UNC SCHOOL OF LAW

NORTH CAROLINA LAW REVIEW

Volume 49 | Number 2 Article 4

2-1-1971

Notes

North Carolina Law Review

tional right to his job, he may at least assert that he cannot be fired for reasons nor in a manner that constitutes infringement by the state of his constitutional rights including the right to be free from arbitrary governmental action. The public employee may even argue that Justice Holmes's holding has been so emasculated that it should no longer be considered valid. Many courts may agree with the court in *Albaum v. Carey*:

> Whether we state the matter in traditional terms that government largess is a property right within the meaning of the fourteenth amendment . . . or whether we say that to deprive a government employee of his job for exercising Constitutionally protected rights is to deprive of the liberty guaranteed by that amendment, or whether we merely reason that all government action with respect to its employees must meet the standards imposed by the Amendment, our conclusion is the same: the Federal Constitution requires every level of government to afford nondiscriminatory and fair treatment, both substantively and procedurally, to all its employees; conditions of governmental employment may not stifle fundamental liberties.[93]

The more recent cases have one essential element in common; each recognizes that the state is always the state and no matter the capacity in which it acts, be it employer or landlord, it is constrained by the Constitution.[94] When public employers, as well as the courts, recognize this basic fact and act accordingly the public employee will truly have made significant progress in protecting himself against arbitrary dismissal.[95]

BEN F. TENNILLE

NOTES

Admiralty—Recovery Under the Jones Act for Foreign Seamen: The Demise of the Law of the Flag

"A vessel at sea may be a thing of beauty . . . but . . . she presents a structure full of hazards for even the most experienced mariner."[1] This

[93] 283 F. Supp. at 9-10.

[94] *See* Van Alstyne, *The Constitutional Rights of Public Employees: A Comment on the Inappropriate Uses of an Old Analogy*, 16 U.C.L.A.L. REV. 751, 752 (1969).

[95] Hopefully, the entire task of protecting the rights of public employees will not be left to the courts. *See* Rosenbloom, *The Constitution and the Civil Service, Some Recent Developments, Judicial and Political*, 18 U. KAN. L. REV. 839 (1970); Note, *Dismissal of Federal Employees—The Emerging Judicial Role*, 66 COLUM. L. REV. 719 (1966).

[1] 2 M. NORRIS, THE LAW OF SEAMEN § 612 (3d ed. 1970).

is certainly as true for the foreign seaman as the American, yet United States courts have in the past been reluctant to extend coverage under the Jones Act[2] to foreign seamen proceeding against foreign shipowners.[3]

In 1920 Congress passed the Jones Act[4] to provide injured seamen with the rights and remedies afforded railway employees under the Federal Employers' Liability Acts.[5] The practical effect of this legislation was to give to seamen a cause of action for negligence while abolishing the fellow-servant rule[6] and the defenses of assumption of risk and contributory negligence.[7]

One of the primary problems in dealing with the Jones Act has been the proper ambit of the phrase "any seaman." When a foreign seaman brings an action under the Act for personal injuries sustained aboard a foreign vessel, the court must decide whether American law may or should be applied. Conceivably, in international shipping, a number of nations may be relevantly linked to the transaction. In the landmark decision, *Lauritzen v. Larsen*,[8] the Supreme Court attempted to establish guidelines in determining whether the Jones Act may be applied to the disposition of actions involving foreign contacts.

Justice Jackson began this elaborate opinion by stressing the importance of comity and the need for respecting the laws of other sovereignties. While recognizing that technically the Jones Act "conferred an American right of action" on "any seaman,"[9] he recognized the further necessity of "reconciling our own with foreign interests and in accom-

[2] 46 U.S.C. § 688 (1964).

[3] "The Jones Act was passed for the welfare of *American* seamen." The Magdapur, 3 F. Supp. 971, 973 (S.D.N.Y. 1933) (emphasis added). *See also* The Paula, 91 F.2d 1001, 1003-04 (2d Cir. 1937), *cert. denied*, 302 U.S. 750 (1937). *But see* Arthur v. Compagnie Generale Transatlantique, 72 F.2d 662 (5th Cir. 1934).

[4] Any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the right of trial by jury, and in such action all statutes of the United States modifying or extending the common law right or remedy in cases of personal injury to railway employees shall apply . . . .

46 U.S.C. § 688 (1964).

[5] 45 U.S.C. §§ 51-60 (1964).

[6] The fellow-servant rule holds that the employer is not liable for injuries to an employee caused by the negligence of a fellow employee.

[7] Although after passage of the Jones Act contributory negligence was no bar to recovery in an action against his employer, the rule of comparative negligence was applied, and damages were reduced in proportion to the negligence of the injured seaman. 45 U.S.C. § 53 (1964).

[8] 345 U.S. 571 (1953).

[9] *Id.* at 576.

modating the reach of our own laws to those of other martime nations."[10] The Jones Act was construed "to apply only to areas and transactions in which American law would be considered operative under prevalent doctrines of international law."[11] This caveat was issued for consideration when a choice of law was necessary:

> [I]n dealing with international commerce we cannot be unmindful of the necessity of mutual forbearance if retaliations are to be avoided; nor should we forget that any contact which we hold sufficient to warrant application of our law to a foreign transaction will logically be as strong a warrant for a foreign country to apply its law to an American transaction.[12]

Justice Jackson indicated that the proper way to avoid or resolve the conflicts between competing laws was to ascertain points of contact between the transaction and the governments involved and weigh the significance of these contacts. Seven factors "generally conceded to influence choice of law"[13] were set out along with the weight and significance to be accorded each. They were (1) place of the wrongful act, (2) law of the flag, (3) allegiance or domicile of the injured, (4) allegiance of the defendant shipowner, (5) place of the contract, (6) inaccessibility of foreign forum, and (7) the law of the forum.

Of these factors, it was said that "[p]erhaps the most venerable and universal rule of maritime law . . . is that which gives cardinal importance to the law of the flag."[14] Allowing the law of the ship's flag to govern torts aboard a ship which might pass through numerous jurisdictions and spend much time on the high seas added a dimension of predictability and provided a measure of uniformity. The Court re-emphasized[15] the significance of the flag by holding that the "weight given to the ensign overbears most other connecting events"[16] and it "must prevail unless some heavy counterweight appears."[17]

Despite the emphasis placed on the law of the flag, the Court recognized the prevalence of "flags of convenience":

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[10] *Id.* at 577.
[11] *Id.*
[12] *Id.* at 582.
[13] *Id.* at 583.
[14] *Id.* at 584.
[15] The law of the flag had become settled American doctrine. *See* RESTATEMENT OF CONFLICT OF LAWS §§ 405-06 (1934).
[16] 345 U.S. at 585.
[17] *Id.* at 586.

> [I]t is common knowledge that in recent years a practice has grown, particularly among American shipowners, to avoid stringent shipping laws by seeking foreign registration eagerly offered by some countries. Confronted by such operations, our courts on occasion have pressed beyond the formalities of more or less nominal foreign registration to enforce against American shipowners the obligations which our law places upon them.[18]

When the flag is one of convenience, its significance as a point of contact diminishes, and there is a corresponding increase in the importance of the allegiance of the shipowner.

Recognition of the flag-of-convenience problem by the Supreme Court presaged a liberal trend in the application of the *Lauritzen* factors. It is in dealing with vessels of "convenient" foreign registry that the greatest extension in the application of the Jones Act to foreign seamen has occurred and this is perhaps the area of greatest confusion. A review of the ensuing decisions reveals the state of flux which evolved.

Zielinski v. Empresa Hondurena de Vapores[19] began a series of Jones Act decisions in the prolific, if not always consistent, District Court for the Southern District of New York. A foreign seaman who had been injured aboard a ship of Honduran registry owned by a Honduran company the stock of which was owned by an American company was allowed to sue under the Jones Act. In disregarding the flag of the vessel, the court expressed the belief that effect should be given to the nationality of actual control of the ship. This decision was followed by holdings that American ownership of the stock of the shipowning corporation alone was not enough to justify the application of the Jones Act.[20] *Bobolakis v. Compania Panamena Maritima San Gerassimo, S.A.*[21] then followed, with a decision by the court that "majority ownership and control by Americans of the corporate owner of the vessel represents sufficient contact with the United States to justify the application of the Jones Act,"[22] but cast doubt that the distinction between ownership and control was valid and indicated a belief that American ownership alone was sufficient for the Jones Act to apply. A retreat from this position was indicated in

[18] *Id.* at 587.

[19] 113 F. Supp. 93 (S.D.N.Y. 1953).

[20] Mproumeriotis v. Seacrest Shipping Co., 149 F. Supp. 265 (S.D.N.Y. 1957); Argyros v. Polar Compania De Navegacion, Ltda., 146 F. Supp. 624 (S.D.N.Y. 1956).

[21] 168 F. Supp. 236 (S.D.N.Y. 1958).

[22] *Id.* at 238.

Moutzouris v. National Shipping & Trading Co.[23] in which the court held that American stock ownership of the shipowning corporation, without more, was insufficient for application of the Jones Act.

The Court of Appeals for the Second Circuit had earlier attempted to inject a measure of stability into the application of the *Lauritzen* factors in *Bartholomew v. Universe Tankships, Inc.*[24] Citing the "inherent vagueness" of the *Lauritzen* test, Judge Medina attempted a "restatement of the method of approach and the principles to be applied."[25] He concluded that the test was one of "substantial contacts," and held as substantial, contacts that included remote United States ownership.[26]

The Supreme Court addressed itself to the application of *Lauritzen* in two noteworthy cases. In refusing to apply the Jones Act in *Romero v. International Terminal Operating Co.*,[27] it stressed again the need for respect of the interests of foreign nations and advised the use of "circumspection" when "adjudicating issues inevitably entangled in the conduct of our international relations."[28] Although *McCulloch v. Sociedad Nacional de Marineros de Honduras*[29] did not concern the Jones Act, the issue was whether American law extended to crews on foreign flag vessels that were beneficially owned by a United States corporation. The National Labor Relations Board, using a test relying on the relative weight of American as compared with foreign contacts, had found that the operations involved substantial United States contacts so as to require application of American law. The Court rejected this "balancing of contacts" theory, saying its use could "raise considerable disturbance not only in the field of maritime law but in our international relations as well."[30] Even though the Court pierced the corporate veil and found American owners, application of American law was not allowed. In a footnote, the

[23] 194 F. Supp. 468 (S.D.N.Y. 1961).

[24] 263 F.2d 437 (2d Cir. 1959), *cert. denied*, 359 U.S. 1000 (1959).

[25] *Id.* at 439.

[26] The defendant was a Liberian corporation the stock of which was held by a Panamanian corporation, and citizens of the United States owned all the stock of the Panamanian corporation. In addition, all the officers of the Liberian shipowning corporation were American citizens and the company's principal place of business was in New York City.

[27] 358 U.S. 354 (1959). The *Romero* decision has major significance in areas of admiralty other than choice of law. For a more complete discussion of the case see H. BAER, ADMIRALTY LAW OF THE SUPREME COURT § 5-1, at 104-11 (2d ed. 1969) and Currie, *The Silver Oar and All That: A Study of the Romero Case*, 27 U. CHI. L. REV. 1 (1959).

[28] 358 U.S. at 383.

[29] 372 U.S. 10 (1963).

[30] *Id.* at 19.

Court again stressed the importance of the law of the flag in determining the applicability of the Jones Act.[31] Prompted by this decision, the Second Circuit Court of Appeals in *Tjonaman v. A/S Glittre*[32] reconsidered the "substantial contacts" test it had announced in *Bartholomew*[33] and, noting that this test had been interpreted as limiting the dominating importance of the law of the flag, recognized *McCulloch* as restoring that importance.

This was the development of the law preceding a direct conflict between the Second and Fifth Circuit Courts of Appeals which ultimately led to action by the Supreme Court in *Hellenic Lines Ltd. v. Rhoditis*.[34] *Tsakonites v. Transpacific Carriers Corp.*[35] came before the second circuit in 1966. Following its interpretation of *McCulloch* and its reasoning in *Tjonaman* the court determined that, although the great majority of the stock of the corporation that owned the vessel was owned by a permanent resident alien of the United States who substantially controlled the ship from New York, the flag was not a flag of convenience and its law should prevail. Primary consideration was given to comity and it was noted that "[t]he Supreme Court has given no indication that the law of the flag (when not a flag of convenience) is still not to be considered of paramount importance."[36] Judge Waterman dissented, noting that United States courts do not hesitate to pierce the corporate veil to apply United States law to Americans who have sought to circumvent their responsibility by incorporating and registering their vessels abroad. It was his contention that resident aliens were accorded the same constitutional protections as citizens and enjoyed the considerable benefits of resident alien status and should therefore have imposed upon them the same duties and obligations as citizens.

The facts in *Hellenic Lines Ltd. v. Rhoditis*[37] closely parallel those in *Tsakonites*. The Greek flag vessel on which the injury occurred was owned by a Panamanian corporation[38] that was in turn owned by a Greek corporation operating from a base in New York.[39] Ninety-five per cent

[31] *Id.* n.9.
[32] 340 F.2d 290, 292 (2d Cir. 1965), *cert. denied,* 381 U.S. 925 (1965).
[33] *See* p. 324 *supra.*
[34] 398 U.S. 306 (1970).
[35] 368 F.2d 426 (2d Cir. 1966), *cert. denied,* 386 U.S. 1007 (1967).
[36] *Id.* at 429.
[37] 398 U.S. 306 (1970).
[38] The Panamanian corporation was in reality a holding company with no operational responsibilities in connection with the ship. Hellenic Lines Ltd. v. Rhoditis, 412 F.2d 919, 921 (5th Cir. 1969).
[39] The company's principal office, employing seventy-five, was in New York. An office of fifteen employees was located in New Orleans. *Id.* n.5.

of the stock of the operating corporation was owned by a Greek citizen who had resided in the United States since 1945.[40]

The injured seaman, a Greek citizen, brought an action in the district court and sought recovery under the Jones Act.[41] The court found the American contacts "quite substantial"[42] and held the Jones Act applicable, awarding damages of six thousand dollars.[43] The Fifth Circuit Court of Appeals agreed, finding the flag of the vessel "more symbolic than real."[44] The court recognized that in *Tsakonites* the second circuit "reached a contrary result on identical factors,"[45] but favored the reasoned dissent of Judge Waterman, rejecting outright the majority position.

In light of the developments in the application of the *Lauritzen* test to foreign vessels flying flags of convenience, culminating in the *Tsakonites-Rhoditis* split, the Supreme Court granted Hellenic Lines' petition for certiorari.[46] In a five-to-three[47] decision, the application of the Jones Act by the fifth circuit was affirmed.

Justice Douglas began the opinion by recognizing that the majority of the *Lauritzen* factors operated against Jones Act jurisdiction, but countered by stating that the test was not meant to be mechanical nor the factors exhaustive. The test of "substantial contacts" formulated by the

[40] The owner had become a lawful permanent resident alien in 1952. 398 U.S. at 309.

[41] The suit originated as a libel (complaint) *in rem* against the ship and in personam against Universal Cargo Carriers and Hellenic Lines. After discovering the defendants' substantial United States contacts, Rhoditis successfully moved to have the Jones Act applied. 412 F.2d at 920 n.4. Under the Jones Act, the suit is in personam against the shipowner, and not against the ship itself. Plamals v. S.S. "Pinar Del Rio," 277 U.S. 151 (1928).

[42] In addition to the fact that the controlling corporation was based in New York and owned by a permanent resident alien of the United States, the injury occurred in a United States port and the entire income of the vessel was generated by cargo either originating or terminating in the United States. On the other hand, both the controlling corporation and its owner were in fact Greek, the vessel was registered in Greece, the injured seaman was a citizen of Greece, the contract of employment was signed in Greece and specifically provided that the Greek legal system should be used in settling any claims arising out of the contract, and relief was apparently available in a Greek forum.

[43] Rhoditis v. Hellenic Lines, Ltd., 273 F. Supp. 248 (S.D. Ala. 1967).

[44] Hellenic Lines, Ltd. v. Rhoditis, 412 F.2d 919, 923 (5th Cir. 1969).

[45] *Id.* The resident alien shipowner was the same man in both *Tsakonites* and *Rhoditis*, but the facts of the cases were not completely identical. The variations were minor, however, and apparently of no consequence. *See* Note, *Admiralty—Choice of Law—Jones Act Held Applicable in Action Against Resident Alien Shipowner*, 44 TUL. L. REV. 347, 353 n.34 (1970).

[46] 396 U.S. 1000 (1970).

[47] Chief Justice Burger and Justices Harlan and Stewart dissented, with Justice Harlan authoring the opinion. Justice Douglas wrote for the majority.

second circuit in *Bartholomew*[48] and the addition of "base of operations" as a factor of importance by the court in *Pavlou v. Ocean Traders Marine Corp.*,[49] were cited favorably. The Court's unwillingness to allow the owner a competitive advantage "by allowing him to escape the obligations and responsibility"[50] of the Jones Act echoed Judge Waterman's dissent in *Tsakonites.*

Justice Harlan's dissent expressed a belief that the premises on which *Lauritzen* was founded had been misconstrued by courts "that have taken the phenomenon of 'convenient' foreign registry as a wedge for displacing the law of the flag."[51] The purpose of *Lauritzen* "was to reconcile the all-embracing language of the Jones Act with . . . principles of comity . . . ."[52] It was said that "contacts . . . simply serve as an adequate nexus between this country and defendant to assert jurisdiction in a case where Congressional policy is otherwise furthered," and "have no bearing in themselves on whether Jones Act recovery is appropriate" no matter how "substantial or numerous."[53] Justice Harlan noted that only recently in *McCulloch* the Court had declined to override the law of the flag where there were substantial United States contacts including beneficial ownership of the vessel by a United States company, and that perhaps the courts have become "mesmerized by contacts."[54]

Although the Supreme Court in *Lauritzen* had accorded paramount importance to the law of the flag in determining the applicability of the Jones Act, tacit approval was given to the practice of looking beyond the flag when the foreign registration of the vessel was "more or less nominal."[55] Implementation of this decision has resulted in an increasingly liberal trend in the determination of whether a flag is one of "convenience," and the lack of specific guidelines in making this determinaiton has resulted in confusion in the case law. The need for clarification of what exactly constitutes a "flag of convenience" and positive standards to apply once this determination has been made was obviously indicated by the *Tsakonites-Rhoditis* conflict. The Supreme Court in *Rhoditis* failed to respond to these needs.

Beginning with *Lauritzen,* the Court's repeated emphasis on the law

[48] *See* pp. 324-25 *supra.*
[49] 211 F. Supp. 320, 325 (S.D.N.Y. 1962).
[50] 398 U.S. at 310.
[51] *Id.* at 315.
[52] *Id.* at 318.
[53] *Id.* at 315.
[54] *Id.* at 318.
[55] *See* text accompanying note 18 *supra.*

of the flag established a position heavily relied on by the courts. The treatment in *Rhoditis*, whereby the flag was summarily relegated to a position of insignificance, with no consideration of whether it was real or illusory, undercuts this position. A reassessment of the significance to be accorded this "most venerable"[56] factor was indicated. "Base of operations" was approved as a factor due consideration, but there was no prescription for its application. The Court's inconsistency and failure to respond adequately to the needs revealed by the confused application of *Lauritzen* will do little to order the confusion.

The reasoning that led to the Court's emphasis on respect for the relevant interests of foreign nations and concern that our law should be interpreted consistent with principles of international law in *Lauritzen*, *Romero*, and *McCulloch* is as valid today as when dictated. The decision in *Rhoditis* portends a broadening of the circumstances under which the courts of the United States will permit utilization of the Jones Act by aliens injured in the service of foreign vessels—a trend which could lead to unwarranted consequences. It has been suggested that the "retaliations" by foreign countries warned of in *Lauritzen*[57] are not a threat where the alien shipowner is a resident of the United States,[58] but the court in *Tsakonites* found significant Greek contacts,[59] which Greece has a recognized interest in protecting. Application of American law with its attendant bountiful recoveries could effectively encumber foreign shipping, and the threat of retaliations becomes more than a remote possibility.[60] The United States would look askance at the efforts of any foreign power to impose its law—and thus burden our shipping industry—for the purpose of adjudicating rights between American citizens created by American law.

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[56] *See* text accompanying note 14 *supra*.

[57] *See* text accompanying note 12 *supra*.

[58] Note, *Admiralty—Conflict of Laws—Provisions of Jones Act Applicable So As To Allow Recovery To Alien Seamen Injured In A United States Port On A Foreign Flag Vessel Owned And Controlled By United States Alien Domiciliaries*, 1 ST. MARY'S L.J. 247, 253-54 (1969); Note, 44 TUL. L. REV. 347, *supra* note 45, at 354, suggest that Greece has no interest to protect where the defendant shipowner, though technically a citizen of Greece, is a resident of the United States.

[59] In addition to the fact that the ship was registered in and flew the flag of Greece and the injured plaintiff was a Greek citizen who had signed a contract in Greece limiting his rights to those arising under Greek law, the court noted, *inter alia*, that all the officers and directors as well as all the shareholders of Hellenic Lines were Greek, the company maintained an office in Greece, and the crew and officers of the ship were almost entirely Greek. 368 F.2d at 427-28.

[60] The Royal Greek Government filed a brief in the Supreme Court as Amicus Curiae urging reversal of the fifth circuit's application of the Jones Act.

In the face of the Court's apparent disregard of the law of the flag, extension of the reasoning applied in *Rhoditis* would leave virtually no contact insufficient for the application of American law. Maintenance of a United States office could be the critical factor rendering a legitimate foreign shipper liable under the Jones Act. Foreign shipowners are encouraged to locate their "base of operations" elsewhere, lest they are forced to shoulder a burden they would not otherwise encounter.

Another necessary consequence of this decision is the additional burden the already overcrowded United States courts can look forward to in the way of unnecessary, unwarranted, and ill-advised litigation by foreign seamen attempting to take advantage of the liberal provisions of the Jones Act rather than proceeding in the appropriate foreign jurisdiction. The Supreme Court has held that the Jones Act is "welfare legislation . . . entitled to a liberal construction to accomplish its beneficent purposes."[61] This pronouncement is in line with a trend in admiralty law manifested most recently by the decision in *Rhoditis*. Despite the humanitarianism of this action, reasoned, logical, consistent development of the law is perhaps more to be desired. An examination by the Court, not only of the direction of their decisions in this area, but of the motivating forces behind them might well be in order.[62]

JOHN E. HODGE, JR.

Admiralty—Wrongful Death Action Under General Maritime Law

In *Moragne v. States Marine Lines, Inc.*[1] the Supreme Court of the United States held for the first time that an action will lie under general maritime law for death caused by a violation of maritime duties. In so holding, the court specifically overruled an 1886 decision[2] and took a giant stride toward clearing up what had become a legal morass of anomalies and inequities.

The plaintiff in *Moragne*, alleging both negligence and unseaworthiness, sued in a Florida state court seeking to recover damages from a shipowner for the wrongful death of her husband, a longshoreman, aboard a vessel on navigable waters within the state of Florida. The suit was

[61] *E.g.*, Cosmopolitan Shipping Co. v. McCallister, 337 U.S. 783, 790 (1949).
[62] *See* H. BAER, *supra* note 27, at 192.

[1] 398 U.S. 375 (1970).
[2] The Harrisburg, 119 U.S. 199 (1886).

removed to the United States District Court for the Middle District of Florida which dismissed the unseaworthiness claim but made the necessary certification under 28 U.S.C. § 1292(b)[3] to allow plaintiff an interlocutory appeal to the Court of Appeals for the Fifth Circuit. The court of appeals, under a procedure provided by Florida state law,[4] certified to the Florida Supreme Court the question of whether the Florida wrongful death statute encompassed a cause of action for unseaworthiness. The Florida court answered that question in the negative,[5] and on return of the case to the court of appeals, the order of the district court was affirmed.[6] The Supreme Court of the United States granted certiorari[7] and invited the United States to participate as amicus curiae.[8] Before discussing the court's decision, it will be helpful to first obtain a view of the law of maritime wrongful death as it stood before *Moragne*.

MARITIME WRONGFUL DEATH

Martime Duties Generally

Since ancient times seamen who have been injured or taken sick while in the service of their ship have been entitled to maintenance and cure,[9] which includes living allowance, nursing and medical expenses, and wages until they recover.[10] This remedy is available regardless of the presence or absence of fault, but it provides the seaman with no real compensation—rather it merely sustains him during his recovery.[11]

In seeking a compensatory recovery, however, the seaman may also avail himself of two other grounds: breach of the duty of seaworthiness and breach of the duty of care. The duty of seaworthiness[12] is a develop-

[3] 28 U.S.C. § 1292(b) (1964) provides for the court of appeals to allow, at its discretion, an appeal to be taken from an otherwise not appealable order in a civil action if the district judge states in writing that the order "involves a controlling question of law as to which there is substantial ground for difference of opinion...."

[4] FLA. STAT. ANN. § 25.031 (1970).

[5] Moragne v. States Marine Lines, Inc., 211 So. 2d 161 (Fla. 1968).

[6] Moragne v. States Marine Lines, Inc., 409 F.2d 32 (5th Cir. 1969).

[7] Moragne v. States Marine Lines, Inc., 396 U.S. 900 (1969).

[8] Moragne v. States Marine Lines, Inc., 396 U.S. 952 (1969).

[9] H. BAER, ADMIRALTY LAW OF THE SUPREME COURT § 1-1, at 1 (2d ed. 1969) [hereinafter cited as BAER].

[10] BAER § 1-2, at 6.

[11] BAER § 1-4, at 13.

[12] "Seaworthiness" has been defined as the "absolute nondelegable duty of a shipowner to provide . . . a vessel 'sufficient in all respects for the trade in which it is employed' . . . and to prevent . . . injury [to seamen] by any part of the vessel or equipment used in the ordinary course of their employment." Moragne v. States Marine Lines, Inc., 211 So. 2d 161, 163 (Fla. 1968).

ment of the maritime case law and traces its beginnings back to the late nineteenth century.[13] Since the decision of the Supreme Court in *The Osceola*,[14] the generally accepted view has been that this duty imposes liability absolutely.[15]

The duty of care was of little use to seamen until 1920 because the duty did not extend to injuries suffered from the negligence of members of the ship's company.[16] In 1920, however, this duty was given substance with the enactment by Congress of two statutes: the Jones Act[17] which incorporates part of the Federal Employers Liability Act[18] and gives seamen essentially the same rights against their employers as railroad employees are given against their employers; and the Death on the High Seas Act[19] which provides a more general cause of action for wrongful death caused by "wrongful act, neglect, or default occurring on the high seas beyond a marine league from the shore of any state."

Wrongful Death Actions

At first glance it would seem that, if a person to whom one of these duties is owed were killed as a result of a breach of one of the duties, a wrongful death action would lie against the breaching party. In fact, however, the law on this point before *Moragne* was much more complex. The problem began with the Supreme Court's 1886 decision, *The Harrisburg*,[20] which quite bluntly held that the maritime law does not afford an action for wrongful death in the absence of a statute granting such an action. Between 1886 and 1920 the only recoveries for maritime wrongful deaths were in cases in which the federal courts allowed the application of state wrongful death statutes.[21] Then in 1920 the two previously

[13] Mitchell v. Trawler Racer, Inc., 362 U.S. 539, 544 (1960).

[14] 189 U.S. 158 (1903).

[15] Mitchell v. Trawler Racer, Inc., 362 U.S. 539, 547 (1960).

[16] The Osceola, 189 U.S. 158 (1903).

