at 259-62.

Generally, a fund is made available by the recovery of damages in a civil suit. But the existence of a fund and its origin become more difficult to conceptualize when the plaintiffs are stockholders of a defendant corporation. It is not the purpose of this comment to analyze these conceptual problems but merely to expose the Seventh Circuit ramifications of a fund and recovery of attorney fees under the common benefit theory.
of a monetary reward is a relatively recent trend,\textsuperscript{7} Supreme Court decisions have never suggested that the common benefit exception is operable only upon the existence of a fund, as several 1975 Seventh Circuit cases have held.

The Seventh Circuit first hinted at requiring a fund prior to recovery of attorney fees under the common benefit exception in \textit{Satoskar v. Indiana Real Estate Commission}.\textsuperscript{8} In \textit{Satoskar} the plaintiff had successfully challenged the constitutionality of an Indiana statute that precluded aliens from receiving real estate licenses,\textsuperscript{9} a nonmonetary benefit, but he had failed in his attempt to recover attorney fees. Satoskar appealed the denial of attorney fees on several grounds, including the common benefit exception. The Seventh Circuit rejected the plaintiff's complaint because the earlier suit had not created a judgment fund, holding that "[a]ny benefit to resident aliens of Indiana was theoretical and not reducible to monetary figures."\textsuperscript{10} Implicit in this statement is the requirement that a fund must exist before attorney fees would be recoverable, since the specific language refers to the necessity of a monetary judgment.

The Seventh Circuit was more forthright in its requirement of a fund in \textit{Townsend v. Edleman}.\textsuperscript{11} \textit{Townsend} involved a class action filed by plaintiffs to recover payments from Aid to Families with Dependent Children (AFDC) that had been wrongfully withheld. The Seventh Circuit rejected claims for retroactive relief, and similarly rejected attempts to recover attorney fees. Plaintiffs did not seek recovery of attorney fees through the common benefit exception, but the \textit{Townsend} court, in dicta, offered a fuller rationale for the necessity of a fund than did the \textit{Satoskar} court. The \textit{Townsend} court wrote that "[i]n the present case plaintiffs did not press their claim for attorneys fees on this rationale [common benefit] undoubtedly because there existed an open-ended group of beneficiaries with no distinct pool of funds created by the litigation . . . ."\textsuperscript{12}

The last decision in the trilogy of cases requiring a fund is \textit{Burbank v. Two-\textit{mey}}.\textsuperscript{13} There the plaintiff, an inmate at the Illinois State Prison, filed a complaint seeking declaratory and injunctive relief against certain prison policies. These policies were changed after the filing of the suit, and the complaint, together with the request for attorney fees, was dismissed for mootness. On appeal to the Seventh Circuit, Burbank argued that he had provided a common benefit to all other Illinois prisoners. Again the court relied on the rationale it had employed in both \textit{Satoskar} and \textit{Townsend)—that the plaintiff had sought recovery of attorney fees without the existence of a fund\textsuperscript{14}—to deny his contention.

However, consistent application of these three decisions was undermined by the Seventh Circuit decision in \textit{Swanson v. American Consumer Industries Inc.}\textsuperscript{15} \textit{Swanson} involved a suit by the minority shareholders of Peoria Service Company.

\textsuperscript{7} The practice was initiated by the Supreme Court in Sprague v. Ticonic Nat'l Bank, 307 U.S. 161 (1939), some 50 years after the Court's first common benefit case, Trustees v. Greenough, 105 U.S. 527 (1882).

\textsuperscript{8} 517 F.2d 696 (7th Cir. 1975).

\textsuperscript{9} Indiana Real Estate Comm'n v. Satoskar, 417 U.S. 938 (1974).

\textsuperscript{10} Id. at 698.

\textsuperscript{11} 518 F.2d 116 (7th Cir. 1975).

\textsuperscript{12} Id. at 123.

\textsuperscript{13} 520 F.2d 744 (7th Cir. 1975).

\textsuperscript{14} Id. at 749.

\textsuperscript{15} 517 F.2d 555 (7th Cir. 1975).
to recover attorney fees from a fund created by earlier successful litigation. In the initial suit the defendants had been adjudged to have employed materially misleading proxies in promoting a merger between Peoria Service Company and the defendant, and the plaintiffs were awarded a substantial judgment. Applying the common benefit exception, the Swanson court here approved the plaintiffs' claim for attorney fees. The Seventh Circuit held that the expense of the suit should be borne by those benefitting from the action. There is a certain consistency between Swanson and the Satoskar, Townsend, and Burbank line of cases, for clearly there was a fund in Swanson, since the minority shareholders had recovered monetary damages from the corporation. Thus the requirement of a preexisting fund for recovery under the common benefit theory was held appropriate. Nevertheless, there is an underlying inconsistency in the Swanson court's reasoning. In its opinion, the Swanson court baldly embraced Mills v. Electric Auto-Lite, Inc. as its sole authority for granting the award of attorney fees under the common benefits theory. This reliance on Mills is confounding, and casts doubt upon the other Seventh Circuit cases that view a fund as a prerequisite for the recovery of attorney fees.

Mills, like Swanson, involved a suit challenging a corporate merger that sought to set aside the merger because of materially misleading proxies. In addition, the Supreme Court was asked to award attorney fees to the plaintiffs despite the lack of a definite fund. Faced with the difficult dilemma of deciding whether an award of attorney fees would be proper under the common benefit theory (although no fund existed) the Court noted that in Trustees v. Greenough, the first decision to employ the common benefit theory, the Supreme Court did not feel restricted to awarding attorney fees only where a fund existed. The Mills Court also turned to another Supreme Court decision, Sprague v. Ticonic National Bank, which had similarly held that a fund was not a necessity for a recovery. In Sprague, plaintiff had won her claim to the proceeds of some bonds. The results of this suit also allowed 14 others similarly situated to claim relief. There was no fund created by the suit in Sprague, but the Court nevertheless chose to award attorney fees, reasoning that the plaintiff had created a precedent from which other plaintiffs would be allowed to recover their share of the bonds.

