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Notes

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NOTES

Constitutional Law—State Action and Tax Benefits to Private Charitable Organizations

Since June 1971, a series of federal court decisions has sustained attacks on state and federal tax exemption and deduction provisions as applied to racially segregated charitable and educational organizations.[1] The principle emerging from these cases is that tax administrators are under an affirmative duty to insure that recipients of the tax benefits generally available to private charitable and educational institutions do not practice racial discrimination in their admissions and membership policies. All of these decisions have profound implications for federal, state, and local tax administration.[2] One of them, *Pitts v. Department of Revenue*,[3] in its application of the state action doctrine, appears to bring fourteenth amendment prohibitions more directly to bear on private conduct than any case since *Burton v. Wilmington Parking Authority*.[4]

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[1]Pitts v. Department of Revenue, 333 F. Supp. 662 (E.D. Wis. 1971); Green v. Connally, 330 F. Supp. 1150 (D.D.C.), *aff'd mem. sub nom.* Coit v. Green, 92 S. Ct. 564 (1971); McGlotten v. Connally, 338 F. Supp. 448 (D.D.C. 1972).

[2]The decree in Green v. Connally, 330 F. Supp. 1150 (D.D.C.), *aff'd mem. sub nom.* Coit v. Green, 92 S. Ct. 564 (1971), illustrates the kind of administrative action necessary to implement the decisions. The Internal Revenue Service is enjoined from granting tax exempt status to any Mississippi private school and from allowing deductions for contributions to any such school, except upon a showing of compliance with detailed advertising requirements establishing nondiscriminatory policies in school administration, admissions, scholarship and loan programs, and athletic and extra-curricular activities. In addition to the advertising requirements, the school must furnish the Service with information "which the court finds material in order for the Service to be in an effective position to determine whether the school has actually established a policy of nondiscrimination . . . ." Included in this information is the racial composition of the school's student body, applicants for admission, faculty, and administrative staff; the amount of any scholarship aid and the racial composition of recipients; a list of incorporators, founders, board members, and donors, and a statement as to whether any of them are identified with segregationist organizations. 330 F. Supp. at 1180. A comment on the case has suggested that its impact on actual Service practices may be minimal because of the sheer manpower limitations. "Investigation of hiring or admissions policy and substantive determination of whether the activities of each of some 400,000 groups conflict with public policy presents a far more massive task than the largely mechanical decision making previously employed. The practical restrictions will probably influence courts to avoid sweeping mandates, leaving the assault on charitable exemptions to private litigants on a case by case basis." Note, *Federal Taxation—Charities—Taxpayers May Contest IRS Allowance of Exempt Status, and Organizations whose Activities Violate Public Policy May Not Be Accorded Favored Tax Treatment*, 50 TEXAS L. REV. 544, 549 (1972).

[3]333 F. Supp. 662 (E.D. Wis. 1971).

[4]365 U.S. 715 (1961).

Wisconsin, like most states, exempts from taxation the property and income of organizations that may be called charitable institutions.[5] The statutes, drafted in broad terms, exempt the *property and income*[6] of all churches, private schools, historical societies, women's clubs, libraries, and fraternal orders such as Elks and Moose lodges, and the *income*[7] of "other corporations or associations of individuals not organized or conducted for pecuniary profit." The plaintiffs in *Pitts* claimed to represent a class of non-Caucasian Wisconsin taxpayers and Caucasian taxpayers not affiliated with or members of organizations that discriminate in membership on the basis of race.[8] Focusing their attack on the exemption of fraternal orders, they sought a declaration that the exemption statutes were unconstitutional as applied to organizations that discriminate in membership on the basis of race and an injunction prohibiting the Department of Revenue from enforcing the statutes as to those organizations.

The proposition that government must not fiscally subsidize racist organizations seems scarcely debatable in the year 1971. Numerous legal theories bolster this principle,[9] and under most of them a plaintiff's

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[5]The Wisconsin statutes exempt from property taxation all

> [p]roperty owned and used exclusively by educational institutions . . . churches or religious educational or benevolent associations . . . women's clubs . . . domestic, incorporated historical societies . . . domestic, incorporated, free public library associations [and] fraternal societies operating under the lodge system . . . .

WIS. STAT. § 70.11(4) (1967). Exempted from income tax is the income of "all religious, scientific, educational, benevolent or other corporations or associations of individuals not organized or conducted for pecuniary profit." WIS. STAT. § 71.01(3)(a) (1967). Although the *Pitts* plaintiffs attacked only the exemptions of private fraternal orders, the court's holding applied to all of the above-named exemptees. 333 F. Supp. at 670.

[6]WIS. STAT. §§ 70.11(4), 70.01(3)(a) (1967).

[7]*Id.* § 70.01(3)(a) (1967).

[8]333 F. Supp. at 669-70. The district court, relying on Flast v. Cohen, 392 U.S. 83 (1968), held that plaintiffs' standing as taxpayers was sufficient to invoke federal jurisdiction. 333 F. Supp. at 669-70. In *Flast* the Supreme Court held that a federal taxpayer has standing to challenge Congressional spending programs alleged to be in violation of specific constitutional limitations on the power of the federal government. Whether *Flast* properly applies to state fiscal matters, whether it applies to exemptions from taxation as well as to appropriations, and whether the equal protection clause is a "specific limitation" are questions beyond the scope of this note.

[9]Charitable institutions are not taxed because they fulfill a "public purpose," which is also a limitation on the taxing and spending power of a state legislature. However, the beneficiaries of a charitable activity need not include the entire public; a use is charitable if its accomplishment "is of such social interest to the community as to justify permitting the property to be devoted to the purpose in perpetuity." RESTATEMENT (SECOND) OF TRUSTS § 368, comment *b* at 248 (1959). Thus an activity is charitable if it achieves a result that otherwise would be achieved only at public expense. Union & New Haven Trust Co. v. Eaton, 20 F.2d 419, 421 (D. Conn. 1927); *cf.* H.R.

principal burden would be the largely factual one of establishing the proposition as an apt characterization of the particular transactions involved: at issue would be whether a tax exemption is a significant subsidy in light of the total financial structure of a given organization or class of organizations and the weight to be accorded a policy of restricted participation in organizational activities where the otherwise charitable purposes and effects of such activities are assigned to justify the favored treatment. It may be that no public benefit can outweigh the interest of the victim of racial prejudice practiced by the one who confers the benefit, and certainly categorizing an institution as charitable cannot immunize it from judicial scrutiny in terms of contemporary standards of social benefit and public good. To be sure, the courts' freedom to apply these tests to legislative enactments is more circumscribed than it is when the subject before them is the validity of a charitable trust.[10] But this does not mean that the tests are not appropri-

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REP. NO. 1860, 75th Cong., 3d Sess. 19 (1938). *See generally* Clark, *Charitable Trusts, the Fourteenth Amendment and the Will of Stephen Girard*, 66 YALE L.J. 979 (1957). But racial discrimination *arbitrarily* excludes a part of the public and therefore may defeat the public character of an activity.

> The individual philanthropist cannot be indulged in his own vagaries as to what is charitable; he must conform to some kind of norm, else he cannot obtain subsidy or tax exemption. Similarly the general principle of a "desire to benefit one's own kind" is an acceptable incentive to philanthropy as applied to a wide range of causes. But it takes on a different and unacceptable hue when it is manifested as racial discrimination.

Green v. Connally, 330 F. Supp. 1150, 1163 (D.D.C.), *aff'd mem. sub nom.* Coit v. Green, 92 S. Ct. 564 (1971), discussed in text accompanying notes 33-35 *infra*. Note also the statement in McGlotten v. Connally, 338 F. Supp. 448, 456 n.38 (D.D.C. 1972):

> We do not find it significant that plaintiff does not allege . . . that the charitable purposes to which the federal funds are put are in themselves discriminatory. Plaintiff alleges that he and others in his position are denied the opportunity to help determine the purposes to which the funds are devoted. Paternalism should not be confused with equality.

McGlotten is discussed in text accompanying notes 58-60 *infra*.

As for federal tax benefits, the *McGlotten* case held that INT. REV. CODE OF 1954, §§ 170(a), (c) and 501(c)(8) constitute "federal financial assistance" within the meaning of Title VI of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000d to 2000d-4 (1970), and that plaintiffs had a cause of action under § 601 of the Act, 42 U.S.C. § 2000d, which provides that "[n]o person . . . shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance." For a discussion of state and federal statutory bases for withdrawing tax benefits to private segregated schools, see Note, *Federal Tax Benefits to Segregated Private Schools*, 68 COLUM. L. REV. 922, 940-50 (1968).

[10]The Wisconsin cases, for example, while implicitly recognizing that there are limits beyond which the legislature may not go, allow a wide berth for legislative discretion. *See* Fulton Foundation v. Department of Taxation, 13 Wis. 2d 1, 14, 108 N.W.2d 312, 319 (1960); Lawrence Univ. v. Otugamie County, 150 Wis. 244, 246, 136 N.W. 619, 620 (1912).

ate guides to statutory construction. Nor is it necessarily true that where there is no room for construction in conformity with these standards the legislative determination that they are met is conclusive: concepts of public purpose have their constitutional basis in due process principles that are as binding on the legislatures as on the courts. It is too often forgotten that most state constitutions have due process clauses and that the demise of "substantive due process" that has restricted judicial review of such legislative judgments has been for the most part a phenomenon peculiar to the federal fifth and fourteenth amendments.[11]

The plaintiffs in *Pitts*, however, selected an approach designed to obtain an adjudication of federal constitutional right: they contended that Wisconsin's allowance of tax benefits in favor of segregated fraternal orders was state action fostering racial discrimination in violation of the equal protection clause of the fourteenth amendment. Inevitably a high degree of risk attends an unnecessary forcing of constitutional issues. In this case there was the additional factor that the constitutional frame of reference within which the court was asked to operate was so fraught with contrary precedent[12] and conflicting principles that the court could sustain the plaintiffs' claim against the presumption of the statute's constitutionality only "with the unfortunate certainty of complicating the already complex state action concept."[13]

The Wisconsin Department of Revenue's defense was based on the statute's "neutrality" in the matter of race. It pointed out that the criteria for exempt status were set out in terms of institutional objectives and that any fraternal or benevolent organization meeting the requirements was granted the exemption without regard to internal (member-

[11]*See generally* Carpenter, *Economic Due Process and State Courts*, 45 A.B.A.J. 1027 (1959); Horn, *Judicial Power Over Policy Under State Constitutions*, 6 PUB. POLICY 47 (1955); Paulsen, *The Persistence of Substantive Due Process in the States*, 34 MINN. L. REV. 92 (1950). Substantive due process is not dead, of course, even in the federal practice. *See* Packer, *The Aims of the Criminal Law Revisited: A Plea for a New Look at "Substantive Due Process,"* 44 S. CAL. L. REV. 490 (1971).

[12]In addition to the Seventh Circuit cases discussed in text accompanying notes 16-21 *infra*, *see also* Guillory v. Administrators of Tulane Univ., 212 F. Supp. 674, 685 (E.D. La. 1962) ("a simple tax benefit [does not evoke] state action. [Otherwise,] every legal creature would be within the proscription of the Fourteenth Amendment."); Eaton v. Grubbs, 329 F.2d 710, 713 (4th Cir. 1964) (tax exemption not sufficient by itself to impose fourteenth amendment restrictions but "may attain significance when viewed in combination with other attendant state involvements") (dictum); Smith v. YMCA, 316 F. Supp. 899, 906 (M.D. Ala. 1970) (same) (dictum).

[13]333 F. Supp. at 669.

ship) policies.[14] From this premise the court was asked to conclude that since the exemption provisions "do not isolate the factor of racial discrimination either by their terms or application, plaintiffs cannot argue . . . that the state encourages or is involved in private discriminations."[15] The Department of Revenue relied primarily on two recent cases involving tax exemptions. In *Walz v. Tax Commission*,[16] the Supreme Court held that a grant of tax exemption to religious organizations did not violate the establishment clause of the first amendment, because the exemption amounted to only a "benevolent neutrality" and a "minimal and remote involvement." In *Chicago Joint Board, Amalgamated Clothing Workers of America v. Chicago Tribune*,[17] the plaintiff union claimed that by granting a use tax exemption to a newspaper publishing company the state had so insinuated itself as to become the author of the newspaper's denial to plaintiff of a medium of speech. The Seventh Circuit rejected the contention in these words:

> The use tax exemption, which newspapers share in common with magazines and periodicals . . . does represent a "state involvement" in the limited sense that any tax exemption does, but not to a degree which constitutes state participation in the conduct or action of the enterprise granted the exemption.[18]

The *Pitts* court discussed one other recent case. In *Bright v. Isenbarger*[19] students in a parochial school claimed that their summary expulsion by school officials violated their rights of procedural due process. The *Bright* court, citing *Burton v. Wilmington Parking Authority*, held that a tax exemption in favor of parochial schools, even when

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[14]Where the state's involvement in discriminatory acts is established, this "neutrality" argument is subject to the stock response that "equal protection of the laws is not achieved through indiscriminate imposition of inequalities." Shelley v. Kraemer, 334 U.S. 1, 22 (1948). The neutrality asserted here, however, goes to the question of state involvement and is more substantial. *See* Lewis, *The Meaning of State Action*, 60 COLUM. L. REV. 1083, 1108 (1960):

> The important consideration for the state action problem is whether exemption involves the government in an endorsement of the specific policies and goals of an exempt organization. In the case of tax exemptions for charitable institutions, applying to very broadly defined private activities diverse in makeup and purposes almost beyond imagination, the theory that the state and federal governments provide the assistance in an indiscriminate manner will withstand scrutiny.

[15]Brief for Defendant at 10.

[16]397 U.S. 664, 676 (1970).

[17]435 F.2d 470 (7th Cir. 1970), *cert. denied*, 402 U.S. 973 (1971).

[18]*Id.* at 477 (citations omitted).

[19]314 F. Supp. 1382 (N.D. Ind. 1970), *aff'd per curiam*, 445 F.2d 412 (7th Cir. 1971).

coupled with state supervision of private education, did not "so insinuate the State into a position of interdependence with [the school] that it must be recognized as a joint participant in the challenged activity."[20]

In discussing *Walz*, the *Pitts* court appears to have perceived some difference between the state action doctrine and the principle applicable to discovering a violation of the establishment clause: the *Walz* opinion had not discussed "the state action doctrine as such" but had only "weighed factors similar to those relevant to determination of state action issues."[21] The court's basis for distinguishing the *Chicago Joint Board* and *Bright* cases is even more problematical and more significant. The court accorded special importance to the fact that these cases involved respectively the right of freedom of expression and the right to procedural due process. On the basis that "equal protection rights are to be accorded a special significance where governmental or state action is in question," the court held that "[w]hatever its nature in other contexts, a tax exemption constitutes affirmative, significant state action in an equal protection context where racial discrimination fostered by the State is claimed," and added: "Inherent in our decision . . . and in any distinction of *Walz, Chicago Joint Board* and *Bright,* is a determination that a different standard must be applied to ascertain state action in cases involving equal protection than in cases involving other rights."[22] The court did not define the "different standard" that applies to equal protection cases. Just what it is about a tax exemption that "significantly involves" the taxing authority in the racially discriminatory membership policies of private institutional recipients of exemptions is left for determination by the process, at best speculative, of interpreting the result in the light of the particular facts. For its part, the court chose to rest the decision on the conclusory observation that tax exemptions "obviously" encourage the activities, "including racial discrimination," of exempted organizations.[23]

Two other cases have enjoined enforcement of tax benefits in favor of segregated institutions. *McGlotten v. Connally,*[24] which involved federal Internal Revenue Code income tax benefits (including income tax deductions for donors) for *Pitts*-type institutions, was decided three

[20] *Id.* at 1396.
[21] 333 F. Supp. at 665.
[22] *Id.* at 668.
[23] *Id.* at 669.
[24] 338 F. Supp. 448 (D.D.C. 1972).

months subsequent to and in substantial accord with *Pitts* on fifth amendment grounds. In *Green v. Connally*,[25] also a federal income tax case, the question of the constitutionality of exemptions and deductions as applied to private segregated schools was not reached. Rather, the court construed the challenged sections as not applying to such schools. Moreover, the fact that the institutional recipients in *Green* were schools rather than clubs or fraternal orders suggests the possibly critical distinction that the governmental aid represented by tax benefits, especially charitable contribution deductions, was shown to be supportive of efforts by white Mississippians to circumvent court-ordered desegregation.[26] Nevertheless, in view of the heavy reliance on *Green* by the *Pitts* court, a brief treatment of the *Green* opinion at this point is in order.

The Green plaintiffs were black children attending Mississippi public schools, and their parents. They sought alternative declaratory relief, arguing first that sections 170 and 501 of the Internal Revenue Code[27] did not authorize tax benefits operating to the advantage of deliberately segregated private schools in Mississippi and, second, that those sections were unconstitutional to the extent they so authorized tax benefits. Noting its pendent jurisdiction to decide the claim based on statutory

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[25]330 F. Supp. 1150 (D.D.C.), *aff'd mem. sub nom.* Coit v. Green, 92 S. Ct. 564 (1971).

[26]*Cf.* Coffey v. State Educ. Fin. Comm'n, 296 F. Supp. 1389 (S.D. Miss. 1969) (historical maintenance of segregated public school system imposes affirmative duty to establish a system of integrated public education, making state tuition grants to private segregated institutions in derogation of that duty unconstitutional). *See also* Poindexter v. Louisiana Financial Assistance Comm'n, 275 F. Supp. 833 (E.D. La. 1967), *aff'd per curiam*, 389 U.S. 571 (1968) (aid to segregated schools that is the product of the state's policy of fostering segregated schools is unconstitutional). "We distinguish . . . state aid from tax benefits, free schoolbooks, and other products of the state's traditional policy of benevolence toward charitable and educational institutions." *Id.* at 854. The court in *Green* was careful to point out that its decision "goes beyond the class of schools considered in our prior opinion [Green v. Kennedy, 309 F. Supp. 1127, 1132-37 (D.D.C.), *appeal dismissed*, 400 U.S. 986 (1970)] where we discussed the constitutional problems inhering in providing tax benefits for private schools forming 'a system of segregated private schools as an alternative available to white students seeking to avoid desegregated public schools.'" 330 F. Supp. at 1164. But the opinion also makes clear that its inclusion of "all private schools, without reference to any finding or determination that such schools were formed for the purpose of avoiding a unitary school system," is based on federal public policy and not on equal protection principles. *Id.* Moreover, even if the constitutional question were regarded as identical where there is no finding of purposeful avoidance, education, "a matter affected with the greatest public interest . . . whether . . . offered by a public or private institution" and a function historically associated with the state, presents considerations which distinguish schools from the private charitable institutions involved in *Pitts*. Guillory v. Administrators of Tulane Univ., 203 F. Supp. 855, 858-59, *vacated on rehearing*, 207 F. Supp. 554 (E.D. La.), *aff'd per curiam*, 306 F.2d 489 (5th Cir. 1962).

[27]INT. REV. CODE OF 1954, §§ 170(a), (c) allow a deduction for charitable contributions to defined organizations. *Id.* §§ 501(a), (c) exempt the income of such organizations.

construction, the court embarked on an extended discussion of the "underlying" law of charitable trusts.[28] Citing cases and treatises for the rule that a limitation to accomplish a purpose contrary to public policy will cause a charitable trust to fail, the court observed a modern trend in the case law to deny enforcement of discriminatory provisions in educational trust instruments by means of a variety of judicial techniques ranging from *cy pres* to reverter. The court concluded, "There is at least a grave doubt whether an educational organization that practices racial discrimination can qualify as a charitable trust under general trust law."[29] With this perspective the court proceeded to construe the relevant Internal Revenue Code provisions in light of federal public policy. Finding a federal policy against federal support for segregated private schools in the post-Civil War amendments, various Supreme Court decisions in the wake of *Brown v. Board of Education*,[30] and the Civil Rights Act of 1964, the court held:

> The Internal Revenue Code provisions on charitable exemptions and deductions must be construed to avoid frustrations of Federal policy. Under the conditions of today they can no longer be construed so as to provide to private schools operating on a racially discriminatory premise the support of the exemptions and deductions which Federal tax law affords to charitable organizations and their sponsors.[31]

As for the *Green* plaintiffs' fourteenth amendment claims, the court remarked only that "[t]he propriety of the interpretation approved by this court is underscored by the fact that it obviates the need to determine such serious constitutional claims."[32]

Despite the relatively narrow holding of *Green* and its pointed refusal to decide the constitutional issue, the court in *Pitts* viewed *Green* as indistinguishable. Ignoring the basis of the *Green* decision, it instead

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[28]330 F. Supp. at 1157-61.

