UNC SCHOOL OF LAW

NORTH CAROLINA LAW REVIEW

Volume 53 | Number 2 Article 6

12-1-1974

Notes

North Carolina Law Review

NOTES

Antitrust Law—The Sherman Act and Minimum Legal Fee Schedules: Learned Professions and State-Action Immunity

The question of whether the minimum fee schedules promulgated by state and local bar associations violate the Sherman Act[1] has caused considerable debate both inside and outside the legal profession.[2] Commentators have not only questioned the legality of these pricing arrangements, but also the motives behind minimum fee schedules and the results they produce.[3] In 1973 a federal court considered for the first time the antitrust questions raised by the legal profession's use of minimum fee schedules. In *Goldfarb v. Virginia State Bar*[4] a United States district court ruled that minimum fee schedules constitute price-fixing in violation of section 1 of the Sherman Act.[5] On appeal, the United States Court of Appeals for the Fourth Circuit reversed.[6] In reaching its decision, the Fourth Circuit vitalized the "learned profession" exemption from the antitrust laws, extended the "state action" immunity from antitrust liability,[7] and found that the practice of law, at least the practice of examining titles in Fairfax County, Virginia, does not sufficiently "affect" interstate commerce to meet the jurisdictional requirements of the Sherman Act.[8]

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1. 15 U.S.C. §§ 1-8 (1970).

2. *E.g.*, Arnold & Corley, *Fee Schedules Should Be Abolished*, 57 A.B.A.J. 655 (1971); Miller & Weil, *Let's Improve, Not Kill, Fee Schedules*, 58 A.B.A.J. 31 (1972); Morgan, *Where Do We Go from Here with Fee Schedules?*, 59 A.B.A.J. 1403 (1973); Comment, *Minimum Fee Schedules as Price Fixing: A Per Se Violation of the Sherman Act*, 22 AM. U.L. REV. 439 (1973); Comment, *A Critical Analysis of Bar Association Minimum Fee Schedules*, 85 HARV. L. REV. 971 (1972).

3. *E.g.*, Arnold & Corley, *supra* note 2.

4. 355 F. Supp. 491 (E.D. Va. 1973), *rev'd*, 497 F.2d 1 (4th Cir. 1974), *cert. granted*, 43 U.S.L.W. 3255 (U.S. Oct. 29, 1974).

5. 15 U.S.C. § 1 (1970).

6. Goldfarb v. Virginia State Bar, 497 F.2d 1 (4th Cir. 1974). On the day after the Fourth Circuit handed down the *Goldfarb* decision, the Antitrust Division of the Department of Justice filed a complaint charging the Oregon State Bar with combining and conspiring "to raise, fix, stabilize, and maintain fees charged by its members . . . for rendering legal services." United States v. Oregon State Bar, Civil No. 74-362 (D. Ore., filed May 9, 1974).

7. *See* Parker v. Brown, 317 U.S. 341, 350 (1943).

8. This note will discuss only the "learned profession" and "state action" defenses accepted by the Fourth Circuit in *Goldfarb*. However, in regard to the interstate commerce test, the author is of the opinion that Judge Craven in his dissent correctly articulated and applied the test for determining when interstate commerce is sufficiently af-

The Goldfarbs contracted to purchase a home in Reston, Virginia on October 26, 1971. To finance the purchase, they obtained a home mortgage, which required that they obtain title insurance. Thus a title examination of the real estate had to be made by an attorney. Unable to purchase the services of a Virginia attorney at less than the rate prescribed by the locally adopted minimum fee schedule, the Goldfarbs paid an attorney the minimum rate and subsequently instituted a class action against the Virginia State Bar and three local bar associations seeking treble damages for violation of the federal antitrust laws.[9]

The United States District Court found that the minimum fee schedule was a price-fixing agreement, a per se violation of the federal antitrust laws.[10] Finding a sufficient effect on interstate commerce to sustain jurisdiction under the Sherman Act, the district court concluded that the Fairfax County Bar Association's adoption and distribution of a minimum fee schedule was a violation of the Sherman Antitrust Act.[11] The court dismissed the action against the Virginia State Bar because "[i]n its minor role in this matter, the Virginia State Bar was engaged in state action," and was, therefore, exempt from the prohibitions of the Sherman Act.[12] The Goldfarbs and the Fairfax County Bar Association appealed.

The Fourth Circuit unanimously agreed that the action of the Virginia State Bar did not violate the federal antitrust laws. Judge Boreman for the majority concluded that the State Bar came within the state action immunity[13] from the antitrust laws set out by the United States Supreme Court in *Parker v. Brown*.[14] The court of appeals, however, reversed the district court's decision that the Fairfax

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fected to satisfy the jurisdictional requirements of the Sherman Act. 497 F.2d at 21-23.

9. Two of the local bar associations, the Alexandria Bar Association and the Arlington County Bar Association, agreed to consent judgments prior to the trial of the case. They were directed by the district court "to cancel their existing minimum fee schedules and enjoined from adopting, publishing or distributing any future schedules of suggested or minimum fees." 355 F. Supp. at 492 n.1.

10. *Id.* at 493-94.

11. *Id.* at 494, 496.

12. *Id.* at 496; *see* Parker v. Brown, 317 U.S. 341, 350 (1943); text accompanying note 50 *infra*.

13. 497 F.2d at 8-12.

14. 317 U.S. 341 (1943). In a concurring and dissenting opinion in *Goldfarb*, Judge Craven was unwilling to conclude that the *Parker* requirements for state action immunity had been satisfied, but he found that the "minor role" of the Virginia State Bar in the price-fixing arrangement was insufficient to justify imposition of Sherman Act liability. 497 F.2d at 21.

County Bar Association's adoption and publication of a minimum fee schedule violated section 1 of the Sherman Act.[15] Acknowledging that "the fee schedule and the enforcement mechanism supporting it act as a substantial restraint upon competition among attorneys practicing in Fairfax County,"[16] the court concluded that anticompetitive restraints on the practice of law are not within the scope of the Sherman Act. The court reasoned that law is a "learned profession" and not a "trade or commerce" within the meaning of the Act.[17] In addition, the court of appeals held that the restraining effect of the minimum fee schedule on the interstate business of financing and insuring home mortgages was "fortuitous," "incidental," and too "remote" to satisfy the interstate commerce requirement of the Sherman Act.[18]

THE "LEARNED PROFESSION" EXEMPTION

The language of section 1 of the Sherman Act declares that "every contract, combination . . . , or conspiracy, in restraint of trade or commerce among the several states . . . ." is unlawful.[19] There is not express exception for professional activities and the statutory language is "so expansive that courts have been reluctant to find exceptions."[20] The only extended analysis of the meaning of the word "trade" in the Sherman Act was made by Chief Judge Groner in *United States v. American Medical Association.*[21] Judge Groner pointed out that "[t]he phrase 'restraint of trade' had its genesis in the common-law, and its legal import and significance is declared again and again in the decisions of English courts . . . as well as in American decisions in many of the States. The Supreme Court has said that Congress passed the Sherman Act with this common-law background in

15. 15 U.S.C. § 1 (1970).
16. 497 F.2d at 13.
17. *Id.* at 13-15.
18. *Id.* at 18-19. Judge Craven dissented from the majority opinion on the Sherman Act liability of the local bar association. *Id.* at 21-24.
19. 15 U.S.C. § 1 (1970).
20. Goldfarb v. Virginia State Bar, 355 F. Supp. 491, 493 (E.D. Va. 1973). The Supreme Court, in United States v. South-Eastern Underwriters Ass'n, 322 U.S. 533, 561 (1944), concluded "if exceptions are to be written into the [Sherman] Act, they must come from the Congress, not this Court." *See generally* S. OPPENHEIM & G. WESTON, FEDERAL ANTITRUST LAWS 35-37 (1968).
21. 110 F.2d 703, 710 (D.C. Cir. 1940), *aff'd*, 317 U.S. 519 (1943). The Supreme Court affirmed the result in this case without reaching the question of whether the term "trade" applies to the professions. *See also* United States v. National Ass'n of Real Estate Bds., 339 U.S. 485, 491-92 (1950), in which Mr. Justice Douglas refers to Chief Judge Groner's "extended analysis and summary of the problem."

mind."[22] At common law an agreement by an individual not to engage in the practice of his occupation, including the "learned professions," was considered an illegal contract in restraint of trade unless the court found that the agreement was "reasonable."[23] Since these "ancillary" restraints[24] of trade were, and still are, illegal if unreasonable,[25] it follows that a direct restraint on the practice of a "learned profession" is also within the scope of the Sherman Act. Judge Groner concluded that "[t]he indutiable effect of . . . English and American [cases], is to enlarge the common acceptance of the phrase 'restraint of trade' to cover all occupations in which men are engaged for a livelihood."[26]

Although the Supreme Court has stated that it is in the "broad sense that 'trade' is used in the Sherman Act,"[27] it has on two occasions sidestepped the opportunity to determine if "trade" in this "broad sense" includes the professions.[28] In *American Medical Association v. United States*,[29] the Supreme Court affirmed the result reached by Judge Groner for the court of appeals. The Court, however, avoided the question of whether the practice of medicine is a "trade" within the meaning of the Sherman Act by focusing on the fact that the illegal anticompetitive activities of the local medical association were directed against a business engaged in trade or commerce within the meaning of the Sherman Act.

Seven years later, in *United States v. National Association of Real*

22. 110 F.2d at 707.

23. *Id.* at 708.

24. "An ancillary restraint refers to a covenant or a separate contract which is subordinate to the main lawful purpose of a larger transaction it is designed to effectuate. Illustrative is a covenant not to compete accompanying the sale of a business or professional practice or a contract of employment." S. OPPENHEIM & G. WESTON, *supra* note 20, at 4.

25. *See* United States v. American Medical Ass'n, 110 F.2d 703, 709 (D.C. Cir. 1940), *aff'd*, 317 U.S. 519 (1943); Beam v. Rutledge, 217 N.C. 670, 9 S.E.2d 476 (1940). *See generally* Note, *Professional Responsibility—Covenants Not to Compete Between Attorneys*, 50 N.C.L. REV. 936 (1972). *See also* N.C. STATE BAR CODE OF PROESSIONAL RESPONSIBILITY DR2-108(A) which makes it a disciplinary violation for an attorney to "be a party to or participate in a partnership or employment agreement with another lawyer that restricts the right of a lawyer to practice law after the termination of a relationship created by the agreement, except as a condition to payment of retirement benefits."

26. 110 F.2d at 710.

27. *E.g.*, United States v. National Ass'n of Real Estate Bds., 339 U.S. 485, 491 (1950); Atlantic Cleaners & Dyers, Inc. v. United States, 286 U.S. 427, 435 (1932).

28. United States v. National Ass'n of Real Estate Bds., 339 U.S. 485, 492 (1950); American Medical Ass'n v. United States, 317 U.S. 519, 528 (1943).

29. 317 U.S. 519 (1943).

Estate Boards,[30] the Supreme Court again sidestepped the "learned profession" issue. The Court stated:

> We do not intimate an opinion on the correctness of the application of the term "trade" to the professions. We have said enough to indicate we would be contracting the scope of the concept of "trade," as used in the phrase "restraint of trade," in a precedent-breaking manner if we carved out an exemption for real estate brokers. Their activity is commercial and carried on for profit.[31]

The Supreme Court's failure to consider the validity of the "learned profession" exemption has allowed the professions to focus on three older Supreme Court decisions in supporting a claim of Sherman Act exemption. In *Federal Base Ball Club of Baltimore, Inc. v. National League of Professional Baseball Clubs*,[32] the Supreme Court held that professional baseball was not subject to the prohibitions of the Sherman Act, in part because the Court found that "personal effort, not related to production, is not a subject of commerce."[33] Although the Supreme Court has on two occasions affirmed its decision in *Federal Base Ball*,[34] the Court in *Flood v. Kuhn*[35] explained that *Federal Base Ball* and its progeny are "aberration[s] confined to baseball."[36] In two other decisions, *Federal Trade Commission v. Raladam Co.*[37] and *Atlantic Cleaners & Dyers, Inc. v. United States*,[38] the Supreme Court in dicta stated that the "learned professions" are not "trades" within the meaning of the Sherman Act. The dicta in these two cases "decided in an era of judicial antagonism to governmental regulation of business and commerce,"[39] stand as the only affirmative support for an exclusion of the "learned professions" from the scope of the Sherman Act.

Until the Fourth Circuit's decision in *Goldfarb*, no court has found enough vitality in the "learned profession" exemption to base a dis-

30. 339 U.S. 485 (1950).
31. *Id.* at 491-92.
32. 259 U.S. 200 (1922).
33. *Id.* at 209.
34. Flood v. Kuhn, 407 U.S. 258 (1972); Toolson v. New York Yankees, Inc., 346 U.S. 356 (1953).
35. 407 U.S. 258 (1972).
36. *Id.* at 282. The arguments of other professional sports organizations that they come within the scope of the exemption granted to baseball in *Federal Base Ball* have been uniformly rejected by the Supreme Court. *See, e.g.*, Haywood v. National Basketball Ass'n, 401 U.S. 1204 (1971); Radovich v. National Football League, 352 U.S. 445 (1957); United States v. International Boxing Club, 348 U.S. 236 (1955).
37. 283 U.S. 643, 653 (1931).
38. 286 U.S. 427, 436 (1932).
39. Goldfarb v. Virginia State Bar, 497 F.2d 1, 23 (4th Cir. 1974) (dissenting opinion).

missal of charges of antitrust violations primarily on this defense.[40] In *Northern California Pharmaceutical Association v. United States*[41] and *United States v. Utah Pharmaceutical Association*,[42] lower courts imposed Sherman Act liability on professional groups. Those courts found that the "commercial" aspects of the alleged anticompetitive professional activities brought the professionals within the scope of the Sherman Act.[43] At the same time, because of the Supreme Court's dicta relating to the professions, no court has declared that the exemption does not exist.

The *Goldfarb* majority argued that the traditional belief in an exemption for the "learned professions," as evidenced by dicta in *Raladam* and *Atlantic Cleaners & Dyers*, is entitled to great weight.[44] In the court's opinion, to overturn this traditional belief would amount to judicial legislation.[45] While this argument is analogous to that made by the Supreme Court in justifying the continued vitality of *Federal Base Ball*,[46] the "learned profession" exemption does not share the history of professional baseball's exemption. The "learned profession" exclusion is supported only by dicta, while baseball's exemption is supported by three affirmative Supreme Court decisions. Faced since 1922 with baseball's "aberrational," judicially granted exemption from the antitrust laws, Congress has failed to pass remedial legislation. The Supreme Court has found that this is "something other than mere Congressional silence and passivity," concluding "that Congress as yet has had no intention to subject baseball's reserve system to the reach of the antitrust statutes."[47] In contrast, the dicta supporting the "learned profession" exemption has not stood as a red flag inviting affirmative Congressional action to close a gap in Sherman Act

40. *E.g.*, Riggall v. Washington County Medical Soc'y, 249 F.2d 266 (8th Cir. 1957), the court of appeal's opinion was based primarily on the absence of interstate commerce, but the court included a statement that "the practice of [medicine] . . . is neither trade nor commerce within Section 1 of the Sherman Antitrust Act." *Id.* at 268.

41. 306 F.2d 379 (9th Cir.), *cert. denied*, 371 U.S. 862 (1962).

42. 201 F. Supp. 29 (D. Utah), *aff'd mem.*, 371 U.S. 24 (1962).

43. Both cases involved agreements among pharmacists to fix the prices of prescriptions. *See* Alabama Optometric Ass'n v. Alabama State Bd. of Health, 5 TRADE REG. REP. (1974-2 Trade Cas.) ¶ 68,914 (M.D. Ala. July 26, 1974). *Cf.* Marjorie Webster Junior College, Inc. v. Middle States Ass'n of Colleges & Secondary Schools, Inc., 432 F.2d 650 (D.C. Cir.), *cert. denied*, 400 U.S. 965 (1970), in which the court concluded that "an incidental restraint of trade absent an intent or purpose to affect the commercial aspects of the profession, is not sufficient to warrant application of the antitrust laws." *Id.* at 654.

44. 497 F.2d at 19.

45. *Id.*

46. *See* Flood v. Kuhn, 407 U.S. 258 (1972).

47. *Id.* at 283.

coverage. The reach of the Sherman Act has continued to expand into areas at one time thought to enjoy professional immunity,[48] while the Congress has done nothing to stop this extension.

The Fourth Circuit also found justification for the "learned profession" exemption on the basis of extensive state regulation of the legal profession.[49] State regulation, however, brings immunity only if the requirements of *Parker v. Brown*[50] are met. The "learned" or "unlearned" nature of the activity regulated by the state has never been a consideration in the analysis of a claim of *Parker* immunity. If the "learned professions" are to enjoy immunity from the federal antitrust laws because of "the special form of regulation already imposed upon those in the legal profession," that "special regulation" must meet the requirements for "state action" immunity set out by the Supreme Court.

STATE ACTION

In *Parker* the Supreme Court concluded that there is "nothing in the language of the Sherman Act or in its history which suggests that its purpose was to restrain a state or its officers or agents from activities directed by its legislature."[51] The Court held that the California Raisin Prorate Program, an anticompetitive agricultural marketing scheme, did not violate the Sherman Act. The program "derived its authority and efficacy from the legislative command of the state," and it was executed and enforced by state officials.

