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## Case Comments

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## CASE COMMENTS

**FEDERAL INCOME TAXATION — TAX BENEFIT RULE — IF TAXPAYER RECOVERS PROPERTY PREVIOUSLY DONATED TO CHARITY, THE FULL AMOUNT OF THE CHARITABLE CONTRIBUTION DEDUCTIONS TAKEN IN PRIOR YEARS IS INCLUDIBLE IN THE TAXPAYER'S GROSS INCOME IN THE YEAR OF RECOVERY AND TAXABLE AT THE THEN EXISTING RATE.** — In 1939 and again in 1940, the Alice Phelan Sullivan Corporation [Sullivan], a California corporation, donated certain real property to the California Province of the Society of Jesus, a charitable organization. On its 1939 corporate income tax return, Sullivan reported the fair market value of the donated realty as \$18,954.55<sup>1</sup> and took a maximum charitable deduction of \$4,243.49. Under the then applicable corporate tax rate of 18%, the deduction yielded Sullivan a tax benefit of \$806.26. In 1940, Sullivan reported the fair market value of that year's donation as \$44,935.99<sup>2</sup> and deducted \$4,463.44 from its gross income. That year the corporate tax rate had risen to 24% so that the overall tax saving afforded by this deduction was \$1,071.23. Each of these donations had been made subject to the condition that the property be used for religious or educational purposes. In 1957, however, the donee determined that the donation could no longer be used for the stipulated activities and reconveyed the land to Sullivan. Sullivan failed to include this recovery in its 1957 gross income, treating it as a non-taxable return of capital. The Commissioner of Internal Revenue took issue with Sullivan's characterization of its recovery and determined that the transaction did give rise to taxable income. Based on that premise, the Commissioner added to Sullivan's 1957 taxable income \$8,706.93, the sum of those charitable contribution deductions previously claimed and allowed in 1939 and 1940. Applying the 1957 corporate tax rate of 52% to this amount, the Commissioner then assessed a deficiency against Sullivan of \$4,527.60. Sullivan paid the additional assessment and filed a claim for a refund of \$2,650.11, the difference between the deficiency and the aggregate tax benefit originally enjoyed in 1939 and 1940. The United States Court of Claims disallowed the taxpayer's claim and *held*: the full amount of previously taken charitable contribution deductions for donated real property is includible in the taxpayer's gross income in the year that the property is recovered and taxable at the then existing tax rate, even though the resulting tax exceeds the amount of taxes saved in the year that the deductions were taken. *Alice Phelan Sullivan Corporation v. United States*, 381 F.2d 399 (Ct. Cl. 1967).

"Income" has been traditionally defined as the gain derived from capital, labor, or both, including profit gained through the sale or conversion of capital.<sup>3</sup> In this sense, gross income would not seem to include the recovery of a debt previously charged off as worthless, a tax refund, or similar adjustments affecting items deducted in prior years. Yet, except when the return for the year when the deduction was taken can be adjusted, such recoveries ordinarily constitute

1 Brief for Plaintiff in Support of Its Motion for Summary Judgment at 3, *Alice Phelan Sullivan Corp. v. United States*, 381 F.2d 399 (1967).

2 *Id.* at 3.

3 *Eisner v. Macomber*, 252 U.S. 189, 207 (1920). Today, of course, capital gains must be distinguished for income tax purposes from items of ordinary income. *See* INT. REV. CODE of 1954, §§ 61, 1202.

taxable income in the year of recovery.<sup>4</sup> Cutting across this general rule, however, and modifying it, is the tax benefit rule which provides that the restoration of a prior deduction is not included in gross income if the deduction did not produce a reduction of taxable income, *i.e.*, a tax benefit, in the year it was taken.<sup>5</sup>

The tax benefit rule is the product of a long and controversial development. For years the absence of any express statutory provision governing the income tax consequences of restorations of prior deducted items caused a multitude of disputes between the Government and taxpayers concerning the method of adjustment.<sup>6</sup> Early federal court decisions adopted a rule, at least with respect to bad debt recoveries, known as the "tax recovery" rule which required an accounting for recovered items by including their value in gross income in the year of recovery.<sup>7</sup> Several courts went so far as to apply this rule regardless of whether the taxpayer had derived any tax benefit in the year that the deduction was taken.<sup>8</sup>

Because of such inequitable results, the necessity of establishing some limit on the harsh injustices of the "tax recovery" rule was eventually recognized. The first leniency in this direction was provided by the Bureau of Internal Revenue in the late 1930's through a series of published rulings that permitted the application of tax benefit principles to bad debt and tax recoveries.<sup>9</sup> These recoveries were not taxable unless the prior deduction had produced a reduction in tax liability. The Bureau retreated from this position, however, and in 1940 reinstated the old "tax recovery" rule.<sup>10</sup> Although the Board of Tax Appeals opposed the Bureau's position and even extended the application of the tax

4 Union Trust Co. v. Commissioner, 111 F.2d 60 (7th Cir.), *cert. denied*, 311 U.S. 658 (1940); Kahn v. Commissioner, 108 F.2d 748 (2d Cir. 1940); Putnam Nat'l Bank v. Commissioner, 50 F.2d 158 (5th Cir. 1931); 1 J. MERTENS, LAW OF FEDERAL INCOME TAXATION § 7.34 (rev. ed. 1962); J. STANLEY & R. KILCULLEN, THE FEDERAL INCOME TAX 45-46 (3d ed. 1955); Atlas, *Tax Free Recoveries: The Tax Benefit Rule*, N.Y.U. 9TH INST. ON FED. TAX. 847 (1951); Lassen, *The Tax Benefit Rule and Related Problems*, 20 TAXES 473 (1942); Plumb, *The Tax Benefit Rule Today*, 57 HARV. L. REV. 129, 130-31 (1943); Note, 56 HARV. L. REV. 428, 434 (1942).

5 See 1 J. MERTENS, *supra* note 4, § 7.34; J. STANLEY & R. KILCULLEN, *supra* note 4, at 46. See, e.g., Amsco-Wire Prods. Corp., 44 B.T.A. 717 (1941); National Bank of Commerce, 40 B.T.A. 72 (1939), *aff'd*, 115 F.2d 875 (9th Cir. 1940); Central Loan & Inv. Co., 39 B.T.A. 981 (1939).

6 For collected cases, see 1 CGH 1967 STAND. FED. TAX REP. ¶¶ 1131.013-52 at 19.250-54; 1 MERTENS, *supra* note 4, §§ 7.34-37.

7 Putnam Nat'l Bank v. Commissioner 50 F.2d 158 (5th Cir. 1931); Cart v. Commissioner, 28 F.2d 551 (5th Cir. 1928).

Some decisions, based on the statutory definition of gross income and estoppel or implied waiver, theorized that by taking the deduction the taxpayer impliedly consented that any future recovery with respect to the item would be included in his gross income. *E.g.*, Philadelphia Nat'l Bank v. Rothensies, 43 F. Supp. 923 (E.D. Pa. 1942). Better support for the "tax recovery" rule was simply that the deduction resulted in a part of gross income not being taxed. Therefore, any restoration was taxable as the gross income which had not been taxed before. Buck Glass Co. v. Hofferbert, 176 F.2d 250 (4th Cir. 1949); Commissioner v. First State Bank, 168 F.2d 1004 (5th Cir.), *cert. denied*, 335 U.S. 867 (1948); National Bank of Commerce v. Commissioner, 115 F.2d 875 (9th Cir. 1940); Kahn v. Commissioner, 108 F.2d 748 (2d Cir. 1940).

8 Harwick v. Commissioner, 133 F.2d 732 (8th Cir. 1943); Helvering v. State-Planters Bank & Trust Co., 130 F.2d 44, 46 (4th Cir. 1942); Lake View Trust & Sav. Bank, 27 B.T.A. 290, 292 (1932).

9 G.C.M. 18525, 1937-1 CUM. BULL. 80; I.T. 3172, 1938-1 CUM. BULL. 150; G.C.M. 20854, 1939-1 CUM. BULL. 76; I.T. 3256, 1939-1 CUM. BULL. 172; I.T. 3278, 1939-1 CUM. BULL. 102.

10 G.C.M. 22163, 1940-2 CUM. BULL. 76; I.T. 3438, 1940-2 CUM. BULL. 82. See also Plumb, *supra* note 4, at 133 nn.19 & 20.

benefit rule to many additional situations, many federal court decisions at that time held against the rule.<sup>11</sup>

Finally, by 1942, the chaos was such that Congress stepped into the breach and exacted the tax benefit rule into law. Section 116 of the Revenue Act of 1942<sup>12</sup> excluded from gross income recoveries of bad debts, prior taxes, and delinquency amounts if the previous deduction for these items had not reduced the taxpayer's tax liability. But even this legislation failed to clear the air entirely since the Commissioner of Internal Revenue attempted to limit the scope of section 116 to the three items specifically enumerated in the statute. This misconception was rectified in *Dobson v. Commissioner*<sup>13</sup> where the Supreme Court stated:

[N]o statute or regulation having the force of one and no principle of law compels the Tax Court to find taxable income in a transaction where as a matter of fact it found no economic gain and no use of the transaction to gain tax benefit.<sup>14</sup>

Pursuant to the *Dobson* rationale, and to resolve any fear of administrative complications in its application, the Treasury Department adopted Treasury Decision 5454<sup>15</sup> which provided that the tax benefit principle should apply to "other losses, expenditures, and accruals made the basis of deductions from gross income"<sup>16</sup> as well as to the original statutory items. This position was strengthened in 1956 by Treasury Decision 6220<sup>17</sup> which recognized that Section 111 of the Internal Revenue Code of 1954, the successor of section 116, allowed the tax benefit rule to have the same extensive application as that intended by Treasury Decision 5454.<sup>18</sup>

Today, then, the general rule concerning the recovery of items deducted in a prior year is that the recovery is taxable income in the year of recovery subject to the caveat of Section 111 of the 1954 Code. This statutory modification of the general rule provides for the exclusion from taxpayer's gross income of that portion of his recovery equivalent to the amount of the deduction in the earlier year which did not result in a tax benefit to the taxpayer.

Unfortunately, there is no express provision in the Internal Revenue Code for including the value of a recovered charitable contribution in the taxpayer's gross income; nor is there any specific instruction on whether such a recovery is to be taxed under the tax rate existing at the time of recovery or at the time the contribution was made. However, in *Perry v. United States*<sup>19</sup> the Court of

11 See, e.g., *Commissioner v. United States & Int'l Sec. Corp.*, 130 F.2d 894 (3d Cir. 1942); *Helvering v. State-Planters & Trust Co.*, 130 F.2d 44 (4th Cir. 1942), *rev'g* 45 B.T.A. 630 (1941). See also Note, 33 TUL. L. REV. 247, 250 & nn.23-24 (1958).

12 Revenue Act of 1942, ch. 619, § 116, 56 Stat. 812 (now INT. REV. CODE OF 1954, § 111).

13 320 U.S. 489 (1943).

14 *Id.* at 506.

15 T.D. 5454, 1945 CUM. BULL. 68.

16 *Id.* T.D. 5454 did not include recoveries of depreciation, depletion, amortization, or amortizable bond premiums.

17 T.D. 6220, 1957-1 CUM. BULL. 34, 43-48. See Treas. Reg. § 1.111-1 (1956).

18 Section 111 of the 1954 Code made no significant changes in the provisions of Section 116 of the Revenue Act of 1942.

19 160 F. Supp. 270 (Ct. Cl. 1958).

Claims was faced with a factual situation virtually identical to that in *Sullivan*. For five consecutive years, commencing in 1944, taxpayer made charitable gifts of securities and cash to the town of Fitzwilliam, New Hampshire, to be used exclusively for the construction of an addition to the public library. He deducted these same amounts from his income in those years, thereby receiving an income tax benefit. The community ultimately decided not to build the addition and returned Mr. Perry's property. The Commissioner of Internal Revenue then required Perry to include in his gross income for the year of recovery the aggregate amount restored. However, the Court of Claims held that: (1) the recovered property was capital and not income; (2) judicial precedent required that the Government be permitted to recoup the taxes lost as a result of the charitable deductions; (3) it would be inequitable to require Perry to include the aggregate of his deductions previously claimed in his income for the year of recovery; and (4) the most equitable process was to require the taxpayer to pay an additional tax in the amount by which his income tax, in aggregate, had been reduced in prior years. The court concluded that in the year of recovery

the taxpayers [Mr. and Mrs. Perry] should exclude from their income the amount of the corpus returned to them in that year, but they should add to the tax thus computed on their 1953 [the year of recovery] income the amount by which their taxes in prior years had been decreased on account of the deductions made for contributions to this trust fund.<sup>20</sup>

The essence of the taxpayer corporation's argument in *Sullivan* was, of course, that the holding in *Perry* dictated that the value of the returned donated property was not to be included in its gross income in the year of recovery,<sup>21</sup> but that the taxpayer was only required to add to the tax thus computed the amount by which its taxes in prior years had been decreased on account of the deduction. Furthermore, the taxpayer urged the court to consider the equitable considerations that had caused the court in *Perry* to remark:

It would be inequitable to require plaintiffs to include in their income for 1953 [the year of recovery] the aggregate of the deductions claimed in prior years, because of the fact that the rates of taxation vary greatly from year to year, and because the inclusion in one year of all the deductions taken in several years would probably put the taxpayer in a higher tax bracket.<sup>22</sup>

The Court of Claims in *Sullivan*, however, refused to accept this argument and proceeded to set forth the reasons why it felt justified in "examining anew" the issue decided in *Perry*.<sup>23</sup> Following the Government's line of argument and

<sup>20</sup> *Id.* at 272.

<sup>21</sup> The court in *Perry* noted that "the return to the taxpayer of the property he had tried to give away cannot possibly be considered as income — he merely got back his own property." *Id.* at 271.

<sup>22</sup> *Id.* at 272.

<sup>23</sup> *Alice Phelan Sullivan Corp. v. United States*, 381 F.2d 399, 400-01 (Ct. Cl. 1967). The criteria, relied on in *Sullivan*, under which judicial re-examination of an earlier decision is justifiable, is set out in *Mississippi River Fuel Corp. v. United States*, 314 F.2d 953, 958 (Ct. Cl. 1963) (concurring opinion).

the views of the *Perry* dissent,<sup>24</sup> the court noted that "the 'balancing' technique adopted by the court in *Perry* — though equitable — was otherwise without legal foundation" and went "beyond the recognized limits of either statutory or judge-made law."<sup>25</sup> Similar expressions of disagreement with the majority position in *Perry* were cited by the court to support this position.<sup>26</sup> Furthermore, the court seemingly agreed with the Government's contention that *Perry* was decided on a ground which neither of its parties had argued and which, in at least two later decisions, had been abandoned. In *California & Hawaiian Sugar Refining Corporation v. United States*,<sup>27</sup> a 1962 decision, the Court of Claims had implied that a tax refund would be treated as income if the taxpayer previously received a tax benefit. And more importantly, in the 1961 case of *Citizens Federal Savings & Loan Association v. United States*,<sup>28</sup> the same court had held that a bad debt reserve deducted from income in previous years by a liquidated domestic building and loan association was taxable to a transferee building and loan association in the year in which it acquired all of the assets and liabilities of the liquidated association. The court in that case distinguished *Perry* on the ground that in *Perry* a charitable contribution deduction was involved and not a bad debt.<sup>29</sup> The *Sullivan* court therefore concluded that "[t]he foregoing considerations express sufficient reason to relinquish our deference to precedent in order to examine anew the issue which this case presents."<sup>30</sup>

Having disposed of *Perry*, the court then had no difficulty in finding the full amount of the charitable contribution deductions claimed in 1939 and 1940 includible in *Sullivan*'s gross income and taxable at the rate prevailing in 1957, the year that the property was recovered. The court noted that it is a well-established principle of our tax law that where full use of a deduction has been made and a tax saving thereby obtained, any subsequent recovery must be treated as income to the full extent of the deduction previously allowed. This "tax-benefit concept," the court continued, once exclusively a judicial process, now finds expression both in statute and administrative regulations. Section 111 of the Internal Revenue Code of 1954 applies tax benefit principles to bad debts, prior taxes, and delinquency amounts subsequently recovered.<sup>31</sup> *Dobson v. Com-*

24 Judge Madden, dissenting in *Perry*, noted that:

What we have, then, is the unanticipated recovery by a former owner of property of that property after he has given it up for lost. . . . The administrative authorities and the courts, without the help of any statute, required him to pay income tax upon his recovery. . . . The reason . . . was that, once having used the . . . deduction, the prospect of recovery was, for income tax purposes, written off . . . . Having been written off, the later realization of the claim was, again for tax purposes, like a windfall to the taxpayer, and within the broad definition of taxable income. *Perry v. United States*, 160 F. Supp. 270, 272-73 (Ct. Cl. 1958) (dissenting opinion).

25 *Alice Phelan Sullivan Corp. v. United States*, 381 F.2d 399, 401 (Ct. Cl. 1967).

26 *Id.* at 401. The court cited Rev. Rul. 59-141, 1959-1 CUM. BULL. 17; 1 MERTENS, *supra* note 4, § 7.37; S. SURREY & W. WARREN, *FEDERAL INCOME TAXATION* 538 (1960).

27 311 F.2d 235 (Ct. Cl. 1962).

28 290 F.2d 932 (Ct. Cl. 1961).

29 *Id.* at 938.

30 *Alice Phelan Sullivan Corp. v. United States*, 381 F.2d 399, 401 (Ct. Cl. 1967).

31 INT. REV. CODE OF 1954, § 111 provides, in part:

(a) GENERAL RULE.—Gross income does not include income attributable to the recovery during the taxable year of a bad debt, prior tax, or delinquency amount,

*missioner*<sup>32</sup> held that the scope of section 111 is not limited to those three items specifically enumerated therein.<sup>33</sup> And Treasury regulations have extended section 111 treatment to "all other losses, expenditures, and accruals made the basis of deductions from gross income for prior taxable years . . . ."<sup>34</sup> Therefore, the court concluded that "[t]he *Dobson* decision insured the continued validity of the tax-benefit concept, and the regulation — being but the embodiment of that principle — is clearly adequate to embrace a recovered charitable contribution."<sup>35</sup>

But neither section 111, *Dobson*, or the regulations specify which tax rate is to be applied. The court in *Sullivan*, in determining that the applicable rate is the rate existing in the year of recovery, relied on *Burnet v. Sanford & Brooks Company*.<sup>36</sup> In *Burnet*, the Supreme Court established that the basic principle of our tax system is the concept of accounting for items of income and expense on an annual basis.<sup>37</sup> From this concept, the *Sullivan* court reasoned that annual income must be computed without reference to losses experienced in an earlier accounting period and must be taxed without reference to earlier tax rates. Consequently,

[s]ince taxpayer in this case did obtain full tax benefit from its earlier deductions, those deductions were properly classified as income upon recoupment and must be taxed as such. This can mean nothing less than the application of that tax rate which is in effect during the year in which the recovered item is recognized as a factor of income.<sup>38</sup>

Admittedly the argument made in *Perry* has an obvious equitable appeal.

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to the extent of the amount of the recovery exclusion with respect to such debt, tax, or amount.

(b) DEFINITIONS.—For purposes of subsection (a)—

(4) RECOVERY EXCLUSION.—The term "recovery exclusion," with respect to a bad debt, prior tax, or delinquency amount, means the amount, determined in accordance with regulations prescribed by the Secretary or his delegate, of the deductions or credits allowed, on account of such bad debt, prior tax, or delinquency amount, which did not result in a reduction of the taxpayer's tax under this subtitle . . . reduced by the amount excludable in previous taxable years with respect to such debt, tax, or amount under this section.

32 320 U.S. 489 (1943).

33 *Id.* at 505-06. *Dobson* specifically referred to § 116 of the Revenue Act of 1942 which is now § 111 of the 1954 Code.

34 Treas. Reg. § 1.111-1 (1956), entitled "Recovery of Certain Items Previously Deducted or Credited," provides:

(a) *General.* Section 111 provides that income attributable to the recovery during any taxable year of bad debts, prior taxes and delinquency amounts shall be excluded from gross income to the extent of the "recovery exclusion" with respect to such items. The rule of exclusion so prescribed by statute applies equally with respect to all other losses, expenditures, and accruals made the basis of deductions from gross income for prior taxable years, including war losses referred to in section 127 of the Internal Revenue Code of 1939, but not including deductions with respect to depreciation, depletion, amortization, or amortizable bond premiums. The term "recovery exclusion" as used in this section means an amount equal to the portion of the bad debts, prior taxes, and delinquency amounts (the items specifically referred to in section 111), and of all other items subject to the rule of exclusion which, when deducted or credited for a prior taxable year, did not result in a reduction of any tax of the taxpayer under subtitle A . . . . (Emphasis added.)

35 *Alice Phelan Sullivan Corp. v. United States*, 381 F.2d 399, 403 (Ct. Cl. 1967).

36 282 U.S. 359 (1931).

37 *Id.* at 365.

38 *Alice Phelan Sullivan Corp. v. United States*, 381 F.2d 399, 403 (Ct. Cl. 1967).

If it is determined that the tax liability arising from the return of a charitable gift is equivalent to the tax benefit experienced at the time of its donation, then the economic equilibrium is restored. The Government gets back exactly what it lost while the tax benefits received by the taxpayer in the earlier years are expunged. In fact, Judge Collins, the author of the *Sullivan* opinion, voiced these considerations when he remarked in a footnote:

This opinion represents the views of the majority and complies with existing law and decisions. However, in the writer's personal opinion, it produces a harsh and inequitable result. . . . The tax-benefit concept is an equitable doctrine which should be carried to an equitable conclusion. Since it is the declared public policy to encourage contributions to charitable and educational organizations, a donor, whose gift to such organizations is returned, should not be required to refund to the Government a greater amount than the tax benefit received when the deduction was made for the gift. Such a rule would avoid a penalty to the taxpayer and an unjust enrichment to the Government.<sup>39</sup>

On legal grounds, however, such an approach could hardly be sustained. In the first place there was no precedent for it. As a practical matter, *Perry* was contrary to a long line of judicial authority holding that recovery of previously deducted items constituted taxable income in full in the year of recovery if the taxpayer had realized a full tax benefit from his prior deductions.<sup>40</sup> It was also contrary to the Internal Revenue Service's published position on the matter.<sup>41</sup> In at least one case after *Perry*, the Court of Claims sanctioned taxation of recovered deductions at the tax rate prevailing in the year of recovery.<sup>42</sup> Moreover, it can even be argued that *Perry* reached its conclusion in an illogical manner. As one writer has noted:

Throughout its opinion the court [in *Perry*] gave lip service to, and even argued in support of, the principle of annualization, yet in the end it related the repayment back to the years of the deductions, a result totally inconsistent with the principle which the court purported to follow.<sup>43</sup>

The decision in *Sullivan* now gives the area uniformity by treating returned charitable contributions in the same manner as any other restored item that was beneficially deducted in a prior year. Where the amount recovered has been previously deducted to offset income, it should be reported as a part of gross income for the year in which it is recovered. In the words of the Board of Tax Appeals, "[n]o other system would be practical in view of the statute of limitations, the obvious administrative difficulties involved, and the lack of finality in income tax liability, which would result."<sup>44</sup> It is even possible that after the decision in *Sullivan*, the equities of the situation could work against the

39 *Id.* at 403 n.5.