[17] 46 U.S.C. § 688 (1964). In addition to granting an injured seaman a right to sue for negligence, this act also gives the personal representative of a deceased seaman a cause of action for the seaman's death *if* the seaman died because of the *negligence* of the employer.

[18] 45 U.S.C. §§ 51-60 (1964). "The FELA and the Jones Act impose upon the employer the duty of paying damages when injury to the worker is caused, in whole or in part, by the employer's fault. This fault may consist of a breach of the duty of care, analogous but by no means identical to the general common law duty . . . ." Kernan v. American Dredging Co., 355 U.S. 426, 432 (1958).

[19] 46 U.S.C. §§ 761-68 (1964).

[20] 119 U.S. 199 (1886).

[21] Moragne v. States Marine Lines, Inc., 398 U.S. 375, 393 (1970). *E.g.*, The Hamilton, 207 U.S. 398 (1907) (Delaware wrongful death statute applied where the vessels were owned by Delaware corporations).

mentioned acts were enacted. In addition, all of the states have enacted wrongful death statutes.[22] It has been in the interpretation of rights under these various statutes that the confusion has arisen.

In 1930, ten years after the passage of the two acts, the Supreme Court said, in dictum, that the Jones Act provides the exclusive remedy for the death of a seaman.[23] In 1964, in *Gillespie v. United States Steel Corp.*,[24] the Court, relying on the earlier dictum, arrived at the same conclusion. This would seem to indicate that any recovery for the wrongful death of a seaman must depend upon a showing of negligence. However, in *Kernan v. American Dredging Co.*,[25] the Court inserted a footnote[26] which has been construed by at least three authorities as meaning that unseaworthiness is a basis for recovery under the Death on the High Seas Act.[27] It is clear that the Court in *Moragne* attaches such a meaning to the footnote.[28] Therefore the law as it applied to seamen before *Moragne* apparently was that beyond a marine league from shore, a wrongful death action would lie for unseaworthiness, but that within a marine league recovery would have to rest upon a showing of negligence under the Jones Act.

In construing the rights of land-based workers, however, the Supreme Court has been more generous. In 1926, in a suit by a stevedore against his employer, the Court classified the stevedore as a seaman because he was rendering a "maritime service formerly rendered by the ship's crew."[29] Thus he was allowed to recover under the Jones Act. This holding was amplified twenty years later in *Seas Shipping Co. v. Sieracki*[30] in which the Court allowed an injured stevedore to sue a shipowner on a theory of unseaworthiness despite Justice Frankfurter's dissenting opinion that the duty of seaworthiness is owed only to seagoing crew

[22] 398 U.S. 375, 390 (1970).
[23] Lindgren v. United States, 281 U.S. 38 (1930).
[24] 379 U.S. 148 (1964).
[25] 355 U.S. 426 (1958).
[26] *Id.* at 430 n.4, which states, "Where death occurs beyond a marine league from state shores, the Death on the High Seas Act . . . provides a remedy for wrongful death. Presumably any claims, based on unseaworthiness, for damages accrued prior to the decedent's death would survive, at least if a pertinent state statute is effective to bring about a survival of the seaman's right. . . ."
[27] Moragne v. States Marine Lines, Inc., 398 U.S. 375, 395 (1970); Gillespie v. United States Steel Corp., 379 U.S. 148, 159 (1964) (dissenting opinion by Goldberg, J.); 1 P. EDELMAN, MARITIME INJURY AND DEATH 235 (1960).
[28] 398 U.S. at 395.
[29] International Stevedoring Co. v. Haverty, 272 U.S. 50 (1926).
[30] 328 U.S. 85 (1946).

members because only they are "exposed to the perils of the sea and all the risks of unseaworthiness, with little opportunity to avoid those dangers or to discover and protect themselves from them or to prove who is responsible for the unseaworthiness causing the injury."[31] Since the decision in *Sieracki* the Court has extended the duty of seaworthiness to "an electrician, a ship cleaner, a shoreside watchman, a repairman, a rigger"[32] and others. Two 1959 cases—*The Tungus v. Skovgaard*[33] and *United New York & New Jersey Sandy Hooks Pilots Association v. Halecki*[34]—illustrate the pre-*Moragne* status of the maritime wrongful death law as applied to land-based workers as a result of the preceding line of cases. In *The Tungus* the Court found the New Jersey wrongful death statute broad enough to encompass an action for death caused by unseaworthiness in state waters and, therefore, allowed the survivor of an oil company's maintenance foreman to recover for the foreman's death. There was never any question that a duty of seaworthiness was owed to the decedent. The only argument was whether the duty was contained in state law as the majority claimed,[35] or in federal law (with state law providing a remedy) as the minority claimed.[36] In *Halecki* the Court disallowed a similar suit for recovery for the death of an employee of an electrical concern because the Court found that he was not, under the *Sieracki* rule, one to whom the duty of seaworthiness was owed. The Court restated the test as whether the person involved was doing "work traditionally done by members of the crew."[37] In short, the earlier line of cases established a duty of seaworthiness to certain land-based workers for which a wrongful death recovery could be obtained if the worker met the *Sieracki* test, and if the applicable state wrongful death statute contained the duty of seaworthiness.

In summary, the end result of all of these cases was that recovery for the death of a land-based worker can often be had more easily than a recovery for the death of a seagoing crew member. Justice Goldberg seems to be correct in his criticism of this situation:

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[31] *Id.* at 104.

[32] 1 P. EDELMAN, MARITIME INJURY AND DEATH 177 (1960) (footnotes omitted).

[33] 358 U.S. 588 (1959).

[34] 358 U.S. 613 (1959).

[35] The Tungus v. Skovgaard, 358 U.S. 588, 596 (1959).

[36] *Id.* at 601. (Brennan, Black and Douglas, J.J., and Warren, C.J., concurring in part and dissenting in part).

[37] 358 U.S. at 617.

> [T]he Court today preserves an anomaly in admiralty law which has neither reason nor justification. A seaman who is either injured or killed while on the high seas is given a remedy for either negligence or unseaworthiness, . . . a seaman who is injured in territorial waters may also sue for either negligence or unseaworthiness , . . . an injured seaman may also sue for maintenance and cure and these claims survive his death, . . . a nonseaman's death in territorial waters gives rise to an action based upon the applicable state wrongful death statute for both negligence and the general maritime doctrine of unseaworthiness. . . . Only the family survivors of a seaman are left without a remedy for his death within territorial waters caused by failure to maintain a seaworthy vessel. Only they are denied recourse to this rule of absolute liability and relegated to proof of negligence under the Jones Act. This disparity in treatment has been characterized by the lower federal courts as "deplorable," "anomalous," "archaic," "unnecessary," and "hard to understand." . . . I agree with these characterizations.[38]

The Moragne Decision

Early in the *Moragne* decision the Court concludes that "the primary source of the confusion is not to be found in *The Tungus*, but in *The Harrisburg*, and that the latter decision, somewhat dubious even when rendered, is such an unjustifiable anomaly in the present maritime law that it should no longer be followed."[39] The Court attacks *The Harrisburg* as being quite likely wrong when it was decided.[40] But the real basis of the decision is the Court's determination that developments since *The Harrisburg* have rendered that case invalid.[41] The developments in question are the rejections—partly judicial, but largely legislative—of the old common law policy against recovery for wrongful death; these developments include the adoption by every state and by Congress of statutes allowing wrongful death recoveries.[42] On the basis of these developments the Court concludes that "Congress has given no affirmative indication of an intent to preclude the judicial allowance of a remedy for wrongful death to persons in the situation of this petitioner."[43]

The Court rejected the argument that the Jones Act and the Death

[38] Gillespie v. United States Steel Corp., 379 U.S. 148, 158-59 (1964) (dissenting opinion).
[39] 398 U.S. at 378.
[40] *Id.* at 379-88.
[41] *Id.* at 388.
[42] *Id.* at 390.
[43] *Id.* at 393.

on the High Seas Act preempted the field, concluding that a refusal to recognize a general maritime remedy for wrongful death "would perpetuate three anomalies of present law":[44] (1) "the discrepancy produced whenever the rule of *The Harrisburg* holds sway: within territorial waters, identical conduct violating federal law . . . produces liability if the victim is merely injured, but frequently not if he is killed,"[45] (2) "that identical breaches of the duty to provide a seaworthy ship, resulting in death, produce liability outside the three-mile limit . . . but not within the territorial waters of a State whose local statute excludes unseaworthiness claims,"[46] and (3) "that a true seaman—that is, a member of the ship's company, covered by the Jones Act—is provided no remedy for death caused by unseaworthiness within territorial waters, while a longshoreman . . . does have such a remedy when allowed by state statute."[47]

Accordingly the Court overruled *The Harrisburg*. But in so doing it went beyond the language necessary to decide the case before it and held: "an action does lie under general maritime law for death caused by violation of maritime duties."[48] The Court went to the trouble to append to its decision a footnote which makes it clear that *Gillespie* is no longer good law;[49] in short to specify that the Jones Act shall no longer be the exclusive remedy for the wrongful death of a seaman within territorial waters. The result of the Court's holding seems to be that a breach of *either* maritime duty resulting in *either* injury or death on *either* territorial or non-territorial waters will result in liability. Thus the anomalies and inequities are eliminated, and the only holdover problem from the pre-*Moragne* law is that created by the *Sieracki* line of cases, namely the determination of who is owed these duties.

The Beneficiaries

The Court left open the question as to who should be the beneficiaries for this new right of action.[50] There appear to be four possible schemes of making this determination: (1) that followed by the Death on the High Seas Act which provides damages "for the exclusive benefit of the decedent's wife, husband, parent, child, or dependent relative,"[51] (2) that

[44] *Id.* at 395.
[45] *Id.* at 395.
[46] *Id.* at 395.
[47] *Id.* at 395-96.
[48] *Id.* at 409.
[49] *Id.* at 396 n.12.
[50] *Id.* at 408.
[51] 46 U.S.C. § 761 (1964).

followed by the Jones Act which incorporates the FELA and provides a tightly structured scheme "for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee,"[52] (3) that followed by the Longshoremen's and Harbor Workers' Compensation Act,[53] which provides standardized amounts in the manner of typical workmen's compensation acts, and (4) that followed by an applicable state wrongful death statute. The first three were mentioned by the Court[54] and would seem to be the prime candidates. One of the reasons advanced by the Court in *Moragne* for its decision is the discrepancy between various state laws; and this factor would probably eliminate the fourth possibility. Of the remaining three, the Court appears to lean heavily toward the first, the Death on the High Seas Act:

> It is the congressional enactment that deals specifically and exclusively with actions for wrongful death, and that simply provides a remedy—for deaths on the high seas—for breaches of the duties imposed by maritime law. In contrast, the beneficiary provisions of the Jones Act are applicable only to a specific class of actions—claims by seaman against their employers—based on violations of the special standard of negligence imposed under the Federal Employers' Liability Act. That standard appears to be unlike any imposed by general maritime law. Further, although the Longshoremen's and Harbor Workers' Compensation Act is applicable to longshoremen such as petitioner's late husband, its principles of recovery are wholly foreign to those of general maritime law—like most workmen's compensation laws, it deals only with the responsibilities of employers for death or injury to their employees, and provides standardized amounts of compensation regardless of fault on the part of the employer.
>
> The only one of these statutes that applies not just to a class of workers but to any "person," and that bases liability on conduct violative of general maritime law, is the Death on the High Seas Act. The borrowing of its schedule of beneficiaries, argues the United States, will not only effectuate the expressed congressional preference in this area but will also promote uniformity by ensuring that the beneficiaries will be the same for identical torts, rather than varying with the employment status of the decedent.[55]

[52] 45 U.S.C. § 51 (1964).
[53] 33 U.S.C. §§ 901-50 (1964).
[54] 398 U.S. at 407-08.
[55] *Id.*

Rather than determine the issue, however, the court left it for "further sifting through the lower courts."[56]

Conclusion

Both from the standpoint of providing equitable treatment for all maritime workers and from the standpoint of providing a more uniform body of law in the maritime tort area, there is little question but that *Moragne* is properly decided. The inequity of the pre-*Moragne* law, as pointed out by Justice Goldberg, was so apparent as to be beyond dispute. The only real choices open to the court in eliminating this inequity were to reduce the recovery available to land-based workers so as to bring them into line with seagoing workers, or to extend the recovery available to seagoing workers. In light of recent trends in tort law—not only in maritime law, but also in products liability and other areas—for the Court to have chosen the first alternative would have been to turn back the hands of time. Its commendable choice of the second alternative creates a uniform, equitable and much more easily understandable body of law to replace what had been a totally unsatisfactory morass.

Louis W. Payne, Jr.

Civil Rights—Section 1983 Action Lies for Gross and Culpable Negligence

Section I of the Civil Rights Act of 1871, now 42 United States Code section 1983,[1] in recent years has been relied upon increasingly by individuals seeking redress for alleged deprivations of constitutional rights under color of law. In *Jenkins v. Averett*,[2] the Court of Appeals for the Fourth Circuit has broadened the scope of conduct actionable under this statute. Robert Jenkins, an 18-year-old black youth, was shot by a policeman in the course of a pursuit following a confrontation with some white youths in Asheville, North Carolina. Jenkins brought suit in the United States District Court to recover damages under section 1983, and for

[56] *Id.* at 408.

[1] 42 U.S.C. § 1983 (1964) states:
Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

[2] 424 F.2d 1228 (4th Cir. 1970).

assault and battery under a pendent state claim. While Jenkins claimed that the shooting—resulting in a six-inch hole in his thigh—was intentional, the officer testified that his gun fired accidentally as he returned it to his holster.[3] The district court found that the shooting was not intentional, but did find that the policeman was grossly or culpably negligent. Based on these findings, the court rejected the section 1983 claim but held the defendant liable on the state cause of action.[4]

The court of appeals, in reversing the lower court's decision on the section 1983 claim, held that the defendant's "reckless use of excessive force"[5] amounted to a deprivation of the plaintiff's constitutional right to be free from injuries arbitrarily inflicted by the police.[6] Hence, grossly or culpably negligent police action was found to be sufficiently arbitrary for the purposes of the federal statute.

Although section 1983 is silent as to the type of conduct actionable under its provisions, prior to *Jenkins* no recovery had been allowed for anything less than intentional conduct. Indeed, the District Judge had dimissed the federal claim in *Jenkins* because there was no finding of intent, but allowed the state claim for assault and battery on the principle that gross or culpable negligence, in lieu of intentional conduct, may be actionable in North Carolina.[7] Judge Sobeloff, writing for the majority, reversed the district court and fashioned new federal law by asserting that

[3] The chase took place at night but on lighted streets. The youth ran with an eighteen-inch tire tool stuck down his trousers leg and later held in his hand. The policeman claimed that he thought it was a gun and that as soon as he realized his error, he started to put his pistol away. The youth alleged that the policeman shot him deliberately and that he had taken aim to fire a second time when another policeman arrived, causing the defendant to put his gun away. Jenkins had neither committed a crime nor was he subsequently charged with one.

[4] 424 F.2d at 1231.

[5] *Id.* at 1232.

[6] For examples of police abuse, *see* Screws v. United States, 325 U.S. 91 (1945); Stringer v. Dilger, 313 F.2d 536, 541 (10th Cir. 1963).

[7] The lower court's interpretation of North Carolina law is at best questionable. The North Carolina cases cited by the court of appeals are the following: State v. Eason, 242 N.C. 59, 86 S.E.2d 774 (1955); State v. Agnew, 202 N.C. 755, 164 S.E. 578 (1932); State v. Sudderth, 184 N.C. 753, 114 S.E. 828 (1922). These decisions suggest that such might be the rule in *criminal* actions for assault and battery. While it is not unreasonable to assume that the court might hold similarly in civil actions, it has not done so yet. Only a few jurisdictions have so held: *e.g.*, Lentine v. McAvoy, 105 Conn. 528, 136 A. 76 (1927); Lambrecht v. Schreyer, 129 Minn. 271, 152 N.W. 645 (1915). Some jurisdictions have explicitly said that only intentional acts would support the civil claim: *e.g.*, Murray v. Modoc State Bank, 181 Kan. 642, 313 P.2d 304 (1957). Thus for the majority opinion to call the proposition a "general rule," especially in civil actions in North Carolina, is misleading.

> if intent is required [for recovery under section 1983], it may be supplied, *for federal purposes,* by gross and culpable negligence, just as it was supplied in the common law cause of action.[8]

Presumably then, for future actions under section 1983, the type of conduct involved in *Jenkins*—whether it be labeled as "wanton," "arbitrary," or "reckless"[9]—may be substituted for the supposed requirement of intent.[10]

Jenkins is one of a series of cases that have wrestled to determine the reach of section 1983. The seminal case in the interpretation of the statute's motivational requirements was *Monroe v. Pape*[11] in which the Supreme Court held that one acting under color of state law need not specifically intend a deprivation of a plaintiff's constitutional rights in order to be liable. Thus, it would be sufficient that a defendant intentionally do the *act* which led to a deprivation. Prior to *Monroe,* some courts had required that the defendant should have acted with specific intent. This supposed requirement had been carried over from an earlier Supreme Court decision in *Screws v. United States,*[12] an action based on the criminal counterpart[13] of section 1983, in which specific intent was held to be an essential element. The Court in *Monroe* noted the difference in statutory language; while the criminal statute requires that the defendant *willfully* subject the plaintiff to a deprivation, that term does not appear in the text of section 1983.

Most significant to later interpretations of section 1983 was the observation in *Monroe* that "Section 1979 [now 1983] should be read

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[8] 424 F.2d at 1232 (emphasis added).

[9] "Gross or culpable negligence" is an imprecise term, especially in North Carolina. The court in *Jenkins* seems to use the term as a shorthand expression of several other labels it put on the defendant's conduct: "reckless use of excessive force"; "wanton conduct"; "arbitrary and gross abuse of police power"; and "raw abuse of power." 424 F.2d at 1232.

[10] North Carolina, as noted in *Jenkins,* also holds a policeman liable for criminal assault if he "arbitrarily and grossly abuse[s] the power confided to him." State v. Pugh, 101 N.C. 737, 740, 7 S.E. 757 (1888).

[11] 365 U.S. 167 (1961).

[12] 325 U.S. 91 (1945).

[13] Now 18 U.S.C. § 242 (1964):

> Whoever, under color of any law, statute, ordinance, regulation, or custom, willfully subjects any inhabitant of any State, Territory, or District to the deprivation of any rights, privileges, or immunities secured or protected by the Constitution or laws of the United States, or to different punishments, pains, or penalties, on account of such inhabitant being an alien, or by reason of his color, or race, than are prescribed for the punishment of citizens, shall be fined not more than $1,000 or imprisoned not more than one year, or both; and if death results shall be subject to imprisonment of any term of years or for life.

against the background of tort liability that makes a man responsible for the natural consequences of his actions."[14] The broad language of the Court would appear to authorize a claim for any type conduct recognized under tort law principles—whether the claim be based on intent to do wrong, gross negligence, or simple negligence. The Supreme Court's invitation to expand the grasp of section 1983 has not brought a uniform reaction from the courts. Some seem to have ignored it and looked for different obstacles. Courts have held that the defendant must have acted with a bad motive.[15] But other courts, in the spirit of *Monroe*, have rejected the "bad motive" requirement.[16] In *Joseph v. Rowen*[17] police officers arrested the plaintiff without a search warrant and without probable cause; the plaintiff's claim was allowed under section 1983 even though there was no showing that the police officers had acted malevolently. The court observed that nothing in the statute's language required restriction to bad motive.[18]

Although *Joseph* exemplifies the expansive spirit of *Monroe*, the type of conduct required of the defendant for a valid claim under section 1983 depends upon how broadly the courts are willing to interpret the Supreme Court's mandate. There appears to be a trend in the courts toward requiring less sophisticated states of motivation, and after *Jenkins*, there is precedent for bringing an action based on gross negligence. Arguably, a logical extension of *Monroe* would be to allow recovery on conduct amounting to simple negligence; however, in most cases brought under section 1983, the possibility of negligent deprivation has not been in issue since the acts complained of have been clearly intentional.[19]

Nevertheless, there have been attempts by prisoners in custody of a

[14] Monroe v. Pape, 365 U.S. 167, 187 (1961).

[15] Striker v. Pancher, 317 F.2d 780, 784 (6th Cir. 1963). In Beauregard v. Wingard, 230 F. Supp. 167, 183 (S.D. Cal. 1964), the court stated, "[i]n determining what constitutes lack of 'due process' we think that motive should and does bear heavily in cases under Section 1983, 42 U.S.C.A. where police officers are involved . . . ." *Accord*, Bargainer v. Michal, 233 F. Supp. 270 (N.D. Ohio 1964).

[16] *E.g.*, Whirl v. Kern, 407 F.2d 781 (5th Cir. 1969) (and cases cited at 787).

[17] 402 F.2d 367 (7th Cir. 1968), *overruling* Hardwick v. Hurley, 289 F.2d 529 (7th Cir. 1961).

[18] In those situations where good motive might be a defense to an action under the federal statute, it is a defense only because the analagous comon law tort claim would recognize it. 402 F.2d at 369.

[19] *E.g.*, Stringer v. Dilger, 313 F.2d 536 (10th Cir. 1963) (highway patrolman blackjacked plaintiff after arrest for driving intoxicated); Jackson v. Martin, 261 F. Supp. 902 (N.D. Miss. 1966) (policeman allegedly shot plaintiff maliciously); Brooks v. Moss, 242 F. Supp. 531 (W.D.S.C. 1965) (constable stopped car, assaulted the driver without cause, then arrested him wrongfully).

state to sue under section 1983 for allegedly negligent medical attention.[20] In *Hopkins v. County of Cook*,[21] the court said that mere negligence was not actionable under the statute. The disallowance of claims based upon negligence in the prison situation reflects a judicial policy decision to avoid ensnarlment in suits by prisoners grumbling about the management of their captivities.[22] Although it has been intimated by one court that in extreme circumstances improper care might form a basis for an action under section 1983,[23] it is unclear whether the court would require conduct amounting to gross negligence or only simple negligence coupled with exceptionally shocking results.

A district court has suggested that the logical end to the *Monroe* rationale would indeed be an action founded on simple negligence. Dictum in *Huey v. Barloga*[24] indicates that negligent deprivations of constitutional rights under color of state law *are* actionable under section 1983:

> Section 1983 has been interpreted to provide a new type of tort: the invasion, under color of law, of a citizen's constitutional rights. It is also clear that it is not necessary that this invasion be intentional; it may merely be negligent.[25]

However, no court has yet gone as far as the court in *Huey* suggests is possible. But Judge Bryan, dissenting in *Jenkins*, argues that "given the scope the court now grants it, 1983 would indeed be all-pervasive."[26]

Despite the fears of Judge Bryan, *Jenkins* does not appear to herald the day when claims resulting from simple negligence will be actionable under section 1983. The federal courts are still looking for an intentional act—or something that they consider, for federal purposes, as having the same legal weight. The court in *Jenkins* makes clear that its "concern

[20] Jackson v. Hartford Accident and Indem. Co., 422 F.2d 1272 (8th Cir. 1970) (plaintiff claimed doctor and sheriff had not furnished nonnegligent professional medical and surgical attention); United States *ex rel.* Gittlemackey v. Pennsylvania, 281 F. Supp. 175, 177 (E.D. Pa. 1968) (plaintiff complained of improper medical treatment).

[21] 305 F. Supp. 1011, 1012 (N.D. Ill. 1969). "It is an abuse of the Civil Rights Act to characterize a charge of negligence or malpractice, properly questions of state law, as a violation of constitutional rights."

[22] *E.g.*, Coppinger v. Townsend, 398 F.2d 392, 393 (10th Cir. 1968), in which the court stated that "[t]he internal affairs of prisons, including the discipline, treatment, and care of prisoners are ordinarily the responsibility of the prison administrators and are not subject to judicial review."

[23] Stiltner v. Rhay, 371 F.2d 420, 421 n.3 (9th Cir. 1967).

[24] 277 F. Supp. 864 (N.D. Ill. 1967).

[25] *Id.* at 872.

[26] 424 F.2d at 1235.

. . . is with the raw abuse of power by a police officer . . . and not with simple negligence on the part of a policeman or any other official."[27] The decision to reject section 1983 claims based on simple negligence is not an irrational line drawing. Assuming that the purpose of the statute is punitive and corrective, as well as compensatory,[28] courts are not unreasonable to require that the defendant should have intended to do the act resulting in the deprivation—or at least to have behaved so recklessly or arbitrarily that the courts will view his actions with the same level of indignation heretofore reserved for intentional deprivations. Simple negligence, even when resulting in the deprivation of constitutional rights, does not carry the same weight of culpability.

The *Jenkins* decision turns heavily on the factual situation. The court does not suggest a readily apparent standard for the type of conduct now required for a section 1983 action, other than "gross or culpable negligence"—a particularly imprecise concept. One suspects that the decision is a visceral one—more emotional than objective.[29] Its utility in future litigation will depend upon how readily a future court is shocked by the circumstances of the case then before it.

ELMER LISTON BISHOP, III

Constitutional Law—Exemption of Church Property From Taxation

Since the birth of the nation, Congress and the states have afforded religious organizations a favored status under tax legislation.[1] An important example of that benevolence is the universal practice of exempting from ad valorem taxation property owned by religious organizations and used exclusively for religious purposes.[2] *Walz v. Tax Commission of City*

[27] *Id.* at 1232.

[28] *See* Monroe v. Pape, 365 U.S. 167, 170-87 (1961).

[29] Notice, for example, the considerable space Judge Sobeloff gives to recounting the rather remarkable testimony given at the trial. 424 F.2d at 1230-31.

[1] *See, e.g.*, Stimson, *The Exemption of Churches from Taxation*, 18 TAXES 361 (1940); Zollman, *Tax Exemptions of American Church Property*, 14 MICH. L. REV. 646 (1916); Note, *Constitutionality of the Real Property Church Exemption*, 36 BROOKLYN L. REV. 430 (1970).

[2] A representative provision is N.C. CONST. art. 5, § 5. State constitutional and statutory provisions for the property tax exemptions are collected in Van Alstyne, *Tax Exemption of Church Property*, 20 OHIO ST. L.J. 461 (1959); Note, *The Establishment Dilemma: Exemption of Religiously Used Property*, 4 SUFFOLK L. REV. 533 (1970).

of New York[3] has resolved the much debated issue[4] of whether such exemptions *necessarily* violate the establishment clause of the first amendment.[5] They do not. This note examines *Walz* in terms of its relation to the precedent under the establishment clause, and the impact the decision may have upon the future of that clause.

Appellant Walz[6] sought to enjoin the exemption from ad valorem taxes of property owned by religious organizations and used solely for religious worship, arguing that the exemptions indirectly required him to make a contribution to religious groups. In New York, exemptions for such property, as well as for a broad class of property including nonprofit educational and charitable facilities, are required by a statute[7] implementing a provision of the state constitution.[8]

It is hardly surprising that the Court upheld the New York exemption. Twice before, the Court had been presented the issue on appeals from state court decisions sustaining religious exemptions and had dismissed for want of a substantial federal question.[9] No prior Court decisions holding

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The pecuniary importance of the property exemption is illustrated by the fact that the exempted church property in New York City is valued at 692,000,000 dollars. The revenue gained from taxation of that property at the prevailing fiscal 1969 rate would have been 35,000,000 dollars. N.Y. Times, June 17, 1969, at 1, col. 6.

[3] 397 U.S. 664 (1970).