Thus, consistent with the precedent of Greenough and Sprague, the Mills Court clearly held that an existing fund was not a prerequisite for recovery under the common benefit theory. In the words of Justice Harlan: "The fact that the suit has not yet produced, and may never produce a monetary recovery from which the fees could be paid does not preclude an award based on this ratio-

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16 Swanson v. American Consumers Indus., Inc., 475 F.2d 516 (7th Cir. 1973). In this case the Seventh Circuit said: "[B]lunt cognizant that pecuniary benefit is not the sole criterion for the award of attorneys' fees." Id. at 521.
17 517 F.2d at 560.
19 517 F.2d at 560.
20 Id. at 392-93 n.17.
21 105 U.S. 527 (1882).
24 Id. at 167.
The inconsistency between Swanson and Satoskar, Townsend, and Burbank is thus clear. In its opinion applying the common benefit exception, the Swanson court chose to rely upon Mills where the Supreme Court had held that a fund was not a requirement of recovery. This decision stands in sharp contrast to the Seventh Circuit cases of Satoskar, Townsend, and Burbank, where a fund was specifically required.

There are a number of possible explanations for the Swanson court’s reliance on Mills. It is necessary to assess these possibilities in response to an anticipated use of the common benefit exception following the Alyeska decision. First, it is arguable that the Seventh Circuit intended to distinguish Swanson, where apparently no fund was necessary for recovery (although one did in fact exist) from Satoskar, Townsend, and Burbank, where a fund was necessary. This conclusion is at best doubtful, since the Burbank opinion itself approvingly relied upon Swanson. Assuming that the Seventh Circuit was cognizant of the inherent conceptual conflict of these cases, the Burbank court undoubtedly would have made some attempt to explain or distinguish Swanson. Second, it might be suggested that the Swanson court was attempting to redefine or limit the scope of the Mills holding; this, however, is unlikely, since the Swanson court had employed language from Mills which was central to that case’s holding. A third conclusion is that Swanson is a judicial aberration and the Seventh Circuit clearly meant that a fund was necessary for recovery. None of these conclusions suggests any real solution to the inconsistent posture of the Seventh Circuit which can be extracted from Swanson.

It could be argued that since Swanson was decided prior to Satoskar and Townsend, the more recent expressions of the Seventh Circuit should control. This suggestion is suspect because Satoskar and Townsend were decided only four days after Swanson, certainly not a sufficient length of time to effect any shift in the court’s thinking. Burbank was handed down two months after Swanson, but the Burbank court chose to rely upon Swanson rather than distinguish it.

The Seventh Circuit’s development of this inconsistent doctrine with respect to the necessity of a fund for recovery under the common benefit exception apparently stems from an improper application of the holding in Alyeska Pipeline Service Co. v. Wilderness Society. An analysis of pre- and post-Alyeska Seventh Circuit cases supports this conclusion.

The only 1975 pre-Alyeska case concerning the common benefit exception was Indiana State Employees Association Inc. v. Boehning. In Boehning, the plaintiff claimed that she had been improperly dismissed from her job without a due process hearing; she sought damages, an injunction, and attorney fees. The Seventh Circuit, prior to the Alyeska decision, denied her claim for attorney fees under the common benefit exception because of the lack of a class of beneficiaries. Although there was no fund, the court did not base its holding on this factor.

26 520 F.2d at 749.
27 517 F.2d at 560.
29 511 F.2d 834 (7th Cir. 1975).
30 Id. at 839.
In fact, the *Boehning* court never even discussed the requirement of a fund, which was of central importance to the Seventh Circuit holdings in *Satoskar, Townsend,* and *Burbank.* The comparison of *Boehning* with *Satoskar* underscores the shift of the Seventh Circuit's reasoning on common benefit cases after *Alyeska.* Both *Boehning* and *Satoskar* had plaintiffs who sought to enforce their constitutional rights, both involved suits against government agencies, both failed to recover a fund, and both resulted in a denial of attorney fees. *Boehning,* a pre-*Alyeska* decision, rejected the request for fees because of the inappropriateness of the class. *Satoskar,* a post-*Alyeska* decision, rejected the request not only for want of a well-defined class but also for lack of a fund, a ground *Boehning* neglected. It is striking that such a pivotal element of all the post-*Alyeska* cases is absent in the one pre-*Alyeska* decision. Thus, the *Satoskar* court and the other courts reaching fund-related decisions most likely read *Alyeska* to require a fund for recovery. This conclusion offers the best hope for reconciling the Seventh Circuit's decisions in *Boehning* and the post-*Alyeska* cases.

If the Seventh Circuit has interpreted *Alyeska* to mean that a fund must be required before a litigant can recover attorney fees under the common benefit exception, that interpretation must be questioned. The Supreme Court has continued to rely on *Mills v. Electric Auto-Lite, Inc.*, and its companion cases for the proposition that no fund is necessary to invoke the common benefit exception. Even the *Alyeska* Court noted that the common benefit exception had been properly applied in cases like *Mills* and *Sprague.* The Supreme Court also cited with approval *Hall v. Cole,* the most recent pre-*Alyeska* Supreme Court case holding that a fund was not a necessary prerequisite to recovery of attorney fees under the common benefit theory. In *Hall,* the plaintiff, expelled from a union for openly criticizing union policy, sought, in addition to injunctive relief, damages and attorney fees. The district court granted the injunction and ordered reinstatement, but did not allow damages. Despite its failure to create a fund by refusing the request for damages, the district court did allow the claim for attorney fees. The Second Circuit affirmed in all respects, as did the Supreme Court, which reasoned from *Mills* that a fund was not necessary for recovery of attorney fees. In addition, the *Hall* Court held that if some benefit, even though nonmonetary, was extended to a class of people, an award of attorney fees was appropriate. Justice White wrote that "to the extent that such lawsuits contribute to the preservation of union democracy, they frequently prove beneficial not only in the immediate impact of the results achieved but in their implications for the future conduct of union affairs." *Hall* clearly demonstrated a reaffirmation of the *Mills* and *Sprague* holdings that a fund is not necessary for recovery of attorney fees. The continued viability of *Mills, Hall,* and *Sprague* is
unquestionable in light of the *Alyeska* Court's reliance on these decisions.\(^{40}\)

Unless it was merely coincidental, the Seventh Circuit's imposition of the requirement of a fund to recover attorney fees appears to be a judicial response to the Supreme Court's mandate in *Alyeska* that attorney fees should only be awarded to successful plaintiffs in narrowly defined situations. Upon a close reading of *Alyeska* and its concomitant cases, such a reaction can only be described as unwarranted.

