UNC SCHOOL OF LAW

NORTH CAROLINA LAW REVIEW

Volume 53 | Number 3 Article 4

2-1-1975

Notes

North Carolina Law Review

NOTES

Antitrust Law—United States v. General Dynamics: Toward an Analytical Approach to Post-Acquisition Evidence

It has been suggested by some of the more audacious legal commentators that the Government cannot lose a suit under section 7 of the Clayton Act.[1] The antitrust enforcement agencies have an unfair advantage over the section 7 defendant, it is urged, because under the time-of-suit doctrine[2] they may utilize evidence of events that have occurred between the time of the challenged acquisition and trial to establish the probable anti-competitive effect[3] of the acquisition, while such post-acquisition evidence tending to reflect favorably upon the corporate defendant's position has been held to be of limited probative value.[4] One of the primary justifications advanced for the disparate treatment accorded post-acquisition evidence is that defendants are likely to refrain deliberately from engaging in anti-competitive conduct prior to the time the suit is filed to establish the lack of future anti-competitive potential of the acquisition.[5]

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1. Solomon, *Why Uncle Sam Can't Lose a Case Under Section 7 of the Clayton Act*, 53 A.B.A.J. 137, 140-41 (1967). Section 7 of the Clayton Act, 15 U.S.C. § 18 (1970) reads as follows:

> No corporation engaged in commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share capital and no corporation subject to the jurisdiction of the Federal Trade Commission shall acquire the whole or any part of the assets of another corporation engaged also in commerce, where in any line of commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or tend to create a monopoly.

2. *See* text accompanying notes 29-33 *infra*. For a fuller discussion of this doctrine see Barnes, *Competitive Mores and Legal Tests in Merger Cases: The Du Pont-General Motors Decision*, 46 GEO. L.J. 564 (1958); Subcommittee on Section 7, *The Backward Sweep Theory and the Oligopoly Problem*, 32 ANTITRUST L.J. 306 (1966).

3. In view of the Clayton Act's purpose of arresting mergers when the trend toward a lessening of competition in a line of commerce is in its incipiency, the standard for establishing a violation of the Act is one of "probability." *See* Brown Shoe Co. v. United States, 370 U.S. 294, 317-18 (1962); S. REP. No. 698, 63d Cong., 2d Sess. 1 (1914).

4. *See, e.g.*, FTC v. Proctor & Gamble Co., 386 U.S. 568 (1967); FTC v. Consolidated Foods Corp., 380 U.S. 592 (1965); United States v. Continental Can Co., 378 U.S. 441 (1964); United States v. Ingersoll-Rand Co., 320 F.2d 509 (3d Cir. 1963); United States v. Phillips Petroleum Co., 367 F. Supp. 1226 (C.D. Cal. 1973); International Tel. & Tel. Corp. v. General Tel. & Elec. Corp., 351 F. Supp. 1153 (D. Hawaii 1972). *See also* text accompanying notes 34-42 *infra*.

5. *See* Note, *Post-Acquisition Evidence and Conglomerate Mergers*, 46 N.C.L. REV. 366, 369 (1968); text accompanying notes 39-40 *infra*.

The United States Supreme Court recognized this consideration in *United States v. General Dynamics Corp.*,[6] but at the same time criticized the past approach as giving the Government a "heads-I-win, tails-you-lose" advantage over section 7 defendants. In upholding a merger exclusively on the basis of post-acquisition evidence, the Court indicated that such evidence diminishing the probable anti-competitive effect of an acquisition may be given controlling significance when it reflects substantial changes in market structure, not likely to have been the product of the defendant's deliberate manipulation.[7]

THE GENERAL DYNAMICS CASE

General Dynamics arose out of a 1959 horizontal merger[8] in the Midwestern coal industry, that occurred when Freeman Coal Mining Corporation acquired United Electric Coal Company.[9] In 1967 the Justice Department sued under section 7 of the Clayton Act, charging that Freeman's acquisition had the probable effect of substantially lessening competition in the production and sale of coal in the relevant geographic markets.[10] As evidence of the violation, the Government relied primarily upon statistics indicating that the merged company controlled a market share comparable to those that had been found in prior cases to be violative of section 7.[11] The statistics also revealed a marked trend toward industry concentration in the relevant markets.[12]

A sharply divided Supreme Court, while acknowledging the past instances in which statistical showings comparable to the one offered by the Government were sufficient to make out a case requiring divestiture,[13] held by a vote of five to four that the Freeman-United Electric merger did not pose a substantial threat to competition at the time of

6. 415 U.S. 486 (1974).