[29]*Id.* at 1157. It is well established that judicial enforcement of a racially discriminatory limitation in a trust instrument or of a racially restrictive covenant in a deed is unconstitutional state action. Evans v. Newton, 382 U.S. 296 (1966); Shelley v. Kraemer, 334 U.S. 1 (1948). The suggestion in *Green* is of something quite different: that a charitable trust which provides a racially discriminatory use will be invalidated as a matter of common law, at the instance of the heirs or residuary legatees or by the court on its own motion, by subjecting the limitations to the Rule Against Perpetuities, the rules regarding accumulations, and those against remoteness in vesting and suspension of the power of alienation.

[30]347 U.S. 483 (1954).

[31]330 F. Supp. at 1164.

[32]*Id.* at 1165.

directed its attention to that part of the opinion rejecting the claim of the intervenors, representatives of a class of white students enrolled in the private schools and their parents. The intervenors had contended that construction of the Code to exclude them and their schools from the exemptions and deductions would violate their first amendment rights to freedom of association. In response to these claims the court declared that the governmental interest in preventing racial discrimination is "dominant over other constitutional interests to the extent that there is complete and unavoidable conflict"[33] and observed that the "governmental and constitutional interest of avoiding racial discrimination in educational institutions embraces the interest of avoiding even the 'indirect economic benefit' of a tax exemption."[34]

Thus these statements—which, *Pitts* concludes, compel the result that tax exemptions for racially restricted clubs constitute unconstitutional state action—were actually made in the course of a ruling that the right to free association in the form of private segregated education does not include a right to governmental support through tax benefits. The statements mean only that the state has, consistent with the freedom of association, a constitutional interest in discouraging racial discrimination which justifies it in withdrawing all forms of support from discriminatory organizations, not that it has a constitutional obligation to do so. Yet *Pitts* held that *any* governmental financial assistance, however economically negligible and however benign its purpose, is unconstitutional state action if it appears that the recipient in some way, whether or not related to the purpose of the assistance, practices racial discrimination. The implications of this holding must be examined in its historical context.

It is familiar learning that, with scattered few exceptions here immaterial, constitutional prohibitions are addressed to government. This follows not only from the literal terms of the constitution but also from the essential character of constitutional government. Constitutions are written to define the scope of governmental interference in the affairs of constituents. Although the understanding with respect to the validity of these general observations as applied to the fourteenth amendment has been the subject of some controversy among scholars,[35] the Su-

[33] *Id.* at 1167.

[34] *Id.* at 1169.

[35] Several writers maintain that the judicial distinction between state and private action is a departure from the original understanding of the fourteenth amendment. *See* A. BLAUSTEIN & C.

preme Court very early registered its adherence to the position that the amendment's prohibitions operate only on the states.[36] Verbal reaffirmance of the rule is still a ritual with the modern judiciary, most scrupulously observed where it appears least reconcilable with the result. A strict requirement of state action, however, assumes an anachronistic model of social organization. Oriented toward a time when government was the only institution sufficiently powerful to pose any threat to individual liberty, it is ill-equipped to account for the potential impact on personal liberty of modern corporate social structure. An accommodation had to be made, because eventually it became apparent that certain freedoms had to be protected from private infringements as well as from governmental ones. Thus, modern state action doctrine developed as a device for bringing fourteenth amendment proscriptions to bear on private conduct by ascribing that conduct to the state.[37] To those who value predictability in the law, "state action" is an exasperating subject. The extreme difficulty of making any meaningful statement about state action generally is a consequence of the manifold contexts in which the problem is presented: the permutations of the claims of constitutional right and the instances of private-governmental interaction are virtually limitless. But whether the case is one of governmental control over the

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FURGESON, DESEGREGATION AND THE LAW 92 (1957); H. FLACK, THE ADOPTION OF THE FOURTEENTH AMENDMENT 277 (1909); Williams, *The Twilight of State Action*, 41 TEXAS L. REV. 347 (1963). *But see* Avins, *State Action and the Fourteenth Amendment*, 17 MERCER L. REV. 352 (1966).

[36]United States v. Cruikshank, 92 U.S. 542, 554-55 (1875); Virginia v. Rives, 100 U.S. 313, 318 (1880); United States v. Harris, 106 U.S. 629, 643-44 (1882).

[37]Actually, two theoretical directions have been taken. Marsh v. Alabama, 326 U.S. 501 (1946), and Smith v. Allwright, 321 U.S. 649 (1944), head a line of cases enforcing constitutional prohibitions against private organizations engaged in a public or governmental function. This kind of enforcement, relatively restricted in its application, is an extension of the meaning of "state" to include not only the official organs of state government but also the arrogation of governmental authority or power in the exercise of an activity normally associated with the state or traditionally within its province. *See* Note, *Applicability of the Fourteenth Amendment to Private Organizations*, 61 HARV. L. REV. 344 (1948). Of course, principles derived from the public function cases influence the decision of governmental action cases, and vice versa. For example, the Court in Evans v. Newton, 382 U.S. 296 (1966), relied both on the public nature of the recreational facility and on the fact that court appointment of private trustees in order to preserve the segregated character of the park is state action. Similarly, one interpretation of *Marsh* is that the state's enforcement of its trespass laws against the defendants for exercising protected freedoms is critical to the case. *See* Berle, *Constitutional Limitations on Corporate Activity—Protection of Personal Rights from Invasion through Economic Power*, 100 U. PA. L. REV. 933 (1952). Despite the overlap, the classification is well enough defined so that discussion of public function authority is not helpful in analyzing the type of state action case under discussion—public aid to private institutions.

private actor's general operation,[38] judicial enforcement of private discriminatory[39] or otherwise injurious[40] conduct, or legislative encouragement of or complicity in private activity,[41] enforcement has hinged on a finding of some causal relation between the state and private activity that would support an attribution of that activity to the state.[42]

The problem of state aid to private institutions has never lent itself well to this kind of analysis.[43] Of course, state assistance can take many forms: direct financial assistance in the form of legislative appropriations, use of government property on advantageous terms, loan guarantees, or allowing the beneficiary to exercise the power of eminent domain. The kind of financial assistance represented by a tax exemption, however, is a conspicuously nebulous factor in the relationship between the state and the recipient.[44] Prior to 1961, the case law clearly supported the comment by one writer that "the fact that a state appropriates money to a private . . . institution has nothing to do with the determination of whether the acts of the . . . institution constitute state

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[38]*E.g.*, Moose Lodge No. 107 v. Irvis, 40 U.S.L.W. 4715 (U.S. June 13, 1972), *rev'g.* Irvis v. Scott, 318 F. Supp. 1246 (M.D. Pa. 1970).

[39]Shelley v. Kraemer, 334 U.S. 1 (1948).

[40]New York Times Co. v. Sullivan, 376 U.S. 254 (1964).

[41]Reitman v. Mulkey, 387 U.S. 369 (1967).

[42]The requirement of a causal relation between the state and private activity was recently articulated in Powe v. Miles, 407 F.2d 73 (2d Cir. 1968). Responding to the claim that New York's regulation of educational standards in private colleges renders a college's acts in curtailing protest the acts of the state, Judge Friendly noted that the contention

> overlooks the essential point—that the state must be involved not simply with some activity of the institution alleged to have inflicted the injury but with the activity that caused the injury. . . . [T]he fact that New York has exercised some regulatory powers over the standard of education offered by [the college] does not implicate it generally in [the college's] policies toward demonstrations and discipline.

Id. at 81.

[43]Part of the reason for the uneasy fit of governmental assistance cases is the lack of any authoritative consideration of the problem in the Supreme Court. Lower courts have had to deal with the problem by drawing on principles developed in often radically different contexts. Of course, since use of governmental property is one form of state assistance, the leading case on the use of governmental property, Burton v. Wilmington Parking Authority, 365 U.S. 715 (1961), suggests itself. But the multiplicity of factors on which the Court based its finding of state action in *Burton* makes it extremely difficult to isolate those properly labeled "assistance" from their opposites—facts establishing the benefits flowing to the municipal corporation. The only true similarity *Burton* bears to *Pitts* is the innocence with which the state activity was undertaken. The *Burton* finding of state action must rest in the last analysis on public ownership of the leased property. Lewis, *Burton v. Wilmington Parking Authority—A Case Without Precedent*, 61 COLUM. L. REV. 1458, 1464-65 (1961).

[44]*See* Lewis, *supra* note 43, at 1464 n.23.

action."[45] The matter was consistently viewed by the courts as one of agency, financial assistance being relevant only as it bore on the question of state control.[46] As one court put it:

> It is well settled that aid given by a government to a private corporation is not enough in itself to change the character of the corporation from private to public.
> . . . If each time a government lends its assistance to a private institution it were to acquire that institution as an arm of government, then government would indeed become a many armed thing.[47]

The erosion of the agency approach began in 1961 with the Supreme Court's decision in *Burton v. Wilmington Parking Authority*.[48] The question there was whether a private restaurateur, the lessee of space in a municipal parking facility, could constitutionally refuse to serve Negroes. In holding the discrimination to be state action, the Court pointed to a number of contacts between the lessee and the municipality—such as public ownership of the real estate and the consequent tax exemption for any improvements made by the lessee, the Authority's responsibility for upkeep and maintenance, and the fact that rental revenue was an "indispensable part of the State's plan to operate its project as a self-sustaining unit."[49] Describing its approach as one of "sifting facts and weighing circumstances [so that] the nonobvious involvement of the State in private conduct [can] be attributed its true significance,"[50] the court concluded that "[t]he State [had] so far insin-

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[45]Abernathy, *Expansion of the State Action Concept Under the Fourteenth Amendment*, 43 CORNELL L.Q. 375, 391 (1958). The author suggests that while financial aid alone may be irrelevant, it would be unconstitutional if coupled with (1) a degree of control which is "unusual" in the sense that it is distinguishable in some way from that under the general police power or with (2) impermissible motive, as where a state appropriates money to a private institution in order that the recipient might be able to accomplish a purpose which the state could not accomplish directly. *Id.* at 390; *cf.* Griffin v. County School Bd., 377 U.S. 218 (1964).

[46]*Compare* Kerr v. Enoch Pratt Free Library, 149 F.2d 212 (4th Cir.), *cert. denied*, 326 U.S. 721 (1945) (library required to admit blacks to its training course where 99% of its budget was financed by the city), *with* Norris v. Mayor & City Council, 78 F. Supp. 451 (D. Md. 1948) (state and city annual appropriations, plus lease of building for nominal rental, not state action requiring private school to admit blacks), *and* Mitchell v. Boys Club of Metropolitan Police, 157 F. Supp. 101 (D.D.C. 1957) (use of municipal property for meetings, cooperation of police in securing members and donations, and services of policemen in coordinating club activities did not require Boys Club to integrate).

[47]Mitchell v. Boys Club of Metropolitan Police, 157 F. Supp. 101, 107-08 (D.D.C. 1957).

[48]365 U.S. 715 (1961).

[49]*Id.* at 723-24.

[50]*Id.* at 722.

uated itself into a position of interdependence with [the restaurant] that it must be recognized as a *joint participant* in the challenged activity . . . ."[51] While it is clear that the *Burton* case repudiated the strict agency test without replacing it, it is just as clear that "significant involvement" contemplates something more than the mere grant of tax exempt status to private charitable organizations. The move from *Burton* to *Pitts* is aided by principles stemming from another recent Supreme Court decision, *Reitman v. Mulkey*,[52] holding unconstitutional an amendment to the California constitution prohibiting open housing legislation because it "significantly encourage[d] and involve[d] the State in private discriminations."[53]

Pitts, then, represents a synthesis of *Reitman* and *Burton* that equates "encouragement" of racial discrimination with "significant involvement." However, neither *Reitman* nor *Burton* justifies the court's abandonment of the causation principle. The *Pitts* court looked at the legislative enactment of tax benefits—clearly state action—and at the fact that the private recipients of those benefits practice racial discrimination, but it never examined the relationship between the state and private activities to see if one is in any way responsible for the other. The court betrayed this cumulative reasoning process by its declaration that a "different standard must be applied to ascertain state action in cases involving equal protection than in cases involving other rights."[54] If this statement means that the same state activity may constitute a violation of some rights and not of others, it accords with the weight of modern authority: a finding of state action violating a particular right does not render the private actor a plenary state agent subject to all constitutional prohibitions.[55] But in a later passage the court says that it cannot decide the state action question "in a vacuum" but must examine the state conduct "both in the light of the right it allegedly violates and in the light of the right under which it is asserted to be proper."[56] The constitutional interests to be balanced, the opinion con-

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[51] *Id.* at 725 (emphasis added).

[52] 387 U.S. 369 (1967).

[53] *Id.* at 381.

[54] 333 F. Supp. at 668.

[55] *See, e.g.*, Lefcourt v. Legal Aid Soc'y, 445 F.2d 1150, 1155 & n.6 (2d Cir. 1971); Wolin v. Port Authority, 392 F.2d 83, 89 (2d Cir. 1968), *cert. denied*, 393 U.S. 940 (1969); Powe v. Miles, 407 F.2d 73, 81-82 (2d Cir. 1968); Lewis, *supra* note 14, at 1119-20. *But see* Abernathy, *supra* note 45, at 416-17.

[56] 333 F. Supp. at 669.

tinues, are the "right to equal protection of the laws against a right of certain organizations to discriminate in their membership on the basis of race . . . ."[57] In thus focusing on the plaintiffs' rights as against those of the charitable organization, instead of on the plaintiffs' rights against the state, the court is allowing the enormity of the violation charged—racial discrimination—to compensate for the deficiency of the state's involvement in it. If the necessary state activity is minimal in racial discrimination cases, it is submitted that the reason is because the substantive right is more easily violated, that less activity on the part of the state may be required to encourage racial discrimination than to encourage deprivation of freedom of expression or procedural due process.

The question is whether "significant encouragement" means actual encouragement of the discriminatory conduct or merely a showing that the actor, as distinguished from his acts, is in some way supported by the state. It is on this point that the *McGlotten* court's approach differs from that in *Pitts*. The *McGlotten* court framed the issue this way:

> To demonstrate the unconstitutionality of the challenged deductions plaintiff must . . . show that they in fact aid, perpetuate, or encourage racial discrimination. . . . Every deduction in the tax laws provides a benefit to the class who may take advantage of it. . . . An additional line of inquiry is essential, one considering the nature of the Government activity in providing the challenged benefit and necessarily involving the sifting and weighing prescribed in *Burton*.[58]

The *McGlotten* court specifically found the Internal Revenue Code provisions for charitable contribution deductions to be a stamp of approval[59] of discriminatory activities and concluded that

> [t]he public nature of the activity delegated to the organization in question, the degree of control the Government has retained as to the purposes and organizations which may benefit, and the aura of Government approval inherent in an exempt ruling by the Internal Revenue Service, all serve to distinguish the benefits at issue from the general run of deductions available under the Internal Revenue Code.[60]

However accurate or inaccurate the *McGlotten* court's factual ap-

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[57] *Id.*
[58] 338 F. Supp. at 455-56.
[59] *Id.* at 456.
[60] *Id.* at 457.

praisal, its approach is in marked contrast to that in *Pitts*. The *Pitts* decision goes a long way toward imposing on government a constitutional duty to insure that no recipient of its financial aid practices racial discrimination.[61] Almost a decade ago scholars began to prophesy the end of the distinction between state and private action under the fourteenth amendment.[62] The courts have not yet abandoned the distinction, but the *Pitts-McGlotten* fact situation presents the terminal case. The reason the state action analysis breaks down at this point lies in its origin as a largely ad hoc reconciliation between the early judicial interpretation of the fourteenth amendment and the necessity of insuring the continued vitality of constitutionally guaranteed civil rights and liberties. Enforcing the fourteenth amendment against private acts almost invariably requires the court to balance a claim of right based on the amendment's violation against an opposing claim that the challenged activity is itself constitutionally protected. A doctrine developed in this

[61]The implicated tax laws alone present a parade of horrors to give any court pause. Are not estate and gift tax deductions for charitable bequests subject to invalidation under the *Pitts* reasoning if the bequest is to a racially discriminatory institution? What about the income tax deduction for mortgage interest where the taxpayer refuses to sell his residential property to a black? Will the same homeowner lose his standard deduction? What about accelerated depreciation, capital gains treatment, and ordinary and necessary business expense deductions? As to expense, interest, and depreciation deductions, one writer, pointing out that "even criminal enterprises may deduct their business expenditures," suggests that exemptions that stem from the definition of taxable income—from the policy of taxing net income rather than gross receipts—should not be subjected to equal protection challenges based on the taxpayer's bigotry. Note, 68 COLUM. L. REV., *supra* note 9, at 938. Accelerated depreciation and capital gains rates can be distinguished on the ground that whereas charitable exemptions and deductions advance "social" goals, "a provision purporting to serve macroeconomic ends is not necessarily anomalous or objectionable even where the institution it aids is an objectionable one." *Id.* at 939. It is difficult to see how either of these distinctions has any bearing on the "significant involvement" of the state under the *Pitts* reasoning, where the mere fact of financial support controls and the nature or purpose of the aid is not deemed a proper subject of consideration.

The *McGlotten* court distinguished between provisions that "operate to provide a grant of . . . funds through the tax system" and those that are "part and parcel of defining appropriate subjects of taxation" in discussing the deduction for "exempt function income" of private clubs provided by INT. REV. CODE OF 1954, § 501(c)(7). 338 F. Supp. at 458. But the decision—that INT. REV. CODE OF 1954, § 501(c)(7) as applied to segregated organizations was constitutional while the § 501(c)(8) exemption of "passive investment income" of fraternal orders was unconstitutional when so applied—was not based on this distinction. The court noted the arm's-length nature of the lease in *Burton* and concluded that the fact "that the Government provides no monetary benefit does not . . . insulate its involvement from constitutional scrutiny." 338 F. Supp. at 458. Section 501(c)(8) was distinguished on the narrow ground that it "does not limit its coverage to particular activities; exemption is given to 'clubs organized and operated exclusively for pleasure, recreation *and other nonprofitable purposes* . . . .'" *Id.* (Emphasis by the court)

[62]*See* Williams, *supra* note 35.

context is of very little usefulness in coming to grips with the sort of pocketbook interest asserted in *Pitts* and *McGlotten,* in which the plaintiffs did not even suggest that the organizations the tax benefits of which they attacked do not have the right to discriminate in their choice of associates.[63] However salutary the result in *Pitts* and *McGlotten,* it should not rest on a finding that unnecessarily undermines the freedom to engage in an activity that is not even challenged.[64] As far as the state's "significant involvement" is concerned, it is not clear on what basis past financial aid can be distinguished from a continuing subsidy. How far removed is the *Pitts* holding from one that finds in the *historical* grant of tax benefits sufficient state action to compel private clubs to open their doors to persons of all races?[65] Compulsory association of this sort may be the inevitable upshot of modern judicial attitudes in the area of race relations, and it may even reflect good social policy.[66] But the conflicting interests to be adjusted have nothing to do with the *Pitts* problem, where plaintiffs asserted only the right of a taxpayer not to have his tax burden increased as a result of exclusion from the tax base of the income and property of organizations that exclude him solely because of his race.

Sooner or later the Supreme Court must address the problem of

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[63]Abernathy, *supra* note 45, at 390-91, 394, suggests that where the state aid itself is challenged the proper analysis is under the due process clause. *But see* Lewis, *supra* note 14, at 1105-06.

An attack on state assistance at its source after conceding the private character of the recipient was tried in both the *Norris* and *Mitchell* cases, discussed note 46 *supra.* In each instance the claim based on the rights of complainants as citizens and taxpayers was rejected. Assuming the applicability to exemptions of the *Flast* doctrine, the question remains whether the difference in the nature of the right claimed puts a different substantive constitutional question before the courts. The court in *Pitts* recognized the difference in remedial postures but failed to accord it the proper significance, concluding only that it "may bear upon the weight to be accorded to the prerogatives of private organizations in balancing them against the rights asserted. . . . [I]n neither instance will the tax exemption transgress the Fourteenth Amendment unless with respect to the particular rights said to be infringed, the state involvement can be asid to be significant." 333 F. Supp. at 666.