[4] *E.g.*, Kauper, *The Constitutionality of Tax Exemptions for Religious Activities*, in THE WALL BETWEEN CHURCH AND STATE 95 (D. Oaks ed. 1963); Bittker, *Churches, Taxes and the Constitution*, 78 YALE L.J. 1285 (1969).

[5] U.S. CONST. amend. I provides in pertinent part: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . ."

[6] It is possible that Walz bought his twenty-two by twenty-nine foot Staten Island lot, valued at one hundred dollars and on which the annual property tax is five dollars and twenty-four cents, to qualify as a taxpayer having standing to bring the suit. N.Y. Times, June 20, 1969, at 1, col. 3.

[7] The statute provides in pertinent part:

> Real property owned by a corporation or association organized exclusively for the moral or mental improvement of men and women, or for religious, bible, tract, charitable, benevolent, missionary, hospital, infirmary, educational, public playground, scientific, literary, bar association, medical society, library, patriotic, historical or cemetery purposes . . . and used exclusively for carrying out thereupon one or more of such purposes . . . shall be exempt fom taxation as provided in this section.

N.Y. REAL. PROP. TAX LAW § 420(1) (McKinney Supp. 1970).

[8] N.Y. CONST. art. 16, § 1.

[9] General Fin. Corp. v. Archetto, 93 R.I. 392, 176 A.2d 73 (1961), *appeal dismissed*, 369 U.S. 423 (1962); Lundberg v. County of Alameda, 46 Cal. 2d 644, 298 P.2d 1, *appeal dismissed sub nom.*, Heisey v. County of Alameda, 352 U.S 921 (1956).

legislation unconstitutional were in point. New York had not singled out churches for special treatment, but had included them in a broad class of exemptees.[10] The historical fact of long practice weighed heavily in favor of a constitutional interpretation sustaining the exemption. Possibly, the Court was not unmindful of the vituperative public reaction that followed the school prayer cases[11] and wished to avoid a similar spectacle. Although the decision could be viewed as virtually "preordained," it is nevertheless significant, for in reaching its result the Court rejected some of the earlier establishment clause reasoning, and at the same time retained, expanded, and fashioned some anew.

In *Everson v. Board of Education*[12] the Court transformed the establishment clause from an apparition into a reality when it applied that clause to the states through the fourteenth amendment and yet upheld the practice of reimbursing parents for the costs of transporting their children to public and nonprofit private schools, including sectarian schools. In *Everson* the Court made the classic statement of the establishment clause limitations:

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[10] *See* note 7 *supra*. The breadth and character of the groups afforded preferred treatment could be especially important factual variants. Problems of statutory construction are thoroughly discussed in Van Alstyne, *Tax Exemption of Church Property*, 20 OHIO ST. L.J. 461 (1959).

Of particular interest are the issues of whether the courts may and in what manner they should or must define the term "religious" in the exemption statutes. See Rabin, *When is a Religious Belief Religious: United States v. Seeger and the Scope of Free Exercise*, 51 CORNELL L.Q. 231 (1966); Comment, *Defining Religion: Of God, the Constitution, and the D.A.R.*, 32 U. CHI. L. REV. 533 (1965); Note, *Qualifying for State and Federal Religious Statutory Exemptions*, 1969 U. ILL. L.F. 249.

Must a group whose avowed tenets are atheistic but which otherwise has the characteristics of a church be numbered among the "religious" exemptees? The majority in *Walz* did not speak to the problem. In his concurring opinion in *Walz*, Justice Harlan assumed that the New York statute did extend the exemption to such groups and therefore satisfied the requirement of government neutrality between religion and nonreligion. 397 U.S. at 697. Justice Douglas, the lone dissenter in *Walz*, felt that the statute did not include such groups, resulting in aid to organized believers but denying it to non-believers, whether organized or not, in violation of governmental neutrality. 397 U.S. at 700. Welsh v. United States, 398 U.S. 333 (1970), and Seeger v. United States, 380 U.S. 163 (1965), may have revealed the Court's general approach to this issue. Those cases involved construction of the term "religious training and belief" in the statutory provision for exemption of conscientious objectors from combatant service in the Universal Military Training and Service Act § 6(j), 50 U.S.C. APP. 456(j) (1964).

[11] School Dist. of Abington Township v. Schempp, 374 U.S. 203 (1963); Engel v. Vitale, 370 U.S. 421 (1962). See p. *infra*. For an account of the public reaction to those decisions see Kurland, *The School Prayer Cases*, in THE WALL BETWEEN CHURCH AND STATE 142 (D. Oaks ed. 1963).

[12] 330 U.S. 1 (1947).

> The "establishment of religion" clause of the First Amendment means at least this: Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another. . . . No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called . . . .[13]

Thus the Court settled the long-standing debate over whether the establishment clause was intended to proscribe only governmental preference of one religion over another, or governmental advancement of all religions as well, and couched its interpretation of the clause in absolute language. In keeping with the strict "no aid to religion" principle, the watchwords of early establishment cases were "separation of church and state."[14] In later cases the Court recognized, and in *Walz* it strongly reiterated, that this constitutional goal of separation cannot mean absence of all contact,[15] and the absolute "no aid" principle was abandoned—properly so, it would seem, since such an approach had proved unsuitable in other areas of constitutional law.[16]

Board of Education of Abington Township v. Schempp[17] marked a significant step in the evolution of establishment clause standards. In *Schempp* the Court held that a state may not require readings of Bible verses or recitation of the Lord's Prayer in public schools and restated the establishment clause test as follows:

> [W]hat [is] the purpose and primary effect of the enactment? If either is the advancement or inhibition of religion then the enactment exceeds the scope of legislative power as circumscribed by the Constitution. That is to say that to withstand the strictures of the Establishment

[13] *Id.* at 15-16.

[14] Zorach v. Clauson, 343 U.S. 306, 314 (1952); Everson v. Board of Educ., 330 U.S. 1 (1947).

[15] 397 U.S. at 676.

[16] *E.g.*, in Ogden v. Saunders, 25 U.S. (12 Wheat.) 213 (1827), all but one of the Justices agreed that the contract clause, "No State shall . . . pass any . . . Law impairing the Obligation of Contracts," U.S. CONST. art. I, § 10, imposed an absolute ban. See Hale, *The Supreme Court and the Contract Clause* (pt. 1), 57 HARV. L. REV. 512, 533 (1944). Thereafter, in some cases, the Court engaged in the dubious enterprise of creating state contract law and reading implied conditions into contracts in order to uphold some statutes and yet preserve this absolute principle. *Id.* (pt. 3), 852, 872-73. This awkward position was abandoned, and the modern view puts it "beyond question that the prohibition is not an absolute one and is not to be read with literal exactness like a mathematical formula." City of El Paso v. Simmons, 379 U.S. 497, 508 (1965).

[17] 374 U.S. 203 (1963).

> Clause there must be a secular legislative purpose and a primary effect that neither advances nor inhibits religion.[18]

Under the *Schempp* test, the validity of legislation turned on mere form—the manner in which aid to religion came about, rather than the magnitude of the aid. In *Walz*, the Court did not adopt the *Schempp* test,[19] and once again one may find striking parallels in other areas of constitutional law in which distinctions based on form were ultimately rejected.[20]

In some establishment cases the Court had relied on the secularization of religious institutions to sustain governmental advancement of them.[21] "Blue laws" requiring Sunday closing were upheld upon the Court's finding that although they were originally enacted to serve religion, the prevailing modern use of Sunday justified their continuance to advance the secular state goal of providing a day of recreation and respite from labor.[22] In *Walz* the Court specifically rejected a similar justification of the exemption based on performance of secular social services by churches.[23]

In *Everson*, while admitting that reimbursing parents for the transportation costs helped children get to sectarian schools, the majority of

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[18] *Id.* at 222.

[19] The *Schempp* test was adopted in substantially the same form and applied in the establishment cases decided by the Court after *Schempp* and before *Walz*. See Epperson v. Arkansas, 393 U.S. 97 (1968) (a state may not prohibit the teaching in the public schools of the theory that man evolved from lower orders of life, at least when it is clear that the purpose of the statute is to prevent contradiction of the traditional Biblical account of man's creation); Board of Educ. v. Allen, 392 U.S. 236 (1968) (a state may "lend" secular textbooks to children attending sectarian schools).

[20] *E.g.*, Congressional power under the commerce clause to regulate intrastate activities was once held not to extend to those activities having only an indirect effect on interstate commerce. The Court's view was that "[t]he distinction between a direct and an indirect effect turns, not upon the magnitude of either the cause or the effect, but entirely upon the manner in which the effect has been brought about," and that "[i]t is quite true that rules of law are sometimes qualified by considerations of degree . . . . [b]ut the matter of degree has no bearing upon the question here . . . ." Carter v. Carter Coal Co., 298 U.S. 238, 308 (1936). That view was later rejected; "questions of the power of Congress are not to be decided by reference to any formula which would give controlling force to nomenclature such as . . . 'indirect' and foreclose consideration of the actual effect of the activity . . . ." Wickard v. Filburn, 317 U.S. 111, 120 (1942). Now such an activity may be regulated "if it exerts a substantial economic effect on interstate commerce," regardless of whether that effect is direct or indirect or how local in nature the activity is. *Id.* at 125.

[21] *E.g.*, if sectarian school education had not become secularized, the reimbursement of transportation costs in *Everson* would have taken on the quality of providing transportation to church services.

[22] McGowan v. Maryland, 366 U.S. 420, 444-45 (1961).

[23] 397 U.S. at 674.

five was careful to characterize the aid as being to parents rather than to church schools.[24] In *Board of Education v. Allen*,[25] the Court applied the *Schempp* "purpose and effect" test to uphold the practice of lending textbooks to sectarian school children on "formal request" by the children. The books were chosen by the sectarian schools and approved by public school authorities. In *Allen*, the Court insisted that "[no] books are furnished to parochial schools, and the financial benefit is to parents and children, not to schools."[26] *Walz* recharacterized *Everson* and *Allen* and cited their facts in support of its result; the *Everson* transportation costs and the *Allen* books were said surely to have constituted "aid" to the sponsoring churches, and, in the *Allen* case, relieved "those churches of an enormous aggregate cost for those books."[27] Building on this view, the Court failed to see how the "broader range of police and fire protection given equally to all churches, along with nonprofit hospitals, art galleries, and libraries . . . is different for purposes of the Religion Clauses."[28] Thus it is clear that the Court will not invalidate legislation for the sole reason that it results in very substantial aid to religion, and, accordingly, the Court no longer feels compelled to cover up the fact of that substantial aid by calling it something else.

The Court retained only the skeleton of the establishment clause test that existed prior to *Walz*. In initially defining the limits of governmental power, the Court stated that "[e]ach value judgment under the Religion Clauses must . . . turn on whether particular acts in question are intended to establish or interfere with religious beliefs and practices or have the effect of doing so."[29] This broad and general guideline does not, without more, add significantly to precise consideration of establishment issues, since in that regard it merely begs the question. However, it is noteworthy that the Court framed this test in terms of the "Religion *Clauses*." Discussion on the relationship of the establishment and free exercise clauses is scarce in earlier opinons, but the opinion in *Walz* is replete with references to that relationship[30] and at least indicates that the Court has begun to consider the clauses together.

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[24] 330 U.S. at 18.
[25] 392 U.S. 236 (1968).
[26] *Id.* at 243-44.
[27] 397 U.S. at 671-72.
[28] *Id.* at 671.
[29] *Id.* at 669.
[30] *E.g.*, "The Court has struggled to find a neutral course between the two Religion Clauses, both of which are cast in absolute terms, and either of which, if expanded to a logical extreme, would tend to clash with the other." *Id.* at 668-69.

When the Court applied the "purpose" phase of the test, it found that the purpose of the exemption was neither advancement nor inhibition of religion. Instead, the purpose was said to be simply to spare a broad class of nonprofit organizations, including religious groups, that "foster the moral or mental improvement" of and are beneficial and stabilizing influences in the community from the burden of taxation levied upon private profit institutions.[31]

In applying the "effect" phase of the test, the Court stated it to be "inescapably one of degree." Past decisions have indicated that the establishment clause test is properly one of degree,[32] although that theme was not then developed. Adoption of a degree test seems entirely appropriate, especially when it has proved workable in other areas of constitutional law.[33] Yet after determining that an excessive degree of something is impermissible, the question remains, of what? In *Walz*, the Court answered, "excessive governmental entanglement with religion."[34] Indeed, "entanglement" and "involvement" appear to have become new watchwords.

The Court analyzed the exemption issue by comparing the exemption with the alternative of taxation. Exemption, although resulting in an indirect economic benefit, was said to occasion far less "involvement" by avoiding tax valuation of church property, tax liens, and so forth; furthermore, exemption was not viewed as sponsorship since the state does not transfer part of its funds to the church. Unfortunately, the Court's analysis on this point is obscure. The sort of involvement avoided by the exemption could hardly lead to an establishment of religion; even disregarding the financial burden, the inconvenience to the church caused by the taxation process is much more relevant to the *free exercise clause*. Of course, the free exercise clause can limit the operation of the establish-

[31] *Id.* at 672.

While specifically declining to justify the exemption because of the secular services performed by churches, the Court accepted the New York legislative determination that along with the other exemptees, religious organizations *qua* religious organizations contribute to the secular goals of fostering the "moral or mental improvement" and stabilization of the community. Thus it appears that for the first time in an establishment case the Court has given specific recognition to what Professor Giannella has called a "secularly relevant religious factor," and seems to accept the notion that the advancement of religion per se *always* advances *some* permissible secular goals to some extent. See Giannella, *Religious Liberty, Nonestablishment, and Doctrinal Development*, 81 HARV. L. REV. 513, 528 (1968).

[32] *E.g.*, Zorach v. Clauson, 343 U.S. 306, 314 (1952).

[33] See note 20 *supra*.

[34] 397 U.S. at 674.

ment clause, and has freequently been held to require government to create special exceptions in favor of religion.[35] It is possible and seems probable, that, although it did not specifically so state, the Court was enaging in a balancing of the interference with the "free exercise" of religion that would result from taxation against whatever "establishment" or advancement results from exemption.[36]

It is also possible that the Court has embraced quantitative minimization of church-state involvement[37] as an independent factor in the establishment clause or religion clauses test. It appears from the *Walz* opinion that a statute conditioning tax exemption on performance of secular services by the church would not find favor with the Court.[38] Of course, performance of such services would be a burden on the church, and the imposition of that burden could conceivably run afoul of the free exercise clause. However, the Court's position seems to be that even if the burden of performance was negligible, the application of such a statute to churches would nevertheless be unconstitutional solely because of the church-state involvement precipitated. It is true that such a statute would visit some slight burden on the church due to the inconvenience of documented conformity, but the Court leaves unclear whether it is this consideration or the mere fact of the involvement, the church-state con-

[35] *E.g.*, in Follett v. McCormick, 321 U.S. 573 (1944), the Court held that a town could not impose its license fee for the selling of books on a Jehovah's Witness minister for whom the selling of religious literature was a religious exercise and source of living income.

[36] In other parts of the opinion, the Court did talk in terms of the "Religion *Clauses*." *See* note 30 *supra*. The Court did say that the exemption tends to complement and reinforce the desired separation, but did not clarify whether it is the operation of the free exercise clause that makes the separation desirable in this instance. 397 U.S. at 676.

[37] The phrase "quantitative minimization of church-state involvement" is intended to denote diminution of church-state intercourse and entanglement of the state in activities of the church without regard to its quality, kind, effect, etc. An extreme and absurd example would be denial of police and fire protection to the church because of the "involvement" occasioned by affording the protection.

[38] The Court found it not only unnecessary but also undesirable to justify the exemption on the social welfare service performed by churches. In the Court's words,

> [t]o give emphasis to so variable an aspect of the work of religious bodies would introduce an element of governmental evaluation and standards as to the worth of particular social welfare programs, thus producing a kind of continuing day-to-day relationship which the policy of neutrality seeks to avoid. Hence, the use of a social welfare yardstick as a significant element to qualify for tax exemption could conceivably rise to confrontations that could escalate to constitutional dimensions.

397 U.S. at 674.

tact, that could require condemnation of the statute. Minimization of church-state involvement and entanglement is properly an independent consideration, since even neutral involvement, in which the church is treated neither favorably nor unfavorably because it is the church, may be so direct or intense as to draw the church into the political arena and invite strife and "political division on religious lines."[39] Hopefully, however, the Court is not unwittingly heading towards a reversion culminating with quantitative minimization of church-state involvement as *the* controlling factor. The Court has already rejected quantitative maximization of separation of church and state as the *only* constitutional goal,[40] and should similarly limit the role of this, its obverse.

The "purpose" element of the test seems open to question. A legislative purpose to advance religion is in some instances easily concealed, especially in the tax field. Professor Bittker has pointed out that taxation statutes can be drafted so as to avoid positive exemptions and therefore the use of such words as "religion" as a basis for classification.[41] Other potential problems with the examination of legislative purpose are illustrated by *Zorach v. Clauson*,[42] in which the Court sustained the practice of releasing children from public schools on parental request to attend religious instruction classes without the school grounds. School attendance was otherwise compulsory; those children not leaving the school for religious instruction were required to remain at the school. The Court declared this program to be a permissible state accommodation of its public school schedule to religious activities.[43] If faced with the *Zorach* facts again, although the "effect" of the program is clearly the advancement of religion, the Court could simply hold that it is not such to an unconstitutional degree. But who could deny that the "purpose" of the program is the establishment of religion, or at least the advancement of religion? If the *Zorach* result were to be reached again, it would appear that the Court would either have to strike the purpose inquiry from the test or fashion some sort of degree scale for determining permissible legislative purpose.

[39] "[P]olitical division on religious lines is one of the principal evils that the first amendment sought to forestall." Freund, *Public Aid to Parochial Schools*, 82 HARV. L. REV. 1680, 1692 (1969). In his concurring opinion in *Walz*, Justice Harlan adopted and applied the factor of minimization of church-state involvement as the third element in a tripartite test also imposing "voluntarism" and "neutrality" requirements. 397 U.S. at 695.

[40] See p. 345 *supra*.

[41] Bittker, *Churches, Taxes, and the Constitution*, 78 YALE L.J. 1285, 1293 (1969).

[42] 343 U.S. 306 (1952).

[43] *Id.* at 315.

Perhaps the best means of obviation of these difficulties is also the simplest—elimination of the purpose inquiry. After all, one wonders why even the most fastidious atheist would object to a statute, the admitted purpose of which is the establishment of an official religion, but which is wholly ineffectual to accomplish that result.

Since the Court did not summarily dispose of the exemption issue as it apparently could have,[44] it would seem that it considered *Walz* to be an appropriate vehicle for definitive exposition of its views on the establishment clause. *Walz* does indicate that the Court will use the free exercise clause and a degree test to limit the operation of the establishment clause, especially when the "aid," albeit substantial, is afforded equally to all religions. Adoption of a degree test was an appropriate step towards more refined consideration of establishment issues, but the unfortunate use of church-state "involvement" per se, without clarification, as the measure of the validity of the exemption has not contributed to that goal, and it still remains for the Court to do what it has already said the first amendment does with respect to church-state relations—"studiously [define] the manner, the specific ways, in which there shall be no concert or union or dependency one on the other."[45]

R. B. TUCKER, JR.

Criminal Procedure—Application of the Doctrine of Collateral Estoppel to State Criminal Prosecutions

In *Ashe v. Swenson*[1] the Supreme Court has constitutionally required a variation of the civil law doctrine of collateral estoppel for state criminal trials.[2] The Court defined collateral estoppel as the principle that "when an issue of ultimate fact has once been determined by a valid and final judgment, that issue cannot be litigated between the same parties in any

[44] See p. — & note 9 *supra*.
[45] Zorach v. Clauson, 343 U.S. 306, 312 (1952).

[1] 397 U.S. 436 (1970).
[2] Collateral estoppel, as required in criminal cases is distinguishable in two ways from that traditionally applied in the civil law. First, the requirement of mutuality—that a party cannot benefit from the doctrine unless he would be bound by it if the opposite result had been reached—is not carried over into the criminal law. Second, the general verdict of a criminal trial requires some speculation as to its basis that the special verdict of the civil trial often does not. For a good discussion of the problems of mutuality and the general verdict *see* Note, *Collateral Estoppel in Criminal Cases*, 28 U. CHI. L. REV. 142 (1960).

future lawsuit."[3] This note will explore the justification for, and the ramifications of, the adoption of collateral estoppel as a constitutional requirement in state criminal trials.

Ashe was charged with six separate counts of armed robbery arising out of his alleged participation, with three others, in the armed robbery of six members of a single poker game. Ashe was first tried on one of those counts, for the robbery of one of the victims, and the jury, although not instructed to elaborate on its verdict, found him not guilty by reason of insufficient evidence. The only contested issue at that trial was the identity of Ashe as one of the robbers; and the prosecution witnesses, four of the six victims, gave weak testimony on this point.[4]

Six weeks later Ashe was tried on a second count for the robbery of another of the victims. At this trial the prosecution witnesses gave much stronger testimony,[5] and the jury returned a guilty verdict. The Supreme Court of Missouri affirmed the conviction denying Ashe's plea of former jeopardy;[6] Ashe then brought a federal habeas corpus proceeding. The district court denied the writ,[7] the court of appeals affirmed,[8] and the United States Supreme Court granted certiorari.[9] Justice Stewart, writing the Court's opinion, held that the doctrine of collateral estoppel was inherent in the fifth amendment's guarantee against double jeopardy and, therefore, enforceable against the states.[10] Justice Stewart said that the single issue determined in the first trial was that there was reasonable doubt that Ashe was one of the robbers and that the doctrine of collateral estoppel prevented the state from retrying this issue in the second trial.

In the single dissent Chief Justice Burger argued that collateral estoppel is not inherent in the fifth amendment guarantee against double jeopardy, remarking that if it is, it has eluded judges and justices for

[3] 397 U.S. at 443.

[4] One of the witnesses said Ashe sounded much like one of the robbers, and another identified Ashe by his size and actions. Two of the prosecution witnesses thought there had only been three robbers and were unable to identify Ashe as one of them. *Id.* at 438.

[5] Two witnesses who had been unable to identify Ashe now said his features matched those of one of the robbers. *Id.* at 440.

[6] State v. Ashe, 350 S.W.2d 768 (Mo. 1961).

[7] Ashe v. Swenson, 289 F. Supp. 871 (W.D. Mo. 1967).

[8] Ashe v. Swenson, 399 F.2d 40 (8th Cir. 1968).

[9] Ashe v. Swenson, 393 U.S. 1115 (1969).

[10] 397 U.S. at 445. In Benton v. Maryland, 395 U.S. 784 (1969), the Supreme Court held that the double jeopardy clause of the fifth amendment is enforceable against the states through the fourteenth amendment. In a companion case to *Benton*, North Carolina v. Pearce, 395 U.S. 711 (1969), the Court accorded full retroactivity to the *Benton* doctrine.

two centuries and that collateral estoppel is not applicable in the *Ashe* fact pattern because the basis of the jury's verdict is not readily determinable. The Chief Justice visualized the guesswork required to discern the verdict's basis, when all the court has before it is a general verdict from a jury allowed to reach inconsistent results, as an inherent and fatal weakness in the use of collateral estoppel in criminal trials.

The United States Supreme Court had earlier wrestled with the problem of collateral estoppel in criminal prosecutions both in supervisory review over the federal courts and constitutional review over the state courts.[11] Justice Stewart pointed out in *Ashe* that collateral estoppel is an established principle in federal criminal law.[12] However, when previously confronted with a fact pattern almost identical to that in *Ashe*, the Court had implied in *Hoag v. New Jersey*[13] that collateral estoppel was not a doctrine of constitutional proportions.[14] The Court purported to explain the inconsistency of *Ashe* and *Hoag* by saying, "The doctrine of *Benton* . . . puts the issues in a perspective quite different from that in which the issues were perceived in *Hoag v. New Jersey*. The question is no longer whether collateral estoppel is a requirement of due process, but whether it is a part of the Fifth Amendment's guarantee against double jeopardy."[15]

Justice Stewart cites no authority for the proposition that collateral estoppel is embodied in the fifth amendment guarantee against double jeopardy and dismissed this question by stating, "Whether its [collateral estoppel's] basis was a constitutional one was a question of no more than academic concern until this Court's decision in *Benton v. Maryland*."[16] Indeed, the cases Justice Stewart cited as authority for his statement that collateral estoppel is an established rule of federal law seem to consider

[11] In supervisory review over the federal courts the Supreme Court required collateral estoppel in United States v. Oppenheimer, 242 U.S. 85 (1916), and held it could be used even with a general verdict in Sealfon v. United States, 332 U.S. 575 (1948). The court of appeals held that lack of mutuality would not be a bar to the use of collateral estoppel in United States v. Kramer, 289 F.2d 909 (2d Cir. 1961). In constitutional review over the state courts the Supreme Court refused to require collateral estoppel in Hoag v. New Jersey, 356 U.S. 464 (1958).

[12] 397 U.S. at 443.

[13] 356 U.S. 464 (1958).

[14] The Supreme Court said that "[d]espite its wide employment, we entertain grave doubts whether collateral estoppel can be regarded as a constitutional requirement. Certainly this court has never so held." *Id.* at 471. The decision, however, was based on other grounds.

[15] 397 U.S. at 442.

[16] *Id.* at 446-47 n.10.

collateral estoppel and the fifth amendment guarantee against double jeopardy as separate doctrines. In *United States v. Oppenheimer*[17] the Court said, regarding collateral estoppel, that "the Fifth Amendment was not intended to do away with what in the civil law is a fundamental principle of justice . . . ."[18] In *Sealfon v. United States*[19] the Court granted the petitioner relief on grounds of collateral estoppel after he had abandoned his plea of double jeopardy. This implies a difference in the doctrines. In the other major case cited by Justice Stewart, *United States v. Kramer*,[20] the court also construed the fifth amendment's double jeopardy protection and collateral estoppel as separate doctrines.[21] Thus there is at least some basis for Chief Justice Burger's complaint that the Court is taking a step in constitutional law on no more than a feeling that *retrial of issues* has the same double "run[ning of] the gantlet"[22] effect that the fifth amendment guarantees against for *retrial of offenses.*

In examining the policy considerations involved in deciding whether the Court was correct in adopting collateral estoppel as a requirement for the states, it is important to stress one thing at the outset. The question is not which policy is fairest or most efficacious; but rather it is, in light of our federal system, which policy is required by the Constitution. However, the Court does have considerable leeway in deciding whether collateral estopel is "embodied" in the fifth amendment, and in this light it is important to consider what might influence a decision based on this question.

In *Ashe* the Court wanted to prevent a state prosecutor from using the separate crimes involved in a multiple-victim situation to give the state an advantage over the defendant. Justice Stewart said:

> [The state] treated the first trial as no more than a dry run for the second prosecution: "No doubt the prosecutor felt the state had a provable case on the first charge and, when he lost . . . he refined his

[17] 242 U.S. 85 (1916).
[18] *Id.* at 88.
[19] 332 U.S. 575 (1948).
[20] 289 F.2d 909 (2d Cir. 1961).
[21] Kramer appeals from the District Court's overruling of his contention that the Connecticut judgment barred a later prosecution under the clause of the Fifth Amendment forbidding that "any person be subject for the same offense to be twice put in jeopardy of life or limb," and, alternatively, that it precluded the Government from relitigating issues necessarily determined in the earlier trial. We hold the District Court was right as to the former, wrong as to the latter.
Id. at 912.
[22] 397 U.S. at 465.