Several other circuits have confronted the issue of whether a fund is a prerequisite to recovery of attorney fees under the common benefit exception. The Fifth Circuit, in its post-*Alyeska* cases, reached a conclusion similar to *Satoskar, Townsend*, and *Burbank*. In *Wallace v. House*,\(^{41}\) a group of black citizens brought suit, claiming a deprivation of civil rights in a local election. The district court granted them attorney fees by reasoning that a substantial benefit was rendered to local citizens by the suit, which had overturned an illegal election system.\(^{42}\) The Fifth Circuit, however, reversed the district court's award of attorney fees by citing *Mills* and *Sprague* and arguing that fees could not be granted unless a fund existed.\(^{43}\) As noted earlier, however, both *Mills* and *Sprague* apparently held that a fund is not necessary before recovery of attorney fees is proper.\(^{44}\) Apparently the Fifth Circuit applied the same improper gloss to these cases as did the Seventh Circuit, yet the Fifth Circuit did not provide the doctrinal development that lends the cases to thorough analysis.

Both the Fourth\(^{45}\) and Sixth\(^{46}\) circuits were asked to award attorney fees based on the common benefit exception and both, in post-*Alyeska* decisions, refused to award the fees. In each case the court chose to reject the claims for fees without reason or analysis.

The District of Columbia Circuit has adopted a more reasoned reading of the cases, suggesting in *National Treasury Employees v. Nixon*\(^{47}\) that a fund was not necessary for recovery of attorney fees. In *Nixon*, the plaintiffs were a class of employees who had sought and recovered retroactive back pay improperly impounded by former President Nixon. However, in awarding back pay the district court denied the claim for attorney fees. The District of Columbia Circuit court reversed, reasoning that there was a properly defined class of beneficiaries from the litigation and that a fund did exist for awarding the attorney fees.\(^{48}\)

Although these facts would have firmly supported an award of attorney fees under the new Seventh Circuit requirement with respect to the necessity of a fund, the court expanded on its holding by discussing the court control that must exist over a recovery before the attorney fees would be recoverable. The *Nixon* court relied upon *Mills* to demonstrate that judicial control was not a prerequisite, arguing that "the [Mills] court held that minority shareholders should be reim-

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40 See note 33 supra.
41 515 F. 619 (5th Cir. 1975). See also Handler v. San Jacinto Jr. College, 519 F.2d 273 (5th Cir. 1975).
43 Wallace v. House, 515 F.2d 619, 636 (5th Cir. 1975).
44 See text accompanying notes 22-25 supra.
45 Wright v. Jackson, 522 F.2d 955 (4th Cir. 1975).
46 Machinists Lodge Local 1194 v. Sargent Indus., 522 F.2d 280 (6th Cir. 1975).
47 521 F.2d 317 (D.C. Cir. 1975).
48 Id. at 320-21.
bursed for the costs of establishing a violation of the securities laws even though
the suit might never produce a monetary recovery." Thus, it becomes apparent
that the District of Columbia Circuit has adopted a policy that would allow
recovery of attorney fees under the common benefit exception without requiring
judicial control of an existing fund. Careful attention must be given to the court’s
language that suggests that courts need not exercise control over any recovery,
monetary or nonmonetary, to recover under the common benefit exception.

Thus a visible split is emerging in the circuits on the issue of the necessity of
a fund for recovering attorney fees. A thorough reading of the cases demonstrates
that the Seventh Circuit has unnecessarily concluded that a fund is indispensable
before recovery of attorney fees will be allowed. Hopefully, the Seventh Circuit
will reevaluate this issue and adopt the more reasoned District of Columbia ap-
proach in Nixon.

The Necessity of a Small and Identifiable Class

It has been shown that courts are in disagreement over what kind of recovery
is necessary before the common benefit exception will operate to award the suc-
cessful plaintiff reimbursement of his attorney fees. An equally perplexing ques-
tion is what type of class must exist for the plaintiff to recover his attorney fees.

In the earliest case employing the common benefit exception—Trustees v.
Greenough—the plaintiff was suing for “himself and other bondholders.” The
next application of the common benefit theory came in Central Railroad &
Banking Co. v. Pettus, where the plaintiff brought suit to impose liens on prop-
erty which had been purchased by other railroad corporations. The suit was
successful, and attorney fees were awarded under the authority of Greenough.
A fund or benefit was clearly created for the class of litigants in Pettus, but the
Supreme Court did not establish class-size requirements as a prerequisite to re-
cover attorney fees. In its only reference to the class size, the Pettus Court wrote
that “[t]hose creditors resided in several States, and their claims aggregated a
large amount. Cooperation among them was impracticable.” As in Greenough,
the Pettus Court set no specifications for class size and identifiability.

In recent Supreme Court decisions preceding Alyeska, the size of the class
was not determinative of grants of attorney fees. In Mills, the plaintiffs were
minority shareholders suing derivatively to set aside a merger. The Mills Court
awarded attorney fees despite the absence of a fund. Similarly, the Court did
not view the class size as controlling its decision; rather, the Court gave cursory
treatment to the issue of class size and identifiability, even though it noted that
the minority shareholders controlled over 300,000 votes. In Mills as in Pettus,
the Court engaged in a vague description of the class but did not characterize
the group’s size as significant or in any way determinative.

49 Id. at 321 (emphasis added).
50 105 U.S. 527 (1882).
51 Id. at 528. The Court’s opinion did not mention the actual number of the class.
52 113 U.S. 116 (1885).
53 Id. at 123.
55 See text accompanying notes 20-25 supra.
Hall v. Cole\textsuperscript{56} is yet another example of the Supreme Court’s pre-Alyeska lack of concern for the class size of the beneficiaries. Hall involved a plaintiff who sought injunctive relief, in addition to damages and attorney fees, after he had been expelled from a union for criticizing union policy. The Supreme Court affirmed the award of attorney fees despite the absence of a fund,\textsuperscript{57} choosing to particularize the benefit as a vindication of all union members’ rights. It stated: “When a union member is disciplined for the exercise of any rights protected by Title I, the rights of all members of the union are threatened. And, by vindicating his own right, the successful litigant dispels the chill cast upon the rights of others.”\textsuperscript{58} Thus, the class of beneficiaries in Hall was not merely the plaintiff but rather all members of the union. The clear import of the Court’s language is that this suit protected the Title I rights of the entire labor movement, which certainly exceeds the bounds of a small and identifiable group.