40 See cases cited note 5 *supra*.

41 Rev. Rul. 54-566, 1954-2 CUM. BULL. 96.

42 *Citizens Fed. Sav. & Loan Ass'n v. United States*, 290 F.2d 932 (Ct. Cl. 1961). *Cf. California & Hawaiian Sugar Ref. Corp. v. United States*, 311 F.2d 235 (Ct. Cl. 1962).

43 Note, *Taxation of Refunded Amounts Deducted in Prior Years: Charitable Contributions*, 1959 DUKE L.J. 151, 153.

44 *Estate of Block*, 39 B.T.A. 338, 341 (1939), *aff'd sub nom. Union Trust Co. v. Commissioner*, 111 F.2d 60 (7th Cir.), *cert. denied*, 311 U.S. 658 (1940).

Government in a given case such as where the deduction occurred in a profitable year and the recovery came in a year in which the taxpayer either suffered a loss or was in a lower tax bracket. In any event, as Judge Collins pointed out, "the court cannot legislate and any change in the existing law rests within the wisdom and discretion of the Congress."<sup>45</sup> Until such legislation is forthcoming, the result in *Sullivan* seems unassailable.

Leo G. Stoff, Jr.

CONSTITUTIONAL LAW — FAIR LABOR STANDARDS ACT — 1966 AMENDMENTS EXTENDING COVERAGE TO CERTAIN EMPLOYEES OF STATE PUBLIC SCHOOLS, HOSPITALS, AND RELATED INSTITUTIONS HELD CONSTITUTIONAL. — The State of Maryland, joined by twenty-four other states as parties plaintiff,<sup>1</sup> brought an action in the United States District Court for the District of Maryland seeking a declaration that the 1966 amendments<sup>2</sup> to the Fair Labor Standards Act [hereinafter FLSA or the Act] of 1938<sup>3</sup> are unconstitutional insofar as they are applicable to state employees, and asking that enforcement of these provisions against them be enjoined. The states limited their objection to the application of the minimum wage provisions<sup>4</sup> and the overtime provisions<sup>5</sup> to employees of state-operated public schools, hospitals, and related institutions. The 1966 amendments extended the coverage of these provisions to the states by specifically including states and their political subdivisions engaged in these activities in the amended definition of "employer" in section 203(d).<sup>6</sup> A three-judge United States District Court for the District of Maryland, in a divided opinion, denied the plaintiffs' request for an injunction and *held*: the 1966 amendments of the Fair Labor Standards Act that extend coverage to, among others, nonprofessional, nonexecutive, and nonadministrative employees of state public schools, hospitals, and related institutions are not, with respect to the minimum wage provisions, unconstitutional. *State of Maryland v. Wirtz*, 269 F. Supp. 826 (D. Md. 1967).

Congress passed the original FLSA in 1938 relying on its power to regulate commerce among the several states. The purpose of the Act was to correct and eliminate labor conditions detrimental to the maintenance of a minimum standard of living by providing for a minimum wage for employees engaged in commerce or in the production of goods for commerce.<sup>7</sup> The constitutionality of this Act was upheld by the Supreme Court in *United States v. Darby*.<sup>8</sup> In 1961, an amendment to the FLSA, which was subject to part of the states' attack in

45 *Alice Phelan Sullivan Corp. v. United States*, 381 F.2d 399, 403 n.5 (Ct. Cl. 1967).

1 Alabama, Arizona, Arkansas, Colorado, Delaware, Florida, Hawaii, Iowa, Kansas, Maine, Maryland, Mississippi, Missouri, Nebraska, New Jersey, New Mexico, North Dakota, Ohio, Oklahoma, South Carolina, South Dakota, Texas, Virginia, and Wyoming. Brief for Defendant in Support of Motion to Dismiss at 1 n.1, *Maryland v. Wirtz*, 269 F. Supp. 826 (D. Md. 1967).

2 29 U.S.C.A. §§ 203, 206-07, 213-14, 216 (Supp. 1966).

3 29 U.S.C. §§ 201-19 (1964).

4 29 U.S.C.A. § 206 (Supp. 1966).

5 *Id.* § 207. Some concession is made for the unusual nature of hospital work. *Id.* § 207(j).

6 *Id.* § 203(d).

7 29 U.S.C. § 202 (1964).

8 312 U.S. 100 (1941).

*Wirtz*, introduced the "enterprise" concept<sup>9</sup> by which employees involved in all the related activities of a business engaged in commerce are brought under the coverage of the FLSA, even though part of these activities are not strictly "commerce" or the "production of goods for commerce." In 1966, section 203(r), which defines the "enterprise concept," was amended to include the activities performed by persons in both public and private, profit and nonprofit schools and hospitals.<sup>10</sup> At the same time the contested minimum wage and overtime provisions were explicitly extended to previously exempted state enterprises by the amendment of section 203(d). Section 203(d) now provides:

"Employer" . . . shall not include the United States or any State or political subdivision of a State (except with respect to employees of a State, or a political subdivision thereof, employed (1) in a hospital, institution, or school referred to in the last sentence of subsection (r) of this section . . . .<sup>11</sup>

The states urged support for their position with three basic contentions. First, they claimed that the activities of the states in the operation of their schools, hospitals, and related institutions are not "commerce." They pointed to three attributes which, they argued, remove the activities in question from any legitimate definition of commerce: (1) they are nonprofit; (2) they are purely governmental; and (3) there are no private systems that compete with, or could effectively be substituted for, these activities. While the very definition of "enterprise"<sup>12</sup> would seem dispositive of these arguments, the court referred to additional authority to support its position that "[c]ommerce" is not confined to "business" activity in a conventional sense; it includes nonbusiness and nonprofit activities, whether private or governmental in nature and irrespective of whether they compete with or may be substituted for by private enterprise.<sup>13</sup> Among these additional authorities, the court cited *United States v. Ohio*,<sup>14</sup> a recent Supreme Court decision reversing the Sixth Circuit's holding<sup>15</sup> that wheat grown and entirely disposed of on a state prison farm as part of a rehabilitation program was not subject to federally imposed acreage allotments. The Court's reversal in *Ohio* was rendered solely upon the authority of *Wickard v. Filburn*,<sup>16</sup> in which the Supreme Court had upheld the imposition of similar restraints on privately produced and self-consumed wheat. *Ohio* presented all the elements relied on by the states in *Wirtz* in that the provision for places of detention for criminals is an essential, governmental, nonprofit function that neither competes with nor could be provided for by private enterprise. The court in *Wirtz* thus characterized *Ohio* as conclusive authority for the broad scope of Congress' power to regulate commerce, although not determinative on the issue of impair-

9 29 U.S.C. §§ 203(r)-(s) (1964) (1961 version), as amended, 29 U.S.C.A. §§ 203(r)-(s) (Supp. 1966).

10 29 U.S.C.A. §§ 203(r)-(s) (Supp. 1966).

11 80 Stat. 831 (1966), 29 U.S.C.A. § 203(d) (Supp. 1966).

12 See text accompanying notes 9-11 *supra*.

13 *Maryland v. Wirtz*, 269 F. Supp. 826, 832 (D. Md. 1967).

14 385 U.S. 9 (1966).

15 *United States v. Ohio*, 354 F.2d 549 (6th Cir. 1965), *rev'd*, 385 U.S. 9 (1966).

16 317 U.S. 111 (1942).

ment of state sovereignty.<sup>17</sup> The court, in unanimously concluding that "commerce" is involved, also considered the enormous impact that expenditures for school and hospital supplies must have on interstate commerce.<sup>18</sup>

In their second contention, the states urged that the very essence of the "enterprise" concept as originally embodied in the 1961 amendments<sup>19</sup> is an unconstitutional extension of the commerce power. While the question of the general validity of the "enterprise" concept has never been specifically decided by the Supreme Court, the district court of Maryland expressly followed the district courts of South Carolina<sup>20</sup> and Louisiana<sup>21</sup> and sustained without dissent the validity of that concept.

The third and most troublesome contention urged by the states was that the 1966 amendments unconstitutionally impugn their sovereignty by unduly interfering with the states' natural function of providing their citizens with services unobtainable elsewhere. They further contended that the amendments impose upon them a graduated financial burden that severely impedes the execution of their sovereign taxation and budgetary functions. These arguments, while being rejected in a well-precedented discussion by Judge Winter, speaking for the court in *Wirtz*, were the source of considerable consternation to Judge Thomsen, whose partial concurrence expressed reservation as to the applicability of previous decisions, and were the striking point of the dissent of Judge Northrop, who characterized the 1966 amendments as a "direct transgression on the concept of federalism."<sup>22</sup>

Judge Winter began the court's opinion by limiting the question in accordance with the rule that a court, in determining constitutional issues, must adjudge only the legal rights of litigants in actual controversy.<sup>23</sup> He then rather summarily put to rest any of the states' arguments based on the tenth amendment by passing that amendment off as a "truism" — "that all is retained which has not been surrendered."<sup>24</sup> He concluded that the tenth amendment "neither adds to nor detracts from the essential question to be decided in this case."<sup>25</sup>

With these preliminaries settled, Judge Winter turned directly to a long line of cases where federal regulation of "essential" state functions had been upheld.<sup>26</sup> He cited, among others, the line of cases, beginning with *United States v. California*,<sup>27</sup> in which the Court upheld the application of various federal regulations to railroads operated by the states on, or near, state-owned waterfront facilities. He admitted that these cases may appear distinguishable as to

17 *Maryland v. Wirtz*, 269 F. Supp. 826, 844 (D. Md. 1967).

18 *Id.* at 833-34. See also Reply Brief for Defendants at 2-4, *Maryland v. Wirtz*, 269 F. Supp. 826 (D. Md. 1967).

19 See text accompanying note 9 *supra*.

20 *Wirtz v. Edisto Farms Dairy*, 242 F.Supp. 1, 6 (E.D.S.C. 1965).

21 *Goldberg v. Ed's Shopworth Supermarket, Inc.*, 214 F. Supp. 781, 783 (W.D. La. 1963).

22 *Maryland v. Wirtz*, 269 F. Supp. 826, 853 (D. Md. 1967) (dissenting opinion).

23 *Maryland v. Wirtz*, 269 F. Supp. 826, 837 (D. Md. 1967).

24 *Id.* at 838, quoting from *United States v. Darby*, 312 U.S. 100, 124 (1941).

25 *Maryland v. Wirtz*, 269 F. Supp. 826, 838 (D. Md. 1967).

26 *Id.* at 838.

27 297 U.S. 175 (1936) (Safety Appliance Act). Accord, *Parden v. Terminal Ry. of Alabama State Docks Dept.*, 377 U.S. 184 (1964) (Federal Employer's Liability Act); *California v. Taylor*, 353 U.S. 553 (1957) (Railway Labor Act); *California v. United States*, 320 U.S. 577 (1944) (Shipping Act of 1916).

the actual degree of the "essentialness" of the functions involved. However, he noted that, in each of these cases, the essential nature of the activity and the sovereignty of the state were rejected as defenses by the Supreme Court, not on the ground that the activity was not essential, but on the ground that the "essential" concept was not a good defense.<sup>28</sup> In further rejecting the "essentialness" test, Judge Winter made reference to *Case v. Bowles*<sup>29</sup> in which the State of Washington was held limited by the Emergency Price Control Act in its sale of timber to help support public education. Judge Winter attached extreme significance to the rejection of the "essential function" argument. "The power of Congress to regulate commerce is no less plenary and no less exclusive than the power to make war under which the Emergency Price Control Act was adopted."<sup>30</sup>

On the other hand, noting that the states claimed support from *New York v. United States*<sup>31</sup> and other cases indicating limitations on the congressional power to tax, Judge Winter was quick to point out that while cases decided under any of the plenary powers are precedents for similar situations arising under one of the other plenary powers, an unqualified analogy between the concurrent taxing power and the plenary commerce power cannot be made.

Having satisfied himself that the state activities in question are subject to regulation, Judge Winter proceeded to present two reasons why the scope of judicial review did not encompass the states' contention concerning the claimed effects that the 1966 amendments will have on the states' financial resources and the resulting curtailment of state services. He found support in *Sanitary District of Chicago v. United States*<sup>32</sup> for his conclusion that when Congress exercises its power over commerce, the welfare or needs of the inhabitants of a particular state cannot even be considered by the courts. In *Sanitary District*, the Supreme Court enjoined the Chicago Sanitary District from diverting water from Lake Michigan in excess of a limit set by a federal statute, even though a state statute authorized more, because the lowering of the lake interfered with commerce and violated a treaty with Great Britain. Judge Winter maintained that disposing of sewage is as much a part of public health as providing hospitals. He cited Justice Holmes who, speaking for a unanimous Court in *Sanitary District*, rejected evidence showing the need of Chicago for the additional water since "we are not at liberty to consider [the evidence] here as against the edict of a paramount power."<sup>33</sup>

Judge Winter also reasoned that the financial impact of the 1966 amendments is an argument to be addressed to Congress and not to the courts. He found support for this conclusion in the landmark case of *Gibbons v. Ogden*<sup>34</sup>

28 *Maryland v. Wirtz*, 269 F. Supp. 826, 841 (D. Md. 1967).

29 327 U.S. 92 (1946).

30 *Maryland v. Wirtz*, 269 F. Supp. 826, 841 (D. Md. 1967).

31 326 U.S. 572 (1946).

32 266 U.S. 405 (1925).

33 *Id.* at 432.

34 22 U.S. (9 Wheat.) 1 (1824). In this case, Chief Justice Marshall said:

The wisdom and the discretion of Congress, their identity with the people, and the influence which their constituents possess at elections, are, in this, as in many other instances, as that, for example, of declaring war, the sole restraints on which they have relied, to secure them from its abuse. They are the restraints on which the people must often rely solely, in all representative governments. *Id.* at 197.

and the more recent case of *Oklahoma ex rel Phillips v. Guy F. Atkinson Company*.<sup>35</sup> In the latter case, the Supreme Court rejected Oklahoma's argument that a planned federal dam would unnecessarily take more land than the purpose of the project demanded thereby substantially reducing the taxable property within the state.

Such matters raise not constitutional issues but questions of policy. They relate to the wisdom, need, and effectiveness of a particular project. They are therefore questions for the Congress, not the courts. . . .

Nor is it for us to determine whether the resulting benefits to commerce as a result of this particular exercise by Congress of the commerce power outweigh the costs of the undertaking.<sup>36</sup>

Judge Winter then enunciated his basic rationale: "The specific and peremptory rejection of the argument that the principle of duality in our system of government may limit in any way the authority of Congress to regulate commerce is dispositive of the present case."<sup>37</sup>

While Judge Thomsen also concluded that the injunction requested by the states should be denied, he refused to agree that the power of the federal government is as absolute and unqualified as the broad language of the authorities cited by Judge Winter would seem to make it. Judge Thomsen noted that "[i]n none of those cases were the essential taxing and budgetary functions of the States so seriously affected as they are by the statute under consideration."<sup>38</sup> He also indicated dissatisfaction with Judge Winter's treatment of the tenth amendment, chastising that:

To characterize that Amendment as a "truism" does not mean that it was intended to be devoid of meaning, lulling the States into acceptance of a national government which may, without further amendment to the Constitution, take away from the States the substance, if not the trappings, of the sovereignty which they intended to preserve.<sup>39</sup>

The concurring judge rejected the idea that such exercise of legislative power is not subject to judicial review of its wisdom and merits. Rather, he indicated that the courts have a positive duty to scrutinize an attempted exercise of federal commerce power by asking "does it interfere unduly with the State's performance of its sovereign and indispensable functions of government?"<sup>40</sup> To facilitate application of such a test, Judge Thomsen suggested that four factors must be considered: (1) congressional findings with regard to effects of the activities on interstate commerce; (2) the importance of the activity as a state function; (3) the extent and possibility of effective substitution by private enterprise; and (4) whether such regulation seriously interferes with the states' performance or regulation of their sovereign functions.<sup>41</sup> Although he suggested

35 313 U.S. 508 (1941).

36 *Id.* at 527-28.

37 *Maryland v. Wirtz*, 269 F. Supp. 826, 840 (D. Md. 1967).

38 *Id.* at 848 (concurring opinion).

39 *Id.* at 847.

40 *Id.* at 849.

41 *Id.* at 849-50.

that the 1966 amendments are unacceptable under the first three considerations, he conceded that the minimum wage provisions do not so unduly interfere with the states' performance of their sovereign functions as to render them unconstitutional. He recognized the interference with the budgetary function, "[b]ut that interference must be weighed against the interest of the federal government, representing all the people of the United States, in seeing that all the people are paid an appropriate minimum wage."<sup>42</sup> He would, however, draw the line with the overtime provisions since he felt that they constituted such unconsidered interference with organizational and budgetary functions as to render them unconstitutional. He would not prejudice the states' right to challenge them in future actions. But, since he felt that the problems created by the application of the amendments could best be worked out by regulation and a case-by-case treatment, he joined Judge Winter in concluding that a sweeping injunction was not justified at this time.

Judge Northrop, in dissent, could accept neither the absolute preemption of Congress espoused by Judge Winter nor the patient case-by-case adjudication suggested by Judge Thomsen. In his first point of departure, he maintained that Judge Winter, in effect, held "that from the beginning federalism, as embodied in our Constitution, existed by the will of Congress rather than by the will of the people."<sup>43</sup> Judge Northrop argued that neither case law, history, nor the structure of the Constitution support such a conclusion.

However, his main point of contention seems to be that the issue raised in *Wirtz* is not simply a political question. Rather, "[i]t amounts to the national government compelling state government action and controlling and operating the state government with little or no knowledge of the requirements of its citizens or the financial ability of those citizens to pay the bill."<sup>44</sup> He reasoned that there is only so much revenue available, and because the states' congressional delegations do not have the time, knowledge, or responsibility to become involved in the fiscal policies of the states, Congress is forcing the states to either increase taxes, curtail the services in question, cut back in other areas, or refrain from expanding services to meet demands. Judge Northrop feared that such an unconsidered intrusion into the functioning of state governments carries with it the seeds for the destruction of federalism and, consequently, that it should be policed by judicial review.

He also indicated a belief that Judge Thomsen's plan of case-by-case resolution in the wake of Labor Department regulations would amount to judicial buck-passing. "Unless the Department of Labor emasculates the Act, there will be no way for this or some other court to avoid the constitutional question posed herein."<sup>45</sup>

While Judge Winter's opinion for the court reflects a lack of constitutional conservatism, it is hardly a new approach. As early as 1908, Woodrow Wilson observed:

The old theory of sovereignty of the States . . . has lost its vitality. . . .

42 *Id.* at 851. See note 47 *infra*.

43 *Maryland v. Wirtz*, 269 F. Supp. 852 (D. Md. 1967) (dissenting opinion).

44 *Id.* at 854.

45 *Id.* at 853.

[T]he federal government is, through its courts, the final judge of its own powers. . . . Its power is "to regulate commerce between the States," and attempts now made during every session of Congress to carry the implications of that power beyond the utmost boundaries of reasonable and honest inference show that the only limits likely to be observed by the politicians are those set by the good sense and conservative temper of the country.<sup>46</sup>

The many cases cited by Judge Winter provide vivid examples of how far Congress is willing to go, and they take on added significance when viewed in the light of the Supreme Court's observation that the purpose of the FLSA was not to regulate commerce as such, but rather to facilitate a long-range social policy; namely, the elimination of sub-standard labor conditions.<sup>47</sup> This policy seems no less vital today. But is there *any* limit other than one from within the Congress itself? Judge Winter would seem to answer no, and his broad array of authorities gives impressive support.<sup>48</sup> The advocates of judicial review might, however, take some comfort in the views of Justice Douglas in *New York v. United States*:<sup>49</sup>

The notion that the sovereign position of the States must find its protection in the will of a transient majority of Congress is foreign to and a negation of our constitutional system. There will often be vital regional interests represented by no majority in Congress. The Constitution was designed to keep the balance between the States and the Nation outside the field of legislative controversy.<sup>50</sup>

But their comfort must be an uneasy one since this is a dissenting opinion and may be traced back to the majority position in *Hammer v. Dagenhart*.<sup>51</sup> The present trend, adhered to by Judge Winter, reflects Justice Holmes' dissent in *Hammer*,<sup>52</sup> which view has prevailed from the time that case was overruled in *United States v. Darby*,<sup>53</sup> the very case that upheld the validity of the FLSA.

46 W. WILSON, CONSTITUTIONAL GOVERNMENT IN THE UNITED STATES 178-79 (1908).

47 With reference to the objectives of the Act, the Supreme Court, speaking through Mr. Justice Burton, has observed:

In this Act, the primary purpose of Congress was not to regulate interstate commerce as such. It was to eliminate, as rapidly as practicable, substandard labor conditions throughout the nation. It sought to raise living standards without substantially curtailing employment or earning power. . . .

The Act declared its purpose in bold and sweeping terms. Breadth of coverage was vital to its mission. Its scope was stated in terms of substantial universality . . . *Powell v. United States Cartridge Co.*, 339 U.S. 497 at 509-10, 516 (1950) (footnote omitted).

For congressional agreement with this stated purpose, see H.R. REP. NO. 1366, 89TH CONG., 2D SESS. 5-6 (1966).

48 See, e.g., *Wickard v. Filburn*, 317 U.S. 111, 129-30 (1942); *United States v. Darby*, 312 U.S. 100, 115 (1941).

49 326 U.S. 572 (1946).

50 *Id.* at 594 (dissenting opinion).