7. *Id.* at 506.

8. "A horizontal merger involves the acquisition by one company of all or part of the stock or assets of a competitor which offers the same goods or services in the same market area." E. KINTNER, AN ANTITRUST PRIMER 88 (1964).

9. Shortly thereafter Freeman was acquired by defendant General Dynamics, but the legality of this acquisition was never at issue.

10. These markets consisted of the State of Illinois and the Eastern Interior Coal Province Sales Area (EICP). The EICP is one of four major coal distribution areas recognized by the coal industry, comprising Illinois, Indiana, and parts of Kentucky, Tennessee, Iowa, Minnesota, Wisconsin, and Missouri. 415 U.S. at 490.

11. *See* note 24 *infra*. For a more detailed review of some of these cases and the criteria generally relied upon in assessing the competitive effect of a merger see note 23 *infra*.

12. *See* note 24 *infra*.

13. 415 U.S. at 496.

suit, "[i]rrespective of the markets within which the acquiring and the acquired company might be viewed."[14] In reaching this conclusion, the majority relied heavily on factors relating to the structure and prevailing business customs of the coal industry, with particular emphasis on post-acquisition evidence of United Electric's depleted coal reserves.

Specifically, the majority noted that electric utility companies today consume the great bulk of the coal produced in this country.[15] Moreover, the flow of coal from the mines to these utilities is largely governed by long-term "requirements contracts,"[16] often lasting for as long a period as the parties remain productive. In rejecting the Government's prima facie case based on past coal production statistics, the majority reasoned that the true indicator of a coal company's ability to affect competition lay in its ability to negotiate new long-term contracts with the utilities. The fact that a coal company accounts for a large percentage of the production in a particular market proves nothing about its ability to affect prices if the bulk of such production is already committed at a constant price under existing long-term contracts. The majority accepted the district court's finding that at the time the suit was brought United Electric's coal reserves were depleted to the extent that it lacked the resources necessary to compete for future long-term contracts[17] and that new reserves were unavailable for acquisition.[18] It followed that its divestiture would not affect the vigor of competition in any market.[19]

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14. *Id.* at 511. Interestingly, the Court did not reach the market issues in its opinion. For that reason an analysis of the relevant product and geographic markets is outside the scope of this note. Suffice to say that it is highly unusual for a determination of the competitive effect of a merger to be made without a prior determination of the markets in which to judge such effect.

15. *Id.* at 499. *See generally* R. MOYER, COMPETITION IN THE MIDWESTERN COAL INDUSTRY 41 (1964).

16. Due to the large capital investment required in the construction of a power generating plant, it is essential to the electric utility that a flow of coal sufficient to meet its needs be guaranteed in advance to the greatest extent practicable. Requirements contracts similarly benefit the coal producer by assuring an outlet for his production.

17. 415 U.S. at 503.

18. *Id.* at 509. Since United Electric was a strip mining company, the majority discounted the availability of deep reserves in reaching this conclusion.

19. The Government contended that this "weak reserve" argument was essentially a "failing company" defense and that the defendants should have been required to conform to the strict limitations placed on its use. The failing company defense, first espoused by the Supreme Court in International Shoe Co. v. FTC, 280 U.S. 291 (1930), is an affirmative defense that, if sustained, will validate a merger, despite anti-competitive effects, if the acquired company faces a grave probability of business failure unless the merger takes place and if it can be shown that no other prospective purchaser was available. *See* Citizen Publishing Co. v. United States, 394 U.S. 131 (1969). The majority rejected this contention, however, on the grounds that the failing company defense

Finally, and most significantly, the majority rejected the assertion that its reliance on United Electric's weak coal reserves at the time of suit placed undue emphasis on post-acquisition evidence.[20] While recognizing an "obvious" need for a limitation on the weight accorded such evidence, the majority felt that the practical considerations underlying this limitation were inapplicable to the present case.[21] The evidence of weak reserves, it was held, "could not reflect a positive decision on the part of the merged companies to deliberately but temporarily refrain from anti-competitive actions."[22] Thus, by upholding the merger, the Court indicated that a defendant's post-acquisition evidence may be given controlling weight in defending a merger subjected to section 7 attack. This result was reached notwithstanding the fact that had post-acquisition evidence not been considered, the Freeman-United Electric merger almost certainly would have been dissolved under the criteria generally relied upon to determine a section 7 violation.[23] The Government's undisputed statistical showing casts con-