Since *Parker*, the Supreme Court has failed to refine its definition of the scope of the "state action" immunity. Although *Parker* dealt specifically with immunity for state officials acting under the mandate of legislative command, the case has been interpreted to confer antitrust immunity on private persons who engage in anticompetitive activities under a similar mandate.[52] When extending the *Parker* exemption to activities of private parties, the lower courts have agreed

48. *E.g.*, United States v. National Ass'n of Real Estate Bds., 339 U.S. 485 (1950); American Medical Ass'n v. United States, 317 U.S. 519 (1943). The Department of Justice has been very successful in recent years in getting consent decrees in cases it has brought against professional groups challenging their fee setting arrangements. *Cf.* United States v. American Institute of Architects, 1972 Trade Cas. 92,091 (D.D.C.); United States v. American Soc'y of Civil Eng'rs, 1972 Trade Cas. 91,972 (S.D.N.Y.).

49. 497 F.2d at 14-15.

50. 317 U.S. 341 (1943).

51. *Id.* at 350-51.

52. *See* Kintner & Kaufman, *The State Action Antitrust Immunity Defense*, 23 AM. U.L. REV. 527, 530 (1974).

that the proposition that there was government participation "only begins the analysis, for it is not every governmental act that points a path to an antitrust shelter."[53]

The anticompetitive activities must be specifically authorized by legislative command and aimed at achieving some legitimate state objective.[54] In addition, the activities of the private parties must be "actively supervised" by independent state officials.[55] General supervision over the private parties is not sufficient to invoke "state action" immunity in the majority of federal courts.[56]

In *Washington Gas Light Co. v. Virginia Electric & Power Co.*[57] the Fourth Circuit departed significantly from this standard. The court rejected an argument that the "active supervision" requirement of *Parker* was not satisfied because the Virginia State Corporation Commission had not affirmatively approved promotional practices of VEPCO alleged to violate the Sherman Act. The court stated: "The argument is not without merit but the conclusion is not inevitable unless one equates administrative silence with abandonment of administrative duty. It is just as sensible to infer that silence means consent, i.e., approval."[58] The conclusion of the Fourth Circuit that the potential for state regulation satisfies the "active supervision" requirement of *Parker* has been characterized by one court as an "unwarranted hyperextension of *Parker*."[59] The Fifth Circuit in *Gas Light Co. v. Georgia Power Co.*[60] expressly declined to adopt the *Washington Gas Light* reasoning. The court stated: "The *Parker* exclusion applies to the rates and practices of public utilities enjoying monopoly status under state policy when their rates and practices are subjected

53. Woods Exploration & Prod. Co. v. Aluminum Co. of America, 438 F.2d 1286, 1294 (5th Cir. 1971), *cert. denied*, 404 U.S. 1047 (1972).

54. *E.g.*, Hecht v. Pro-Football, Inc., 444 F.2d 931 (D.C. Cir. 1971), *cert. denied*, 404 U.S. 1047 (1972); George R. Whitten, Jr., Inc. v. Paddock Pool Builders, 424 F.2d 25 (1st Cir.), *cert. denied*, 400 U.S. 850 (1970).

55. *E.g.*, Norman's on the Waterfront, Inc. v. Wheatley, 444 F.2d 1011 (3d Cir. 1971).

56. *See, e.g.*, Gas Light Co. v. Georgia Power Co., 440 F.2d 1135 (5th Cir. 1971), *cert. denied*, 404 U.S. 1062 (1972); Kintner & Kaufman, *supra* note 52, at 533.

57. 438 F.2d 248 (4th Cir. 1971).

58. *Id.* at 252.

59. International Tel. & Tel. Corp. v. General Tel. & Elec. Corp., 351 F. Supp. 1153 (D. Hawaii 1972). *See also* Norman's on the Waterfront, Inc. v. Wheatley, 444 F.2d 1011, 1018 (3d Cir. 1971); Note, *State Action Exemption—Potential State Regulatory Control Exempts Private Party—Tying Arrangements—Reduction in Price of Buried Power Lines for Builders Installing Major Electrical Appliances Does Not Constitute a Tie-In*, 85 HARV. L. REV. 670 (1972).

60. 440 F.2d 1135 (5th Cir. 1971), *cert. denied*, 404 U.S. 1062 (1972).

to meaningful regulation and supervision by the state to the end that they are the result of the considered judgment of the state regulatory authority. . . ."[61]

Assuming arguendo that *Washington Gas Light* is a correct application of *Parker*,[62] *Goldfarb* remains an unwarranted extension of "state action" immunity. In *Washington Gas Light* the state regulatory agency was directed by statute to fix the rate structure of public utilities.[63] In addition, the anticompetitive practices complained of in *Washington Gas Light* were reviewed and disapproved by the regulatory agency after the antitrust action had been filed, but prior to the court's decision.[64] In *Goldfarb* the Virginia Supreme Court had no mandate to impose or approve fixed fee schedules for Virginia attorneys. Furthermore, there was no prior or subsequent approval or disapproval of the price-fixing arrangements.[65]

The statutes that granted power to the Virginia Supreme Court and the Virginia State Bar to regulate the practice of law in Virginia did not authorize or direct the state agencies to approve or disapprove

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61. *Id.* at 1140. *Georgia Power* is in line with the interpretation of the *Parker* "active supervision" requirement reached by the majority of lower courts. *See* Kintner & Kaufman, *supra* note 52, at 530.

62. The validity of this assumption has been questioned by other courts. *E.g.*, Gas Light Co. v. Georgia Power Co., 440 F.2d 1135, 1140 (5th Cir. 1971), *cert. denied*, 404 U.S. 1062 (1972); International Tel. & Tel. Corp. v. General Tel. & Elec. Corp., 351 F. Supp. 1153, 1202 (D. Hawaii 1972).

63. 438 F.2d at 251.

64. *Id.* at 252.

65. Judge Craven, who wrote the *Washington Gas Light* opinion, although concurring in the majority's result in *Goldfarb* as to the State Bar, did not agree that the State Bar was excluded from antitrust liability under *Parker v. Brown*. He concluded that the Virginia Supreme Court would be "surprised to learn that it is engaged in *active* supervision of the State Bar's implementation of minimum fee schedules in Virginia." 497 F.2d at 21. Judge Craven concluded that the State Bar should not be subject to Sherman Act liability because of the "exceedingly 'minor role' of the State Bar in this matter." In reaching this result Judge Craven looked to the Supreme Court's decision in *National Association of Real Estate Boards*, in which the Court affirmed the district court's decision that the National Association did not share the Sherman Act liability of the Washington Real Estate Board. The Supreme Court concluded that although "we might give the facts another construction . . . and find a more sinister cast to its actions . . ., we cannot say that the District Court was clearly erroneous in finding that the National Association . . . was not laced into the conspiracy to fix commissions." 339 U.S. at 495. In *Goldfarb* the district court did not find that the State Bar's "minor" involvement in the implementation of the minimum fee schedules by the Fairfax County Bar Association was insufficient to justify imposition of Sherman Act liability. Instead it concluded that in its minor role the Virginia State Bar was engaged in immune state action. The state action immunity is discounted by Judge Craven in his dissenting opinion. To characterize the threat of disciplinary action against those who failed to follow the local bar associations' minimum fee schedules as "minor," gives very little weight to the enforcement aspect of the alleged price-fixing agreement.

minimum fee schedules.[66] Although the parties stipulated that "the Virginia statutes have given the Virginia court authority to make questions involving suggested minimum fee schedules . . . questions of ethics under the laws of Virginia,"[67] Judge Craven in his dissent correctly pointed out that the trial court expressly rejected this stipulation as "a conclusion of law rather than a fact."[68] Absent an express legislative declaration commanding anticompetitive behavior as a part of the regulatory scheme, courts have been very reluctant to imply a grant of immunity from antitrust liability.[69]

CONCLUSION

The *Goldfarb* decision places unwarranted restraints on the scope of the federal antitrust laws. The decision breathes new life and respectability into the "learned professions" claim of antitrust exemption, a claim that is supported only by antiquated dicta of the United States Supreme Court. Neither the modern decisions of the Supreme Court nor the common-law history of the phrase "restraint of trade" supports such an exemption. Judicial recognition of an antitrust exemption for the "learned professions" can only lead courts into the quagmire of determining in future cases which professions are "learned" and which are "unlearned." Because the policy of prohibiting price-fixing agreements is vital to the nation, the federal antitrust laws implementing that policy should apply to the profession largely entrusted with enforcement of those laws.

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66. VA. CODE ANN. § 54-48 (1972), *as amended* (Supp. 1974) provides:
The Supreme Court of Appeals may, from time to time, prescribe, adopt, promulgate and amend rules and regulations:
(a) Defining the practice of law.
(b) Prescribing a code of ethics governing the professional conduct of attorneys at law and a code of judicial ethics.
(c) Prescribing procedure for disciplining, suspending, and disbarring attorneys at law.

67. 497 F.2d at 9.

68. *Id.* at 20.

69. *See generally* Semke v. Enid Automotive Dealers Ass'n, 456 F.2d 1361 (10th Cir. 1972); Ladue Local Lines, Inc. v. Bi-State Dev. Agency, 433 F.2d 131 (8th Cir. 1970); George R. Whitten, Jr. Inc. v. Paddock Pool Builders, 424 F.2d 25 (1st Cir. 1970). This interpretation of the scope of the *Parker* "state action" immunity is supported by a long line of Supreme Court decisions dealing with the antitrust liability of federally regulated industries. In those cases the Court concluded that absent an express Congressional exemption from the federal antitrust laws, implied exemptions are "strongly disfavored" and will only be found in cases of "plain repugnancy between the antitrust and regulatory provisions." United States v. Philadelphia Nat'l Bank, 374 U.S. 321, 350-51 (1963). *See also* Otter Tail Power Co. v. United States, 410 U.S. 366 (1973); Teply, *Antitrust Immunity of State and Local Governmental Action*, 48 TUL. L. REV. 272 (1974).

If the learned professions are to enjoy immunity from liability when engaging in anticompetitive activities that would otherwise violate the federal antitrust laws, that immunity must be found in the *Parker* "state action" doctrine. *Parker*, however, requires much more than a stipulation that the legislature granted a state regulatory agency power to sanction generally price-fixing arrangements and an inference that failure to act amounts to "active supervision." If allowed to stand, the Fourth Circuit's decision in *Goldfarb* will mark a significant erosion of the scope of the Sherman Act.[70]

GEORGE T. ROGISTER, JR.

Civil Procedure—Class Actions—Amending Rule 23 in Response to Eisen v. Carlisle & Jacquelin

The federal class action[1] has been praised as a device that provides for the small claimant a means of obtaining redress for injuries to his legally protected rights.[2] Without this device many wrongs that are too small in relation to the cost of obtaining relief would go unremedied.[3] Recently, in *Eisen v. Carlisle & Jacquelin*[4] the United

70. The North Carolina State Bar and the North Carolina Bar Association have acted to foreclose antitrust suits similar to those in the instant case. In 1972, prior to the district court decision in *Goldfarb*, the State Bar repealed paragraph three of the Canon of Ethics Number 12 relating to the use by attorneys of minimum fee schedules. In addition, the State Bar rescinded all ethics opinions that discussed or related to minimum fee schedules. At the same time, the North Carolina Bar Association eliminated from its *Advisory Handbook on Office Management and Fees* the schedule of fees for specific services. Many local bar associations in North Carolina have followed suit and have also wisely eliminated minimum fee schedules. Sitton, *Professional Liability*, 25 BAR NOTES 84, 96-97 (1974).

1. FED. R. CIV. P. 23.

2. *See, e.g.*, Green v. Wolf Corp., 406 F.2d 291 (2d Cir. 1968), *cert. denied*, 395 U.S. 977 (1969); Booth v. General Dynamics Corp., 264 F. Supp. 465 (N.D. Ill. 1967); Ford, *Federal Rule 23: A Device for Aiding the Small Claimant*, 10 B.C. IND. & COM. L. REV. 501 (1969); Frankel, *Amended Rule 23 From a Judge's Point of View*, 32 ANTITRUST L.J. 295 (1966); Kaplan, *Class Action Symposium, A Prefatory Note*, 10 B.C. IND. & COM. L. REV. 497 (1969); Pomerantz, *New Developments in Class Actions—Has Their Death Knell Been Sounded?*, 25 BUS. LAW. 1259 (1970).

3. *See, e.g.*, Hackett v. General Host Corp., 455 F.2d 618 (3d Cir.) (Rosenn, J., dissenting), *cert. denied*, 407 U.S. 925 (1972); Green v. Wolf Corp., 406 F.2d 291 (2d Cir. 1968), *cert. denied*, 395 U.S. 977 (1969); Berland v. Mack, 48 F.R.D. 121 (S.D.N.Y. 1969); Kalven & Rosenfield, *The Contemporary Function of the Class Suit*, 8 U. CHI. L. REV. 684 (1941).

4. 94 S. Ct. 2140 (1974).

States Supreme Court sharply limited the extent to which the class action may be used. The *Eisen* case was a private antitrust suit initiated in 1966.[5] Because his claim was too small to make an individual suit profitable and because there were many other potential plaintiffs,[6] Morton Eisen sought to maintain the suit as a class action under Federal Rule of Civil Procedure 23(b)(3).[7] This created considerable litigation in the federal district and appellate courts.[8] In 1974

5. Eisen alleged that the defendant brokerage firms had conspired to fix the odd-lot differential at an excessive level in violation of the Sherman Act. (The odd-lot differential is the charge levied on the odd-lot trader in addition to the standard brokerage commission. An odd-lot trader is one who buys or sells securities in lots of less than a hundred.) Eisen claimed to represent all odd-lot traders on the New York Stock Exchange during a four-year period. The Exchange was also made a defendant. *Id.* at 2144.

6. *See* note 18 *infra.*

7. Rule 23(b) provides as follows:

> (b) **Class Actions Maintainable.** An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:
>
> (1) the prosecution of separate actions by or against individual members of the class would create a risk of
>
> (A) inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class, or
>
> (B) adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests; or
>
> (2) the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole; or
>
> (3) the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. . . .

Eisen also tried to qualify under subdivisions (1) and (2), but the court of appeals held that they were inapplicable. *See* Eisen v. Carlisle & Jacquelin, 391 F.2d 555, 564 (2d Cir. 1968). *See also* text accompanying notes 21-25 *infra.*

8. The district court originally denied class action status for three reasons: (1) The plaintiff could not adequately protect the interests of the class. (2) Common questions did not predominate over questions of interest to only certain members of the class. (3) The requirement of individual notice to all known class members could not be fulfilled. Eisen v. Carlisle & Jacquelin, 41 F.R.D. 147, 150-52 (S.D.N.Y. 1966), *rev'd*, 391 F.2d 555 (2d Cir. 1968). On remand from the Court of Appeals for the Second Circuit, however, the district court allowed the suit to proceed as a class action. Despite the specific notice requirement of subdivision (c)(2) of rule 23, the court proposed a scheme of notification that fell short of complete individual notice. The elements of the notice were as follows: (1) individual notice to all member firms of the New York Stock Exchange and to commercial banks with large trust departments; (2) individual notice to identifiable class members with at least ten odd-lot transactions during the period; (3) individual notice to five thousand additional class members selected at random; and (4) publication notice in the *Wall Street Journal* and other newspapers in New York and California. Eisen v. Carlisle & Jacquelin, 52 F.R.D. 253, 267-68 (S.D.N.Y. 1971). Defendants appealed, and the court of appeals reversed, holding that rule 23 required individual notice to all members who could be identified with reasonable effort. Eisen v.

the controversy reached the Supreme Court.[9] The Court held that subdivision (c)(2)[10] of rule 23 requires that individual, mailed notice of a class action brought pursuant to subdivision (b)(3) of the rule must be provided to every member of the class who can be identified with reasonable effort.[11]

The Court supported its literal reading of the rule by observing that the notice requirement for (b)(3) class actions had been added by the Rules' Advisory Committee in 1966 in order to satisfy what the Committee perceived as the requirements of due process[12] established in *Mullane v. Central Hanover Bank & Trust Co.*[13] The Court, however, expressed no opinion on whether due process requires individual notice to all known class members.[14]

In light of the history[15] and the express language of rule 23,[16]

Carlisle & Jacquelin, 479 F.2d 1005, 1015 (2d Cir. 1973), *vacated*, 94 S. Ct. 2140 (1974). In addition, the court of appeals held that Eisen was required to bear the initial cost of such notice as part of the usual burden of financing his own suit. *Id.*

9. In challenging the notice requirement, Eisen contended that the cost of individual notice was so prohibitive that it would preclude him from proceeding with the class action. 94 S. Ct. at 2151. In addition, he argued that individual notice was unnecessary because no class member would desire to proceed individually and because, in any event, he would adequately represent their interests. *Id.*

10. Subdivision (c)(2) provides as follows:

> (2) In any class action maintained under subdivision (b)(3), the court shall direct to the members of the class the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort. The notice shall advise each member that (A) the court will exclude him from the class if he so requests by a specified date; (B) the judgment, whether favorable or not, will include all members who do not request exclusion; and (C) any member who does not request exclusion may, if he desires, enter an appearance through his counsel.