51 247 U.S. 251 (1918) (a five-to-four decision holding that the Child Labor Laws exceeded the commerce power).

52 *Id.* at 277 (dissenting opinion). Holmes, speaking for all four dissenters said:

But if an act is within the power specifically conferred upon Congress, it seems to me that it is not made any less constitutional because of the indirect effects that it may have, however obvious it may be that it will have those effects, and that we are not at liberty upon such grounds to hold it void. *Id.* (Emphasis added.)

53 312 U.S. 100 (1941). The Court said:

The conclusion is inescapable that *Hammer v. Dagenhart*, was a departure from the principles which have prevailed in the interpretation of the Commerce Clause both before and since the decision and that such vitality, as a precedent, as it then had has long since been exhausted. It should be and now is overruled. *Id.* at 116-17.

Trends begun by dissents, once having gained avid acceptance and broad application, are rarely reversed by subsequent dissents attempting to revive the rejected ideas.

Yet, in view of the significance of the areas affected by the intrusion into state functions by the 1966 amendments, the charges of the doubters cannot be regarded as mere emotional outcries unfounded in any sources other than long outmoded political theories. Judge Northrop pointed to governmental activities that are in the nature of a federal-state partnership, and maintained that in the light of this relationship,

it would indeed be tragic at this point in history to expand and broaden the power of the federal government over the state governments in the exercise of their necessary governmental functions under the guise of the "Commerce Clause" to a point never heretofore reached by any decision.<sup>54</sup>

Indeed, one can point to other areas of internal cooperation, such as interstate highway programs, and the construction of higher education facilities, in which the federal government aids the states in the performance of their necessary functions. But this "Cooperative Federalism," as Professor Corwin styles it,<sup>55</sup> of itself spells further extension of the national power. It is a brutal fact of life that

when two cooperate it is the stronger member of the combination who calls the tunes. Resting as it does primarily on the superior fiscal resources of the National Government, Cooperative Federalism has been, to date, a short expression for a constantly increasing concentration of power at Washington in the instigation and supervision of local policies.<sup>56</sup>

The ideological revolutions following the Great Depression and the New Deal imported to the Government the duty to guarantee economic security to every citizen. Having rendered its aid in many areas, the federal government is now demanding reciprocation by the states in the form of a cooperative effort to carry out this duty, deemed in the best interest of all the nation, by providing a nondiscriminatory minimum wage.<sup>57</sup> Certainly, it is grossly unfair that a man should be discriminated against merely because he happens to be in the service of a state rather than the employee of a similar private enterprise.

The prevailing attitudes, evidenced by the case law and commentators previously discussed, would indicate support for the proposition that when Congress acts under one of its specified powers, the fact that it has acted wisely and in the national interest is a presumption to be rebutted only by the people in whose name it has acted, and such wisdom and policy are beyond consideration by the courts. Judge Northrop's point that the states' congressional delegations are not fully informed of the details of state fiscal policy weakens this idealistic proposition. Yet, it is necessary to counter that the states had sufficient notice of the impending congressional action to enable them to mobilize their forces.<sup>58</sup>

54 *Maryland v. Wirtz*, 269 F. Supp. 826, 854 (D. Md. 1967) (dissenting opinion).

55 Corwin, *The Passing of Dual Federalism*, 36 Va. L. Rev. 1, 17-21 (1950).

56 *Id.* at 21.

57 See note 47 *supra*.

58 *Maryland v. Wirtz*, 269 F. Supp. 826, 829-30 (D. Md. 1967). Judge Winter pointed out that this

was not a concept first advanced in the Second Session of the 89th Congress under

By assuming the positive course of action of making certain that their Congressmen and Senators were informed in detail of the reasons now put forth for their objections to the measure, and by joining forces at the legislative level as they have belatedly done in the present litigation, they might have effectively blocked passage of the 1966 amendments. They have, instead, either through their procrastination or their ill-consideration of alternatives, chosen to present a suit on constitutional grounds which flies directly in the face of over half a century of precedent and theory. These overwhelming precedents and the present trend toward constitutional liberalism in the Supreme Court suggest that the states would, upon appeal to the Supreme Court, meet with resistance similar to that found in the district court and be dealt a similar fate.

*Daniel L. Hebert*

TORTS — NEGLIGENCE — ILLINOIS APPELLATE COURT ADOPTS COMPARATIVE NEGLIGENCE DOCTRINE. — On October 16, 1964, Charles Raymond Maki was killed in a collision at an intersection in Kane County, Illinois. Plaintiff, as administrator of his estate, brought suit under the Illinois Wrongful Death Act.<sup>1</sup> Her complaint was in three counts, the third of which alleged "that at times relevant hereto if there was any negligence on the part of the plaintiff or the plaintiff's decedent it was less than the negligence of the defendant, Calvin Frelk, when compared."<sup>2</sup> The defendant moved to dismiss this count for failure to state a cause of action because the plaintiff failed to allege that her decedent was exercising due care for his own safety at the time of the collision, as required by Illinois law.<sup>3</sup> The defendant's motion was allowed and the plaintiff appealed directly to the Illinois Supreme Court on the theory that the Illinois rule of contributory negligence violated the fourteenth amendment of the United States Constitution<sup>4</sup> and article II, sections 2 and 19 of the Illinois Constitution.<sup>5</sup> The supreme court felt that the theory presented by the plaintiff's appeal did not raise a constitutional question of such a nature as to give it jurisdiction by way of direct appeal.<sup>6</sup> However, the cause was transferred, on the

circumstances which would have prevented the States from presenting their views in opposition to the proposal, had they sought to keep abreast of matters under consideration by Congress.

The first legislative effort to extend coverage to some state employees occurred in the First Session of the 89th Congress. *Id.*

In a lengthy footnote, Judge Winter cited the three main proposals submitted to the House during the First Session of the 89th Congress. *Id.* at 830 n.7.

1 ILL. ANN. STAT. ch. 70, §§ 1, 2 (Smith-Hurd 1959, Supp. 1966).

2 Maki v. Frelk, 229 N.E.2d 284, 285 (Ill. App. 1967).

3 Hanson v. Trust Co., 380 Ill. 194, 43 N.E.2d 931 (1942); Williams v. Rock River Sav. & Loan Ass'n, 51 Ill. App. 2d 5, 200 N.E.2d 848 (1964).

4 U.S. CONST. amend. XIV. Although it is not indicated in the opinion, presumably the plaintiff was relying on the due process clause in section 1 of the fourteenth amendment.

5 ILL. CONST. art. 2, § 2: "No person shall be deprived of life, liberty or property, without due process of law."  
ILL. CONST. art. 2, § 19:

Every person ought to find a certain remedy in the laws for all injuries and wrongs which he may receive in his person, property or reputation; he ought to obtain, by law, right and justice freely, and without being obliged to purchase it, completely and without denial, promptly, and without delay.

6 Maki v. Frelk, 229 N.E.2d 284, 285 (Ill. App. 1967).

court's own motion, to the state's appellate court for consideration as to "whether, as a matter of justice and public policy,"<sup>7</sup> the rule of contributory negligence ought to be changed.

The appellate court, after a lengthy discussion of the checkered history of contributory negligence in Illinois and an evaluation of the arguments for and against comparative negligence, expressed approval of the Wisconsin doctrine of comparative negligence and *held*:

it is and should be the public policy of Illinois that, commencing with the date upon which this decision becomes final, and in this case, contributory negligence shall not bar recovery in an action by any person or his legal representative to recover damages for negligence resulting in death or an injury to person or property, if such negligence was not as great as the negligence of the person against whom recovery is sought, but any damages allowed shall be diminished in the proportion to the amount of negligence attributable to the person recovering. *Maki v. Frelk*, 229 N.E.2d 284, 290 (Ill. App. 1967).

Ever since that fateful evening in 1809 when Butterfield rode his horse into the pole negligently left extending across a part of the highway by Forrester,<sup>8</sup> the concept of contributory negligence has been used by the common-law courts to deny recovery to a plaintiff whose own negligence was partly responsible for his injuries. Protagonists of the rule agree with Lord Ellenborough in *Butterfield* that "[a] party is not to cast himself upon an obstruction which has been made by the fault of another, and avail himself of it, if he do [sic] not himself use common and ordinary caution to be in the right."<sup>9</sup> The antagonists of the rule, while perhaps acknowledging the appeal of its simplistic logic, point to the

obvious injustice of a rule which visits the entire loss caused by the fault of two parties on one of them alone, and that one the injured plaintiff, least able to bear it, and quite possibly much less at fault than the defendant who goes scot free.<sup>10</sup>

The common law soon devised means by which to mitigate the harshness of the contributory negligence doctrine on the plaintiff. In *Davies v. Mann*,<sup>11</sup> where the defendant's servant drove a cart into the plaintiff's donkey, which had been negligently left on the highway by the plaintiff, the plaintiff was allowed to recover because the defendant, through the exercise of reasonable care, could have avoided the collision. This holding gave rise to what is now recognized as the "last clear chance" doctrine.<sup>12</sup> A second device that has developed to allow a plaintiff to recover despite his own negligence is the rule that if the defendant's conduct amounts to what is variously described as gross negligence, recklessness, or wanton and willful misconduct, then his misconduct is sufficiently greater in kind so as to prevent his using the plaintiff's "mere" negli-

7 *Id.*

8 *Butterfield v. Forrester*, 103 Eng. Rep. 926 (K. B. 1809).

9 *Id.* at 927, quoted in, *Maki v. Frelk*, 229 N.E.2d 284, 285-86 (Ill. App. 1967).

10 Prosser, *Comparative Negligence*, 51 MICH. L. REV. 465, 469 (1953).

11 152 Eng. Rep. 588 (Ex. 1842).

12 Prosser, *supra* note 10, at 471-73.

gence as a defense.<sup>13</sup> Whatever benefit these devices are to plaintiffs, it is clear that they retain the same injustice of placing the entire loss on one of two negligent parties — only this time it is the defendant.

It was this unsatisfactory state of affairs that gave rise to the development of the theory of comparative negligence.<sup>14</sup> The only way in which the "old law maxim that 'no man shall take advantage of his own wrong or negligence' in his prosecution or defense against another"<sup>15</sup> actually can be realized is to allow the plaintiff to recover that portion, but only that portion, of his damages that is attributable to the defendant's negligence. In short, comparative negligence is simply the theory of damage apportionment according to fault.<sup>16</sup>

As the court in *Maki v. Frelk* indicated,<sup>17</sup> there are three basic arguments generally offered in support of comparative negligence.<sup>18</sup> First, the contributory negligence doctrine, which is displaced by comparative negligence, developed during the Industrial Revolution as a means of limiting the liabilities of the rapidly growing industries.<sup>19</sup> This objective is no longer valid because the majority of claims against industry are now covered by Workmen's Compensation Acts where the negligence of the plaintiff is not at issue.<sup>20</sup> The second argument has already been alluded to — comparative negligence provides a more just and socially desirable distribution of loss than contributory negligence.<sup>21</sup> Finally, it is argued that comparative negligence encourages settlements and thereby tends to relieve docket delays.<sup>22</sup>

The opponents of comparative negligence usually make the following counter-arguments:<sup>23</sup> (1) however harsh or unjust contributory negligence might be theoretically, its impact is softened in practice by compromise verdicts of juries;<sup>24</sup> (2) comparative negligence actually discourages settlements because the plaintiff who previously had no chance of recovery is more likely to recover at

13 W. PROSSER, LAW OF TORTS 436 (3d ed. 1964).

14 For an excellent and concise treatment of this development, see Prosser, *supra* note 10.

15 *Galena & C. U. R.R. v. Jacobs*, 20 Ill. 478, 491 (1858), *quoted in*, *Maki v. Frelk*, 229 N.E.2d 284, 286 (Ill. App. 1967).

16 See Prosser, *supra* note 10, at 465.

17 229 N.E.2d 284, 290 (Ill. App. 1967).

18 There is a wealth of material advocating adoption of comparative negligence. *E.g.*, Atten, *Should Illinois Adopt a Comparative Negligence Statute? Yes!*, 51 ILL. B.J. 194 (1962); Bress, *Comparative Negligence: Let Us Harken to the Call of Progress*, 43 A.B.A.J. 127 (1957); Mole & Wilson, *A Study of Comparative Negligence*, 17 CORNELL L. Q. 333, 604 (1932); Prosser, *supra* note 10; Turk, *Comparative Negligence on the March*, 28 CHI-KENT L. REV., 189, 304 (1950).

19 *Maki v. Frelk*, 229 N.E.2d 284, 286 (Ill. App. 1967). See Prosser, *supra* note 10, at 468-69.

20 See ILL. ANN. STAT. ch. 48, §§ 138.1-.28 (Smith-Hurd Supp. 1966).

21 *Maki v. Frelk*, 229 N.E.2d 284, 290 (Ill. App. 1967).

22 *Id.* See Averbach, *Comparative Negligence Legislation: A Cure for Our Congested Courts*, 19 ALBANY L. REV. 4 (1955).

23 There is likewise considerable material critical of comparative negligence. *E.g.*, Benson, *Comparative Negligence—Boon or Bane*, 23 INS. COUNSEL J. 204 (1956); Burns, *Comparative Negligence: A Law Professor Dissents*, 51 ILL. B. J. 708 (1963); Burrell, *Should Illinois Adopt a Comparative Negligence Statute? No!*, 51 ILL. B. J. 195 (1962); Heft, *Comparative Negligence—Problem Child: A Study of Growth to Manhood*, 7 DEFENSE L. J. 46 (1960); McKinnon, *The Case Against Comparative Negligence*, 28 CAL. S.B.J. 23 (1953); Palmer, *Let Us Be Frank About Comparative Negligence*, 28 L. A. BAR. BULL. 37 (1952); Powell, *Contributory Negligence: A Necessary Check on the American Jury*, 43 A.B.A.J. 1005 (1957).

24 *Maki v. Frelk*, 229 N.E.2d 284, 290 (Ill. App. 1967). See *Karcesky v. Laria*, 382 Pa. 227, 114 A.2d 150, 154 (1955) where the court expressly recognized the tendency of juries to use compromise verdicts.

least something, and this increased likelihood of recovery for plaintiffs will cause insurance rates to rise and will also bring about increased congestion of court dockets.<sup>25</sup>

The court in *Maki* lost little time in disposing of these standard arguments against comparative negligence. One paragraph was sufficient:

In determining the public policy in this state we are not impressed by the arguments pertaining to administrative and procedural problems. Substantive rights are involved in our determination and even, were the more desirable rule to result in increased administrative complications, expense or delay, we would feel it should be adopted and that suitable steps be taken to resolve the resulting procedural problems. Similarly, we are not impressed with the argument that the contributory negligence rule is not as bad as it seems to be because juries have the good sense not to follow it implicitly.<sup>26</sup>

However, before the court could finally decide the public policy of Illinois, it had to consider two other arguments — one raised by each party. The defendant-appellee maintained that any change in the law of negligence, as radical as the abandonment of the contributory negligence doctrine should be left to the legislature.<sup>27</sup> The force of this argument is considerably augmented by the fact that the seven states which employ a general theory of comparative negligence,<sup>28</sup> as well as almost all the other states which apply it in certain limited situations,<sup>29</sup> do so on the basis of statutory provisions. In addition, there is case law in jurisdictions that do not recognize comparative negligence holding that the courts must enforce the contributory negligence doctrine until the legislature acts.<sup>30</sup> This argument was met squarely by the *Maki* court:

[T]he doctrine of contributory negligence was a creature of the courts and having found the doctrine to be unsound and unjust under present conditions the courts have, not only the right, but the duty to abolish the defense.<sup>31</sup>

25 For an interesting statistical survey on this subject, see Rosenberg, *Comparative Negligence in Arkansas: A "Before and After" Survey*, 36 N.Y.S.B.J. 457 (1964) where the author concluded that

forecasts of putative effects upon clogged dockets and delayed trials are not constructive arguments for either side. Legislatures facing the issue should confine themselves to the substantive pros or cons of the contending principles and should rule out arguments tied to problems of court administration. *Id.* at 475.

26 *Maki v. Frelk*, 229 N.E.2d 284, 290 (Ill. App. 1967).

27 *Id.* at 291.

28 See notes 38-41 *infra*.

29 See Prosser, *supra* note 10, at 478-80, for an extensive catalogue of jurisdictions that have adopted comparative negligence with respect to specific factual situations such as railroad crossing collisions, other injuries inflicted by a railroad, and certain dangerous occupations.

30 *Haeg v. Sprague, Warner & Co.*, 202 Minn. 425, 430, 281 N.W. 261, 263 (1938).

31 *Maki v. Frelk*, 229 N.E.2d 284, 291 (Ill. App. 1967). In support of its position the court cited *Molitor v. Kaneland Community Unit Dist.*, 18 Ill. 2d 11, 163 N.E.2d 89 (1959) where the supreme court had said:

The doctrine of school district immunity was created by this court alone. Having found that doctrine to be unsound and unjust under present conditions, we consider that we have not only the power, but the duty, to abolish that immunity. "We closed our courtroom doors without legislative help, and we can likewise open them." *Id.* at 25, 163 N.E.2d at 96. (Citation omitted).

Besides the usual arguments in favor of comparative negligence, the plaintiff-appellant offered an argument based on an analogy to the concept of indemnification of a "passive" tortfeasor by an "active" tortfeasor, a concept that has become a part of Illinois negligence law.<sup>32</sup> Under this theory a defendant who may be "passively" negligent and therefore secondarily liable for an injury to a third person may recover by way of indemnity or contribution from the principal or "active" tortfeasor. The plaintiff in *Maki* argued that consistency requires that a plaintiff who is secondarily or passively at fault be permitted to recover his own damages, or a part thereof, from an actively negligent defendant.<sup>33</sup> In response to this position, the defendant argued that the analogy was not appropriate since a successful indemnitee recovers the whole amount of the judgment, and a successful contributtee recovers only the excess of what he has paid over his pro rata share. In short, neither indemnity nor contribution requires the liability to be apportioned according to the degree of fault.<sup>34</sup> Apparently the *Maki* court recognized that the plaintiff's analogy could not be used to argue towards comparative negligence, since there is no indication of reliance on it in the opinion. However, as will be discussed later,<sup>35</sup> the court did employ this analogy to argue for the application of comparative negligence to a system of contribution on the basis of fault and the elimination of the "fictions of 'active-passive' or 'primary-secondary' negligence."<sup>36</sup>

The tenor of the court's opinion in *Maki* never faltered in reaching its decision that the doctrine of contributory negligence ought to be scrapped in favor of a theory of comparative negligence. However, the next question had to be: What *type* of comparative negligence? Three versions of comparative negligence are generally recognized and may be referred to in descending order of "plaintiff-orientation" as the "pure," the "modified," and the "slight and gross" approaches.<sup>37</sup> Under the pure form, the plaintiff may recover from the defendant that portion of his damages which corresponds to the defendant's percent of causal negligence, no matter how much more negligent the plaintiff himself may have been. Thus, to give the extreme case, a plaintiff who is 99% negligent may recover 1% of his damages from the defendant. Only one American state, Mississippi, uses this pure approach.<sup>38</sup> Arkansas, Georgia, Maine, and

32 *Chicago & I.M. Ry. v. Evans Constr. Co.*, 32 Ill. 2d 600, 208 N.E.2d 573 (1965); *Reynolds v. Illinois Bell Tel. Co.*, 51 Ill. App. 2d 334, 336 201 N.E.2d 322, 323 (1964).

33 *Maki v. Frelk*, 229 N.E. 2d 284, 288-89 (Ill. App. 1967).

34 *Reynolds v. Illinois Bell Tel. Co.*, 51 Ill. App. 2d 334, 339, 201 N.E.2d 322, 324-25 (1964).

35 See text accompanying note 55 *infra*.

36 *Maki v. Frelk* 229 N.E.2d 284, 290 (Ill. App. 1967).

37 For a thorough discussion of these types of comparative negligence, see Prosser, *supra* note 10, at 480-94.

38 Miss. CODE ANN. § 1454 (1956) provides:

In all actions hereafter brought for personal injuries, or where such injuries have resulted in death, or for injury to property, the fact that the person injured, or the owner of the property, or person having control over the property may have been guilty of contributory negligence shall not bar a recovery, but damages shall be diminished by the jury in proportion to the amount of negligence attributable to the person injured, or the owner of the property, or the person having control over the property.

The Federal Employee's Liability Act, 45 U.S.C. § 53 (1964), also applies this "pure" form of comparative negligence.

Wisconsin follow the modified version,<sup>39</sup> which allows the plaintiff to recover that portion of his damages which corresponds to the percent of the defendant's negligence provided that the plaintiff's negligence is less than the defendant's. Once again putting the extreme case, this means that a plaintiff who is 49% negligent may recover 51% of his damages, but a plaintiff whose negligence is 50% or greater can recover nothing. Finally, one state, Nebraska, applies the slight and gross version<sup>40</sup> whereby the negligent plaintiff may recover only when his negligence is "slight" and the defendant's is "gross" by comparison. In that jurisdiction the plaintiff's recovery is reduced by an amount found by the jury to correspond to the plaintiff's "slight" negligence. Until 1964, South Dakota

39 ARK. STAT. ANN. § 27-1730.1 (1962) provides: "Contributory Negligence shall not bar recovery of damages for any injury, property damage or death where the negligence of the person injured or killed is of less degree than the negligence of any person, firm, or corporation causing such damage." ARK. STAT. ANN. § 27-1730.2 (1962) provides:

In all actions hereafter accruing for negligence resulting in personal injuries or wrongful death or injury to property, contributory negligence shall not prevent a recovery where any negligence of the person so injured, damaged, or killed is of less degree than any negligence of the person, firm or corporation causing such damage; provided that where such contributory negligence is shown on the part of the person injured, damaged or killed, the amount of the recovery shall be diminished in proportion to such contributory negligence.

GA. CODE ANN. § 105-603 (1956) provides:

If the plaintiff by ordinary care could have avoided the consequences to himself caused by the defendant's negligence, he is not entitled to recover. In other cases the defendant is not relieved, although the plaintiff may in some way have contributed to the injury sustained.

A modified version of comparative negligence has been obtained from the last sentence of this section by judicial construction. *See, e.g.,* Whatley v. Henry, 65 Ga. App. 668, 16 S.E.2d 214 (1941); Southern Ry. v. Watson, 104 Ga. 243, 30 S.E. 818 (1898). For a more complete collection of cases *see*, Prosser, *supra* note 10, at 490 nn.150-51. As for the significance of the first sentence, *see* Comment, 1 Ga. S.B.J. 500, 505 (1965).