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is a "lesser of two evils" approach, which presupposes an adverse effect on competition, but permits a merger because even worse consequences would presumably accrue both to competition, and to the community in which the failing company is located, if it is forced to go out of business as an alternative to merger. Rather than establishing a failing company defense, the majority reasoned, the evidence of United Electric's weak reserves was relevant to the initial question of whether there would be an adverse effect on competition to begin with, and established that there would not be.

20. For cases limiting the probative value of post-acquisition evidence tending to diminish the probability of anti-competitive effects see cases cited note 4 *supra*.

21. *See* text accompanying notes 35-42 *infra*.

22. 415 U.S. at 506. The dissenters disagreed with this factual conclusion, citing the ready availability of deep reserves and United Electric's acquisition of substantial amounts of these reserves. *Id.* at 524 & n.21 (Douglas, J., dissenting).

23. *See* Brown Shoe Co. v. United States, 370 U.S. 294, 321-22 (1962). Market shares were conceded to be the primary index of market power, but other important criteria included the degree of concentration already existing in the market, whether a trend toward concentration over a longer time span was discernible, and the ease of entry of new competitors into the market. In United States v. Philadelphia Nat'l Bank, 374 U.S. 321 (1963), the Supreme Court found a merger that produced a firm controlling a 30% share of the market to be presumptively illegal where the market concentration was already high before the merger. The Court stated that "we think that a merger which produces a firm controlling an undue percentage share of the relevant market, and results in a significant increase in the concentration of firms in that market, is so inherently likely to lessen competition substantially that it must be enjoined in the absence of evidence clearly showing that the merger is not likely to have such anti-competitive effects." *Id.* at 363. The Court further warned that "if concentration is already great, the importance of preventing even slight increases in concentration . . . is correspondingly great." *Id.* at 365 n.42. *See* United States v. Pabst Brewing Co., 384 U.S. 546 (1966); United States v. Von's Grocery Co., 384 U.S. 270 (1966); United States v. Continental Can Co., 378 U.S. 441 (1964); Maryland & Va. Milk Prod. Ass'n, Inc. v. United States, 362 U.S. 458 (1960). *But see* United States v. Crowell, Collier & Macmillan, Inc., 361 F. Supp. 983 (S.D.N.Y. 1973) (merger was upheld despite a high degree of market concentration and a 42.5% market share on the part of the merged

siderable light on this conclusion.[24]

POST-ACQUISITION EVIDENCE AND "COMPETITIVE EFFECTS"

The role that post-acquisition evidence has played in assessing whether a merger poses a substantial threat to competition has been a source of controversy. Some feel that such evidence is the best evidence available at the time of suit, and, therefore, both parties should be permitted to use it to remove section 7 determinations from the realm of speculation.[25] On the other hand, this evidence has been discounted as of little probative value to either side,[26] and, in any case, contrary to the specific statutory language of section 7, which defines a violation in terms of the initial acquisition, and not in terms of what later occurred.[27] While the state of the law prior to *General Dynamics* represented neither of these extremes, it has pleased few legal commentators and even fewer corporate defendants.[28]

The Supreme Court in *United States v. E. I. du Pont de Nemours & Co.*[29] first sanctioned the Government's use of post-acquisition evidence by holding that the probability that an acquisiton is likely to restrain competition is viewed as of the time of the antitrust suit rather

company). *See generally* von Kalinowski, *Section 7 and Competitive Effects*, 48 VA. L. REV. 827 (1962).