> presentation in light of the turn of events at the first trial." But this is precisely what the constitutional guarantee forbids.[23]

Certainly, the prevention of intentional harassment of defendants is a worthwhile objective. To what extent will collateral estoppel achieve this objective? An analysis of the holding in *Ashe* shows that its protection is not as far reaching as it sounds. The Court held that when a defendant has been acquitted of one crime arising from a multiple-victim transaction, and the facts of the case shows the reasons for the jury's decision are unarguably clear,[24] the states will be precluded from relitigation of these previously decided points. From this statement of the holding we can see that collateral estoppel would be of no benefit to a defendant if (a) the first trial resulted in a conviction; (b) the conclusion of the jury could not be readily determined, as would be the case if Ashe had contested the issue of whether a robbery in fact took place as well as whether he was one of the perpetrators of it; or (c) the issue decided in the first trial was not conclusive as to the offense in the second trial. For example, if the first jury had based the acquittal on a finding that nothing was taken from the victim, this would not prevent a second trial on the question of whether anything was taken from a different victim. Also, there are several different types of offenses that can result in multiple crimes, and the protection given to Ashe in the multiple-victim case might not be accorded to a defendant accused of a different type of multiple crime. In a recent case, *United States v. Fusco*,[25] the Court of Appeals for the Seventh Circuit held, citing *Ashe*, that collateral estoppel would apply to prevent subsequent prosecution for crimes distinct in terminology. After Fusco's conviction for theft was reversed on appeal without remand,[26] his subsequent conviction for possession of the stolen goods was reversed because "[t]he ultimate fact of Fusco's involvement . . . already had been determined . . . ."[27] Another area of subsequent prosecutions, one which was mentioned in Justice Brennan's concurring opinion in *Ashe*, was that of subsequent prosecutions for crimes that are separable chronologically. In the celebrated case of *Johnson v. Commonwealth*,[28] seventy-five poker

[23] *Id.* at 447.

[24] The Court found that the reason the jury found Ashe not guilty in the first trial could only have been that they believed he was not one of the participants. *Id.* at 446.

[25] 427 F.2d 361 (7th Cir. 1970).

[26] 398 F.2d 32 (7th Cir. 1968).

[27] 427 F.2d at 363.

[28] 201 Ky. 314, 256 S.W. 388 (1923).

hands were held to be seventy-five separate offenses of gambling. It does not follow that collateral estoppel would be applicable in this situation because one hand of poker may not, due to an absence of betting for example, have reached the statutory level of gambling while the next hand may have.[29]

Justice Brennan, joined by Justices Douglas and Marshall, concurred with Justice Stewart's majority opinion that collateral estoppel should apply but added that the doctrine of double jeopardy alone should bar the subsequent conviction. The fifth amendment provides, in part: "nor shall any person be subject for the *same offense* to be twice put in jeopardy of life or limb . . . ."[30] In determining what constitutes the same offense the Court has looked to the "same evidence" test[31]—if different evidence is required, the offenses are different. Justice Brennan insisted that the "same transaction" test should be substituted and that any crimes arising from a single criminal act, occurrence, episode, or transaction should be treated as the same offense for fifth amendment purposes.[32]

Would Justice Brennan's "same transaction" test go further than the collateral estoppel rule in preventing harassment of defendants by multiple trials? Undoubtedly, yes. If the double jeopardy theory is followed, there could be no subsequent trials when the basis of the jury's first acquittal was unclear or even when the first trial resulted in a conviction. A type of merger would operate because the double jeopardy theory would prevent retrial of any part of the single transaction. Even though the "same transaction" test for double jeopardy would prevent most of the harassment of defendants by multiple trials, there are still valid reasons for opposing its adoption. It is not clear that this rule would work completely to the defendant's advantage. There are certainly situations where the defendant

[29] An interesting area for expansion of collateral estoppel as used in criminal law appears in the multiple-criminal cases. The Supreme Court has said that the lack of mutuality poses no problem for the use of collateral estoppel. 397 U.S. at 443. Does it not follow that it should not have to be the same party pleading the estoppel? If two defendants are charged with auto theft, and the sole issue in the trial of the first was whether the prosecuting witness had given permission to use the car, should not the second defendant be able to rely on an acquittal of the first defendant to estop the state from relitigation of the issue of permission?

[30] U.S. CONST. amend. V (emphasis added).

[31] Blockburger v. United States, 284 U.S. 299, 304 (1932).

[32] 397 U.S. at 453-54. Justice Harlan concurred with the majority opinion in *Ashe* but made the specific reservation that the decision was not to include the adoption of the "same transaction" test advanced by Justice Brennan in his concurring opinion. *Id.* at 448.

would prefer not to have the whole transaction tried in one trial.[33] Society's interest in convicting the guilty also must be weighed. Perhaps we do not want always to force prosecutors to try defendants for multiple crimes in a single trial. The possibility of cross issues and confusion in particularly complex crimes is apparent. The example of a man killing his wife and her paramour in a moment of passion, killing his neighbors because they witnessed the first crime, and killing someone else because he had become insane from all this killing is an unlikely one; but it does show that it is possible for what might be considered a single transaction with only one defendant to have some very complex issues involved.

In considering the equities involved in multiple trials the individualist might point to the freedom of choice on the defendant's part. Essentially, it is the defendant who decides to commit multiple crimes, and viewed from this perspective one might say that he is subjecting himself to the possibility of multiple trials.[34] While the *Ashe* fact pattern does not present a very appealing case for the idea of choice because we view the decision as one of robbing a "game," is it really unfair to require a defendant accused of individually and willfully murdering four bank tellers during a robbery to come to trial four times? Some crimes are essentially more like a single transaction than others. This may be more of an emotional than a rational distinction, but it does seem less unfair to have multiple trials in the bank teller situation than the *Ashe* situation. Also, a problem will arise in defining what is and what is not a "single transaction." If a man is accused of passing five hundred bad checks in the past year, fifty in the past month, ten yesterday, and five in one hour yesterday, there seems to be no rational distinction for calling one part of that series a single transaction and not another. If Justice Brennan wants the

[33] For example, in a trial for rape and robbery, a defendant may well feel that his chances of being acquitted for either of these offenses would be greatly reduced by a decision in the mind of the jury that he was guilty of the other. There also may be a fear on the part of an innocent defendant that a jury, confronted with several counts arising from a single transaction, may compromise by finding him guilty of some and innocent of others. Finally, the defendant may fear that the jury members may harbor the feeling that with all these charges against him, he must have done something.

[34] This analysis is subject to the criticism that it presupposes guilt and does not take into account the plight of the innocent defendant confronted with multiple trials. Indeed, it does allow for hardship on the part of the innocent defendant when there is great evidence against him. However, the requirement of only "proof beyond a reasonable doubt" reflects the belief that a workable system will involve some such hardship. The innocent defendant with less proof against him will probably not be brought to trial a second time simply as a matter of prosecutorial discretion.

defendant to be tried for all crimes known to the prosecutor when the defendant is brought to trial, then the problem of complexity mentioned before will be greatly magnified.

These reasons for opposing the adoption of the "same transaction" test for double jeopardy apply, though with considerably less force, to the adoption of collateral estoppel. It must be remembered, though, that collateral estoppel has considerably less effect in curing the abuse of harassment through multiple trials. However, collateral estoppel has a preventive side that the total cure—the "same transaction" test for double jeopardy—does not need. The prosecutor will be forced to try the defendant for all of the crimes involved in a single transaction because he cannot know beforehand what will result during the first trial. If he first brings the defendant to trial for only one crime in an attempt to feel out the defense and test his approach, he may well be estopped from proving a point vital to his prosecution in the subsequent trial for another of the crimes. Where, heretofore, a multiple-crime transaction has given the prosecutor virtually a free try[35] at the defendant in which he could discover the defenses and polish up his case, at least now the prosecutor knows that further trials may be foreclosed by the doctrine of collateral estoppel.

After consideration of the policies involved, the result in *Ashe* appears to have been the best alternative. The application of collateral estoppel should result in better prepared prosecutions and less harassment of defendants without some of the risks of the almost total exclusion of multiple trials required by the adoption of the "same transaction" test for determining double jeopardy.

BRUCE J. DOWNEY, III

Federal Courts—Choice of Controlling Law in Cases Involving Federally Insured Mortgages

In a recent Ninth Circuit Court of Appeals decision, *United States v. Stadium Apartments, Inc.*,[1] the court held that the Federal Housing

[35] Calling this a free try does, however, ignore the fact that the prosecution has lost the opportunity to get additional punishment for the additional crime; but the common practice of concurrent running of the sentences in an *Ashe* situation combined with the small likelihood that a prosecutor, having secured one conviction, would bring prosecutions on the other crimes minimizes this distinction.

[1] 425 F.2d 358 (9th Cir. 1970).

Authority was not subject to a state redemption statute. Stadium Apartments secured an FHA insured loan from the Prudential Insurance Company; the mortgage included a provision waiving any right to redemption "to the extent permitted by law."[2] Stadium Apartments defaulted, and Prudential assigned the mortgage to the Secretary of Housing and Urban Development who paid Prudential the amount due. The United States secured by default judgment a foreclosure decree that, despite the waiver provision, included a one-year redemption period as provided by Idaho statute. The government appealed, arguing that the waiver of redemption clause should have been upheld.

The court of appeals, finding the applicable law to be federal[3] and the state law regarding redemption not to have been adopted as the federal rule,[4] reversed the portion of the lower court decision providing for a period of redemption.[5] The dissent argued that deep-rooted equitable redemptive rights were being cast aside in an unnecessary intrusion into the legitimate local affairs of the states.[6] While accepting "the assumption that federal law is controlling," the dissent felt that effect should be given "to the pertinent and equitable state law by incorporating it into the federal program."[7]

In deciding which law will apply when faced with a situation similar[8]

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[2] *Id.* at 359.

[3] *Id.* at 360, *citing* United States v. View Crest Garden Apts., Inc., 268 F.2d 380 (9th Cir.), *cert. denied*, 361 U.S. 884 (1959).

[4] 425 F.2d at 367. The court felt that the adoption of the state's definition of first mortgage was for commercial convenience and did not constitute an adoption of the state law regarding the remedy. *Id.* at 361. Further the FHA was not viewed as having adopted the state redemption statute by its regulations. *Id.* at 361-62. Finally the court declined to adopt the local law of redemption itself, citing protection of the federal treasury, need for a uniform policy regarding FHA insured loans, and prevention of administrative cost and difficulty as policy reasons against adoption. *Id.* at 362-67.

[5] *Id.* at 367.

[6] *Id.* at 367-68.

[7] *Id.* at 368. The dissent saw neither controlling precedent nor so great a burden on the FHA in destroying uniformity or threatening the treasury that the state redemption rule should not be adopted by the federal courts. *Id.* at 371.

[8] *See, e.g.*, United States v. Merrick Sponsor Corp., 421 F.2d 1076 (2d Cir. 1970), a recent case in which the court applied federal law to uphold the government's interest in an FHA insured loan despite a contrary state statute. After Merrick Sponsor Corporation defaulted and the mortgage was assigned to the Federal Housing Commissioner, the United States secured a foreclosure decree authorizing a deficiency judgment. The deficiency judgment was awarded on motion by the United States 133 days after the delivery of the deed despite a state statute requiring such a motion to be made within ninety days. *Id.* at 1078. The Second Circuit Court of Appeals affirmed the deficiency judgment, holding the question to be one of federal law under which there was no requirement or suggestion that the

to that in *Stadium Apartments*, the court must face two questions.[9] First, is there authority for federal law to apply? If this is answered in the affirmative, then the second question is reached. Should the federal court adopt the state law as the federal rule?[10] These separate questions have been explicitly acknowledged by some courts.[11] Others, however, have expressly declined to treat the questions separately,[12] leaving it "not clear whether the court must apply state law, or whether it merely chooses the state rule as an acceptable statement of federal law."[13]

In answering the question of whether there is authority for federal law to apply, courts generally look to the constitutional mandate to apply federal law[14] and to the policy embodied in the Rules of Decision Act.[15]

The current line of authority to apply federal law in cases sufficiently involving a federal function is bottomed primarily on *Clearfield Trust Co. v. United States*,[16] in which the rights and duties of the United States on the commercial paper it issues were held to be governed by federal rather than local law.[17] The Court reasoned that "[w]hen the United States disburses its funds or pays its debts, it is exercising a constitutional function or power,"[18] and that "[i]n the absence of an applicable Act

state law be applied as the federal rule. *Id.* at 1078-79. The motion 133 days after the delivery of the deed was not considered "untimely as a matter of federal law." *Id.* at 1079.

[9] *See* Friendly, *In Praise of Erie—and of the New Federal Common Law*, 39 N.Y.U.L. REV. 383, 410 (1964); Mishkin, *The Variousness of "Federal Law": Competence and Discretion in the Choice of National and State Rules for Decision*, 105 U. PA. L. REV. 797, 802, 805 (1957).

[10] "The question of judicial incorporation can only arise in an area which is sufficiently close to a national operation to establish competence in the federal courts to choose the governing law, and yet not so close as clearly to require the application of a single nationwide rule of substance." Mishkin, *supra* note 9, at 805.

[11] *E.g.*, United States v. Sommerville, 324 F.2d 712, 715 n.8 (3d Cir. 1964).

[12] *E.g.*, "Since the federal and the state law are the same we need not decide between them." United States v. Matthews, 244 F.2d 626, 633 (9th Cir. 1957) (concurring opinion).

[13] Comment, *Rules of Decision in Nondiversity Cases*, 69 YALE L.J. 1428, 1442 (1960). *See also* Note, *The Competence of Federal Courts to Formulate Rules of Decision*, 77 HARV. L. REV. 1084, 1099 (1964).

[14] U.S. CONST. art. VI, § 2 (supremacy clause).

[15] 28 U.S.C. § 1652 (1964). "The laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States in cases where they apply."

[16] 318 U.S. 363 (1943).

[17] *Id.* at 366. The extent of the holding in *Clearfield*, however, has been drawn into some doubt. *E.g.*, Bank of America Nat'l Trust & Savings Ass'n v. Parnell, 352 U.S. 29 (1956). Nevertheless it has been applied in the field of federally insured mortgages. *See* cases cited note 22 *infra*.

[18] 318 U.S. at 366.

of Congress it is for the federal courts to fashion the governing rule of law according to their own standards."[19] The principle set down in *Clearfield* was amplified by *United States v. Allegheny County*[20] to include "every acquisition, holding, or disposition of property by the Federal Government,"[21] and was later refined to hold that the source of the law governing the relations between the United States and the parties to a government-insured mortgage to be federal.[22] Other recent circuit court decisions have held that "federal law applies in an action by the United States to foreclose a mortgage insured by and assigned to the FHA."[23] The court in *Stadium Apartments* answered the first question directly and found the applicable law to be federal.[24] In so doing it took a position in accord with the developed law in the area.

After concluding that federal law should apply, the court then turned to the second question of whether the state law was to be the federal rule. In answering this question the court first looked to whether Congress or the federal agency had adopted the state law to further federal policy. The court concluded that the state redemption statutes had not been adopted by the Congress[25] or by the FHA[26] and thus faced the question whether it should adopt judicially the state law as the federal rule. In decisions to reject the local law as the federal rule, attention frequently has been given to the intent of Congress and the policies underlying the particular federal program.[27] The court, in *Stadium Apartments*, inferred from Congress' lack of express adoption of the state law and from the general policies

[19] *Id.* at 367. One commentator maintains that "[t]he enduring contribution of *Clearfield* is its clear establishment of power in the federal courts to select the governing law in matters related to going operations of the national government." Mishkin, *supra* note 9, at 833.

[20] 322 U.S. 174 (1944).

[21] *Id.* at 182.

[22] United States v. View Crest Garden Apts., Inc., 268 F.2d 380, 382 (9th Cir. 1959); *accord*, Clark Inv. Co. v. United States, 364 F.2d 7 (9th Cir. 1966); United States v. Flower Manor, Inc., 344 F.2d 958 (3d Cir. 1965) (per curiam); United States v. Chester Park Apts., Inc., 332 F.2d 1 (8th Cir.), *cert. denied*, 379 U.S. 901 (1964), *rehearing denied*, 380 U.S. 927 (1965). In the area of Farmers Home Administration security agreements, the third circuit held that federal law applied, noting that "[w]hen there is a genuine federal interest, the Constitution or statutes of the United States can be said to 'require' application of federal law." United States v. Sommerville, 324 F.2d 712, 716 n.13 (3d Cir. 1964).

[23] United States v. Walker Park Realty, Inc., 383 F.2d 732, 733 (2d Cir. 1967) (per curiam); *accord*, United States v. Wells, 403 F.2d 596 (5th Cir. 1968).

[24] 425 F.2d at 360.

[25] *Id.* at 361.

[26] *Id.* at 362.

[27] Friendly, *supra* note 9, at 410.

embodied in the national housing program a congressional nonintent to adopt the local law. However, the dissent noted with persuasion that Congress had consistently refused to enact bills that would have achieved the same result as this case.[28]

Another major factor considered by federal courts in formulating a substantive rule rather than adopting the local law is the need for national uniformity in the administration of the program.[29] This test frequently is traced to the concern expressed in *Clearfield* that "application of state law . . . would subject the rights and duties of the United States to exceptional uncertainty."[30] Fearing such uncertainty among the twenty-six states having various post-foreclosure redemption statutes, the court in *Stadium Apartments* argued, "[i]t would be contrary to the teaching of every case we have cited to hold that there is a different federal policy in each state, thus making FHA 'subject to the vagaries of the laws of the several states.' "[31] However, the dissent argued that the decision would render FHA financing less attractive in those states that have redemption statutes and suggested that a lack of uniformity would remain between those states with overriden redemption provisions and those with statutes that protect mortgagors and junior lienors in other ways.[32] Furthermore, the court's position appears weakened by its failure to explain why uniformity of foreclosure proceedings for the FHA by nonallowance of redemption rights is desirable for its own sake. When compared with *Clearfield*, the federal interest in uniformity in *Stadium Apartments* does not appear so great as in the issuance of commercial paper by the government.[33]

Also pertinent in decisions not to adopt the local law is the protection of the federal treasury. The coupling of this concern with that for uni-

[28] 425 F.2d at 372-73.

[29] Note, *Federal Common Law—Married Women's Contracts*, 16 BAYLOR L. REV. 412, 418 (1964).

[30] 318 U.S. at 367. This concern for uniformity is reflected in subsequent decisions which declined to adopt the local law as the federal rule. *E.g.*, United States v. Shimer, 367 U.S. 374, 377 (1961); United States v. Standard Oil Co., 332 U.S. 301, 309 (1947); United States v. Wells, 403 F.2d 596, 597-98 (5th Cir. 1968); United States v. Sommerville, 324 F.2d 712, 714-15 (3d Cir. 1964); United States v. View Crest Garden Apts., Inc., 268 F.2d 380, 382 (9th Cir. 1959).

[31] 425 F.2d at 364.

[32] *Id.* at 369. "Some states provide for a statutory appraisal and prohibit foreclosure for less than a certain percentage of that value, while other states depend on anti-deficiency legislation and upset prices." *Id.* at n.1.

[33] While "a single piece of commercial paper issued by the United States may easily be involved in several transactions in different states," the *Stadium Apartments* situation involves "a single transaction within a single state." *Id.* at 371.

formity generally is traced to *United States v. Standard Oil Co.*,[34] in which the government sued to recover hospital expenses incurred for a soldier who was injured by negligent action of an employee of Standard Oil. The Court held that the relation between persons in the armed services and the government derived from federal sources and declined to adopt the state law[35] that would have denied recovery.[36] In *United States v. View Crest Garden Apartments, Inc.*[37] the court also invoked the principle of protection of the federal treasury to disregard a state law requiring a sufficient showing of cause for the appointment of a receiver in the foreclosure of a mortgage. The court noted that in the government's pursuit of remedies, factors other than commercial convenience come into play.

> Now the federal policy to protect the treasury and to promote the security of federal investment which in turn promotes the prime purpose of the Act—to facilitate the building of homes by the use of federal credit—becomes predominant. Local rules limiting the effectiveness of the remedies available to the United States for breach of a federal duty can not be adopted.[38]

Thus the majority position in *Stadium Apartments* appears strongest in its contention that there is substantial precedent to apply federal law to assure protection of the FHA from loss.[39] However, the dissent saw no reason why the government should not take the risk of redemption since "[t]he very purpose of the entire federal housing program is to provide badly needed housing that could not otherwise exist."[40]

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[34] 332 U.S. 301 (1947).

[35] *Id.* at 305-06.

[36] *Id.* at 304 n.4.

> The question, therefore, is chiefly one of federal fiscal policy, not of special or peculiar concern to the states or their citizens. And because those matters ordinarily are appropriate for uniform national treatment rather than diversified local disposition, as well where Congress has not acted affirmatively as where it has, they are more fittingly determinable by independent federal judicial decision than by reference to varying state policies.

Id. at 311. However the Court felt that the exercise of judicial power to establish a new liability of the employer to the United States would intrude into an area properly in the control of Congress and thus found no liability since Congress had not acted. *Id.* at 316.

[37] 268 F.2d 380 (9th Cir. 1959). The court allowed the appointment of a receiver even though the state standards for appointment had not been met.

[38] *Id.* at 383. Subsequent circuit court decisions have also cited protection of the federal treasury in declining to adopt the local law. *E.g.*, Clark Inv. Co. v. United States, 364 F.2d 7, 9 (9th Cir. 1966); United States v. Sommerville, 324 F.2d 712, 716 (3d Cir. 1964).

[39] 425 F.2d at 362.

[40] *Id.* at 371.

In addition, the financial burden imposed on the FHA by the right of redemption would be no greater than that for any other mortgagee in the state and would not constitute an absolute or permanent frustration of the agency's remedy.

Decisions to adopt local law as the federal rule rest upon other factors, one of which is the traditional role of the states in defining family and property relationships.[41] In *United States v. Yazell*[42] the Supreme Court applied the Texas law of coverture to bar a deficiency judgment for the government on a Small Business Administration loan. The Court asserted that state interests in the field of family and family-property arrangements "should be overridden by the federal courts only where clear and substantial interests of the National Government, which cannot be served consistently with respect for such state interests, will suffer major damage if the state law is applied."[43] While this might have been taken to encourage the adoption of the local law in the area of property, the majority in *Stadium Apartments* distinguished *Yazell* on its language.[44]

A second factor that must be considered is the local nature of the activity. In *Bumb v. United States*[45] the circuit court declined to cast aside the requirements of the California Bulk Sales Statute to sustain a chattel mortgage for the SBA because of the local nature of the transaction.[46] In the *Stadium Apartments* situation the FHA engrafted part of the local system of property relations when it defined first mortgage in terms of the state law. After default it proceeded in a foreclosure action on a given transaction in a single state. The context of the relationship thus appears more local than national in its character.

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[41] Note, 27 U. PITT. L. REV. 712, 714 (1966); *e.g.*, Fink v. O'Neil, 106 U.S. 272 (1882).

[42] 382 U.S. 341 (1966).

[43] *Id.* at 352.

[44] The Court in *Yazell* limited its holding in that "material to the resolution of the issue presented" [whether to apply the Texas law of coverture to a loan from the SBA to a husband and wife] was the fact that the loan was "individually negotiated in painfully particularized detail, and . . . with specific reference to Texas law . . . ." *Id.* at 345-46.

The *Stadium Apartments* dissent, however, relied on *Yazell* in framing its test—"whether the state law can be given effect without either conflicting with federal policy or destroying needed uniformity in the pertinent federal law in its operation within the various states." 425 F.2d at 368 (dissenting opinion).

[45] 276 F.2d 729 (9th Cir. 1960).

[46] *Id.* at 738.

> In acquiring security interests, the Small Business Administration is engaging in local activity and in an essentially local transaction. We are unable to conclude that any federal policy in this case requires us to override the sound and well-established policy of the several states which have a vital interest in the protection of local property rights and local creditor citizens.

A final factor is the perceived intent of the Congress. The court in *United States v. Kramel*[47] considered the adoption of state law to be a "matter of inclusion or exclusion governed by the intent (express or implied) of Congress as suited to the situation in the particular case."[48] As already observed, the apparent intent of Congress in not adopting measures to abridge the local right of redemption militates against the abrogation of the local law in the case of *Stadium Apartments*.[49]

While these factors can suggest a tentative answer to the question whether to adopt state law as the federal rule, they do not exhaust the relevant considerations. Decisions to adopt or not adopt state law have significant impact on the operation of the American federalistic system[50] and should be made in the context of the policies that support that system. One partial solution to the problem of balancing federal interests and state policy is suggested by noting that from the Rules of Decision Act through *Erie Railroad Co. v. Tompkins*[51] there is embodied

> the tacit assumption that legal rights and obligations do not attach to a transaction or occurrence unless a competent lawmaking authority creates them. The act regards the states as the sources of the rights and obligations which govern day-to-day relations except where the Constitution, treaties, or statutes of the United States otherwise require or provide.[52]

If the philosophy of the Rules of Decision Act is applied in answering the second question of whether to adopt the local law as the federal rule, a presumption will arise that the state law is adopted.[53] This presumption could be rebutted by a showing of sufficient federal interest for rejection of the local law as the federal rule. Since the federal law is interstitial in nature, building upon the legal relationships established by the states,[54] the state law becomes the primary basis by which men order much of their everyday affairs.[55] To be able to order their affairs effectively they must

[47] 234 F.2d 577 (8th Cir. 1956). *Kramel* involved conversion of livestock that was included in a chattel mortgage held by the Farmers Home Administration.

[48] *Id.* at 580. "[I]t would require a very clearly expressed intent so to invade a field of control [title to real and personal property] which has always been regarded as peculiarly belonging to the States exclusively." *Id.* at 582-83.

[49] 425 F.2d at 372-73 (dissenting opinion).

[50] Friendly, *supra* note 9, at 422.

[51] 304 U.S. 64 (1938).

[52] Note, *The Competence of Federal Courts to Formulate Rules of Decision*, 77 HARV. L. REV. 1084, 1085 (1964).

[53] Note, *The Federal Common Law*, 82 HARV. L. REV. 1512, 1517 (1969).

[54] H. HART & H. WECHSLER, THE FEDERAL COURTS AND THE FEDERAL SYSTEM 435 (1953) (hereinafter cited as HART & WECHSLER).

[55] *Id.* at 634.

have some degree of certainty in advance about the rules by which they are to conduct their daily business.[56]

In *Stadium Apartments* the court by rejecting the local law of redemption changed a basic premise under which the parties entered into the mortgage agreement. The parties hardly could have been expected to anticipate such a decision since the FHA previously had consented to decrees including provision for redemption rights under the state law.[57] Arguably all parties to future mortgage agreements are now on notice to expect different treatment of the right of redemption in an FHA insured mortgage. However, there remains the burden not only of recognizing two laws of redemption for mortgages executed in the state but also of anticipating in what other areas of mortgage law the previously accepted state law may be cast aside in favor of formulating a federal rule.