ME. REV. STAT. ANN. tit. 14, § 156 (Supp. 1966) provides:

Where any person suffers death or damage as a result partly of his own fault and partly of the fault of any other person or persons, a claim in respect of that death or damage shall not be defeated by reason of the fault of the person suffering the damage, but the damages recoverable in respect thereof shall be reduced to such extent as the jury thinks just and equitable having regard to the claimant's share in the responsibility for the damage.

Where damages are recoverable by any person by virtue of this section subject to such reduction as is mentioned, the jury shall find and record the total damages which would have been recoverable if the claimant had not been at fault and the extent to which those damages are to be reduced.

Fault means negligence, breach of statutory duty or other act or omission which gives rise to a liability in tort or would, apart from this section, give rise to the defense of contributory negligence.

If such claimant is found by the jury to be equally at fault, the claimant shall not recover.

Wis. STAT. ANN. § 895.045 (1966) provides:

Contributory negligence shall not bar recovery in an action by any person or his legal representative to recover damages for negligence resulting in death or in injury to person or property, if such negligence was not as great as the negligence of the person against whom recovery is sought, but any damages allowed shall be diminished in the proportion to the amount of negligence attributable to the person recovering.

40 NEB. REV. STAT. § 25-1151 (1964) provides:

In all actions brought to recover damages for injuries to a person or to his property caused by the negligence of another, the fact that the plaintiff may have been guilty of contributory negligence shall not bar a recovery when the contributory negligence of the plaintiff was slight and the negligence of the defendant was gross in comparison, but the contributory negligence of the plaintiff shall be considered by the jury in the mitigation of damages in proportion to the amount of contributory negligence attributable to the plaintiff; and all questions of negligence and contributory negligence shall be for the jury.

had an identical statute, but in that year modified it by eliminating the requirement that the defendant's negligence must be gross.<sup>41</sup> Even though this statute still requires the plaintiff's negligence to be slight, this modification of the slight and gross approach may give rise to a fourth variation on the comparative negligence theme.

After an acknowledgment of the three traditional types of comparative negligence and a brief description of each, the *Maki* court made its choice with a minimum of rhetoric and fanfare: "[W]e must adopt a position which meets present day concepts of equality, justice and sensibility. In our judgment, the 'modified' doctrine of comparative negligence followed in Wisconsin seems closest to our needs."<sup>42</sup> The slight and gross version was rejected apparently because of its similarity to an earlier judicial version of comparative negligence that had proved to be a giant headache to Illinois courts until its official burial in 1894.<sup>43</sup>

41 The new statute reads:

In all actions brought to recover damages for injuries to a person or to his property caused by the negligence of another, the fact that the plaintiff may have been guilty of contributory negligence shall not bar a recovery when the contributory negligence of the plaintiff was slight in comparison with the negligence of the defendant but in such case, the damages shall be reduced in proportion to the amount of plaintiff's contributory negligence. Ch. 149 [1964] Laws of S.D. 182, amending S.D. Code § 47.0304-1 (Supp. 1960).

The clause making all questions of negligence and contributory negligence matters for the jury has been eliminated.

42 *Maki v. Frelk*, 229 N.E.2d 284, 290 (Ill. App. 1967).

43 A good deal of the *Maki* opinion is devoted to tracing this early rise and fall of comparative negligence in Illinois. In *Aurora Branch R.R. v. Grimes*, 13 Ill. 585 (1852), the supreme court adopted the doctrine of contributory negligence as a complete defense, and added the even harsher requirement that the plaintiff has the burden of proving his freedom from contributory negligence. However, just six years later, in a case involving a small boy who was run over by a locomotive, the court adopted a comparative negligence theory instead, saying

in this, as in all like cases, the degrees of negligence must be measured and considered, and wherever it shall appear that the plaintiff's negligence is comparatively slight, and that of the defendant gross, he shall not be deprived of his action. *Galena & C.U. R.R. v. Jacobs*, 20 Ill. 478, 497 (1858).

In 1870, this holding was clarified somewhat when the court said that the plaintiff "can not recover, unless the negligence of the defendant clearly and largely exceeds his." *Illinois Central R.R. v. Baches*, 55 Ill. 379, 390 (1870). Again, in 1874, the court said "a plaintiff who is even guilty of slight negligence may recover of a defendant who has been grossly negligent, or whose conduct has been wanton or wilful. Hence the doctrine of comparative negligence." *Illinois Central R.R. v. Hammer*, 72 Ill. 347, 351 (1874). In *Chicago, M. & St. P. Ry. v. Mason*, 27 Ill. App. 450, 454 (1888), it was stressed that the element of comparison of conduct of the two parties was the essence of the doctrine.

But, by this time, the doctrine was already coming under attack. In an 1885 opinion, the supreme court cited almost a full page of cases that held that in order to recover, the injured party must allege and prove that he was exercising ordinary care for his safety at the time he was injured. The first case cited was *Aurora Branch R.R. v. Grimes*, *supra*, which had never been expressly overruled. *Calumet Iron & Steel Co. v. Martin*, 115 Ill. 358, 368, 3 N.E. 456, 460 (1885). Then in 1894, the end of this experiment with comparative negligence came suddenly and simply: "The doctrine of comparative negligence is no longer the law of this Court." *City of Lanark v. Dougherty*, 153 Ill. 163, 165-66, 38 N.E. 892, 893 (1894).

With regard to why this initial experience with comparative negligence failed, the court in *Maki* gave the following three reasons, suggested by Dean Green: (1) the formula was not complete in that there was no attempt to reduce the plaintiff's damages attributable to his slight negligence; (2) the "degrees of negligence" resulted in doctrinal confusion; and (3) the failure to overrule the *Grimes* case allowed the courts of appeal to continue to rely on it, when they wanted to, in order to require the plaintiff to prove that he had exercised ordinary care on his behalf and that his slight negligence resulted from his failure to use extraordinary care. *Maki v. Frelk*, 229 N.E.2d 284, 288 (Ill. App. 1967). See Green, *Illinois Negligence Law*, 39 ILL. L. REV. 36, 47-54 (1944).

In view of this initial unsatisfactory experience with comparative negligence, the court's reason for adopting the Wisconsin approach becomes somewhat clearer, and it is easier to grasp the full significance of the court's statement: "We believe that the *experience* in Wisconsin has been largely satisfactory . . ."<sup>44</sup> (Emphasis added.) As for the court's rejection of the pure method, nothing is said in the opinion; it is mentioned and described, but never evaluated. Certainly the court was aware that by adopting the Wisconsin method, it was stopping short of the ideal of pure comparative negligence. This fact is implicit in the court's acknowledgment that "the Wisconsin rule has been criticized as being absurd in that a plaintiff almost as negligent as a defendant may recover a substantial portion of his damage but may not recover a cent if both parties are equally negligent."<sup>45</sup>

It would be an exaggeration to call the appellate court decision in *Maki v. Frelk* a legal bombshell. It in no way settles or unsettles the law of Illinois as to comparative negligence, contributory negligence, or any other aspect of negligence law. The court itself recognizes this by acknowledging that its decision does not overrule the supreme court cases<sup>46</sup> that still stand in the way of the statewide adoption of comparative negligence:

It is not within the province of this Court to overrule decisions of the Supreme Court and the foregoing suggestions are made by this Court in conformity with its order of transfer directing us to consider, as a matter of justice and public policy, whether the contributory negligence rule should be changed.<sup>47</sup>

Perhaps, it would be more accurate to describe the *Maki* case as a time bomb, waiting to be activated at the signal of the Illinois Supreme Court. If that court should affirm the decision in *Maki* and overrule the decisions presently blocking comparative negligence, the repercussions on Illinois negligence law could be revolutionary. It is the purpose of the remainder of this comment to briefly consider some of these repercussions and to suggest a general approach for dissipating the potential force of the explosion if and when it should come. How well Illinois can absorb the force of this explosion will also have significant effects in numerous other jurisdictions which, for the present at least, are only spectators of the Illinois experiment.

As is evident from the appellate court's entire opinion in *Maki*, that court conceived its mission to be a narrow one; namely, it was to consider whether, as a matter of justice and public policy, the doctrine of contributory negligence should give way to comparative negligence. Whether the court deliberately attempted to avoid the practical implications of its policy decision or whether they were simply not raised is not clear. Whatever the court's reasoning, it mentioned only two of the many problems that adoption of the modified version of comparative negligence would raise in Illinois.

<sup>44</sup> *Maki v. Frelk*, 229 N.E.2d 284, 290 (Ill. App. 1967).

<sup>45</sup> *Id.* at 291.

<sup>46</sup> *E.g.*, *City of Lanark v. Dougherty*, 153 Ill. 163, 38 N.E. 892 (1894); *Calumet Iron & Steel Co. v. Martin*, 115 Ill. 358, 3 N.E. 456 (1885); *Indianapolis & St. L. R.R. v. Evans*, 88 Ill. 63 (1878).

<sup>47</sup> *Maki v. Frelk*, 229 N.E.2d 284, 291 (Ill. App. 1967).

## 1. Contribution

As was suggested earlier, the court in *Maki* was aware that the adoption of comparative negligence would be inconsistent with the law of contributory negligence. The general rule in Illinois seems to be that there is no right of contribution between joint tortfeasors.<sup>48</sup> However, almost all the courts that have expressed this view have quickly added the well-recognized exception that a passive or secondary tortfeasor may recover on the basis of either contribution or indemnity<sup>49</sup> from an active or primary tortfeasor.<sup>50</sup> Secondary or passive liability is found in the case of a defendant whose fault is imputed or constructive, and is usually the result of a legal relation between the defendants, some positive rule of statutory law, or a failure to discover or correct a dangerous condition actually caused by the primary tortfeasor.<sup>51</sup>

The superimposition of a theory of comparative negligence on this already complicated theory of contribution could leave juries hopelessly confused. For example, consider a case where the injured plaintiff (*P*) sues one defendant (*D*<sub>1</sub>) who then counterclaims for contribution from a second defendant (*D*<sub>2</sub>). Assuming the jury found *P* 5% negligent, *D*<sub>1</sub> 20% negligent, and *D*<sub>2</sub> 75% negligent, the plaintiff could then recover 95% of his damages from *D*<sub>1</sub> since even under comparative negligence, a joint tortfeasor is jointly and severally liable for all the damages not attributable to the plaintiff's own negligence. Unless *D*<sub>1</sub> can recover contribution from *D*<sub>2</sub>, *D*<sub>2</sub> goes "scot free" even though he caused 75% of *P*'s damages. Under present Illinois contribution law, the jury would now have to again compare the negligence of *D*<sub>1</sub> and *D*<sub>2</sub>, only this time in terms of "active" and "passive" negligence—an entirely different kind of standard from that used in determining the comparative negligence of the plaintiff and the defendants.<sup>52</sup> What possible justification could there be for requiring the application of a qualitative standard of negligence when considering the plaintiff's recovery and a quantitative standard when considering a defendant's right of contribution? If such a double standard is retained, the time is not far off when an appellate court will be forced to decide at what

48 In 1961, one author concluded that it was not accurate to say that Illinois forbids contribution between negligent tortfeasors because the question had never been squarely presented to an appellate court. In fact the weight of dicta, he felt, indicated just the opposite. Proehl, *Contribution Between Joint Tortfeasors*, 49 ILL. B. J. 880, 891 (1961). However, in *Dobbins v. Beachler*, 47 Ill. App. 2d 30, 197 N.E.2d 518 (1964), the court held that there could be no contribution in favor of an actively negligent joint tortfeasor. This principle was reiterated with force in *Embree v. De Kalb Forge Co.*, 49 Ill. App. 2d 85, 94, 199 N.E.2d 250, 255 (1964): "It is unquestionably the law of this State that between joint tortfeasors there is no right of contribution." Finally, in 1965 the Supreme Court acknowledged the principle as being well established. *Chicago & I. M. Ry. v. Evans Constr. Co.*, 32 Ill. 2d 600, 208 N.E.2d 573, (1965).

49 It is a disturbing feature of most of the cases dealing with indemnity or contribution that they do not provide a standard for determining when a "passive" tortfeasor has a right of contribution and when he has a right of indemnity. Compare *Sleck v. Butler Bros.*, 53 Ill. App. 2d 7, 202 N.E.2d (1964) with *Reynolds v. Illinois Bell Tel. Co.*, 51 Ill. App. 2d 334, 201 N.E.2d 322 (1964).

50 *Chicago & I. M. Ry. v. Evans Constr. Co.*, 32 Ill. 2d 600, 208 N.E.2d 573 (1965).

51 *Miller v. DeWitt*, 59 Ill. App. 2d 38, 141, 208 N.E.2d 249, 298 (1965), modified on other grounds, 37 Ill. 2d 273, 226 N.E.2d 630 (1967).

52 The task of differentiating between active and passive negligence is generally a matter for the jury. *Blaszak v. Union Tank Car Co.*, 37 Ill. App. 2d 12, 18-19, 184 N.E.2d 808, 811 (1962).

percentage a defendant's negligence becomes active as a matter of law. When that point is reached, much of the equitable benefit that comparative negligence brings to the law of negligence will surely be hampered by recurrent procedural difficulties and numerous appeals.

Elimination of the "active-passive" theory alone would not be the answer, however, because it is this "fiction"<sup>53</sup> which stands between some semblance of contribution and none at all in Illinois. The abandonment of contribution altogether would be even more inconsistent with the ideal of comparative negligence that "no man shall take advantage of his own wrong or negligence" in his prosecution or defense against another."<sup>54</sup>

The *Maki* court proposed a simple and logical solution to the difficulties and inconsistencies that could develop with the attempt to accommodate current Illinois contribution law to a general theory of comparative negligence:

Properly applied, we feel that this rule [comparative negligence] will eliminate the need for continued adherence to the fictions of "active-passive" or "primary-secondary" negligence, for actions for contribution or indemnification will fall under the same rule as original actions for the recovery of damage.<sup>55</sup>

Significantly, in the celebrated case of *Bielski v. Schulze*,<sup>56</sup> the Wisconsin Supreme Court abandoned pro rata contribution in favor of comparative contribution. It reasoned that

[i]f the doctrine [contribution among joint tortfeasors] is to do equity, there is no reason in logic or natural justice why the shares of common liability of joint tortfeasors should not be translated into the percentage of the causal negligence which contributed to the injury.<sup>57</sup>

The holding of this case is an important part of the "largely satisfactory experience" of Wisconsin that the court in *Maki* relied on in adopting the Wisconsin version of comparative negligence.<sup>58</sup> Hopefully, if the supreme court follows the recommendations in *Maki* and makes Illinois a comparative negligence state, it will also "properly apply" comparative negligence theory to the analogous area of contribution.

## 2. Special Verdict

The second potential problem area that the *Maki* court recognized was the need for a method of insuring the application of comparative negligence standards by the jury. As a skeptic might phrase it: If, under the present law, juries refuse to apply contributory negligence to deny the plaintiff any recovery,<sup>59</sup> what is to prevent them from finding larger damages to offset the reduction

53 *Maki v. Frelk*, 229 N.E.2d 284, 290 (Ill. App. 1967).

54 *Id.* at 286, citing *Galena & C. U. R.R. v. Jacobs*, 20 Ill. 478, 491 (1858).

55 *Maki v. Frelk*, 229 N.E.2d 284, 290 (Ill. App. 1967).

56 16 Wis. 2d 1, 114 N.W.2d 105 (1962).

57 114 N.W.2d at 109.

58 *Maki v. Frelk*, 229 N.E.2d 284, 290 (Ill. App. 1967).

59 See note 24 *supra* and accompanying text.

that will be caused by the plaintiff's negligence under comparative negligence? The real answer probably is that there is no way to *prevent* the jury from doing what it will. However, in Wisconsin the use of the special verdict has been considered highly effective in achieving some control over the jury while allowing it to function effectively.<sup>60</sup> The court in *Maki* acknowledged this success and recommended that "the procedural corollaries, particularly the special verdict generally in use in that state, could easily be adopted here."<sup>61</sup> This last phrase is confusing in that it could be read to say that at present Illinois does not permit special verdicts. This is not true. Section 65 of the Illinois Civil Practice Act begins: "Unless the nature of the case requires otherwise, the jury shall render a general verdict. . . ."<sup>62</sup> The official comments to this section add the clarification that "[t]he first sentence of former section 65 is here changed to state that general verdicts are mandatory *except when the nature of the case requires a special verdict*."<sup>63</sup> (Emphasis added.) Although the Wisconsin statute dealing with special verdicts requires their use whenever timely request is made by either party,<sup>64</sup> the present Illinois statute is easily broad enough to allow the general use of special verdicts in a case involving comparative negligence on the ground that it is a "case requiring otherwise." If this observation is correct, there is no need to "adopt" the special verdict, as the court states, but rather the need is for Illinois lawyers to adapt to its use.

### 3. Burden of Proof

In addition to these two problems — contribution and the special verdict — which the court in *Maki* recognized would arise with the judicial adoption of comparative negligence in Illinois, there are several other areas of negligence law, not discussed by the *Maki* court, that could be seriously affected. The first of these is the problem of burden of proof. In Illinois, the plaintiff in a negligence action has the burden of proving not only the defendant's negligence, but also his own freedom from contributory negligence.<sup>65</sup> The fact that the court in *Maki* made no mention of the effect of comparative negligence on this rule is at least mystifying, since this was actually the immediate issue raised by the case. The plaintiff's third count was dismissed for her failure to allege freedom from contributory negligence on the part of the decedent. In effect, the holding of the case is that contributory negligence is no longer a complete defense. It is fairly clear that the plaintiff is thereby relieved of pleading and proving freedom from *all* negligence on his part, but does he now have the burden of alleging and proving that his negligence, if any, is less than the defendant's? If not, the burden of proof in Illinois on the question of the plaintiff's negligence has changed. The disturbing fact is that the court has said nothing about it one way or the other.

60 See Prosser, *supra* note 10, at 497-503.

61 *Maki v. Frelk*, 229 N.E.2d 284, 290 (Ill. App. 1967).

62 ILL. ANN. STAT. ch. 110, § 65, (Smith-Hurd 1956).

63 Joint Committee Comment, ILL. ANN. STAT. ch. 110, § 65, at 340 (Smith-Hurd 1956).

64 WIS. CODE ANN. § 270.27 (1957).

65 *Aurora Branch R.R. v. Grimes*, 13 Ill. 585 (1852); *Vierke v. Sunset Valley Creamery Co.*, 58 Ill. App. 2d 323, 208 N.E.2d 305 (1965).

So it appears that the fate of the burden of proof question as to the plaintiff's negligence is squarely in the hands of the Illinois Supreme Court. Should that court choose to adopt comparative negligence, it would be inconceivable that it would pass over the problem as did the *Maki* court. Not nearly so certain, however, is the direction the court will take. There seems to be no inherent inconsistency in requiring the plaintiff to bear the burden of proving that any negligence on his part was less than the defendant's. Furthermore, despite strong criticism of the fairness of a rule that places on the plaintiff the burden of proving his own lack of contributory negligence,<sup>66</sup> Illinois has lived with it for more than a century. On the other hand, the rule in Wisconsin is that the defendant has the burden of proving both the fact of the plaintiff's negligence and that it was equal to or greater than his own.<sup>67</sup> Assuming that the Illinois Supreme Court approves the adoption of comparative negligence, it is presented with a perfect opportunity to re-evaluate its traditional view on the burden of proof as to the plaintiff's contributory negligence.

#### 4. Assumption of the Risk

In holding that the plaintiff's contributory negligence, if less than the defendant's negligence, is not a complete bar to the plaintiff's recovery, the *Maki* court failed to make any mention of the effect their decision might have on the doctrine of assumption of the risk. In theory, these two common-law defenses are readily distinguishable. The traditional basis is that assumption of the risk is a matter of knowledge of the danger and a voluntary acceptance of it, while contributory negligence involves a departure from the standard of reasonable care.<sup>68</sup> In application, however, both defenses can be available simultaneously if the plaintiff unreasonably assumes a known risk as where he continues to ride, without objection, with a reckless driver,<sup>69</sup> or continues to operate an obviously defective piece of farm machinery.<sup>70</sup> Because of this clear area of overlap, many courts have failed or refused to attempt to distinguish carefully between the two defenses.<sup>71</sup> Actually there is no practical necessity to do so if both are complete defenses. But when contributory negligence is made only a partial defense by the adoption of comparative negligence, the courts must either distinguish the two or abolish assumption of the risk where it overlaps contributory negligence.

For thirty years, defendants in Wisconsin succeeded in circumventing that state's comparative negligence statute by convincing the courts that a plaintiff's

66 Green, *Illinois Negligence Law II*, 39 ILL. L. REV. 116, 125-27 (1944); Note, 18 ME. L. REV. 65, 92-95 (1966).

67 *Geier v. Scandrett*, 236 Wis. 444, 295 N.W. 704 (1941); *Gauthier v. Carboneau*, 226 Wis. 527, 277 N.W. 135 (1938). Maine is the only comparative negligence state that requires the plaintiff to prove his own freedom from contributory negligence. However, since the Maine statute was enacted as recently as 1965, there is as yet no indication as to whether the courts of that state will change the burden of proof rule. See Note, 18 ME. L. REV. 65, 92-95 (1966).

68 W. PROSSER, *LAW OF TORTS* 452 (3d ed. 1964).

69 See, e.g., *Howe v. Corey*, 172 Wis. 537, 179 N.W. 791 (1920), *overruled in*, *McConville v. State Farm Mut. Auto. Ins. Co.*, 15 Wis. 2d 374, 113 N.W. 2d 14 (1962).

70 See, e.g., *Wills v. Paul*, 24 Ill. App. 2d 417, 164 N.E.2d 631 (1960).

71 E.g., *Powell v. Ashland Iron & Steel Co.*, 98 Wis. 35, 73 N.W. 573, 574 (1897).

negligence was really not negligence at all but assumption of the risk.<sup>72</sup> Finally, in 1962, the supreme court admitted that "[c]onduct which has heretofore been denominated assumption of risk may constitute contributory negligence as well."<sup>73</sup> In recognition of this fact, assumption of the risk was abolished as a defense separate from contributory negligence in suits by an automobile guest against his host<sup>74</sup> and in master and servant cases involving farm labor.<sup>75</sup> Although these cases spoke directly to their own factual situations, presumably they would be authority for a general rule that whenever a plaintiff's conduct falls within the area of intersection between contributory negligence and assumption of the risk, that is, whenever the plaintiff negligently and knowingly assumes a risk, the conduct will be considered contributory negligence alone, and therefore the Wisconsin comparative negligence statute applies.