The mandatory notice requirement does not apply to subdivisions (b)(1) and (b)(2).

11. 94 S. Ct. at 2152. The Court also agreed with the court of appeals that the representative was required to pay for the notice. It distinguished lower court cases holding otherwise on the ground that they presented situations in which the defendant owed a fiduciary duty to the class members. *Id.* at 2153. A case discussing exceptional circumstances under which the defendant may be required to pay some or all of the cost of notice is Dolgow v. Anderson, 43 F.R.D. 472, 498-500 (E.D.N.Y. 1968), *rev'd*, 438 F.2d 825 (2d Cir. 1971).

12. 94 S. Ct. at 2150-51.

13. 339 U.S. 306 (1950). "Where the names and post-office addresses of those affected by a proceeding are at hand, the reasons disappear for resort to means less likely than the mails to apprise them of its pendency." *Id.* at 318; *see* Schroeder v. City of New York, 371 U.S. 208, 212-13 (1962). See note 29 *infra* for the facts of the *Mullane* case.

14. 94 S. Ct. at 2152. The Court's opinion gives the impression that at this point it tends toward agreeing with the Committee's analysis of *Mullane*. *See id.* at 2150-52. This analysis, however, is not necessarily correct. *See* C. WRIGHT, HANDBOOK OF THE LAW OF FEDERAL COURTS 313 (2d ed. 1970). This Note will attempt to demonstrate that *Mullane* does not control.

15. Originally the rule was designed to provide a method for consolidating a large number of existing or imminent claims into one action. Because the 1938 version of

the *Eisen* decision as it pertains to the notice requirement is undoubtedly correct. Nevertheless, the decision will certainly have a significant impact upon the use of the federal class action.[17] Requiring individual notice to all known class members will dramatically increase the cost of the procedure,[18] thus reducing the number of people who can afford to bring a class action. Because the procedure is most needed when the expense of litigation is greater than the size of any potential individual recovery,[19] the effect will be to deny a remedy to small claimants who cannot afford to sue individually.[20] Pressure will undoubtedly develop to avoid the consequences of the decision.

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the rule did not accomplish this objective consistently (primarily because of problems in determining who was bound by a decision), *see* Carroll v. American Fed'n of Musicians, 372 F.2d 155, 162 (2d Cir. 1967), *vacated*, 391 U.S. 99 (1968), the Committee drafted the present version to give the court power to determine the scope of a judgment. They provided that all members of a class would be included in any judgment, favorable or unfavorable. FED. R. CIV. P. 23(c)(3). The Committee felt, however, that in a (b)(3) class action the individual class members' interests in conducting their own suits were likely to be so great that due process would not allow them to be bound unless they were first given a chance to exclude themselves from the class or to participate in the proceeding. Relying on *Mullane*, the Committee decided that the minimum acceptable notice to known (b)(3) class members was individual, mailed notice. *Proposed Amendments to Rules of Civil Procedure for the United States District Courts, Advisory Committee's Note*, 39 F.R.D. 69, 104-05 (1966) [hereinafter referred to as *Committee's Note*]. They did not feel, however, that the other categories of the rule were subject to the same requirement, although it is difficult to find a distinction of any substance in regard to the rights being affected. It is true that (b)(1) and (b)(2) are aimed at situations in which the class members' interests are more likely to be intertwined. That factor, however, should determine whether the suit is eligible for class action treatment, not what form of notice is required once such treatment is found proper.

It is also true that (b)(1) and especially (b)(2) are designed for situations in which some type of injunctive or declaratory relief is appropriate. *See id.* at 100. The right to such relief, however, is just as real as the right to compensatory relief. There is no reason to require stricter notice as a prerequisite to foreclosing one right than the other. The rule gives the court discretion to order whatever notice it deems necessary to protect the (b)(1) and (b)(2) class members. No more is necessary to protect the (b)(3) class members.

16. *See* FED. R. CIV. P. 23(c)(2), *quoted in* note 10 *supra*.

17. *See* Eisen v. Carlisle & Jacquelin, 479 F.2d 1005, 1022 (Oakes, J., dissenting from denial of rehearing *en banc*); Pomerantz, *supra* note 2, at 1263.

18. There were over six million members in *Eisen*, of whom 2,250,000 could be identified with reasonable effort. 94 S. Ct. at 2147. The cost of providing notice would have been $315,000. *Id.* at 2147 n.7. Eisen's individual claim was only seventy dollars. *Id.* at 2144.

19. Green v. Wolf Corp., 406 F.2d 291 (2d Cir. 1968), *cert. denied*, 395 U.S. 977 (1969); Dolgow v. Anderson, 43 F.R.D. 472 (E.D.N.Y. 1968), *rev'd*, 438 F.2d 825 (2d Cir. 1971); Ford, *supra* note 2, at 501; Frankel, *supra* note 2, at 295; Kaplan, *supra* note 2, at 497; Pomerantz, *supra* note 2, at 1259.

20. This effect will be greatest in areas of the law where litigation is likely to be lengthy and complex—for example, in the antitrust and securities areas. Because of the great amount of federal law in these areas, they are likely candidates for class actions brought under rule 23.

The fact that attorneys' fees are often allowed in this area may not help the indi-

One possible course available to future class action plaintiffs[21] would be to attempt to qualify their suits under one of the other categories of rule 23(b),[22] for which the rule does not require individual notice. These categories, however, will not prove helpful in the majority of cases in which numerous small claimants are seeking compensatory relief. For example, subdivision (b)(1)(A) was designed to cover the situation in which separate suits might establish incompatible standards of conduct for the defendant.[23] Similarly, subdivision (b)(1)(B) was intended to cover situations in which separate actions would, in effect, either dispose of the interests of class members not parties to the actions or substantially impair their ability to protect their own interest.[24] Neither subdivision will apply in the typical suit for damages. Furthermore, although it would be possible in many instances to qualify under subdivision (b)(2), the only remedy available under that subdivision is injunctive or declaratory relief.[25] The possibility of qualifying the suit under one of the other categories of subsection (b), therefore, offers little promise to those who seek an alternative to the (b)(3) class action.

In light of the problems presented by this and other possible alternatives,[26] the best way to avoid the consequences of *Eisen* is to

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vidual, because the court will probably not award a very large fee in a case where the recovery is very small. Note, *Managing the Large Class Action: Eisen v. Carlisle & Jacquelin*, 87 HARV. L. REV. 426, 436 (1973).

21. Although rule 23 allows a class to be either a plaintiff or a defendant, this Note is primarily concerned with the former situation, which has generally been more common.

22. *See* note 7 *supra*.

23. *See Committee's Note* at 100. The defendant usually must owe a duty to the class members, not merely be guilty of having injured them in the past.

24. An example of such a situation is where defendant is unable to satisfy all of plaintiffs' claims. *See id.* at 100-01.

25. *Id.* at 102. The court of appeals in *Eisen* suggested that this may be preferable to suing for damages. 479 F.2d at 1019-20. This view is questionable if the desire is to use the class action to provide redress for injuries. (The fact that the rule was not created for such purpose should not prevent it from being used in that manner when it is the best method.)

26. Another possible course is to petition the court for an order directing the defendant to pay for some or all of the notice. As a result of *Eisen*, however, this would require proving the existence of a fiduciary relation between the defendant and the class. *See* note 11 *supra*. Even if the relation can be established, the Supreme Court has not indicated whether it will allow the cost of notice to be allocated. *See* 94 S. Ct. at 2153 n.15.

A more interesting alternative was suggested by Justice Douglas in his partial dissent in *Eisen*. He suggested dividing the class into smaller subclasses pursuant to subdivison (c)(4) of rule 23. Although Justice Douglas was optimistic about the possibility of success with this option, he raised several unanswered questions with regard to its use. For example, he noted the existence of questions concerning the collateral estoppel effects of a judgment in the first action on subsequent suits by other class members or

amend rule 23 to eliminate the mandatory notice requirement for actions brought under subdivision (b)(3). This alternative is not without problems, however. Many seem to share the Advisory Committee's apparent belief that the rule's notice requirement is constitutionally compelled, agreeing with the Committee's interpretation of *Mullane*.[27] This interpretation, however, is not necessarily correct for two reasons. First, the Supreme Court in *Hansberry v. Lee*[28] recognized that, if absent class members were adequately represented by the plaintiff in a class action, they could be bound by the judgment rendered. Secondly, the *Mullane* situation can be distinguished in two critical respects from the typical class action situation, and, therefore, *Mullane* may not control the type of notice that rule 23 must require.

The first distinction is that, although *Mullane* did, in a nontechnical sense, involve a party representing a class,[29] the representative had no interest in common with the class members. As a result, there was less assurance that he would adequately represent their interests.[30] The philosophy of rule 23, on the other hand, is that the

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subclasses. He also pointed out that it is not clear whether an action initiated by a subclass will toll the statute of limitations for the entire class. *Id.* at 2153-57 (Douglas, J., dissenting in part).

There are also potential problems that Justice Douglas did not mention. For example, the only situation mentioned by the Advisory Committee in its comments to subdivision (c)(4) was one in which different segments of the class had divergent interests, so that both segments could not be adequately represented by the same individual. Although the rule does not expressly limit the use of subclasses to such situations, the danger exists that the courts may formulate a judicial limitation.

Some additional questions concern whether the representative of the first subclass could also represent the second after a judgment is reached in the first suit; whether the recovery from a favorable judgment in the first suit could be used to finance the required notice to the remaining class members; and whether the defendant, having been found liable once, could be required to pay for notice to the remaining class members. None of these questions have been answered. Therefore, this alternative is of questionable value at this time.

27. *See, e.g.*, Ward & Elliott, *The Contents and Mechanics of Rule 23 Notice*, 10 B.C. IND. & COM. L. REV. 557, 560 (1969).

28. 311 U.S. 32, 42-43 (1940). Because *Mullane* can be distinguished from *Hansberry*, the former cannot be said to have overruled the latter. *See* text accompanying notes 29-31 *infra*.

29. In *Mullane* the trustee of a large trust fund brought an action pursuant to a New York statute to have the trust accounts covering a prior period approved. The court appointed a special guardian as directed by the statute to represent the interests of absent beneficiaries of the fund. The representative contested the action, contending that the form of publication notice of the proceeding prescribed by the statute did not comply with the requirements of due process because it was not reasonably calculated to provide them with actual notice of the proceeding. The Supreme Court held that, as to known and locatable beneficiaries, individual, mailed notice was required by due process. 339 U.S. at 318.

30. *See* Comment, *Class Actions Under Federal Rule 23(b)(3)—The Notice Requirement*, 29 MD. L. REV. 139, 145 (1969).

representative can be counted upon to protect adequately the interests of the class members because he shares common interests with them.[31]

Secondly, the suit in *Mullane* was brought by a potential *adversary* of the class in order to extinguish the class members' rights to sue him. The class action, however, is brought by a *proponent* of the class in order to satisfy the class members' rights to a day in court.

Cases applying *Mullane* and adhering to a strict notice requirement[32] can even more easily be distinguished from the typical class action. Like *Mullane*, they involved adversary situations in which notice was necessary to ensure that the individual's case would be pressed before the court.[33] Those cases are further distinguishable from the class action, because there was no one to represent the individual not receiving notice in the event that he did not appear himself. In the class action, however, the individual's case is argued before the court by the representative of the class. If the representation is inadequate to protect the individual's interest, redress can be afforded collaterally without requiring individual notice in every situation.[34]

Because *Mullane* and its line of cases developed the notice requirement without reference to the class action, that requirement should not be blindly applied to the procedure. Such an application is inconsistent with the general flexibility of due process.[35] Rather, a due process notice requirement should be formulated that is consistent with the goals of the class action and the interests of the parties involved. To do this, the interests of the public, the absent class mem-

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31. *Committee's Note* at 100.

32. *See, e.g.*, Robinson v. Hanrahan, 409 U.S. 38 (1972); Fuentes v. Shevin, 407 U.S. 67 (1972); Groppi v. Leslie, 404 U.S. 496 (1972); Bell v. Burson, 402 U.S. 535 (1971); Boddie v. Connecticut, 401 U.S. 371 (1971); Sniadach v. Family Fin. Corp., 395 U.S. 337 (1969); *In re* Gault, 387 U.S. 1 (1967); Armstrong v. Manzo, 380 U.S. 545 (1965); Schroeder v. City of New York, 371 U.S. 208 (1962); Lambert v. California, 355 U.S. 225 (1957); Walker v. City of Hutchinson, 352 U.S. 112 (1956); City of New York v. New York, N.H. & H.R.R., 344 U.S. 293 (1953); Standard Oil Co. v. New Jersey, 341 U.S. 428 (1951).

33. *See, e.g.*, Bell v. Burson, 402 U.S. 535 (1971) (suspension of uninsured motorist's driver's license); Armstrong v. Manzo, 380 U.S. 545 (1965) (adoption proceeding against the interest of the natural father); Walker v. City of Hutchinson, 352 U.S. 112 (1956) (condemnation proceeding); City of New York v. New York, N.H. & H.R.R., 344 U.S. 293 (1953) (bankruptcy reorganization affecting creditors).

34. *See* Hansberry v. Lee, 311 U.S. 32 (1940); Frankel, *Some Preliminary Observations Concerning Civil Rule 23*, 43 F.R.D. 39, 46 (1967); Note, *Class Action Treatment of Securities Fraud Suits Under the Revised Rule 23*, 36 GEO. WASH. L. REV. 1150, 1166-67 (1968).

35. The Supreme Court itself recognized this flexibility in *Mullane* by allowing mailed notice instead of the more expensive personal service. Note, 87 HARV. L. REV., *supra* note 20, at 438.

ber, and the defendant should be considered. The public's interest is to encourage the use of class actions as a procedure through which the small claimant can obtain redress for his injuries.[36] The absent class member's interests are to sue separately, to participate in the conduct of the class action, or, if he does neither, to be adequately represented by those actively involved in the suit. Finally, the interest of the defendant is to know—at the time the suit begins—the probable extent of the judgment.[37]

In balancing these interests, the rule should provide for the public interest to the greatest extent possible without sacrificing the necessary protection of the individuals involved. The most effective way in which the rule can further the public interest is to decrease as much as possible the costs involved in bringing a class action. This can be done by requiring, in appropriate cases, a less expensive form of notice or even no notice at all.

In considering what notice is necessary to protect the absent class member's interest in suing separately, the size of his claim and the expense of litigation are the most important factors. If the expense is greater than the potential recovery,[38] the class member's interest, if he has one, in suing separately is minimal. Because he cannot expect to profit by suing individually, the existence of a class action is, in a sense, a windfall to him.[39] Therefore, his need to participate directly or to question the adequacy of representation in the class action is likewise minimal. Under such circumstances, notice, as an absolute condition to maintenance of the class action, should not be required for him. In the unlikely event that he does desire to sue separately, it is more consistent with the balancing concept of due process to allow him to raise the issue of lack of notice or of inadequate representation in a later proceeding than to abort the class action because the repre-

36. *But see* note 52 *infra*.

37. The defendant also has an interest in not being subjected to frivolous suits by plaintiffs hoping to force settlements. *Cf.* Eisen v. Carlisle & Jacquelin, 479 F.2d 1005, 1018-19 (2d Cir. 1973). This consideration, however, does not go to the question of what notice should be required once the suit is begun. Other safeguards may need to be developed to protect defendants from this very real danger.

38. This determination could be made at a preliminary hearing. If the court is unable to satisfy itself that a potential class member has no practical interest in suing separately, it should proceed as if he did have such interest.

39. It is a windfall to him only in the sense that, as the law is now, without the class action he cannot effect a net recovery. To the extent that he has a legitimate claim, the class action merely affords him the opportunity to assert his existing right to recover. However, given the fact that the class member cannot recover without the class action, inadequate representation will leave him in no worse position, from a practical standpoint, than he would have been had the class action never been brought.

sentative cannot afford the cost of providing notice. On the other hand, if the potential recovery exceeds the cost of litigation, the class member's interest in suing separately, in participating, or in being adequately represented is substantial. For him some type of notice should be required. Although publication notice has its shortcomings,[40] the rule should, nevertheless, give the court discretion to decide whether, in a given situation, such notification satisfies due process.[41] Furthermore, when the class is very large, the need for complete individual notice may be less significant because of the greater possibility that something less will reach people representative of all views within the class.[42] There may also be situations in which the class is so homogeneous that a particular form of notice—such as individual notice to organizations or individuals who can reasonably be expected to communicate directly with all or a great majority of the class members—will be adequate.[43]

By providing notice to those class members with substantial potential interests in suing separately and by ensuring that the representative adequately protects their interests, the court will protect the interest of the defendant as well. He will know that those members who might be expected to sue separately or to object to the representation have been given an opportunity to do so, and, therefore, are bound by the judgment unless they excluded themselves from the class. In addition, he will know that the only class members not given individual notice are those who would find it unprofitable to sue individually. Although those class members would not be bound by the judgment, there is little danger that they would attempt to sue separately after an

40. *See, e.g.*, Walker v. City of Hutchinson, 352 U.S. 112, 117 (1956); Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 315 (1950); Eisen v. Carlisle & Jacquelin, 479 F.2d 1005, 1017 (2d Cir. 1973), *vacated*, 94 S. Ct. 2140 (1974).