Thus the import of this decision is to diminish the certainty of the primary law that constitutes the basic framework of daily life.[58] The implications of this erosion of certainty have been viewed with concern by scholars such as Henry Hart, who observed that "[p]eople repeatedly subjected, like Pavlov's dogs, to two or more inconsistent sets of directions, without means of resolving the inconsistencies, could not fail in the end to react as the dogs did. The society, collectively, would suffer a nervous breakdown."[59] While the decision in *Stadium Apartments* will not in itself precipitate a national nervous breakdown, the extent to which it contradicts the expectation of a party involved renders the law less certain and less able to serve as a guide to conduct.[60]

A final consideration is the impact that decisions not to adopt the state law and to formulate a federal rule may have on the already overloaded docket of the federal courts, and consequently on the courts' efficiency and clarity of decision. Each decision to reject state law and to formulate a federal rule brings another issue into the federal courts, which may require further explanation by the lower courts or consideration by the Supreme Court if the desired uniformity of federal rule is to be achieved among all the circuit courts. Yet Judge Friendly has noted that the nation's judicial business has grown "far beyond the capacity of any single court

[56] Hart, *The Relations Between State and Federal Law*, 54 COLUM. L. REV. 489 (1954). *See also* HART & WECHSLER 634.

[57] United States v. Stadium Apts., Inc., 425 F.2d 358, 360 (9th Cir. 1970).

[58] Hart, *supra* note 56, at 491.

[59] *Id.* at 489.

[60] Comment, *Rules of Decision in Nondiversity Cases*, 69 YALE L.J. 1428, 1445 (1960).

to preserve uniformity by the force of example."[61] Thus a decision to reject the state law as the federal rule induces confusion regarding the primary rules of conduct in two ways: first, by posing two laws on the same subject and raising doubts about the viability of other state rules; and second, by injecting imprecision through hurried opinions and conflicting decisions among the circuits.

When, as in *Stadium Apartments*, a court chooses to reject the state law as the federal rule, it should face squarely the impact of that decision on the certainty and clarity of its guides to future conduct, especially in an area such as the law of property where the state law is widely presumed to apply and in fact is applied to govern the relations of the parties. The local rule should be rejected only when a sufficient federal interest warrants intrusion into the traditional ambit of the local guides to conduct and the resulting confusion for those who rely on them to plan their future transactions is justified. In *Stadium Apartments* the consequences to the federal system were not confronted directly nor was there an adequate showing of the requisite federal interest to warrant the result obtained.

KENNETH C. DAY

Federal Jurisdiction—Derivative Jurisdiction Upon Removal

"[P]rompt, economical, and sound administration of justice depends upon definite and finally accepted principles governing important areas of litigation, such as the respective jurisdictions of federal and state courts . . . ."[1] One such principle is derivative jurisdiction in the removal area; title 28, United States Code, section 1441[2] allows removal at de-

[61] Friendly, *supra* note 9, at 405. *See also* Mishkin, *The Federal "Question" in the District Courts*, 53 COLUM. L. REV. 157, 158 (1953).

[1] American Fire and Cas. Co. v. Finn, 341 U.S. 6, 8 (1951). Defendant, who had removed on grounds of diversity, lost on the merits in federal court. On appeal he asked that the case be remanded because of jurisdictional shortcomings, and the Court in an opinion written by Justice Reed granted his request, feeling that the ends of justice would be better served through strict enforcement of jurisdictional requirements.

[2] The text of 28 U.S.C. § 1441 (1964) concerns actions removable generally:

(a) Except as otherwise expressly provided by Act of Congress, any civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant . . . to the district court of the United States for the district and division embracing the place where such action is pending.

(b) Any civil action of which the district courts have original jurisdiction founded on a claim or right arising under the Constitution, treaties or laws

fendant's urging of any case from state court into federal court, provided that the federal court had original jurisdiction.[3] However, the federal court also inquires into the jurisdiction of the court from which the case is removed. When jurisdiction is concurrent, Congress may have designated certain types of state courts as the only appropriate state forums, and thus the federal court's inquiry will focus on this conformity.[4] When jurisdiction is exclusively federal, the court must look to the subject matter of the action to determine whether it is within the realm of the exclusive jurisdiction, in which event no state court would be a proper forum. In any case, the jurisdiction of the federal court upon removal is derivative in nature.[5]

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of the United States shall be removable without regard to the citizenship or residence of the parties. Any other such action shall be removable only if none of the parties in interest properly joined and served as defendants is a citizen of the State in which such action is brought.

(c) Whenever a separate and independent claim or cause of action, which would be removable if sued upon alone, is joined with one or more otherwise non-removable claims or causes of action, the entire case may be removed and the district court may determine all issues therein, or, in its discretion, may remand all matters not otherwise within its original jurisdiction.

[3] Jurisdiction normally breaks down into two areas, jurisdiction over person and jurisdiction over subject matter. Of the two, jurisdiction over subject matter is the more important and is the topic of the text. Jurisdiction over person may be waived either explicitly or implicitly by the parties, but jurisdiction over subject matter cannot be. The federal courts strive not to let technical imperfections in service of process interfere with hearing the case on the merits. See FED. R. CIV. P. 4(h). On the other hand a federal court will take cognizance of a lack of subject matter jurisdiction on its own motion and will dismiss the case. Louisville & N.R.R. v. Mottley, 211 U.S. 149, 152 (1908).

[4] *E.g.*, Beckman v. Graves, 360 F.2d 148 (10th Cir. 1966). A farmer commenced action in a Kansas county court to review the wheat marketing quota imposed on him by his local committee pursuant to the Agricultural Adjustment Act of 1938. Defendant agricultural agent removed to federal district court where the action was dismissed for lack of jurisdiction. Such action would have been properly brought if filed in any state court having *general jurisdiction*, but in Kansas the state district courts are courts of general jurisdiction while the county courts are courts of limited jurisdiction. Since the action was instituted in the improper state court, the circuit court affirmed the dismissal.

[5] Lambert Run Coal Co. v. Baltimore & O.R.R., 258 U.S. 377 (1922); *accord*, Freeman v. Bee Machine Co., 319 U.S. 448 (1943). The theory of derivative jurisdiction is not limited solely to the federal removal area. It has been applied in state systems of justice, which rely on a dual judiciary. For instance, formerly in North Carolina, justice of the peace courts had concurrent jurisdiction with superior court on claims of less than $200. Appeal from the justice's court was to the superior court and invoked a trial de novo. Even though the superior court had original jurisdiction, the appeal would be dismissed if the justice of the peace court had no jurisdiction since jurisdiction was entirely derivative. Hopkins v. Barnhardt, 223 N.C. 617, 27 S.E.2d 732 (1943). The recent reorganization of the courts, resulting in a unitary system, should eradicate the doctrine in North Carolina. N.C. GEN. STAT. § 7A-4 (1969).

Leesona Corp. v. Concordia Manufacturing Co.[6] is a recent federal district court case illustrative of this doctrine. Leesona owned patents which it licensed to certain manufacturers. One of the licensees, Kayser-Roth Corporation, became concerned about the validity of the patents and defaulted on a royalty payment. Prior experience had revealed to Leesona that when one licensee defaulted on payments the remaining licensees discontinued payments also, pending settlement of the initial dispute. Accordingly Leesona waged simultaneous suits in the Rhode Island courts with Kayser-Roth to recover damages for contract violation, and with some sixty other licensees to determine the rights of the parties in order to prevent default on payments. Leesona took a voluntary dismissal as to the contracts action and then added Kayser-Roth as a defendant to the second suit for construction of the contracts and declaration as to the validity of the patents. The defendants removed to federal district court in Rhode Island, and there offered five grounds for dismissal, one of which was lack of subject matter jurisdiction. The defendants argued that since suits concerning patent validity are to be tried exclusively in the federal courts,[7] the state court did not have original jurisdiction over the suit; thus the federal court acquired none on removal. The court ruled that indeed this was a suit designed primarily to test patent validity, not one merely construing licensing agreements, and granted the motions to dismiss.[8]

Leesona sharply outlines the paradox inherent in the derivative jurisdiction doctrine. When jurisdiction over a particular suit is *exclusively* vested in the federal courts,[9] and the suit is filed in a state court and then removed, the federal court will not entertain the cause of action for lack of jurisdiction. Since dismissal is without prejudice, the plaintiff may return the next day and file his suit in the court that had previously dismissed it.[10] The aim of this note is to explore the origin and development of the doctrine and to assess the utility of its application in this context.

The earliest indication of the doctrine's existence appears in a rarely

[6] 312 F. Supp. 392 (D.R.I. 1970).
[7] 28 U.S.C. § 1338 (1964).
[8] 312 F. Supp. at 397.
[9] Some of the areas of exclusive jurisdiction are the following: admiralty and maritime jurisdiction; bankruptcy proceedings; copyright cases; and special areas such as litigation of ICC orders, federal antitrust actions, and federal tort claims. See C. WRIGHT, LAW OF FEDERAL COURTS § 10 (2d ed. 1970).
[10] For possible statute of limitations problems which plaintiff might encounter see pp. 372-73 and notes 26-29 *infra*.

cited dictum of *Martin v. Hunter's Lessee*[11] stating that the power of removal is not strictly an exercise of original jurisdiction, but presupposes that original jurisdiction has attached in the state court.[12] Aside from this rather dubious beginning there are two other recognizable sources of the doctrine. One is in a technical reading of the removal statute—more specifically the interpretation of the word "suit,"[13] which appeared in place of the term "civil action"[14] in earlier versions of the statute. Simply put, a controversy is not a suit unless it is instituted in a court of competent jurisdiciton. Hence a controversy being litigated in a state court having improper jurisdiction never attains the status of a suit—a status necessary if the requirements of the removal statute are to be met.[15] Another source frames itself in this obvious tautology: Any defense available in the state court is available in the federal court after removal; the rights of the parties are not changed by removal.[16] In logical pursuit of this concept, any claim of improper jurisdiction of the state court may be revived after removal.

The Supreme Court in two 1922 opinions carefully defined the derivative jurisdiction of the federal courts upon removal.[17] Preceding

[11] 14 U.S. (1 Wheat.) 304 (1816).

[12] This power of removal is not to be found in express terms in any part of the constitution; if it be given, it is only given by implication, as a power necessary and proper to carry into effect some express power. The power of removal is certainly not, in strictness of language [an exercise of original jurisdiction]; it presupposes an exercise of original jurisdiction to have attached elsewhere.

Id. at 349 (the bracketed portion does not appear in the United States Reports but does appear in 4 L. Ed. 97, 108 (1816)).

[13] *E.g.*, the Judiciary Act of March 3, 1887, ch. 373, § 2, 24 Stat. 553:

any *suit* of a civil nature . . . of which the circuit courts of the United States are given original jurisdiction, which now may be pending, or which may hereafter be brought, in any State court, may be removed by the defendant . . . to the circuit court of the United States for the proper district. (emphasis added)

[14] 28 U.S.C. § 1441 (1964), the text of which appears in note 2 *supra*.

[15] Upshur County v. Rich, 135 U.S. 467 (1890); Fidelity Trust Co. v. Gill Car Co., 25 F. 737 (C.C.S.D. Ohio 1885).

[16] *Compare* Davis v. Gray, 83 U.S. (16 Wall.) 203 (1872) *with* Wabash W. Ry. v. Brow, 164 U.S. 271 (1896) *and* Cain v. Commercial Publishing Co., 232 U.S. 124 (1914). Possibly the earliest indication of availability of all state defenses was in Gier v. Gregg, 10 F. Cas. 339 (No. 5406) (C.C.D. Ill. 1847): "The case, when removed from the state court to the circuit court of the United States, stands in the latter court as it stood in the former, before the removal." *Id.*

[17] The doctrine was already established in the lower courts. R.J. Darnell, Inc. v. Illinois Cent. R.R., 190 F. 656 (C.C.W.D. Tenn. 1911). *See* Sheldon v. Wabash R.R., 105 F. 785 (C.C.N.D. Ill. 1900); Auracher v. Omaha & St. L.R.R., 102 F. 1 (C.C.S.D. Iowa 1900); Swift v. Philadelphia & R.R.R., 58 F. 858 (C.C.N.D. Ill. 1893).

decisions had indicated the way,[18] but *Lambert Run Coal Co. v. Baltimore & Ohio Railroad*[19] and *General Investment Co. v. Lake Shore & Michigan Southern Railway*[20] firmly established the doctrine. In *Lambert* the plaintiff coal company filed suit in the state court to enjoin the railroad from following certain rules of railroad car distribution prescribed by the Interstate Commerce Commission. The defendant removed to federal district court which granted the injunction. The Supreme Court affirmed the circuit court's reversal of this decision and noted that the suit should have been dismissed for want of jurisdiction, since review of ICC orders is to occur exclusively in the federal courts.[21] The plaintiff in *General Investment* sought to enjoin the merger of defendant railroads on the grounds that such merger violated the Sherman and Clayton Antitrust Acts. The defendants removed from the state court into federal district court and asked for dismissal for lack of jurisdiction. The Supreme Court ruled that the suit was properly dismissed.[22] Again Congress had provided exclusive jurisdiction for federal courts over private suits filed under these antitrust acts.[23]

In both *Lambert* and *General Investment* the federal court could have properly entertained the actions if they had originally been brought there. Since they had arrived via removal they were treated to the peculiar twist exerted by the derivative jurisdiction doctrine—dismissal. The stance of the Supreme Court has remained unchanged on this problem,[24] and the unswerving dedication of the lower federal courts[25] to the precedent established in *Lambert* and *General Investment* indicates their reluctance to depart judicially from the doctrine.

The primary justification for retention of the doctrine in its strictest application is that it is a definite and accepted principle helping to define the important area of subject matter jurisdiction. Thus it gives incentive

[18] American Well Works Co. v. Layne & Bowler Co., 241 U.S. 257 (1916); DeLima v. Bidwell, 182 U.S. 1 (1901).

[19] 258 U.S. 377 (1922).

[20] 260 U.S. 261 (1922).

[21] Act of Oct. 22, 1913, ch. 32, 38 Stat. 219, currently embodied in 28 U.S.C. § 2321 (1964).

[22] 260 U.S. at 288: "When a cause is removed from a state court into a federal court the latter takes it as it stood in the former. A want of jurisdiction in the state court is not cured by the removal, but may be asserted after it is consummated."

[23] *See* Clayton Act, Act of Oct. 15, 1914, ch. 323, § 4, 38 Stat. 731, currently embodied in 15 U.S.C. § 15 (1964).

[24] *See* Freeman v. Bee Machine Co., 319 U.S. 448 (1943); Minnesota v. United States, 305 U.S. 382 (1939).

[25] Martinez v. Seaton, 285 F.2d 587 (10th Cir. 1961); Keay v. Eastern Air Lines, Inc., 267 F. Supp. 77 (D. Mass. 1967).

to plaintiffs' lawyers to file their complaints in the proper forum initially. Yet in the early stages of a suit the issues may not be in sharp focus, and it is often difficult for the lawyer to select the proper court. In *Leesona* the plaintiff wanted its large number of licensees to continue to abide by the contracts, which in turn depended on the validity of the patents. In order to file suit in the proper forum, Leesona's lawyer had to decide whether the action sounded in contract or in patent law. Since he was mistaken in his choice, the case was dismissed despite its subsequent removal into the correct forum. There are harsher blows than dismissal without prejudice, but such a ruling is nonetheless costly to the plaintiff whose lawyer has expended considerable time and effort in futile argument.

If the plaintiff wishes to reinstitute proceedings in federal court, he immediately encounters a possible statute of limitations problem. Although 28 U.S.C. § 1446(e) (1964) provides that after removal the state court "shall proceed no further unless and until the case is remanded" and thus presumably[26] tolls any statute of limitations where the state courts are concerned,[27] it does not follow that this has effect where jurisdiction is exclusively federal. In this case the federal cause of action is governed by a federal statute of limitations, either specified by Congress or incorporated into federal law from state law as a matter of policy.[28] Since a dismissal for lack of subject matter jurisdiction would seemingly designate all proceedings thus far a nullity, then the appropriate statute of limitations would not have been tolled,[29] and if the time limit has run before the

[26] This presumption arises because plaintiff is prevented from renewing his efforts in the state court, notwithstanding that he intends to proceed in a correct manner, until the federal court remands or dismisses. Thus, in State Hwy & Pub. Works Comm'n v. Diamond S.S. Transp. Corp., 226 N.C. 371, 378-79, 38 S.E.2d 214, 219 (1946), where plaintiff was enjoined by federal court from proceeding except in that jurisdiction and later had his suit dismissed for lack of subject matter jurisdiction, he was not barred by the statute of limitations from now proceeding in state court. A federal statute enjoining proceedings in the state court would seem to have equal if not greater weight than a court order.

[27] Thus in the fact situation of Beckman v. Graves, 360 F.2d 148 (10th Cir. 1966), plaintiff could return to a state court of general jurisdiction in Kansas, confident that in the interval between removal and eventual dismissal in federal court the statute was tolled.

[28] See 2 J. MOORE, FEDERAL PRACTICE ¶ 3.07[2] (1970).

[29] Black v. City Nat'l Bank & Trust Co., 321 S.W.2d 477, 479 (Mo.), *cert. denied*, 360 U.S. 920 (1959). This would not necessarily be true if the appropriate statute of limitations has a "saving" clause whcih extends the time period in the event that plaintiff's complaint is dismissed or nonsuited before receiving a hearing on the merits. Factor v. Carson, Pirie Scott & Co., 393 F.2d 141 (7th Cir. 1968); Lowry v. International Bhd. of Boilermakers, 220 F.2d 546 (5th Cir. 1955); Johnson v. United States, 68 F.2d 588 (9th Cir. 1934). A recent decision has held a statute of

plaintiff refiles, his cause of action could very easily have been cut off by the statute.

Assuming that the statute of limitations has not run, then a new complaint must be drawn and filed with the accompanying lost office time and recurring annoyances such as filing fees[30] and service of process. In *Leesona*, though an extreme example, there were some sixty defendants who would have to be reached through methods of process available in Rhode Island, entailing several hundred dollars in cost. The defendants, while victorious in the tactical maneuvering, have won only a Pyrrhic victory if the statute has not run and the plaintiff refiles since they face corresponding expenses.

After refiling, the suit most likely will be placed towards the rear of the court calendar. This delay when coupled with the loss of time caused by removal, the dismissal arguments, and any wait plaintiff might have taken before refiling means that a substantial period of time will have passed before the merits of the controversy are reached. As a consequence, evidence may be lost and witnesses may leave the jurisdiction or even die. Furthermore it is axiomatic that an extended lapse of time decreases the trustworthiness of oral testimony. The real danger is that the case will become so stale that the true merits are never discovered adding credence to Gladstone's maxim that "justice delayed is justice denied."[31]

The federal court system also has an interest in the refiling of a suit after dismissal; the courts are over-burdened with litigation, and court time is at a premium. A significant contribution to efficiency in the federal district courts was made by the implementation of the Federal Rules of Civil Procedure. Promulgated by the Supreme Court, the rules are to be construed "to secure the just, speedy, and inexpensive determination of every action."[32] In view of this objective a contradiction bordering on the absurd exists in a federal system of justice which so rigidly adheres to the doctrine of derivative jurisdiction. For a plaintiff who pursues his claim, the likelihood is that the final determination will have been anything but just, speedy, and inexpensive.

Conflict has occurred at least once between the policies underlying the

limitations tolled where federal court had jurisdiction but dismissed on grounds of improper venue. Burnett v. New York Cent. R.R., 380 U.S. 424 (1965).

[30] The filing fee for civil actions in the federal district courts in North Carolina is fifteen dollars.

[31] As quoted in France, *Judicial Reorganization—A Solution to Congestion*, 68 DICK. L. REV. 143 (1964).

[32] FED. R. CIV. P. 1.

new rules and those behind derivative jurisdiction. In *Freeman v. Bee Machine Co.*[33] the defendant removed a breach of contract action into federal district court. The plaintiff promptly moved to amend in order to add a Clayton Act claim for treble damages over which the federal courts have exclusive jurisdiction. Based on the theory of derivative jurisdiction, district courts had not previously allowed such joinder,[34] and the plaintiff's motion was accordingly denied. The circuit court reversed, and the Supreme Court affirmed on the ground that Congress had provided that a properly removed suit should be treated as though it had been originally commenced in district court.[35] Thus the federal rules controlled, notwithstanding that such amendment would not have been allowed in the state court.[36] This approach is an effective circumvention of the principle of derivative jurisdiction in the interests of judicial economy—the policy underpinning the liberal joinder of claims.

Freeman marks the limits of progress made by the courts in undercutting the derivative jurisdiction doctrine. In view of this judicial reluctance, the American Law Institute has proposed the abolition of the doctrine through act of Congress.[37] Under the ALI provisions, a suit within the exclusive jurisdiction of the federal courts, mistakenly commenced in the state courts, will not be dismissed upon removal for want of jurisdiction but will be retained as having been properly removed.[38] Presumably, under these proposals speculation on the impact of a federal statute of limitations would become moot since the plaintiff is spared the unnecessary act of refiling.

In a dual judicial system, uncertainty in the area of original and concurrent jurisdiction will persist. Yet when the plaintiff in good faith selects a state court and the defendant removes, for the federal court to dismiss on the ground that it is the court of original jurisdiction is to exalt form over substance. Among commentators who have addressed themselves to the problem, Professors Moore[39] and Wright[40] have expressed distaste for this peculiar application of the doctrine. A correction certainly

[33] 319 U.S. 448 (1943).
[34] Carroll v. Warner Bros. Pictures, Inc., 20 F. Supp. 405, 408 (S.D.N.Y. 1937).
[35] Act of Mar. 3, 1911, ch. 231, § 38, 36 Stat. 1098.
[36] 319 U.S. at 452.
[37] ALI STUDY OF THE DIVISION OF JURISDICTION BETWEEN STATE AND FEDERAL COURTS §§ 1312(d), 1317(b), & 1382(e) (1969).
[38] *Id.* Commentary to § 1312(d), at 206-207.
[39] 1A J. MOORE, FEDERAL PRACTICE ¶ 0.157(3), at 86 (1965).
[40] WRIGHT, note 8 *supra*, at § 38.

is in order, whether it be through judicial reconstruction of the removal statute with an eye toward policy considerations prominent in this day, or through act of Congress.

JOHN WOODWARD DEES

Income Taxation—Nondeductibility of Appraisal Litigation Expenses

In two recent decisions, the United States Supreme Court ruled that litigation expenses incurred by either individual stockholders[1] or a corporation[2] in a statutory appraisal proceeding to value shares of dissenting shareholders were not deductible as nonbusiness[3] or business[4] expenses. The holdings in *Woodward v. Commissioner*[5] and *United States v. Hilton Hotels Corp.*[6] resolved conflicting results reached earlier by the eighth[7] and seventh[8] circuits in essentially similar fact situations. The disallowance of the claimed deductions in these cases may have significant impact upon future corporate decisions regarding proposed alterations of their corporate structures when there is a substantial likelihood of appraisal proceedings being instituted. Moreover, the character of the appraisal remedy itself as a protective device for the interests of dissenting shareholders may be affected by the decisions.

In *Woodward*, taxpayers owning a majority of stock in a publishing firm voted to extend the corporation's finite charter. The minority stockholder voted against the extension and, pursuant to Iowa law,[9] majority taxpayers negotiated to purchase the minority's stock interest. Following

[1] Woodward v. Commissioner, 397 U.S. 572 (1970).

[2] United States v. Hilton Hotels Corp., 397 U.S. 580 (1970).

[3] INT. REV. CODE of 1954, § 212 [hereinafter cited as § 212] provides in general: In the case of an individual, there shall be allowed as a deduction all the ordinary and necessary expenses . . . (1) for the production or collection of income; (2) for the management, conservation, or maintenance of property held for the production of income; or (3) in connection with the determination, collection, or refund of any tax.

[4] INT. REV. CODE of 1954, § 162(a) [hereinafter cited as § 162] permits the deduction of all ordinary and necessary trade or business expenses.

[5] 397 U.S. 572 (1970).

[6] 397 U.S. 580 (1970).

[7] Woodward v. Commissioner, 410 F.2d 313 (8th Cir. 1969).

[8] Hilton Hotels Corp. v. United States, 410 F.2d 194 (7th Cir. 1969).

[9] IOWA CODE ANN. § 491.25 (1949), provides that the majority shareholders voting for renewal "shall have three years from the date such action for renewal was taken in which to purchase and pay for the stock voting against such renewal." Although the Iowa statute would characterize the action taken by the majority stockholders as a "renewal," in essence the action involved the creation of a perpetual corporation from a finite one.

unsuccessful efforts to value the stock, taxpayers initiated appraisal proceedings in state court. Eventually the stock was purchased by the majority at a price determined in the appraisal proceeding.[10]

When taxpayers sought to deduct over twenty-five thousand dollars paid to attorneys, accountants, and appraisers, the Commissioner of Internal Revenue characterized the amounts as capital expenditures that were "incurred in connection with the acquisition of capital stock of a corporation"[11] and disallowed the claimed deductions. The ruling was affirmed by the Tax Court[12] and the Eighth Circuit Court of Appeals.[13]

In *Hilton* the taxpayer corporation, owning approximately ninety per cent of the Hotel Waldorf-Astoria, voted to merge the corporations.[14] Prior to the vote, a minority of Waldorf shareholders filed their objections to the merger and demanded payment for their shares in accordance with New York Stock Corporation Law.[15] Hilton consummated the merger and made a cash offer to the dissenters. The offer was rejected by the dissenters who then began appraisal proceedings in state court, as provided for by section 91 of the New York Stock Corporation Law.[16] A settlement was agreed to by the parties and approved by the court.[17]

Hilton sought to deduct consulting fees, legal expenses, and expenditures for other professional services in connection with the appraisal proceeding. As in *Woodward*, the Commissioner disallowed the deductions, asserting that they were capital expenditures.[18] Following payment of the tax and filing of suit for refund by Hilton, the district court ruled that the

[10] 397 U.S. at 573.

[11] *Id.*

[12] Fred Woodward, 49 T.C. 377 (1968).

[13] Woodward v. Commissioner, 410 F.2d 313 (8th Cir. 1969).

[14] 397 U.S. at 582.

[15] Section 91 enabled a stockholder who voted against consolidation to demand an appraisal to determine the fair market value of his shares and to have the shares paid for pursuant to section 21. Ch. 359, § 7 [1937] N.Y. Sess. L. 936, now embodied in N.Y. Bus. Corp. Law § 623(c) (McKinney 1963). Section 21 of the New York Stock Corporation Law provided:

> (6) Any stockholder demanding payment for his shares shall have no right to receive any dividends or distributions payable to holders of such stock of record after the close of business on the day next preceding the date of the stockholders' vote in favor of the action to which such objection was made, and upon such vote shall cease to have any other rights of a shareholder of the corporation in respect to such stock, except the right to receive payment for the value thereof.

Ch. 647, § 6 [1950] N.Y. Sess. L. 1504, now embodied in N.Y. Bus. Corp. Law 623(e) (McKinney 1963).

[16] Ch. 359, § 7 [1937] N.Y. Sess. L. 936.

[17] 397 U.S. at 582.

[18] *Id.*

appraisal litigation expenses were deductible.[19] Its decision was affirmed by the Seventh Circuit Court of Appeals.[20]

Four factual differences can be discerned in the two cases. First, the type of underlying transaction in *Woodward* was an extension of a finite charter to a perpetual one; *Hilton* involved a statutory merger. Second, the laws of the two situs states differed with regard to the time when title to the dissenters' stock is deemed to have passed. Under Iowa law, title of the stock did not pass until after the price had been determined by the parties or in the appraisal proceeding.[21] New York law, however, provides that title passes as soon as the minority registers its dissent, at which point the dissenters become creditors of the acquiring company for the fair value of their stock.[22] Third, in *Woodward* the individual majority stockholders were required to purchase the dissenter's interest,[23] whereas in *Hilton* the corporation acquired the minority's shares.[24] Finally, deductions in the two cases were sought under different sections of the Internal Revenue Code. Individual taxpayers in *Woodward* sought to deduct appraisal expenses as nontrade or nonbusiness expenses under section 212. The Hilton corporation claimed deduction of its appraisal litigation expenses as ordinary and necessary business expenses under section 162.