The adoption of comparative negligence in Illinois would raise similar problems with assumption of the risk. The general rule in Illinois has long been that assumption of the risk is available only in master-servant situations.<sup>76</sup> There are a few scattered cases that suggest that it may extend to situations where other types of contractual relationships exist,<sup>77</sup> or even where there is any kind of relationship voluntarily assumed.<sup>78</sup> However, a recent attempt to extend the doctrine beyond a master-servant situation on the basis of these cases met with a flat rebuff and a strong reiteration of the general rule.<sup>79</sup> In the area of host-guest suits, where Wisconsin had much of its difficulty, the doctrine has been specifically denied application by Illinois courts.<sup>80</sup> Therefore, unless the adoption of comparative negligence itself causes renewed efforts to apply assumption of the risk to host-guest cases, no particular problems should arise in this area. However, this is not true in the master-servant situation. Two recent Illinois cases, where farm workers were injured as the result of being required to operate defective machinery, illustrate that it is proper for the jury to consider both assumption of the risk and contributory negligence as possible defenses.<sup>81</sup> Thus, there is at least one area where the coincidence of contributory negligence and assumption of the risk could prevent the application of comparative negligence; and, as observed by the Wisconsin court, this is an area where assumption of the risk as an absolute defense "tends to immunize those employers from liability who are the greatest transgressors in providing safe

<sup>72</sup> See the cases explicitly overruled in *McConville v. State Farm Mut. Auto. Ins. Co.*, 15 Wis. 2d 374, 113 N.W.2d 14, 17-19 (1962).

<sup>73</sup> *McConville v. State Farm Mut. Auto. Ins. Co.*, 15 Wis. 2d 374, 113 N.W.2d 14, 19 (1962).

<sup>74</sup> 113 N.W. 2d at 16.

<sup>75</sup> *Colson v. Rule*, 15 Wis. 2d 387, 113 N.W.2d 21 (1962).

<sup>76</sup> *Conrad v. Springfield Consol. Ry.* 240 Ill. 12, 88 N.E. 180 (1909); *Fosen v. Odell Grain & Coal Co.*, 70 Ill. App. 2d 384, 217 N.E.2d 126 (1966).

<sup>77</sup> *Reed v. Zellers*, 273 Ill. App. 18, 24 (1933); *Walsh v. Moore*, 244 Ill. App. 458, 463 (1927).

<sup>78</sup> *Campion v. Chicago Landscape Co.*, 295 Ill. App. 225, 14 N.E.2d 879 (1938); *Brownback v. Thomas*, 101 Ill. App. 81 (1902).

<sup>79</sup> *Hensley v. Hensley*, 62 Ill. App. 2d 252, 259, 210 N.E.2d 568, 572 (1965).

<sup>80</sup> *Reed v. Zellers*, 273 Ill. App. 18, 24 (1933); *Walsh v. Moore*, 244 Ill. App. 458, 463 (1927).

<sup>81</sup> *Clubb v. Main*, 65 Ill. App. 2d 461, 213 N.E.2d 63 (1965); *Wills v. Paul*, 24 Ill. App. 2d 417, 164 N.E.2d 631 (1960).

conditions of work for their employees."<sup>82</sup> Hopefully, if the Illinois Supreme Court adopts comparative negligence, it will at least indicate its intention to close the door on any attempts to subvert the application of comparative negligence in those situations where assumption of the risk and contributory negligence are virtually, if not completely, indistinguishable.

### 5. Last Clear Chance

In time, the common law reacted to the harshness of the doctrine of contributory negligence by inventing the concepts of last clear chance, gross negligence, and wanton and willful misconduct. The purpose and effect of these counterpoises to contributory negligence was to allow the injured plaintiff to recover his damages even though he was guilty of ordinary negligence.<sup>83</sup> The difficulty with these devices is that they likewise visit the entire loss on one party where the fault of two contributed to the injury. Thus, last clear chance and the division of fault into distinct *kinds* of misconduct can raise conflicts in a comparative negligence system.

In Illinois the doctrine of last clear chance was originally adopted in *Moore v. Moss*.<sup>84</sup> However, for some reason this decision, and the doctrine it espoused, silently but swiftly dropped out of the cases. By the 1920's it was being said in some cases that the last clear chance doctrine did not obtain in Illinois,<sup>85</sup> and since that time, it has apparently not been applied by name. Despite these cases, however, it is fairly obvious that the doctrine does exist in Illinois although couched in terms of wanton and willful injury.<sup>86</sup> The numerous cases that develop and apply the latter theory clearly reveal that most of the time the defendant's conduct was not wanton or willful at all.<sup>87</sup> The Illinois courts' standard definition of wanton and willful is that the injury must be either intentional or the act

committed under circumstances exhibiting a reckless disregard for the safety of others, *such as a failure after knowledge of impending danger, to exercise ordinary care to prevent it or a failure to discover the danger through recklessness or carelessness when it could have been discovered by the exercise of ordinary care.*<sup>88</sup> (Emphasis added.)

As one writer has pointed out, this is nothing more than the "discovered peril" branch of the last clear chance doctrine.<sup>89</sup>

In the words of Dean Prosser, "any necessity for the last clear chance as

82 *Colson v. Rule*, 15 Wis. 2d 387, 113 N.W.2d 21, 22 (1962).

83 See W. PROSSER, *supra* note 68, at 444.

84 14 Ill. 105, 111 (1852).

85 *West Chicago St. Ry. v. Liderman*, 187 Ill. 463, 468 (1900); *Specht v. Chicago City Ry.*, 233 Ill. App. 384 (1924); *Bushman v. Calumet & S. C. Ry.*, 214 Ill. App. 435 (1919).

86 See Green, *Illinois Negligence Law III*, 39 ILL. L. REV. 197 (1945) for a full treatment of this conclusion.

87 *Id.* at 207.

88 *Schneiderman v. Interstate Transit Lines, Inc.*, 394 Ill. 569, 583, 69 N.E.2d 293, 300 (1946). *Accord*, *Brown v. Illinois Terminal Co.*, 319 Ill. 326, 331, 150 N.E. 242, 244 (1925); *Wallace v. Radovick*, 55 Ill. App. 2d 264, 268, 204 N.E.2d 835, 837 (1965).

89 Green, *supra* note 86, at 210.

a palliative of the hardships of contributory negligence obviously disappears when the loss can be apportioned.”<sup>90</sup> Despite the initial persuasiveness of this observation, of the four states that have adopted the modified version of comparative negligence, Arkansas has probably eliminated last clear chance,<sup>91</sup> Georgia<sup>92</sup> and Maine<sup>93</sup> still retain it, and Wisconsin has not been faced with the issue since the doctrine was abolished in that state before the adoption of comparative negligence.<sup>94</sup> The retention of the doctrine in Georgia, however, is strictly limited to situations where the defendant knows of the plaintiff’s perilous situation, where the plaintiff is helpless and not merely inadvertent, and where the defendant then has the ability to avoid harming the plaintiff.<sup>95</sup> In this type of situation, it is at least possible to argue either that the defendant’s negligence was the sole proximate cause of the plaintiff’s injuries, and therefore, the plaintiff’s antecedent negligence should not be compared to the defendant’s anyway, or that the defendant’s conduct was wanton and willful in the true sense of the term. But in Illinois, “discovered peril” has been applied where, in fact, there was no discovery,<sup>96</sup> and, therefore, where the defendant’s fault was concurrent with the plaintiff’s and at best only “constructively willful.”<sup>97</sup> Clearly, in this latter situation, the continued application of the Illinois version of last clear chance would create a conflict with comparative negligence and ought to be eliminated. It is suggested, however, that any retention of last clear chance, whether by name or otherwise, is inconsistent with the theory of apportionment basic to comparative negligence. If the Supreme Court of Illinois adopts the comparative negligence theory, the better view and the present tendency would dictate that last clear chance should be put to rest.<sup>98</sup>

## 6. Wanton and Willful Misconduct

The application of a theory of wanton and willful misconduct to situations where last clear chance has normally been applied is but one of the faces that willfulness and wantonness have assumed in Illinois.<sup>99</sup> It has been said, and

90 W. PROSSER, *supra* note 68, at 449.

91 See *Repetto v. Raymond*, 172 F. Supp. 786, 791 (W.D. Ark. 1959).

92 *Southland Butane Gas Co. v. Blackwell*, 211 Ga. 665, 88 S.E.2d 6, 10 (1955); *Palmer v. Stevens*, 115 Ga. App. 398, 154 S.E.2d 803, 807 (1967).

93 Before it adopted comparative negligence in 1965, Maine clearly recognized the doctrine. *Barlow v. Lowery*, 143 Me. 214, 59 A.2d 702 (1948). Since then, no case has considered the problem of whether the doctrine is still applicable. See Note, 18 ME. L. REV. 65, 90-92 (1966).

94 See *Switzer v. Detroit Inv. Co.*, 188 Wis. 330, 206 N.W. 407 (1925).

95 *Southland Butane Gas Co. v. Blackwell*, 211 Ga. 665, 88 S.E.2d 6, 10 (1955).

96 See text accompanying note 88 *supra*.

97 *Bremer v. Lake Erie & W. R.R.*, 318 Ill. 11, 21, 148 N.E. 862, 866 (1925).

98 See *Garner, Comparative Negligence and Discovered Peril*, 10 ARK. L. REV. 72 (1955-56); Comment, 1 GA. S.B.J. 500 (1965).

99 See *Nosko v. O'Donnell*, 260 Ill. App. 544 (1931) where the court said:

From the recent cases in our Supreme Court . . . we gather there are at least four different classes of conduct which may properly be regarded as wilful and wanton, namely (1) where defendant has inflicted an intentional injury; (2) where defendant has failed to exercise ordinary care when a known and extraordinary danger is imminent . . . (3) where a defendant through recklessness regardless of the danger to another, has carelessly failed to discover an extraordinary and impending danger which could have been discovered by the exercise of ordinary care . . . (4) carelessness so gross in its nature as to indicate a mind reckless and regardless of consequences . . . *Id.* at 552 (citations omitted).

not without supporting authority, that the courts have been using willful and wanton conduct as an "undercover" substitute for the brand of comparative negligence that had once been adopted, and subsequently abandoned, in Illinois.<sup>100</sup> This old theory allowed the plaintiff to recover *all* his damages if his own negligence was "slight" and the defendant's was "gross" by comparison.<sup>101</sup> There does not seem to be any practical difference between this approach and one allowing a negligent plaintiff to recover all his damages where the defendant's misconduct can be neatly termed willful and wanton. Supposedly the distinction is that, in the latter situation, the defendant's fault is of a different *kind* and not merely a different *degree*. In practice, however, gross negligence tends to merge into wanton and willful misconduct, and this aggregate becomes nothing more than an aggravated form of ordinary negligence.<sup>102</sup> That this could happen in Illinois became apparent as soon as the courts started talking about "constructive or legal willfulness."<sup>103</sup> That it has happened is acknowledged by several recent cases. In *Cooper v. Cox*,<sup>104</sup> the court said that "[t]he words, 'failure to discover the danger through recklessness or carelessness, when it could have been discovered by the exercise of ordinary care' in effect equate recklessness with ordinary negligence, that is, carelessness."<sup>105</sup> To the same effect is this statement found in *Spivack v. Hara*.<sup>106</sup>

The words willful and wanton . . . no longer have the connotation of willfulness or even utter lack of restraint, but have been used to define a vague and somewhat shadowy area close to ordinary negligence. They do not imply that the defendant *intentionally* disregarded the safety of another.<sup>107</sup>

The elusiveness of such concepts as recklessness, gross negligence, and wanton and willful misconduct was the heart of the Wisconsin Supreme Court's ruling in *Bielski v. Schulze*<sup>108</sup> that any attempt to divide fault into kinds of negligence must fail in a comparative negligence jurisdiction because much, if not most, of what has been held to constitute higher kinds of fault merely constitutes a higher percentage of ordinary negligence. Such a hazy hierarchy of misconduct cannot cohabit with comparative negligence. The ideal of the latter is to compare all degrees of fault; the ideal of the former is that in many situations fault is incomparable. The concurrent existence of the two is not only highly troublesome but unnecessary. The function that gross negligence or willful and wanton misconduct was designed to perform—the achievement of a fairer balance between plaintiffs and defendants—is more equitably performed by comparative negligence. In sum, in the words of the Wisconsin court,

[t]he history of the development of gross negligence, its reason for existing, the content of the concept, and the inequitable results and con-

100 See Green, *supra* note 86, at 213.

101 See note 43 *supra*.

102 W. PROSSER, *supra* note 68, at 189.

103 See *Bremer v. Lake Erie & W. R.R.*, 318 Ill. 11, 21, 148 N.E. 862, 866 (1925).

104 31 Ill. App. 2d 51, 175 N.E.2d 651 (1961).

105 *Id.* at 56, 175 N.E.2d at 653.

106 69 Ill. App. 2d 22, 216 N.E.2d 173 (1966).

107 *Id.* at 26, 216 N.E.2d at 175.

108 16 Wis. 2d 1, 114 N.W.2d 105 (1962).

sequences of its application have led us to decide the doctrine of gross negligence, as we know it, should be interred in the limbo of jurisprudence . . . .<sup>109</sup>

The court in *Bielski* was obviously using gross negligence in the same sense as the Illinois courts have been using wanton and willful misconduct.<sup>110</sup> The history and developing content of the latter in Illinois is probably even more confusing than that of the former in Wisconsin. It has produced the same inequitable results and consequences by shifting the entire loss back to the defendant. Finally, if comparative negligence is adopted in Illinois, the doctrine of wanton and willful misconduct will have lost its reason for existing. It follows that the Illinois Supreme Court should do some interring of its own.

## 7. The Guest Statute

Before the court can "inter" the wanton and willful misconduct concept, at least one practical hurdle<sup>111</sup> must be overcome, namely, the presence of the wanton and willful misconduct standard in the Illinois guest statute.<sup>112</sup> The application of this standard by the courts in the host-guest cases has itself been one of the principal sources of the vagueness that surrounds the meaning of wanton and willful misconduct.<sup>113</sup> However, the fact that this standard has been elevated to statutory prominence, while in no sense redeeming it, does complicate disposing of it. If the Illinois courts are without jurisdiction to expunge the statute, a subject which is beyond the scope of this treatment, it is hoped that the Illinois legislature will itself recognize the *necessity* of doing so. Necessity is emphasized because of the special problem that arises with a guest statute in a comparative negligence state.<sup>114</sup> Assume that an auto accident occurs in which both the host-driver (*H*) and the guest (*G*) are injured, and both have been guilty of ordinary negligence—*H* in failing to keep the car under control and *G* for creating some unintentional distraction in the car. Since *H* was guilty of only ordinary negligence under our assumption, the guest statute would prevent any recovery against him by *G*. On the other hand, the guest statute provides no comparable immunity for *G* who could now be successfully sued by *H* since *H*'s own negligence does not bar his claim against another negligent party under the doctrine of comparative negligence.<sup>115</sup>

It has been the purpose of the preceding sections of this comment to indicate at least some of the problems that will eventually, if not immediately, arise if a comparative negligence theory is simply superimposed upon the present

<sup>109</sup> 114 N.W.2d at 111.

<sup>110</sup> See *id.* at 112.

<sup>111</sup> For several others, see *id.* at 113-14.

<sup>112</sup> ILL. ANN. STAT. ch. 95½, § 9-201 (Smith-Hurd 1958).

<sup>113</sup> The quotation in the text accompanying note 106, *supra*, came from a case arising out of the host-guest relationship.

<sup>114</sup> Wisconsin has never faced the problem because it has never had a guest statute since it adopted comparative negligence. The supreme court expressly held in *McConville v. State Farm Mut. Auto. Ins. Co.*, 15 Wis. 2d 374, 113 N.W.2d 14, 16 (1962) that the driver of an automobile owes his guest the same duty of ordinary care as he owes to others.

<sup>115</sup> For a lengthier development of this problem and two related ones, see Leflar, *Comparative Negligence A Survey of Arkansas Lawyers*, 10 ARK. L. REV. 54, 61-62 (1955-56).

jurisprudence of Illinois.<sup>116</sup> The point is that there is a lot more involved in the adoption of comparative negligence, whether by statute or case law, than the mere recognition that its ideal of damage apportionment better conforms to social policy. It is not that easy to remake the law of any common-law jurisdiction. The important question then for Illinois, assuming the court implements the decision in *Maki v. Frelk*, is how to remake the negligence law of the state with the least amount of inconvenience and injustice. The achievement of this result will necessitate the finding of acceptable solutions to the substantive problems that have been discussed and others that may arise. But even more important is the need to find a comprehensive approach to the solution of these individual problems.

In this regard, the failure of the *Maki* court to anticipate more than two of the numerous practical difficulties that comparative negligence will bring in its wake, is atoned for by the suggestion of such an overall approach. The approach that the *Maki* court suggested should be evident by now from the previous liberal references to the experience of Wisconsin with comparative negligence and its jurisprudential impact. That state has spent over thirty-five years gradually and painfully hacking away the inconsistencies posed by traditional common-law concepts, until it has now achieved recognized success with comparative negligence. As the court in *Maki* put it: "We believe that the experience in Wisconsin has been largely satisfactory. . . ."<sup>117</sup>

By adopting the type of comparative negligence used in Wisconsin, as well as by praising the "experience" in Wisconsin, the *Maki* opinion can be read as advocating the practice of following Wisconsin's lead in dealing with the various conflicts that comparative negligence brings to common-law negligence practice. This might be reading too much into the court's words but wisdom would strongly suggest that one ought not undertake the blazing of an entirely new trail when an established one is already available to the desired destination.

Hopefully, then, the Supreme Court of Illinois will point out the way as soon as possible. That way could be either a confirmation of a general intent to follow the Wisconsin trail or an extended declaratory opinion indicating a solution to some of the more significant difficulties ahead. Either approach would portend considerable reliance on "mere dicta" and all the specters that that term raises. Better that, however, than the naked adoption of comparative negligence as a desirable social policy, without any attempt to provide some guideposts for future litigants who might otherwise be victimized before the equitable ideal of damage apportionment is fully integrated into Illinois law.

Gerald J. Rapien

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<sup>116</sup> For similar undertakings with regard to other states, see Note, 18 ME. L. REV. 65 (1966); Note, 30 MO. L. REV. 137 (1965). See also Symposium, 10 ARK. L. REV. 54-100 (1955-56).

<sup>117</sup> *Maki v. Frelk*, 229 N.E.2d 284, 290 (Ill. App. 1967).

**CIVIL RIGHTS—CIVIL RIGHTS ACT OF 1964—AMUSEMENT PARK IS NOT A PLACE OF PUBLIC ACCOMMODATION AS DEFINED IN SECTION 201 OF THE ACT.**—In March, 1965, Mrs. Patricia Miller, a Negro, took her two minor children to Fun Fair Park in Baton Rouge, Louisiana. They had intended to use the ice skating facilities, which were then in operation at the park, but solely because of their race, they were refused the use of the skating facilities. Fun Fair Park is a privately owned amusement park open to the general public, with the exception of Negroes. In addition to the ice skating rink, which is open during the four winter months, the park contains a number of permanently affixed mechanical rides that are open year-round.

Mrs. Miller and her children then brought an action in the United States District Court for the Eastern District of Louisiana seeking to enjoin the owners of Fun Fair Park from denying Negroes access to the amusement park. Their suit was brought pursuant to sections 201(b)(3) and 201(c)(3) of the Civil Rights Act of 1964.<sup>1</sup> These sections of the Act define a place of public accommodation which affects commerce as "any motion picture house, theater, concert hall, sports arena, stadium or other place of exhibition or entertainment"<sup>2</sup> that "customarily presents films, performances, athletic teams, exhibitions, or other sources of entertainment which move in commerce . . . ."<sup>3</sup> While an

<sup>1</sup> Civil Rights Act of 1964 § 201, 78 Stat. 243-44, 42 U.S.C. § 2000a (1964) provides in part:

(a) All persons shall be entitled to the full and equal enjoyment of the goods, services, facilities, privileges, advantages, and accommodations of any place of public accommodation, as defined in this section, without discrimination or segregation on the ground of race, color, religion, or national origin.

(b) Each of the following establishments which serves the public is a place of public accommodation within the meaning of this title if its operations affect commerce, or if discrimination or segregation by it is supported by State action:

(1) any inn, hotel, motel, or other establishment which provides lodging to transient guests . . . ;

(2) any restaurant, cafeteria, lunchroom, lunch counter, soda fountain, or other facility principally engaged in selling food for consumption on the premises . . . ;

(3) any motion picture house, theater, concert hall, sports arena, stadium or other place of exhibition or entertainment; and

(4) any establishment (A) (i) which is physically located within the premises of any establishment otherwise covered by this subsection, or (ii) within the premises of which is physically located any such covered establishment, and (B) which holds itself out as serving patrons of such covered establishment.

(c) The operations of an establishment affect commerce within the meaning of this title if (1) it is one of the establishments described in paragraph (1) of subsection (b); (2) in the case of an establishment described in paragraph (2) of subsection (b), it serves or offers to serve interstate travelers or a substantial portion of the food which it serves, or gasoline or other products which it sells, has moved in commerce; (3) in the case of an establishment described in paragraph (3) of subsection (b), it customarily presents films, performances, athletic teams, exhibitions, or other sources of entertainment which move in commerce; and (4) in the case of an establishment described in paragraph (4) of subsection (b), it is physically located within the premises of, or there is physically located within its premises, an establishment the operations of which affect commerce within the meaning of this subsection. . . .

(d) Discrimination or segregation by an establishment is supported by State action within the meaning of this title if such discrimination or segregation . . . .

(e) The provisions of this title shall not apply to a private club or other establishment not in fact open to the public . . . .

<sup>2</sup> 78 Stat. 243 (1964), 42 U.S.C. § 2000a(b)(3) (1964).