41. The court is presently given that discretion with respect to class actions brought under subdivision (b)(1) or (b)(2), so the Advisory Committee has demonstrated that it does not consider such discretion beyond the province of the court. *See* FED. R. CIV. P. 23(d).

42. Kaplan, *Continuing Work of the Civil Committee: 1966 Amendments of the Federal Rules of Civil Procedure (I)*, 81 HARV. L. REV. 356, 396 (1967). There is also language in the opinion in *Mullane* that recognizes that less than perfect notice may be acceptable. *See* 339 U.S. at 319.

43. Dolgow v. Anderson, 43 F.R.D. 472, 501 (E.D.N.Y. 1968), *rev'd on other grounds*, 438 F.2d 825 (2d Cir. 1971); Comment, 29 MD. L. REV., *supra* note 30, at 148. This is the theory upon which the district court based its notification scheme in *Eisen*. *See* note 8 *supra*. The court reasoned that, because all class members had invested in securities, individual notice to brokerage firms and banks with large trust departments, plus publication notice in financial newspapers, would be adequate to notify those class members with substantial interests in suing separately.

unfavorable judgment.[44]

The possibility of foreclosing without notice a person's right to conduct his own suit, however insubstantial this right may be, is, without doubt, unacceptable to some. The answer to such objections is that the present rule causes a much greater inequity. It forecloses the substantial rights of an entire class to protect the relatively insubstantial rights of a segment of that class.[45] Furthermore, there are other areas of the law in which individual rights are foreclosed without notice or with less than perfect notice. For example, statutes of limitations operate without notice to cut off rights of action. Yet they have been upheld against due process challenges.[46] In addition, people are charged with knowledge of criminal and civil statutes, although they may have received no actual notice of their existence.[47] Furthermore, the rule of *stare decisis* affects the rights of absent individuals without notice.[48] Also the Uniform Commercial Code allows creditors to repossess goods from the allegedly defaulting buyer-debtor without notice or a prior hearing.[49] Even in *Mullane* the possibility of less than one hundred percent individual notice was accepted by the Supreme Court.[50] Thus, there is adequate precedent for limiting individual rights without perfect individual notice.

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44. There is evidence that a very small percentage of those class members who have received notice under rule 23(c)(2) have asked to be excluded from the class. Furthermore, not one of the individuals who requested exclusion brought his own suit. This is a strong indication that no rights would actually be affected by not providing notice in limited circumstances. Pomerantz, *supra* note 2, at 1266; *cf.* Berland v. Mack, 48 F.R.D. 121, 129 (S.D.N.Y. 1969).

45. In fact, under the guise of protecting the members' rights to sue, the rule takes away from them the only realistic method presently available for recovering at all. The right to sue individually is worthless if it cannot be afforded. The rule also "vitiate[s] the class action device in situations where application thereof as a matter of public policy can be important, such as private antitrust, consumer, and environmental litigation." Eisen v. Carlisle & Jacquelin, 52 F.R.D. 253, 266 (S.D.N.Y. 1971).

46. *See, e.g.*, Chase Securities Corp. v. Donaldson, 325 U.S. 304 (1945); Order of R.R. Telegraphers v. REA, 321 U.S. 342 (1944); Atchafalaya Land Co. v. F.B. Williams Cypress Co., 258 U.S. 190 (1922); Blinn v. Nelson, 222 U.S. 1 (1911); Hazard, *A General Theory of State-Court Jurisdiction*, 1965 SUP. CT. REV. 241, 288. The class action shortens the limitation period somewhat, but does not take away the right to recover.

47. Lambert v. California, 355 U.S. 225 (1957) (Frankfurter, J., dissenting); North Laramie Land Co. v. Hoffman, 268 U.S. 276 (1925); Ballard v. Hunter, 204 U.S. 241 (1907).

48. Frankel, *supra* note 34, at 46.

49. UNIFORM COMMERCIAL CODE § 9-503. Recent decisions have put the constitutionality of this provision in doubt . The reason, however, is not the lack of notice so much as the fact that it allows the debtor to be deprived of property without the benefit of any representation in a judicial proceeding. *See* Fuentes v. Shevin, 407 U.S. 67 (1972). The situation in the class action is different. There is a full judicial proceeding, and the members of the class must be adequately represented.

50. *See* note 42 *supra*.

Although the Supreme Court will have to retreat somewhat from the absolute wording of *Mullane* to uphold the constitutionality of a rule that does not require individual notice in all cases to known persons, rule 23 should, nevertheless, be amended,[51] and the Court should uphold it.[52] Cases such as *Eisen*, although decided correctly under the present rule, demonstrate the need for a device that will help to create "a system of law that dispenses justice to the lowly as well as to those liberally endowed with power and wealth."[53]

RICHARD G. CHANEY

Constitutional Law—Executive Privilege: Tilting the Scales in Favor of Secrecy

Executive privilege is a concept invoked by members of the executive branch of the government to justify withholding evidence and other communicative materials from the legislative and judicial branches.[1] Since 1792[2] debate surrounding the doctrine has been pre-

51. The amended rule should make no distinction between subdivision (b)(3) and subdivisions (b)(1) and (b)(2) with regard to the notice requirement. It would still be appropriate, however, to require the court to find that the class action is the best available means for handling the controversy. *See* note 52 *infra*. The court will also have discretion under subsection (d) to direct that notice be provided to the class members when the court feels it is necessary.

52. Not everyone agrees that the class action is the best method for dealing with antitrust and securities actions involving a very large number of potential claimants. *See, e.g.*, Eisen v. Carlisle & Jacquelin, 479 F.2d 1005, 1019-20 (2d Cir. 1973), *vacated*, 94 S. Ct. 2140 (1974); Kaplan, *supra* note 42, at 394; H. FRIENDLY, FEDERAL JURISDICTION: A GENERAL VIEW 118-20 (1973). Although arguments against such use of the class action may have merit, they should not be determinative of the notice required by due process once the court has determined that no better method exists for handling the controversy, as it must under subdivision (b)(3). One factor in the determination may be the possible necessity for future notice to the class members for the purpose of filing proofs of loss after the defendant is found liable. *See* Eisen v. Carlisle & Jacquelin, 391 F.2d 555, 567 (2d Cir. 1968). This possibility alone, however, should not preclude use of the class action. Siegel v. Chicken Delight, Inc., 271 F. Supp. 722, 726 (1967). In fact, in such a situation it may be possible to require the defendant to finance the notice. Comment, 29 MD. L. REV., *supra* note 30, at 157.

53. Eisen v. Carlisle & Jacquelin, 94 S. Ct. 2140, 2157 (1974) (Douglas, J., dissenting).

1. *Cf.* Carl Zeiss Stiftung v. V.E.B. Carl Zeiss, Jena, 40 F.R.D. 318 (D.D.C. 1966), *aff'd per curiam sub nom.* V.E.B. Carl Zeiss, Jena v. Clark, 384 F.2d 979 (D.C. Cir.), *cert. denied*, 389 U.S. 952 (1967).

2. In refusing to turn over documents requested by Congress in its inquiry into a disastrous military expedition against a tribe of Indians, President Washington con-

dominated by three questions. First, is executive privilege constitutionally based? Secondly, who is the final judge of the validity of any assertion of the privilege? Thirdly, assuming that the judiciary has the power to review such assertions, what is the scope of the privilege, and what guidelines will be used to determine whether, in a given case, the assertion of the privilege is warranted?[3] In *United States v. Nixon*[4] a unanimous[5] Supreme Court gave its first definitive answers to these questions. The Court held that, while the privilege is rooted in the Constitution, the courts, and not the Executive, must be the final arbiters of the scope and the validity of any claim of executive privilege.

The case arose out of an unusual chain of events. On March 1, 1974, a federal grand jury investigating the case of *United States v. Mitchell*[6] indicted seven individuals[7] for conspiracy to obstruct justice and to defraud the United States. Thereafter, the Special Prosecutor[8] was granted a third-party subpoena duces tecum, pursuant to Federal Rules of Criminal Procedure 17(c), requiring the pre-trial production of certain tape recordings and documents that were in the President's possession. In response, counsel for the President filed a motion to quash the subpoena, accompanied by a formal claim of privilege. The District Court for the District of Columbia denied the motion to quash

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tended that "the executive ought to communicate such papers as the public good would permit, and ought to refuse those, the disclosure of which would injure the public." STAFF OF SUBCOMM. ON CONSTITUTIONAL RIGHTS OF THE SENATE COMM. ON THE JUDICIARY, 85TH CONG., 2D SESS., MEMOS OF THE ATTORNEY GENERAL ON THE POWER OF THE PRESIDENT TO WITHHOLD INFORMATION FROM THE CONGRESS 5 (1958). The presidential use of executive privilege has become more and more widespread in the twentieth century. President Eisenhower's letter to Secretary of Defense Charles Wilson, directing both the Secretary and his subordinates to refrain from testifying about executive discussions on the Army-McCarthy dispute, provided substantial precedential authority for the withholding of information in quasi-judicial proceedings. This trend toward secrecy was accelerated by the Nixon administration. *See* R. BERGER, EXECUTIVE PRIVILEGE: A CONSTITUTIONAL MYTH 252-64 (1974); F. ROURKE, SECRECY AND PUBLICITY 65-74 (1961); W. TAFT, THE PRESIDENT AND HIS POWERS 129 (1916).

3. A fourth question, whether decisions adverse to the President can be enforced, and how, has also been posed during the debate. The question will not be definitively answered until circumstances precipitate a constitutional crisis of greater magnitude than any yet seen.

4. 94 S. Ct. 3090 (1974).

5. Mr. Justice Rehnquist took no part in the consideration or decision of the case.

6. Criminal No. 74-110 (D.D.C., filed Mar. 1, 1974).

7. The defendants were John N. Mitchell, H.R. Haldeman, John D. Ehrlichman, Charles W. Colson, Robert C. Mardian, Kenneth W. Parkinson, and Gordon Strachan. All of the defendants were either members of the White House staff or occupied a position of responsibility in the 1972 Committee for the Re-Election of the President. 94 S. Ct. at 3097 n.3.

8. The Attorney General delegated the authority to represent the United States in matters arising out of the investigation of the "Watergate affair" to a Special Prosecutor. 38 Fed. Reg. 30739, *as amended*, 38 Fed. Reg. 32805 (1973).

and ordered the prompt production of the subpoenaed items. The President gave notice of appeal, and subsequently, the Special Prosecutor filed in the Supreme Court a petition for writ of certiorari before judgment.[9] Because of the unique setting in which the dispute arose, the Court granted the petition,[10] bringing before it the important questions presented by the President's assertion of executive privilege.

After dispensing with several important preliminary questions,[11] Chief Justice Burger examined the two arguments made by the President's counsel in support of a constitutionally based executive privilege. First, the President contended that the constitutional doctrine of the separation of powers guaranteed the absolute independence of the Executive in the fulfillment of his Article II duties and that this "independence . . . insulates a president from judicial subpoena."[12] Secondly, the President argued that the powers expressly delegated to the Executive by the Constitution carry with them certain inherent powers and privileges that are necessary to their efficient performance. Acknowledging the validity of these arguments, Chief Justice Burger recognized a privilege in favor of the Executive resting on "constitutional underpinnings."[13] The Court reasoned that occasions may arise in which the Executive could obtain candid advice from his advisers only by insuring them that their comments would not be made public.[14] The privilege granted to the President was necessary, therefore, to insure efficiency in the executive decisionmaking process.

The Court next considered the President's contention that the privilege was unreviewable.[15] The Chief Justice first examined the judiciary's role in the tripartite federal government. Admitting that each branch must individually interpret the Constitution in the pursuance of its constitutional duties, he nonetheless reiterated that "it is 'emphatically the province and the duty' of this Court 'to say what the

9. 28 U.S.C. §§ 1254(1), 2101(e) (1970); 94 S. Ct. at 3098-100 & n.1. Because the district court's order was "final" and therefore appealable and because of the special circumstances in the case, the Court felt that the petition for writ of certiorari before judgment was appropriate in *Nixon*. *Id.* at 3099.

10. 94 S. Ct. at 3098.

11. The Court considered claims that it lacked subject-matter jurisdiction, that the dispute was not justiciable and that the Special Prosecutor had failed to comply with the requirements of FED. R. CRIM. P. 17(c). 94 S. Ct. at 3098-105. The Court's treatment of these issues is noteworthy itself. *See* note 44 *infra*.

12. 94 S. Ct. at 3106.

13. *Id.*

14. *Id.*

15. *Id.*

law is' . . . "[16] Therefore, all such constitutional interpretations, regardless of the branch making them, are subject to Supreme Court review.[17] This power to determine whether an action by another branch exceeds its constitutional mandate is based upon the separation of powers doctrine, which delegates to the Court its role as the ultimate interpreter of the Constitution.[18] The Chief Justice reasoned that since such judicial review encompasses the powers expressly delegated by the Constitution, it must likewise extend "to powers alleged to *derive* from enumerated powers."[19] Thus, the Court has the authority to review claims of privilege whether based upon the express or the implied powers of the President.

After concluding that the judiciary is the final arbiter of the validity of any claim of executive privilege, the Court formulated a test for determining the merits of such claims. Chief Justice Burger first discussed the judiciary's constitutional mandate to conduct trials in accordance with due process, which, he suggested, is in direct conflict with the exercise of the President's privilege. As seen by the Chief Justice, the primary responsibility of the courts is to facilitate the "search for truth." This duty is fulfilled through "full disclosure of all the facts, within the framework of the rules of evidence."[20] Privileges to withhold evidence are "not lightly created nor expansively construed, for they are in derogation of the search for truth."[21] Because of this concern, only the most exigent circumstances justify the compromise of these judicial principles. Therefore, since "the legitimate needs of the judicial process"[22] may outweigh the President's privilege in some situations, the Court adopted a balancing test to weigh these competing interests.

In order, however, to protect the need for security in the executive decisionmaking process,[23] the Court felt compelled to show deference to the President in formulating the balancing test. Chief Justice Burger therefore termed the privilege "presumptive":[24] when the President asserts the privilege, the party seeking production has the burden of going forward with sufficient evidence to rebut the presumption.

16. *Id., quoting* Marbury v. Madison, 1 U.S. (1 Cranch) 137, 177 (1803).
17. 94 S. Ct. at 3106-07.
18. Marbury v. Madison, 1 U.S. (1 Cranch) 137 (1803).
19. 94 S. Ct. at 3105 (emphasis added).
20. *Id.* at 3108.
21. *Id.; see id.* at 3108 n.18.
22. *Id.* at 3107.
23. *See* text accompanying note 14 *supra.*
24. 94 S. Ct. at 3107-08.

Applying this test to the facts in *Nixon*, the Chief Justice ruled that the claim of privilege could not prevail. The specific need for obtaining relevant evidence in a pending *criminal* proceeding and the sixth amendment guarantees of fair trial and compulsory process outweighed the President's claim of privilege. The Court noted, however, that the claim of privilege in this case was general—based solely on the need to insure effective decisionmaking. The Court further noted that the President's claim made no reference to military or diplomatic matters. Indeed, the Court intimated that, had these elements been present, the result may have been different.[25] Likewise, the Chief Justice expressly refused to consider whether a *civil* litigant's rights could outweigh even a generalized claim of privilege like that asserted in *Nixon*.[26]

The Court's ruling is the foreseeable result of over 150 years of litigation involving executive privilege. Arguments presented in favor of the privilege have been rooted in the common law,[27] in the concept of the separation of powers[28] and in the nature of the executive branch itself. Regardless of its basis, the privilege has continually been recognized as a valid exception to the general rules of evidence.[29]

In 1807 in *United States v. Burr*[30] Mr. Chief Justice Marshall, sitting as a trial judge, ruled that President Jefferson must deliver confidential correspondences to the court for use by the defendant in a

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25. *Id.* at 3108-09.

26. *Id.* at 3108-09 n.19.

27. *See* United States v. Burr, 25 F. Cas. 30 (No. 14,692d) (C.C.D. Va. 1807); F. ROURKE, *supra* note 2, at 63; Berger, *The President, Congress and the Courts*, 83 YALE L.J. 1111 (1974); Annot., 95 L. Ed. 425 (1950); *cf.* United States *ex rel.* Touhy v. Ragen, 340 U.S. 462 (1951). The common law basis of executive privilege is doubtful. In the year that the Constitution was adopted by the United States, a British court stated that "it is to be observed, that the crown can no more withhold evidence of documents in its possession, than a private person. If the court thinks proper to order the production of any public instrument, that order must be obeyed." The Ship Columbus, 1 Collectanea Juridica 88, 92 (Adm. 1789). Not until fifty-three years later did the British courts recognize a privilege for "candid exchange" at high levels. Smith v. East India Co., 41 Eng. Rep. 550 (Ch. 1841). After sweeping extension in Duncan v. Cammell, Laird & Co., [1942] A.C. 624 (making the privilege conclusive), the House of Lords repudiated the privilege in Conway v. Rimmer, [1968] A.C. 910.

28. *See* United States v. Nixon, 94 S. Ct. 3090 (1974). *But see* Nixon v. Sirica, 487 F.2d 700, 715 (D.C. Cir. 1973) (per curiam), in which the court reasoned that the recognition of the type of privilege urged in *Nixon* would amount to a *breach* of the separation of powers.