24. At the time of the merger the two firms produced 12.4% of the coal mined in the EICP market and 23.2% in the Illinois market. This is a far larger market share than the 5% found illegal in *Brown Shoe*, and in Illinois it approaches the 30% share found presumptively illegal in United States v. Philadelphia Nat'l Bank, 374 U.S. 321 (1963). The Government bolstered its case by introducing post-acquisition evidence of a substantial increase in concentration in the market as well. The number of coal producing firms in Illinois decreased a dramatic 73% between 1957-1967, from 144 producers to 39. 415 U.S. at 494-95. Although unmentioned by the Government, the once easy access of new firms into the coal industry no longer exists. The capital requirements necessary for entry have increased, as the existing firms have become increasingly mechanized and concentrated in fewer and fewer hands. Desirable reserves are also less accessible than they once were. *See* Kennecott Copper Corp. v. FTC, 467 F.2d 67, 77 (10th Cir. 1972); R. MOYER, *supra* note 15, at 119.

25. FTC v. Consolidated Foods Corp., 380 U.S. 592, 605-06 (1965) (Stewart, J., concurring).

26. *See* Proctor & Gamble Co., 63 F.T.C. 1465, 1534 (1963) (2d opinion of the FTC), *aff'd*, 386 U.S. 568 (1967). The Commission mounted a multi-faceted attack on the use of post-acquisition evidence by either party, citing the possibility of frequent remands for further such evidence until the proceedings became so protracted as to preclude effective relief. *Id.* at 1559.

27. *See* FTC v. Proctor & Gamble Co., 386 U.S. 568, 592-93 (1967) (Harlan, J., concurring); Neal, *The Clayton Act and the Transamerica Case*, 5 STAN. L. REV. 179, 220-21 (1953).

28. *See, e.g.*, Note, *Postacquisition Evidence and Section 7 of the Clayton Act: A Study in Judicial Legislation*, 36 U. CIN. L. REV. 434 (1967).

29. 353 U.S. 586 (1957).

than the time of the acquisition itself. Since the Clayton Act has no applicable statute of limitations, the time of suit can be thirty years after the acquisition, as was the case in *DuPont*. Thus, *DuPont* implicitly recognized that the Government may make use of post-acquisition evidence in claiming that an acquisition, apparently harmless to competition when made, has since threatened to pose the prohibited "substantial anti-competitive effect."[30] While this rule has been criticized,[31] it has been justified as advancing the avowed Clayton Act policy of curbing monopolistic trends in their formative stages,[32] regardless of how long after an acquisition such a trend becomes apparent.[33] Critics feel, however, that a double standard is in operation because the courts and the FTC have consistently held that post-acquisition evidence may not be accorded substantial weight when it is used by the defendant to show the lack of anti-competitive consequence of the merger.[34] This disparity is not intended as an arbitrary handicap to section 7 defendants: there are four justifications for its continued viability.

In *FTC v. Consolidated Foods Corp.*[35] the Supreme Court acknowledged that the use of post-acquisition evidence by a defendant was not totally precluded, but it reversed a lower court decision for placing *undue emphasis*[36] on market conditions as they existed after the challenged merger had been consummated. In this decision the Court emphasized that the prohibition of section 7 is determined by probabilities, not by what later transpired. If the existence or nonexistence of actual anti-competitive effects were allowed to override the probability of such an occurrence existing at the time of suit, the policy of curbing such effects in their incipiency would be frustrated.[37]

Consolidated Foods further pointed out that "once the two companies are united, no one knows what the fate of the acquired company and its competitors would have been but for the merger."[38] Thus, even if competitive market conditions do not appear to have been ad-

30. *See id.* at 607.
31. *Id.* at 620 (Burton, J., dissenting).
32. S. REP. No. 698, *supra* note 3.
33. *But see* United States v. E.I. du Pont de Nemours & Co., 353 U.S. 586, 620 (Burton, J., dissenting).
34. *See* cases cited note 4 *supra*. *But see* Day, *Conglomerate Mergers and "The Curse of Bigness"*, 42 N.C.L. REV. 511 (1964); Solomon, *supra* note 1.
35. 380 U.S. 592 (1965).
36. *Id.* at 598; *see* FTC v. Proctor & Gamble Co., 386 U.S. 568, 576-77 (1967).
37. 380 U.S. at 598; *see* FTC v. Proctor & Gamble Co., 386 U.S. 568, 576-77 (1967).
38. 380 U.S. at 598. *But see id.* at 606 (Stewart, J., concurring).

versely affected by a merger, the possibility exists that competition would have been better off had there been no merger at all. Since post-acquisition evidence would shed little light on what market conditions would have been but for the merger, its defensive use should be limited.