<sup>3</sup> 78 Stat. 243 (1964), 42 U.S.C. § 2000a(c)(3) (1964).

amusement park is not one of the specifically enumerated establishments in the Act, plaintiffs claimed that Fun Fair Park was included in the phrase "other place of exhibition or entertainment." The district court, relying on the rules of *ejusdem generis*,<sup>4</sup> held that an amusement park is not an "other place of exhibition or entertainment."<sup>5</sup> The United States Court of Appeals for the Fifth Circuit, one judge dissenting, affirmed and held: amusement parks that offer no exhibitions for the entertainment of spectators are not places of entertainment as contemplated by section 201(b)(3) of the Civil Rights Act of 1964. *Miller v. Amusement Enterprises, Incorporated*, No. 24259 (5th Cir., Sept. 6, 1967).

Soon after the Civil Rights Act of 1964 became effective, the constitutionality of title II, the public accommodations title, was tested in *Heart of Atlanta Motel, Incorporated v. United States*<sup>6</sup> and *Katzenbach v. McClung*.<sup>7</sup> In those cases the Supreme Court upheld the constitutionality of title II under the commerce clause. Although *Heart of Atlanta Motel* and *McClung* involved section 201(c)(1) and section 201(c)(2) respectively, it has been held that those cases are determinative of the issue of the constitutionality of section 201(c)(3).<sup>8</sup>

In *Miller*, the issue was the coverage, not the constitutionality, of section 201(b)(3) and 201(c)(3). Since the passage of the Act, a few cases, mainly on the district court level, have construed the coverage of section 201. In *Evans v. Laurel Links, Incorporated*,<sup>9</sup> a golf course was held to be a place of exhibition or entertainment. In the tournaments and team matches played on the golf course facilities, one golf team from out of state played on the course on a regular annual basis. The court stated that greater frequency was not required to establish that the team was "customarily presented," as required by section 201(c)(3). In *Robertson v. Johnston*<sup>10</sup> a nightclub that presented performances only two nights a week was held to be a place of entertainment. However, the sources of entertainment were essentially local in nature and were, therefore, held not to meet the "move in commerce" test of section 201(c)(3). Although the Tenth Circuit in *Cuevas v. Sdrales*<sup>11</sup> had applied the rule of *ejusdem generis* to hold that a bar was not an "other facility principally engaged in selling food for consumption on the premises" covered by section 201(b)(2), *Robertson* was the first case to apply *ejusdem generis* to the phrase "other place of exhibition or entertainment" in section 201(b)(3). In order to prevent this general language from extending the coverage of the Act to establishments not really intended, the court in

4 Literally: "Of the same kind, class, or nature." BLACK'S LAW DICTIONARY 608 (4th ed. 1951), *Cuevas v. Sdrales*, 344 F.2d 1019 (10th Cir. 1965), *cert. denied*, 382 U.S. 1014 (1966), in holding that a bar was not an "other facility principally engaged in selling food for consumption on the premises" stated: "Ordinarily, when specific terms in a statute are followed by general terms, the general terms are limited to matters similar to those specified, unless to do so would defeat the obvious purposes of the statute." *Id.* at 1020 (citations omitted).

5 *Miller v. Amusement Enterprises, Inc.*, 259 F. Supp. 523 (E.D. La. 1966), *aff'd*, No. 24259 (5 Cir., Sept. 6, 1967).

6 379 U.S. 241 (1964).

7 379 U.S. 294 (1964).

8 *Twitty v. Vogue Theatre Corp.*, 242 F. Supp. 281, 285 (M.D. Fla. 1965). *Accord*, *United States v. Gulf-State Theaters, Inc.*, 256 F. Supp. 549 (N.D. Miss. 1966).

9 261 F. Supp. 474 (E.D. Va. 1966) (alternative holding).

10 249 F. Supp. 618 (E.D. La. 1966).

11 344 F.2d 1019 (10th Cir. 1965), *cert. denied*, 382 U.S. 1014 (1966).

*Robertson* stated that "'place of entertainment' is not to be construed to mean 'place of enjoyment,' but rather must be limited at least to 'place where performances are presented.'"<sup>12</sup>

*Robertson* is one of the two cases cited by the Fifth Circuit in *Miller*. The court also cited *Kyles v. Paul*<sup>13</sup> in which a federal district court in Arkansas held that two recreational parks for swimming, boating, picknicking, and sunbathing were not places of exhibition or entertainment.<sup>14</sup> After citing *Robertson* and the rule of *ejusdem generis*, the court in *Kyles* applied the rule to section 201(b)(3) and held that:

The statutory phrase "other place of exhibition or entertainment" must refer to establishments similar to those expressly mentioned. When one considers the exhibitions and entertainment offered by motion picture houses, theatres, concert halls, sports arenas, and stadiums, it is clear at once that basically patrons of such establishments are edified, entertained, thrilled, or amused in their capacity of spectators or listeners; their physical participation in what is being offered to them is either nonexistent or minimal; their role is fundamentally passive.<sup>15</sup>

The district court in *Miller* quoted the following definition of *ejusdem generis* from the Tenth Circuit's opinion in *Cuevas*: "Ordinarily, when specific terms in a statute are followed by general terms, the general terms are limited to matters similar to those specified, unless to do so would defeat the obvious purposes of the statute."<sup>16</sup>

Then the district court applied the rule:

[S]ince the establishments specifically enumerated in Section 201(b)(3) are all, without exception, of a kind which furnish entertainment to a spectator audience, rather than to a participating audience, it must follow that the general reference, following the specific, to "other place of . . . entertainment" must be held to refer to establishments of the same general kind as those specifically enumerated.<sup>17</sup>

By limiting "other place of exhibition or entertainment" to establishments that furnish entertainment to spectators, as distinguished from participants, the district court excluded Fun Fair Park from coverage under section 201(b)(3).

In evaluating the district court's application of *ejusdem generis*, the Fifth Circuit in *Miller* looked to the legislative history of sections 201(b)(3) and 201(c)(3). At the conclusion of the oral argument, the circuit court had requested that the United States file its brief setting forth the legislative history of those two sections to the extent that that history might be pertinent to the issues

<sup>12</sup> *Robertson v. Johnston*, 249 F. Supp. 618, 622 (E.D. La. 1966).

<sup>13</sup> 263 F. Supp. 412 (E.D. Ark. 1967). This case is now pending before the United States Court of Appeals for the Eighth Circuit awaiting oral argument. Appellants' Petition for Rehearing with Suggestion for Rehearing *En Banc* at 2 n.1, *Miller v. Amusement Enterprises, Inc.*, No. 24259 (5th Cir., Sept. 6, 1967).

<sup>14</sup> *Kyles v. Paul*, 263 F. Supp. 412, 419-20 (E.D. Ark. 1967).

<sup>15</sup> *Id.* at 419.

<sup>16</sup> *Miller v. Amusement Enterprises, Inc.*, 259 F. Supp. 523, 526 (E.D. La. 1966), *aff'd*, No. 24259 (5th Cir., Sept. 6, 1967).

<sup>17</sup> *Id.*

involved in the appeal.<sup>18</sup> After examining the pertinent legislative history, the majority concluded that any parts supporting coverage of amusement parks are greatly overbalanced by other parts supporting non-coverage. The majority attached the brief containing the legislative history as an exhibit to its opinion. Unfortunately, the slip opinion does not contain the vertical lines in the exhibit's margins by which the majority indicated the parts that it thought supported non-coverage. Other than the legislative history, the majority stated only that it affirmed "for the reasons so ably expressed by the learned district judge . . ."<sup>19</sup>

The dissenting judge in *Miller* stated that the majority's holding is a "narrow construction"<sup>20</sup> "based upon an extremely inadequate legislative history"<sup>21</sup> and that it is "contrary to the overriding purpose of Title II"<sup>22</sup> and "completely ignores a strong and . . . conclusive history of Executive and Congressional general intent and purpose . . ."<sup>23</sup> To support his characterizations of the majority's holding, the dissenting judge quoted extensively, and almost exclusively, from statements made by President Kennedy before the Act was passed. In his February 28, 1963 message to Congress, President Kennedy spoke against the barring of Negro citizens "from restaurants, hotels, theaters, *recreational* areas and other public accommodations and facilities."<sup>24</sup> (Emphasis added.) On June 19, 1963 the President went before Congress to emphasize that federal action was needed "to secure the rights of all citizens to the full enjoyment of *all* facilities which are open to the general public."<sup>25</sup> (Emphasis added.)

To base the interpretation of the Civil Rights Act of 1964 on presidential statements, as the dissent does, is to ignore the political reality of getting the Act through Congress. The President undoubtedly knew that Congress would not enact a civil rights bill which was not specific in nature. Attorney General Robert F. Kennedy told the House Committee on the Judiciary that Congress could take into account that "the areas of coverage should be clear to both the proprietors and the public . . ."<sup>26</sup> Furthermore, "[t]he coverage [of the administration bill] was quite explicit. We did not include other establishments which were constitutionally within the reach of Federal regulations . . ."<sup>27</sup> Two members of the House of Representatives also noted that title II did not cover all public accommodations. Representative Kastenmeier filed his views recommending passage of the Act, but he stated:

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18 The United States, acting through the Civil Rights Division of the Department of Justice, filed its brief and stated: "Our study of that history has convinced us that it is inconclusive on these issues." *Miller v. Amusement Enterprises, Inc.*, No. 24259, at 8 (5th Cir., Sept. 6, 1967).

19 *Id.* at 7.

20 *Id.* at 31 (dissenting opinion).

21 *Id.* at 29.

22 *Id.*

23 *Id.* at 31.

24 *Hearings on Miscellaneous Proposals Regarding the Civil Rights of Persons Within the Jurisdiction of the United States Before Subcomm. No. 5 of the House Comm. on the Judiciary*, 88th Cong., 1st Sess., ser. 4, pt. 2, at 1448 (1963) [hereinafter cited as *1963 Hearings*].

25 *Id.*

26 *Hearings on H.R. 7152 As Amended by Subcomm. No. 5 Before the House Comm. on the Judiciary*, 88th Cong., 1st Sess., ser. 4, pt. 4, at 2655 (1963).

27 *Id.*

[T]itle II . . . is deficient in that it guarantees equal access to only some public accommodations . . . . [T]he bill would allow discrimination to continue in . . . bowling alleys, and other places of recreation and participation sports, unless such places serve food.<sup>28</sup>

Representative Lindsay described title II as "carefully drafted," "pinpointed," and "nonsweeping."<sup>29</sup> In the Senate, the floor manager of title II, Senator Magnuson, described its coverage: "The types of establishments covered are clearly and explicitly [sic] described in the four numbered subparagraphs of section 201(b)."<sup>30</sup> A racial demonstration at an amusement park outside Baltimore, Maryland, brought forth a strong statement on the floor of the Senate by Senator Humphrey, in which he spoke of the desirability of the proposed civil rights bill.<sup>31</sup> At that time the Senator did not express his opinion on whether amusement parks would or should be covered. Nearly nine months later Senator Humphrey spoke in favor of ensuring that every public place of amusement be open to Negroes, but he admitted that some discriminatory practices were not reached by title II. He expressed hope for the voluntary disappearance of such practices.<sup>32</sup>

If the Kennedy Administration's proposed Civil Rights Act of 1963 had been enacted in the form submitted to Congress, amusement parks would most likely have been held to be covered. The provision which became section 201(b)(3) originally covered "any motion picture house, theater, sports arena, stadium, exhibition hall, or other public place of *amusement* or entertainment . . . ."<sup>33</sup> (Emphasis added.) If this language had been enacted, application of *eiusdem generis* so as to limit "public place of amusement or entertainment" to spectator establishments would have collided with the plain language of the statute. The proposed act also contained a broad provision that could have been interpreted to cover amusement parks. This provision covered, *inter alia*, other establishments where goods that had moved in interstate commerce were held out to the public for sale or use.<sup>34</sup> This provision was omitted altogether from the Act. Although this legislative history may not be termed conclusive, it is difficult to question the majority's claim in *Miller* that the weight of that history supports the proposition that, as the statute was finally enacted, an amusement park is not a "place of exhibition or entertainment."

The majority's holding could, of course, be nullified by an amendment to the Act. Not only amusement and recreation parks, but also dance halls, bowling alleys, and other participative establishments could be specifically enumerated. Currently, five state civil rights acts specifically cover "amusement and recreation parks."<sup>35</sup> However, barring an amendment, an applicable state statute, or volun-

28 H.R. REP. NO. 914, 88th Cong., 1st Sess. 40-41 (1963).

29 110 CONG. REC. 1924 (1964).

30 *Id.* at 7405.

31 109 CONG. REC. 12275 (1963).

32 110 CONG. REC. 6533-34 (1964).

33 1963 *Hearings*, *supra* note 24, pt. 1, at 652.

34 *Id.* at 652-53.

35 N.J. STAT. ANN. § 10:1-5 (1960); N.M. STAT. ANN. § 49-8-5 (1966); N.Y. CIV. RIGHTS LAW § 40 (McKinney 1948); PA. STAT. ANN. tit. 18, § 4654 (1963); R.I. GEN. LAWS ANN. § 11-24-3 (1956). One additional state has judicially construed its statutory phrase "place of public accommodation or amusement" so as to cover amusement parks.

tary compliance by amusement park owners, future litigants must be wary of *ejusdem generis* as applied to title II of the Act. A litigant, in other than the Fifth Circuit, might still argue that *ejusdem generis* does not apply, because the plain meaning of "place of entertainment" includes amusement parks. But the legislative history and the specific nature of the language used in defining a place of public accommodation which affects commerce clearly indicate that Congress did not intend a man-in-the-street interpretation of sections 201(b) and 201(c).<sup>36</sup>

A better alternative might be to grant the applicability of *ejusdem generis*, but argue that the spectator limitation is too narrow. This argument is based on the fact that the catch-all phrase is "other place of exhibition *or* entertainment." (Emphasis added.) Since Congress was so careful in choosing its words, the "or" must mean that "place of entertainment" includes establishments other than, or in addition to, "place of exhibition." So far no case has considered this point, and quite likely no case will, since the Act contains a provision under which a litigant can more easily establish coverage of an amusement park. Section 201(b)(4) extends coverage of the Act to

any establishment (A)(i) which is physically located within the premises of any establishment otherwise covered by this subsection [201(b)], or (ii) within the premises of which is physically located any such covered establishment, and (B) which holds itself out as serving patrons of such covered establishment.<sup>37</sup>

Under this section, coverage has been extended to a golf course<sup>38</sup> and a bowling alley<sup>39</sup> due to the fact that lunch counters covered by section 201(b)(2) were physically located within those participative establishments. Many amusement parks contain concession stands arguably covered by section 201(b)(2).<sup>40</sup> Fun Fair Park contained a concession stand, but counsel for all parties stipulated that the plaintiffs were making no claim under sections 201(b)(2) or 201(b)(4).<sup>41</sup> This stipulation succeeded in making *Miller* a test case under section 201(b)(3).

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*Fletcher v. Coney Island, Inc.*, 54 Ohio Op. 112, 69 Ohio L. Abs. 264, 121 N.E.2d 574 (C.P. Hamilton County 1954), *rev'd on other grounds*, 100 Ohio App. 259, 60 Ohio Op. 218, 136 N.E.2d 344 (Ct. App. 1955), *aff'd*, 165 Ohio St. 150, 59 Ohio Op. 212, 134 N.E.2d 371 (1956).

<sup>36</sup> An example of the specific nature of the language is found in § 201(c) which provides that the operations of a restaurant affect commerce if a substantial portion of the food it serves "has moved in commerce." 78 Stat. 243 (1964), 42 U.S.C. § 2000a(c)(2) (1964) (emphasis added). On the other hand, sources of entertainment must "move in commerce." 78 Stat. 243 (1964), 42 U.S.C. § 2000a(c)(3) (1964) (emphasis added). Since the mechanical rides at Fun Fair Park were permanently affixed, the district court held that they did not "move in commerce." *Miller v. Amusement Enterprises, Inc.*, 259 F. Supp. 523, 528 (E.D. La. 1966), *aff'd*, No. 24259 (5th Cir., Sept. 6, 1967).

<sup>37</sup> 78 Stat. 243 (1964), 42 U.S.C. § 2000a(b)(4) (1964).

<sup>38</sup> *Evans v. Laurel Links, Inc.*, 261 F. Supp. 474 (E.D. Va. 1966).

<sup>39</sup> *Adams v. Fazio Real Estate Co.*, 268 F. Supp. 630 (E.D. La. 1967). *See also* *Pinkney v. Meloy*, 241 F. Supp. 943 (N.D. Fla. 1965) (barber shop covered because physically within a covered hotel).

<sup>40</sup> Large amusement parks often present exhibitions arguably covered by § 201(b)(3) such as bands and singing groups that might bring such parks within the coverage of § 201(b)(4). *But cf. Kyles v. Paul*, 263 F. Supp. 412 (E.D. Ark. 1967).

<sup>41</sup> Record at 128-29, *Miller v. Amusement Enterprises, Inc.*, No. 24259 (5th Cir., Sept. 6, 1967). The Memorandum of the United States as Amicus Curiae on Appellants' Petition for Rehearing at 2-5, *Miller v. Amusement Enterprises, Inc.*, No. 24259 (5th Cir., Sept. 6, 1967), asserts that the Fifth Circuit answered a hypothetical question and should, therefore, ignore this stipulation on rehearing and decide the case on the basis of the facts.

Now that the results are in, plaintiffs can proceed accordingly. However, a plaintiff in a *Miller*-type situation is not guaranteed victory by section 201(b)(4). The district court in *Kyles* held that neither of the two recreational facilities in that case was covered by section 201(b)(4). The court held that each facility was a single unitized operation "with the sales of food and drink being merely adjuncts to the principal business of making recreational facilities available to the public."<sup>42</sup> It remains to be seen whether "merely adjuncts" will limit section 201(b)(4) as *ejusdem generis* now limits section 201(b)(3).

*William J. Hassing*

CONSTITUTIONAL LAW — INTERGOVERNMENTAL TAX IMMUNITY OF NATIONAL BANKS — MASSACHUSETTS SALES AND USE TAX HELD APPLICABLE TO PURCHASES MADE BY A NATIONAL BANK. — In March, 1966, Massachusetts adopted a temporary sales and use tax<sup>1</sup> as a revenue measure.<sup>2</sup> The sales tax is assessed at 3% of the gross receipts of a vendor from all sales as defined in the statute.<sup>3</sup> The vendor is obliged to pass the burden of the tax on to the purchaser,<sup>4</sup> but it is the vendor who may be penalized for failure to collect the tax.<sup>5</sup> The use tax is applied at a rate of 3% of the sales price of goods stored, used, or consumed in the commonwealth.<sup>6</sup> Sales taxed under the sales tax provision of section 1 are exempt from the use tax.<sup>7</sup> The responsibility for the use tax falls on the purchaser provided that the vendor is not engaged in doing business in the commonwealth.<sup>8</sup> Significantly exempt from both sales and use taxes are "[s]ales which the commonwealth is prohibited from taxing under the constitution or laws of the United States"<sup>9</sup> and "[s]ales to the United States, the

42 *Kyles v. Paul*, 263 F. Supp. 412, 419 (E.D. Ark. 1967). *But cf. Adams v. Fazzio Real Estate Co.*, 268 F. Supp. 630 (E.D. La. 1967) where the court stated:

The statute contains no percentage test, and it is not necessary to show that the covered establishment which magnetizes the non-covered establishment in which it is physically located occupies a majority, or even a substantial part of the premises, or that its sales are the major or even a substantial part of the revenues of the establishment. *Id.* at 638 (footnote omitted).

1 MASS. ANN. LAWS ch. 58, app., §§ 1-80 (Supp. 1966).

2 Dane, *The New Sales and Use Tax Law*, 51 MASS. L.Q. 239, 241 (1966). This article contains an excellent analysis of the Massachusetts statute.

3 MASS. ANN. LAWS ch. 58, app., § 1(2) (Supp. 1966) provides:

An excise is hereby imposed upon sales at retail of tangible personal property in this commonwealth by any vendor at the rate of three percent of the gross receipts of the vendor from all such sales of such property, except as otherwise provided in this section.

4 *Id.* § 1(3) provides:

Reimbursement for the tax hereby imposed shall be paid by the purchaser to the vendor and each vendor in this commonwealth shall add to the sales price and collect from the purchaser the full amount of the tax imposed by this section, or an amount equal as nearly as possible or practical to the average equivalent thereof; and such tax shall be a debt from the purchaser to the vendor, when so added to the sales price, and shall be recoverable at law in the same manner as other debts.

5 *Id.* § 1(7)(c). See Dane, *supra* note 2, at 247.

6 MASS. ANN. LAWS ch. 58, app., § 2(2) (Supp. 1966) provides:

Except as otherwise provided in this section an excise is hereby imposed upon the storage, use or other consumption in this commonwealth of tangible personal property purchased from any vendor for storage, use or other consumption within this commonwealth at the rate of three percent of the sales price of the property.

7 *Id.* § 2(5)(a).

8 *Id.* §§ 2(3)-(4). See Dane, *supra* note 2, at 249.

9 MASS. ANN. LAWS ch. 58, app., § 1(6)(a) (Supp. 1966).

commonwealth of Massachusetts or any political subdivision thereof, or their respective agencies."<sup>10</sup> The plaintiff, First Agricultural National Bank of Berkshire County, is chartered under the laws of the United States.<sup>11</sup> After an unsuccessful attempt to have the State Tax Commission rule that it was exempt from the sales and use tax as an agency of the United States, the plaintiff national bank petitioned for a declaratory judgment to that effect. The single judge who heard the petition reserved and reported the case without decision to the Supreme Judicial Court of Massachusetts. That court *held*: national banks are constitutionally subject to the Massachusetts sales and use tax. *First Agricultural National Bank of Berkshire County v. State Tax Commission*, 229 N.E.2d 245 (Mass. 1967).