Upon review, the Supreme Court disallowed the claimed deductions in both cases. The principal holding was delivered in *Woodward* in which Mr. Justice Marshall began by noting that capital expenditures were not deductible under either section 212 or section 162,[25] sections of the Internal Revenue Code that had been judicially declared to be *in pari materia*.[26]

[19] Hilton Hotels v. United States, 285 F. Supp. 617 (N.D. Ill. 1968).

[20] 410 F.2d 194 (7th Cir. 1969).

[21] *See* note 9 *supra*.

[22] *See* note 15 *supra*; *see also* 397 U.S. at 583.

[23] IOWA CODE ANN. § 491.25 (1949).

[24] *See* note 16 *supra*.

[25] 397 U.S. at 574; INT. REV. CODE of 1954, § 263(a) [hereinafter cited as § 263], provides generally that no deduction will be allowed for capital expenditures. TREAS. REG. § 1.263(a)-(b) (1958), defines capital expenditures as "amounts paid or incurred (1) to add to the value, or substantially prolong the useful life, of property owned by the taxpayer, such as plant or equipment, or (2) to adapt property to a new or different use."

[26] 397 U.S. at 575, n.3; *cf.* Bingham v. Commissioner, 325 U.S. 365, 373 (1944). The significance of this statement is that the fact of deduction being sought in one case under section 162 and in the other under section 212 is of no consequence since Congress provided the nonbusiness deduction in 1941 to afford individual taxpayers the same opportunities to deduct certain expenses from gross income that had been available to corporate taxpayers. *Id.* at 373-74, *citing* H.R. REP. No. 2333, 77th

He then proceeded to state that any costs incurred in the acquisition or disposition of a capital asset were capital in nature, including such ancillary expenses as legal and accounting fees.[27] Mr. Justice Marshall rejected the "primary purpose" test as a standard for determining whether the costs were to be considered as "incurred in the acquisition or disposition of a capital asset."[28] This test had been adopted by the seventh circuit in *Hilton*[29] and two lower courts in other cases involving deductions for appraisal litigation expenses.[30] Instead of asking whether the

Cong., 2d Sess. 46, 74-76 (1944); S. REP. No. 1631, 77th Cong., 2d Sess. 87-88 (1944).

[27] 397 U.S. at 575-76; *see also* Spangler v. Commissioner, 323 F.2d 913 (9th Cir. 1963) (taxpayer's litigation expenses in recovering property sold upon fraudulent inducement held to be capital expenditures); United States v. St. Joe Paper Co., 284 F.2d 430 (5th Cir. 1960) (taxpayer's legal expenses following acquisition of stock in company about to reorganize held to be part of stock's cost and capital in nature). *See generally* 4A J. MERTENS, LAW OF FEDERAL INCOME TAXATION §§ 25.25, 25.26, 25.40, 25A.15 [hereinafter cited as MERTENS].

[28] 397 U.S. at 577. The "primary purpose" test was first developed with reference to TREAS. REG. § 1.263(a)-2(c) (1958), which requires expenditures incurred in "defending or perfecting title to property" to be capitalized. Strictly construed, this regulation would require the capitalization of any litigation expenses since title may be conceivably affected in virtually any suit against a taxpayer. Convinced that Congress did not intend such a fate for all legal expenses, the courts determined that such expenses be capitalized under the regulation only when the taxpayer's "primary purpose" in the litigation was to defend or perfect title to property. *See* Rassenfoss v. Commissioner, 158 F.2d 764 (7th Cir. 1946).

[29] 410 F.2d at 196.

[30] Vermont Bank & Trust Co. v. United States, 296 F. Supp. 682 (D. Vt. 1969); Smith Hotel Enterprises, Inc. v. Nelson, 236 F. Supp. 303 (E.D. Wis. 1964). *But see* Boulder Bldg. Corp. v. United States, 125 F. Supp. 512 (W.D. Okla. 1954). If the "primary purpose" test were applied to *Woodward* and *Hilton*, the expenditures would probably be deductible. The "primary purpose" tests asks simply what *chiefly motivated* or *prompted* the taxpayer to incur the expenditure in question. If the expenditure was not incurred in order to effect the acquisition of a capital asset, the expenses would be deductible. Here both underlying transactions had been completed prior to the initiation of appraisal proceedings. Taxpayers arguably incurred the appraisal litigation expenses and acquired the dissenters' shares only because of statutory requirements. Indeed, the appraisal proceedings could have been avoided if dissenters and the taxpayers in each case had been successful in negotiating the value of the former's shares. Thus, it could not be argued that the appraisal proceedings were necessary to complete either the renewal in *Woodward* or the merger in *Hilton*. The appraisal remedy aims at the establishment of a fair value for dissenters' shares. *See* note 56 *infra*. Accordingly, taxpayers in *Woodward* and *Hilton* should be able to argue successfully that the "primary purpose" of incurring the appraisal expenses was not to complete a capital transaction or to acquire a capital asset, but only to establish the "fair value" of dissenters' stock, which under Iowa and New York law the majorities and acquiring corporation were required respectively to purchase. The expenditures would then be deductible. *See*, Comment, *Deductibility of Appraisal Litigation Expenses*, 70 COLUM. L. REV. 538, 548-50 (1970).

primary purpose of the expenditure was to acquire a capital asset, the Court held that the proper inquiry looked to the "origin and character of the claim."[31] If the expenses in question originated in the process of acquiring or disposing of a capital asset, the expenses must be capitalized. The Court reasoned that since the establishment of the purchase price, herein accomplished by the appraisal court, was clearly part of the process of acquisition, it followed that the appraisal litigation expenses were part of the stock's cost and had to be capitalized.[32]

The Court in *Hilton* primarily relied upon *Woodward* to rule that the appraisal expenses were nondeductible. The taxpayer had argued that the expenses could not be regarded as part of the process of acquisition since, under New York law, unlike the Iowa law governing the parties in *Woodward*, title had already passed to the acquired corporation before appraisal proceedings commenced. The Court in *Hilton* rejected this argument, saying that the "functional nature of the appraisal remedy as a forced purchase of the dissenters' stock is the same, whether title passes before or after the price is determined."[33]

The Supreme Court's disallowance of appraisal litigation cost deduction in *Woodward* and *Hilton* regrettably leaves many questions unanswered. The Court correctly noted in *Woodward* that expenses incurred in connection with the acquisition or disposition of a capital asset had to be capitalized.[34] What the Court was really called upon to decide is how sufficiently related to a capital acquisition or disposition an expense must be before it is deemed to be incurred *in connection with* the acquisition or disposition and is therefore required to be capitalized. Will deduction problems of this nature be resolved by determining if the expenditure in question was incurred in order to effect the acquisition or disposition of a capital asset, *i.e.*, if such an objective was the taxpayer's "primary purpose?"[35] Or will a more indirect causal relationship between the expense and capital acquisition or disposition require the capitalization of the former? The Court in *Woodward* adopted the latter approach.

As previously stated, the Court concluded in *Woodward* that an "origin and character" test should be used to determine the deductibility

[31] 397 U.S. at 578. The Court relied on United States v. Gilmore, 372 U.S. 39 (1963).
[32] 397 U.S. at 579.
[33] *Id.*
[34] *Id.* at 575.
[35] *See* note 28 *supra.*

tion of a capital asset.[36] Such a test looks to the "origin and character" of the expenditure, rather to its "primary purpose." Rejecting the "primary purpose" test as too uncertain for such tax problems, the Court preferred the "simpler inquiry whether the origin of the claim litigated is in the process of acquisiton itself."[37] The Court relied upon *United States v. Gilmore*,[38] in which expenses of defending a divorce suit were disallowed because the claim stemmed from the marital relationship and not from the conservation of income-producing assets.[39]

The genesis of the "origin and character" type of analysis for tax problems may be found in *Lykes v. United States*,[40] in which a taxpayer was not allowed to deduct litigation expenses incurred in contesting the amount of his federal gift tax under section 212 because the expense was attributable to the gifts and not to the conservation of his income-producing assets.[41] The Court in *Lykes* reasoned that since the litigation expenses would not have arisen but for the gift and those expenses could be traced to the gift for their origin, the expenses were of a personal nature and could not be deducted.[42] Applying the type of causal analysis employed in *Lykes* to *Woodward* and *Hilton*, the appraisal litigation expenses would be regarded as *originating* in the process of acquiring the dissenters' shares, and since such acquisition is of a capital *character*, the expenses would not be deductible.[43]

The problem with an "origin and character" type of analysis was suggested by Mr. Justice Jackson in his dissent in *Lykes*:

> A majority of my brethren think they can escape this conclusion by going further back in the chain of causation. They can say the cause of this legal expense was the gift. Of course one can reason, as my brethren do, that if there had been no gift there would have been no tax, if there had been no tax, there would have been no deficiency, if there were no deficiency there would have been no contest, if there were no contest there would have been no expense. And so the gifts caused

[36] 397 U.S. at 577.
[37] *Id.*
[38] 372 U.S. 39 (1963).
[39] *Id.* at 51.
[40] 343 U.S. 118 (1952).
[41] *Id.* at 125.
[42] The specific holding of *Lykes* was overruled by Congress through an amendment of section 212 in the Internal Revenue Code of 1954, but the causal analysis employed by the majority in that decision has survived. Snyder, *The Impact of Supreme Court Decisions of the Deduction of Legal Fees*, 23 TAX LAW. 339, 342 (1970).
[43] *See* 397 U.S. at 577.

> the expense. The fallacy of such logic is that it would be just as possible to employ it to prove that the lawyer's fees were caused by having children. If there had been no children, there would have been no gift . . . . If this reasoning were presented by a taxpayer, what would we say of it?[44]

Accordingly, it can be seen that the "origin and character" test of necessity involves a highly subjective causal exploration in tax situations where the issue is whether litigation expenses arose from personal activities of the taxpayer. Prior to *Woodward* and *Hilton*, this test had not been extended to cover tax problems involving expenses allegedly incurred in the process of acquiring or disposing of a capital asset.

It would appear that the same problems of unpredictable causal explorations and likelihood of inconsistent results that were pointed to by Mr. Justice Jackson in *Lykes* will likely surround the extended application of the "origin and character" test to tax questions similar to those presented in *Woodward* and *Hilton*. For example, it is well-established that expenses of a complete liquidation, including legal and accounting fees, are deductible as ordinary and necessary business expenses.[45] But suppose that the *Lykes-Gilmore* type of analysis (now that of *Woodward* and *Hilton*) is applied to determine the deductibility of liquidation expenses. If the origin of the corporation's decision to liquidate can be traced to a personal dispute between two principal shareholders or to some other personal reason, the "origin and character" test would disallow deduction of hitherto unquestionably deductible expenses. Courts have permitted the deduction of liquidation expenses on the theory that no capital asset was being created or continued,[46] although liquidation does involve a disposition of capital assets. But if the "origin and character" type of analysis is valid for tax questions such as those raised in *Lykes-Gilmore* and now *Woodward-Hilton*, there is no reason not to apply it to liquidation and other tax problems. Such application would require tax courts to make a subjective search for the origin of any transaction giving rise to expenses of questionable deductibility. It would appear then that the Court's adoption of the "origin and character" test for the problems posed in *Woodward* and *Hilton* portends increasing uncertainty for the taxpayer and increasing tax litigation for the courts. The Court in *Woodward*

[44] 343 U.S. at 128.

[45] Pridemark, Inc. v. Commissioner, 345 F.2d 35 (4th Cir. 1965); Gravois Planing Mill Co. v. Commissioner, 299 F.2d 199 (8th Cir. 1962).

[46] Gravois Planing Mill Co. v. Commissioner, 299 F.2d 199, 206 (8th Cir. 1962), *citing* 4 MERTENS § 25.35.

fails to justify its rejection of the alternative "primary purpose" test. The Court's approach is especially questionable in view of the fact that there have been a number of cases involving expenditures connected with the acquisition or disposition of a capital asset that have been resolved by analysis that focuses on the purpose of the expenditure rather than its "origin and character."[47]

Another question emerging in the wake of the decisions concerns the possibility of an argument by the taxpayer in the *Woodward* fact situation that the appraisal litigation expenses are deductible as organizational expenditures under section 248 of the Internal Revenue Code.[48] Applying the "origin and character" test adopted by the Court, the expenses of the appraisal proceeding could be said to lie in the extension of the corporate charter by the majority shareholders. Since that transaction essentially resulted in the creation of a perpetual corporation from a finite one, the ensuing appraisal expenses should arguably be deductible as organizational expenses under section 248.[49]

[47] *See, e.g.*, Kennecott Copper Corp. v. United States, 347 F.2d 275, 305 (Ct. Cl. 1965); Gravois Planing Mill Co. v. Commissioner, 299 F.2d 199 (8th Cir. 1962); *see especially* Campbell v. Fields, 229 F.2d 197, 203 (5th Cir. 1956), in which the taxpayer incurring litigation and surveying charges incident to the establishment of unitization, pooling, and operating agreements between himself and other gas and oil lessees, was allowed to deduct such expenses because they had not been for the purpose of acquiring a capital asset but to satisfy a requirement of a state regulatory commission. This case would appear to support an argument that if the "primary purpose" test were applied to the facts in *Woodward* and *Hilton*, the appraisal expenses would be deductible, in view of the fact that the proceeding was required by state law. *See*, Comment, *Deductibility of Appraisal Litigation Expenses*, 70 COLUM. L. REV. 538, 550 (1970). *See also* Straub v. Granger, 143 F. Supp. 250 (W.D. Pa. 1956) (legal expenses paid for advice given on ways to preserve taxpayer's interest in a closely held corporation held deductible, even though a majority of the corporation's stock was acquired pursuant to such advice). The district court in *Straub* noted that the legal expenses were "regarded properly in relation to the purpose for which taxpayers obtained counsel rather than to the increased ownership which resulted." *Id.* at 254. "Primary purpose" was held to be the governing test there and "the fact that the taxpayers' ownership in the corporation was increased partly through the services of counsel does not establish that counsel was paid for acquiring stock." *Id.* at 255.

[48] INT. REV. CODE of 1954, § 248(a) provides that organizational expenditures of a corporation may be treated as deferred expenses and deducted ratably from gross income. Section 248(b) defines an organizational expenditure as one which "(1) is incident to the creation of the corporation (2) is chargeable to capital account; and (3) is of a character which, if expended incident to the creation of a corporation having a limited life, would be amortizable over such life." TREAS. REG. § 248-1(b)(2) (1956), adds that "legal services incident to the organization of the corporation" are organizational expenditures.

[49] Such an argument would not be available to the taxpayer in *Hilton* since the original transaction was a reorganization which clearly requires capital treatment.

Unfortunately the opinions in *Woodward* and *Hilton* do not discuss the tax consequences of the holdings for the corporate taxpayer. The Court in *Woodward* does note that capital expenditures "are added to the basis of the capital asset with respect to which they are incurred, and are taken into account for tax purposes either through depreciation or by reducing the capital gain (or increasing the loss) when the asset is sold."[50] For the taxpayer in the *Hilton* situation, it would appear that the appraisal expenses may never be taken into account for tax purposes. Any stock is nondepreciable, for it is an intangible asset with an unlimited life.[51] Following the merger, Hilton can either put the costs of the appraisal proceeding as an addition to good will or attempt to apply the costs to adjust the basis of tangible assets it acquired from Waldorf-Astoria. The Commissioner would be certain to insist that these capital expenditures be accorded the former treatment, arguing that the acquiring Hilton corporation increased the intangible benefits flowing to it from the Waldorf corporation by increasing its own percentage of stock holdings as a consequence of the appraisal proceeding. Even if the taxpayer were able to argue successfully for the application of appraisal costs to an adjustment of the basis of tangible assets it acquired from the Waldorf entity, a highly complicated allocation problem would remain. With either treatment, the taxpayer is unlikely to realize any tax benefit from the capital expenditures. The Hilton corporation will be able to recover the costs of the appraisal proceeding only upon liquidation, making it probable that any tax advantage of an adjusted basis will never be realized.

Another problem concerns the Court's rejection of Hilton's argument that the appraisal costs should be regarded as obligations of the acquired Waldorf corporation which the acquiring Hilton corporation assumed and satisfied as ordinary and necessary expenses. The Court briefly noted that since Hilton had conceded that the purchase price of the dissenters' shares was a capital outlay, it could not successfully argue that the appraisal costs belonged to the Waldorf corporation.[52] The Court's arbitrary dismissal of taxpayer's argument is clearly unsatisfactory. If the "origin and character" test is applied to Hilton, the appraisal costs may be seen to have originated as a consequence of Waldorf's statutory obligation to pay the dissenting shareholders the fair value of their shares, *i.e.*, the appraisal expenses arose in connection with an obligation of the

[50] 397 U.S. at 574-75; *see also* TREAS. REG. § 1.1001-1(a) (1957).
[51] TREAS. REG. § 1.167(a)-3 (1956).
[52] 397 U.S. at 584-85.

disappearing corporation. Hilton, as the acquiring corporation, assumed the obligations of paying the purchase price of the dissenters' shares and paying the accompanying costs of the appraisal proceeding. The latter expenses may be regarded as closely analogous to clearly deductible liquidation expenses.[53] As is the case with a liquidating corporation, Waldorf will cease to exist as a corporate entity following the merger. What the acquiring Hilton corporation is doing in paying the costs of the appraisal proceeding (which initially arose as a part of Waldorf's statutory obligation to pay the dissenters for their shares)[54] is essentially the same process involved when a liquidating corporation pays or satisfies its debts and obligations. Here the obligation has merely been transferred to the Hilton corporation in the course of the merger. There would appear to be little reason for according transactions having essentially the same juridical effect differing tax treatment.

In *Woodward* it is uncertain whether the capital asset with respect to which the expenditures in question were incurred is only the stock acquired from the dissenters or is all of the taxpayers' stock in the corporation. The issue then is which stock will receive an adjustment in basis. The Court reasoned that the appraisal expenses arose as part of the process of acquisition and had to be capitalized. Since majority stockholders in *Woodward* incurred the expenses of the appraisal proceeding in the course of a transaction which undoubtedly affected the "character" of their pre-extension stock interests, could not such expenses be regarded as incurred with respect to all of the stock in the corporation and not just that acquired from the dissenters? In this event, the taxpayers in *Woodward* would be entitled to a basis boost on all their stock in the corporation. The decision in *Woodward* affords little guidance to this problem of basis adjustment. The only tax consequence that is clear is that whatever stock is benefited by the increase in adjusted basis, the benefit will be realizable only upon an inter vivos disposition of the shares. As an intangible asset with an unlimited life, the stock is nondepreciable, and there is no other asset to which a basis boost can be applied.

Woodward and *Hilton* could well result in a change in the availability of the appraisal remedy itself as a protective device for the interest of the

[53] *See* note 45 *supra.*

[54] The Court itself noted that establishment of the purchase price of a capital asset was part of the process of acquisition. *See* text preceding note 32 *supra.* It would follow from this that the appraisal expenses were part of Waldorf's obligation to pay to the dissenters the fair value of their shares.

dissenting minority shareholder upon future corporate alterations. The appraisal remedy may be regarded as the "*quid pro quo* for statutes giving the majority [stockholders] the right to override the veto which previously the holder of even one share could exercise against mergers, sales of all assets, and other basic corporate changes."[55] The appraisal proceeding is designed to protect the investment of the minority shareholder by assuring that he receives a "fair value" for his interest in the corporation.[56]

In order to determine such "fair value," parties are usually required to make considerable expenditures in paying for legal, accounting, and consulting services. Since legislatures and courts generally have failed to provide for an apportionment of appraisal costs,[57] the average investor, "faced with outlays disproportionate to the value of his holdings,"[58] is often handicapped in asserting his appraisal rights. *Woodward* and *Hilton* would appear to impose an additional burden on the dissenting seller by requiring his share of the appraisal costs, like those of the purchasing majority, to be capitalized and not deducted. Although neither opinion so states explicitly, the early Tax Court decision of *Heller v. Commissioner*,[59] allowing the seller to deduct his appraisal costs, is overruled by implication. Such a tax consequence could well revert the dissenter to his unfortunate position before the enactment of appraisal statutes when "the minority was pretty well stuck with the new investment if the required statutory majority approved the deal."[60]

Following *Woodward* and *Hilton*, a significant possibility exists that corporations contemplating merger may opt to forego such a reorganization when faced with the nondeductibility of appraisal costs and the likelihood of appraisal proceedings being instituted by a minority of its own shareholders or by a minority of the newly-acquired corporation. Instead, corporations faced with such a prospect may elect to effect a tax-free acquisition of assets, in which the acquiring corporation exchanges its own

[55] Vorenburg, *Exclusiveness of the Dissenting Shareholder's Appraisal Right*, 77 HARV. L. REV. 1189, 1194 (1964).

[56] Note, *Valuation of Dissenters' Stock Under Appraisal Statutes*, 79 HARV. L. REV. 1453, 1456 (1966).

[57] N.C. GEN. STAT. § 55-113(e) (1965), provides: "The court shall assess the cost of said proceedings as it shall deem equitable."

[58] Note, *Appraisal of Corporate Dissenters' Shares: Apportioning the Proceeding's Financial Burdens*, 60 YALE L.J. 337, 341 (1951).

[59] Joseph Heller, 2 T.C. 371 (1943), *aff'd*, 147 F.2d 376 (9th Cir. 1945).

[60] Doar, *Protection of Minority Shareholders' Rights: Consolidation, Merger, and Sale of Assets*, 33 WIS. BAR BULL. 29, 34 (Aug., 1960).

stock or securities for all or part of another corporation's assets.[61] With the latter type of reorganization, the shareholders of the acquiring corporation have no recourse to the appraisal remedy under the law of most jurisdictions; and, in one-quarter of the states, even the shareholders of the acquired corporation cannot invoke the appraisal remedy.[62] Thus it appears that *Woodward* and *Hilton* could seriously impair the effectiveness of statutory appraisal remedies as protective devices for the interests of the minority shareholder.

E. CADER HOWARD

Labor Law—Issuance of Injunction to End Strike in Breach of Arbitration Agreement

Since the turn of this century, Congress and the United States Supreme Court have endeavored to balance the respective powers of labor and management. Whenever the scales tipped more favorably towards one group than the other, the reaction has been to establish equilibrium either legislatively or judicially. *Boys Markets, Inc. v. Retail Clerks Local 770*[1] is a striking example of this balancing process. The Supreme Court held that a federal district court could enjoin a strike in breach of a collective bargaining agreement despite section four of the Norris-LaGuardia Act, which prohibits the granting of federal injunctions in labor-management disputes. Significantly, the Court reversed *Sinclair Refining Co. v. Atkinson*,[2] in which it had held to the contrary. *Boys Markets* points up the unfortunate situation produced by the interaction of the Norris-LaGuardia[3] and Taft-Hartley Acts.[4]

Norris-LaGuardia was occasioned by the massive intervention of the judiciary into labor-management relations.[5] Prior to its enactment, a strike seemingly was labor's most potent weapon; however, management

[61] INT. REV. CODE of 1954, § 354(a)(1) provides: "No gain or loss shall be recognized if stock or securities in a corporation a party to a reorganization are, in pursuance of the plan of reorganization, exchanged solely for stock or securities in such corporation or in another corporation a party to the reorganization."

[62] 13A B. FOX & E. FOX, BUSINESS ORGANIZATIONS: CORPORATE ACQUISITIONS AND MERGERS § 2501[2] (1970).

[1] 398 U.S. 235 (1970).
[2] 370 U.S. 195 (1962).
[3] 29 U.S.C. §§ 101-15 (1964).
[4] 29 U.S.C. §§ 141-97 (1964).
[5] *See generally* F. FRANKFURTER & N. GREENE, THE LABOR INJUNCTION (1932).

easily countered any strike with an injunction, usually granted with little reluctance by federal courts not particularly disposed to labor's cause.[6] Section four of the 1932 Norris-LaGuardia Act[7] prohibited federal courts from enjoining strikes growing out of labor disputes.[8] The 1935 Wagner Act[9] also aided labor by including a federal guarantee of the right to self-organization and to engage in collective action—including the strike. In order to restore the balance lost and to place labor and management on a more equal footing, Congress enacted the Taft-Hartley Act.[10] Section 301 of the Taft-Hartley Amendments opened "the federal courts to suits for violations of collective bargaining agreements and, thereby, facilitated enforcement of such contracts by removing some of the procedural disabilities blocking suits against unions in state courts."[11] Taft-Hartley reflected congressional desire to promote industrial peace and harmony through increased enforcement of collective bargaining agreements.[12] Accordingly, in *Textile Workers Union v. Lincoln Mills*[13] the Supreme Court

[6] State courts generally would not issue injunctions against peaceful picketing for economic gains. *See, e.g.*, Plant v. Woods, 176 Mass. 492, 57 N.E. 1011 (1900); Vegelahn v. Gunter, 167 Mass. 92, 44 N.E. 1077 (1896). However, since the employer was usually a Delaware corporation, the federal courts would issue injunctions exercising their jurisdiction by diversity of citizenship. *See* generally F. FRANKFURTER & N. GREENE, THE LABOR INJUNCTION (1932).

[7] 29 U.S.C. § 104 (1964), provides in part:

> No court of the United States shall have jurisdiction to issue any restraining order or temporary or permanent injunction in any case involving or growing out of any labor dispute to prohibit any person or persons participating or interested in such dispute . . . from doing, whether singly or in concert, any of the following acts:
>
> (a) Ceasing or refusing to perform any work or to remain in any relation of employment . . . .

[8] Although Norris-LaGuardia reflected a *laissez-faire* policy on the part of government with regards to labor relations, it clearly served to give labor a larger arsenal in its struggle against management. Wellington & Albert, *Statutory Interpretation and the Political Process: A Comment on Sinclair v. Atkinson*, 72 YALE L.J. 1547, 1555 (1963).

[9] 29 U.S.C. §§ 151-68 (1964).

[10] 29 U.S.C. §§ 141-97 (1964). Indeed, Taft-Hartley could be classified as pro-management in a number of ways: It guaranteed the right to the employee to refrain from union activity; it made it unlawful for a union to restrain or coerce employees who did not want to strike; it outlawed the closed-shop agreement; and it prohibited the secondary boycott.

[11] Keene, *The Supreme Court, Section 301 and No-Strike Clauses: From Lincoln Mills to Avco and Beyond*, 15 VILL. L. REV. 32, 34 (1969). For example, the common law rules of many states frustrated any and all attempts to serve process and execute judgment against unions, whereas employers were easily sued. *Id.*

[12] *Id.*

[13] 353 U.S. 448 (1957). The Court ruled that the Norris-LaGuardia Act did not deprive a federal court of jurisdiction to compel an employer to arbitrate grievances in accordance with the arbitration clause of the agreement in question. Speaking

gave added significance to section 301 by directing the federal courts to fashion a body of federal common law to deal with subsequent suits.[14] The Court was not only desirous of achieving effective enforcement of collective bargaining agreements, but also encouraged the development of a uniform system of labor law.[15]

Inevitably, the development of federal law under section 301 and the anti-injunction provisions of section four of Norris-LaGuardia were destined to clash. *Sinclair Refining Co. v. Atkinson*[16] provided an appropriate field for the ensuing struggle. Section four emerged victorious; the Court held that federal courts were prohibited from enjoining labor strikes even though a collective bargaining agreement enforceable under section 301 had been violated. This decision seemed to fly in the face of the Court's pronouncement in *Lincoln Mills*; a remedy available in most state courts[17] was denied a party in federal court.