[64]Although the court notes that "nothing in the present record indicates that the court could order desegregation of the organizations the right of which to tax exemptions is challenged," 333 F. Supp. at 667 n.10, it also states, apparently recognizing the implications of its finding of "significant involvement," that "any private right to discriminate is not constitutionally protected." *Id.* at 664 n.4.

[65]*Cf.* Evans v. Newton, 382 U.S. 296, 301 (1966), in which the Court held that the "momentum" gained by a segregated park from its history of, *inter alia,* tax exempt status was "certainly not dissipated ipso facto by the appointment of 'private' trustees."

[66]*See generally* Black, *Foreword to The Supreme Court, 1966 Term,* 81 HARV. L. REV. 69 (1967).

state financial aid to restricted clubs.[67] A definitive statement in this area is long overdue, and the delay is largely responsible for the divergent paths taken by the lower federal courts in *Pitts, McGlotten,* and *Green.* When it comes, it is to be hoped that the Court will adopt an approach that focuses on the real interests at stake, one more intellectually coherent than the almost metaphysical attempt to find "significant state involvement" in the mere grant of tax benefits.

JOSEPH W. FREEMAN, JR.

Constitutional Law—The Equal Protection Clause and the Student's Right to Vote Where He Attends School

The right of students to vote in the communities where they attend school has become an issue of vastly greater significance since the twenty-sixth amendment was ratified on June 30, 1971. Now that the age barrier has fallen,[1] the number of eligible student voters has increased, as have fears in some college communities that students may now be able to control local elections. Whether this spectre will materialize depends on many factors, but the principal obstacle remaining is

[67]The district court decision in *Green* was affirmed *per curiam.* Coit v. Green, 92 S. Ct. 564 (1971). In *Pitts* the defendant did not appeal, and there has been no reported Supreme Court disposition in *McGlotten.* Any future disposition of a recent Alabama federal district court decision, Gilmore v. City of Montgomery, 337 F. Supp. 22 (M.D. Ala. 1972), should be noted. The court there held that the city of Montgomery may not permit the use of its recreational facilities by private segregated academies, saying "what is important is the *effect* the state's aid has on the maintenance of a racially balanced public school system, but . . . the *extent* of the aid provided is immaterial." *Id.* at 24. Turning to the problem of use of the same facilities by private groups other than schools, the court felt

> the test should be somewhat different. Whereas state and city officials are under an affirmative obligation to end discrimination in situations involving education, this affirmative duty does not extend to cases involving private groups other than those affiliated with schools. Consequently, although state aid to such a group is unconstitutional if the organization discriminates on the basis of race, the mere fact that such an organization is segregated is not enough to render state aid to it *per se* constitutionally improper.

Id. at 25-26.

[1]A recent California case held unconstitutional the presumption that the residence of unmarried minors is at the home of their parents. The fact that students brought the suit was only incidental since the discrimination was "on account of age." Jolicoeur v. Mihaly, 5 Cal. 3d 565, 570-575, 96 Cal. Rptr. 697, 699-703, 488 P.2d 1, 4-7 (1971); *accord,* Ownby v. Dies, 337 F. Supp. 38 (E.D. Tex. 1971) [declaring TEX. ELECTION CODE art. 5.08(m) (Supp. 1972) unconstitutional].

created by state residence requirements, and assaults against that barricade are already underway. This note will examine state laws that govern student voting in college towns and will evaluate the recent decision by the Michigan Supreme Court in *Wilkins v. Bentley*,[2] which held unconstitutional a statute that hindered the establishment of voting residences by students in college towns.

I. THE LAW OF DOMICIL AND STUDENT VOTING RESIDENCE

The common pattern of residence requirements for voting includes a presumption that students do not reside where they attend school. The statute struck down by the Michigan Supreme Court in *Wilkins* was identical in form to statutes in eighteen other states[3] and was substantially similar to statutes in six states.[4] It stated: "No elector shall be deemed to have gained or lost a residence . . . while a student at any institution of learning."[5]

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[2]385 Mich. 670, 189 N.W.2d 423 (1971). The *Wilkins* court held that the statute violated the due process clause as well as the equal protection clause, but it did not rest its decision on due process grounds. *Id.* at 678-679, 189 N.W.2d at 427. The court's discussion of the due process clause and its relation to the statute was taken chiefly from a law journal note, *Restrictions of Student Voting: An Unconstitutional Anachronism?*, 4 J.L. REFORM 215, 221-22 (1970).

[3]ALA. CODE tit. 17, § 17 (1959); ALASKA STAT. § 15.05.020 (1971); ARIZ. CONST. art. 7, § 3; CAL. ELECTIONS § 14283 (West 1961); HAWAII REV. STAT. tit. 2, § 11-13(5) (Supp. 1971); IDAHO CONST. art. 6, § 5; KAN. CONST. art. 5, § 3; LA. CONST. art. 8, § 11; MINN. CONST. art. 7, § 3; MO. CONST. art. 8, § 6; MONT. CONST. art. IX, § 3; N.H. REV. STAT. ANN. § 54:10 (Supp. 1971); N.M. CONST. art. VII, § 4; N.Y. CONST. art. 2, § 4; PA. STAT. ANN. tit. 25, § 2813 (1963); S.C. CONST. art. 2, § 7; TEX. ELECTION CODE art. 5.08 (Supp. 1972). All these statutes explicitly enact presumptions. North Carolina has no such statute.

Ohio's statute, OHIO REV. CODE § 3503.05 (1960), was held to violate the equal protection clause in Anderson v. Brown, 332 F. Supp. 1195 (S.D. Ohio 1971) (per curiam).

The New York statute was upheld against constitutional challenge in Gorenberg v. Board of Election, 328 N.Y.S.2d 198 (App. Div. 1972), and in Whittington v. Board of Elections, 320 F. Supp. 889 (N.D.N.Y. 1970). The current status of New York law is surveyed in Note, *Student Voting and the Constitution: New York State Bona Fide Residency Requirement*, 72 COLUM. L. REV. 162 (1972).

The Texas statute was upheld in Wilson v. Symm, 341 F. Supp. 8 (S.D. Tex. 1972).

[4]The following statutes do not specifically enact a presumption but provide that a student may not gain a voting residence by attending a school. They are construed as not preventing the acquisition of a voting residence by a student who can prove residence by facts other than his enrollment in school. *See* Carrington v. Rash, 380 U.S. 89, 91 n.3 (1965). MO. CONST. art. II, § 1; NEV. REV. STAT. § 293.487 (1969); UTAH CODE ANN. § 20-2-14(2) (1953); VT. STAT. ANN. tit. 17, § 66 (Supp. 1971); WASH. REV. CODE § 29.01.140 (Supp. 1971); WYO. STAT. ANN. § 22-118.3(k)(2) (Supp. 1971).

[5]MICH. STAT. ANN. § 6.1011(b) (Supp. 1971), *quoted in* Wilkins v. Bentley, 385 Mich. 670, 675, 189 N.W.2d 423, 424-25 (1971). This statute has a protective aspect which presumes that a student does not lose his residence by attending school. No issue is raised here about this aspect

Virtually all states interpret voting statutes that limit the franchise to residents as requiring that one must be domiciled in the community in order to vote.[6] Domicil may be briefly defined as the place one normally abides. To establish a domicil one must go to a place with the intention of remaining there. Any absence must be considered temporary, and there must be an intention of returning to the former abode. The difference between simple residence and domicil lies in one's attitude and intentions.[7] A person might suppose himself able to determine his own domicil. That is not the case, however, for when domicil is called into question, a court is not bound to accept a party's declarations as to his intended domicil but may look at extrinsic facts to make its own determination.[8] This power of the court is clearly necessary in non-voting situations, as when jurisdictional questions or choice-of-law disputes arise. If the court did not have this power, an interested party could resolve the issue in his own favor. However, the result of applying the same test to qualifications to vote is that one is not able to choose his own voting residence.

In accordance with the interpretation of "residence" in voting statutes as "domicil," state courts have created common-law presumptions against domicil that in no way differ from the presumption in the Michigan statute. The courts rightly assume that the ordinary student establishes residence at a college or university for the temporary purpose of pursuing his education. In order to overcome the presumption, the student must prove his intent to establish a domicil—a burden that is often difficult to carry.[9]

Two views prevail among the states as to the ease with which a student may acquire a new domicil. By the more stringent view, the student must establish an intent to reside in the community *permanently* or for an *indefinite* time—a period that does not terminate with his graduation.[10] By the more liberal view, once a student has established

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of the statute because it preserves rather than inhibits the freedom to maintain a domicil of choice.

[6]*See* Vanderpoel v. O'Hanlon, 53 Iowa 246, 5 N.W. 119 (1880); Shaeffer v. Gilbert, 73 Md. 66, 20 A. 434 (1890); Opinion of the Judges, 46 Mass. 587 (1843); Fry's Election Case, 71 Pa. 302 (1872).

[7]White v. Tennant, 31 W. Va. 790, 791-93, 8 S.E. 596, 597 (1888); Fry's Election Case, 71 Pa. 302, 309 (1872).

[8]*E.g.*, Clark v. Clark, 71 Ariz. 194, 198, 225 P.2d 486, 488 (1951).

[9]*E.g.*, Ptak v. Jameson, 215 Ark. 292, 220 S.W.2d 592 (1949).

[10]The North Carolina Supreme Court recently adopted this view. Hall v. Bd. of Elections, 280 N.C. 600, 187 S.E.2d 52 (1972). Other cases adopting this view are Ptak v. Jameson, 215 Ark. 292, 220 S.W.2d 592 (1949); Parsons v. People, 30 Colo. 388, 70 P. 689 (1902); Vanderpoel v.

his intent to *abandon* his former domicil, he may acquire a new one where he presently intends to reside regardless of the fact that he may intend to leave the place at a definite time in the future.[11]

Courts utilizing the stringent indefinite-time test ignore a student's renunciation of his former domicil unless his intended period of residence in the school community extends beyond graduation.[12] Abandonment of former domicil was shown conclusively in two cases in which seminary students had entered a religious order the rules of which required an oath of renunciation of all family ties and a pledge to regard the seminary as their only home. Nevertheless, because the seminarians were subject to transfer on completion of their studies, the proof of abandonment of former domicil was held irrelevant.[13] The result in such a case is that a student may be disfranchised completely even if he renounced his former residence in good faith.[14] The extreme of disfranchisement was accomplished in New York when a student who lived in a dormitory was denied the vote. He was a naturalized citizen whose parents had come from Germany and spent only a brief time in this country before emigrating to South America. Presumably he could have voted in South America or in Germany, the country of his birth, but he

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O'Hanlon, 53 Iowa 246, 5 N.W. 119 (1880); Sanders v. Getchell, 76 Me. 158 (1884); Goben v. Murrell, 195 Mo. App. 104, 190 S.W. 986 (1916); *In re* Blankford, 241 N.Y. 180, 149 N.E. 415 (1925); *In re* Barry, 164 N.Y. 18, 58 N.E. 12 (1900); *In re* Garvey, 147 N.Y. 117, 41 N.E. 439 (1895); *In re* Goodman, 146 N.Y. 284, 40 N.E. 769 (1895); *In re* Sugar Creek Local School Dist., 185 N.E.2d 809 (Ohio Ct. C.P. 1962); State v. Daniels, 44 N.H. 383 (1862); Fry's Election Case, 71 Pa. 302 (1872); Siebold v. Wahl, 159 N.W. 546 (Wis. 1916). Texas has enacted this view by statute. *See* TEX. ELECTION CODE art. 5.08 (Supp. 1971).

[11]Cases following this view are Welsh v. Shumway, 232 Ill. 54, 83 N.E. 549 (1907); Pedigo v. Grimes, 113 Ind. 148, 13 N.E. 700 (1887); Shaeffer v. Gilbert, 73 Md. 66, 20 A. 434 (1890); Putnam v. Johnson, 10 Mass. 488 (1813); Chomeau v. Roth, 230 Mo. App. 709, 72 S.W.2d 997 (1934); Berry v. Wilcox, 44 Neb. 82, 62 N.W. 249 (1895); Shirelhood v. Davis, 336 F. Supp. 1111 (D. Vt. 1971).

New York abandoned a long line of precedent and implicitly adopted this position in Robbins v. Chamberlain, 297 N.Y. 108, 75 N.E.2d 617 (1947). California has enacted this view by statute. *See* CAL. ELECTIONS § 14283 (West 1961).

[12]Hall v. Bd. of Elections, 280 N.C. 600, 187 S.E.2d 52 (1972); Fry's Election Case, 71 Pa. 302 (1872).

[13]*In re* Blankford, 241 N.Y. 180, 149 N.E. 415 (1925); *In re* Barry, 164 N.Y. 18, 58 N.E. 12 (1900). If this strict test were applied to other segments of society, many non-students would also be disenfranchised. For example, Methodist clergymen are often transferred at regular intervals. Under this strict test they would never be able to acquire a new domicil after abandoning their old one. *See generally*, MISS. CODE ANN. § 3235 (Supp. 1971). The absence of cases protesting such treatment suggests that the law is not uniformly applied, although it purports to be based on general principles of domicil law.

[14]*In re* Blankford, 241 N.Y. 180, 149 N.E. 415 (1925).

was totally without a voting residence in his adopted country![15]

These are not unintended results. The policy behind the rule is to limit a student's ability to vote where he goes to school. The New York Court of Appeals candidly acknowledged this: "It may be urged that the enforcement of this rule will render it well-nigh impossible for a student to establish a residence in a seminary of learning, but the very obvious answer is that the letter and spirit of the New York constitution contemplate such a result."[16] This policy seems to be grounded upon a fear that concentrated student voting would be dangerous. Another court said: "It certainly would strike one as extraordinary to learn that it was in the power of those nontaxpaying sojourners [students] to wrest the city or county government from the voice and hand of the permanent citizens."[17]

Courts that take the more liberal view do not disregard evidence that a student has abandoned his former residence. Of course, they do not accept his declared intent as conclusive.[18] If there is evidence that he is emancipated from his parents,[19] that he provides his own support,[20] that he does not invariably return home on vacations but goes where he can find work,[21] or that he has a family of his own,[22] then these courts may find that his present residence is his domicil. Emancipation and self-support are the most important factors in overcoming the presumption that his residence at school is merely temporary. If he can demonstrate these facts, the court will recognize the location of the school as his domicil despite the fact that he may intend to remain there only for a limited or definite time.

The fact that students plan to stay in one place only for a limited time does not make them substantially different from other young people. A surprisingly modern observation to this effect was made by a court in 1813 in the earliest recorded case in which student voting rights were litigated:

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[15]Watermeyer v. Mitchell, 275 N.Y. 73, 9 N.E.2d 783 (1937). Ironically, the first case in New York to enunciate this strict standard was seeking to preserve the vote of a student at his former residence while he was away at school. *See In re* Goodman, 146 N.Y. 284, 40 N.E. 769 (1895).

[16]*In re* Garvey, 147 N.Y. 117, 123, 41 N.E. 439, 441 (1895).

[17]Goben v. Murrell, 195 Mo. App. 104, ____, 190 S.W. 986, 988 (1916). Similar fears were expressed in Anderson v. Pifer, 315 Ill. 164, 168, 146 N.E. 171, 173 (1925).

[18]Welsh v. Shumway, 232 Ill. 54, 87-88, 83 N.E. 549, 562 (1907).

[19]Putnam v. Johnson, 10 Mass. 488, 500 (1813).

[20]Robbins v. Chamberlain, 297 N.Y. 108, 111, 75 N.E.2d 617, 618 (1947).

[21]Berry v. Wilcox, 44 Neb. 82, 84, 62 N.W. 249, 250 (1895).

[22]Robbins v. Chamberlain, 297 N.Y. 108, 111, 75 N.E.2d 617, 618 (1947).

> In this new and enterprising country, it is doubtful whether one half of the young men, at the time of their emancipation, fix themselves in any town with an intention of *always staying there*. They settle in a place by way of experiment, to see whether it will suit their views of business and advancement in life; and with an intention of removing to some more advantageous position if they should be disappointed. Nevertheless, they have their home in their chosen abode while they remain. Probably the meaning of [the rule] is, that the habitation fixed in any place, without any present intention of removing therefrom, is the domicile. At least, this definition is better suited to the circumstances of this country.[23]

The Missouri Supreme Court best articulated the policy that should dictate a court's interpretation of voter residency requirements when it said that election laws should be liberally construed in aid of the right to vote. It dismissed the fear that a combination of students might control an election as an unworthy ground for denying them suffrage. Even the fact that students might not be taxpayers was held to be an invalid consideration since that is not a prerequisite for voting. The court found that students have an interest in electing officials because they are subject to local laws.[24]

II. THE EQUAL PROTECTION CLAUSE APPLIED TO RESIDENCE REQUIREMENTS[25]

Although the Constitution recognizes the right of the states to determine voting qualifications,[26] the Supreme Court has held that state legislative classifications must not violate the equal protection clause of the fourteenth amendment.[27] Dicta in recent Supreme Court cases concede that states may limit the franchise to bona fide residents within this constitutional limitation.[28] The two differing views of the way in which a student may establish a new residence both assume that a finding of local domicil is necessary before a student has the right to vote in local elections and require a student to overcome a presumption that his residence at school is temporary. The presumption, whether created

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[23]Putnam v. Johnson, 10 Mass. 488, 501 (1813).

[24]Chomeau v. Roth, 230 Mo. App. 709, ____, 72 S.W.2d 997, 1000-01 (1934).

[25]This note will not examine the effect of durational residence requirements on a student's right to vote. Students can generally meet durational residence requirements; they have a more difficult time showing that they are bona fide residents of the town where they attend school.

[26]*See* Pope v. Williams, 193 U.S. 621, 632-33 (1904).

[27]*E.g.*, Harper v. Virginia Bd. of Elections, 383 U.S. 663, 665 (1966).

[28]See cases cited *infra* note 53.

judicially or by statute, is merely an aspect of the law of domicil. In theory all persons, not merely students, must prove domiciliary intent before they are allowed to vote in local elections.[29] All persons whose occupations require them to move regularly or who have entered into short-term contracts to work in particular places must be able to resolve judicial doubt as to their intent to establish a domicil. In order to do this they must prove facts that will indicate this intent, such as purchase of a home or auto registration. The necessity of proving intent elevates the requisite evidence into additional qualifications for the right to vote. However, it would be constitutionally impermissible to impose voting qualifications consisting of the facts usually established by such evidence.[30] Even if this evidence is not viewed as an explicit qualification for the right to vote, the application of the presumption against domicil by reason of a person's "temporary" occupation presents a constitutional issue as to whether this discriminatory classification denies a person's right to equal protection when it denies him the privilege of freely declaring his domiciliary intent once he has proved that he lives in the community.[31] At the present time, only two states statutorily grant this privilege to students.[32]

State legislative classifications are judged by one of two standards under the equal protection clause. The Supreme Court normally gives the states the benefit of the doubt and presumes that the classification is constitutional. The Court will uphold a classification so long as the legislative distinctions "bear some relationship to a legitimate state end . . . [and are not] based on reasons totally unrelated to the pursuit of

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[29]Even when a statute does not violate the equal protection clause, the discriminatory application of the statute may be unconstitutional. Yick Wo v. Hopkins, 118 U.S. 356, 373-74 (1886).

[30]Any qualifications based on wealth, such as requiring independent means of support to prove a student's emancipation or requiring ownership of property to prove intent to remain in the community, would be constitutionally impermissible. *See* Harper v. Virginia Bd. of Elections, 383 U.S. 683 (1966); Griffin v. Illinois, 351 U.S. 12 (1956).

[31]Where students had to answer questionnaires as to their domiciliary intent, but no other class of persons had to do so, the practice was held to violate the equal protection clause. Bright v. Baesler, 336 F. Supp. 527 (E.D. Ky. 1971).