Although there is no provision in the Constitution for intergovernmental tax immunity, the courts have traditionally recognized the concept.<sup>12</sup>

The doctrine of mutual immunity of state and of nation from taxation by the other, enunciated by Chief Justice Marshall in *M'Culloch v. State of Maryland*, 4 Wheat. 316, 4 L.Ed. 579, has not lost vitality with age. . . . [T]he basic principle that the United States, its property, its essential functions and activities are not subjects of taxation by the states has not been questioned in modern times.<sup>13</sup>

In determining the validity of a state tax that may affect the United States or one of its agencies or instrumentalities, most courts have followed the "legal incidence" test implied by the Supreme Court in *Alabama v. King & Boozer*.<sup>14</sup> King & Boozer, a partnership, sold lumber to "cost-plus-a-fixed-fee" contractors who were constructing an army camp for the United States. A state excise tax was imposed on the sale, and King & Boozer sought to be relieved from the burden of collecting the tax on the theory that the federal government ultimately bore the economic burden of the tax. The Court rejected this contention, stating that

[t]he contractors were thus purchasers of the lumber, within the meaning of the taxing statute, and as such were subject to the tax. They were not relieved of the liability to pay the tax either because the contractors, in a loose and general sense, were acting for the Government in purchasing the lumber or, as the Alabama Supreme Court seems to have thought, because the economic burden of the tax imposed upon the purchaser would be shifted to the Government by reason of its contract to reimburse the contractors.<sup>15</sup>

In *Curry v. United States*,<sup>16</sup> a companion case to *King & Boozer*, the Court allowed the application of the Alabama use tax to government contractors, again re-emphasizing the theory that immunity does not attach to a government con-

10 *Id.* § 1(6)(d).

11 12 U.S.C. §§ 21-215(b) (1964).

12 Rakestraw, *The Reciprocal Rule of Governmental Tax Immunity — A Legal Myth*, 11 FED. B.J. 3, 4 (1950).

13 *United States v. Livingston*, 179 F. Supp. 9, 19 (E.D.S.C. 1959), *aff'd mem.*, 364 U.S. 281 (1960).

14 314 U.S. 1 (1941).

15 *Id.* at 12.

16 314 U.S. 14 (1941).

tractor when the economic burden of the tax only indirectly falls upon the federal government. The *Curry* Court held:

If the state law lays the tax upon them [contractors] rather than the individual with whom they enter into a cost-plus contract like the present one, then it affects the Government, like the individual, only as the economic burden is shifted to it through operation of the contract. . . . [T]he Constitution, . . . does not prohibit a tax upon Government contractors because its burden is passed on economically by terms of the contract or otherwise as a part of the construction cost to the Government.<sup>17</sup>

However, on the same day that it rendered the *King & Boozer* and *Curry* decisions, the Court, noticing that the North Dakota Supreme Court had held the legal incidence of that state's sales tax to be on the purchaser,<sup>18</sup> seemingly applied the same "legal incidence" test to strike down the imposition of the sales tax on sales to federal land banks.<sup>19</sup>

In 1954, the Court in *Kern-Limerick, Incorporated v. Scurlock*<sup>20</sup> followed the same basic principle, this time invalidating a state excise tax imposed upon a government contractor since the federal government itself was the disclosed purchaser with title to the merchandise passing directly to it and never vesting in the contractor. In distinguishing the result from that reached in *King & Boozer*, the Court said:

[T]he purchaser under this contract was the United States. Thus, *King & Boozer* is not controlling for, though the Government also bore the economic burden of the state tax in that case, the legal incidence of that tax was held to fall on the independent contractor and not upon the United States.<sup>21</sup>

State courts, when faced with the more specific question of the validity of a state tax imposed upon a national bank, have generally followed the "legal incidence" test. The Supreme Court of Michigan adopted the test in deciding that retailers selling to a federal reserve bank must include such sales in their gross receipts for computation of the sales tax since the legal incidence of that tax fell on the retailer.<sup>22</sup> This same court gave an even clearer illustration of the "legal incidence" test in *National Bank of Detroit v. Department of Rev-*

17 *Id.* at 18.

18 *Jewel Tea Co. v. State Tax Comm'r*, 70 N.D. 229, 293 N.W. 386 (1940).

19 *Federal Land Bank v. Bismarck Lumber Co.*, 314 U.S. 95 (1941). Although the North Dakota sales tax is quite similar to the Massachusetts sales tax in the principal case, the Massachusetts tax may still be upheld under the "legal incidence" test since the Court stated, "[t]hese determinations of the incidence of the tax by the state court are controlling . . . ." *Id.* at 99. *Accord*, *Colorado Nat'l Bank v. Bedford*, 310 U.S. 41, 52 (1940). But see *Kern-Limerick, Inc. v. Scurlock*, 347 U.S. 110, 121 (1954). The Massachusetts court determined the incidence of the sales tax to be on the vendor. *First Agricultural Nat'l Bank v. State Tax Comm'n*, 229 N.E.2d 245, 251 (Mass. 1967). But the court's interpretation of where the legal incidence of the tax falls, may, itself, be open to criticism as there is some authority for the proposition that a tax which must be passed on to the purchaser places the legal incidence upon the purchaser. See *Liberty Nat'l Bank & Trust Co. v. Buscaglia*, 26 App. Div. 2d 97, 101, 270 N.Y.S.2d 871, 875 (1966).

20 347 U.S. 110 (1954).

21 *Id.* at 122.

22 *Federal Reserve Bank v. Department of Revenue*, 339 Mich. 587, 64 N.W.2d 639 (1954).

*enue*.<sup>23</sup> In this case a national bank sought a declaratory judgment that it was freed from the obligation of: (1) paying the state sales tax on purchases made by the bank; and (2) collecting the tax on sales made by the bank. As to the bank's purchases, the court held that the application of the "legal incidence" test would preclude immunity. The court reasoned that

[s]ince the legal incidence of the tax does not fall on the purchaser of merchandise but rather on the retailer, such purchaser, in legal contemplation, is not the taxpayer even though the economic burden may be shifted to him.<sup>24</sup>

However, on the question of the bank's own sales, the court reached a different conclusion.

[A]s to sales made by it [national bank] in its cafeteria, and of repossessed merchandise, the plaintiff is not subject to the payment of the sales tax. Here the legal incidence of such tax obviously falls on it. Under the doctrine of implied constitutional immunity extended to an instrumentality of the Federal government . . . the State may not impose such tax and the statute may not properly be construed as contemplating it.<sup>25</sup>

Illinois has adopted the same approach in upholding the application of the state retailers' occupation tax to purchases made by national banks.<sup>26</sup> Also, the Appellate Division of the New York Supreme Court recently followed the "legal incidence" test, stating: "It is the legal incidence, rather than the economic burden . . . which is determinative of the issue."<sup>27</sup>

In *First Agricultural National Bank*, the Massachusetts court determined that "the incidence of the sales tax is upon the vendor."<sup>28</sup> By so holding, the court, in light of the cases just discussed, had no difficulty in allowing the application of the sales tax on sales to the plaintiff bank.

However, no such test or line of precedent was available to the court in upholding the use tax. Judge Reardon, author of the court's opinion, was quick to admit that "[i]n contrast to the sales tax, there is no doubt that the incidence of the use tax is upon the purchaser."<sup>29</sup> However, as the previously discussed cases illustrate, the "legal incidence" test only disallows a tax imposed directly upon an agency or instrumentality of the United States. Hence, the court was able to sustain the application of the use tax by holding that national banks are not agencies or instrumentalities of the federal government at least to the extent that a tax on them is equivalent to a tax on the United States.<sup>30</sup>

23 340 Mich. 573, 66 N.W.2d 237 (1954).

24 *Id.* at 576, 66 N.W.2d at 239.

25 *Id.* at 577, 66 N.W.2d at 239.

26 *National Bank v. Isaacs*, 27 Ill. 2d 205, 188 N.E.2d 704 (1963).

27 *Liberty Nat'l Bank & Trust Co. v. Buscaglia*, 26 App. Div. 2d 97, 100, 270 N.Y.S.2d 871, 874 (1966).

28 *First Agricultural Nat'l Bank v. State Tax Comm'n*, 229 N.E.2d 245, 251 (Mass. 1967).

29 *Id.*

30 *Id.* at 252-56. Since the court reached the conclusion that national banks do not constitutionally or statutorily enjoy immunity from the Massachusetts sales and use taxes, Judge Cutter in his concurring opinion argued that there was no need to decide the incidence of the taxes. *First Agricultural Nat'l Bank v. State Tax Comm'n*, 229 N.E.2d 245, 260 (Mass. 1967) (concurring opinion).

In reaching this conclusion, the court recognized that national banks have traditionally been considered to be government agencies.<sup>31</sup> In fact, one commentator, writing in 1941, gave the following definition of national banks:

National banks are private banking corporations, organized under Federal law by individual stockholders, with their own capital, for private gain, and managed by officers, agents and employees of their own selection. . . . They constitute no part of any branch of the Government of the United States, but to the extent that they are in aid of governmental purposes *they are regarded as quasi-public institutions or instrumentalities of the national government.*<sup>32</sup> (Emphasis added.)

In opposing this traditional concept of national banks, the court noted that within the last century significant changes have occurred within the banking industry itself so that today's national bank bears little resemblance to its predecessors. Judge Reardon pointed out<sup>33</sup> that national banks are now allowed to make mortgage loans,<sup>34</sup> exercise fiduciary powers,<sup>35</sup> and buy and sell securities besides those of state and federal governments.<sup>36</sup> The effect of these changes has been to make the "difference between them [national banks] and their State chartered competitors hard to discern."<sup>37</sup>

Furthermore, the 1913 Federal Reserve Act has caused great changes in the national banks. Judge Reardon stated:

The Federal Reserve Act of 1913 reduced considerably the importance of national banks as fiscal agents of the United States. . . . In effect, the Federal Reserve System assumed in large part the functions and responsibilities conferred in earlier years on the first two banks of the United States and successor national banks.

The Federal Reserve System also assumed responsibility relative to the entire banking industry. No longer are national banks the exclusive depository of government funds, but Federal reserve banks and all member banks, regardless of whether they are State or national banks, are authorized to be Federal depositories. § 15, 38 Stat. 265, as amended, 12 U.S.C. § 391 (1964).<sup>38</sup>

31 *First Agricultural Nat'l Bank v. State Tax Comm'n*, 229 N.E.2d 245, 252 (Mass. 1967). For an example of this traditional approach, see *Buder v. First Nat'l Bank*, 16 F.2d 990 (8th Cir. 1927) where the court stated:

We think it is now too late to attempt to overturn the well-settled doctrine that national banks are instrumentalities of the United States, subject to its paramount authority, and taxable by the states only to the extent and in the manner expressly permitted by Congress. *Id.* at 992 (citations omitted).

*Accord, e.g., Colorado Nat'l Bank v. Bedford*, 310 U.S. 41 (1940); *Bank of California, N.A. v. King County*, 16 F. Supp. 976 (W.D. Wash. 1936); *O'Neil v. Valley Nat'l Bank*, 58 Ariz. 539, 121 P.2d 646 (1942); *First Nat'l Bank & Trust Co. v. Town of West Haven*, 135 Conn. 191, 62 A.2d 671 (1948); *First Nat'l Bank v. Marion County*, 169 Ore. 595, 130 P.2d 9 (1942).

32 W. O'CONNOR, *THE LAW OF NATIONAL BANKING*, ¶ 505 at 25 (1941).

33 *First Agricultural Nat'l Bank v. State Tax Comm'n*, 229 N.E.2d 245, 254-55 (Mass. 1967).

34 12 U.S.C. § 371 (1964).

35 *Id.* § 92(a)(a) (but a special permit from the Comptroller of the Currency is required).

36 *Id.* § 24 (the securities must be prescribed by the Comptroller of the Currency).

37 *First Agricultural Nat'l Bank v. State Tax Comm'n*, 229 N.E.2d 245, 255 (Mass. 1967).

38 *Id.* at 254-55.

Judge Reardon further noted that in several areas of federal law the courts have chosen not to extend intergovernmental immunity to the national banks.<sup>39</sup> In applying federal labor law to the national banks, the Ninth Circuit stated:

It [national bank] is a privately owned corporation, privately managed and operated in the interest of its stockholders. . . . The United States did not create it, but has merely enabled it to be created. True, national banks are subject to federal regulation and supervision, but so are a host of other private enterprises. It is true, also, that national banks may at times be called upon as aids in carrying out the fiscal policies of the government, but their activities in these respects are occasional and incidental to the primary purpose of the individuals who organize them.<sup>40</sup> (Footnote omitted.)

This opinion relied heavily on the following dicta of Mr. Justice Brandeis in *Emergency Fleet Corporation, United States Shipping Board v. Western Union Telegraph Company*.<sup>41</sup>

Instrumentalities like the national banks or the federal reserve banks, in which there are private interests, are not departments of the Government. They are private corporations in which the Government has an interest.<sup>42</sup>

Finally,<sup>43</sup> the court in *First Agricultural National Bank* noted a definite trend toward the breakdown of intergovernmental immunity for private persons engaged in quasi-public activities.

Furthermore, there has been an unmistakable trend in recent Supreme Court decisions, many of which overrule earlier precedent, to deny implied constitutional immunity for State taxation to essentially private persons, both individual and corporate, who conduct businesses for profit and at the same time perform some governmental functions.<sup>44</sup>

Certainly, there has been somewhat of a breakdown of intergovernmental immunity in several areas. As previously discussed, the Supreme Court has denied immunity to government contractors when the incidence of the tax is upon them despite the fact that the economic burden may ultimately rest upon the federal government.<sup>45</sup> Likewise, persons using government property, which would ordinarily be tax immune, for personal use and profit have been held taxable to the same extent as if they actually owned the property, the theory being that the tax was imposed upon the individual and not upon the Government.<sup>46</sup> Also,

39 *Id.* at 257-58.

40 *NLRB v. Bank of America, Nat'l Trust & Sav. Ass'n*, 130 F.2d 624, 627 (9th Cir. 1942). The National Labor Relations Act § 2(2), 29 U.S.C. § 152(2) (1964) states that the term "employer" does not include the United States, any wholly government owned corporation, or any Federal Reserve Bank.

41 275 U.S. 415 (1928).

42 *Id.* at 425-26.

43 For purposes of brevity, the court's discussion of 12 U.S.C. § 548 (1964) (which sets out the methods by which the states may tax the shares of the national banks) has been omitted from this comment. It is sufficient to state that the court held that the statute does not preclude the application of the Massachusetts sales and use taxes to national banks. *First Agricultural Nat'l Bank v. State Tax Comm'n*, 229 N.E.2d 245, 258-60 (Mass. 1967).

44 *Id.* at 257.

45 See text accompanying notes 14-17 *supra*.

46 *United States v. City of Detroit*, 355 U.S. 466 (1958); *United States v. Township of Muskegon*, 355 U.S. 484 (1958); *City of Detroit v. Murray Corp. of America*, 355 U.S. 489 (1958).

*Graves v. New York ex rel. O'Keefe*<sup>47</sup> overturned the long-standing principle established in *Collector v. Day*,<sup>48</sup> that intergovernmental immunity rendered the salaries of government employees immune from nondiscriminatory taxation.<sup>49</sup>

Nevertheless, none of these cases concerned the immunity of an entity even similar to a national bank, which can exist only by virtue of an act of Congress. National banks are extremely well regulated by federal statute<sup>50</sup> and, in fact, have been statutorily deemed capable of being employed as "financial agents of the government."<sup>51</sup> Many recent cases have recognized national banks to be tax exempt agencies of the federal government<sup>52</sup> and the Supreme Court itself has seemingly reaffirmed the immunity of national banks. In *Department of Employment v. United States*,<sup>53</sup> a 1966 case, the Court, in holding the Red Cross to be a tax immune federal agency, stated:

In those respects in which the Red Cross differs from the usual government agency — *e. g.*, in that its employees are not employees of the United States, and that government officials do not direct its every day affairs — the Red Cross is like other institutions — *e. g.*, national banks — whose status as tax-immune instrumentalities of the United States is beyond dispute.<sup>54</sup> (Emphasis added.)

While it is, therefore, unlikely that the decision in *First Agricultural National Bank* will meet with widespread acceptance, it is important to note the ramifications of an overall breakdown in the tax-exempt status of national banks. Such a result would have a most telling effect on two entities. First, the states, many of whom now rely on sales taxation as a primary source of revenue,<sup>55</sup> would be able to assess such taxes against national banks without regard for the incidence of the tax or other immunity claims. Secondly, and perhaps more significantly, state-chartered banks, which are in direct competition with the national banks, would find their competitive position greatly enhanced. On the other hand, should the national banks retain their tax immunity, their advantage over the state-chartered banks would be compounded by the cybernetic age. As one commentator has stated:

47 306 U.S. 467 (1939).

48 78 U.S. (11 Wall.) 113 (1871).

49 For additional comments on the breakdown of intergovernmental immunity, see Powell, *The Waning of Intergovernmental Tax Immunities*, 58 HARV. L. REV. 633 (1945); Powell, *The Remnants of Intergovernmental Tax Immunities*, *id.* at 757.

50 *E.g.*, 12 U.S.C. §§ 26-27 (1964) (a national bank cannot commence business until authorized by the Comptroller of the Currency and certified by him); *id.* §§ 51-67 (the issuance of stock in a national bank is closely regulated); *id.* § 71 (the election of bank directors is specified); *id.* § 72 (the qualifications of directors are set); *id.* § 82 (the limit of indebtedness is set); *id.* § 85 (the rate of interest chargeable is controlled).

51 12 U.S.C. § 90 (1964).

52 *See, e.g.*, *First Nat'l Bank v. Alabama*, 262 Ala. 155, 77 So. 2d 653 (1954) (dictum); *National Bank v. Isaacs*, 27 Ill. 2d 205, 188 N.E.2d 704 (1963) (dictum); *National Bank v. Department of Revenue*, 340 Mich. 573, 66 N.W.2d 237 (1954).

53 87 S. Ct. 464 (1966).

54 *Id.* at 467. It is interesting to note that the *First Agricultural National Bank* court actually cited the *Department of Employment* case for the proposition that it is difficult to determine what is a government agency. *First Agricultural Nat'l Bank v. State Tax Comm'n*, 229 N.E.2d 245, 253 (Mass. 1967), but chose to ignore this damaging dicta.

55 *See Due, The Nature and Structure of Sales Taxation*, 9 VAND. L. REV. 123 (1956).

The status of sales to national banks is likely to prove a major bone of contention since national banks and state banks are in direct competition in many areas, particularly in the area of supplying computer and data processing services on a fee basis. If the national banks are entitled to purchase data processing equipment free of any sales [or use] tax burden, their competitive position vis-a-vis their state-chartered rivals is greatly enhanced.<sup>56</sup>

However, as advantageous to state taxing authorities and state banks as Judge Reardon's opinion in *First Agricultural National Bank* may be, it seems improbable that many other courts will be willing to concur in the Massachusetts court's lack of regard for traditional concepts and contemporary dicta dealing with the tax immunity of national banks.

James P. Gillece, Jr.

CONSTITUTIONAL LAW — PUBLIC HOUSING — CIRCULAR ISSUED BY THE DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT REQUIRING HOUSING AUTHORITY TO GIVE TENANTS THE REASON FOR THEIR EVICTION MAY HAVE THE STATUS OF LAW AND THIS REASON MAY BE CONSTITUTIONALLY INSUFFICIENT TO EFFECT EVICTION IF IT AMOUNTS TO A CONDITIONING OF FURTHER TENANCY UPON FORBEARANCE OF CONSTITUTIONAL RIGHTS. — In November, 1964, Joyce Thorpe became a tenant in a federally assisted, low-rent, public housing project owned and managed by the Housing Authority of the City of Durham, North Carolina. The lease provided for a tenancy from month-to-month and gave both the tenant and the Authority the right to terminate by giving notice at least fifteen days before the end of any monthly term. All apparently went well for eight months. On August 10, 1965, Miss Thorpe was elected president of a tenants' organization. The next day the Housing Authority gave her notice of termination of her tenancy as of August 31. The notice gave no reasons for the cancellation and the Housing Authority refused to give any explanation. She refused to vacate the premises, and the Housing Authority thereupon brought summary ejectment proceedings in a justice court. A judgment of eviction was obtained in that court and was affirmed on appeal by the Superior Court of Durham County and the Supreme Court of North Carolina. The Supreme Court of the United States granted certiorari. According to the concurring opinion of Justice Douglas two issues were presented:

The first is whether a tenant in a publicly assisted housing project operated by a state agency can be evicted for any reason or no reason at all. The second is whether a tenant in such a housing project can be evicted for the exercise of a First Amendment right.<sup>1</sup>

The majority, however, never reached these issues because the Department of Housing and Urban Development (hereinafter referred to as HUD) had issued a circular in the interim between the granting of certiorari and oral argument.

<sup>56</sup> Dane, *The New Sales and Use Tax Law*, 51 MASS. L.Q. 239, 247-48. (1966).

<sup>1</sup> Thorpe v. Housing Authority, 386 U.S. 670, 677 (1967) (concurring opinion).

Basically, the circular requires that the local housing authorities: (1) give tenants the reasons for their evictions in private conference or in another appropriate manner; (2) give the tenants the opportunity to reply; and (3) keep records of the reasons for the evictions and of any conferences held with the evicted tenants.<sup>2</sup>

In vacating and remanding the Supreme Court *held*: if this procedure (that specified in the circular) were accorded to the petitioner, her case would assume a posture quite different from the one now presented. The judgment of the Supreme Court of North Carolina is accordingly vacated, and the case remanded for such further proceedings as may be appropriate in the light of the February 7 circular of the Department of Housing and Urban Development. *Thorpe v. Housing Authority of the City of Durham*, 386 U.S. 670 (1967), *vacating and remanding* 267 N.C. 431, 148 S.E.2d 290 (1966).

This area of public housing law has been bristling with deep-seated sociological and jurisprudential implications for some time. The roots of this particular problem can be found in the early view of the courts toward the powers of the Government in its role as landlord. In *Brand v. Chicago Housing Authority*,<sup>3</sup> the Seventh Circuit in 1941 held that the federal government and state governments, as well as their respective agencies, have the same rights as similarly placed private individuals when they enter a contract.<sup>4</sup> The result was that a public housing authority was allowed to terminate a month-to-month tenancy upon fifteen days notice just as any private landlord could. Since the public authority was given the same rights as a private landlord, the tenant's argument that he had acquired a vested property right that could not be destroyed without

2 The text of the circular is as follows:

**SUBJECT: Terminations of Tenancy in Low-Rent Projects**

Within the past year increasing dissatisfaction has been expressed with eviction practices in public low-rent housing projects. During that period a number of suits have been filed throughout the United States generally challenging the right of a Local Authority to evict a tenant without advising him of the reasons for such eviction.

Since this is a federally assisted program, we believe it is essential that no tenant be given notice to vacate without being told by the Local Authority, in a private conference or other appropriate manner, the reasons for the eviction, and given an opportunity to make such reply or explanation as he may wish.