The policy considerations behind the Hall decision were impressively noted in the Second Circuit’s decision in Cole v. Hall. The court there saw a far ranging impact for a large group of beneficiaries in its decision, contending that “[t]hese benefits to the union and the labor movement would be lost in most instances without the discretionary authority in courts to grant counsel fees.”\textsuperscript{59} The court further argued that to refuse “to award counsel fees in cases such as this would be tantamount to repealing the Act itself by frustrating its basic purpose.”\textsuperscript{60}

As illustrated, the pre-Alyeska litigation for recovery of attorney fees paid little heed to the size or constituency of the class of litigants seeking relief. However, a footnote in Alyeska changed all of this. There the Supreme Court wrote that

> [In this Court’s common fund and common benefit decisions, the class of beneficiaries was small and easily identifiable. The benefits could be traced with some accuracy, and there was reason for confidence that the costs could indeed be shifted with some exactitude to those benefitting.]

Thus, it was this language that was quickly seized upon by the Seventh Circuit and was used as a justification to deny claims for attorney fees under the common benefit exception.

In Satoskar v. Indiana Real Estate Commission\textsuperscript{62} plaintiff sued on behalf of all resident aliens of Indiana, claiming that a state statute which prohibited them from receiving real estate licenses was unconstitutional. Despite his success on the merits, the Seventh Circuit rejected plaintiff’s claim for attorney fees on two grounds—lack of an existing fund\textsuperscript{63} and lack of a definite class. In rejecting the claim for fees on the latter ground the Satoskar court posited that, “[T]he [Alyeska] Court also noted the limits of the common fund and common benefit

\textsuperscript{56} 412 U.S. 1 (1973).
\textsuperscript{57} See text accompanying notes 34-39 supra.
\textsuperscript{58} 412 U.S. at 8 (emphasis added).
\textsuperscript{59} Cole v. Hall, 462 F.2d 777, 780 (2d Cir. 1965) (emphasis added).
\textsuperscript{60} Id. at 780.
\textsuperscript{62} 517 F.2d 696 (7th Cir. 1975).
\textsuperscript{63} See text accompanying notes 8-10 supra.
justification for awarding attorneys fees: that in all the cases upholding awards on that basis the class of beneficiaries was small in number and easily identifiable.64 The Satoskar court's reliance on Alyeska, however, appears to be misplaced, for the class in Alyeska was deemed to be the general public and the Court was justifiably concerned with the difficulty of assessing the benefits of the Alyeska litigation among 210 million Americans. The Alyeska class must be contrasted with the class in Satoskar where the beneficiaries were resident aliens of Indiana. Whatever the difficulty that might arise from locating all of the resident aliens of Indiana, it is difficult to accept the fear that the administrative dilemma involved would rise to the degree that so concerned the Supreme Court in Alyeska.

This narrow, literal interpretation of the Alyeska class requirements continued in two other 1975 Seventh Circuit cases—Townsend v. Edleman65 and Burbank v. Twomey.66 Townsend involved a claim for monetary relief from state officials who had improperly withheld AFDC benefits. The identifiable class of litigants were all Illinois families who had been denied payments because their children attended college rather than vocational school. The Seventh Circuit again viewed this class as "an open ended group of beneficiaries"67 and, in dicta, relied upon Alyeska to reject the claim of attorney fees because the class did not qualify as small and easily identifiable. In Burbank, plaintiff was an Illinois inmate who sought declaratory and injunctive relief from certain prison policies on behalf of himself and all Illinois prisoners. The policies were changed, the suit was dismissed for mootness, and the claim for attorney fees based on the common benefit theory was denied. The Seventh Circuit affirmed on the familiar dual grounds of no fund and no identifiable class. With respect to the class, the court wrote that "[T]his class and the benefit to each member is clearly too indefinite to permit recovery under the common fund theory."68 It is not critical whether the court decided to ground its holding on benefit or class, for both are questions of definiteness. Thus in both Townsend and Burbank the court employed the identical reading of Alyeska as it did in Satoskar. Classes of plaintiffs that can be defined so as to include all Illinois families denied AFDC benefits because their children were enrolled in college, or all Illinois prisoners, do not present the court with the insurmountable problems in the allocation of attorney fees that the class in Alyeska did. In Alyeska the Supreme Court determined that the general public was too large and unidentifiable to administer an award of attorney fees.69

Thus the Seventh Circuit has apparently misapplied the Supreme Court's holding in Alyeska that a class must be small and identifiable for Alyeska's holding regarding class size must be restricted to its particular facts that the class be smaller than 210 million Americans. It is difficult to assess the effect this reading will have on plaintiffs who seek to recover attorney fees, but it is clear that through this interpretation of Alyeska a substantial narrowing of the already weakened common benefit exception has occurred.

As noted with respect to the requirement of a fund for recovery under the

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64 517 F.2d at 698.
65 518 F.2d 116 (7th Cir. 1975).
66 520 F.2d 744 (7th Cir. 1975).
67 518 F.2d at 123.
68 520 F.2d at 749.
69 421 U.S. at 264-65 n.39.
common benefit exception, there has been a distinct split among the circuits. A similar division is developing over the interpretation of the Alyeska Court’s requirement that the class of beneficiaries be small and easily identifiable.

The Fifth70 and Sixth Circuits71 have each decided cases since Alyeska, but have not chosen to invoke the Alyeska requirement of a small and identifiable class in their decisions. However, the Fourth Circuit has indicated that it will require an identifiable class before recovery based on the common benefit exception will be allowed. In Wright v. Jackson,72 that court was presented with a case that paralleled the Seventh Circuit case of Burbank v. Twomey.73 Wright, a federal inmate in Virginia, sought a revision in certain prison policies. The district court had awarded attorney fees, but the Fourth Circuit vacated the decision, reasoning from Alyeska that benefits were not conferred on “identifiable individuals.”74 The decision was thus reminiscent of the Seventh Circuit in Burbank, where the court rejected the plaintiff’s claim for attorney fees because the class was too indefinite.

In sharp contrast to the Fourth and Seventh Circuits, the District of Columbia Circuit has adopted a position the impact of which renders the Alyeska requirement of a small and identifiable class less effective in denying claims for attorney fees. In National Treasury Employees v. Nixon,75 plaintiffs were 3.5 million employees who had been improperly denied a salary increase. The district court denied all attorney fees grounded on the common benefit exception; the District of Columbia Circuit reversed. The Court wrote:

[M]illions of federal employees tangibly benefitted directly because plaintiff persevered in this litigation. Where the members of a distinct class of persons such as these federal employees, derive a significant sum of money from the efforts of a few, it is only just to permit the few to spread their reasonable expenses to all members of the class.76

The District of Columbia Circuit may have exceeded the mandate of Alyeska by defining a class so large as 3.5 million. A class of this size poses many of the same complex allocation problems that so worried the Alyeska Court.