The majority in *Sinclair* relied heavily on the legislative history of section 301 to demonstrate that the anti-injunction provision of Norris-LaGuardia was still viable and therefore controlled the disposition of the case. This legislative analysis, when combined with a literal reading of sec-

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for the majority, Justice Douglas explained that "the kinds of acts which had given rise to abuse of the power to enjoin are listed in § 4 of [Norris-LaGuardia]. The failure to arbitrate was not a part and parcel of the abuses against which the Act was aimed." *Id.* at 458. Many commentators suggest that Taft-Hartley impliedly repealed Norris-LaGuardia. Thus began what many regard as the encroachment of section 301 on the Norris-LaGuardia Act. Bartosic, *Injunctions and Section 301: The Patchwork of Avco and Philadelphia Marine on the Fabric of National Labor Policy*, 69 COLUM. L. REV. 980, 984-85 (1969).

[14] The Court stated:

> Plainly the agreement to arbitrate grievance disputes is the quid pro quo for an agreement not to strike. Viewed in this light, the legislation does more than confer jurisdiction in the federal courts over labor organizations. It expresses a federal policy that federal courts should enforce these agreements on behalf of or against labor organizations and that industrial peace can be best obtained in that way . . . . We would undercut the Act and defeat its policy if we read § 301 narrowly as only conferring jurisdiction over labor organizations.

353 U.S. at 455-56.

[15] The development of federal susbtantive law under this mandate has been arduous for three reasons: (1) the power of the court to enjoin certain acts conflicted with the federal anti-injunction laws; (2) the scope of federal jurisdiction under section 301 was unclear; and (3) the courts were given insufficient procedural guidelines to develop effectively the federal law of labor arbitration. Note, *Federal Enforcement of Grievance Arbitration Provisions Under the Doctrine of Lincoln Mills*, 42 MINN. L. REV. 1139, 1145 (1958).

[16] 370 U.S. 195 (1962).

[17] Although twenty-four states do have "little Norris-LaGuardia Acts" on their books, ten do not apply their acts to strikes in breach of collective bargaining contracts. Keene, *supra* note 11, at 49.

tion four,[18] enabled the Court to conclude that Congress did not want federal courts to intefere in labor disputes involving strikes that were in breach of collective bargaining agreements. However, Justice Brennan, dissenting, articulated the theory of judicial accommodation, which later proved more formidable than the majority's logic. While conceding that "[S]ection 301 of the Taft-Hartley Act did not, for purposes of actions brought under it, 'repeal' section four of the Norris-LaGuardia Act," Brennan recognized that "the two provisions do co-exist and that they apply . . . in apparently conflicting senses."[19] He visualized the Court's duty as seeking out "that accommodation of the two which will give the fullest effect to the central purposes of both."[20] The result would be to place section 301 actions beyond the ambit of the anti-injunction provision of Norris-LaGuardia.[21]

Brennan's dissent in *Sinclair* ultimately became the *ratio decidendi* in *Boys Markets*, in which the employer and the union were parties to a collective bargaining agreement that provided that all disputes should be resolved by arbitration and that during the life of the agreement, there should be "no cessation or stoppage of work, lock-out, picketing or boycotts."[22] A controversy arose when one of the employer's supervisors and several non-union employees began to rearrange products in the frozen food counter in one of the employer's supermarkets.[23] A union representative insisted that the counter be emptied and restocked by union personnel. When the employer did not yield to the union's demand, a strike was called and the union began picketing the employer's establishment. The employer immediately requested that the union terminate the picketing and resort to the arbitration procedures set forth in the agree-

[18] *See* note 7 *supra.*

[19] 370 U.S. at 215-16.

[20] *Id.* at 216.

[21] Brennan apparently thought that reading the two acts together would do little damage to section four, whereas section 301 would be significantly harmed if accommodation was not allowed. Representative of the accommodation theory is Brotherhood of R.R. Trainmen v. Chicago River & Ind. R.R., 353 U.S. 30, 40 (1957), in which the Court concluded that there "must be an accommodation of the Norris-LaGuardia Act and the Railway Labor Act so that the obvious purposes in the enactment of each is preserved." A theory similar to accommodation is that even if Congress rejected express repeal of Norris-LaGuardia by Taft-Hartley, it did not mean that Congress intended to apply Norris-LaGuardia literally in derogation of the articulated policies of Taft-Hartley. Congress may have intended to leave to judicial interpretation the extent to which equitable remedies should be available in section 301 suits. Note, *Strikes and Boycotts: Section 4 of the Norris-LaGuardia Act Held to Prohibit Federal Court Injunction of Strike Over an Arbitrable Grievance*, 111 U. PA. L. REV. 247, 249-50 (1962).

[22] 398 U.S. at 239.

[23] *Id.*

ment. Met with refusal, the employer obtained a temporary restraining order in state court forbidding continuation of the strike. The union removed the entire matter to a federal district court and requested that the restraining order be dissolved. Concluding that the dispute was subject to arbitration under the collective bargaining agreement, the district court denied the union's request, held that the strike was in violation of the agreement, and ordered the parties to arbitrate.[24] The Supreme Court, reversing the Court of Appeals for the Ninth Circuit, affirmed the district court order and overruled *Sinclair*.

Boys Markets will no doubt be applauded as one of the most beneficent labor decisions bestowed upon management in recent years. For one thing, the questionable result yielded by the interaction of *Sinclair* with *Avco Corp. v. Aero Lodge No. 735, I.A.M. & A.W.*[25] will no longer plague management. In *Avco* the Court allowed a union to remove to federal court[26] a state court action brought by the employer to enjoin the union from striking. Upon removal, the federal court typically denied the injunction in keeping with section four of the Norris-LaGuardia Act even though the state court, from which the action was removed, could have issued the injunction.[27] Thus, state court jurisdiction was effectively eliminated where management sought an injunction to end a strike in breach of a collective bargaining agreement. After *Boys Markets* if the union removes to federal court, management will be able to obtain an injunction in a federal court. Moreover, the negative effect that *Sinclair* had upon arbitration will no longer be present.[28] The employer was with-

[24] *Id.* at 240.

[25] 390 U.S. 557 (1968).

[26] 28 U.S.C. § 1441(c) (1964), provides:

> Whenever a separate and independent claim or cause of action, which would be removable if sued upon alone, is joined with one or more otherwise non-removable claims or causes of action, the entire case may be removed and the district court may determine all issues therein, or, in its discretion, may remand all matters not otherwise within its original jurisdiction.

[27] There is a split of authority in this area. Some courts have said the language of section four means there is no jurisdiction in the federal courts if only an injunction was sought and therefore have remanded the case to the state court. Others have held to the contrary. *Compare In re* New York Shipping Ass'n, Inc. v. International Longshoremen's Ass'n, 276 F. Supp. 51 (S.D.N.Y. 1967) *with* Sealtest Foods-Branch 443 v. Conrad, 262 F. Supp. 623 (N.D.N.Y. 1966). *See also* General Elec. Co. v. Local 191, 413 F.2d 964 (1969); Day-Brite Lighting Div. v. I.B.E.W., 303 F. Supp. 1086 (N.D. Miss. 1969).

[28] *Sinclair's* negative effect upon arbitration defeated the policy underlying the Court's opinions in the *Steelworkers Trilogy*. United Steelworkers v. American Mfg. Co., 363 U.S. 564 (1960); United Steelworkers v. Warrior & Gulf Navigation Co., 363 U.S. 574 (1960); United Steelworkers v. Enterprise Wheel & Car

out remedy in federal court when the union refused to comply with their contractual agreements, thereby generating little incentive for the employer to agree to arbitrate.

The Court in *Boys Markets* could have chosen to extend *Sinclair* to the states[29] consistent with the establishment of a national system of labor law.[30] By precluding federal courts from issuing injunctions for breach of contracts not to strike, the Court in *Sinclair* made state courts the preferred forum by employers, and thus seriously impaired the volume of federal court suits and the opportunity for federal development of a uniform interpretation of labor-management contracts. However, the Court realized that extending *Sinclair* to the states would hamper the effectiveness of section 301 in promoting the speedy enforcement of collective bargaining agreements. Moreover, such an extension, while establishing uniformity, would unnecessarily give labor the upper hand over management. Stressing the importance of arbitration[31] as the overriding consideration in labor-management disputes, the Court chose another, less absolute method of achieving uniformity—federal courts should be able to issue injunctions as well as state courts. Logically, the decision is appealing; concurrent jurisdiction in the area of labor law is preserved, and the necessity for forum shopping is obviated.[32] Furthermore, a certain symmetry in the law is maintained, which serves to foster federal-state relations in an area of national concern.

Although *Boys Markets* may herald a new era in labor-management relations, a caveat is appropriate for those who would read the decision broadly. The case does not stand for the proposition that access to the federal courts will now be allowed to any employer seeking to enjoin a union from striking in breach of a collective bargaining agreement. The Court made explicit the limited nature of its holding:

Corp., 363 U.S. 593 (1960). In these cases, the Court held that where the issue constitutes an arbitrable grievance, federal court authority did not extend beyond determining the existence of a collective bargaining agreement with an arbitration clause and determining whether there was an allegation that a provision of that agreement had been violated. The courts may not replace the judgment of the arbitrator with their own, nor may they refuse to act, because, in their opinion, a claim is frivolous or unwarranted. Aaron, *The Labor Injunction Reappraised*, 10 U.C.L.A.L. REV. 292, 337 (1963).

[29] The Court raised this possibility: "[i]t is undoubtedly true that each of the foregoing objections to *Sinclair-Avco* could be remedied either by overruling *Sinclair* or by extending that decision to the States." 398 U.S. at 247.

[30] *See* note 37 *infra*.

[31] 398 U.S. at 243, 252.

[32] The result would also have been obtained if *Sinclair* had been extended to the states.

> Our holding in the present case is a narrow one. We do not undermine the vitality of the Norris-LaGuardia Act. We deal only with the situation in which a collective-bargaining contract contains a mandatory grievance adjustment or arbitration procedure. Nor does it follow from what we have said that injunctive relief is appropriate as a matter of course in every case of a strike over an arbitrable grievance . . . .[33]

Several principles were adopted to determine the appropriateness of relief: the injunction must be appropriate in spite of the Norris-LaGuardia Act; both parties must be contractually bound to arbitrate the grievance and the contract must so state;[34] the employer should be ordered to arbitrate as a condition precedent to his obtaining injunctive relief against the strike;[35] the injunction must be warranted under ordinary principles of equity, *i.e.*, whether the employer has been or will be caused irreparable injury by the breaches.[36]

Although *Boys Markets* may have favorably restored the balance of power between labor and management, one issue remains unresolved: whether state courts must now apply the same principles as federal courts in granting equitable relief? This issue will arise when management obtains an injunction in a state court that would not have been issued in federal court under the standards set down in *Boys Markets*. The union will contend that the requirements for an injunction established by *Boys Markets* should be made applicable to the states. The Supreme Court will ultimately be called upon to resolve the issue. If the Court decides that *Boys Markets* is inapplicable, uniformity in labor law will suffer due to the different standards that state courts will inevitably establish.[37] How-

[33] 398 U.S. at 253-54.

[34] That this principle must be met before injunctive relief will be granted in a federal court is evidenced by the recent decision of Stroehmann Bros. Co. v. Local 427, Confectionary Workers, 74 LAB. REL. REP. 2957, 2960 (M.D. Pa. July 25, 1970), in which injunctive relief was denied to an employer because he and the union were not contractually bound to arbitrate grievances.

[35] In Holland Constr. Co. v. Operating Eng'rs, 74 LAB. REL. REP. 3087, 3088 (D. Kan. July 27, 1970), the court referred to the requirements of *Boys Markets*, and stated that "the employer should be ordered to arbitrate as a condition of obtaining an injunction assuming the other criteria favoring an injunction are also present."

[36] 370 U.S. at 228.

[37] The doctrine of federal preemption does not necessarily arise in this context. Although preemption usually applies when a state court attempts to resolve an issue governed by a federal statute, the National Labor Relations Board, not a state court, has authority to initially rule on a particular labor activity. Disputes over labor agreements are usually left for judicial resolution, whereas, labor practices are ruled upon by the Board. Breach of a labor contract is not considered an unfair labor practice and is therefore left to the usual processes of the law. Stewart,

ever, the Court, in the interest of uniformity, should hold that *Boys Markets* is applicable to the states. *Teamsters Local 174 v. Lucas Flour Co.*[38] emphasized that national labor policy could not tolerate inconsistent state and federal court enforcement and interpretation of labor contracts:

> Incompatible doctrines of local law must give way to principles of federal labor law . . . . The dimensions of § 301 require the conclusion that substantive principles of federal labor law must be paramount in the area covered by the statute. Comprehensiveness is inherent in the process by which the law is to be formulated under the mandate of *Lincoln Mills*, requiring issues raised in suits of a kind covered by § 301 to be decided according to the precepts of federal labor policy . . . . [T]he subject matter of § 301 (a) "is peculiarly one that calls for uniform law."[39]

The field of labor law stands on the threshold of a new era that promises consistent development on both state and federal levels. Broad policies of national interest will be the predominant concern in any labor-management controversy. Past errors and incompatible doctrines should be cast aside and resurrected only in historical comment. The judiciary should not take umbrage at emerging concepts alien to past interpretations. As Justice Stewart noted, concurring in *Boys Markets*, "[w]isdom too often never comes, and so one ought not to reject it merely because it comes late."[40]

ROBERT D. RIZZO

Restraints on Trade—Covenants in Employment Contracts not to Compete within the Entire United States

The North Carolina Supreme Court has now put to rest the notion that nationwide restraints on trade were per se illegal in North Carolina. In *Harwell Enterprises, Inc. v. Heim*,[1] the supreme court upheld a re-

No-Strike Clauses in the Federal Courts, 59 MICH. L. REV. 673, 675-76 (1961); H.R. REP. No. 510, 80th Cong., 1st Sess. 42 (1947); 1 LEGISLATIVE HISTORY OF THE LABOR-MANAGEMENT RELATIONS ACT 546 (1948). The NLRB honors this distinction. Repeatedly it has said it will not adjudicate contract violations. At least one commentator disagrees. Kiernan, *Availability of Injunctions Against Breaches of No-Strike Agreements in Labor Contracts*, 32 ALBANY L. REV. 303, 316 (1968).

[38] 369 U.S. 95 (1962).

[39] *Id.* at 102-03.

[40] Justice Stewart borrowed this quote from Justice Frankfurter. 398 U.S. at 255.

[1] 276 N.C. 475, 173 S.E.2d 316 (1970).

strictive covenant in an employment contract in which the employee covenanted that he would not compete with the corporation anywhere within the United States for a period of two years.[2]

The plaintiff-corporation was engaged in various business endeavors including all phases of silk screen processing, plastics, importing and various other ventures throughout the United States and brought this action against its former employee for the violation of the restrictive covenant.[3] The case reached the North Carolina Supreme Court on a demurrer which had been sustained by the court of appeals on the grounds that the territory embraced in the restrictive covenant was too great.[4] In ruling upon the demurrer the supreme court accepted, *inter alia*, the allegations that there was a valid written contract, that plaintiff-corporation was engaged in this business throughout the United States, and that Heim had acquired valuable trade secrets and technical processes, customer lists, price information, and research and development data while employed by plaintiff.[5] The court said that "upon the allegations of the complaint, which the proof may or may not sustain, the court should have overruled both demurrers and permitted the defendants to answer and proceed to trial of the case on its merits."[6] The supreme court, therefore, held

[2] *Id.* at 476, 173 S.E.2d at 317.

[3] *Id.* The action was commenced against Heim, individually, for violating his restrictive covenant in the employee contract; and against Heim and Ballard, a codefendant, trading as Metro Screen Engraving Co. of Gastonia, for conspiracy to violate the covenant.

[4] 6 N.C. App. 548, 170 S.E.2d 540 (1969). The court of appeals determined that the mere allegation of business throughout the United States which needed to be protected was not sufficient, and stated that it was incumbent upon plaintiff to show that such a business exists and that the contract was necessary to protect such legitimate interest.

[5] 276 N.C. at 478, 173 S.E.2d at 318.

[6] *Id.* at 480, 173 S.E.2d at 320-21. The supreme court in *Harwell* apparently felt that the burden rested upon the plaintiff to plead such facts in his complaint that would show the covenant to be reasonable on its face. The issue before the court on this demurrer was whether the complaint contained a plain and concise statement of facts constituting a cause of action. What should the plaintiff be required to plead to show that he has a cause of action? Under the pleading rules applicable when this case was tried, the plaintiff needed not plead any more than facts constituting a cause of action and a demand for relief to which the plaintiff is entitled. He did not have to allege evidentiary facts, nor was he required to plead the law. Furthermore, he was not required to anticipate and negate in advance the defenses that the defendant may interpose. In *Harwell* the supreme court seemed to vary these rules and require the plaintiff to plead more than would normally be required. If the plaintiff in a *Harwell* situation is required to plead certain additional facts to indicate reasonableness, what of the many factors affecting reasonableness should he be required to plead? Why should not the burden fall on the defendant, who arguably is in a better position to know if the covenant is un-

that these allegations of the complaint constituted a valid cause of action. This decision indicated that the covenant restricting employment throughout the United States was not void on its face.[7]

The earlier North Carolina precedent concerning nationwide restraints on trade in employment contracts has been unclear although it seems to have limited the area of noncompetition more severely than the court has done in *Harwell*.

The leading case prior to *Harwell* was *Comfort Spring Corp. v. Burroughs*[8] in which the defendant-employee covenanted that for a period of five years after termination of the contract by either party, he would not directly or indirectly enter into the employ of or represent a *certain named competitor* within the entire United States.[9] The court sustained the defendant's demurrer and held that the restriction covering the entire United States was void and unreasonable as to territory, and was unnecessary for the protection of the plaintiff.[10]

The employee-defendant in *Welcome Wagon, Inc. v. Morris*,[11] covenanted not to engage directly or indirectly in the same kind or similar business as that of the plaintiff-corporation in Gastonia or in any other town or city in the United States in which the plaintiff did or had sig-

reasonable as to him, to come forward with facts showing the covenant to be unreasonable? A possible justification for the court's approach in *Harwell* is that historically restraints of trade have been disfavored. Therefore, with no summary judgment provision, the court, for the purpose of intercepting more quickly these possibly unreasonable restraints has decided to require the plaintiff to plead the scope of his business and facts showing that he was a legitimate interest to be protected. The problem is that the supreme court has never articulated the reasons for requiring the plaintiff to plead these things. Where does the plaintiff in a *Harwell* situation look for guidance when he prepares his complaint? Under the new North Carolina Rules of Civil Procedure, the plaintiff apparently will not be required to plead the additional facts as he had to do in *Harwell*. The emphasis in the new rules is on *notice pleading*—giving the defendant notice of the nature and basis of plaintiff's claim to enable him to answer and prepare for trial—with the use of other pretrial procedures to disclose more precisely the basis of the claim and define more narrowly the disputed facts and issues. Fact interception is now handled via the summary judgment procedure. *See* Sutton v. Duke, 277 N.C. 94, 176 S.E.2d 161 (1970), for a decision interpreting N.C.R. Civ. P. 8(a)(1).

[7] 276 N.C. at 480, 173 S.E.2d at 320-21.

[8] 217 N.C. 658, 9 S.E.2d 473 (1940).

[9] *Id.* at 659, 9 S.E.2d at 474.

[10] *Id.* at 661-62, 9 S.E.2d at 475-76. *See* Annot., 43 A.L.R.2d 94, 276 (1955), in which the *Comfort Spring* decision is cited in the list of cases that have held nationwide restrictive covenants unreasonable. *See also* 2 J. Strong, North Carolina Index 2d *Contracts* § 7 (1967), which cites *Comfort Spring* as authority for the proposition that nationwide restraints are per se unreasonable and void in North Carolina.

[11] 224 F.2d 693 (4th Cir. 1955) (applying North Carolina Law).

nified its intention to do business.[12] Judge Dobie, speaking for the court, said:

> In Comfort Spring Corp. v. Burroughs, . . . defendant employee, apparently a salesman, covenanted, inter alia, not to work for a certain competitor anywhere in the United States for a five year period after the termination of his employment with plaintiff-employer. The covenant was breached, but the court held that the covenant was void because it was unreasonable in territorial extent . . . .[13]

Arguably Judge Dobie interpreted *Comfort Spring* as requiring that the restrictive covenant in *Morris* be declared void and unreasonable since the period was unreasonably long and the territory covered was too vast.[14]

In *Welcome Wagon International, Inc. v. Pender*[15] there was a covenant by the employee-defendant which prohibited the employee from engaging in business competitively with the employer in

> (1) Fayetteville, North Carolina, (2) in any other city, . . . or other place in North Carolina, in which the Company is then engaged in rendering its said service, (3) in any city, . . . or village in the United States in which the Company is then engaged in rendering its said service, or (4) in any city, . . . or village in the United States in which the Company has signified its intention to be engaged in rendering its said service.[16]

The covenant was declared void to the extent that it related to any place in the United States where plaintiff was engaged or intended to carry on business, but it was reasonable as to Fayetteville.[17] The court in *Pender*

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[12] *Id.* at 696.

[13] *Id.* at 699.

[14] *Id.* at 694. Possibly Judge Dobie misconstrued the holding of the *Comfort Spring* decision, as did the court of appeals and the defendant in *Harwell*. *Comfort Spring* did not hold that nationwide restrictive covenants were ipso facto void and unreasonable. However, Judge Dobie may still have reached the correct result. The plaintiff in *Morris* alleged that he did business in many cities throughout the United States, but there was no allegation or proof that the defendant-employee had gained such trade secrets as would cause irreparable harm to the plaintiff if the employee was allowed to use them with another employer. Judge Dobie pointed out in the opinion that no trade secrets passed from Welcome Wagon to Morris. The procedural aspect of *Morris*—appeal from a denial of injunctive relief—was different from that of *Harwell*—appeal from granting of a demurrer. It is interesting to note that the court in *Morris* made findings of fact even though it was an appeal from denial of injunctive relief.

[15] 255 N.C. 244, 120 S.E.2d 739 (1961).

[16] *Id.* at 246, 120 S.E.2d at 740.

[17] *Id.* at 248, 120 S.E.2d at 742. In considering the covenant the court said that it was

noted that "the court [in *Comfort Spring*] recognized, as valid, the rule [reasonableness test] . . . but refused to restrain the defendant because of plaintiff's failure to allege sufficient facts . . . ."[18] The differences in facts, allegations, and specific circumstances led to a result in *Pender* that was different, though not conflicting, with that in *Harwell*. In *Pender* the court certainly did not hold that nationwide restrictive covenants were ipso facto void.

The defendants in *Harwell* had relied on *Comfort Spring* to support their contention that the covenant in their contract was void because the territory covered was unreasonable. However, the court in *Comfort Spring* did not hold that nationwide restrictive covenants were ipso facto unreasonable for the court there had expressly pointed out that "[t]here is no allegation nor evidence as to the territory in which the defendant is calling upon the plaintiff's customers . . . . In truth, there is no allegation nor evidence as to over what territory the plaintiff's business extends."[19] Even though the defendant had acquired certain trade and confidential information, the court indicated that the absence of the particular allegation that plaintiff does business throughout the United States left it no choice but to declare the covenant unreasonable for purpose of the demurrer. Apparently the court felt that the absence of this allegation indicated on the face of the complaint that plaintiff had no legitimate interest that required protection throughout the entire United States.

Pender and *Morris*, likewise, would not support the plaintiff's contention that a nationwide restrictive covenant should be enforced. In both *Pender* and *Morris* there were allegations that plaintiff did business throughout the United States. However, in *Pender* there was no allega-

without power to vary or reform the contract by reducing either territory or the time covered by the restrictions. However, where as here, the parties have made divisions of the territory, a court of equity will take notice of the divisions the parties themselves have made, and enforce the restrictions in the territorial divisions deemed reasonable. . . . It is patent that division (1)—Fayetteville—is not unreasonable. Likewise it appears that divisions (3) and (4)—any city or town in the United States in which the plaintiff is doing, or intends to do business—are unreasonable—and will not be enforced. Whether (2) is reasonable is for the chancellor.

Id. The court in *Pender* applied the "blue pencil test"—since the parties had made divisions in the territory themselves, the court could "pencil out" the unreasonable areas and permit the reasonable areas to stand. The *Pender* case was up on a demurrer, and, therefore, only the allegations of the complaint were before the court. There was no allegation that valuable trade secrets and confidential information was acquired by the defendant during the course of her employ.

[18] *Id.* at 249, 120 S.E.2d at 743. *See* note 6 *supra*.

[19] 217 N.C. at 661, 9 S.E.2d at 475.

tion that the employee had acquired valuable trade secrets and confidential information during the course of her employment.[20] In *Morris*, there was allegation that the employee had become acquainted with certain "methods, systems, and trade usages"[21] during the course of her employment, but the court stated that "there were no deep trade secrets, and no highly confidential information was given by Welcome Wagon to Morris."[22] The court in both cases apparently felt that the plaintiff did not have legitimate interests that required protection throughout the United States. In *Harwell* the plaintiff alleged that he did business throughout the United States. This allegation coupled with the allegation that defendant Heim had acquired valuable trade secrets that could irreparably damage the plaintiff competitively, allowed the court to overrule the demurrer and uphold the nationwide restrictive covenant. The combination of these two allegations was absent in *Comfort Spring, Pender*, and *Morris*.

Various states have approached the problem of nationwide territorial restraints on trade in several ways. A few states have antitrust statutes specifically limiting the enforceability of contracts restraining anyone from exercising a lawful trade, profession, or business. Included in this category are Montana,[23] North Dakota,[24] and Oklahoma,[25] which prohibit any such restrictive covenant, except where the covenantor is the seller of a business who agrees not to compete within a specified county, city or part thereof, so long as the vendee or his assignee conducts the business therein, or the seller is a partner who agrees not to compete in order to facilitate dissolution of a partnership.[26] California apparently prohibits post-employment restrictions although it does permit the enforcement of agreements that are ancillary to the sale of a business and its good will or incidental to a partnership dissolution.[27]

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[20] The court apparently felt that without this allegation the covenant would not be reasonable. Thus, in effect, there would be no cause of action. *See* 255 N.C. at 249, 120 S.E.2d at 743.

[21] 224 F.2d at 696.

[22] *Id.* at 701. This language indicates that "trade secrets" in and of themselves are not sufficient. There must be "trade secrets" of the sort found in *Harwell* in order that nationwide protection will be granted.

[23] MONT. REV. CODES ANN. §§ 13-807 to -809 (1967).

[24] N.D. CENT. CODE § 9-08-06 (1959).

[25] OKLA. STAT. tit. 15, §§ 217-19 (1961).

[26] Note, *Employment Contracts and Non Competition Agreements*, 1969 U. ILL. L.F. 61, 63.

[27] CAL. BUS. & PROF. CODE § 16600-02 (West 1964). *But see* Ingrassia v. Bailey, 172 Cal. App. 2d 370, 341 P.2d 370 (1959). (Enforcing employee's agreement not to solicit former employer's customers whose identities were confidential.)