29. *E.g.*, Totten v. United States, 92 U.S. 105 (1875); Nixon v. Sirica, 487 F.2d 700 (D.C. Cir. 1973) (per curiam); Committee for Nuclear Responsibility, Inc. v. Seaborg, 463 F.2d 788 (1971) (per curiam); United States v. Burr, 25 F. Cas. 30 (No. 14,692d) (C.C. D. Va. 1807).

30. 25 F. Cas. 30 (No. 14,692d) (C.C.D. Va. 1807).

pending criminal trial. In the course of his opinion, the Chief Justice acknowledged, in dictum, an exception in favor of the Executive to the general rule that "the public . . . has a right to every man's evidence."[31] The court did not, however, specifically acknowledge the basis of the privilege, define its scope, or establish a method for determining its validity in a given case. It held merely that there were situations in which certain documents in the President's possession should not be opened to the public view. Because Chief Justice Marshall stated that the privilege resulted from the President's position of public responsibility,[32] he arguably based the privilege on the inherent powers of the President.

Subsequent decisions indicated a trend toward executive absolutism, at least in the area of military secrets.[33] Such decisions intimated that the judiciary would be precluded from even considering claims of executive privilege. These decisions did not determine the scope and the validity of assertions of executive privilege, holding only that military and diplomatic secrecy required judicial protection. A line of cases in the lower federal courts, however, uniformly held that the power to determine the scope of executive privilege and to determine the validity of refusals to disclose communications rested solely in the judiciary as a result of the separation of powers doctrine.[34]

In *United States v. Reynolds*[35] the Supreme Court agreed with these lower courts. Passing on a claim of privilege asserted by the government in a suit under the Tort Claims Act, the Court stated that "[t]he court itself must determine whether the circumstances are appropriate for the claim of privilege. . . . Judicial control over the evidence in a case cannot be abdicated to the caprice of executive offi-

31. Branzburg v. Hayes, 408 U.S. 665, 688 (1972); United States v. Bryan, 339 U.S. 323, 331 (1950); *cf.* Watkins v. United States, 354 U.S. 178, 187 (1957).

32. 25 F. Cas. at 192.

33. *E.g.*, United States *ex rel.* Touhy v. Ragen, 340 U.S. 462 (1951); Boske v. Comingore, 177 U.S. 459 (1900); Totten v. United States, 92 U.S. 105 (1875); Dayton v. Dulles, 254 F.2d 71, 77 (D.C. Cir. 1957); Firth Sterling Steel Co. v. Bethlehem Steel Co., 199 F. 353 (E.D. Pa. 1912). *But see* United States v. Reynolds, 345 U.S. 1 (1953); Halpern v. United States, 258 F.2d 36, 44 (2d Cir. 1958); Cresmer v. United States, 9 F.R.D. 203 (E.D.N.Y. 1949) (which all strongly suggest that even this privilege is not absolute).

34. Reynolds v. United States, 192 F.2d 987, 997 (3d Cir. 1951), *rev'd*, 345 U.S. 1 (1953); United States v. Schine Chain Theatres, 4 F.R.D. 108 (W.D.N.Y. 1964); O'Neill v. United States, 79 F. Supp. 827 (E.D. Pa. 1948); Zimmerman v. Poindexter, 74 F. Supp. 933 (D. Hawaii 1947); Bank Line v. United States, 68 F. Supp. 587 (S.D.N.Y. 1946); Walling v. Richmond Screw Anchor Co., 4 F.R.D. 265 (E.D.N.Y. 1943).

35. 345 U.S. 1 (1953).

cers."[36] This ruling has been followed by courts subsequently faced with claims of privilege.[37]

Although these cases seemingly established the supremacy of the judiciary in deciding such disputes, they did not elucidate a method for determining the validity of specific claims of executive privilege. A test later evolved in the lower courts, however, under which the moving party's need for the documents was balanced against the reasons asserted by the government in defending their confidentiality.[38] This adjustment of competing interests has been used most notably in cases involving generalized claims of privilege based solely upon the sanctity of the executive decisionmaking process.[39] In *Nixon v. Sirica*[40] the standard was further refined by the recognition of a "presumptive privilege" in favor of the President, showing deference to the Executive in striking the balance.[41]

The balancing test that developed in the lower federal courts was adopted in its entirety by the Supreme Court in *Nixon*. This test is deceptively simple. When the President determines that evidentiary materials sought by legal process should not be disclosed, he will assert the privilege. This assertion is presumed to be valid and thus shifts the burden of going forward to the party seeking production. The moving party must then rebut the presumption. Once this has occurred, the relative merits of both parties are weighed and the court decides whether production is warranted.

The strengths of this test are readily apparent. Primarily, the

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36. *Id.* at 8-10.

37. Sperandeo v. Milk Drivers Local 537, 334 F.2d 381, 384 (10th Cir. 1964); Boeing Airplane Co. v. Coggeshall, 280 F.2d 654 (D.C. Cir. 1960); Overby v. United States Fidelity & Guar. Co., 224 F.2d 158, 163 (5th Cir. 1955); Timken Roller Bearing Co. v. United States, 38 F.R.D. 57, 63 (N.D. Ohio 1964); Kaiser Aluminum & Chem. Corp. v. United States, 157 F. Supp. 939 (Ct. Cl. 1958). *See also* Rosee v. Board of Trade, 36 F.R.D. 684, 689 (N.D. Ill. 1965).

38. Nixon v. Sirica, 487 F.2d 700 (D.C. Cir. 1973) (per curiam); Committee for Nuclear Responsibility, Inc. v. Seaborg, 463 F.2d 788 (D.C. Cir. 1971) (per curiam); Carl Zeiss Stiftung v. V.E.B. Carl Zeiss, Jena, 40 F.R.D. 318 (D.D.C. 1966), *aff'd per curiam sub nom.* V.E.B. Carl Zeiss, Jena v. Clark, 384 F.2d 979 (D.C. Cir.), *cert. denied*, 389 U.S. 952 (1967).

39. Nixon v. Sirica, 487 F.2d 700 (D.C. Cir. 1973) (per curiam); Carl Zeiss Stiftung v. V.E.B. Carl Zeiss, Jena, 40 F.R.D. 318 (D.D.C. 1966), *aff'd per curiam sub nom.* V.E.B. Carl Zeiss, Jena v. Clark, 384 F.2d 979 (D.C. Cir.), *cert. denied*, 389 U.S. 952 (1967).

40. 487 F.2d 700 (D.C. Cir. 1973) (per curiam). In this case the court was presented with arguments similar to those in *United States v. Nixon*. Here, the President sought to withhold tape recordings from the grand jury, rather than from the prosecution or defense.

41. *Id.* at 717.

flexibility inherent in balancing tests is well suited for insuring the maximum sanctity of conflicting interests—here, the independence of both the executive and judicial branches, as well as the basic principles underlying each.[42] These interests are weighed on a case by case basis. Obviously, this approach is more desirable than the wholesale compromise of principles which would result from the recognition of an absolute privilege on the one hand or the denial of a privilege as a matter of law on the other.[43] An additional strength of the *Nixon* test is the presumption of validity afforded the President's assertion. This presumption conforms the test to the separation of powers doctrine by showing deference to the executive branch.

These strengths, however, may, in future applications, be outweighed by weaknesses in the test. The burden placed upon the party seeking evidence is somewhat inequitable. It requires that party to justify access to facts essential to his case, contrary to the accepted methods of the Anglo-American legal system.[44] Furthermore, the prestige of the parties involved and the questions pertaining to national security that may arise in cases like *Nixon* may make it difficult for lower federal and state court judges to render competent decisions.

Foremost among these weaknesses are problems in the mechanics of the balancing test. Before a court is called upon to apply the *Nixon* test, the party seeking production must comply with the pertinent evidentiary requirements for obtaining a subpoena, such as showing relevance and materiality. If the privilege is then asserted to prevent disclosure, what further can be shown to overcome the President's presumption? Cases applying the standards of Rule 17(c),[45] the rule

42. *See* text accompanying notes 12-15, 21-24 *supra.*

43. For the same reasons, a test similar to the one adopted in *Nixon* could be utilized to evaluate "novel" privileges. For example, in Branzburg v. Hayes, 408 U.S. 665 (1972), the Supreme Court seems to have applied a balancing test of sorts in weighing the merits of the "journalist's privilege" to withhold the identity of his sources. In that case, the Court held, again, that the demands of the criminal justice system compelled disclosure. However, the first amendment guarantee of free press is also a fundamental right, and deserves, at least, the protection of a case by case weighing, if not a presumptive privilege in favor of the reporter, rather than a summary denial of judicial protection.

44. *See* cases cited note 31 *supra.*

45. The leading case interpreting these standards is Bowman Dairy Co. v. United States, 341 U.S. 214 (1951), which recognized that the subpoena duces tecum was not intended to provide a method for discovery in criminal cases, but was merely a means to expedite trials by establishing a time and place prior to trial for the inspection of materials obtained through compliance with the standards of the Federal Rules of Criminal Procedure. *Id.* at 220. These standards were concisely stated by Judge Winfield in United States v. Iozia, 13 F.R.D. 335, 338 (S.D.N.Y. 1952). In order to procure pretrial production, the moving party must show that the documents are both evi-

applicable in *Nixon*, indicate that this initial showing practically exhausts the knowledge of the party seeking production. Indeed, not much more than a general showing of relevance, admissibility and specificity is possible in cases in which the documents sought are of a secret nature.

One must assume, however, that something more is required to rebut the presumption afforded the President than a reiteration of the facts justifying the issuance of a subpoena. To conclude otherwise would render the presumption meaningless—a mere form, serving no purpose other than to frustrate the party seeking production and to prolong the court's inquiry. Apparently, the litigant must assert the basic principles underlying his action itself as a part of this further showing.[46] These rudimentary principles include, for example, any constitutional rights of the litigants as well as any strong public policy reflected in his suit. In addition, any facts that make the moving party's need critical to the maintenance of his action or that distinguish his case from others of a similar nature should be asserted.[47]

In those cases in which the underlying principles and special facts presented are adjudged to rebut the presumption, something further must be shown by the Executive to justify nondisclosure. Is the President now required to disclose the specific interests and conversations that should be guarded?[48] It may seem initially that disclosure of such information to the courts would deprive the balancing test of its substance, since the same result could be reached through initial *in camera* inspection without the delay occasioned by the *Nixon* test. The process

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dentiary and relevant, that they are not accessible by other means available to the party seeking them, and that the materials are essential to the preparation of the case to be presented. In addition, the application for the subpoena must be made in good faith and not merely as a "fishing expedition."

46. In *Nixon* the principles underlying all *criminal* proceedings—the constitutional rights of defendants to a fair trial and compulsory process, the need for efficiency and justice in the system of criminal law, and the nation's committment to the rule of law—when coupled with the special facts presented, note 47 *infra*, were adjudged to outweigh the presumption. 94 S. Ct. 3106-08.

47. In *Nixon* these circumstances included the fact that the alleged injustices were perpetrated in the offices of the White House. Moreover, the President had been declared an unindicted co-conspirator by the grand jury investigating the Watergate scandal. Brief for the Petitioner at 11-12.

48. This problem could also lead to litigation because the assertion of the general privilege afforded in *Nixon* may constitute a waiver of other privileges recognized by the courts, *i.e.* those resting on the need to protect military and diplomatic secrets. It is suggested that this *should* be the case, since the assertion of the general privilege in the face of such secrets would be little more than a frustration of the legal process and a stalling tactic, if in fact privileges do exist for the specific purpose of protecting the national security.

outlined in *Nixon*, however, affords the maximum protection for executive conversations by precluding disclosure, even to the courts, except in those special cases in which the need for the documents outweighs the presumption.

Furthermore, it has been argued that even *in camera* inspection of the conversations would negate the beneficial results of the privilege.[49] There is, however, "no danger to the public interest in submitting the question of privilege to the decision of the courts. The judges . . . are public officers whose responsibility under the Constitution is just as great as that of the heads of the executive departments."[50] When the presumption of judicial integrity is also considered, there is sufficient protection afforded the executive in those comparatively few cases in which the court is called upon to balance the important competing interests presented.

Having reached the point in the test at which the needs of the executive are to be weighed against the countervailing public and private rights presented by the party seeking production, the court is faced with a serious dilemma. Confronted with an array of conflicting principles and factual arguments, the courts will undoubtedly examine prior cases to determine which facts have been crucial in decisions concerning the exercise of executive privilege. These cases indicate that the following facts carry considerable weight: whether the materials sought are of primary importance to the case presented;[51] the volume and diversity of prior production by the party asserting the privilege;[52] the presence of available alternatives for obtaining the information sought;[53] allegations of governmental misconduct;[54] and allegations of

49. The argument that the disclosure of executive deliberations to even one person outside the executive branch would inhibit the flow of ideas necessary to effective decisionmaking by instilling a fear of prosecution or public criticism in advisers has been accepted by federal courts in previous cases. EPA v. Mink, 410 U.S. 73 (1973); Kaiser Aluminum & Chem. Corp. v. United States, 157 F. Supp. 939 (Ct. Cl. 1958). *See generally* R. BERGER, *supra* note 2; F. ROURKE, *supra* note 2.

50. Reynolds v. United States, 192 F.2d 987, 997 (3d Cir. 1951), *rev'd*, 345 U.S. 1 (1953). Judge Maris's views were adopted by the dissenters, Justices Black, Frankfurter and Jackson, in United States v. Reynolds, 345 U.S. 1 (1953).

51. Carl Zeiss Stiftung v. V.E.B. Carl Zeiss, Jena, 40 F.R.D. 318 (D.D.C. 1966), *aff'd per curiam sub nom.* V.E.B. Carl Zeiss, Jena v. Clark, 384 F.2d 979 (D.C. Cir.), *cert. denied*, 389 U.S. 952 (1967).

52. *Id.*

53. United States v. Reynolds, 345 U.S. 1, 11 (1953); Carl Zeiss Stiftung v. V.E.B. Carl Zeiss, Jena, 40 F.R.D. 318 (D.D.C. 1966), *aff'd per curiam sub nom.* V.E.B. Carl Zeiss, Jena v. Clark, 384 F.2d 979 (D.C. Cir.), *cert. denied*, 389 U.S. 952 (1967).

54. Singer Sewing Mach. Co. v. NLRB, 329 F.2d 200, 208 (4th Cir. 1964); Bank of Dearborn v. Saxon, 244 F. Supp. 394 (E.D. Mich. 1965); Rosee v. Board of Trade, 36 F.R.D. 684, 689 (N.D. Ill. 1965).

perversion of government power.[55] While such factors may be helpful in reaching a decision, the court's ultimate determination can be made only after considering the case in the perspective of the political system in which the judiciary functions.

The separation of powers doctrine, viewed in the realistic manner presented in *Nixon*, must be the focal point of this consideration.[56] In weighing the public and private interests involved in such cases, it is apparent that not all court-protected interests warrant an intrusion into executive privacy. Of primary concern, however, is the judiciary's role as a limiting factor in the tripartite system, as well as its dedication to its function as a forum for the resolution of conflicts. The courts must, therefore, conscientiously protect the mechanism for accomplishing these purposes. Thus, those rights that are critical to this process should outweigh the privilege in all cases except those presenting countervailing interests most critical to the preservation of the governmental system as a whole.

There is another important area which should be considered by courts applying the *Nixon* test. The Supreme Court in *Nixon* assumed that secrecy is both necessary and appropriate in the decisionmaking process.[57] Secrecy is, however, by its very nature foreign to and potentially destructive of a democracy and its practical institutions. For that reason, its use should be minimized, the indulgence in this practice being permitted only in situations in which it is absolutely essential. A consideration of this problem and an awareness of the trends toward increasing use of secrecy and its validation by the Supreme Court should be paramount in the deliberations of those applying the *Nixon* test.

Nixon establishes an additional weapon in the executive arsenal of secrecy. While the privilege recognized by the Court is not absolute, it is one which places a substantial burden upon the party seeking evidentiary materials in a criminal proceeding. Regardless of its availa-

55. United States v. Proctor & Gamble Co., 25 F.R.D. 485 (D.N.J. 1960).

56. In contrast to the President's interpretation of the doctrine as a source of almost absolute independence among the branches, Chief Justice Burger viewed it as a limiting factor. He stated that the "separate powers were not intended to operate with absolute independence," but that each branch must depend upon the others for validation and implementation of its actions. 94 S. Ct. at 3107. For example, the Congress relies upon the Executive to carry out congressional declarations of war, a power expressly delegated to the former. Likewise, the Executive relies upon funding from Congress for the projects that the former deems important, and for confirmation of official appointments. The judiciary is instrumental in enforcing the acts of Congress and the decrees of the Executive.

57. *Id.* at 3106.

bility and validity in non-criminal proceedings or the extension of the Court's reasoning into other areas of privilege, the implications of the ruling are important when viewed in the context of the growth of executive power in the American system. In addition, serious weaknesses in the *Nixon* test pose difficult problems for those who will apply it in future cases. What is called for in response to the decision is extreme presidential circumspection in asserting the privilege, as well as continued, responsible review by the courts. Hopefully, such judicious exercise of power will prevent executive privacy from degenerating into a convenient instrument for concealing from the public what it has a right to know.