It is apparent that neither the Seventh Circuit nor the District of Columbia Circuit has reached a totally satisfactory solution to the issues of class size and identifiability that are now required by Alyeska. As noted, the cases that precede Alyeska suggest that a class can be substantial and still qualify for recovery of attorney fees. Similarly, the reservations that the Alyeska Court expressed about class size and identifiability stemmed from a situation where the class was the general public. Those fears are not present in the 1975 Seventh Circuit cases considered here. Thus the Seventh Circuit should strive for a balance which would allow recovery for a class similar to those of Mills and Hall without forging

70 Wallace v. House 515 F.2d 619 (5th Cir. 1975); Handler v. San Jacinto Jr. College, 519 F.2d 273 (5th Cir. 1975).
71 Machinists Lodge Local 1194 v. Sargent Indus., 522 F.2d 280 (6th Cir. 1975).
72 522 F.2d 955 (4th Cir. 1975).
73 520 F.2d 744 (7th Cir. 1975).
74 522 F.2d at 957.
75 521 F.2d 317 (D.C. Cir. 1975).
76 Id. at 321.
a rule that pays no deference to the *Alyeska* decision.

The rationale that supported the "American rule" for almost two centuries has sagged under the pressures of a more complex legal system. Yet the question of whether or not to support the "American rule" is not for the Seventh Circuit to decide; that decision was left to Congress in the Supreme Court's *Alyeska* decision. The Seventh Circuit does, however, have an important jurisprudential decision to make: whether to limit the "American rule" or to doctrinally revitalize it. If the court chooses to limit the narrowness of the rule, which its 1975 decisions suggest is not its intent, the court must relax the restrictive holdings of *Sotomayor, Townsend* and *Burbank*. If on the other hand the court chooses to revitalize the rule, which its 1975 decisions suggest is its intent, the court must eliminate the doctrinal inconsistencies that accompanied its 1975 decisions. In making its decision the Seventh Circuit should look to the various policy considerations that support the rule. A balance must be struck to both avoid opening the floodgates of litigation and to preserve the independent spirit of the American legal tradition.

In either event, the issue of recovery of attorney fees is far too important to Seventh Circuit litigants to remain in the confused state that presently exists.

*Michael T. Bierman*

**V. STATISTICS***

**PART I**

**BUSINESS OF THE COURT OF APPEALS FOR THE SEVENTH CIRCUIT**

Calendar year 1975 was statistically the biggest in the history of the United States Court of Appeals for the Seventh Circuit. There were more docketings, and more terminations, in 1975 than ever before in the Court's history. As in 1973 and 1974, terminations exceeded docketings; thus the number of appeals pending at the close of 1975 (757) was fewer than the number pending at the beginning of the year (789). It is a real credit to the judges and their staffs that this feat was accomplished in spite of the increased dockettings.

The five attached tables show comparative figures for appeals docketed, terminated, and pending in the Court for calendar years 1974 and 1975. The statistics are also categorized to show the courts and federal agencies from which the Court of Appeals business originated.

Tables I and IV show that 1,201 appeals were docketed in the Court during 1975, an increase of 72 (6 per cent) from 1974. There were 996 appeals from district courts of the Circuit. This was 40 more than in 1974. There were 120 petitions for review or enforcement of decisions of federal agencies, an increase

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* These statistics are taken from the report entitled "Report Of The Business Of The Federal Courts Of The Seventh Judicial Circuit For The Calendar Year Ending December 31, 1975." This report is prepared annually and was submitted this year at the Twenty-Sixth Annual Joint Meeting of the Judicial Conference of the Seventh Circuit and The Bar Association of the Seventh Federal Circuit, held May 10 through May 12, 1976 at French Lick, Indiana.
of 4 from 1974. There were 16 appeals from the Tax Court, up from 9 the

### TABLE I

**DOCKETINGS IN THE SEVENTH CIRCUIT**
**DURING CALENDAR YEARS 1974 AND 1975**

<table>
<thead>
<tr>
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<td>31</td>
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<td>5</td>
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<td>49</td>
<td>75</td>
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<td>76</td>
<td>33</td>
<td>32</td>
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<td>21</td>
<td>30</td>
<td>0</td>
<td>0</td>
<td>69</td>
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<td>7</td>
<td>10</td>
<td>2</td>
<td>1</td>
<td>17</td>
</tr>
</tbody>
</table>

**Sub-Totals,**
**Appeals from**

| District Courts          | 634   | 669    | 308   | 303   | 14    | 24    | 956        | 996          | 4.2 |

| Atomic Energy Commission | 1     | 0      |       |       |       |       |            |              |     |
| Board of Governors, Federal Reserve Board | 1 | 0 |
| Civil Service Commission | 0     | 1      |       |       |       |       |            |              |     |
| Consumer Products and Safety Commission | 1 | 0 |
| Department of Interior   | 3     | 0      |       |       |       |       |            |              |     |
| Environmental Protection Agency | 22 | 16 |
| Federal Aviation Administration | 1 | 0 |
| Federal Communications Commission | 3 | 2 |
| Federal Power Commission | 0     | 2      |       |       |       |       |            |              |     |
| Federal Energy Administration | 1 | 0 |
| Federal Trade Commission | 0     | 2      |       |       |       |       |            |              |     |
| Immigration and Naturalization Service | 11 | 19 |
| Interstate Commerce Commission | 0 | 7 |
| National Labor Relations Board | 61 | 63 |
| Occupational Safety and Health Review Commission | 6 | 5 |
| Securities and Exchange Commission | 0 | 2 |
| Department of Labor       | 3     | 1      |       |       |       |       |            |              |     |
| Department of Treasury    | 1     | 0      |       |       |       |       |            |              |     |
| Department of Transportation | 1 | 0 |

**Sub-Totals, Review or Enforcement of Orders of Federal Agencies**

| 116 | 120 | 3.4 |

**Tax Court of the United States**

| 9   | 16  | 78.0 |

**Original Petitions for Writs of Mandamus, etc.**

| 48  | 69  | 43.8 |

**GRAND TOTALS**

| 1,129 | 1,201 | 6.4 |
previous year. There were 69 original petitions filed during 1975, an increase of 21 from 1974.