A third justification for limiting the probative value of post-acquisition evidence is the "best-behavior" rationale.[39] If it were within the power of the defendant not to engage in anti-competitive conduct up to the time of suit, he should not be able to point to the absence of such conduct, which may be of limited duration, in order to validate the acquisition.[40]

A final and somewhat weaker justification was advanced by the FTC in *Reynolds Metals Co.*[41] The Commission refused to reopen a divestiture case to consider post-acquisition evidence on the grounds that "[e]ven though subsequent events may show that future competitive conditions are not as anticipated, this would not make legal that which was illegal . . . as of the time of trial."[42]

Faced with this background and with a merger that was apparently illegal in 1959, the essential question before the Supreme Court in 1974 was whether to take cognizance of significant changes in market structure that had occurred in the fifteen year interim, apparently beyond the control of the defendants, tending to indicate that at the time of suit there no longer existed a threat to competition as a result of the 1959 merger. As seen, the Court gave controlling weight to these post-acquisition changes, in the form of United Electric's depleted reserves and its inability to negotiate new long term contracts as a result.[43] In doing so, the Court indicated that relevant economic data unrelated to the defendant's post-acquisition behavior will not be subjected to the usual limitations merely on the basis of its classification as post-acquisition evidence.[44] In this respect, the *General Dynamics* holding is a sound one, for there is no justification for a restriction on

39. *See* text accompanying note 5 *supra.*

40. *See* Note, 46 N.C.L. REV., *supra* note 5; text accompanying note 47 *infra.*

41. 56 F.T.C. 1680 (1960).

42. *Id.* at 1681. If the evidence sought to be introduced is viewed as bearing on the probability of a substantial lessening of competition at the time of suit, then the FTC's reasoning is circular. Evidence proving that the merger was in fact legal at the time of suit is inadmissible contends the Commission, since the merger was illegal.

43. The dissent emphasized that post-acquisition evidence can be used at most to influence the time of acquisition findings, but that none were ever made by the district court. 415 U.S. at 524 (Douglas, J., dissenting).

44. *See* Note, 46 N.C.L. REV., *supra* note 5, at 378.

the use of post-acquisition evidence absent the usual reasons for applying such a restriction.

In the *General Dynamics* setting, the Court felt that it was beyond United Electric's power to remedy its depleted reserves, a circumstance the company was unlikely to have created intentionally.[45] Accepting this factual premise,[46] the "best-behavior" rationale for limiting the probative value of the depleted reserve evidence loses its force since it presupposes conditions capable of the defendant's manipulation in his own self interest. However, when manipulative capabilities exist the defendant's use of post-acquisition evidence may be discounted for reasons analogous to the suspicion with which self-serving statements are generally viewed.[47] At the same time, however, the efficacy of the "best-behavior" rationale should be viewed in terms of an analytical distinction between the case in which the source of an acquisition's probable anti-competitive effect lies in the defendant's ability to engage in specific prohibited conduct[48] and the case in which such source lies in a more general effect on market structure as a whole.[49] In the former situation the newly acquired potential to engage in anti-competitive behavior makes the acquisition illegal, regardless of the defendant's motive or actual conduct. Here it should avail the defendant little to point to the absence of actual anti-competitive behavior after the acquisition, because of the likelihood that he has been on his "best behavior."

The "best-behavior" rationale has little applicability, however, to the case in which an acquisition violates section 7 by contributing to an increasingly oligopolistic market structure. Here the defendant's good behavior is irrelevant because the Government's case is not dependent on his particular opportunity to engage in anti-competitive

45. *See* text accompanying notes 15-19 *supra.*

46. *But see* note 22 *supra.*

47. *See* 6 J. WIGMORE, EVIDENCE § 1732 (1940); Note, 46 N.C.L. REV., *supra* note 5, at 376-77. *Contra,* Handler, *Recent Antitrust Developments—1965,* 40 N.Y.U.L. REV. 823, 843-44 (1965); Note, 36 U. CIN. L. REV., *supra* note 28.