H. KING MCGLAUGHON, JR.

Constitutional Law—Lowering the Compelling State Interest Hurdle

During the twelve years since its decision in *Baker v. Carr*,[1] the Supreme Court has considered numerous challenges to state election laws raised by potential voters and candidates.[2] In ruling upon these challenges, the Court has developed an exacting standard to be applied in determining whether a state's restrictions on the right to vote violate the equal protection clause of the fourteenth amendment.[3] Because of the stringency of this standard, which requires a state to justify its restrictions by showing their necessity to further a "compelling" state interest,[4] many state laws regulating voter qualifications and candidacy

1. 369 U.S. 186 (1962). In this landmark, legislative apportionment case, the Court extended equal protection to nonracial challenges of state election statutes. Note, *Oregon v. Mitchell and the Compelling State Interest Doctrine—The End of an Era?*, 22 SYRACUSE L. REV. 1123, 1125 (1971). In so extending the equal protection clause, the Court "substantially modified the constitutional matrix in this area." 30 OHIO ST. L.J. 202 (1969).

2. *See, e.g.*, Kusper v. Pontikes, 414 U.S. 51 (1973); Dunn v. Blumstein, 405 U.S. 330 (1972); Bullock v. Carter, 405 U.S. 134 (1972); Evans v. Cornman, 398 U.S. 419 (1970); Kramer v. Union Free School Dist. No. 15, 395 U.S. 621 (1969).

3. *See* Kramer v. Union Free School Dist. No. 15, 395 U.S. 621 (1969), in which the Court justified its imposition of this new test as follows: "This careful examination is necessary because statutes distributing the franchise constitute the foundation of our representative society. Any unjustified discrimination in determining who may participate in political affairs or in the selection of public officials undermines the legitimacy of representative government." *Id.* at 626.

4. *Id.* at 627.

requirements have been declared unconstitutional.[5] In the recent case of *Storer v. Brown*,[6] however, the Supreme Court upheld the constitutionality of a portion of the California Election Code[7] concerning independent candidates.[8] In upholding these statutes, the Court ostensibly applied the compelling state interest test;[9] however, an examination of the majority opinion reveals that the Court actually applied a standard much closer to that of the traditional equal protection test that is normally reserved for cases in which neither fundamental rights nor suspect classifications are involved.[10] When viewed in light of other recent franchise opinions,[11] the *Storer* decision indicates the Court's willingness to give state legislatures greater latitude in enacting electoral restrictions and to ease the states' burdens in meeting challenges to these laws.

The *Storer* case arose out of the 1972 California elections in which plaintiffs Storer, Frommhagen, Hall, and Tyner sought to be placed on the ballot as independent candidates in the general election. Storer and Frommhagen, who both desired to run for Congress from their respective districts, were denied ballot access because they had been affiliated with the Democratic Party within a year prior to the 1972 primary,[12] thereby failing to meet one of the requirements for independent candidacy prescribed by California law.[13] Plaintiffs Hall and

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5. *See, e.g.*, cases cited note 2 *supra*.

6. 415 U.S. 724 (1974). Mr. Justice White wrote the majority opinion. Justices Brennan, Douglas, and Marshall dissented in an opinion written by Mr. Justice Brennan. *Id.* at 755.

7. CAL. ELEC. CODE §§ 6830-31, 6833 (West Supp. 1974).

8. 415 U.S. at 736.

9. *Id.*: *see* American Party v. White, 415 U.S. 767, 780 (1974).

10. In McGowan v. Maryland, 366 U.S. 420 (1961) Chief Justice Warren explained the traditional equal protection test as follows:

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

Id. at 425-26. For a discussion of the development of the two equal protection standards and the distinctions between them see Engdahl, *Constitutionality of the Voting Age Statute*, 39 GEO. WASH. L. REV. 1, 28-32 (1970).

11. *E.g.*, O'Brien v. Skinner, 414 U.S. 524, 535 (1974) (Blackmun & Rehnquist, J.J., dissenting); Kusper v. Pontikes, 414 U.S. 51, 61 (1973) (Blackmun, J., dissenting); Rosario v. Rockefeller, 410 U.S. 752 (1973); Dunn v. Blumstein, 405 U.S. 330, 363 (1972) (Burger, C.J., dissenting); Lippitt v. Cipollone, 404 U.S. 1032 (1972), *aff'g mem.* 337 F. Supp. 1405 (N.D. Ohio 1971).

12. 415 U.S. at 728.

13. CAL. ELEC. CODE § 6830 (West Supp. 1974), which governs independent can-

Tyner, who desired to run for President and Vice-President of the United States,[14] complied with the above party disaffiliation requirement, but were denied ballot access because of their failure to meet the requirements concerning the submission of nominating petitions.[15] Thus the four potential candidates brought actions in federal district court challenging the constitutionality of the provisions of the California Election Code regulating independent candidates' access to the ballot.[16]

A three-judge district court dismissed the complaints, concluding that the statutes "served a sufficiently important state interest to sustain their constitutionality."[17] On direct appeal,[18] a divided Supreme Court upheld the provisions requiring one year of disaffiliation.[19] In doing so, the Court concluded that the requirement furthered "the State's interest in the stability of its political system"—an interest the Court found to be compelling. This note will examine the manner in which the Court evaluated the disaffiliation requirement and the nature and extent of its departure from the previously developed compelling state interest test.

Before evaluating the Court's opinion, it is necessary to examine

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didates, provides in part:

> Each candidate or group of candidates shall file a nomination paper which shall contain:
>
> . . . .
>
> (c) A statement that the candidate and each signer of his nomination paper did not vote at the immediately preceding primary election at which a candidate was nominated for the office mentioned in the nomination paper. . . .
>
> (d) A statement that the candidate is not, and was not at any time during the one year preceding the immediately preceding primary election at which a candidate was nominated for the office mentioned in the nomination paper, registered as affiliated with a political party . . . .

14. Hall and Tyner were members of the Communist Party, which had failed to qualify for ballot status under California law. They therefore sought to run as independent candidates. 415 U.S. at 728.

15. The Court summarized these requirements as follows:

> The independent candidate must . . . file nomination papers signed by no less than 5% nor more than 6% of the entire vote cast in the preceding general election in the area for which the candidate seeks to run. § 6831. All of these signatures must be obtained during a 24-day period following the primary and ending 60 days prior to the general election, § 6833, and none of the signatures may be gathered from persons who vote at the primary election. § 6830(c).

Id. at 726-27.

16. *Id.* They argued that the statutes violated their first and fourteenth amendment rights.

17. *Id.* at 728.

18. 28 U.S.C. § 1253 (1970) authorizes an appeal directly to the Supreme Court from a judgment of a three-judge district court concerning the constitutionality of a state law.

19. The Court remanded the cases of Hall and Tyner, instructing the district court to determine from prior election data that was unavailable to the Court whether the petition requirements placed an unconstitutional burden on independents seeking positions on the ballot. 415 U.S. at 738-40.

briefly the franchise cases out of which the compelling state interest test evolved.[20] Its development may be viewed in three phases.[21] In the cases constituting the initial phase,[22] the Court articulated the importance of the right to vote[23] and asserted that a state's abridgment of this right should be examined very carefully.[24] By the time of its decision in *Harper v. Virginia Board of Elections*,[25] a majority of the Court was on the verge of expressing a new equal protection standard to be applied in voting rights cases.

The articulation of this new test occurred during the second phase. In *Williams v. Rhodes*[26] the Court made clear that, although a state had the authority to enact laws regulating elections, this grant of authority was not absolute; it could not be exercised in violation of the equal protection clause.[27] The Court then listed the following factors to be considered in determining whether an election statute is unconstitutional:

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20. Prior to the mid-1960's, the Court had applied the concepts of the equal protection clause to two types of cases: those involving commercial regulations, *e.g.*, McGowan v. Maryland, 366 U.S. 420 (1960), and those in which racially discriminatory state action was alleged, *e.g.*, Korematsu v. United States, 323 U.S. 214 (1944). The Court applied two different equal protection standards in evaluating statutes, its choice depending upon the type of classification involved. In commercial regulation cases, the Court determined whether the statute rationally promoted a legitimate state interest. The state's interest was presumed to be legitimate unless the classifications were shown to be arbitrary. Note, 22 SYRACUSE L. REV., *supra* note 1. Because this traditional standard allowed important individual rights to be subordinated to less important state interests, the Court applied a more stringent standard when racial classifications were involved. Because of their "suspect" classifications, these statutes were presumed illegitimate unless "shown to be absolutely free of any purpose which might encourage 'invidious discrimination.'" *Id.* at 1125.

21. This somewhat arbitrary division is devised merely to aid in the analysis of a large group of decisions. Admittedly it oversimplifies the process of the development of the compelling state interest test.

22. Harper v. Virginia Bd. of Elections, 383 U.S. 663 (1966) (Virginia's poll tax held unconstitutional); Carrington v. Rash, 380 U.S. 89 (1965) (Texas law prohibiting servicemen from voting held unconstitutional); Reynolds v. Sims, 377 U.S. 533 (1964) (Alabama state legislative apportionment plans held unconstitutional).

23. In Reynolds v. Sims, 377 U.S. 533 (1964), the Court stated that "[t]he right to vote freely for the candidate of one's choice is of the essence of a democratic society, and any restrictions on that right strike at the heart of representative government." *Id.* at 555. "Undoubtedly, the right of suffrage is a fundamental matter in a free and democratic society." *Id.* at 561-62.

24. In Harper v. Virginia Bd. of Elections, 383 U.S. 663 (1966), the Court said, "We have long been mindful that where fundamental rights and liberties are asserted under the Equal Protection Clause, classifications which might invade or restrain them must be closely scrutinized and carefully confined." *Id.* at 670.

25. 383 U.S. 663 (1966).

26. 393 U.S. 23 (1968). This case involved a challenge by would-be candidates to the Ohio election laws, which, because of their stringent requirements, made it virtually impossible for a third party or an independent candidate to gain access to the ballot. *Id.* at 25.

27. *Id.* at 29.

"the facts and circumstances behind the law, the interests which the State claims to be protecting, and the interests of those who are disadvantaged by the classification."[28] Since the "precious" rights of voting and association were involved, the Court held that the State had to justify its infringement of them by showing a "compelling state interest."[29]

Because the majority in *Williams* rested its opinion on both first amendment and equal protection grounds, it remained unclear whether the Court had created a new equal protection test to be applied in franchise cases.[30] Subsequent decisions removed any uncertainty. Although *Shapiro v. Thompson*[31] was not a voting rights case, the Court stated succinctly the appropriate equal protection standard for evaluating statutes abridging rights that the Court deemed to be "fundamental": "[T]he traditional criteria do not apply in these cases. Since the classification here touches on the fundamental right of interstate movement, its constitutionality must be judged by the stricter standard of whether it promotes a *compelling* state interest."[32]

After the compelling state interest test had been used to declare several state election laws unconstitutional,[33] the development of the test entered its third phase[34] when certain members of the Court began to express their displeasure at the continued interference with enactments of state legislatures.[35] An early example of this abandonment

28. *Id.* at 30.

29. *Id.* at 31.

30. 30 OHIO ST. L.J., *supra* note 1, at 215.

31. 394 U.S. 618 (1969). This case arose out of challenges to states' durational residency requirements for welfare benefits.

32. *Id.* at 638. Having developed this new standard, the Court then began to apply it in cases in which state election laws were challenged. In Kramer v. Union Free School Dist. No. 15, 395 U.S. 621, 632 (1969), for example, the Court expressed the compelling state interest test in a two-step analysis. It must first be determined whether the classifications under consideration are "tailored so that the exclusion of appellant and members of his class is necessary to achieve the articulated state goal." If they are so tailored, then the Court must determine whether that goal constitutes a compelling state interest. *Id.* at 632 n.14.

33. *E.g.*, Dunn v. Blumstein, 405 U.S. 330 (1972) (Tennessee durational residency requirements for voting held unconstitutional); Bullock v. Carter, 405 U.S. 134 (1972) (Texas filing fee system held unconstitutional). Other cases in which the Court applied this standard in evaluating election laws include, City of Phoenix v. Kolodziejski, 399 U.S. 204 (1970) (Arizona law permitting only real property taxpayers to vote on issuance of general obligation bonds held unconstitutional); Evans v. Cornman, 398 U.S. 419 (1970) (Maryland law denying franchise to residents of federal enclaves within the state held unconstitutional); Cipriano v. City of Houma, 395 U.S. 701 (1969) (Louisiana law restricting franchise in certain elections to those who paid taxes on real property held unconstitutional).

34. This phase overlaps the previous one.

35. *See, e.g.*, Dunn v. Blumstein, 405 U.S. 330, 363 (1972) (Burger, C.J., dissent-

of the stringent standard was the Court's affirmance, by a five to four vote, of the district court decision in *Lippitt v. Cipollone*.[36] The majority accepted without opinion the standard applied below, which clearly was less demanding than the compelling state interest test.[37] More recently in *Rosario v. Rockefeller*[38] the majority applied a standard that, according to the dissent, resembled "the traditional 'rational basis' test."[39] Both of these cases were relied on by the majority in its decision in *Storer*,[40] which should also be included in this third phase.

In analyzing the *Storer* decision, it first must be determined whether, under the facts of the case, the application of the compelling state interest test was required. Although the Court has never classi-

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ing), in which the Chief Justice termed the compelling state interest test "seemingly insurmountable." *Id.* at 363-64. In the very recent case of O'Brien v. Skinner, 414 U.S. 524, 535 (1974) (Blackmun & Rehnquist, J.J., dissenting), Justice Blackmun expressed his dissatisfaction as follows: "I would refrain from continued tampering and interference with the details of state election laws. If details are deserving of cure, the State's legislature, not this Court, ought to be the curative agent." *Id.* at 537.

36. 404 U.S. 1032 (1972), *aff'g mem.* 337 F. Supp. 1405 (N.D. Ohio 1971). This case upheld Ohio's statute which specified that candidates in party primaries could not have voted in another party's primary within the four previous years.

A similar retreat by the Court from its application of the compelling state interest test occurred in equal protection challenges in other areas. *See, e.g.*, Salyer Land Co. v. Tulare Lake Basin Water Storage Dist., 410 U.S. 719 (1973) (California Water Code provision restricting voting rights in water district general elections to landowners and apportioning votes according to land value upheld); Lindsey v. Normet, 405 U.S. 56 (1972) (Oregon judicial procedure for evicting non-paying tenants upheld); Gordon v. Lance, 403 U.S. 1 (1971) (West Virginia requirement of sixty percent voter approval for incurring public debts or increasing tax rates upheld); Dandridge v. Williams, 397 U.S. 471 (1970) (Maryland law setting maximum for welfare grants upheld).

It has been suggested, and the Court's approaches in the above cases and in *Storer* add credence to the suggestion, that in recent years the Court has moved away from a rigid dual-pronged equal protection approach. Rather than choosing either the traditional, rational basis test or the stringent, compelling state interest test, the Court has begun to employ a standard lying somewhere between the two extremes. *See* San Antonio Independent School Dist. v. Rodriguez, 411 U.S. 1, 98-110 (1973) (Marshall, J., dissenting).

37. The district court stated that the state legislature is presumed to have acted constitutionally; Lippitt v. Cipollone, 337 F. Supp. 1405, 1406 (N.D. Ohio 1971), *aff'd mem.*, 404 U.S. 1032 (1972); a presumption that is rejected under the compelling state interest test. Kramer v. Union Free School Dist. No. 15, 395 U.S. 621, 627 (1969).

38. 410 U.S. 752 (1973). The Court upheld a provision of the New York Election Code that restricted primary voting to those whose party affiliation had been registered at least thirty days before the previous general election (*i.e.* eleven months prior to the non-presidential primary).

39. *Id.* at 767 (Powell, J., dissenting). The majority's opinion seems to support this conclusion because the Court affirmed the statute upon finding that the restriction was "tied to a particularized legitimate purpose, and [was] in no sense invidious or arbitrary." *Id.* at 762. The "invidious" or "arbitrary" test is traditionally applied in cases involving economic regulation. *See* note 20 *supra.*

40. 415 U.S. at 734, 736.

fied candidacy per se as a fundamental right,[41] it has recognized that the rights of candidates and those of voters often overlap.[42] Thus an infringement of candidates' rights that also affects those of voters requires the application of the compelling state interest test.[43] The majority's nominal use of the compelling state interest test in *Storer*[44] suggests that there was sufficient infringement of voters' rights here to require a close scrutiny. As the Court itself stated in *Lubin v. Panish*,[45] decided the same day as *Storer*, "[T]he right to vote is 'heavily burdened' if that vote may be cast only for one of two candidates in a primary election at a time when other candidates are clamoring for a place on the ballot."[46] Similarly, the rights of a significant group of voters are "heavily burdened" when the number of independent candidates is limited.

Although the Court recognized the necessity of applying the compelling state interest test in *Storer*, it departed from its own guidelines established in earlier cases in applying that test. One of the fundamental aspects of the test is the state's burden of justifying any restrictions on the right to vote.[47] In the past the Court had clearly rejected the automatic presumption of legitimacy of the state action[48] and instead had required the state to show compelling reasons for its restrictions.[49]

Despite this basic requirement, there is no indication in the *Storer* opinion that the burden of justification was placed on California. On the contrary, the Court stated that it had no reason for "concluding that the device California chose, § 6830(d), was *not* an essential part of its

41. *See* Bullock v. Carter, 405 U.S. 134, 142-43 (1972). *But cf.* Lippitt v. Cipollone, 404 U.S. 1032 (1972) (Douglas, J., dissenting), *aff'g mem.* 337 F. Supp. 1405 (N.D. Ohio 1971).