In addition to informing the tenant of the reason(s) for any proposed eviction action, from this date each Local Authority shall maintain a written record of every eviction from its federally assisted public housing. Such records are to be available for review from time to time by HUD representatives and shall contain the following information:

1. Name of tenant and identification of unit occupied.
2. Date of notice to vacate.
3. Specific reason(s) for notice to vacate. For example, if a tenant is being evicted because of undesirable actions, the record should detail the actions which resulted in the determination that eviction should be instituted.
4. Date and method of notifying tenant with summary of any conferences with tenant, including names of conference participants.
5. Date and description of final action taken.

The Circular on the above subject from the PHA Commissioner, dated May 31, 1966, is superseded by this Circular.

*Thorpe v. Housing Authority*, 386 U.S. 670, 672-73 n.3 (1967).

3 120 F.2d 786 (7th Cir. 1941).

4 *Id.* at 788. "When the United States enters into contract relations, its rights and duties therein are governed generally by the law applicable to contracts between private individuals." *Lynch v. United States*, 292 U.S. 571, 579 (1934).

due process fell on deaf ears.<sup>5</sup> The authority owned the project; therefore, just like a private landlord, it could set rents and membership qualifications and could change them at will even though this forced formerly eligible tenants out of the project.<sup>6</sup>

After *Brand*, the courts of many jurisdictions were not long in adopting and developing the theory that tenants in public housing had no greater tenancy rights than those in privately owned housing which meant that public housing authorities could evict with the same liberality as could their private counterparts.<sup>7</sup> In some cases the precise result was that a tenancy could be terminated without the authority having to state the reason for the eviction.<sup>8</sup> For example, in *Housing Authority of the City of Pittsburgh v. Turner*<sup>9</sup> the issue was whether a public corporation could assert the same right as a private corporation or individual in terminating a month-to-month lease without giving a reason for its action. Stated in another way, does the public nature of a public corporation's activities and purposes affect its right to rely on the express provision of a month-to-month lease that allows termination by either party upon fifteen days notice?<sup>10</sup> The court relied upon *Brand* in holding that the Government as landlord has all the rights of a private landlord<sup>11</sup> and explained that exposing the Housing Authority to interrogation and investigation of its reasons for terminating a lease "would place an unreasonable restraint on its powers and make it impossible for it to carry out the policies declared by the Legislature."<sup>12</sup>

In *United States v. Blumenthal*,<sup>13</sup> the issue was the same: whether the United States as landlord could terminate a tenancy from month-to-month without giving a reason while continuing to rent to other tenants on a similar basis. It was asserted that such action amounted to discrimination so arbitrary as to deny the tenant due process of law.<sup>14</sup> In rejecting this claim, the court said:

[T]he plaintiff [United States], which is here acting in its proprietary rather than its governmental capacity, has the same absolute right as any other landlord to terminate a monthly lease by giving appropriate notice and to recover possession of the demised property without being required to give any reason for its action. *Brand v. Chicago Housing Authority*, 7 Cir., 1941.

5 *Brand v. Chicago Housing Authority*, 120 F.2d 786, 788 (7th Cir. 1941).

6 *Id.* at 788-89. A similar result had been reached in the Application of the United States Housing Corp., 196 App. Div. 819, 188 N.Y.S. 365 (1921), where a tenant in World War I emergency public housing was evicted despite his argument that he was being evicted for failure to pay an illegal rent increase.

7 *Walton v. City of Phoenix*, 69 Ariz. 26, 208 P.2d 309 (1949); *San Diego State College Foundation v. Hasty*, 90 Cal. App. 2d 884, 202 P.2d 868 (1949); *Chicago Housing Authority v. Ivory*, 341 Ill. App. 282, 93 N.E.2d 386 (1950), noted in 7 J. OF HOUSING 432 (1950).

8 *Chicago Housing Authority v. Ivory*, 341 Ill. App. 282, 93 N.E.2d 386 (1950), noted in 7 J. OF HOUSING 432 (1950); *Cleveland Metropolitan Housing Authority v. Patterson*, decided without opinion in the Ohio Court of Appeals, Cuyahoga County, July 10, 1963, noted in 21 J. OF HOUSING 384 (1964); *Columbus Metropolitan Housing Authority v. Simpson*, 85 Ohio App. 73, 85 N.E.2d 560 (1949), noted in 6 J. OF HOUSING 150 (1949); *Housing Authority v. Turner*, 201 Pa. Super. 62, 191 A.2d 869 (1963).

9 201 Pa. Super. 62, 191 A.2d 869 (1963).

10 *Id.* at 870.

11 *Id.* at 871.

12 *Id.* at 872.

13 315 F.2d 351 (3rd Cir. 1963).

14 *Id.* at 353. This case involved a business property rather than public housing but all other facts were analogous to the public housing cases in issue.

120 F.2d 786, 788; *Faris v. United States*, 10 Cir., 1951, 192 F.2d 53, 55. And at least in the absence of an allegation of conspiracy or design to injure the defendant or benefit its competitors . . . the fact that a landlord is not evicting other tenants holding similar property is of no concern to the tenant whose lease is being terminated and is not a defense to his eviction. Certainly the owner of land is not put to the election of evicting all his tenants or none of them.<sup>15</sup>

In New York, a tenant in public housing has at least some right to be given the grounds for the termination of his tenancy and generally these grounds will have to show that the tenant was undesirable due to conduct detrimental to the health, safety, or morals of others.<sup>16</sup> This right stems from rules and procedures set up by the local housing authority for the termination of a lease for undesirability.<sup>17</sup> A tenant being evicted can force the authority to prove that it has complied with the regulations that it has set up and that its findings are reasonable; but after such compliance is established, its action is unquestionable.<sup>18</sup>

Hence, it is apparent that the vast majority of courts that have faced the issue of whether a tenant in a publicly assisted housing project need be given any reason for his eviction have found that in the absence of any specific regulation to the contrary, the public authority can act just as a private landlord and need give none. Indeed a number of public authorities have encountered judicial disapproval only when they did give a reason for eviction. In the cases that follow, public housing authorities were unsuccessful in obtaining the eviction of tenants who refused to sign disclaimers of membership in organizations, subversive and otherwise, that were named on a list published by the Attorney General of the United States. The housing authorities required these disclaimers under local regulations designed to effectuate the anti-subversive policy of the Gwinn Amendment.<sup>19</sup>

Courts in several jurisdictions refused to force the eviction of such tenants on the ground that while a tenant might have no right to occupy public housing, he could not be evicted from it because he chose to exercise certain constitutional rights.<sup>20</sup> Citing *Frost & Frost Trucking Company v. Railroad Commis-*

<sup>15</sup> *Id.*

<sup>16</sup> *New York City Housing Authority v. Watson*, 27 Misc. 2d 618, 207 N.Y.S.2d 920, 925 (Sup. Ct. 1960) (dissenting opinion of Judge Hofstadter); *Sanders v. Cruise*, 10 Misc. 2d 533, 173 N.Y.S.2d 871 (Sup. Ct. 1958); *New York City Housing Authority v. Russ*, 1 Misc. 2d 170, 134 N.Y.S.2d 812 (Sup. Ct. 1954).

<sup>17</sup> *New York City Housing Authority v. Watson*, 27 Misc. 2d 618, 207 N.Y.S.2d 920 (Sup. Ct. 1960).

<sup>18</sup> *New York City Housing Authority v. Watson*, 27 Misc. 2d 618, 207 N.Y.S.2d 920, 922 (Sup. Ct. 1960). See *Smalls v. White Plains Housing Authority*, 34 Misc. 2d 949, 230 N.Y.S.2d 106 (Sup. Ct. 1962); *Sanders v. Cruise*, 10 Misc. 2d 533, 173 N.Y.S.2d 871 (Sup. Ct. 1958); *New York City Housing Authority v. Greenbaum*, 1 Misc. 2d 138, 140 N.Y.S.2d 321 (Sup. Ct. 1955); *New York City Housing Authority v. Russ*, 1 Misc. 2d 170, 134 N.Y.S.2d 812 (Sup. Ct. 1954).

<sup>19</sup> That no housing unit constructed under the United States Housing Act of 1937, as amended, shall be occupied by a person who is a member of an organization designated as subversive by the Attorney General: *Provided further*, That the foregoing prohibition shall be enforced by the local housing authority . . . 66 Stat. 403 (1937). This provision is no longer in force.

<sup>20</sup> *Housing Authority v. Cordova*, 130 Cal. App. 2d 883, 279 P.2d 215 (Super. Ct. 1955); *Chicago Housing Authority v. Blackman*, 4 Ill. 2d 319, 122 N.E.2d 522 (1954); *Kutcher v. Housing Authority*, 20 N.J. 181, 119 A.2d 1 (1955); *Peters v. New York City Housing Author-*

sion of California<sup>21</sup> and other cases,<sup>22</sup> these courts agreed that, in the case of a privilege that it may deny altogether, the state may not condition this privilege on the surrender of a constitutional right. Eviction for failure to sign such a disclaimer was found to be arbitrary, capricious and a violation of due process and equal protection.<sup>23</sup> In *Housing Authority of the City of Los Angeles v. Cordova*<sup>24</sup> the court cited *Peters v. New York Housing Authority*<sup>25</sup> for the proposition that:

Obviously, the government is under no duty to provide bounties in the form of low rent housing accommodations for its citizens. If it elects to do so, however, it cannot arbitrarily prevent any of its citizens from enjoying these statutorily created privileges. Nor can it make the privilege of their continuance dependent upon conditions that would deprive any of its citizens of their constitutional rights. A government is without power to impose an unconstitutional requirement as a condition for granting a privilege, even though the privilege may have been the use of government property. *Frost v. Railroad Commission of California*, 271 U.S. 583 . . . .<sup>26</sup>

Likewise, in *Rudder v. United States*<sup>27</sup> it was said that while a private landlord might recover possession in a court proceeding without having to give a reason for his termination of a month-to-month lease, "[t]he government as landlord is still the government. It must not act arbitrarily, for, unlike private landlords, it is subject to the requirements of due process of law. Arbitrary action is not due process."<sup>28</sup> The court in *Housing Authority of the City of Los Angeles v. Cordova*<sup>29</sup> seemed to agree, saying:

We believe it fairly obvious that a public body, a housing authority as here, does not possess the same freedom of action as a private landlord, who is at liberty to select his tenants as he pleases, and in the absence of a letting for a prescribed term, may terminate their tenancy either without reason or for any reason regardless how arbitrary or unreasonable it may be. Thus he may refuse either to rent to or permit the continued occupancy of his premises by persons of a particular race or religion or political affiliation. A housing authority, however, has no such freedom of action. See *Banks v. Housing Authority*, 1953, 120 Cal. App. 2d 1, 8, et. seq., 260 P.2d 668. And if it may not discriminate arbitrarily between persons and classes in leasing its premises, we see no reason why like considerations do not preclude arbitrary discrimination as between existing tenants in their right to continue such occupancy. See *Chicago Housing Auth. v. Blackman*, 1954, 4 Ill. 2d 319, 122 N.E.2d 522.<sup>30</sup>

ity, 9 Misc. 2d 942, 128 N.Y.S.2d 224 (Sup. Ct. 1954), *modified and aff'd*, 283 App. Div. 801, 128 N.Y.S.2d 712 (1954), *rev'd and remitted*, 307 N.Y. 519, 121 N.E.2d 529 (1954), *petition dismissed on other grounds* 1 App. Div. 2d 694, 147 N.Y.S.2d 859 (1955); *Lawson v. Housing Authority*, 270 Wis. 269, 70 N.W.2d 605, *cert. denied*, 350 U.S. 882 (1955) (holding that the local resolution adopted pursuant to the Gwinn Amendment was unconstitutional and void as presenting too much of a threat to the freedoms of the first amendment).

21 271 U.S. 583 (1926).

22 See Note, 73 HARV. L. REV. 1595 (1960).

23 *Rudder v. United States*, 226 F.2d 51 (D.C. Cir. 1955); *Kutcher v. Housing Authority*, 20 N.J. 181, 188-89, 119 A.2d 1, 5 (1955).

24 130 Cal. App. 2d 883, 279 P.2d 215 (Sup. Ct. 1955).

25 9 Misc. 2d 942, 128 N.Y.S.2d 224, 236 (1954).

26 *Housing Authority v. Cordova*, 130 Cal. App. 2d 883, 279 P.2d 215, 218 (1955).

27 226 F.2d 51 (D.C. Cir. 1955).

28 *Id.* at 53. See also *Kutcher v. Housing Authority*, 20 N.J. 181, 119 A.2d 1 (1955).

29 130 Cal. App. 2d 883, 279 P.2d 215 (1955).

30 *Id.* at 216.

On the basis of this developing case law, it seems apparent that while many courts have concluded that a tenant in public housing need be given no reason for the termination of his month-to-month tenancy, any reason that is given may be scrutinized by the courts in order to ascertain whether it is arbitrary or capricious or amounts to a conditioning of public housing upon the foregoing of constitutional rights. Consequently, a public housing authority desiring to terminate a tenancy would be much wiser to give no reason, under decisions of this kind, than to take the chance that a given reason will be found invalid. Indeed, in *United States v. Blumenthal*<sup>31</sup> the *Rudder* case was distinguished on the grounds that in *Rudder* the Government did give a specific reason for the eviction which the court held to be an invalid one, while in *Blumenthal* the Government had given no reason at all.<sup>32</sup>

It was against this background that the Supreme Court granted certiorari in *Thorpe*. However, as previously mentioned, HUD issued a directive to local housing authorities between the time that the Court granted certiorari and the time the case was argued. According to the Court's per curiam opinion,

After reciting the fact that dissatisfaction had been expressed with eviction procedures in low-rent housing projects and that suits had been brought to challenge evictions in which the local authority had not given any reason for its action, the circular stated:

"Since this is a federally assisted program, we believe it is essential that no tenant be given notice to vacate without being told by the Local Authority, in a private conference or other appropriate manner, the reasons for the eviction, and given an opportunity to make such reply or explanation as he may wish."

The circular goes on to require local authorities to keep future records of evictions, the reasons therefor, and summaries of any conferences held with tenants in connection with evictions.<sup>33</sup>

The Court went on to note that, were the procedure outlined in the circular accorded to the petitioner, her case would have assumed a posture quite different from the one presented.<sup>34</sup> Thus, the judgment of the North Carolina Supreme Court was vacated and the case was remanded for such further proceedings as might be appropriate in light of the HUD circular.<sup>35</sup>

Justice White dissented on the ground that while there could have been a more adequate record made in the courts below as to the basis for the eviction, petitioner was afforded a full due process hearing in the lower court and had the opportunity to explore fully the reasons for her eviction. He agreed with Justice Douglas' concurring opinion that there are certain reasons for which the Authority could not terminate the petitioner's lease, *viz.*, the exercise of free speech and free association. But he felt that the trial court's finding and the North Carolina Supreme Court's affirmance that the exercise of these freedoms was not the reason for the eviction settled the matter without reference to the

31 315 F.2d 351 (3rd Cir. 1963).

32 *Id.* at 353.

33 *Thorpe v. Housing Authority*, 386 U.S. 670, 672 (1967).

34 *Id.* at 673.

35 *Id.* at 673-74.

circular. However, he disagreed with the North Carolina court's statement that the reasons for eviction are immaterial.<sup>36</sup>

Justice Douglas concurred in the majority's result, but he reasoned:

[P]etitioner has already had a hearing in the state courts. And the status of the circular, whether a regulation or only a press release, is uncertain, an uncertainty which the Court does not remove. Vacating and remanding "for such further proceedings as may be appropriate in light . . . of the circular" therefore furnishes no guidelines for the state courts on remand, and does not dispose of the basic issue presented. I would vacate and remand to the state courts to determine the precise reason why petitioner was evicted and whether that reason was within the permissible range for state action against the individual.<sup>37</sup>

Justice Douglas felt that the circular only implied that a housing authority must have a reason for eviction. He criticized the circular for not specifically stating the reasons that can support eviction and for failing to say a tenant could not be evicted for his stand on civil rights. Justice Douglas also argued that it is questionable whether the circular even requires an administrative hearing before eviction. In this case, he wondered what such a hearing could achieve since the petitioner had already had a full court hearing without obtaining any relief. He felt the real issue concerned the standards to be applied, that is, "what reasons can support an eviction after hearing"<sup>38</sup> — an element sorely lacking in the circular.

Instead of depending on the circular, Justice Douglas would settle once and for all that "[t]he government as landlord is still the government. It must not act arbitrarily, for, unlike private landlords, it is subject to the requirements of due process of law. Arbitrary action is not due process." *Rudder v. United States* . . .<sup>39</sup> Justice Douglas made it clear that eviction by the Government without reason is arbitrary action and that eviction without having to give a reason leaves room for the exercise of arbitrary power.

In the tradition of *Frost & Frost Trucking Co. v. Railroad Commission of California*,<sup>40</sup> Justice Douglas felt that a privilege granted by the state cannot be made to depend upon the grantee's submission to a state-imposed condition that is hostile to the federal constitution. With conviction, he stated that a tenant "in a public housing project cannot be made to forfeit the benefit because he exercises a constitutional right."<sup>41</sup>

It is suggested that Justice Douglas is correct in maintaining that the HUD circular does not settle the real issue — what reasons are or are not sufficient to support eviction from public housing. However, the circular at least provides that the tenant be told the reasons for his eviction and be given an opportunity to make such reply or explanation as he may wish. Since public housing authorities apparently must now make their reasons for eviction known, public housing

36 *Id.* at 681 (dissenting opinion).

37 *Id.* (concurring opinion).

38 *Id.* at 677-78 (concurring opinion).

39 *Id.* at 678 (concurring opinion).

40 271 U.S. 583 (1926).

41 *Thorpe v. Housing Authority*, 386 U.S. 670, 678-79 (1967) (concurring opinion).

tenants will hereafter enjoy some degree of protection in that the reasons for their evictions will be subject to scrutiny on constitutional grounds as they were in the Gwinn Amendment cases.<sup>42</sup> This, of course, assumes that lower courts will give the HUD circular the force and effect of law even though the majority in *Thorpe* did not decide whether it should have such an effect.<sup>43</sup>

Since the decision in *Thorpe*, a federal district court in Virginia has been confronted by an almost identical factual situation in *Holt v. Richmond Redevelopment and Housing Authority*.<sup>44</sup> Here the housing authority claimed it was evicting the tenant on the ground that he was receiving unreported income that would have placed him in a higher rent bracket. The tenant, who sought an injunction against his eviction and against interference with his first amendment rights, contended that the real reason he was being evicted was his activity in organizing the tenants and serving as president of a civic association. Without reference to the HUD circular and with only a passing remark to distinguish *Thorpe* on the basis of the North Carolina court's findings, the Virginia court upheld the tenant's claim on the ground that "a tenant's continued occupancy in a public housing project cannot be conditioned upon the tenant's foregoing his Constitutional rights."<sup>45</sup> The court pointed out "that the rights granted by the First Amendment are too valuable to be frittered away under the guise of breach of contract based upon an ex parte computation of income attributed to hair cutting."<sup>46</sup>

How much effect *Thorpe* and the HUD circular will have on the rights of public housing tenants remains to be seen. But it is obvious that the door has been opened to arguments that the Government is not as free as the private landlord, that the Government's housing authorities must give reasons before they can evict tenants, and that these reasons must measure up to minimal constitutional standards.

The remaining question is whether these restraints on the discretion of the public housing authorities are desirable. The management of public housing will, of course, object to these new restrictions and argue, as did the court in *Housing Authority of the City of Pittsburgh v. Turner*,<sup>47</sup> that to compel management to submit to interrogation and investigation as to its reasons for eviction places an undue burden and restraint on its powers, making it unable to carry out the policies intended by the legislature in setting up public housing.<sup>48</sup>

In giving the public housing tenant the right to a valid reason before eviction, it logically follows that he has been given a certain right or vested interest to remain in the public housing in the absence of such a valid reason. Despite *Brand* and similar cases, which it is suggested are now or should be dead, this is a desirable and overdue development. A tenant with a "vested right" to his

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42 See cases cited in notes 21-32 *supra* and accompanying text.

43 "The legal effect of the circular, the extent to which it binds local housing authorities, and whether it is in fact applicable to the petitioner are questions we do not now decide." *Thorpe v. Housing Authority*, 386 U.S. 670, 673 n.4 (1967).

44 266 F. Supp. 397 (E.D. Va. 1966).

45 *Id.* at 401.

46 *Id.*

47 201 Pa. Super. 62, 191 A.2d 869 (1963).

48 *Id.* at 872. See quote and text accompanying note 12 *supra*.

apartment has a stake in his home, his community, and his neighbors. A tenant with such a right need not bend to unreasonable or arbitrary rules, but can instead involve himself in internal tenant government and responsibility without fear of being evicted for his efforts towards improving living conditions. He will have the opportunity to actively participate in society, something few of our urban poor have the opportunity to do. If public housing is rehabilitative rather than custodial, these opportunities should and must be available to the tenants without the threat of eviction hanging over them. What does it matter if the projects do not run quite as smoothly and managers do have a few more problems? These projects are public not private; they are run by government employees who are not subject to the mercenary demands of the competitive market; they are intended to better the lot of the poor for the good of all, rather than function smoothly and show a profit.<sup>49</sup>

Each man must have an enclave for his individualism safe from the arbitrariness of agencies, boards, committees or whatever else takes the form of "big brother." Government should gain no power as against constitutional limitations by reason of its role as dispenser of wealth.<sup>50</sup> In modern life, status is as important as personality. A man in public housing must have a right to be there — his status must also be protected.

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49 See Friedman, *Public Housing and the Poor: An Overview*, 54 CALIF. L. REV. 642 (1966) where many of these ideas and numerous others are suggested. It is interesting to note that this article points out the fact that all local housing authorities require a month-to-month lease though nothing in any state statute explicitly requires this. *Id.* at 660, 665. It would seem that a partial solution to the whole problem of tenant evictions and that of establishing a feeling of "belonging" among the tenants would be the use of long-term leases of a year, two years, or more, with specific and rigidly fair terms.

50 See Reich, *The New Property*, 73 YALE L.J. 733 (1964). For suggestions as to ways of bringing similar rights and status to the urban poor who occupy private housing, see Schier, *Protecting the Interests of the Indigent Tenant: Two Approaches*, 54 CALIF. L. REV. 670 (1966); Schoshinski, *Remedies of the Indigent Tenant: Proposal for Change*, 54 GEO. L.J. 519 (1966).