[32]In Colorado a student may overcome the presumption that his residence at school is temporary by filing a written affidavit under oath with the county clerk that he has abandoned his former domicil and established a new one. COLO. REV. STAT. ANN. § 49-3-4(2) (1964). In Wisconsin a student who resides part of the year with his parents may establish a new residence by electing to register elsewhere. WIS. STAT. ANN. § 6.10(4) (1967). In 1971 Vermont deleted a provision similar to that of Colorado. VT. STAT. ANN. tit. 17, § 66 (Supp. 1971).

that goal."[33] However, when a fundamental constitutional right is affected by the state legislative classification, the state must show that the classification is necessary to promote "a compelling governmental interest."[34] The constitutionality of the presumption that a student's presence at school is for temporary purposes turns upon which of these two standards is applied.

The courts early recognized student residency requirements as having two primary purposes.[35] First, they serve to prevent fraud by identifying the voter as a member of the community and by protecting against the possibility of voting in two places.[36] Secondly, they endeavor to ensure that the voter is interested in matters pertaining to the community's government.[37]

Fraud can be discovered only by diligent investigation and administrative procedures that can detect simultaneous registration at two or more places. The assumption is that a factual determination of domicil would be the same no matter where the attempt to register was made. Practically speaking, a person who maintains more than one residence could easily convince officials in each place that he is domiciled there, especially if he made false statements. Fraud becomes less possible when one is an identifiable member of the community—but physical presence, not domiciliary intent, distinguishes this factor. Once suspicion of duplicity arises, fraud becomes no more difficult to detect if the registrant is allowed the freedom to declare his voting residence. These facts suggest that an independent factual determination of domicil is at best unnecessary for the prevention or detection of fraud.[38]

The other purpose of residence requirements is to ensure that the franchise is limited to citizens who have an interest in the community. Assuming that one who regards his residence as his home has a deeper

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[33]McDonald v. Board of Election Comm'rs, 394 U.S. 802, 808-09 (1969).

[34]Shapiro v. Thompson, 394 U.S. 618, 634 (1969).

[35]One purpose underlying stringent residence requirements is to disenfranchise students and other "transient" citizens out of a fear that they might be able to control the elections. This purpose was deemed constitutionally impermissible in Carrington v. Rash, 380 U.S. 89. 93-94 (1965).

[36]Fry's Election Case, 71 Pa. 302, 306-08 (1872); Putnam v. Johnson, 10 Mass. 488, 502 (1813).

[37]Shaeffer v. Gilbert, 73 Md. 66, 70-71, 20 A. 434, 435 (1890); *see also* Fry's Election Case, 71 Pa. 302, 311 (1872).

[38]A factual determination of domiciliary intent by election officials is open to misuse by unscrupulous officials. Registrars may require proof of domiciliary intent only from certain segments of society, omitting the requirement for others. *See* note 14 *supra*. If one is allowed to declare his intent to reside in a particular place, this particular form of discrimination would be obviated.

interest in the community than one who regards his residence there as temporary, the question becomes whether a voluntary declaration of domiciliary intent will not serve this purpose as well as a factual determination of intent. A voluntary declaration would seem to *create* an interest in the community even if one did not exist before. A domiciliary usually becomes subject to many of the obligations of citizenship—such as local taxation, jury duty, and auto registration—which do not fall on temporary residents. This fact alone would seem to ensure good faith as much as possible. In addition, the interest of a voter is affected by physical residence in the community as well as by domiciliary intent.

According to the Supreme Court, the "interest" that warrants a vote is not a narrow concept. Persons who pay property taxes obviously have an interest in how their money is spent. Persons who live in a community but who do not pay a property tax are also interested in local government: they are subject to the criminal laws, send their children to public school, use municipal services, and are subject to gasoline, sales, and use taxes.[39] They have an interest in being represented in the state legislature because they are included in the census of the local community on which apportionment of the legislature is based.[40] A student who physically resides in the community for a large part of the year must inevitably qualify as an "interested" citizen. Only the possession of a domicil elsewhere should exclude him from voting in local elections.

Although one may properly conclude that a factual determination of domicil as required by the rebuttable presumption of a student's domiciliary intent is unnecessary or even superfluous, this does not force a conclusion that the practice is unconstitutional. A factual determination of domicil is not "totally unrelated"[41] to the legitimate state goals of preventing fraud or limiting the franchise to interested voters, and thus the practice of requiring it is not unconstitutional under the traditional equal protection test. However, if the compelling interest standard is applied, then no state will be able to show an interest sufficient to support the presumption. An independent factual determination of domiciliary intent does not serve the purposes of preventing fraud and ensuring the interest of voters in any way that would not be better served

[39]Evans v. Cornman, 398 U.S. 419, 424 (1970).

[40]*Id.* at 421. Students are included in the census where they go to school and not where their parents reside. Bethel Park v. Stans, 449 F.2d 575, 579-81 (3d Cir. 1971).

[41]McDonald v. Board of Election Comm'rs, 394 U.S. 802, 808-09 (1969).

by a voluntary declaration of domiciliary intent by the voter.[42] Yet the former method of establishing intent will inevitably exclude many "interested" persons who subjectively intend to establish a voting residence in the community. The latter method would exclude none of them. Thus the high standards of exactness required by the compelling interest standard are not met.[43]

III. WHICH STANDARD APPLIES?

Thus the crucial issue regarding the constitutionality of the presumption against domicil is whether the traditional or compelling-interest equal protection test is applied. The Michigan court in *Wilkins v. Bentley*[44] applied the compelling-interest test on the theory that precedents had resolved the issue. That proposition is not entirely true, for no prior Supreme Court cases apply directly to the issue in *Wilkins*.

The Michigan court determined that the statutory presumption of non-residency placed a special "burden on the right to vote" of students and quoted language from the Supreme Court decision in *Williams v. Rhodes*[45] to the effect that whenever the right to vote is "heavily burdened," the state must show a "compelling interest" to justify the burden.[46] However, that language was taken from its proper context and does not support the proposition for which it was cited in *Wilkins*. In *Williams*, the issue was whether a state could restrict access by third party candidates to the ballot for presidential electors. The Court held that the Ohio restrictions diluted the effectiveness of the votes of qualified voters who desired to vote for third party candidates. Thus the "burden" in *Williams* fell on qualified voters whose right to vote was recognized by the state.[47] Other Supreme Court decisions have pointed out that there is no fundamental "right to vote" as such.[48] One's right to vote depends on whether he meets the legitimate qualifications required by the state. If there were an unquestioned fundamental right to vote, then the "compelling state interest" standard undoubtedly would

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[42]This point is discussed in text accompanying notes 36-41 *supra*.

[43]Kramer v. Union Free School Dist., 395 U.S. 621, 632 (1969).

[44]385 Mich. 670, 189 N.W.2d 423 (1971).

[45]The language appears in 393 U.S. 23, 30-31 (1968).

[46]385 Mich. at 670, 189 N.W.2d at 429.

[47]393 U.S. at 30-34.

[48]Pope v. Williams, 193 U.S. 621, 632-33 (1904), *cited in* Carrington v. Rash, 380 U.S. 89, 91 (1965); *see also*, Oregon v. Mitchell, 400 U.S. 112 (1970).

apply to any state restrictions of that right.[49]

Similarly, the Michigan court gave improper weight to other Supreme Court precedents which had established the principle that any *exclusion of bona fide residents* who meet the other qualifications for voting must be justified by a compelling state interest.[50] The Michigan court stretched the facts and language of those cases to hold that the "exclusions" dealt with were something less than complete denials of the vote and were mere "rebuttable presumptions" similar to the Michigan statute.[51] By this imaginative interpretation, the *Wilkins* court was able to apply the "compelling interest" test to the Michigan statute without confronting the fact that the Michigan statute was not designed to exclude persons who were bona fide residents under traditional domicil law. In the Supreme Court cases cited by the Michigan court, the excluded citizens were all stipulated to be bona fide residents by the states concerned;[52] the states argued against their "interest" in the elections and not against their residence.[53] The Supreme Court has never defined the residency standards permissible under the equal protection clause. Thus, the Michigan court was breaking new ground and not well-plowed earth as the opinion would lead one to believe.

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[49]Shapiro v. Thompson, 394 U.S. 618, 634 (1969).

[50]These cases all involved state exclusion of *domiciliaries* from the franchise. City of Phoenix v. Kolodziejski, 399 U.S. 204, 206 (1970); Evans v. Cornman, 398 U.S. 419, 421 (1970); Cipriano v. City of Houma, 395 U.S. 701, 703 (1969); Kramer v. Union Free School District, 395 U.S. 621, 624-25 (1969); Harper v. Virginia Bd. of Elections, 383 U.S. 663, 664 (1966); Carrington v. Rash, 380 U.S. 89, 91 (1965).

[51]The Michigan court said that what the Supreme Court termed an "exclusion" of qualified voters was not a total denial of the right to vote. 385 Mich. at 682-83, 189 N.W.2d at 428-29. Texas had enacted a conclusive presumption that servicemen resided where they had resided when they entered the service. Carrington v. Rash, 380 U.S. 89, 91 (1965). The *Wilkins* court felt that this did not prevent a serviceman from voting in another state and called it less than a complete denial of the vote. However, Texas clearly had done all it could to deny servicemen the vote. The Michigan court also said that when New York would not permit bachelors or persons who did not own property to vote in school elections, Kramer v. Union Free School Dist., 395 U.S. 701, 703 (1969), or when Louisiana, Cipriano v. City of Houma, 395 U.S. 701, 703 (1969), and Arizona, City of Phoenix v. Kolodziejski, 399 U.S. 204, 206 (1970), did not permit persons who did not pay property taxes to vote for bond issues, the states were merely enacting "rebuttable presumptions" similar to the Michigan statute. That reasoning is patently absurd. Though one individual might remove himself from the excluded class, the class of excluded citizens would remain unchanged.

[52]Carrington v. Rash, 380 U.S. 89, 91, 93-94 (1965); *cited in* Evans v. Cornman, 398 U.S. 419, 421 (1970); Kramer v. Union Free School Dist., 395 U.S. 621, 625 (1969).

[53]In some Supreme Court cases in which voting rights under the equal protection clause were considered, the concerned parties were qualified voters. *E.g.*, Gray v. Sanders, 372 U.S. 368, 379 (1964); McDonald v. Board of Election Comm'rs, 394 U.S. 802, 803 (1968). In all others they were stipulated to be domiciliaries of the state. *See* cases cited *supra* note 51.

Although Supreme Court precedents do not lead directly to a conclusion that the compelling interest standard applies to rebuttable presumptions against residency, one may glean from the opinions sound principles that will support such a result. In *Kramer v. Union Free School District*,[54] the Supreme Court said that the presumption of constitutionality and the "traditional approval given state classifications if the Court can conceive of a 'rational basis' for the distinctions made"[55] did not apply when there was evidence that the statute involved denied the vote to qualified residents. The presumption of constitutionality is based on the "assumption that the institutions of state government are structured so as to represent fairly all the people. However, when the challenge to the statute is in effect a challenge to this basic assumption, the assumption can no longer serve as the basis for presuming constitutionality."[56]

One might argue that Kramer's express limitation of this principle to residents was merely incidental to the basic idea that whenever the assumption of the *representative* character of state government is called into question, the traditional presumption of constitutionality will not apply. The Court should carry *Kramer* one step further and apply the compelling interest test whenever there is evidence that any *person* is excluded from the franchise. Arguably, the Court should do so; demonstrably, it has not.[57]

The Court should give special consideration to the fact that a person who challenges the representative character of state government has exhausted every formal method of redressing his grievances when he loses in court.[58] Implicit in the traditional presumption of constitutionality is the idea that if a person who has challenged a state legislative scheme loses in court, he may still seek to change the law directly by exercise of his voting power. This alternative is not available to one who alleges that he is unlawfully disenfranchised. If he is able to vote only in another state or in federal elections, he cannot affect the legislative scheme of the state that excluded him. Moreover, Congress apparently

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[54]395 U.S. 621 (1969).

[55]*Id.* at 627-28.

[56]*Id.*

[57]*See* note 54 *supra*. The "compelling interest" standard was rejected in Palla v. Board of Elections, 40 U.S.L.W. 2835 (N.Y. Ct. App. June 7, 1972).

[58]*Cf.* Baker v. Carr, 369 U.S. 186, 258-59 (Clark, J., concurring). Of course, one who is denied a vote may always seek to change the law through moral suasion of the legislature. However, this is hardly a guarantee that one's proposals will be treated fairly.

lacks the power under the enforcement clause of the fourteenth amendment to change the state legislative scheme.[59]

States have argued that a voter who cannot acquire a voting residence in one state is not thereby prevented from voting in the state where he retains his domicil.[60] This fact should not cloud the issue. One state cannot lawfully prevent a person from voting in another state; each state separately determines the right to vote of those persons who seek to vote in its own elections. If a state attempted to exclude people from voting in the elections of another state, it would be violating a fundamental principle of state sovereignty.[61] However, state policies that make it difficult for students to acquire a new domicil require that a student retain his old one if he wishes to vote at all. This may deny the student the *effective* exercise of his voting right. The availability of an absentee ballot does not refute this assertion. If one has removed from a locality, he likely has little interest and information on which to base a vote on matters of local concern. Thus one state may have a definite impact on the composition of the voting populace in another state by foisting on that state a class of voters who must either vote there or not at all. The issue is one of national import and, therefore, is not an appropriate subject for judicial deference to states' rights.

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[59]Congress was said to have broad powers to determine when legislation is appropriate under the enforcement clause of the fourteenth amendment in Katzenbach v. Morgan, 384 U.S. 641 (1966). There the Court upheld a Congressional prohibition of state laws that denied the right to vote because of an inability to read English. The purpose of the legislation was to ensure that Puerto Rican immigrants, among others, would be allowed to vote if they had attained the requisite level of education. *Id.* at 643 n.1. However, *Morgan* was not followed in a more recent case in which the Supreme Court held that Congress did not have the power to lower age qualifications in state elections to age eighteen. Oregon v. Mitchell, 400 U.S. 112 (1971). It is not clear why *Morgan* did not control that case. Various reasons were given to distinguish *Morgan* in the separate opinions of the justices who formed the majority on that issue. *Morgan* was said to uphold the power of Congress to ban "racial discrimination," *id.* at 129 (Black, J.), or discrimination against a "discrete and insular minority," *id.* at 296 (Stewart & Blackmun, JJ., & Burger, Ch. J.). Four justices denied that Congress could be the judge of the appropriateness of legislation enacted pursuant to the enforcement clause, *id.* at 204-05 (Harlan, J.), or could make a determination of substantive constitutional law that the compelling-interest standard applied to particular state legislation, *id.* at 295-96 (Stewart & Blackmun, JJ., & Burger, Ch. J.). On any of the above grounds Congressional legislation would be inappropriate to change state voting-residency laws. Thus *Oregon v. Mitchell* must be read as having limited the application of the broad Congressional power recognized in *Morgan.*

[60]Carrington v. Rash, 380 U.S. 89, 89 n.1 (1965); Wilkins v. Bentley, 385 Mich. 670, ____, 189 N.W.2d 423, 428-29 (1971).

[61]*See* Pink v. A.A.A. Highway Express, 314 U.S. 201, 209-11 (1941).

IV. CONCLUSION

Rebuttable presumptions as to a student's domiciliary intent do not appear to be discriminatory in theory, because all persons are subject to a factual determination of domiciliary intent under a strict application of the law of domicil to voting residency laws. However, the burden of factual proof is greater for those whose presence in the community is for what are ordinarily conceived to be "temporary" purposes. Thus students, unlike persons in other occupational categories, are not able to vote in local elections after establishing that they dwell in the community and declaring their domiciliary intent. This discrimination is not strictly necessary to achieve any legitimate state purpose and cannot be sustained under the equal protection clause if the "compelling interest" standard is applicable. That standard should be invoked by the courts whenever any person is denied the vote, whether or not he be an admitted resident by state standards. A citizen's vote is the foundation of our representative democracy. Any state abridgement of access to the vote should be given the closest judicial scrutiny. The equal protection clause requires no less!

VANCE BARRON, JR.

Here's to You Mrs. Robinson—Title VII and the Hangover Effect of Prior Racial Discrimination in Hiring

Mrs. Dorothy Robinson applied for a job with the P. Lorillard Company at its Greensboro, North Carolina, plant following its opening there in 1956.[1] Mrs. Robinson was referred to the North Carolina Employment Service Office, an exclusively Black agency. All of Lorillard's Black job applicants were referred to that office. During this time, Lorillard practiced a policy of racial discrimination in its hiring policy. Mrs. Robinson was allowed to apply only for a position in one of the "Black" departments of the Company. She accepted a job in the "Black" service department and had worked for Lorillard from that time.[2]

Mrs. Robinson and her fellow employees, both Black and White,

[1]During the course of the litigation discussed below, P. Lorillard Company changed its name to Lorillard Corporation.

[2]Robinson v. Lorillard Corp., 319 F. Supp. 835, 836-37 (M.D.N.C. 1970).

were represented by the Tobacco Workers International Union in their dealings with the company.[3] The Greensboro local was, in fact, the first integrated local in the entire tobacco industry.[4] Included in the many facets of the union and management negotiations were the development and evolution of a seniority system for the workers at the Greensboro plant.

A system of seniority was included in the first bargaining agreement between the union and Lorillard in 1957.[5] This agreement established seniority rights based upon a worker's tenure in his specific job in one of nine production and service departments and prohibited transfers between departments.[6] Under this plan, Mrs. Robinson could aspire to no greater position than that of senior floor sweeper in the all-Black service department. In 1962, the Company negotiated a new contract which eliminated job seniority, but maintained departmental seniority.[7] Under this plan, any worker in a deparment could "bid" for an opening based on his length of service in the department. Interdepartmental transfers were allowed, but a transferring employee was required to forfeit all his accumulated seniority rights and start in his new position at the lowest entry level.[8] Each day that Mrs. Robinson worked in the service department she had more to lose in transferring. In 1962, the Company eliminated racial discrimination in its hiring practices.[9] The seniority system continued as outlined above with minor amendments until Mrs. Robinson went to Federal court to challenge it as racially discriminatory.

In *Robinson v. Lorillard Corporation*,[10] the Fourth Circuit Court of Appeals upheld an order of the North Carolina Middle District Court[11] outlawing the seniority system as it existed, restructuring it with plant-wide seniority as the determining factor in job mobility and protection.[12] Both the circuit court and the district court held that the seniority system established by Lorillard perpetuated the effects of the

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[3]*Id.* at 836.
[4]*Id.* at 837.
[5]*Id.* at 838.
[6]*Id.* The job classifications are listed at 837.
[7]*Id.*
[8]*Id.*
[9]*Id.* at 837; *see* Robinson v. Lorillard Corp., 444 F.2d 791, 794-95 (4th Cir. 1971).
[10]444 F.2d 791 (4th Cir. 1971).
[11]Robinson v. Lorillard Corp., 319 F. Supp. 835 (M.D.N.C. 1970).
[12]*Id.* at 842.

company's prior policy of racial discrimination in hiring[13] and was thus illegal under Title VII of the Civil Rights Act of 1964.[14]

Title VII deals with racial discrimination in labor practices and is one of eleven sections of the Civil Rights Act, a comprehensive statute formulated to attack institutionalized racial discrimination on many fronts.[15] Section 703 of Title VII states that an employer may not lawfully "fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges or employment" because of his race, color, religion, sex or national origin, or to "limit, segregate, or classify his employees in any way which would . . . deprive any individual of employment opportunities or otherwise adversely affect his status as an employee."[16] Labor organizations are similarly prohibited from acts of discrimination.[17] Mrs. Robinson, as plaintiff, in her individual capacity and representative of the class of all persons hired into all-Black departments under the discriminatory policy, sued Lorillard Corporation under section 703 and alleged that the seniority system as it had evolved effectively kept them from advancement into higher paying departments. Transferring would have required that plaintiffs forfeit their accumulated seniority and, in many cases forced them to take an actual cut in pay. Plaintiffs argued that because they were Black and because they were hired into the lowest paying "Black" departments, they had had no chance of being anywhere else in the hiearchy of jobs.[18] For example, if two workers, one Black and one White, went to work prior to 1962 on the same day, the White worker would begin in a department paying a higher wage and offering more responsibility. Even after all racial discrimination was eliminated in present employee selection procedures, the Black employee would never attain seniority on a parity with the White worker under a system of job or departmental seniority. This, Mrs. Robinson argued, was discriminatory under section 703. She

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[13]444 F.2d at 794-95; 319 F. Supp. at 842.