42. Bullock v. Carter, 405 U.S. 134, 143 (1972).

43. *Id.* at 144.

44. An example of the Court's use of this terminology is the following statement: "We also consider that interest as not only permissible, but compelling and as outweighing the interest [of] the candidate and his supporters. . . ." 415 U.S. at 736.

45. 415 U.S. 709 (1974). The Court held unconstitutional the California filing fee requirement, which in its application prevented indigent candidates from gaining ballot status. In reaching its decision, the Court found that the "[s]election of candidates solely on the basis of ability to pay a fixed fee without providing any alternative means [was] not *reasonably necessary* to the accomplishment of the State's legitimate election interests." *Id.* at 717 (emphasis added). Because of the State's complete failure to demonstrate the necessity of its restrictions, the Court in *Lubin* was able to find the statute unconstitutional under even the more tolerant standard that it applied.

46. *Id.* at 716.

47. Dunn v. Blumstein, 405 U.S. 330, 335 (1972).

48. *See* Kramer v. Union Free School Dist. No. 15, 395 U.S. 621, 627-28 (1969).

49. *See* Dunn v. Blumstein, 405 U.S. 330, 335 (1972).

overall mechanism to achieve its acceptable goals."[50] Rather than requiring the State to prove that the restriction *was* "necessary to achieve its articulated state goal,"[51] it accepted a lack of proof to the contrary as sufficient. Clearly in doing so, the Court eased considerably the State's task in justifying its statute.

Implicit in the Court's acceptance of the disaffiliation requirement is its assumption that an absence of the requirement would lead to political instability. However, the opinion referred to no data supporting such conclusion; thus it must be assumed that the Court was merely speculating on the result. Under the traditional equal protection test, such an approach by the Court is permissible.[52] But under previously enumerated guidelines, the compelling state interest test prohibits such speculation; mere theoretical problems do not justify infringements of individual rights.[53]

The Court's discussion of the rationale behind the disaffiliation requirement displays other ways in which it departed from past guidelines.[54] In prior decisions the Court had required "exacting standard[s] of precision" in statutes affecting voting rights.[55] Those statutes, which contained sweeping exclusions of a large number of citizens for reasons that were valid for only a segment of that group, were declared unconstitutional.[56] Here, however, the Court said that one of the justifications of the disaffiliation requirement was that it protected against "candidacies prompted by short-range political goals, pique or personal quarrel."[57] The Court failed to consider that in excluding those types of candidacies, the statute also excludes those prompted by a desire for public service and a belief that the partisan candidates fail to represent adequately the viewpoints of a significant group of voters.

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50. 415 U.S. at 73 (emphasis added).

51. Kramer v. Union Free School Dist. No. 15, 395 U.S. 621, 632 (1969).

52. Under this less stringent standard, "the Court may even engage in speculation to find some possible justification for the state law." Engdahl, *supra* note 10, at 32.

53. *See* Williams v. Rhodes, 393 U.S. 23, 33 (1968).

54. The Court stated the reasons for the disaffiliation requirement as follows:

> It protects the direct primary process by refusing to recognize independent candidates who do not make early plans to leave a party and take the alternate course to the ballot. It works against independent candidacies prompted by short-range political goals, pique or personal quarrel. It is also a substantial barrier to a party fielding an "independent" candidate to capture and bleed off votes in the general election that might well go to another party.

415 U.S. at 735.

55. *See* Dunn v. Blumstein, 405 U.S. 330, 360 (1972).

56. *See, e.g., id.* at 351; Carrington v. Rash, 380 U.S. 89, 96 (1965).

57. 415 U.S. at 735.

As the Court stated in *Storer* and had earlier stated in *Williams v. Rhodes*,[58] among the factors to be considered in evaluating a statute under the compelling state interest test are "the facts and circumstances behind the law."[59] In prior decisions the Court had included practical political considerations among the circumstances that it considered. Thus in *Williams* it noted that Ohio's early petition deadline was at odds with the constantly changing nature of American politics.[60] In *Storer*, however, the Court completely disregarded the disaffiliation requirement's relationship to political realities.[61] By omitting this consideration the Court failed to evaluate fully the extent of the impact of the requirement upon potential independent candidates.

The final and perhaps most striking departure of the Court from its past decisions was its failure to consider the availability of less burdensome means of achieving the State's objectives. Under the traditional equal protection test, a legislature has great latitude in enacting regulations, as long as they are rationally related to the state's objectives.[62] But under the compelling state interest test, there are further limitations on the legislature's authority. As the Court stated in *Dunn v. Blumstein*,[63] even if a state is attempting to achieve a legitimate interest, it cannot "unnecessarily burden or restrict constitutionally protected activity."[64] The Court stated further: "[I]f there are other, reasonable ways to achieve those goals with a lesser burden on constitutionally protected activity, a State may not choose the way of greater interference. If it acts at all, it must choose 'less drastic means.'"[65] In contrast, while *Storer* stated that California was not required to choose ineffectual means to further its interests,[66] it failed to require California to show that there were no effective, but less burdensome, means available. This failure is especially significant in light of the Court's statement that "[a] State need not take the course California has."[67] Hav-

58. 393 U.S. 23 (1968).

59. 415 U.S. at 730, *quoting* Williams v. Rhodes, 393 U.S. 23, 30 (1968).

60. *See* 393 U.S. at 33. The Court explained that the identity of those opposed to the candidates and policies of the major parties often could not be determined until shortly before the election.

61. As the dissent noted, this requirement meant that a party member would have to realize seventeen months before an election that he desired to run as an independent candidate. Accordingly, he would have to take action at a time when the potential nominees of the two major parties would probably be unknown. 415 U.S. at 758.

62. Engdahl, *supra* note 10, at 29.

63. 405 U.S. 330 (1972).

64. *Id.* at 343.

65. *Id.*

66. 415 U.S. at 736.

67. *Id.* North Carolina, for example, is not noted for its political instability or

ing implied that some states achieved political stability by other means, the Court should have inquired into the nature of these alternatives. By not requiring the State to utilize less drastic means, the Court went a step further in increasing the latitude of the legislature's authority.

The significance of the *Storer* decision lies in its implications for future franchise cases. It suggests that, when election laws that do not directly and blatantly infringe the rights of voters are challenged, the Court will lower the justification hurdle that the state must surmount. As a result, it is likely that the Court will approve electoral restrictions that accomplish indirectly what it was previously declared could not be done directly. The *Storer* decision indicates particularly that when candidacy restrictions are involved, the Court will apply a more lenient standard of evaluation. Such an approach by the Court seems unwise, for little has been gained if a soldier in Texas[68] or an indigent in Virginia[69] is allowed into the voting booth only to discover that those candidates representing his point of view have been excluded from the ballot. James Madison recognized this critical relationship between rights of candidates and those of voters when he said, "A republic may be converted into an aristocracy or oligarchy, as well by limiting the number capable of being elected as the number authorized to elect."[70]

S. ELIZABETH GIBSON

Sovereign Immunity—Scheuer v. Rhodes: Reconciling Section 1983 Damage Actions with Governmental Immunities

In developing satisfactory judicial approaches to the section 1983 remedies of the Civil Rights Act,[1] federal courts have encountered con-

its high degree of interparty raiding, and yet it places no requirement of prior disaffiliation on independent candidates. Under N.C. GEN. STAT. § 163-122 (Supp. 1973), a potential independent candidate must file an affidavit stating that he "*does not* affiliate with any political party" (emphasis added). There is no further requirement that he must not have affiliated with a party at any time in the past.

68. *See* Carrington v. Rash, 380 U.S. 89 (1965).

69. *See* Harper v. Virginia Bd. of Elections, 383 U.S. 663 (1966).

70. 5 J. ELLIOT, THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 404 (1845).

1. 42 U.S.C. § 1983 (1970) (originally enacted as Act of April 20, 1871, ch. 22, § 1, 17 Stat. 13) provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof

flicting policy considerations. Effective redress for injured parties against officials "acting under color of" state law has been curtailed by various governmental immunities designed to protect officials and to promote efficient, decisive government action.[2] Federal courts have also guarded against overburdening the federal judicial structure and against unnecessarily preempting traditional state torts.[3] These considerations have prompted three significant judicial limitations on section 1983 actions:[4] (1) a narrow interpretation of the word "person" in the act;[5] (2) a strict construction of the eleventh amendment's sovereign immunity implications, which has severely limited suits against the state;[6] and (3) the development of various personal immunities.

Although section 1983 actions against governments have thus been restricted, the United States Supreme Court in *Scheuer v. Rhodes*[7] unanimously[8] reaffirmed the section's vitality in damage actions against individuals who have allegedly abused governmental executive powers. In suits brought on behalf of three students killed in 1970 at Kent State University, the Court held that neither the eleventh amendment nor an absolute executive immunity sheltered state officials with discretionary[9] responsibilities from personal liability for unconstitutional actions. Although some major issues remain unsettled,[10] *Scheuer* signals progress in reconciling section 1983 damage remedies with the policies of governmental immunity.

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to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

2. *See* text accompanying note 30 *infra.*

3. *See* notes 50-56 and accompanying text *infra.*

4. McCormack, *Federalism and Section 1983: Limitations on Judicial Enforcement of Constitutional Protections,* 60 VA. L. REV. 1, 4-5 (1974).

5. *See* Note, *Federal Jurisdiction—Municipal Immunity under the Civil Rights Act—Closing the Loopholes,* 52 N.C.L. REV. 1289 (1974).

6. Engdahl, *Immunity and Accountability for Positive Governmental Wrongs,* 44 U. COLO. L. REV. 1, 8-13 (1972) traces the interpretative expansion of the eleventh amendment from its primary purpose, that of protecting states from the debt claims of citizens of other states, into a broad doctrine of sovereign immunity.

7. 94 S. Ct. 1683 (1974).

8. The decision was 8-0, with Mr. Justice Douglas not participating.

9. Courts have traditionally attempted to distinguish between "ministerial" (or "non-discretionary") duties and "quasi-judicial" (discretionary) duties. An early case defined a ministerial duty as one in respect "to which nothing is left to discretion. It is a simple, definite duty, arising under conditions admitted or proved to exist, and imposed by law." Mississippi v. Johnson, 71 U.S. (4 Wall.) 475, 498 (1866). On the other hand, a discretionary duty is one in which an official has "a power and duty to make a choice among valid alternatives." Jaffe, *Suits Against Governments and Officers: Damage Actions,* 77 HARV. L. REV. 209, 218 (1963).

10. *See* text accompanying note 47 *infra.*

The tragedy in question occurred on May 4, 1970, when Ohio National Guardsmen fired into a group of students at Kent State University, killing four and injuring nine. Section 1983 actions were filed on behalf of three deceased students,[11] joining as defendants in their individual capacities Ohio Governor Rhodes,[12] the guard adjutant and assistant adjutant generals, various other guard personnel and the Kent State University president. Allegedly, the defendants willfully caused an unnecessary guard deployment and ordered illegal actions resulting in the student deaths.[13]

Before answers were filed,[14] the district court dismissed the actions[15] because they were against the state and therefore barred by the eleventh amendment. The Sixth Circuit Court of Appeals affirmed,[16] finding alternatively that an unqualified executive immunity protected the defendants. The Supreme Court, however, reversed the dismissals as "inappropriate" and held that the claimants were "entitled to offer evidence to support [their] claims."[17]

In considering the lower courts' sovereign immunity arguments, the Supreme Court reaffirmed earlier decisions that the eleventh amendment precluded claims against the state as the named defendant or the defendant in fact.[18] Relying on *Ex parte Young*,[19] the Court

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11. A special counsel to the attorney general of Ohio stated that twenty-two civil suits had been commenced claiming more than ninety-nine million dollars in damages. Howarth, *Sovereign Immunity—An Argument Pro*, 22 CLEV. ST. L. REV. 48 (1973). Many suits encountered difficulties. One was dismissed on the ground that the state could not be sued in tort. Krause v. Rhodes, 28 Ohio App. 2d 1, 274 N.E.2d 321 (1971), *rev'd*, 31 Ohio St. 2d 132, 285 N.E.2d 736 (1972), *appeal dismissed*, 409 U.S. 1052 (1973). In another, the Court held that a suit for injunctive relief against premature deployment of the guard by government officials and for a declaration that a state statute was unconstitutional was not justiciable under the circumstances. Gilligan v. Morgan, 413 U.S. 1 (1973).

12. Governor Rhodes was sued for initially calling out the guard and for allegedly inciting unconstitutional activity later. Brief for Petitioners at 11-12, 59-60, Scheuer v. Rhodes, 94 S. Ct. 1683 (1974).

13. 94 S. Ct. at 1686.

14. Two proclamations by the governor were attached to the motion to dismiss, one ordering the guard to protect against truck strike violence and the other recounting conditions on the Kent State campus. *Id.*

15. Krause v. Rhodes, Civil No. C 70-544 (N.D. Ohio, June 2, 1971); Miller v. Rhodes, Civil No. C 70-816 (N.D. Ohio, June 2, 1971); Scheuer v. Rhodes, Civil No. C 70-859 (N.D. Ohio, June 2, 1971).

16. Krause v. Rhodes, 471 F.2d 430 (6th Cir. 1972) (2-1 decision).

17. 94 S. Ct. at 1686.

18. *Id.* at 1687, *citing* Edelman v. Jordan, 94 S. Ct. 1347 (1974).

19. 209 U.S. 123 (1908). This case, which permitted suit for injunctive relief against the attorney general of Minnesota to prohibit enforcement of an allegedly unconstitutional statute, attempted to reconcile the eleventh amendment prohibition of suits against the state with the fourteenth amendment prohibition of constitutional in-

nevertheless concluded that "the Eleventh Amendment provides no shield for a state official" confronted by a section 1983 claim. The Court reasoned that

> when a state officer acts under a state law in a manner violative of the Federal Constitution, he "comes into conflict with the superior authority of that Constitution, and he is in that case stripped of his official or representative character and is subjected *in his person* to the consequences of his individual conduct."[20]

Although both *Young* and *Scheuer* concerned state officers with considerable discretionary powers, the two cases arguably can be distinguished because *Young* was a federal action seeking an injunction rather than monetary damages. Nevertheless, *Scheuer* concluded that, as long as recovery is not sought from public funds, executive officials whose discretionary conduct[21] violates section 1983 rights can be sued for damages in their individual capacities.[22]

In similarly rejecting the court of appeal's theory of executive immunity,[23] the Supreme Court indicated that immunities were judicial value judgments. Executive immunity, for example, represented " 'an impression of a policy designed to aid in the effective functioning of government.' "[24] Unlike absolute legislative[25] and judicial[26] immunities, however, unqualified executive immunities are not firmly en-

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fringements occurring "under color of" state law. This case was the precedent for actions against school boards in the important desegregation cases of the 1950's.

20. 94 S. Ct. at 1687, *quoting Ex parte* Young, 209 U.S. 123, 159-60 (1908).

21. The three cases cited to support the Court's conclusion involved public officials with relatively little discretionary power. In Myers v. Anderson, 238 U.S. 368 (1915), an election official violated section 1983 by enforcing a "grandfather clause" in Maryland that effectively denied a black the right to vote. Damage actions in voting cases have been previously justified by the special nature of the constitutional deprivation. *See* McCormack, *supra* note 4, at 60-64. The other two cases, Monroe v. Pape, 365 U.S. 167 (1961), and Moor v. County of Alameda, 411 U.S. 693 (1973), concerned alleged brutality by law enforcement officials.

22. Although courts might recognize an absolute sovereign immunity for states under the eleventh amendment depriving federal courts of subject-matter jurisdiction, there is no jurisdictional bar to section 1983 actions against state executive officials in their individual capacities. The qualified immunity enjoyed by executive officials is an affirmative defense or privilege, more accurately relating to the claim's merits than to a court's jurisdiction. *See* Engdahl, *supra* note 6, at 41.

23. "It can hardly be argued at this late date that under no circumstances can the officers of state government be subject to liability under [section 1983]." Scheuer v. Rhodes, 94 S. Ct. 1683, 1690 (1974).

24. Barr v. Matteo, 360 U.S. 564, 572-73 (1959), *quoted in* Scheuer v. Rhodes, 94 S. Ct. 1683, 1689 (1974). *Barr* involved a libel action rather than a section 1983 infringement.

25. 94 S. Ct. at 1690, *citing* Tenney v. Brandhove, 341 U.S. 367, 379 (1951).