Table II shows, among other things, that the Court of Appeals terminated 1,233 appeals during the year 1975. This represented an increase of 48 cases

**TABLE II**

**APPEALS DOCKETED AND TERMINATED**
**IN THE UNITED STATES COURT OF APPEALS**
**FOR THE SEVENTH CIRCUIT**
**BY MONTHS**

<table>
<thead>
<tr>
<th></th>
<th>Docketed</th>
<th>Terminated</th>
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<tr>
<td>January</td>
<td>28</td>
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<tr>
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<td>November</td>
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<td>26</td>
</tr>
<tr>
<td>December</td>
<td>18</td>
<td>33</td>
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<tr>
<td>TOTALS</td>
<td>349</td>
<td>547</td>
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### TABLE III

**Appeals Filed, Terminated, and Pending in the United States Court of Appeals for the Seventh Circuit During Calendar Years 1974 and 1975**

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<td><strong>Appeals from</strong></td>
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<td><strong>Sub-Totals, Appeals from District Courts</strong></td>
<td>769</td>
<td>956</td>
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<td><strong>Federal Agencies</strong></td>
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<td>97</td>
<td>81</td>
<td>120</td>
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<td><strong>United States</strong></td>
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<td>5</td>
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<td>73</td>
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<td><strong>TOTALS</strong></td>
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<td>1,129</td>
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<td>789</td>
<td>1,201</td>
<td>1,233</td>
<td>757</td>
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</table>
from 1974. This is a 4 per cent increase. The high number of terminations decreased the number of pending appeals for only the third time since 1966. Table III indicates that the number of appeals pending at the close of 1975 was 757, a decrease of 32 cases (4 per cent) from 1974.

In addition to the foregoing appeals, there were 117 cases entered on the miscellaneous docket. This was a decrease of 15 from 1974.

### TABLE IV

<table>
<thead>
<tr>
<th>DOCKETINGS IN THE SEVENTH CIRCUIT</th>
<th>DURING CALENDAR YEAR 1975</th>
</tr>
</thead>
</table>

Appealed from:

- Northern Illinois: 536
- Eastern Illinois: 69
- Southern Illinois: 51
- Northern Indiana: 111
- Southern Indiana: 108
- Eastern Wisconsin: 89
- Western Wisconsin: 32

Sub-Total, Appeals from District Courts: 996

- Civil Service Commission: 1
- Environmental Protection Agency: 16
- Federal Communications Commission: 2
- Federal Power Commission: 2
- Federal Trade Commission: 2
- Immigration and Naturalization Service: 19
- Interstate Commerce Commission: 7
- National Labor Relations Board: 63
- Occupational Safety and Health Review Commission: 5
- Securities and Exchange Commission: 2
- Department of Labor: 1

Sub-Total, Review or Enforcement of Decisions of Federal Agencies: 120

- Tax Court of the United States: 16
- Original Petitions for Mandamus, etc.: 69

GRAND TOTAL: 1,201
Table V indicates that petitions for writs of certiorari from decisions of the Court of Appeals for the Seventh Circuit were filed in the Supreme Court of the United States in 204 appeals during 1975. This is only a slight increase from the 200 such petitions filed in calendar year 1974. In 1975 the Supreme Court denied or dismissed 191 petitions and granted 10 petitions. There were 81 petitions pending at the close of 1975.

The Court of Appeals appointed 193 members of the bar to represent indigent litigants during 1975. The Court expresses its appreciation to these attorneys for the professional services they have rendered, which have been of benefit to their clients and the Court.

Four graphs are included with this year's report.

Graph A illustrates the growth of both filings and terminations in the Court of Appeals since 1960. In only 5 of those 16 years has the Court been able to terminate more appeals than it docketed. They were 1963, 1966, 1973, 1974, and 1975.

Graph B illustrates the sources of the Court of Appeals case load in 1975. The Northern District of Illinois was the chief source, being the origin of 536 appeals in 1975. That was 44.63 per cent of the Court's business. Administrative agencies were the next largest source of business for this Court, with 120 appeals,

### TABLE V

#### SEVENTH CIRCUIT CERTIORARI DATA

FOR CALENDAR YEAR 1975

<table>
<thead>
<tr>
<th>Petitions Pending</th>
<th>Civil</th>
<th>Criminal</th>
<th>Bankruptcy Court</th>
<th>Tax Court</th>
<th>Administrative Appeals</th>
<th>Original Petitions for Mandamus</th>
<th>Totals</th>
</tr>
</thead>
<tbody>
<tr>
<td>Jan. 1, 1975</td>
<td>34</td>
<td>38</td>
<td>1</td>
<td>0</td>
<td>2</td>
<td>3</td>
<td>78</td>
</tr>
<tr>
<td>Petitions Filed in 1975</td>
<td>85</td>
<td>91</td>
<td>1</td>
<td>4</td>
<td>8</td>
<td>15</td>
<td>204</td>
</tr>
<tr>
<td>Petitions Granted in 1975</td>
<td>9</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>1</td>
<td>0</td>
<td>10</td>
</tr>
<tr>
<td>Petitions Denied in 1975</td>
<td>77</td>
<td>90</td>
<td>1</td>
<td>2</td>
<td>5</td>
<td>15</td>
<td>190</td>
</tr>
<tr>
<td>Petitions Dismissed in 1975</td>
<td>0</td>
<td>1</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>1</td>
</tr>
<tr>
<td>Petitions Pending Dec. 31, 1975</td>
<td>33</td>
<td>38</td>
<td>1</td>
<td>2</td>
<td>4</td>
<td>3</td>
<td>81</td>
</tr>
</tbody>
</table>
or 10 per cent. There were 111 and 108 appeals from, respectively, the Northern and Southern Districts of Indiana.

Graph C illustrates the number of appeals presented for oral argument and the number of appeals terminated by slip opinions in the Court each year from 1960 through 1975. Appeals presented for oral argument grew from 228 to 807 in that period; opinions grew from 261 to 826 over that span. (This last figure includes terminations by order under Circuit Rule 28 which became effective February 1, 1973.)