[14]Civil Rights Act of 1964 [hereinafter cited as Act] §§ 701-716, 42 U.S.C. §§ 2000e to 2000e-15 (1970). For a recent analysis of the application of Title VII to seniority systems, *see* Note, *Employment Discrimination and Title VII of the Civil Rights Act of 1964*, 84 HARV. L. REV. 1109, 1155-66 (1971).

[15]42 U.S.C. §§ 1981-2000h (1970). The index of Chapter 21 of 42 U.S.C. at 10279-10281 gives an informative outline of the scope of the Act. *See* 42 U.S.C. § 1981 (1970), giving the scope of the Act.

[16]Act § 703(a), 42 U.S.C. § 2000e-2(a) (1970).

[17]*Id.* § 703(d), 42 U.S.C. § 2000e-2(c) (1970).

[18]Robinson v. Lorillard Corp., 319 F. Supp. 835, 837 (M.D.N.C. 1970).

pointed to evidence (not uncontradicted, but accepted by the court) that in spite of the transfer provision in the 1962 agreement, 85 per cent of the Blacks and 97 per cent of the Whites hired prior to 1962 had not transferred departments.[19] Apparently the dual factors of sacrifice of seniority rights and the possibility of a cut in pay "operated as built-in headwinds"[20] which offered resistance to the aspirations of Black workers.

Mrs. Robinson convinced the district court that the Lorillard seniority system was discriminatory. The court ordered the system restructured and granted the plaintiffs an award of back pay that has been calculated to be in excess of 500,000 dollars.[21] However, the court denied attorneys' fees to the plaintiff.[22]

On appeal Lorillard Corporation admitted a policy of racial discrimination prior to 1962, but argued that its seniority system did not retain the effects of that discrimination. Even if it did, the company argued, it was insulated from attack by provisions of Title VII that set certain exceptions and limitations to the inclusive wording of section 703.

Lorillard first argued that even if the system might show some effects of discrimination, it was not illegal unless "the court finds that the respondent has intentionally engaged in . . . an unlawful employment practice."[23] Intent, however, in the employment context has been interpreted to mean "only that the defendant meant to do what he did, that is, his employment practice was not accidental."[24] A judicial interpretation of "intent" in regard to Title VII cases was formulated by the Supreme Court in *Griggs v. Duke Power Co.*[25] There the court said, "[C]ongress directed the thrust of the Act (Civil Rights Act of 1964) to the *consequences* of employment practices, not simply the motivation,"[26] adding that "good intent or absence of discriminatory intent does not redeem employment procedures"[27] otherwise found discriminatory.

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[19]*Id.* at 840.

[20]444 F.2d at 797. *See* Griggs v. Duke Power Co., 401 U.S. 424, 432 (1970).

[21]Letter from C. Allen Foster, Attorney for Lorillard Corporation, to Lee A. Patterson, II, January 21, 1972.

[22]319 F. Supp. at 843.

[23]Act § 706(g), 42 U.S.C. § 2000e-5(g) (1970).

[24]444 F.2d 791, 796 *quoting* Local 189, United Papermakers & Paperworkers v. United States, 416 F.2d 980, 996 (5th Cir. 1969), *cert. denied*, 397 U.S. 919 (1970).

[25]401 U.S. 424 (1971).

[26]*Id.* at 432 (emphasis in the original).

[27]*Id.*

Failing on the issue of intent, Lorillard next argued that its system of seniority was acceptable as "bona fide" under Section 703(h).[28] This section states, "Notwithstanding any other provision of this subchapter, its shall not be . . . unlawful . . . for an employer to apply different standards of compensation, or different terms, conditions, or privileges of employment pursuant to a bona fide seniority or merit system . . . provided that such differences are not the result of an intention to discriminate . . . ."[29] Again arguing that there was no "intent" to discriminate, Lorillard submitted that this exception would render its seniority system acceptable under the law.

Rejecting this contention, the circuit court cited the first case of major impact regarding discriminatory effects of a seniority system: *Quarles v. Phillip Morris, Inc.*[30] There the court said, "Obviously one characteristic of a *bona fide* seniority system must be lack of discrimination."[31] The court accepted the idea that Congress could not have intended "to freeze an entire generation of Negro employees into discriminatory patterns that existed before the act."[32]

A federal district court sitting in Virginia in a case subsequent to *Robinson* summarized the law in the Fourth Circuit. "[T]he law in this circuit is that if an employee still suffers the effects of past discriminatory acts, even though the employer's policy may have changed, he is entitled to relief."[33]

Failing in defenses arising from statutory interpretation, Lorillard argued that if its system was based on a business purpose and was organized so that it was "necessary to the safe and efficient operation of the business,"[34] it could withstand attacks of discriminatory effect on some employees. The basis of this argument is that even in the enforcement of civil rights, the courts have not required changes in the structure of the defendant business or corporation so severe as to drive it out of business or seriously damage its safe and efficient operation.

This defense raised by Lorillard required the circuit court to formulate a test against which to measure the effects of reorganizing the

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[28]Act § 703(h), 42 U.S.C. § 2000e-2(h) (1970). *See* Robinson v. Lorillard Corp., 444 F.2d at 797.

[29]Act § 703(h), 42 U.S.C. § 2000e-2(h) (1970).

[30]279 F. Supp. 505 (E.D. Va. 1968).

[31]*Id.* at 517.

[32]*Id.* at 516.

[33]United States v. Virginia Electric & Power Co., 3 FEP Cases 529, 533 (E.D. Va. 1971).

[34]Jones v. Lee Way Motor Freight, Inc., 431 F.2d 245, 249 (10th Cir. 1970).

seniority system. This test was that of "business necessity."[35] Before laying out the component parts of its own test, the court reviewed formulations from other courts and jurisdictions.

The cases set out two different lines of decision. One upholds seniority systems that are formally discriminatory on the basis of the need for efficiency and safety. In cases where one job qualifies a worker for the next along a line of progression, the need for ability and skill may outweigh the desire to root out the last vestiges of discrimination.[36] The Fifth Circuit Court of Appeals commented that it would uphold a system of seniority on the need of employees "to perform the jobs satisfactorily and—more importantly—without danger of physical injury to themselves and their fellow employees."[37] One district court commented, "The company is not required to forgo its legitimate interest in maintaining the skill and efficiency of its labor force."[38]

The other line of decisions requires more than a mere showing of greater safety or efficiency in the old discriminatory system than in a proposed new one. Although no court as of yet has required an employer "to place an unqualified employee into a particular job qualification,"[39] some, following this second line of reasoning, have reflected the approach taken by the Second Circuit in *United States v. Bethlehem Steel Corp.*,[40] suggesting that qualification must be clearly proved essential before it will be considered necessary. "Necessity connotes an irresistible demand. To be preserved, the seniority and transfer system must not only directly foster safety and efficiency of a plant, but also be essential to those goals."[41] The Tenth Circuit rejected defense arguments that allowing transfer in violation of the existing discriminatory agreement would increase costs and create problems with the negotiating unions.[42] "Some have asserted that no amount of business purpose should be accepted as justification for a seniority system with a significant detri-

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[35]In *Griggs*, the Supreme Court set out a test of "business necessity" stating, "If an employment practice which operates to exclude Negroes cannot be shown to be related to job performance, the practice is prohibited." 401 U.S. at 431.

[36]United States v. H. K. Porter Co., 296 F. Supp. 40, 91 (N.D. Ala. 1968).

[37]Local 189, United Papermakers & Paperworkers v. United States, 416 F.2d 980, 993 (5th Cir. 1969), *quoting* United States v. H. K. Porter Co., 296 F. Supp. 40, 90 (N.D. Ala. 1968).

[38]United States v. Local 189, United Papermakers & Paperworkers, 301 F. Supp. 906, 917 (E.D. La. 1969).

[39]United States v. Virginia Electric & Power Co. (E.D. Va. 1971) 3 FEP Cases 529, 536.

[40]446 F.2d 652 (2d Cir. 1971).

[41]*Id.* at 662.

[42]Jones v. Lee Way Motor Freight, Inc., 431 F.2d 245, 249 (10th Cir. 1970).

mental impact on minorities."[43]

Weighing the two lines of authority, the *Robinson* court accepted this second view, placing an extreme burden on the defendant company to clearly demonstrate the business necessity of its practice. It couched its test for business necessity in terms of "overriding legitimate business purpose . . . necessary to the safe and efficient operation of the business . . . . sufficiently compelling to override any racial impact . . . [with] no acceptable alternative policies or practices."[44] In effect, this test is a judicial amalgamation of those offered by the Second and Tenth Circuits, extending the scope and coverage beyond either of those circuit's individual tests.[45]

Against this formulation, the "business purposes" offered by the company had little chance for success. The arguments that extra administrative expenses would be involved in changing the system and that the same system was working in other places were summarily dismissed.[46] Evidence of pressure from the union to adopt the existing system was also rejected as insufficient for business necessity.[47] The assertion that an alteration of the system would adversely affect "efficiency, economy, and morale" was also found insufficient.[48] Finally, a stepping-stone theory of progressive job advancement, with one job serving as necessary training fot the next, was rejected as unsupported by the facts. The district court in *Robinson* explained that higher level jobs in the company were simply not so difficult that they required a stepping-stone approach, pointing out that between 1956 and 1968 all employees who transferred between unrelated departments were successful at their new jobs.[49] It was equally damning that the seniority system granted as relief by the district court and appealed from by the company was precisely the same system offered by the company to and rejected by the union in collective bargaining three years earlier.[50]

The argument that the new system would disappoint the expecta-

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[43]Note, *Employment Discrimination and Title VII of the Civil Rights Act of 1964, supra* note 14, at 1163.

[44]444 F.2d at 798.

[45]See the *Robinson* court's discussion of these tests. 444 F.2d at 797.

[46]*Id.* at 798-79. *See* Jones v. Lee Way Motor Freight, Inc., 431 F.2d 245, 249-50 (10th Cir. 1970).

[47]444 F.2d at 799.

[48]*Id.*

[49]Robinson v. Lorillard Corp., 319 F. Supp. 835, 840 (M.D.N.C. 1970).

[50]444 F.2d at 799.

tions of the White workers was rejected as a necessary price to pay in the achievement of equality in opportunity. On this point, the *Bethlehem Steel* court stated, "If relief under Title VII can be denied merely because the majority group of employees, who have not suffered discrimination, will be unhappy about it, there will be little hope of correcting the wrongs to which the Act is directed."[51]

Mrs. Robinson and her fellow plaintiffs won a total victory before the circuit court. The court not only upheld the restructuring of the seniority system and awarded back pay, but also reversed the lower court and granted attorneys' fees.[52] These fees and out-of-pocket expenses were estimated to be in excess of 225,000 dollars.[53]

In reversing the district court on attorneys' fees the circuit court quoted its own memorandum opinion, *Lea v. Cone Mills, Inc.*,[54] which granted attorneys' fees to a plaintiff in a Title VII suit on the authority of *Newman v. Piggie Park Enterprises*.[55] There the Supreme Court required attorneys' fees awards in cases under Title II of the Civil Rights Act.[56] Title II outlaws discrimination in public accomodations.[57] The Supreme Court in *Piggie Park* commented that attorneys' fees should be required because plaintiffs under that section were acting in fact as "private attorneys-general," winning rights for all affected by violations of the public accomodations section.[58] Under Title II as under Title VII, there is no allowance for monetary relief.[59]

The dissent in *Cone Mills* pointed out the differences between possible relief under Titles II and VII, and added that under both titles the authority to grant attorneys' fees was in the discretion of the trial judge, so that in the absence of a ruling from the Supreme Court on Title VII

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[51]446 F.2d at 663.

[52]444 F.2d at 804.

[53]Letter from C. Allen Foster, attorney for P. Lorillard Corporation, to Lee A. Patterson, II, January 21, 1972.

The court also upheld the district court order of the adoption by the company of a procedure of "red circling" which would allow a transferee to retain his former rate of pay in his new job, regardless of the level at which the new job started, until the transferee reached a level where the pay rate equalled or exceeded that of his former job. 444 F.2d at 799.

[54]438 F.2d 86 (4th Cir. 1971) (per curiam).

[55]390 U.S. 400 (1968) (per curiam). *See* Lea v. Cone Mills, Inc., 438 F.2d at 88.

[56]*Id.* at 402; Act § 204(b), 42 U.S.C. § 2000a-3(b) (1970).

[57]Act §§ 201-207, 42 U.S.C. §§ 2000a to 2000a-6 (1970).

[58]390 U.S. at 402.

[59]For remedies available under Title II, see Act §§ 204, 207(b), 42 U.S.C. §§ 2000a-3, 2000a-6(b) (1970). Newman v. Piggie Park Enterprises, 390 U.S. 400, 402 (1968) (per curiam).

analogous to *Piggie Park* on Title II (which converted the discretionary grant of attorney's fees into a mandatory order) the lower court should not be reversed without a showing of abuse of discretion.[60] The legislative history of Title VII would support the Lorillard court's decision on the attorneys' fes, but this was not mentioned.[61] The court was apparently confident in resting its holding on the *Cone Mills* precedent.

Robinson v. Lorillard is a decision of great importance to employer and employees alike. Although it does not appear to completely resolve the problems of Title VII litigation, it clearly defines the terms in which such cases will be argued. The court's formulation of its "business necessity test" puts any company defendant on notice that it faces significant obstacles in proving that its seniority system is essential to safe and efficient operation. Perhaps nothing will suffice short of a tightly structured seniority plan where one job trains a worker for the next and where experience is proven necessary for progression as well as the training.

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[60]438 F.2d at 90-91. In *Newman*, the Supreme Court commented "[O]ne who succeeds under that Title (Title II) should ordinarily recover an attorney's fee unless special circumstances would render such an award unjust." 391 U.S. at 402.

The plaintiffs, in their cross-appeal brief before the circuit court, cited several cases where attorneys' fees were awarded to plaintiffs in Title VII cases. While these cases clearly show that the attorneys' fees may be granted, none support the proposition that the denial of them by a district judge is an abuse of discretion. Brief for Appellee at 12, Robinson v. Lorillard Corp., 444 F.2d 791 (4th Cir. 1971). *See, e.g.*, Parham v. Southwestern Bell Telephone Co., 433 F.2d 421 (8th Cir. 1970); Sprogis v. United Airlines, Inc., 308 F. Supp. 959, 962 (N.D. Ill. 1970); Clark v. American Marine Corp., 304 F. Supp. 603, 611 (E.D. La. 1969); Richards v. Griffith Rubber Mills, 300 F. Supp. 338, 341 (D. Ore. 1969); Quarles v. Phillip Morris, Inc., 279 F. Supp. 505, 521 (E.D. Va. 1968); Bowe v. Colgate-Palmolive Co., 272 F. Supp. 332, 367 (S.D. Ind. 1967), *rev'd in part* 416 F.2d 711 (1969).

The plaintiffs also cite cases upholding the idea mentioned in *Newman* that a plaintiff in a discrimination case acts not only for himself, but also as a "private attorney general" to correct wrongs injuring the community at large. 390 U.S. at 402. They are Bowe v. Colgate-Palmolive Co., 416 F.2d 711, 7)9-20 (7th Cir. 1969); Jenkins v. United Gas Corp., 400 F.2d 28, 32-33 (5th Cir. 1968); Oatis v. Crown Zellerback Corp., 398 F.2d 496, 499 (5th Cir. 1968). Brief for Appellee at 14, Robinson v. Lorillard Corp., 444 F.2d 791 (4th Cir. 1971). Although these cases do give precedent for analogizing Title VII to Title II as interpreted by *Newman*, they do not speak to the point of overruling a district judge declining to grant attorneys' fees.

[61]When the Civil Rights Act of 1964 first passed the House, it allowed any member of the Equal Employment Opportunities Commission to file a charge against an employer. 110 CONG. REC. 13693 (1964) (Remarks of Senator Humphrey). This procedure was changed in the Senate to require an aggrieved worker to bring suit or to allow the Attorney General to bring action against the employer. Act §§ 706(e), 707(a), 42 U.S.C. §§ 2000e-5(e), 2000e-6(a) (1970). Therefore there is some legislative history that suggests that there was intent to encourage workers injured by an employment practice made illegal by the title to bring suit without the inhibiting factor of possibly being saddled with the cost of attorney's fees.

Robinson clearly places the burden of proof and persuasion on the defendant company to show that its seniority system is not discriminatory or that it is necessary. The plaintiff apparently needs only to prove that the company once practiced racial discrimination, and that there are workers presently with the company who were affected by it. This fact is brought home forcefully when one realizes that in *Robinson* the plaintiff won virtually every point. In demands for relief, procedural contests, and factual discrepancies, the court accepted the plaintiff's argument.[62]

Only time and subsequent litigation will tell how widely the sweep of the *Robinson* opinion will be in other situations and in other industries. The tobacco and textile industries of this state could be greatly effected. The expenses and attorneys' fees awarded to the plaintiffs approach 750,000 dollars. Such an award could seriously affect the profits and business lives of many of the marginal industries in the South.

Finally, this decision has a great impact on the working man, both Black and White. Any decision that alters seniority rights affects what is perhaps as important a right as has been developed in and been protected by the collective bargaining system.[63] It is an unfortunate necessity that the inequities of years of racial discrimination may only be corrected by actions affecting the plans and aspirations of some White workers who may be personally blameless for the situation.

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[62]Lorillard Corporation filed a petition for certiorari in the Supreme Court on September 24, 1971. In the brief of that petition, the company requested a reversal of the order of back pay for the class of injured employees and a reversal of the court of appeals ruling allowing attorneys' fees. Lorillard based its first reason for appeal upon the argument that back pay should not be granted since they had operated their system of seniority in reliance on a letter from the Equal Employment Opportunity Commission, filed July 27, 1966, holding that there was no reasonable cause to believe that their system violated Title VII. Petitioner's Brief for Certiorari at 8-11, filed Sept. 4, 1971. The company also argued that the plaintiff had waived the claim for money damages in their brief and in pretrial negotiations. *Id.* at 18-19.

The company also questioned the court's reversal of the district court's denial of attorneys' fees, largely for the reasons expressed in the *Cone Mills* dissent. The company's brief on the petition for certiorari distinguishes *Newman* on the grounds that under Title II, the plaintiff would be acting as a "private attorney general," and if he were successful, he would attain an injunction against the offending party rather than any money recovery. Petitioner's Brief for Certiorari at 15-17.

Pursuant to a settlement agreement between the two parties approved by the district court, Lorillard Corporation withdrew its petition for certiorari. Letter from C. Allen Foster, Attorney for Lorillard Corporation, to Lee A. Patterson, II, March 8, 1972.

[63]Aaron, *Reflections on the Legal Nature and Enforceability of Seniority Rights*, 75 HARV. L. REV. 1532, 1534-35 (1962).

Robinson v. Lorillard demonstrates at least two important principles regarding the elimination of racial discrimination in employment. First, it shows the vigor with which the courts will attack the system that shows the signs of perpetuating discrimination. Secondly, it reveals that the costs of this necessary effort are very high.

LEE A. PATTERSON, II

Private Prosecution—The Entrenched Anomaly

Since the days of our Constitution's infancy, traditional judicial truisms have been superseded by the viable doctrines of "due process," "equal protection," and "judicial fairness." Notwithstanding this evolution, there remain seemingly impregnable citadels of judicial tradition. One such remnant of the past is the policy allowing private prosecution in criminal actions. Recently in *State v. Best*,[1] the North Carolina Supreme Court reiterated[2] its stand condoning the practice.

I. BACKGROUND AND STATE OF LAW

At common law criminal prosecution adhered to the pure form of the adversary system; each aggrieved party retained his own counsel to prosecute his private interest. The private prosecutor had the case laid before the grand jury and took charge of the trial before the petit jury.[3] Despite statutory provisions requiring a public prosecutorial system[4] and judicial repudiation of the procedure in some jurisdictions[5] private prosecution remains well entrenched.[6]

While adhering to the philosophy of the common law rule, the North Carolina courts have modified its application. Whereas the clas-

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[1]280 N.C. 413, 186 S.E.2d 1 (1972).

[2]*See, e.g.*, State v. Westbrook, 279 N.C. 18, 181 S.E.2d 572 (1971); State v. Lippard, 223 N.C. 167, 25 S.E.2d 594 (1943); State v. Carden, 209 N.C. 404, 183 S.E. 898, *cert. denied*, 298 U.S. 682 (1936); State v. Davis, 203 N.C. 13, 164 S.E. 737 (1932).