There are some states which by judicial decision hold void a contract restricting the employee beyond the scope of his original employment, even though the employer's business extends further;[28] while a few states apparently hold, without regard to particular facts, that any restraint that covers at least an entire state is invalid.[29] Several states support the rule that a restrictive covenant not to compete is ipso facto void if unlimited as to territory.[30] Even where there is no limitation as to territory, or territory is expressly made unlimited, however, the majority of jurisdictions hold that the covenant is not ipso facto invalid[31] and apply the test of reasonableness to the specific circumstances and facts of each case.[32] Generally the nationwide restrictive covenant has been upheld where the employer's business actually covered the United States and the breaching employee had possession of "valuable trade secrets"[33] of the employer.[34] However, where it does not appear that the employer conducted a nationwide business or that the employee had garnered such secret or confidential

[28] *See* Comment, *Contracts in Restraint of Trade: Employee Covenants Not to Compete*, 21 ARK. L. REV. 214, 219 (1967).

[29] Orkin Exterminating Co. v. Dewberry, 204 Ga. 794, 51 S.E.2d 669 (1949); Hubman Supply Co. v. Irvin, 67 Ohio L. Abs. 119, 119 N.E.2d 152 (C.P. 1953).

[30] Vendo Co. v. Long, 213 Ga. 774, 102 S.E.2d 173 (1958); Magic Fingers, Inc. v. Robins, 86 N.J. Super. 236, 206 A.2d 601 (Super. Ct. 1965); Annot., 43 A.L.R.2d 94, 125 (1955).

[31] Award Incentives, Inc. v. Van Rooyen, 263 F.2d 173 (3d Cir. 1959); Tuscaloosa Ice Mfg. Co. v. Williams, 127 Ala. 110, 28 So. 669 (1899); Annot., 43 A.L.R.2d 94, 130 (1955).

[32] *See, e.g.*, Annot., 43 A.L.R.2d 94, 116-21, 141-236 (1955). *See generally* these North Carolina cases: Jewel Box Stores Corp. v. Morrow, 272 N.C. 659, 158 S.E.2d 840 (1968); Orkin Exterminating Co. v. Griffin, 258 N.C. 179, 128 S.E.2d 139 (1962); Beam v. Rutledge, 217 N.C. 670, 9 S.E.2d 476 (1940); Scott v. Gillis, 197 N.C. 223, 148 S.E. 315 (1929).

[33] The use of the term "trade secrets" covers a broad area. General "trade secrets" may or may not be protected depending on the circumstances. Usually secrets are protected when they are of a special type—secret technical processes developed at great expense. *See generally* Annot., 43 A.L.R.2d 94, 275 (1955) for the types of trade secrets that are protected.

[34] *See, e.g.*, Irvington Varnish & Insulator Co. v. Van Norde, 138 N.J. Eq. 99, 46 A.2d 201 (1946); Eastman Kodak Co. v. Powers Film Prod., 189 App. Div. 556, 179 N.Y.S. 325, *appeal denied*, 190 App. Div. 970, 179 N.Y.S. 919 (1919); Eagle Pencil Co. v. Jannsen, 135 Misc. 534, 238 N.Y.S. 49 (Sup. Ct. 1929). *See* Annot., 43 A.L.R.2d 94, 275 (1955); 36 AM. JUR. *Monopolies* § 79 (1941).

> The fact that the employment is of such a character as to inform the employee of business methods and trade secrets, which if brought to the knowledge of a competitor, would prejudice the interests of the employer, tends to give an element of reasonableness to a contract that the employee will not engage in a similar business for a limited time after the termination of his employment, and is always regarded as a strong reason for upholding the contract.

Id.

trade information that could cause irreparable harm to the employer, nationwide covenants are declared unreasonable.[35] The individual factual situation and the specific circumstances of each case generally seem to determine whether or not the covenant will meet the required test of reasonableness.[36]

This test of reasonableness is comprised of three elements—reasonableness as to the employer, as to the employee, and as to the public interest. The reasonableness of each element is contingent upon the absence or presence of a number of factors.[37] As to the protection desired by the employer, consideration must be given to the nature of the trade or business involved, the nature of the employee's occupation, the nature of the skill acquired by the employee during employment, the employee's contact with customers, the employee's contact with and acquisition of trade secrets and confidential information, and generally whether or not the employer has a legitimate interest that requires protection. As to the reasonableness of the covenant with respect to the employee, consideration must be given to possible economic hardship to the employee and his family, the inconvenience to the employee resulting from the necessity of changing occupation or residence, and the nature of the skill acquired by the employee during employment.[38] As to the public interest, consideration must be given to the interference with the utilization of the employee's skill and productivity, the possibility of a consequent shift of competition or creation of a monopoly,[39] the possibility of the employee becoming a public charge, and the creation of opportunity of employment. Each of the elements must, also, be considered in relation to the duration of the covenant and the territory restricted by the covenant.[40] In order for the restrictive covenant

[35] *See, e.g.*, Hydraulic Press Mfg. Co. v. Lake Erie Eng'r Corp., 132 F.2d 403 (2d Cir. 1942); McCluer v. Super Maid Cook-Ware Corp., 62 F.2d 426 (10th Cir. 1932); Mallinckrodt Chem. Works v. Nemnich, 169 Mo. 388, 69 S.W. 355 (1902).

[36] In Jewel Box Stores Corp. v. Morrow, 272 N.C. 659, 158 S.E.2d 840 (1968), the North Carolina Supreme Court emphasized that time and area must be considered in determining reasonableness but neither is conclusive of the validity of the covenant.

[37] See Comment, note 28 *supra* at 215-17; Blake, *Employee Agreements Not to Compete*, 73 HARV. L. REV. 625, 647 (1960); Note, *Validity and Enforceability of Restrictive Covenants Not to Compete*, 16 WES. RES. L. REV. 161 (1964). For excellent discussions of these three elements of reasonableness and factors that influence them, see 17 C.J.S. *Contracts* § 247 (1963); Annot., 43 A.L.R.2d 94, 141-236, 275-77 (1955); Annot., 41 A.L.R.2d 15, 46-154 (1955).

[38] For an example of this resulting situation see Annot., 43 A.L.R.2d 94, 141-236 (1955).

[39] *Id.*

[40] *See generally* authorities cited note 37 *supra*.

to be reasonable under a certain factual situation, there must be some combination of the above factors to make each element reasonable in respect to the duration of the covenant and the territory restricted by the covenant.[41] In balancing these elements, courts have found that the covenant will be enforceable if it is ancillary to the employment contract; if it is no greater than is required for the protection of the person—employer—for whose benefit the restraint is imposed; if it does not impose undue and unreasonable hardship on the person restricted—employee; and if it is not injurious to the public interest.[42]

When analyzing the reasonableness test, it does not seem impossible, illogical, or unlikely that courts in North Carolina, under the appropriate factual situations, could find a nationwide restrictive covenant reasonable and enforceable. However, the *Harwell* decision is the first in North Carolina to uphold such a covenant.

With the growth of nationwide business, increased use of nationwide restrictive covenants will follow.

> Because of the increased technical and scientific knowledge used in business today, the emphasis placed upon research and development, the new products and techniques constantly being developed, the nation-wide activities (even world-wide in some instances) of many business enterprises, and the resulting competition on a very broad front, the need for such restrictive covenants to protect the interests of the employer becomes increasingly important. If during the time of employment new products are developed and new activities are undertaken, reason would require their protection as well as those in existence at the date of the contract, and to a company actually engaged in nationwide activities, nationwide protection would appear to be reasonable and proper.[43]

But what of the employee bound by this restrictive covenant? Either he must change occupations or leave the country; certainly neither alternative is desirable. There must of necessity, be a balancing process between the interests of the employer and employee. In traveling this path of bal-

[41] These factors are easy to list. The difficulty arises when one tries to apply these factors to specific circumstances. *See generally* authorities cited in note 37 *supra*. The cases cited in those discussions will be an aid in determining what factors are relevant in a particular situation and covenant.

[42] *See generally* authorities cited in note 37 *supra*; Sineath v. Ratzis, 218 N.C. 740, 12 S.E.2d 671 (1940). Note, *Employment Contracts and Non Competition Agreements*, 1969 U. ILL. L.F. 61. *See also* 17 C.J.S. *Contracts* § 247 (1963); Annot., 9 A.L.R. 1456, 1468 (1920).

[43] 276 N.C. at 480-81, 173 S.E.2d at 320.

ancing, the courts have adopted rules which reflect the whole evolution of industrial technological advances, business methods, social values, and popluation. In *Harwell*, North Carolina took the path of least net injustice.

MICHAEL GUNTER

Torts—Comparative Injury Doctrine of Nuisance

Should a court of equity close a forty-five million dollar cement plant, thereby destroying the jobs of over three hundred workers and depriving the county of important tax revenue, in order to prevent comparatively minor damages[1] to nearby property? This was the question that confronted the New York Court of Appeals recently in *Boomer v. Atlantic Cement Co.*[2] The cement plant emitted dirt, smoke, and vibrations which neighboring property owners claimed injured their lands. The owners filed several suits asking the court to restrain the operation of the plant as a nuisance and to award money damages for past injury. The trial court found that the operation of the plant did indeed constitute a nuisance, even though the plant was equipped with the most effective pollution control devices available, and that plaintiffs had been substantially injured. Damages for past injuries were awarded, but the court refused to issue an injunction because of the great hardship it would bring upon defendant and the community.[3] The appellate division affirmed.[4]

The court of appeals agreed with the lower courts that closing the plant was too drastic a remedy but disagreed with the manner in which the lower courts had avoided such remedy. With one judge dissenting, the court reversed the order of the trial court and instructed that an injunction be issued unless defendant paid plaintiffs' permanent damages. Such relief, said the court, would do justice between the parties as it would fully redress the economic loss to plaintiffs' properites without being overly oppressive to defendant. Citing *United States v. Causby*,[5] the

[1] Approximately 535 dollars per month.

[2] 26 N.Y.2d 219, 257 N.E.2d 870, 309 N.Y.S.2d 312 (1970). This decision consolidated appeals handled separately by the appellate division.

[3] Boomer v. Atlantic Cement Co., 55 Misc. 2d 1023, 287 N.Y.S.2d 112 (Sup. Ct. 1967).

[4] Boomer v. Atlantic Cement Co., 30 App. Div. 2d 480, 294 N.Y.S.2d 452 (1968); Meliak v. Atlantic Cement Co., 31 App. Div. 2d 578, 295 N.Y.S.2d 622 (1968) (mem.).

[5] 328 U.S. 256 (1946).

court said "[t]he theory of damage is the 'servitude on land' of plaintiffs imposed by defendant's nuisance."[6] And, said the court, since plaintiffs' acceptance of the permanent damages would be in compensation for a servitude on the lands, plaintiffs would be barred from future recovery.[7]

Apparently the court's decision overrules previous New York cases[8] and aligns the state with those jurisdictions which adhere to the comparative injury doctrine.[9] That doctrine, stated simply, says that a court of equity should deny injunctive relief, notwithstanding the fact that the existence of a nuisance and substantial injury to plaintiff have been established, when issuance of the injunction would cause defendant much greater hardship than continuance of the nuisance would cause plaintiff.[10]

Such balancing of equities has been justified by courts which accept the doctrine as a natural consequence of several fundamental principles of equity. These courts insist that the granting or withholding of relief by a court of equity always rests in the discretion of the chancellor. As one court has put it, "To an injunction . . . no one has an absolute and unqualified right. Such an application appeals to the conscience of the chancellor, to the exercise of a wise and sound discretion . . . ."[11]

The extraordinary nature of injunctive relief is also stressed as supporting the comparative injury doctrine. Most likely a court about to compare the hardships will make some comment reminiscent of Mr. Justice Baldwin's statement that "[t]here is no power the exercise of which is

[6] 26 N.Y.2d at —, 257 N.E.2d at 875, 309 N.Y.S.2d at 319.

[7] Judge Jasen in his dissent attacked the majority's apparent overthrow of the long-standing New York rule that a nuisance which results in substantial continuing damage to neighboring property should be enjoined. The judge also referred to the grave dangers to health cause by particulate pollution and to the unconstitutionality of allowing defendant to impose a servitude on plaintiffs' lands by the payment of money damages. As an alternative to the majority's conditional injunction, Judge Jasen proposed issuance of an absolute injunction to take effect in eighteen months if the nuisance was not abated by then. 26 N.Y.2d at —, 257 N.E.2d at 875-77, 309 N.Y.S.2d at 319-22.

[8] *E.g.*, Whalen v. Union Bag & Paper Co., 208 N.Y. 1, 101 N.E. 805 (1913); McCarty v. Natural Carbonic Gas Co., 189 N.Y. 40, 81 N.E. 549 (1907); Strobel v. Kerr Salt Co., 164 N.Y. 303, 58 N.E. 142 (1900).

[9] For a thorough discussion of this doctrine see McClintock, *Discretion to Deny Injunction Against Trespass and Nuisance*, 12 MINN. L. REV. 565 (1928); Mechem, *The Peasant in His Cottage: Some Comments on the Relative Hardship Doctrine in Equity*, 28 S. CAL. L. REV. 139 (1955); Annot., 61 A.L.R. 924 (1929); Annot., 31 L.R.A. (n.s.) 881 (1911).

[10] *E.g.*, Pritchett v. Wade, 261 Ala. 156, 73 So. 2d 533 (1954); Storey v. Central Hide & Rendering Co., 148 Tex. 509, 226 S.W.2d 615 (1950); Beard v. Coal River Collieries, 103 W. Va. 240, 137 S.E. 7 (1927).

[11] McCarthy v. Bunker Hill & Sullivan Mining & Concentrating Co., 164 F. 927, 940 (9th Cir. 1908), *cert. denied*, 212 U.S. 583 (1909).

more delicate, which requires greater caution, deliberation, and sound discretion, or is more dangerous in a doubtful case than the issuing of an injunction. . . ."[12] Likewise the comparative injury jurisdictions point out that a court of equity should never grant relief which would be inequitable or "operate contrary to the real justice of the case."[13] From such principles of equity these courts conclude that an injunction is not the proper remedy when it would cause defendant disproportionately greater hardship than continuance of the nuisance would cause plaintiff.

Not all courts agree, however. Previous New York cases[14] and a substantial number of other jurisdictions[15] reject the notion of balancing the equities. These courts argue that whenever a clear case of nuisance is established and the wrong causes plaintiff substantial injury which cannot be adequately remedied at law, plaintiff has an absolute right to injunctive relief even though there is a large disparity in the economic consequences of the nuisance and of the injunction.[16]

Courts which refuse to balance the equities generally disagree with

[12] Bonaparte v. Camden & A.R.R., 3 F. Cas. 821, 827 (No. 1617) (C.C.D.N.J. 1830). For an example of a nuisance case employing such a statement see Bartman v. Shobe, 353 S.W.2d 550 (Ky. 1962).

[13] McCarthy v. Bunker Hill & Sullivan Mining & Concentrating Co., 164 F. 927, 940 (9th Cir. 1908).

[14] *See* cases cited note 8 *supra.*

[15] *E.g.*, Meriwether Sand & Gravel Co. v. State, 181 Ark. 216, 26 S.W.2d 57 (1930); Hulbert v. California Portland Cement Co., 161 Cal. 239, 118 P. 928 (1911); Wente v. Commonwealth Fuel Co., 232 Ill. 526, 83 N.E. 1049 (1908); Brede v. Minnesota Crushed Stone Co., 143 Minn. 374, 173 N.W. 805 (1919); Hennessey v. Carmony, 50 N.J. Eq. 616, 25 A. 374 (1892).

North Carolina apparently rejects the comparative injury doctrine also. "[W]here a nuisance is established . . . no private enterprise for the mere purpose of bringing gain to its owner can be allowed to destroy one's home or to impair his health. Both are irreparable injuries, and no damage can compensate a man for destruction of his home or for the undermining of his health." Redd v. Edna Cotton Mills, 136 N.C. 342, 344, 48 S.E. 761, 762 (1904). However, the state's courts will balance the equities when an injunction would cause "public inconvenience" and that term is given a very broad meaning. *See* Attorney General *ex rel.* Bradsher v. Lea, 38 N.C. 301 (1844); Barnes v. Calhoun, 37 N.C. 199 (1842).

[16] Phrased more eloquently:

> The law, in cases of this kind, will not undertake to balance the conveniences, or estimate the difference between the injury sustained by the plaintiff and the loss that may result to the defendant from having its trade and business, as now carried on, found to be a nuisance. No one has a right to erect works which are a nuisance to a neighboring owner, and then say he has expended large sums of money in the erection of his works, while the neighboring property is comparatively of little value. The neighboring owner is entitled to the reasonable and comfortable enjoyment of his property, and, if his rights in this respect are invaded, he is entitled to the protection of the law, let the consequences be what they may.

Susquehana Fertilizer Co. v. Malone, 73 Md. 268, 282-83, 20 A. 900, 902 (1890).

the comparative injury jurisdictions as to the nature of equitable relief, contending that such relief is not "of grace" but is a matter of right whenever plaintiff is able to make out his case.

> The phrase "of grace" predicated of a decree in equity . . . has no rightful place in the jurisprudence of a free commonwealth, and ought to be relegated to the age in which it was appropriate. It has been somewhere said that equity has its laws as law has its equity. This is but another form of saying that equitable remedies are administered in accordance with rules as certain as human wisdom can devise, leaving their application only in doubtful cases to the discretion, not the unmerited favor or grace of the chancellor. Certainly no chancellor . . . will at this day admit that he dispenses favors or refuses rightful demands, or deny that, when a suitor has brought his cause clearly within the rules of equity jurisprudence, the relief he asks is demandable ex debito justitiae, and needs not be implored ex gratia.[17]

Courts which hold this view of the nature of equitable relief argue that the comparative injury doctrine takes the property of the poor and gives it to the rich,[18] and "puts the hardship on the party in whose favor the legal right exists instead of on the wrong-doer."[19] Furthermore, these courts contend that the injunction cannot result in injury to defendant because defendant is not injured by being restrained from doing that which he had no right to do.[20]

The dichotomy between those courts which reject the comparative injury doctrine and those which accept it, however, is not as distinct as the foregoing discussion might suggest. The dividing line is blurred, sometimes beyond recognition, by the exceptions that many of the courts which purport to reject the doctrine make to their no-balancing rule. For example, most jurisdictions balance the equities on applications for injunctions pendente lite and refuse such applications where the injunction would injure defendant much more than continuance of the nuisance would damage plaintiff.[21] Likewise, the equities may be balanced whenever: (1) plaintiff's injury is trivial per se even though occasioned by an

[17] Walters v. McElroy, 151 Pa. 549, 557, 25 A. 125, 127 (1892).
[18] Whalen v. Union Bag & Paper Co., 208 N.Y. 1, 5, 101 N.E. 805, 806 (1913).
[19] 1 J. POMEROY, EQUITABLE REMEDIES § 530 (1905).
[20] Walters v. McElroy, 151 Pa. 549, 558, 25 A. 125, 127 (1892).
[21] *E.g.*, United States v. Luce, 141 F. 385 (C.C.D. Del. 1905); Sexton v. Public Serv. Co-Ordinated Transp., 5 N.J. Super. 555, 68 A.2d 648 (1949); Huskin v. Yancey Hosp., Inc., 238 N.C. 357, 78 S.E.2d 116 (1953).

admitted nuisance;[22] (2) plaintiff is guilty of laches or there is an element of estoppel present;[23] (3) plaintiff comes to the court in bad faith, as when he seeks the court's aid only to force defendant to pay an exorbitant price for his property;[24] or (4) the public has an interest in the continuation of the nuisance.[25] These exceptions, combined with the agility with which some jurisdictions are able to alter their viewpoints,[26] make simple categorizations of a court's position extremely perilous and render predictions of whether a given court will or will not balance the equities in a particular case most unreliable.

But if a court does balance the equities and the balancing results in the denial of the injunction, one question is invariably raised: Does the denial of the injunction amount to an improper taking of plaintiff's property? *Boomer* vividly demonstrates the problem. Defendant's activities invaded plaintiffs' property rights. The court, however, instead of ordering the cessation of the wrongful acts, allowed defendant to purchase those rights which were being invaded and placed plaintiffs in such a position that they had no choice but to sell the rights.[27] Such action would appear to amount to a kind of private, and therefore unconstitutional, inverse condemnation.[28]

Most courts which deny injunctive relief after balancing the conveniences, however, are not impressed by the private condemnation argu-

[22] *E.g.*, MacDonald v. Perry, 32 Ariz. 39, 255 P. 494 (1927); Gray v. Manhattan Ry., 128 N.Y. 499, 28 N.E. 498 (1891).

[23] *See* Grey *ex rel.* Simmons v. Mayor of City of Patterson, 60 N.J. Eq. 385, 45 A. 995 (1900); Knoth v. Manhattan Ry., 187 N.Y. 243, 79 N.E. 1015 (1907); Kinsman v. Utah Gas & Coke Co., 53 Utah 10, 177 P. 418 (1918).

[24] *See* Edwards v. Allouez Mining Co., 38 Mich. 46 (1878).

[25] *E.g.*, Daughtry v. Warren, 85 N.C. 136 (1881); Booth-Kelly Lumber Co. v. City of Eugene, 67 Ore. 381, 136 P. 29 (1913).

[26] *Compare* Sullivan v. Jones & Laughlin Steel Co., 208 Pa. 540, 57 A. 1065 (1904), *with* Elliott Nursery Co. v. Duquesne Light Co., 281 Pa. 166, 126 A. 345 (1924).

[27] Of course plaintiffs could have refused to accept the permanent damages and maintained successive actions at law for damages as further injury was incurred. Such a course, however, is so onerous as to eliminate it as a realistic alternative.

[28] *Boomer* is strikingly similar to inverse condemnation cases such as Ferguson v. Village of Hamburg, 272 N.Y. 234, 5 N.E.2d 801 (1936), and Papphenheim v. Metropolitan Elevated Ry., 128 N.Y. 436, 28 N.E. 518 (1891). In cases of this type, defendant's activities substantially impair some property right of plaintiff and suit is brought to enjoin the acts causing the injury. Since the defendant possesses the power to condemn the invaded property the court usually grants an injunction conditioned on defendant's payment of plaintiff's permanent damages and thereby avoids forcing defendant to institute a separate condemnation proceeding. The critical difference between these cases and the principal case is that the Atlantic Cement Co. had no power to condemn the property rights which the operations of its plant invaded.

ment. Many,[29] including the United States Supreme Court,[30] follow the practice of the court of appeals in *Boomer* and make little or no reply to the contention. Others hint that the emphasis on the constitutional impropriety of the court's action is misplaced and that the only question involved concerns the abiltiy of a court of equity to mold its judgment to fit the circumstances of the case. And this ability, it is said, is not affected by defendant's lack of the power of condemnation.[31] One court, replying directly to the condemnation contention, noted that similar arguments could be advanced in cases in which injunctions are denied because of the adequacy of the remedy at law.[32] "The answer to the 'condemnation' argument," said the same court, "is that one who comes to equity does so by choice. Equity forces nothing from him, and he may stand on his legal remedies if he wishes. But if he wants equity he must do equity."[33]

Neither the courts' silence, nor their emphasis on the powers of equity courts, nor their instructions on what one must do to merit equitable relief, however, resolves the issue. The fact remains that defendant has, in effect, been allowed to condemn plaintiff's property rights for private purposes by creating a nuisance which invades those rights. If such action is not unconstitutional, it would seem that the courts should be able to state why it is not.

Another problem raised by *Boomer* and neglected by the opinion concerns the terms of the conditional injunction. Should provision be made to allow defendant to recover part of the damages paid if the nuisance is abated in the future? Or, conversely, should the decree allow plaintiffs to return to the court if the nuisance becomes more intense in the future?

Probably the court need concern itself with neither of these contingencies when drafting the decree. As for the possiblity of future abatement, it is generally said that where a nuisance is not legally abatable the defendant cannot object to the assessment of permanent damages because the court will presume that the nuisance will continue to operate

[29] *See* cases cited note 10 *supra.*

[30] *See* Harrisonville v. W.S. Dickey Clay Mfg. Co., 289 U.S. 334 (1933); New York City v. Pine, 185 U.S. 93 (1902).

[31] Knoth v. Manhattan Ry., 109 App. Div. 802, 96 N.Y.S. 844 (1905), *aff'd*, 187 N.Y. 243, 79 N.E. 1015 (1907).

[32] Bartman v. Shobe, 353 S.W.2d 550 (Ky. 1962).

[33] *Id.* at 555. Interestingly enough one court has suggested that the issuance of an injunction that would cause defendant comparatively greater hardship than continuance of the nuisance would cause plaintiff would constitute an improper appropriation of defendant's property. Madison v. Ducktown Sulphur, Copper & Iron Co., 113 Tenn. 331, 83 S.W. 658 (1904).

under the same conditions for an indefiinte period.[34] Since defendant's ability to in fact abate the nuisance will not prevent the recovery of permanent damages, it may be assumed that he should not be allowed to recover any money paid to plaintiffs if the nuisance is actually abated. On plaintiffs' side, so long as the nature and extent of the servitude conveyed to defendant by acceptance of the permanent damages is clearly defined, plaintiffs should have no trouble obtaining relief from increased injury by an action to enjoin the overburdening of the servient estate. Defining the nature and extent of the servitude conveyed, however, may itself present serious difficulties since it is an open question how an easement to pollute is to be measured.

Notwithstanding the questions left unanswered by the decision in *Boomer*, it is difficult to quarrel with the majority's resolution of the conflict between the parties. The facts of the case placed the court in the unenviable position of being forced to choose between following its former decisions and closing the cement plant or overruling itself and awarding plaintiffs what seems less than adequate remedy. No other alternative presented itself. The cement company could not be forced to experiment with pollution control devices because its plant already had the best available. Retention of the case to allow the court to keep the situation under its supervision would have been possible but would not have satisfied the needs of plaintiffs. And a delayed injunction, such as that proposed by the dissent,[35] would have amounted to nothing more, under the circumstances, than a delayed closing of defendant's plant. Thus it appears that the course followed by the majority was the only practical solution to the problem.

This is not to say that the decision is to be applauded. On the contrary, it is most unsatisfactory. Pollution continues to emanate from defendant's plant—pollution which not only injures plaintiffs' properties but also damages the health of the general public. And the fact remains that plaintiffs have been afforded inadequate relief. All that can be said about the decision is that it is an example of a case which, because of the limited powers and resources of the courts, is incapable of satisfactory judicial resolution.

It must be remembered, however, that all pollution cases are not as extreme as *Boomer*. Seldom do the facts of a case force a court to elect

[34] Northern Ind. Pub. Ser. Co. v. W.J. & M.S. Vesey, 210 Ind. 338, 351, 200 N.E. 620, 626 (1936).

[35] 26 N.Y.2d at —, 257 N.E.2d at 877, 309 N.Y.S.2d at 322.

between closing a multi-million dollar operation, thereby devastating a large business and destroying the economy of an entire community, and awarding the plaintiff inadequate relief. In the majority of pollution cases other alternatives are present. For example, it may be possible to reduce or eliminate the injurious pollution by obligating the defendant to install effective pollution control devices. Or, where the defendant is an extremely wealthy concern, it may be possible to stimulate the development of new and more efficient pollution control devices by forcing investment in research. At the very least, a court should explore all plausible courses of action before resorting to the comparative injury doctrine as a means of resolving the dispute. Such resolution is so unsatisfactory, especially in the pollution area where the public interest is great, that it should be limited to cases in which the facts allow no other solution. Above all the courts must not evade the problems raised by the pollution crisis by indiscriminately employing the doctrine of comparative injury.

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