48. This concern is most often encountered with conglomerate mergers, where the acquiror enters a new market for the first time by acquiring an already existing competitor in that market. Since obviously there is no effect on market shares or concentration as a result of such a merger, specific anti-competitive practices become the focus of the section 7 charge. *See, e.g.,* FTC v. Proctor & Gamble Co., 386 U.S. 568 (1967) (predatory pricing); FTC v. Consolidated Foods Corp., 380 U.S. 592 (1965) (reciprocity); Reynolds Metals Co. v. FTC, 309 F.2d 223 (D.C. Cir. 1962) (price leadership).

49. Violations of section 7 are most often found on the basis of changes in market structure in horizontal and vertical mergers, where the merging firms were involved in the same market prior to merger, either as competitors (horizontal) or as suppliers or customers of one another (vertical).

conduct. Rather, the violation stems from a sound recognition that oligopolistic market structure tends to cause all the firms in a market to engage in economic cooperation rather than competition. Thus there is no need to apply the "best-behavior" rationale to limit the defendant's post-acquisition evidence of his own good behavior; it is sufficient that the use of such evidence as a defense fails to meet the thrust of the Government's attack.

The Supreme Court in *General Dynamics* looked carefully at the context in which the Freeman-United Electric merger took place in finding inapplicable still another rationale for limiting its consideration of post-acquisition evidence. Although this evidence apparently established United Electric as a non-viable competitive force at the time of suit, the acquisition of which could not adversely affect competition, the majority refused to adopt placidly the argument that had the merger never taken place competition might have been even more vigorous than it was. The problem with this approach, as the majority asserted, is that the factors that relegated United Electric to its present position were the product of *inevitable* forces[50] on the coal industry throughout the country. Therefore, the Court could conclude with some confidence that the structure of the market would not have been significantly different had the merger never occurred.[51]

The peculiar factual context of *General Dynamics* renders inapplicable another often cited reason for limiting the probative value of post-acquisition evidence. Generally, it is true that, if the lack of concrete anti-competitive effects could be relied upon to defeat a divestiture action, the policy of curbing monopolistic trends before they manifest themselves in actual monopolistic action would be frustrated. The post-acquisition evidence relied upon by General Dynamics, however, had nothing to do with the absence of past anti-competitive symptoms. Rather, the evidence of depleted reserves bore on the probability of a future lessening of competition at the time of suit,[52] irrespective of the fact that had the Government acted promptly in bringing suit in 1959, the merger might have been found illegal at that time. Thus, an important distinction to apply in determining the weight of the defendant's post-acquisition evidence is whether this evidence bears on the future probabilities existing at the time of suit, or merely on what occurred prior to the suit, but after the acquisition.

50. *See* text accompanying notes 15-19 *supra.*
51. 415 U.S. at 506.
52. *Id.*

There was nothing theoretically objectionable about the Court's reliance on post-acquisition evidence in *General Dynamics* from the standpoint of the policies underlying the restrictions generally placed on the probative value of such evidence. Indeed, courts ought to be more analytical in their approach to post-acquisition evidence and less prone to rely on rules that limit the value of this evidence without regard to the circumstances of the particular case. The inquiry should not be ended, however, by a determination that the reasons for generally limiting the probative value of post-acquisition evidence are not present. Cases may arise in which, despite the absence of objections to the use of post-acquisition evidence, the value of this evidence is outweighed by other factors indicating that general antitrust policies would be furthered by an order of divestiture. One such cogent policy is the need to prevent oligopoly in a natural resource extraction industry, where demand is constant, but the supply is capable of being tightly controlled, as the oil producing nations recently illustrated. In the *General Dynamics* context, perhaps the Supreme Court should have considered the possibility that the trend toward oligopoly in the coal industry would be enhanced by Freeman's acquisition of the substantial assets of United Electric, regardless of the latter's ability to compete independently in the market.[53] Generally, however, when antitrust policies do not militate against the merger, post-acquisition evidence supporting it should be capable of being accorded controlling weight in appropriate circumstances.

While the Supreme Court in *General Dynamics* may have signalled the adoption of a new approach to post-acquisition evidence in section 7 cases, it may have inadvertantly issued another signal to would-be oligopolists. Those who may have been deterred by past Government success in section 7 litigation may now proceed with questionable mergers in the hope that fortuitous events outside the control of the parties will later occur to validate these mergers. Prudent businessmen will take a careful look at the unusual facts of *General Dynamics* before embarking on such a course. The Government is not always going to wait long enough before attacking a merger to allow later occurrences to validate it.