[3]State v. Carden, 209 N.C. 404, 410, 183 S.E. 898, 902, *cert. denied*, 298 U.S. 682 (1936). *See generally* 42 AM. JUR. *Prosecuting Attorneys* § 10 (1942).

[4]*E.g.*, N.C. CONST. art. IV, § 18; N.C. GEN. STAT. § 7A-61 (Supp. 1971).

[5]*E.g.*, McKay v. State, 90 Neb. 63, 132 N.W. 741 (1911); Bird v. State, 77 Wis. 276, 45 N.W. 1126 (1890); Biemel v. State, 71 Wis. 444, 37 N.W. 244 (1888).

[6]*E.g.*, Handley v. State, 214 Ala. 172, 106 So. 692, 694-95 (1925); Robinson v. State, 69 Fla. 521, 68 So. 649 (1915); State v. Bartlett, 105 Md. 212, 74 A. 18 (1909); State v. Westbrook, 279 N.C. 18, 181 S.E.2d 572 (1971).

sic interpretation precluded any challenge to the private prosecutor,[7] North Carolina courts have reserved the final determination for the discretion of the trial judge[8] but have intimated that the practice is not to be interferred with in the absence of a showing of abuse.[9] As justification for retaining the practice it has been tersely stated that it has "existed in our courts from their incipiency."[10]

Decisions in other jurisdictions reflect diverse judicial attitudes ranging from agreement with the common law view[11] to abolishment of the practice.[12] Various jurisdictions condition allowance of the procedure on the approval of the prosecutor,[13] the state,[14] or the court.[15] Language in some decisions espouses the public duty to carry out such prosecutions.[16] Indeed, in the face of a statute that banned private prosecutors, one court ruled that the definition of "private prosecutor" did not include an attorney hired by the complaining witness to prosecute.[17] On the other side of the spectrum it has been ruled in cases involving prosecuting for contingent fees that prosecuting for the private purse of the solicitor in such cases is abhorrent to the sense of justice.[18] Another court[19] construed a statute providing for publicly financed solicitors[20] as precluding private prosecution because of its inherent private motivation. Similarly, numerous cases forbid a prosecutor to appear in any capacity where he is financially backed or is appointed by any private interest.[21] Rulings on challenges to the private prosecutor appearing before the grand jury overwhelmingly hold that prejudice to the defendant is too damaging to be tolerated[22] because the prosecutor's position

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[7]*See generally* 42 AM. JUR. *Prosecuting Attorneys* § 10 (1942).

[8]State v. Davis, 203 N.C. 13, 26, 164 S.E. 737, 744 (1932).

[9]State v. Carden, 209 N.C. 404, 411, 183 S.E. 898, 902, *cert. denied*, 298 U.S. 682 (1936).

[10]State v. Best, 280 N.C. 413, 416, 186 S.E.2d 1, 3 (1972). *See also* State v. Lippard, 223 N.C. 167, 171, 25 S.E.2d 594, 597 (1943).

[11]Price v. Caperton, 62 Ky. 204, 1 Duv. 207 (1864).

[12]Biemel v. State, 71 Wis. 444, 37 N.W. 244 (1888).

[13]State v. Bartlett, 105 Me. 212, 74 A. 18 (1909).

[14]Handley v. State, 214 Ala. 176, 106 So. 692, 694-95 (1925).

[15]State v. Kent, 4 N.D. 577, 62 N.W. 63 (1895).

[16]Robinson v. State, 69 Fla. 521, 68 So. 649 (1915).

[17]Warren v. State, 130 Tex. Crim. 448, 94 S.W.2d 430 (1935).

[18]Bacca v. Padilla, 26 N.M. 223, 190 P. 730 (1920).

[19]McKay v. State, 90 Neb. 63, 132 N.W. 741 (1911).

[20]North Carolina has a similar statute. *See* N.C. GEN. STAT. § 7A-61 (Supp. 1971).

[21]*E.g.*, Bird v. State, 77 Wis. 276, 45 N.W. 1126 (1890); Biemel v. State, 71 Wis. 444, 37 N.W. 244 (1888).

[22]Nicholas v. State, 17 Ga. App. 873, 87 S.E. 817 (1916); Wilson v. State, 70 Miss. 595, 13 So. 225 (1893); Flege v. State, 93 Neb. 610, 142 N.W. 276 (1913); Hartgraves v. State, 5 Okla. Crim. 266, 114 P. 343 (1911).

as an officer of the court demands a degree of impartiality unlikely in the private prosecutorial setting. Those decisions abolishing or severely restricting private prosecution have generally based their determinations on the contemporary judicial philosophy recognizing its almost complete morphasis since the concept of private prosecution emerged.

II. CONFLICT IN ROLES

Perhaps the one area which has changed most drastically since the inception of the doctrine permitting private prosecutors has been the role of the public prosecutor. From his sole function as procured advocate for a prosecution, the duties of the public prosecutor have taken on new dimensions. He is not an advocate in the ordinary sense of the word, but is the people's representative, and his primary duty is not to convict but to see that justice is done.[23] The prosecutor is an officer of the state who should have no private interest in the prosecution and who is charged with seeing that the criminal laws of the state are honestly and impartially administered, unprejudiced by any motives of private gain.[24] It is his duty to show the whole transaction as it was, regardless of whether it tends to establish a defendant's guilt or innocence.[25]

Conversely, a privately retained attorney owes his client individual allegiance, and once employed he must not act for an interest even slightly[26] adverse to that of his client in the same general matter.[27] Therefore, in view of the ethical[28] and judicial[29] restrictions imposed on the public prosecutor and the generally recognized loyalties of the private advocate, "private prosecutor" is a contradiction in terms. The high standard of impartiality demanded of a prosecutor realistically cannot be expected of the private advocate.[30]

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[23]Berger v. United States, 295 U.S. 78, 88 (1935); NCSB CANONS OF ETHICS No. 5.

[24]Biemel v. State, 71 Wis. 444, 37 N.W. 244 (1888).

[25]McKay v. State, 90 Neb. 63, 132 N.W. 741 (1911). *See generally* 23A C.J.S. *Criminal Law* § 1081 (1961).

[26]Parker v. Parker, 99 Ala. 239, 13 So. 520 (1893).

[27]People v. Hanson, 290 Ill. 370, 371, 125 N.E. 268, 270 (1919); People v. Gerald, 265 Ill. 448, 107 N.E. 165 (1914).

[28]NCSB CANONS OF ETHICS No. 5; *see* NCSB CANONS OF ETHICS Nos. B, C.

[29]Biemel v. State, 71 Wis. 444, 37 N.W. 244 (1888).

[30]The prosecuting officer represents the public interest, which can never be promoted by the conviction of the innocent. His object, like that of the court, should be simply justice; and he has no right to sacrifice this to any pride of professional success . . . [even though] counsel employed by outside parties . . . would not feel bound by any such rule of conduct. He appears as private counsel simply, to represent the wishes,

Besides the conceptual anomaly in the conflicting roles and loyalties of the two types of prosecutors, the practical consequences of a private advocate in today's prosecutorial role results in intolerable prejudices. Unlike their common law counterparts, modern prosecutors wield the power of the state's investigatory force, decide whom to indict and prosecute, negotiate the state's position in plea bargaining, and, because of their supposed impartiality as officers of the court, are influential in recommending punishment to the court.

In the normal private prosecutorial setting, the prosecutor remains in charge. Where the private advocate only observes the proceedings from indictment to completion of trial, arguably his presence exposes the defendant to minimal prejudice. However, since the private prosecutor's influence is not confined to the open courtroom, in which obvious prejudice could be more easily detected by the court, all stages of the judicial process must be considered in determining whether the mere presence of the private prosecutor is intollerably prejudicial. The following illustrations of the possible consequences of allowing a private prosecutor demonstrates the prejudice. Because of the varying degrees of control relinquished by the prosecutor, the following discussion by no means illustrates the actual situation in any given case, but it does indicate that the practice is fraught with possible prejudice.

One prosecutorial power that, if imprudently employed, could result in dire consequences to those suspected of a crime is the discretionary authority to decide when to prosecute. At this initial stage of the criminal proceeding, the private advocate is unlikely to play any normal role. However, though the public prosecutor decides whether to prosecute, possibly his decision may be influenced by the pressure of a privately retained attorney.

The solicitor's discretionary power to prosecute is restricted in federal criminal actions by the fifth amendment requirement that all prosecutions for infamous crimes be commenced by grand jury indictment. The function of the grand jury is to stand between the accusor and accused and determine whether a charge is well founded or possibly whether it is a result of malice or ill will.[31] However, the fifth amendment requirement of grand jury indictment does not apply to states indictments, which may be served on the formal charge of the prosecu-

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prejudice, and animosities of this clients; to secure a conviction at all hazards. McKay v. State, 90 Neb. 63, 74, 132 N.W. 741, 745 (1911).

[31]Wood v. Georgia, 370 U.S. 375, 390 (1962).

tor.[32] In this setting, a private prosecutor could, in those cases where the public prosecutor abdicated to the private attorney, use the discretion of his position at the whim of his client. Likewise, where the private prosecutor also represents a client in a civil suit arising from the same situation, the indictment power could be used as a lever to procure or enhance a financial settlement in the civil action. The reverse of this blackmail situation may be as damaging. For example, a private advocate retained by parties sympathetic to the defendant's plight could move for dismissal, fail to prosecute, or emasculate the indictment through plea bargaining.

Closely related to the power of the prosecutor to indict and prosecute is his discretionary use of the nolle prosequi.[33] Though officially in the province of the court, the employment of nolle prosequi and capias is normally left to the discretion of the solicitor.[34] Prejudices inherent in the exercise of such discretion when the possessor of it owes his loyalty to a private party seeking a conviction are repugnant to our system of justice and could lead to prolonged harassment.[35] The practice of plea bargaining is well established in the criminal process. Recently the United States Supreme Court indicated that plea bargaining is not inherently incompatible with a reasonable judicial standard and that the courts should not interfere unless there has been prosecutorial overreaching.[36] Because the allegiance owed by a private prosecutor to a possibly vengeful client must coexist with the impartiality demanded in the role of solicitor, a fair termination of any plea bargaining based on the equities of the situation is highly unlikely. The public solicitor who is in control of the plea bargaining is less likely to be fair if he is assisted and counseled by a private advocate. If the private prosecutor is given control of the plea bargaining, the interest of his client might override those of the public in determining whether a plea

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[32]Hurtado v. California, 110 U.S. 516 (1864).

[33]A nolle prosequi is merely a declaration on the part of the solicitor that he will not prosecute the suit further at this time. It is not an acquittal, although its effect is to discharge the defendant without delay. Wilkinson v. Wilkinson, 159 N.C. 265, 74 S.E. 740 (1912). However, the defendant may be arrested and tried again. State v. Faggart, 170 N.C. 737, 87 S.E. 31 (1915); State v. Smith, 129 N.C. 546, 40 S.E. 1 (1901); State v. Thornton, 35 N.C. 256 (1852).

[34]State v. Moody, 9 N.C. 529 (1873); State v. Buchanan, 23 N.C. 59 (1840); State v. Thompson, 10 N.C. 613 (1825).

[35]Coupled with the prosecutor's discretionary power to prosecute, this device could be employed to blackmail an accused.

[36]Brady v. United States, 397 U.S. 742 (1970).

to a lesser crime[37] should be accepted.

With the development of the concept of the public prosecutor as an unbiased officer of the court has evolved the influence on the bench of the prosecutor's recommendations for punishment. A solicitor is under a duty to weigh all the mitigating and exculpatory circumstances in arriving at a fair recommendation. Such a duty would be meaningless if the private prosecutor, intent on conviction, possessed the responsibility.

Perhaps the most important power of the prosecutor is his discretion to choose what evidence is submitted to the court.[38] Through the evidence-collecting machinery available to prosecutors such as police investigatory agencies, the prosecutor uncovers both exculpating and inculpating evidence, which may not be discoverable by the defense despite an array of Supreme Court decisions that have proscribed the suppression of evidence which would exonerate the defendant.[39] Notwithstanding the court's admonishments, the prosecution still determines which evidence is exonerating and which is not. This discretion of the prosecution to determine initially what constitutes discoverable evidence should not be tainted with self-dealing.

Finally, at least some jurymen have confidence that the obligations imposed on the prosecutor will be faithfully observed. Consequently, improper suggestions and insinuations from the prosecutor are apt to carry much weight against the accused.[40] Notwithstanding the presence

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[37]The duty incumbent upon the office of prosecutor to ask for a verdict for a lesser offense when the facts and circumstances warrant presents a similar problem in the private prosecutorial setting. *See* State v. Josey, 112 S.C. 20, 99 S.E. 768 (1919). Again there is a discrepancy between the duty of a public prosecutor and that of a private advocate.

[38]At common law, the state was under little duty to disclose to the defense any information concerning the defendant's case. For a more complete description of the common law tradition, see People *ex rel.* Lemon v. Supreme Court, 245 N.Y. 24, 156 N.E. 84 (1927).

[39]The common law approach to prosecution's immunity from defense discovery has been diluted somewhat by the application of the fourteenth amendment to certain prosecution tactics. The prosecution cannot intentionally use perjured testimony against the defendant at trial. Mooney v. Holohan, 294 U.S. 103, 111 (1935). *See also* Miller v. Pate, 386 U.S. 1, 7 (1967). The state is under a duty to correct perjured testimony when presented. Alcorta v. Texas, 355 U.S. 28 (1957); Napue v. Illinois, 360 U.S. 264 (1959). In Brady v. Maryland, 373 U.S. 83, 87 (1963), the Supreme Court held that "the suppression by the prosecution of evidence favorable to an accused . . . violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." In addition, Court has strongly intimated that the prosecution is under a duty to initiate disclosure of evidence of the defense if the evidence will exonerate the defendant. Giles v. Maryland, 386 U.S. 66 (1967).

[40]Berger v. United States, 295 U.S. 78 (1935). There has also been concern about the appearance of a prejudiced solicitor before the grand jury. Nichols v. State, 17 Ga. App. 593, 87 S.E. 817 (1916).

of the private prosecutor, in most situations arising during the criminal proceeding the public solicitor or the court is in a position to avoid any resulting prejudice. This is not true, however, in the situation in which the private advocate examines a witness, addresses the jury, or argues to the bench. On such occasions, the harm is inflicted the instant an unwarranted implication or vituperation is released. Likewise, in some instances the mere presence of a private prosecutor is likely to bolster any inference of the guilt of the defendant in the minds of the jury, since the jury probably would ascribe more credence to a prosecuting witness who had invested heavily in the prosecution

III. Due Process Considerations

The fourteenth amendment due process clause is viewed as incorporating traditional notations of fundamental fairness implicit in the concept of liberty;[41] it is a mandate to the states to afford the defendant the fundamental fairness essential to the concept of justice.[42] To determine if a defendant has been deprived of due process by a particular practice, the crucial question is whether the practice inherently is so prejudicial as to infringe the defendant's fundamental right to a fair trial.[43]

As applied to the private prosecution situation, the constitutional question depends on whether a procedure that demands impartiality on the part of the prosecutor becomes impermissably tainted when substantial private influence is interposed. The question is easily answered in the negative when the public prosecutor remains in complete control of the litigation and his decisions are unaffected by the presence of the private prosecutor. The answer should be different once the private prosecutor, who is paid to obtain a conviction, actually assumes any degree of influence, because his inherently biased suggestions and actions may compromise a crucial and effectively dispositive exercise of

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[41]Palko v. Connecticut, 302 U.S. 319 (1937).

[42]Lisenba v. California, 314 U.S. 219 (1941); Foster v. Illinois, 332 U. S. 134, 136 (1947). The emphasis is upon basic fairness, not upon compliance with the Bill of Rights, and a state procedure may be held to violate due process even though its operation is not contrary to any specific guarantees of the first eight amendments. Israel & LaFave, Criminal Procedure in A Nutshell 7 (1971). This "federalism" theory, though subordinated to the "selective incorporation" theory several years ago has recently re-surfaced in the Supreme Court's opinions. Williams v. Florida, 399 U.S. 78, 117-43 (1970) (Harlan, J., concurring and dissenting).

[43]Estes v. Texas, 381 U.S. 532, 587 (1965) (Harlan, J., concurring, interpreting the majority opinion).

prosecutorial discretion.[44] Moreover, the difficulty in determining whether in specific cases the private prosecutor has actually prejudiced the defendant militates toward a ruling that private prosecutors should be banned in all cases, especially since the countervailing state interest in continuing the practice is miniscule. Arguably, any process which subjects the accused to the abuses inherent in the questioned method of trial deprives him of the fundamental fairness required by the due process clause.

IV. ETHICAL CONSIDERATIONS

Throughout the history of judicial review of private prosecution in North Carolina the ethical question of the propriety of private prosecution has been overlooked.[45] Though related to and often commingled with the conflict-in-roles consideraitons previously discussed, ethical decisions dealing with prosecutors have been less confined to the substantive structures of the past. The North Carolina State Bar has imposed a high moral obligation on the solicitor to seek justice at the expense of being denied convictions.[46] Moreover, both the Council of the North Carolina State Bar and the General Assembly have attempted to segregate the public solicitor from all private influences.[47] This philosophy has been followed to the extent of declaring it unethical for an attorney who shares office space or expenses with any judge, assistant judge, solicitor, assistant solicitor, or substitute solicitor to practice law in a criminal court of such officer[48] or for any attorney who is or has been such an officer to accept professional employment in any case growing out of any matter connected with his office during his incumbency.[49] These strict ethical standards result from the realization by the Council of the frailty of all men and of the adverse effect on public opinion of such associations regardless of whether actual prejudice in the courtroom results.[50] However, because of inconsistent opinions in

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[44]See text accompanying notes 4-9 *supra*.

[45]*See* cases cited note 2 *supra*.

[46]NCSB CANONS OF ETHICS No. 5.

[47]NCSB CANONS OF ETHICS Nos. 5, B, B-1, C. The need for citation to Ethics Opinions which restrict the solicitors private practice of law has been alleviated by the abolishment of such practice by statute. N.C. GEN. STAT. § 7A-61 (Supp. 1971).

[48]NCSB CANONS OF ETHICS No. B-1; *see, e.g.*, NCSB COUNCIL, ETHICS OPINIONS, No. 675 (1969); *id.* No. 623 (1968); *id.* No. 606 (1968); *id.* No. 588 (1967).

[49]NCSB CANONS OF ETHICS No. C; *see, e.g.* NCSB COUNCIL, ETHICS OPINIONS, No. 689 (1969); *id.* No. 665 (1969); *id.* No. 628 (1968); *id.* No. 555 (1967).

[50]Such a practice on the part of a court officer in accepting such employment would

areas tantamount to private prosecution, such as where a city attorney criminally prosecutes a city employee, the Council's ethical stand on the issue is less than clear.[51] These inconsistencies are evidenced by the cumulative impact of the opinions which reveal that while the Council acknowledges that private prosecutors are proper it prohibits solicitors from accepting private fees.[52] It remains anomalous that the Council expects "clean hands" of the solicitor but accepts privately financed prosecution.[53]

V. CONCLUSION

Because of the inherent discrepancies in roles in both the philosophical and practical application, the possible ethical compromises, and the questionable constitutional legitimacy, the private prosecution should be abolished.[54] In the event a party can demonstrate that a particular prosecution is inadequate in a certain situation, the North Carolina General Statutes provide adequate means of alleviating the problem by the appointment of a temporary assistant to the public prosecution. This system avoids the prejudices resulting from private prosecution and results in the appointment of attorneys who prosecute in the state's interest and only for compensation by the state.

JOHN A.J. WARD

> have the appearance of evil whether or not evil grows out of the practice and the solicitors . . . should not permit themselves to become next friends through the influence of attorneys practicing in their courts.
>
> It is human frailty to return favors and consciously or unconsciously favors received often times influence one's conduct . . . .

NCSB COUNCIL, ETHICS OPINIONS, No. 454 (1964).

[51]*See* NCSB COUNCIL, ETHICS OPINIONS, No. 595 (1967); *id.* No. 254 (1959); *id.* No. 234 (1958); *id.* No. 142 (1954); *id.* No. 103 (1953).

[52]NCSB COUNCIL, ETHICS OPINIONS, No. 470 (1965); *id.* No. 250 (1958).