26. 94 S. Ct. at 1690, *citing* Pierson v. Ray, 386 U.S. 547, 554 (1967).

trenched in law and judicial history.[27] Since Congress did not intend for section 1983 to abolish all common law immunities[28] or to be completely circumscribed by absolute immunities,[29] the Court initiated a search for a middle ground. Citing previous immunity justifications such as possible injustice to officials who are required to make discretionary decisions and harm to efficient, effective government,[30] the Court noted that the concept of immunity presupposes that "it is better [for an official] to risk some error and possible injury from such error than not to decide or act at all."[31]

Despite such considerations, the Court concluded that judicial review of discretionary executive conduct allegedly violating constitutional rights was imperative. Otherwise, for example, a governor's determination of the "fact" of an insurrection to justify his actions would make "the fiat of a state governor, and not the Constitution of the United States"[32] the supreme law of the land. To prevent section 1983 from being "drained of meaning,"[33] the Court proposed a qualified immunity for executive-branch personnel. The immunity would be

> dependent upon the scope of discretion and responsibilities of the office and all the circumstances as they reasonably appeared. . . . It is the existence of reasonable grounds for the belief formed at the time and in light of all the circumstances, coupled with good faith

27. 94 S. Ct. at 1691. The Court noted that unlike executive actions, judicial errors may be reviewed and corrected on appeal. *Id.* at 1690. Judge Celebrezze examined the status of executive immunities in greater detail in Krause v. Rhodes, 471 F.2d 430, 454 (6th Cir. 1972) (dissenting opinion).

28. 94 S. Ct. at 1690.

29. *Id.* at 1692.

30. *Id.* at 1688.

31. *Id.* at 1689. In Gregoire v. Biddle, 177 F.2d 579, 581 (2d Cir. 1949), Judge Learned Hand held that the United States Attorney General and other federal officials enjoyed absolute immunities when sued by the plaintiff allegedly for falsely arresting him as an enemy alien. Hand reasoned that it was "better to leave unredressed the wrongs done by dishonest officers than to subject those who try to do their duty to the constant dread of retaliation." *Id.* Although *Scheuer* appears to have approved Hand's logic, the *Gregoire* result has probably been overruled, at least concerning section 1983 actions, by *Scheuer* and Bivens v. Six Unknown Named Agents, 456 F.2d 1339 (2d Cir. 1972), *on remand from* 403 U.S. 388 (1971). Because Bivens held that federal officials were subject to suit under section 1983, one commentator suggested, even before *Scheuer*, that *Bivens* might have overruled *Gregoire*. Engdahl, *supra* note 6, at 54. This implies that Hand's logic in *Gregoire*, while still compelling, may no longer represent overriding considerations.

32. Sterling v. Constantin, 287 U.S. 378, 397-98 (1932), *quoted in* Scheuer v. Rhodes, 94 S. Ct. 1683, 1692 (1974). In *Sterling* the Governor of Texas justified seizure of certain oil wells because of an insurrection. Rejecting the argument that the Governor's determination was unreviewable, the Court examined the facts involved, determined that the Governor's actions were indefensible, and granted the plaintiff's request for a restraining order.

33. 94 S. Ct. at 1692.

> belief, that affords a basis for qualified immunity of executive officers for acts performed in the course of official conduct.[34]

The lower courts were admonished not to presume either an official's good faith or the existence of reasonable justification for the actions taken.[35] Although distinguishing between duties involving little discretion and those in which the range of possible decisions is "virtually infinite,"[36] the Court rejected any categorical distinction between ministerial and discretionary functions as a basis for the immunity.[37] Concentrating instead on the nature of the particular duties allegedly abused, the Court incorporated the subjective "good faith" and objective "reasonableness" standards of *Pierson v. Ray*[38] into a qualified immunity for discretionary actions. Thus, the extent of the immunity would vary with the scope of discretion dictated by the circumstances of the case.[39]

The Court's proposed standards reflect the complicated considerations inherent in damage actions involving official abuse of discretionary powers. As an official's range of viable options increases, it becomes more difficult to formulate clear-cut grounds for liability.[40] In determining whether an official acted within the scope of his permissible discretion, lower courts have agreed with the Supreme Court that

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34. *Id.*

35. *Id.* at 1693.

36. *Id.* at 1691.

37. Jennings, *Tort Liability of Administrative Officers*, 21 MINN. L. REV. 263, 297-301 (1937) criticizes such distinctions as tests in determining administrative liability.

38. 386 U.S. 547, 557 (1967).

39. Judge Celebrezze's two-tier analytical framework would be adaptable to the Court's formation—if the actions were "within the range of discretionary measures which were justified by the exigencies of the situation," defenses of good faith or honest belief became relevant; if outside that range, the defenses were not allowed. Krause v. Rhodes, 471 F.2d 430, 463 (6th Cir. 1972) (dissenting opinion). The initial determination is whether the action was within the permissible scope of discretion. In one case, for example, involving libel rather than a section 1983 violation, immunity was granted for statements made during the school board's investigation of a superintendent, but comments to newspaper reporters were ultra vires and therefore not protected. Lipman v. Brisbane Elementary School Dist., 55 Cal. 2d 224, 359 P.2d 465, 11 Cal. Rptr. 97 (1961).

40. The Fifth Circuit Court of Appeals recently had to consider grounds for liability for executive officials with differing levels of responsibility in Roberts v. Williams, 456 F.2d 819 (5th Cir.), *cert. denied*, 404 U.S. 866 (1971). The court found a superintendent of a prison farm personally liable when a trusty guard that he appointed shot an inmate. The ground for liability was the superintendent's failure adequately to train and supervise the guard, who was twenty-three years old, had only a fourth-grade education, and had been previously convicted of assault with intent to kill. *Id.* at 821-22. Despite their awareness of the superintendent's policies, however, members of the farm's board of supervisors were deemed not liable for a "good faith, reasonable choice among valid policy alternatives, even if an unwise one. . . ." *Id.* at 831.

certain governmental responsibilities entail broad discretion.[41] Governor Rhodes' initial deployment of the guard may well have been a reasonable choice among valid alternatives unless, however, he were aware of the guard's purported unusual propensity for violence.[42] He might also be liable if he later incited the use of unnecessary force at Kent State.[43] It would be more difficult to find the Kent State president's conduct actionable merely because of his passive acquiescence in the governor's apparent authority.[44]

Despite greater fairness to section 1983 claimants and increased official accountability for unconstitutional acts, the conflict between these important considerations and the policy justifications for immunity remains unresolved. Fear of personal liability still results in indecision, and defending claims is highly burdensome.[45] On the other hand, broad immunities can bar plaintiffs from any effective avenue of redress.[46]

Scheuer's attempt to reconcile these competing policy considerations also raises some uncertainties[47] and problems. First, analysis of the immunity solely in terms of the reasonableness of the defendant's actions arguably ignores the seriousness of the alleged offense.[48] This

41. *Id.* at 831.

42. The Ohio National Guard in 1970, according to one charge made after the Kent State tragedy, was particularly prone to violence because of the nature of their training and use of loaded weapons. Gilligan v. Morgan, 413 U.S. 1, 4 (1973). *Roberts*, for example, suggested that the board of supervisors members might have been personally liable on charges of cruel and unusual punishment under section 1983 if they had been aware of certain disciplinary practices at the camp. Roberts v. Williams, 456 F.2d 819, 832 (5th Cir.), *cert. denied*, 404 U.S. 866 (1971). Although Governor Rhodes' knowledge of the guard's propensity for violence would not be actionable, that knowledge might suggest the unreasonableness of dispatching the guard to Kent State.

43. *See* note 12 *supra*.

44. Personal liability for educators is an increasing concern. One commentator believes that members of a board of regents in general are not "proper parties" to a damage action. McCormack, *supra* note 4, at 16.

45. *See* text accompanying note 30 *supra*.

46. A governor, for example, may be immune for reasonably choosing between valid policy alternatives and soldiers immune in carrying out their duties in a reasonable manner. Thus no recovery would be possible even if a plaintiff unquestionably was deprived of constitutional rights by the combination of actions.

47. One such uncertainty concerns the applicability of the *Scheuer* qualified immunity standards to equitable remedies. Unlike damage actions, equity suits under section 1983 generally involve the performance or nonperformance of official duties without the attendant threat of extensive personal liability to officials. Considerations of indecisive action or injustice to officials that justify executive immunities in damage actions are much less relevant in equity suits. Justification for a qualified immunity might exist, however, because of the potentially disruptive effect of equity suits on government and the general reluctance of courts to review fully the constitutionality of every decision of executive branch officials.

48. One commentator would assess executive immunity claims in terms of the

particular shortcoming, however, may be more apparent than real; the Court's assessment of the reasonableness of an official's conduct would certainly take into account the likelihood that such conduct would induce unnecessary violence.[49]

In addition, *Scheuer* may encourage suits by claimants with minor, or even feckless, grievances.[50] Therefore, a narrower definition of the claims permitted under section 1983 possibly should accompany the lowering of the immunity barrier.[51] Recognizing the fundamental change in federal-state relations resulting from section 1983,[52] Congress carefully limited recoveries to "rights, privileges, and immunities" secured by the Constitution.[53] Since the act was designed to supplement rather than to supplant traditional state remedies,[54] the rapid expansion of the scope of actions permitted under the section has elicited criticism.[55] Greater care in restricting these actions would protect both the federal courts and government officials from relatively minor claims that should not be considered "constitutional torts."[56]

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character and severity of the plaintiff's injury, the existence of alternative remedies, the court's capacity to evaluate the propriety of the official's acts and the effect of liability on effective administration. Jaffe, *supra* note 9, at 219.

49. One aspect of determining reasonableness should be the foreseeability of types of injuries that a certain action might produce, with actions risking unreasonable injuries being outside the scope of permissible discretion. Resort to military action, for example, "has traditionally been viewed with suspicion and skepticism." Scheuer v. Rhodes, 94 S. Ct. 1683, 1691 (1974).

50. In Roberts v. Barbosa, 227 F. Supp. 20 (S.D. Cal. 1964), for example, the plaintiff named forty-four different defendants representing almost every level of government service. The complaint was dismissed on traditional immunity grounds.

51. One list of wrongs actionable under section 1983 included violations of speech, assembly, religion, privacy; racial discrimination in labor, education, housing, public accommodations, and voting; economic discrimination, the right to bear arms, freedom from unreasonable searches and seizures, the right to vote and to participate in political processes; due process in criminal investigating, indictment, trials and appeal; and equality in legislative and congressional apportionment. Comment, *Civil Actions for Damages under the Federal Civil Rights Statutes*, 45 TEXAS L. REV. 1015, 1021 (1967).

52. The "legislative history makes evident that Congress clearly conceived that it was altering the relationship between the States and the Nation with respect to the protection of federally created rights." Mitchum v. Foster, 407 U.S. 225, 242 (1972), holding that section 1983 provided an authorized exception to the anti-injunction statute.

53. Monroe v. Pape, 365 U.S. 167, 183 (1961).

54. *See* McCormack, *supra* note 4, at 7.

55. Although immunities are one means of limiting redress, the policy considerations supporting immunities differ from those justifying restrictions on section 1983 actions. The goals of the latter are avoidance of unnecessary preemption of traditional state torts and the protection of the federal courts from a flood of relatively minor claims. Qualified immunities, on the other hand, exempt tortfeasors from personal liability whenever certain conditions are met, regardless of the seriousness of the violation and the availability of redress from other sources.

56. *Compare* Shapo, *Constitutional Tort: Monroe v. Pape and the Frontiers Beyond*, 60 NW. U.L. REV. 277, 324, 327 (1965), *with* McCormack, *supra* note 4, at 7-10. Shapo, suggesting the dangers of preempting state laws, would limit actionable in-

Another means of guarding against undue harassment of officials would be to redefine the traditional role of qualified immunities. The Supreme Court's emphasis on reasonableness[57] to justify executive conduct is analagous to the "reasonable man" standard in torts. Thus, a "reasonable official" standard might be adopted, with the scope of permissible discretion inherent in the office becoming an important consideration in determining the reasonableness of the conduct. In addition, rather than a defendant asserting and proving an affirmative defense, the section 1983 plaintiff might be required to overcome a presumption of reasonableness of the official's conduct.[58]

Even though unnecessary harassment of executive officials can be minimized,[59] the detente between executive immunities and section 1983 actions remains fragile. As long as governments summarily deny responsibility for wrongful actions of their employees,[60] the *Scheuer* approach may nevertheless be the best available. Since reliance on the individual offender for redress in these situations is inadequate, government responsibility is imperative as the only feasible means of reconciling the conflicting policy considerations between executive immunities and section 1983 actions.[61] If governments would acknowledge the common-law assurance of state indemnity for damages incurred by a public official's exercise of good faith judgment,[62] restraints on decisive action would clearly be reduced. A government's shielding

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juries to "outrageous" situations. Stressing that the federal remedy is supplementary to state remedies, McCormack criticizes Shapo's definition of constitutional torts as being too dependent on emotion and, instead, would emphasize the form of the remedy and a plaintiff's reasonable belief that the officer was pursuing a governmental objective.

57. Scheuer v. Rhodes, 94 S. Ct. 1683, 1692 (1974).

58. Caution should be taken, however, not to make the plaintiff's burden too onerous. Summary judgment can be another valid means of protecting defendants from frivolous claims, but the Court appears concerned that section 1983 claimants not be dismissed prematurely. *See* Adickes v. S.H. Kress & Co., 398 U.S. 144, 157 (1970).

59. Other means of protecting government officials are also available. Governments could agree to reimburse officials for defense expenses if the officials were ultimately exonerated or if they could demonstrate good faith. The greater use of administrative boards and procedures, though possibly of little help in emergency situations, would protect plaintiffs' rights and provide a convenient forum for presentation of the reasons for an official's actions. *See* Jennings, *supra* note 37, at 306-14, for a thorough analysis of administrative processes that could be established.

60. McCormack, *supra* note 4, at 29, concluded that "vicarious liability would be an effective deterrent, and therefore it is unfortunate that the Court dismissed it out of hand" in Monroe v. Pape, 365 U.S. 167 (1961).

61. There is little reason now for states not to acknowledge financial responsibility for their employees' actions. "Given the availability of insurance and the ability of states to raise revenues, there is no reason to protect the state from the legitimate claims of its constituents." Verkuil, *Immunity or Responsibility for Unconstitutional Conduct: The Aftermath of Jackson State and Kent State*, 50 N.C.L. REV. 548, 558 (1972).

62. Jaffe, *supra* note 9, at 216.

of both the individual official and itself from suit may also deny a due process right to redress under section 1983.[63] As a corollary, not only should at least one defendant be amenable to suit but, in the interests of justice, he should also be financially responsible.

Although Chief Justice Burger has recommended a viable format for congressional action in this area,[64] legislatures have been unwilling to take the needed steps.[65] Although the Court might understandably prefer that legislative action break the sovereign immunity barrier,[66] Congress arguably has already expressed its intent in enacting section 1983. Since judicial value judgments created the initial expansion of state immunities, the Court should possibly re-examine those judgments and affix "respondeat superior" responsibility to governments for unconstitutional employee actions.[67] *Scheuer*, however, may have accomplished this more subtly. With officials subject to personal liability, governments may find that to attract and keep qualified executive personnel, they will have to protect those officials from expensive damage actions either through assurances of indemnity or by consenting to suit.[68]

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63. Verkuil, *supra* note 61, at 597.

64. Bivens v. Six Unknown Named Agents, 403 U.S. 388, 421-23 (1971) (dissenting opinion). In launching an attack on the exclusionary rule, the Chief Justice suggested the creation of an effective means of redress for citizens whose rights are violated by unlawful fourth amendment conduct by government officials. These suggestions for a remedy against the government itself appear adaptable to section 1983 violations:

> (a) a waiver of sovereign immunity as to illegal acts of law enforcement officials committed in the performance of assigned duties;
>
> (b) the creation of a cause of action for damages sustained by any person aggrieved by conduct of governmental agents in violation of the Fourth Amendment or statutes regulating official conduct;
>
> (c) the creation of a tribunal, quasi-judicial in nature or perhaps patterned after the United States Court of Claims, to adjudicate all claims under the statute. . . .

Id. at 422-23.

65. Governments have generally refused to acknowledge liability for employee actions. *See* Engdahl, *supra* note 6, at 18, 55-56. Engdahl concluded that even the right to indemnity would provide little solace when the state refused to be sued for indemnity. He suggested that the replacement of older nineteenth century immunity standards, which were quite harsh on executive officials, would be unqualifiedly beneficial if effective alternative means for redress were available for aggrieved plaintiffs.

66. Previous eleventh amendment interpretations, the long existence of the immunities, and the considerable financial burden that might be felt by governments would certainly help explain the Court's reluctance.

67. The Court has not refrained from imposing financial burdens on governments when constitutional rights were at stake. In Griffin v. Board of Educ., 377 U.S. 218 (1964), for example, the Court demanded that public schools be kept open even if local taxes had to be raised.

68. State and federal governments will be affected because the *Scheuer* standards have already been held applicable to federal executive officials. States Marine Lines, Inc. v. Shultz, 498 F.2d 1146 (1974).

The Supreme Court has taken important steps toward assuring that section 1983 claims against executive officials will have a full hearing in federal courts. Initiating a reevaluation of governmental immunity justifications, the Court has also proposed a workable qualified immunity standard for alleged abuses of discretionary power. The Court's concern for the plight of citizens deprived of constitutional rights under color of state law hopefully will reveal the inadequacy of relying solely on individual officials for compensation. The Court has recognized the necessity for individual accountability in section 1983 actions. The next step, whether taken by the legislature or the judiciary, is to assure that the accountability is extended to the government. Employer responsibility for the actions of its employees, especially when the employer has clothed those actions in the legitimacy of state law, cannot justifiably end where government employment begins.

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