CONCLUSION

In preserving competition by curbing oligopolistic market struc-

53. *Cf.* Bok, *Section 7 of the Clayton Act and the Merging of Law and Economics*, 74 HARV. L. REV. 226, 340 (1960).

ture, the Government should be able to utilize whatever evidence is available in bringing suit under section 7 of the Clayton Act.[54] Practical as well as policy considerations, however, prevent a section 7 defendant from enjoying a similar latitude. This in itself does not mean that the Government enjoys a "heads-I-win, tails-you-lose" advantage over its adversaries, for often the restrictions placed on the defendant's use of post-acquisition evidence will be completely justifiable, for reasons not applicable to similar use by a prosecuting authority. Where courts have automatically applied restrictive shibboleths to the defendant's use of such evidence, however, this criticism has had some validity. Hopefully the Supreme Court in *General Dynamics* has abdicated such a rigid approach for the future, in favor of a more discriminating analysis.

RAYMOND M. BERNSTEIN

Constitutional Law—Gilmore v. City of Montgomery: Is There More to Equal Protection Than State Action?

Ratification of the fourteenth amendment in 1868 guaranteed that "[n]o State shall . . . deny to any person within its jurisdiction the equal protection of the laws."[1] Fifteen years later the United States Supreme Court in the *Civil Rights Cases* "embedded in our constitutional law"[2] the principle "that the action inhibited by the . . . [equal protection clause] is only such action as may fairly be said to be that of the States. That amendment erects no shield against merely private conduct, however discriminatory or wrongful."[3] Thus a violation of the fourteenth amendment necessitates a finding of two factors.[4] First, it requires a finding of state action.[5] Secondly, there must be a finding of a substantive denial of equal protection, a denial that must

54. *Contra*, Neal, *supra* note 27.

1. U.S. CONST. amend. XIV, § 1.
2. Shelley v. Kraemer, 334 U.S. 1, 13 (1948), *citing* Civil Rights Cases, 109 U.S. 3 (1883).
3. *Id.*
4. Civil Rights Cases, 109 U.S. 3, 11 (1883).
5. Note, *Private Clubs: Freedom of Association Overlooked in Effort to Guarantee Equal Protection*, 23 SYRACUSE L. REV. 905, 910 (1972); *see* Bell v. Maryland, 378 U.S. 226 (1964).

be "wrongful" in the sense that no countervailing interest exists that makes it permissible.[6]

The complex variety of possible circumstances and changing social, moral, and political values have caused the courts to develop equal protection principles on a case by case basis.[7] Although it has emphasized state action, the Court has neglected the development of the substantive requirement.[8] By posing the technical requirement of state action as the sole criterion for finding the existence or nonexistence of constitutionally prohibited discrimination,[9] the Court has been able to ignore the hard decisions involved in defining "wrongful discrimination."[10] In *Gilmore v. Montgomery*,[11] the Burger Court has indicated that it will continue this trend.

In 1958 the petitioners asked for an injunction to desegregate the public parks of the city of Montgomery. The federal district court granted the injunction,[12] and the court of appeals affirmed, modifying the order so that the district court retained jurisdiction.[13] In spite of this order the city continued to allow segregated private school and non-school groups to use the facilities for events such as football and baseball games. Therefore, on a motion for supplemental relief, the district court prohibited the city from allowing access to public recreational facilities to either school or non-school segregated groups.[14] The court of appeals modified this order to allow use by segregated private groups and nonexclusive use by segregated school groups.[15]

The Supreme Court affirmed the prohibition on exclusive use by segregated school groups, but reversed the court of appeals' allowance of use by segregated private groups and nonexclusive use by segregated school groups. The Court based these reversals on the insufficiency

6. Civil Rights Cases, 109 U.S. 3, 11 (1883).

7. *See* Kotch v. Board of River Pilot Comm'rs, 330 U.S. 552 (1947). In Burton v. Wilmington Parking Authority, 365 U.S. 715, 722 (1961), the Court stated that "[o]nly by sifting facts and weighing circumstances can the nonobvious involvement of the State in private conduct be attributed its true significance."

8. Silard, *A Constitutional Forecast: Demise of the "State Action" Limit on the Equal Protection Guarantee*, 66 COLUM. L. REV. 855 (1966).