[53]Of notable significance is the fact that although the Council has issued in excess of 735 decisions, only seven have mentioned private prosecution. In addition, the Council has neither justified its confirmation of the practice nor addressed itself squarely to the issue.

[54]In *Best*, the North Carolina Supreme Court accurately pointed out that the legislature has provided for the appointment of a full-time solicitor to prosecute in the name of the state and to be compensated by the state, and for the appointment of temporary assistants when the dockets are crowded. However, the court concluded that since the statute did not specifically prohibit private prosecution, the practice was allowable. State v. Best, 280 N.C. 413, 186 S.E.2d 1 (1972). However, it could be argued that since the statute established the office of public solicitor, restricted his compensation and loyalties, and provided for the appointment of assistants by a disinterested court in case of emergencies, the legislature intended to exclude the intrusion of private interests.

Securities Regulation—A New Loophole in Section 16(b)—An Insider's Delight

Before 1934, corporate insiders were able to reap large profits by speculating in their own corporation's securities because of their access to inside information.[1] Section 16(b) of the Securities Exchange Act of 1934[2] was enacted to protect the interests of the public and other stockholders against such abuse.[3] To accomplish this purpose, section 16(b) imposes strict liability for profits realized by any insider from a purchase and sale or sale and purchase accomplished within a six-month period.[4] Insiders caught within section 16(b)'s scope of liability include officers, directors, and beneficial owners[5] of more than ten percent of a corporation's securities.

Since 1934, federal courts have struggled to apply the general terms[6] of section 16(b) to the complex transactions revolving around corporate reorganizations, mergers, and other financial maneuvers involving securities. The United States Supreme Court has generally declined to get involved in this problem.[7] However, in *Reliance Electric Company v. Emerson Electric Company*,[8] the Court examined the ap-

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[1]*See* S. REP. NO. 1455, 73rd Cong., 2nd Sess. 55 (1934).

[2]15 U.S.C. §§ 78a-jj (1970).

[3]15 U.S.C. § 78p(b) (1970). In addition this section is designed "to protect the interests of the public against the predatory operatons of directors, officers, and principal stockholders of corporations by preventing them from speculating in the stock of the corporations to which they owe a fiduciary duty." S. REP. NO. 1455, 73rd Cong., 2d Sess. 68 (1934).

[4]15 U.S.C. § 78p(b) (1970). Section 16(b) as follows:

> For the purpose of preventing the unfair use of information which may have been obtained by such beneficial owner, director, or officer by reason of his relationship to the issuer, any profit realized by him from any purchase and sale, or any sale, or any sale and purchase, of any equity security of such issuer (other than an exempted security) within any period of less than six months, unless such security was acquired in good faith in connection with a debt previously contracted, shall inure to and be recoverable by the issuer, *irrespective of any intention on the part of such beneficial owner, director, or officer in entering into such transaction of holding the security purchased or of not repurchasing the security sold for a period exceeding six months. . . . The subsection shall not be construed to cover any transaction where such beneficial owner was not such both at the time of the purchase and sale, or the sale and purchase, of the security involved.* . . . (Emphasis added.)

[5]The 10% definition and filing requirements for such large stockholders are established by § 16(a), 15 U.S.C. § 78p(a) (1970).

[6]Terms in § 16(b) such as "purchase," "sale," and "equity security" are defined by § 3 in general terms also. *See* 15 U.S.C. § 78c(a)(11), (13)-(14) (1970).

[7]Prior to 1972, the only Supreme Court § 16(b) decision was Blau v. Lehman, 368 U.S. 403 (1961). For a discussion of this case, see text accompanying note 33 *infra*.

[8]92 S. Ct. 596 (1972).

plication of section 16(b) to Emerson Electric Company, the corporate owner of 13.2 percent of the stock of another corporation, which had sold its entire holdings in two separate sales, both of which occurred within six months of the purchase. The Court, in a four-to-three decision, held that since the first of the two sales reduced Emerson's interest to 9.96 percent, Emerson was not liable under section 16(b) for the profits derived from the second sale.

In *Reliance*, the sole issue[9] was whether the second sale was within the scope of section 16(b)'s coverage in view of Emerson's intent to escape liability by the split sale. The majority opinion, written by Justice Stewart, accepted the district court's finding that Emerson had split its sale pursuant to a predetermined plan with the intent to avoid section 16(b) liability; however, the majority held that Emerson's intent to avoid section 16(b) liability was irrelevant. In examining the objective requirements of section 16(b), the Court noted that a plan to sell that is conceived within six months of the purchase but carried out after six months has passed clearly would not result in liability. Hence, reasoned the majority, a plan to sell the remaining 9.96 percent did not result in liability merely because the sale was planned with intent to avoid liability while the owner owned more than ten percent.[10] The Court based its decision on a literal interpretation of the requirement that a ten-percent beneficial owner be such both at the time of purchase and at the time of sale and on the congressional design of predicating liability on an objective standard, not the investor's intent.[11]

The dissent, written by Justice Douglas, noted that section 16(b) liability may exist regardless of an insider's access to or intent to abuse inside information. The dissenters advocated a policy-oriented subjective approach of interpreting the terms of section 16(b) in the manner that—they felt—would best effectuate the purpose of the statute: They argued that the statute should be construed as allowing a rebuttable presumption that any such series of dispositive transactions are part of a single plan of disposition and hence should be treated as one sale.[12]

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[9]Emerson did not appeal the court of appeals' holding that Emerson was a 10% beneficial owner at the time of the purchase that enabled Emerson to become such. *Id.* at 598.

[10]Emerson had received written advice from its counsel that so splitting its sale could free the second sale from § 16(b) liability. Emerson Elec. Co. v. Reliance Elec. Co., 434 F.2d 918, 920-21 (6th Cir. 1970).

[11]92 S. Ct. at 599-600.

[12]*Id.* at 604-07. For a discussion of the subjective approach see text accompanying note 20 *infra*.

The seller's actual intent, the dissent pointed out, would be irrelevant. Instead, any factual inquiry would be limited to an objective analysis of the circumstances surrounding the sales and to whether the tests used in the policy-oriented subjective approach indicate that the sales fell within the terms of the statute. The dissenters rejected the majority's view that a ten-percent owner must literally be such both at the time of a purchase and at the time of a sale. Instead, they felt that the purpose of the ten-percent requirement is merely to establish the presumption that a ten-percent owner has access to inside information. Hence, an owner who acquires more than ten percent of a corporation's stock is "tainted" with inside information during the entire six-month period regardless of how he disposes of the stock.

Though there has been little litigation over the exact meaning of the requirement that ten-percent owners be such "both at the time of the purchase and sale,"[13] the *Reliance* Court implicitly agreed with earlier lower court rulings that "at the time of" should be construed as "simultaneous with."[14] Therefore, in the *Reliance* situation the first and second sales must be construed as "one sale" before section 16(b) applies. While both Justice Stewart and Justice Douglas agreed that the finding of "one sale" may not be predicated upon the ten-percent owner's intent, they disagreed as to what constitutes "one sale."

In answering this question, the majority in *Reliance* used the older objective-literal approach: The inquiry focused principally on whether the defendant's transactions could be characterized as a "purchase" or "sale" under section 16(b). If so, and both the purchase and sale were accomplished within six months, section 16(b) has been automatically applied regardless of the actual opportunity for abuse or speculative profit. The facts that the purchase or sale was involuntary and that the transactions were between entities controlled by the same interests without opportunity for profit made little difference.[15]

The *Reliance* majority felt that they could not adopt a subjective approach that "flatly contradicts the words of the statute."[16] Hence, the

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[13]15 U.S.C. § 78p(b) (1970).

[14]*E.g.*, Stella v. Graham-Paige Motors Corp., 232 F.2d 299 (2d Cir.), *cert. denied*, 352 U.S. 831 (1956).

[15]For a discussion of this approach *see* Lowenfels, *Section 16(b): A New Trend in Regulating Insider Trading*, 54 CORNELL L. REV. 45 (1968); *cf.* Park & Tilford, Inc. v. Schulte, 160 F.2d 984 (2d Cir. 1947); Smolowe v. Delendo Corp., 136 F.2d 231, 235-36 (2d Cir.), *cert. denied*, 320 U.S. 751 (1943).

[16]92 S. Ct. at 601.

Court declined to construe the two separate sales as one despite the fact that an opportunity for insider profits existed in *Reliance*.[17] The opinion did leave open the possibility of bringing within the scope of section 16(b) such a second sale were it proven to be legally or contractually connected to the first sale;[18] however, the majority left undecided the standards for such "objective" proof.[19]

As noted above, the minority in *Reliance* argued in favor of adopting the policy-oriented subjective approach in determining whether the split sale was one "sale" within the meaning of section 16(b). The initial and critical inquiry under this approach is whether the particular transaction and circumstances surrounding it presented opportunities for the type of abuse that section 16(b) was intended to prevent.[20] The courts that have used this approach have agreed that no one factor or particular circumstance is necessarily conclusive; rather, all the circumstances surrounding the case must be considered. For example, in *Roberts v. Eaton*,[21] one of the first cases in which the subjective approach was employed, the Second Circuit Court of Appeals held that a reclassification of stock was not a "purchase." Even though the owner had realized a profit on a sale of the new shares within a month of the reclassification, the *Roberts* court found that no possibility of speculative abuse existed since the owner's proportional interest had remained unchanged and there had been full disclosure of the owner's intent to sell before the shareholders had ratified the reclassification.[22]

The policy-oriented subjective approach has also been used to extend section 16(b)'s scope to cover transactions not normally thought of as purchases or sales where the court found that the transaction

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[17]Emerson Elec. Co. v. Reliance Elec. Co., 434 F.2d 918, 924 (6th Cir. 1970). For discussion of an opposite finding see text accompanying note 37 *infra*.

[18]*See* 92 S. Ct. at 600.

[19]For a good discussion of this point *see* Note, *Securities Regulation—Securities Exchange Act Section 16(b)—Owner of More than Ten Percent of Issuer's Stock, Who Reduces His Holdings Below Ten Percent in One Sale With Intent to Avoid Liability for Short-Swing Profits, Does Not Have to Disgorge Profits Derived From Subsequent, "Legally" Unrelated Sales of Remaining Shares Within the Same Six-Month Period*, 5 GA. L. REV. 584, 589-90 (1971).

[20]*E.g.*, Blau v. Lamb, 363 F.2d 507 (2d Cir. 1966), *cert. denied*, 385 U.S. 1002 (1967); Lowenfels, *supra* note 15, at 50; Comment, *The Application of Section 16(b) to Mergers: A Hidden Hazard*, 47 TEXAS L. REV. 1417 (1969).

[21]212 F.2d 82 (2d Cir.), *cert. denied*, 348 U.S. 827 (1954).

[22]The *Roberts* court also relied upon the facts that the new issue's value was related to the value of the corporation, that the owner had no more knowledge than the public about how the new issue would be accepted on the market, and that any increase in value was fortuitous. *Id.* at 85.

would lend itself to speculative abuse. Thus, in *Newmark v. RKO General, Inc.*,[23] the Second Circuit held that an exchange of stock for new stock pursuant to a merger agreement was a "sale." The *Newmark* court viewed as critical the fact that the owner of an option to purchase shares that were later exchanged had control over the approval of a subsequent merger agreement and stood to gain insider's profits.[24]

The crucial test in all such cases seems to be whether the possibility of speculative abuse did in fact exist. In *Abrams v. Occidental Petroleum Corp.*,[25] the Second Circuit reversed a district court holding[26] on the basis that the possibility of speculative abuse by a ten-percent owner did not exist. The *Abrams* court re-examined the circumstances surrounding the granting of an option and the involuntary exchange of stock pursuant to a merger agreement and held that neither of these two transactions were "sales" within the meaning of section 16(b).[27]

The minority in *Reliance* insisted that there is a strong statistical probability that any series of sales made by a ten-percent owner within six months in which he disposes of most of his holdings is likely to be part of a single plan of disposition.[28] Since the possibility of abuse did in fact exist, the majority and minority opinions clash over the question of whether to rely solely on the objective definitions of the statute or on the subjective surrounding factors.

It seems clear from the case law that the majority of courts had adopted the policy-oriented subjective approach;[29] however, the *Reliance* decision certainly has limited its application. Without overruling any previous cases, the *Reliance* Court has in effect proclaimed that

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[23]425 F.2d 348 (2d Cir.), *cert. denied*, 400 U.S. 854 (1970).

[24]The optionee in this case exercised the option before merger plans were finalized and disclosed to he public, and the exchange occurred within six months. *Id.*

[25]450 F.2d 157 (2d Cir. 1971).

[26]The district court had held that the granting of an option was a "sale" based on the finding that the "insider," which had become a ten-percent owner in an unsuccessful attempt to gain control of the issuer corporation, could use its influence and inside knowledge to oppose take-over attempts by others or to induce the issuer or its successor to buy its stock at a profit to the insider. 323 F. Supp. 570, 574-75 (S.D.N.Y.), *rev'd*, 450 F.2d 157 (2d Cir. 1971).

[27]450 F.2d at 163-65. The *Abrams* court distinguished *Newmark* on the differences in influence and control which the ten-percent owner had over the merger. As to the option, the *Abrams* court viewed as critical its finding that the option was a straight-forward business agreement. *Id.* For a general discussion of the problem of when stock options are purchases see Comment, 47 TEXAS L. REV., *supra* note 20, at 1431-34.

[28]92 S. Ct. at 607.

[29]*See* 5 L. LOSS, SECURITIES REGULATION 3037 (Supp. 1969). *See also* Lowenfels, *supra* note 15.

the subjective approach is viable only "where alternative constructions of the terms of § 16(b) are possible."[30] The Court rejected the subjective approach in *Reliance* because Congress had included the express provision that a ten-percent owner must be such at both the time of the purchase and the time of the sale.[31] It has been argued that Congress added this provision to prevent inclusion of stock owners who did not in fact have the presumed access to inside corporate information.[32] Perhaps the subjective approach was rejected because it could lead to harsh results: As the majority conceded, it would be difficult to rebut the presumption that a series of dispositive transactions afforded the owner an opportunity for speculative abuse as an insider.

Both opinions in *Reliance* acknowledged that Congress intended the application of Section 16(b) to be based on objective criteria. In *Blau v. Lehman*,[33] the Supreme Court also refused to use the subjective test to extend the definition of "director" merely because of a potential for abuse. However, in *Lehman* the Court's dictum left open the possibility that subjective proof could be used to establish agency or "deputization" whereby a corporation itself would be deemed a "director" when one of its personnel acts as a director in another corporation.[34]

The Court in *Reliance* was concerned with the substance of the transaction in question (the split sale) and not the intent on Emerson's part to buy or sell within a six-month period. Using the subjective approach, Emerson's intent to split the sale could have been viewed merely as an evidential factor for the court to consider in determining whether the transaction was actually one "sale" within the meaning of section 16(b). Such a finding would then have satisfied the provision requiring that a ten-percent beneficial owner be such "at the time of" the sale. One who is classified as a ten-percent owner within the meaning of section 16(b) automatically incurs liability for profits derived from a sale within six months of a purchase regardless of his intent at the time

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[30]92 S. Ct. at 600; *see* text accompanying note 15 *supra* for a possible test of when the application of the objective approach is required.

[31]There is very little legislative history indicating why this provision was added.

[32]Stella v. Graham-Paige Motors Corp., 232 F.2d 299, 304 (2d Cir.) (dissenting opinion), *cert. denied*, 352 U.S. 831 (1956).

[33]368 U.S. 403 (1961).

[34]*Id.* at 409-10. *Blau* was followed in *Feder v. Martin Marietta Corp.*, 406 F.2d 260 (2d Cir. 1969), *cert. denied*, 396 U.S. 808 (1970), in which the deputization theory was actually used to extend § 16(b) liability on the basis of subjective factors such as "conduct" and "position" and "control" enjoyed by the "deputy" director. *See* Wagner, *Deputization Under Section 16(b): The Implication of Feder v. Martin Marietta Corporation*, 78 Yale L.J. 1151, 1157-62 (1970).

of purchase. Thus Congress intended the statute to apply mechanically.[35]

Alternatively, the *Reliance* Court could have used the policy-oriented subjective approach which would have permitted consideration of the substantial effect and the circumstances surrounding the transaction in question.[36] Such an approach would have allowed the majority in *Reliance* to come to the same decision had it determined that Emerson had not in fact had an opportunity to abuse inside information.[37] Hence, the harsh application of section 16(b) suggested by the minority opinion in *Reliance* could be avoided while the flexibility of the subjective approach would be available for similar future cases.

The *Reliance* decision provides a definite loophole whereby a statu-

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[35]Arguably, the intent to buy and sell within a six-month period is the only intent that is irrelevant under § 16(b). In hearings before the Senate Committee on Banking and Currency prior to enactment of the Securities and Exchange Act of 1934, Mr. Thomas G. Corcoran, a principal draftsman of the Act and its chief spokesman before Congress, testified with respect to § 16(b):

> You hold the director, irrespective of any intention or expectation to sell the security within six months after, because it will be absolutely impossible to prove the existence of such intention or expectation, and you have to have this crude rule of thumb, because you cannot undertake the burden of having to prove that the director intended, at the time he bought, to get out on a short swing.
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> A subjective standard of proof, requiring a showing of an actual unfair use of inside information, would render senseless the provisions of the legislation limiting the liability period to six months . . . .

Hearings on Stock Exchange Practices Before the Senate Comm. on Banking and Currency, 73rd Cong., 2d Sess. 6557 (1934); *see* Blau v. Allen, 163 F. Supp. 702, 705 (S.D.N.Y. 1958); Bateman, *The Pragmatic Interpretation of Section 16(b) and the Need for Clarification*, 45 ST. JOHN'S L. REV. 772, 793 (1971); Lowenfels, *supra* note 15, at 61.

[36]After discussing the purpose of § 16(b), the Seventh Circuit in Bershad v. McDonough, 428 F.2d 693, 697 (7th Cir.), *cer. denied*, 400 U.S. 992 (1970) stated:

> The phrase "any purchase and sale" in Section 16(b) is therefore not to be limited or defined solely in terms of commercial law of sales and notions of contractual rights and duties (citations omitted). Applicability of this Section may depend upon the factual circumstances of the transaction, the sequence of relevant transactions, and whether the insider is "purchasing" or "selling" the security. . . . The insider should not be permitted to speculate with impunity merely because of the paper form of his transactions.

The court went on to note that the commercial substance of the transaction should be examined. *Id.*

[37]*See* Abrams v. Occidental Petroleum Corp., 450 F.2d 157 (2d Cir. 1971). It should be noted that the *Reliance* Court might have found the split sale not a sale within the meaning of § 16(b) on the basis of the involuntary nature of the sale. *See, e.g.*, Petteys v. Butler, 367 F.2d 528 (8th Cir. 1966), *cert. denied*, 385 U.S. 1006 (1967). Arguably the sale in *Reliance* was involuntary because many mergers are completed within six months, R. MUNDHEIM, A. FLEISCHER, & D. GLAZER, FIRST ANNUAL INSTITUTE ON SECURITIES REGULATION 283 (1970), and the completion of the merger may very likely also be a sale. *Id.* at 286; *e.g.*, Newmark v. RKO Gen., Inc., 425 F.2d 348 (2d Cir.), *cert. denied*, 400 U.S. 854 (1970).

tory insider may now dispose of his last 9.9 percent in a legally separate sale within six months of the purchase and retain any profits realized. Hence, the profit motive has been at least partially returned to a beneficial owner who wishes to engage in short-term speculation with the aid of inside information. However, this loophole may be somewhat illusory. Ten-percent beneficial owners are fiduciaries in the same sense as are directors and officers,[38] and section 16(b) was enacted to prevent the abuse of this relationship. But recent judicial development in federal and state law has caused the demise of section 16(b) as the sole remedy for such abuse. The federal courts have begun to develop another remedy by extending the definition of common law fraud under rule 10b-5[39] to include the failure to disclose material information by either a purchaser or a seller in a transaction. A cause of action under rule 10b-5 thus may become the principal means of barring speculative abuse of confidential corporate information by insiders since rule 10b-5 has none of the restrictions that circumscribe the application of section 16(b).[40]

In *Diamond v. Oreamuno*,[41] the Court of Appeals of New York held that although section 16(b) might not apply, a stockholder's derivative action could be maintained under state law to deal with the abuse of a fiduciary relationship by an insider who had actually used corporate information for his own benefit, even though the corporation had not been injured. The primary concern of the court in this case was who had the more legitimate claim to the proceeds derived from the exploitation of inside information.