**Graph A**

**UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT**

**APPEALS FILED AND TERMINATED**

1960 - 1975

*Years when terminations exceeded filings.*
Graph D illustrates the types of appeals docketed in the Seventh Circuit during 1975. Of all the matters docketed, 82.9 per cent were appeals from district court decisions. Of the total, 55.7 per cent, or 669 appeals, were civil in nature. Criminal appeals accounted for 25.2 per cent, or 303 appeals. These two areas constituted the bulk of the Seventh Circuit dockings. Original petitions were a distant third, constituting 5.75 per cent of the Court's dockings.

PART II
BUSINESS OF THE DISTRICT COURTS OF THE SEVENTH CIRCUIT

There were 44,911 cases of all types filed in the district courts of the Seventh Circuit during calendar year 1975, which was 5,988 more than were filed in those courts during calendar year 1974.

Graph B

SOURCES OF SEVENTH CIRCUIT BUSINESS
IN 1975
TOTAL APPEALS: 1,201 (100%)
The district court which had the greatest number of case filings was the Northern District of Illinois. It filed a total of 18,351 cases, an increase of 3,086 cases over 1974.

The district courts terminated 41,101 cases during 1975. That was an increase of 7,546 cases (22.5 per cent) over the number terminated in 1974.

Graph C

NUMBER OF APPEALS ORALLY ARGUED BEFORE THE SEVENTH CIRCUIT, FROM 1960 THROUGH 1975

AND

NUMBER OF APPEALS TERMINATED BY OPINION SEVENTH CIRCUIT, FROM 1960 THROUGH 1975

*These reflect both appeals terminated by slip opinions and by Cir. Rule 28 "Unpublished Orders".
The district court with the largest number of cases terminated was again the Northern District of Illinois. It terminated a total of 14,846 cases, an increase of 2,052 cases (13.8 per cent) over the previous year.

There were 36,353 cases pending in the district courts at the end of 1975. This is an increase of 3,835 cases (11.8 per cent) over 1974. Thus, although the district courts were able once again to increase their efficiency and productivity in calendar year 1975, the greatly increased filings have resulted in the creation of a greater "backlog" than ever.

The following tabulation shows comparative figures of cases of all types filed, terminated, and pending in each of the district courts of this Circuit for the calendar years 1974 and 1975.

Graph D

TYPES OF APPEALS DOCKETED IN THE SEVENTH CIRCUIT IN 1975

TOTAL: 1,201 (100%)

N.L.R.B.- 63 (5.2%)
Administrative Agencies (Except N.L.R.B.)- 57 (4.75%)
Original Petitions- 69 (5.75%)
Bankruptcy- 24 (2%)
Civil Appeals- 669 (55.7%)
Criminal Appeals- 303 (25.2%)
Tax Court- 16 (1.3%)
TOTAL OF ALL TYPES OF CASES
FILED, TERMINATED, AND PENDING FOR CALENDAR YEARS 1974 AND 1975
IN THE DISTRICT COURTS OF THE SEVENTH CIRCUIT

<table>
<thead>
<tr>
<th>District</th>
<th>Pending 12-31-73</th>
<th>Filed 1974</th>
<th>Closed 1974</th>
<th>Pending 12-31-74</th>
<th>Filed 1975</th>
<th>Closed 1975</th>
<th>Pending 12-31-75</th>
<th>Cases Filed</th>
</tr>
</thead>
<tbody>
<tr>
<td>Northern Illinois</td>
<td>9,949</td>
<td>15,265</td>
<td>12,794</td>
<td>12,420</td>
<td>18,351</td>
<td>14,846</td>
<td>15,925</td>
<td>20.0</td>
</tr>
<tr>
<td>Eastern Illinois</td>
<td>1,437</td>
<td>2,347</td>
<td>2,151</td>
<td>1,633</td>
<td>2,543</td>
<td>2,429</td>
<td>1,747</td>
<td>8.0</td>
</tr>
<tr>
<td>Southern Illinois</td>
<td>3,263</td>
<td>4,021</td>
<td>3,552</td>
<td>3,732</td>
<td>4,340</td>
<td>3,967</td>
<td>4,116</td>
<td>8.0</td>
</tr>
<tr>
<td>Northern Indiana</td>
<td>2,404</td>
<td>4,066</td>
<td>3,833</td>
<td>2,637</td>
<td>4,662</td>
<td>4,322</td>
<td>2,977</td>
<td>6.0</td>
</tr>
<tr>
<td>Southern Indiana</td>
<td>4,643</td>
<td>7,202</td>
<td>6,082</td>
<td>5,763</td>
<td>8,639</td>
<td>9,113</td>
<td>5,303</td>
<td>26.5</td>
</tr>
<tr>
<td>Eastern Wisconsin</td>
<td>3,524</td>
<td>3,826</td>
<td>3,206</td>
<td>4,144</td>
<td>3,882</td>
<td>3,948</td>
<td>4,078</td>
<td>1.0</td>
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<tr>
<td>Western Wisconsin</td>
<td>1,930</td>
<td>2,196</td>
<td>1,937</td>
<td>2,189</td>
<td>2,494</td>
<td>2,476</td>
<td>2,207</td>
<td>13.6</td>
</tr>
<tr>
<td>Totals</td>
<td>27,150</td>
<td>38,923</td>
<td>33,555</td>
<td>32,518</td>
<td>44,911</td>
<td>41,101</td>
<td>36,353</td>
<td>15.0</td>
</tr>
</tbody>
</table>
The overall business of the district courts of the Seventh Circuit has been divided, for the purposes of this report, into three categories: civil cases, criminal cases, and bankruptcy cases. Tabulations showing detailed figures for 1974 and 1975 for each district court are attached, following a brief textual statement of the most significant aspects of the statistics in each of those three basic categories.

CIVIL CASES

This tabulation shows that there were 8,736 civil cases filed in the district courts of the Seventh Circuit during 1975, which was 773 (9.7 per cent) more civil cases than were filed during 1974.

The district courts terminated 7,788 civil cases during 1975, an increase of 1,019 cases (15 per cent) over the number terminated in 1974.

The number of civil cases pending in the district courts at the close of 1975 was 9,286. This represents an increase of 959 cases (11.5 per cent) over 1974.

CRIMINAL CASES

The criminal case tabulation shows that there were 2,086 criminal cases filed in the district courts during 1975, a decrease of 267 cases (11.3 per cent) from 1974.

The district courts terminated 2,283 criminal cases during 1975, a decrease of 84 (3.5 per cent) from the number terminated in 1974.

The number of criminal cases pending in the district courts at the close of 1975 was 1,390, 183 fewer (11.6 per cent) than pending at the close of 1974.