In conclusion, it seems that the Court's decision has unnecessarily restricted the Court's flexibility to employ the subjective approach, and thereby the policy underlying section 16(b) has been thwarted. Perhaps this decision, in light of newer developing remedies, is a harbinger of a new reluctance to apply the subjective approach to expand the scope of section 16(b) liability beyond its literal meaning.

THOMAS J. MATKOV

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[38]*See* Fratz v. Claughton, 187 F.2d 46 (2d Cir.), *cert. denied*, 341 U.S. 920 (1951).

[39]SEC Rule 10b-5, 17 C.F.R. § 240.10b-5 (1968).

[40]Bateman, *supra* note 35 at 785; Lowenfels, *supra* note 15, at 61-64; *see* SEC v. Texas Gulf Sulphur Co., 401 F.2d 833 (2d Cir. 1968), *cert. denied*, 394 U.S. 976 (1969).

[41]24 N.Y.2d 494, 248 N.E.2d 910, 301 N.Y.S.2d 78 (1969).

Securities Regulation: Section 13(d) From *Blot* to *GAF*

The Williams Act[1] was passed by Congress in 1968 in order to regulate corporate take-over attempts, principally those in the form of tender offers.[2] Since the enactment of this amendment to the Securities Exchange Act of 1934,[3] however, section 13(d)[4] of the Act, which drew little attention as a companion to the much publicized section 14(d),[5] has proved vexatious in application and has resulted in clear conflicts in interpretation between several federal district courts and at least two courts of appeals.[6] This note will examine the statute as interpreted by the two principal cases decided under it and discuss the weight which should be given those decisions in future applications of the law.

Section 13(d)[7] of the Act provides that upon acquisition of more

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[1]Act of July 29, 1968, Pub. L. No. 90-439, 82 Stat. 454, *amending* Securities Exchange Act §§ 12-14, 15 U.S.C. §§ 78*l*-n (1970).

[2]For an analysis of the corporate take-over attempt by tender offer and the projected effect of the Williams Act see Brudney, *A Note on Chilling Tender Solicitation*, 21 RUTGERS L. REV. 609 (1967). For a more recent appraisal see Note, *Cash Tender Offers*, 83 HARV. L. REV. 377 (1969). Congress determined that there was a need for the protection of shareholders and prospective investors when there were rapid accumulations of the securities of corporations. It responded with the Williams Act. *See* S. REP. NO. 550, 90th Cong., 1st Sess. (1967); 113 CONG. REC. 854-57 (1967) (remarks of Senator Williams);/ Schwartz, *The Sale of Control and the 1934 Act: New Directions for Federal Corporation Law*, 15 N.Y.L.F. 674, 707 (1969); Note, *Securities—The Williams Act: A "Tender Trap,"* 24 SW. L.J. 542 (1970).

[3]15 U.S.C. §§ 78a-hh (1970).

[4]*Id.* § 78m(d).

[5]The corporate tender offer is directly regulated by § 14(d). *Id.* § 78n(d).

[6]These conflicts will be discussed *infra* in the context of the cases in which they arose.

[7]Securities Exchange Act § 13(d), 15 U.S.C. 78m(d) (1970) provides in relevant part:

> (1) Any person who, after acquiring directly or indirectly the beneficial ownership of any equity security of a class which is registered pursuant to section 78*l* of this title, or any equity security of an insurance company which would have been required to be so registered except for the exemption contained in section 78*l*(g)(2)(G) of this title, or any equity security issued by a closed-end investment company registered under the Investment Company Act of 1940, is directly or indirectly the beneficial owner of more than 5 per centum of such class shall, within ten days after such acquisition, send to the issuer of the security at its principal executive office, by registered or certified mail, send to each exchange where the security is traded, and file with the Commission, a statement containing such of the following information, and such additional information, as the Commission may by rules and regulations prescribe as necessary or appropriate in the public interest or for the protection of investors—
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> . . . .
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> (3) When two or more persons act as a partnership, limited partnership, syndicate, or other group for the purpose of acquiring, holding, or disposing of securities of an issuer, such syndicate or group shall be deemed a "person" for the purposes of this subsection.
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> . . . .

than five percent[8] of a class of the securities of a corporation the person or group acquiring such securities must file a Schedule 13D with the Securities Exchange commission. This statement discloses the number of shares the person owns or controls; the sources of funds for any purchases; any prospective additional purchases intended; the background and identity of all persons on whose behalf the purchases were effected; any arrangements with others concerning loans, options, and proxies; whether control of the issuer is sought; and any major plans such person has for the issuer if control is obtained.[9]

In the first case to consider whether the requirement for filing had been "triggered,"[10] *Bath Industries, Inc. v. Blot,*[11] the plaintiff corporation sought a preliminary injunction to prevent Blot and his associates from voting stock they had allegedly acquired without making the disclosure required by section 13(d). The defendants, who owned more than ten percent of Bath's outstanding shares of common stock, "undertook

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(5) The Commission, by rule or regulation or by order, may permit any person to file in lieu of the statement required by paragraph (1) of this subsection or the rules and regulations thereunder, a notice stating the name of such person, the number of shares of any equity securities subject to paragraph (1) which are owned by him, the date of their acquisition and such other information as the Commission may specify, if it appears to the Commission that such securities were acquired by such person in the ordinary course of his business and were not acquired for the purpose of and do not have the effect of changing or influencing the control of the issuer nor in connection with or as a participant in any transaction having such purpose or effect.

. . . .

(6) The provisions of this subsection shall not apply to—

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(B) any acquisition of the beneficial ownership of a security which, together with all other acquisitions by the same person of securities of the same class during the preceding twelve months, does not exceed 2 per centum of that class;

. . . .

(D) any acquisition or proposed acquisition of a security which the Commission, by rules or regulations or by order, shall exempt from the provisions of this subsection as not entered into for the purpose of, and not having the effect of, changing or influencing the control of the issuer or otherwise as not comprehended within the purposes of this subsection. . . .

[8]Pub. L. No. 91-567, § 1, 84 Stat. 1497 (1970), *amending* Securities Exchange Act § 13(d)(1), 15 U.S.C. § 78m(d)(1) (1970), reduced the level of equity ownership triggering the disclosure requirement from 10% to 5%. At all relevant times for the cases discussed in this Note the level was 10%. This change does not affect the principles involved.

[9]Securities Exchange Act § 13(d)(1)(A)-(E), 15 U.S.C. § 78m(d)(1)(A)-(E) (1970). For specific disclosure requirements *see* 17 C.F.R. § 240.13d-101 (1971) (provisions for filing a Schedule 13D).

[10]Susquehanna Corp. v. Pan Am. Sulfur Co., 423 F.2d 1075 (5th Cir. 1970), considered the *sufficiency* of a § 13(d) filing, but the question of whether a filing was required was not at issue.

[11]427 F.2d 97 (7th Cir. 1970), *aff'g* 305 F. Supp. 526 (E.D. Wis. 1969).

a deliberate, conscious plan to pool their voting interests in Bath stock and to acquire additional shares of Bath stock, and to obtain the support and votes of other large stockholders . . . to the end that they could force the resignation of [the president of Bath] . . . ."[12] Pursuant to this "plan," several of the defendants increased their holdings substantially and began preparing for a proxy contest.

In granting Bath's request for an injunction, the district court found that the defendants did constitute a "group" as defined by section 13(d)(3) and therefore were required to file a 13D disclosure.[13] The court of appeals, in affirming, rejected Bath's contention that the Blot group would have to comply with the Act within ten days of the time they agreed to act in concert whether or not any members of the group had purchased *additional* stock in furtherance of their plan.[14] The court found, rather, that "the Act should be interpreted to require compliance with its disclosure provisions when, but only when, any group of stockholders owning more than 10% of the outstanding shares of the corporation agree to act in concert *to acquire additional shares.*"[15] The court further stated that the Act "does [not] proscribe legitimate cooperation among existing shareholders to assert their determination to take over control of management, *absent* an intention to acquire additional shares for the furtherance of such purpose."[16]

The *Bath* court's interpretation of section 13(d) went unchallenged until recently, when the Court of Appeals for the Second Circuit in *GAF Corp. v. Milstein*[17] rejected the *Bath* holding insofar as it would require that the disclosure mechanism be set in motion only by *additional* acquisitions of stock after a section 13(d)(3) group was formed. In *GAF* the GAF Corporation alleged that the Milstein family, which had acquired collectively more than ten percent of the preferred shares of GAF,[18] "formed a conspiracy among themselves and other persons to act as a syndicate or group for the purpose of acquiring, holding, or

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[12]305 F. Supp. at 531.

[13]*Id.* at 537.

[14]427 F.2d at 108-09.

[15]*Id.* at 109 (emphasis by the court).

[16]*Id.* at 110.

[17]453 F.2d 709 (2d Cir. 1971), *rev'g in part* 324 F. Supp. 1062 (S.D.N.Y. 1971).

[18]The Milsteins, a father and his three children, obtained 10.25% of the outstanding preferred shares of GAF Corporation when the Rubberoid Company, in which they held 8% of the common stock, was merged with GAF. Since the merger, the Milsteins had acquired no additional preferred shares of GAF. They had purchased 1.6% of GAF common stock. 324 F. Supp. at 1064.

disposing of securities of GAF with the ultimate aim of seizing control of GAF for their own personal and private purposes."[19]

The lower court determined that the issue was whether organizing a ten percent group with a view to seeking control of the corporation was, without more, a reportable event under 13(d).[20] That court rejected GAF's contention that when a group is formed there is a constructive conveyance of the stock from the individual members to the group and thus an "acquisition" by the group. Instead, in granting the Milsteins' motion for dismissal, the court said that "the specific statutory language is clear and compels the construction that the reportable event is the acquisition . . . and not the mere formation of a group with a view to control."[21]

On appeal, the Court of Appeals for the Second Circuit reversed in part and found that the Milsteins were a "group" and thus a "person" as defined by section 13(d)(3). The controlling question was whether the group had acquired the stock owned by its members.[22] The court answered that question affirmatively, saying that "[m]anifestly, according to the complaint, the group when formed acquired a beneficial interest in the individual holdings of its members."[23] Thus the Milsteins, employing that "legitimate cooperation among existing shareholders" to which the *Bath* court had referred with approval,[24] were found to have subjected themselves to the disclosure requirement of section 13(d).

There is clearly a conflict as to when the formation of a group triggers the filing requirement. The Seventh Circuit would require not only that the group be formed for the stated purposes, but also that the group then agree to acquire additional shares. In *GAF,* the Second Circuit found that the formation of the group in itself constituted the qualifying acquisition. In light of these decisions a court must answer several question in interpreting section 13(d). It must decide when a "group" is formed, and after its formation, when it becomes a "person." The statute provides that "[w]hen . . . persons act as a . . . group for the purpose of acquiring, holding, or disposing of securities . . . such . . . group shall be deemed a 'person' for the purposes of this subsec-

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[19]453 F.2d at 713.
[20]324 F. Supp. at 1064.
[21]*Id.* at 1067.
[22]453 F.2d at 715.
[23]*Id.* at 716.
[24]427 F.2d at 110.

tion."[25] As the court in *GAF* points out, an interpretation requiring that the group agree to acquire additional shares ignores the words "holding" and "disposing."[26] The *Bath* court had been persuaded by the repeated reference in the legislative history of the Act to "purchase" and "acquisition"[27] that the Act was intended to protect investors only when the group made acquisitions after its formation. Such an inference might be valid were it not for the considerable evidence that the Act was intended to provide disclosure when stock is rapidly accumulated, however that accumulation is accomplished. The Committee Reports on the Williams Act stated that:

> [Section 13(d)(3)] would prevent a group of persons who seek to pool their voting or other interests in the securities of an issuer from evading the provisions of the statute because no one individual owns more than 10 percent of the securities. The group would be deemed to have become the beneficial owner, directly or indirectly, of more than 10 percent of a class of securities at the time they agreed to act in concert. Consequently, the group would be required to file the information called for in section 13(d)(1) within ten days after they agree to act together, whether or not the group had acquired any securities at that time. This provision is designed to obtain full disclosure of the identity of any person or group obtaining the benefits of ownership of securities by reason of any contract, understanding, relationship, agreement or other arrangement.[28]

This statement goes directly to the point of the *Bath* and *GAF* cases, and legislative history should be given considerable weight where, as in the case of section 13(d), conflicting interpretations are possible.[29] The court in *Bath* acknowledged the difficulty of proving a group's agreement to acquire securities and concluded that when a group agrees to act in concert and some members of that group subsequently acquire additional securities, there is a rebuttable presumption that the acquisition was made pursuant to an agreement.[30] At the time of the subsequent acquisition the group would be subject to the disclosure requirements of section 13(d). This "presumption" would frustrate the purpose

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[25]Securities Exchange Act § 13(d)(3), 15 U.S.C. § 78m(d)(3) (1970).

[26]453 F.2d at 718 n.18.

[27]*See, e.g.*, 113 CONG. REC. 24664-65 (1967).

[28]H.R. REP. No. 1711, 90th Cong., 2d Sess. 8-9 (1968).

[29]Nolan v. United States, 41 F.2d 962, 965 (Ct. Cl. 1930); *see* Commissioner v. Bilder, 369 U.S. 499, 502 (1962).

[30]427 F.2d at 110.

of the statute since disclosure would, in effect, be required only after the group had actually acquired additional securities, with the result that information would not be available to the shareholder until well *after* the need for it had arisen. In light of the purposes of the Act, the more reasonable interpretation would seem to be that of the Second Circuit: that persons acting in concert are a group; that a group formed for the purposes stated in the Act is to be treated as a person; and that such a "person" who owns more than five per cent of a class of the securities of an issuer must meet the disclosure requirement.

When a five per cent group is formed for one of the purposes set out in the statute,[31] it is subject to the requirements of section 13(d)(1). In addition, however, the courts must determine whether, under that section, an acquisition triggers the filing requirement. Sections 13(d)(5) and 13(d)(6)(D)[32] provide for lesser filing requirements or in some cases for exemptions from filing. Under these two sections the Commission may modify the disclosure requirement if neither the purpose nor the effect of the acquisition was to change or influence the control of the issuer. Congress by these provisions clearly contemplated acquisitions with respect to which no protective disclosure would be necessary.[33] The courts are in conflict, however, as to the relevance of the purpose of an acquisition when there has been no ruling by the Commission under 13(d)(5) or 13(d)(6)(D). Neither *Bath* nor *GAF* directly considered this question, although the *GAF* court did indicate that not all formations, even though acquisitions of the required percentage of stock, would trigger the filing requirement.[34]

The problem is clearly delineated by two district court cases in which groups were not involved. Those cases, *Ozark Air Lines, Inc. v. Cox*[35] and *Sisak v. Wings & Wheels Express, Inc.*[36] both involved the inheritance of securities. In *Ozark* the court held that inheritance was *not* a reportable acquisition, saying that the "subsection . . . clearly is

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[31]15 U.S.C. 78m(d)(3) (1970).

[32]*Id.* § 78m(d)(5), (6)(D), set out note 7 *supra.*

[33]The statute indicates that Congress expected the Securities Exchange Commission to promulgate objective standards for the exemptions provided. *Id.* Research has disclosed no such promulgation as of the date of this writing.

[34]Rejecting the Milsteins' argument that the *GAF* decision would "catch too many fish," the court said that "[m]anagement groups per se, are not customarily formed for the purpose[s]" of the statute. Therefore, the court avoided the question of whether management groups which pool their interests to fight a takeover are subject to section 13(d). 453 F.2d at 719.

[35]326 F. Supp. 1113 (E.D. Mo. 1971).

[36][1970-71 Transfer Binder] CCH FED. SEC. L. REP. ¶ 92,991 (S.D.N.Y. 1970).

designed to regulate filings regarding purposeful acquisitions, holdings or disposals" which change or influence the control of the issuer or affect the market.[37] The court in *Sisak,* on the other hand, held that the beneficiary and the executor of an estate which included thirty-one percent of the shares of a corporation were required to file. The court explained that section 13(d) "is not tied to proxy contests . . . [and] is not limited to any particular mode of 'acquisition.' "[38]

Both the history and the language of the Act seem to support the reasoning in *Sisak.* It seems clear that Congress saw the need for investor protection in situations in which neither tender offers nor proxy fights were contemplated at the time of acquisition.[39] A contrary interpretation would require the courts to speculate about motive rather than focus on the ability to influence the control of the issuer.[40]

Finally, the requirements of section 14(d)[41] should be compared with those of section 13(d). Section 14(d)(1) makes it unlawful for a person to make a tender offer for any class of the securities of an issuer if after the offer is consummated such person would own more than five percent of that class, unless at the time the offer is made a disclosure—Schedule 13D—is filed with the Commission by the person making the offer. Section 14(d) is much narrower in scope than section 13(d) since the latter will require disclosure in many cases in which no tender offer is made. Section 14(d), however, would seem to require disclosure in situations in which section 13(d) does not operate only if a person who owns less than five percent makes a tender offer for more than that

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[37]326 F. Supp. at 1117.

[38][1970-71 Transfer Binder] CCH FED. SEC. L. REP. ¶ 92,991, at 90,668.

[39]The Exchange Act provides for disclosure in proxy fight and tender offer situations. Securities Exchange Act § 14, 15 U.S.C. § 78n (1970). The practical difficulty of proving intent when the initial acquisitions are made, however, requires an objective standard for triggering § 13(d). These considerations were also factors in the decision to lower the percentage of shares which triggers 13(d) to 5%. *See Hearings on Problems in the Securities Industry Before the Subcomm. on Securities of the Senate Comm. on Banking and Currency,* 91st Cong., 1st Sess. 15 (1969) (remarks of Mr. Budge).

[40]Congress sought to protect investors by requiring disclosure when a "person" has the *ability to influence control* of a corporation. Recent Developments, *An Informal Shareholder Group Must Meet Williams Act Disclosure Requirements within Ten Days after the Group Has Decided to Acquire Additional Shares in Furtherance of a Plan to Seek Corporate Control,* 71 COLUM. L. REV. 466, 469-70 (1971); Note, 24 SW. L.J., *supra* note 2, at 550; Comment, *Section 13(d) And Disclosure of Corporate Equity Ownership,* 119 U. PA. L. REV. 853, 856 (1971). *See also* 6 L. LOSS, SECURITIES REGULATION 3664 (Supp. 1969); 113 CONG. REC. 856 (1967).

[41]Securities Exchange Act § 14(d)(1), 15 U.S.C. § 78n(d)(1) (1970). For a general discussion of § 14 see Bromberg, *The Securities Law of Tender Offers,* 15 N.Y.L.F. 462 (1969).

amount and fails to acquire at least five percent. Viewed together, the sections point to the conclusion that while Congress specifically provided for disclosure in tender offer situations, they also saw the need for disclosure with respect to aggregations of securities prior to or in the complete absence of a tender offer.[42]

The conflicting interpretations of section 13(d) thus remain unresolved. The recent amendments to that section,[43] which provide for more stringent disclosure requirements, are a strong indication that Congress saw the need for disclosure in every case in which the control of a corporation might be affected. At the same time, foreseeing that disclosure may in some cases be unnecessary or unduly burdensome, Congress has given the Commission broad discretion to temper the effect of the statute.

Section 13(d) should be interpreted to require disclosure, in the absence of intervention by the Commission, whenever a five percent "group" is formed for the purposes set out in the statute and when a person acquires five percent of a class of shares, whatever the purpose or mode of that acquisition. If this interpretation is followed the influence of section 13(d) in the field of securities regulation will probably be much greater than that of section 14(d), and 13(d) should, in the future, be recognized as the real "meat" of the Williams Act.

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[42]It has been argued that incumbent management's benefit from this "early tipoff" (proxy and tender offer regulations need not be in effect when § 13(d) is triggered) is much greater than that contemplated when Congress voiced its intention *not* to tip the scales in favor of either party. *See, e.g.*, Note, 71 COLUM. L. REV., *supra* note 40.

[43]Pub. L. No. 91-567, § 1, 84 Stat. 1497 (1970), *amending* Securities Exchange Act § 13(d), 15 U.S.C. § 78m (1970).