BANKRUPTCY CASES

A summary of the bankruptcy table shows that there were 34,086 bankruptcy cases filed in the district courts during 1975, 5,479 more cases (19 per cent) than in 1974.

The district courts terminated 31,027 bankruptcy cases during 1975, an increase of 6,608 cases (27 per cent) over 1974.

The number of bankruptcy cases pending in the district courts at the close of 1975 was 25,677, an increase of 3,059 (13.5 per cent) over 1974.

In synopsis, civil filings, terminations, and "backlog" are up rather significantly; those same factors are all somewhat down in the criminal area; and they are all at recent record high levels in the bankruptcy area.
CIVIL CASES FILED, TERMINATED, AND PENDING
DURING CALENDAR YEARS 1974 AND 1975
IN THE DISTRICT COURTS OF THE SEVENTH CIRCUIT

<table>
<thead>
<tr>
<th>District</th>
<th>Pending 12-31-73</th>
<th>Filed 1974</th>
<th>Closed 1974</th>
<th>Pending 12-31-74</th>
<th>Filed 1975</th>
<th>Closed Pending 1975 12-31-75</th>
</tr>
</thead>
<tbody>
<tr>
<td>Northern Illinois</td>
<td>2,608</td>
<td>3,778</td>
<td>3,148</td>
<td>3,238</td>
<td>4,288</td>
<td>3,713</td>
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<tr>
<td>Eastem Illinois</td>
<td>555</td>
<td>628</td>
<td>498</td>
<td>685</td>
<td>615</td>
<td>474</td>
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<tr>
<td>Southern Illinois</td>
<td>363</td>
<td>421</td>
<td>335</td>
<td>449</td>
<td>464</td>
<td>422</td>
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<tr>
<td>Northern Indiana</td>
<td>1,000</td>
<td>789</td>
<td>769</td>
<td>1,020</td>
<td>685</td>
<td>643</td>
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<tr>
<td>Southern Indiana</td>
<td>1,026</td>
<td>1,190</td>
<td>1,129</td>
<td>1,087</td>
<td>1,310</td>
<td>1,211</td>
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<tr>
<td>Eastern Wisconsin</td>
<td>891</td>
<td>647</td>
<td>518</td>
<td>1,020</td>
<td>748</td>
<td>658</td>
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<tr>
<td>Western Wisconsin</td>
<td>690</td>
<td>510</td>
<td>372</td>
<td>828</td>
<td>626</td>
<td>667</td>
</tr>
<tr>
<td>Totals</td>
<td>7,133</td>
<td>7,963</td>
<td>6,769</td>
<td>8,327</td>
<td>8,736</td>
<td>7,788</td>
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CRIMINAL CASES FILED, TERMINATED, AND PENDING
DURING CALENDAR YEARS 1974 AND 1975
IN THE DISTRICT COURTS OF THE SEVENTH CIRCUIT

<table>
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<tr>
<th>District</th>
<th>Pending 12-31-73</th>
<th>Filed 1974</th>
<th>Closed 1974</th>
<th>Pending 12-31-74</th>
<th>Filed 1975</th>
<th>Closed 1975</th>
<th>Pending 12-31-75</th>
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<tbody>
<tr>
<td>Northern Illinois</td>
<td>586</td>
<td>879</td>
<td>902</td>
<td>563</td>
<td>826</td>
<td>725</td>
<td>664</td>
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<tr>
<td>Eastern Illinois</td>
<td>125</td>
<td>205</td>
<td>215</td>
<td>115</td>
<td>169</td>
<td>222</td>
<td>62</td>
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<tr>
<td>Southern Illinois</td>
<td>109</td>
<td>157</td>
<td>149</td>
<td>117</td>
<td>149</td>
<td>192</td>
<td>74</td>
</tr>
<tr>
<td>Northern Indiana</td>
<td>274</td>
<td>433</td>
<td>387</td>
<td>320</td>
<td>370</td>
<td>438</td>
<td>252</td>
</tr>
<tr>
<td>Southern Indiana</td>
<td>166</td>
<td>339</td>
<td>349</td>
<td>156</td>
<td>286</td>
<td>291</td>
<td>165</td>
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<tr>
<td>Eastern Wisconsin</td>
<td>218</td>
<td>242</td>
<td>250</td>
<td>210</td>
<td>177</td>
<td>273</td>
<td>114</td>
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<tr>
<td>Western Wisconsin</td>
<td>109</td>
<td>98</td>
<td>115</td>
<td>92</td>
<td>109</td>
<td>142</td>
<td>59</td>
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<tr>
<td>Totals</td>
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<td>2,353</td>
<td>2,367</td>
<td>1,573</td>
<td>2,086</td>
<td>2,283</td>
<td>1,390</td>
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BANKRUPTCY CASES FILED, TERMINATED, AND PENDING
DURING CALENDAR YEARS 1974 AND 1975
IN THE DISTRICT COURTS OF THE SEVENTH CIRCUIT

<table>
<thead>
<tr>
<th>District</th>
<th>Pending 12-31-73</th>
<th>Filed 1974</th>
<th>Closed 1974</th>
<th>Pending 12-31-74</th>
<th>Filed 1975</th>
<th>Closed 1975</th>
<th>Pending 12-31-75</th>
</tr>
</thead>
<tbody>
<tr>
<td>Northern Illinois</td>
<td>6,755</td>
<td>10,608</td>
<td>8,744</td>
<td>8,619</td>
<td>13,237</td>
<td>10,408</td>
<td>11,448</td>
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<tr>
<td>Eastern Illinois</td>
<td>757</td>
<td>1,514</td>
<td>1,438</td>
<td>833</td>
<td>1,759</td>
<td>1,733</td>
<td>859</td>
</tr>
<tr>
<td>Southern Illinois</td>
<td>2,791</td>
<td>3,443</td>
<td>3,068</td>
<td>3,166</td>
<td>3,727</td>
<td>3,353</td>
<td>3,540</td>
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<td>7,611</td>
<td>3,952</td>
</tr>
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<td>Eastern Wisconsin</td>
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<td>2,954</td>
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<td>2,854</td>
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<td>1,269</td>
<td>1,759</td>
<td>1,667</td>
<td>1,361</td>
</tr>
<tr>
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<td>24,419</td>
<td>22,618</td>
<td>34,086</td>
<td>31,027</td>
<td>25,677</td>
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