9. Comment, *A Statement Against State Action*, 37 S. CAL. L. REV. 463, 467 (1964).

10. Note, *Equal Protection—State Liquor License to Private Club Held Not Significant State Action*, 47 TUL. L. REV. 906, 912 (1973).

11. 417 U.S. 556 (1974).

12. Gilmore v. City of Montgomery, 176 F. Supp. 776 (M.D. Ala. 1959).

13. City of Montgomery v. Gilmore, 277 F.2d 364 (5th Cir. 1960).

14. Gilmore v. City of Montgomery, 337 F. Supp. 22 (M.D. Ala. 1972).

15. Gilmore v. City of Montgomery, 473 F.2d 832 (5th Cir. 1973).

of the record and remanded to the lower court.[16] In remanding for determination of these issues, the Court laid down guidelines for use by the lower court in analyzing the alleged denial of equal protection.

In finding the necessary state action in the exclusive use by school groups, *Gilmore* relied on several factors established by previous decisions as indicative of state action in school desegregation cases. In *Cooper v. Aaron*[17] the Court had held that "[s]tate support of segregated schools through any arrangement, management, funds, or property cannot be squared with the amendment's command that no state shall deny . . . equal protection of the laws."[18] Later cases restricted *Cooper* by holding that generalized services such as electricity, water, and police and fire protection are outside of state action.[19]

Gilmore "fleshed out" this skeleton by stating three factors[20] that, if found to be the effect of city policy, demonstrated state action: (1) enhanced attractiveness, (2) capital savings, and (3) concessions generating revenue. For example, the use of city football stadiums allowed the segregated schools to avoid building facilities of their own. This significant capital saving could be used to fill other needs thus making segregated schools more attractive and thwarting the implementation of a unified desegregated public school system.

The Court suggested that these factors are also relevant in finding state action in nonexclusive use by segregated schools.[21] Use of the facilities in common with others, however, would not provide as much benefit to the private schools. Fewer facilities would be available, and opportunities to generate revenue from concessions would be limited. Therefore, the Court concluded that the potentially lessened benefit

16. 417 U.S. at 570, 575.

17. 358 U.S. 1 (1958). In this case in which the school board attempted to postpone a desegregation plan, the Court came out strongly against any state action which would impede desegregation.

18. *Id.* at 19.

19. Norwood v. Harrison, 413 U.S. 455, 465 (1973); *see, e.g.*, Granes v. Walton County Bd. of Educ., 465 F.2d 887 (5th Cir. 1972); McNeal v. Tate County School Dist., 460 F.2d 568 (5th Cir. 1971); Poindexter v. Louisiana Fin. Ass'n Comm'n, 275 F. Supp. 833 (E.D. La. 1967), *aff'd per curiam*, 389 U.S. 571 (1968); Lee v. Macon County Bd. of Educ., 267 F. Supp. 458 (M.D. Ala. 1967); Griffin v. State Bd. of Educ., 239 F. Supp. 560 (E.D. Va. 1965), *modified*, 296 F. Supp. 1178 (E.D. Va. 1969).

20. 417 U.S. at 569. The court of appeals found the "capital savings" to be of "more practical significance," 473 F.2d at 837, while the district court saw the third factor, "concessions generating revenue," as "more significant." 337 F. Supp. at 25.

21. The Court stated that "such assistance, although proffered in common with fully desegregated groups, might so directly impede the progress of court-ordered school desegregation . . . that it would be appropriate to fashion equitable relief 'adjusting and reconciling public and private needs.'" 417 U.S. at 571.

to the schools would merit approaching the situation on the facts of each case to determine the extent of the impairment of school desegregation orders.[22]

To find state action in use of public facilities by private segregated groups, *Gilmore* examined the extent of state involvement.[23] The Court had used this criterion before in *Burton v. Wilmington Parking Authority*[24] in which the discrimination occurred in a private restaurant located on public property. *Burton* held that benefits mutually conferred on the owner and the State, in combination with public ownership of the property, significantly involved the State and therefore constituted state action.[25] In *Gilmore* the Court emphasized that not all state involvement constituted state action. It classified municipal recreational facilities such as parks, playgrounds and zoos with the traditional state "generalized services" like electricity and water.[26] Consequently the Court required a stronger showing of state involvement and suggested that the rationing of equipment or facilities to private segregated groups by a fixed schedule rather than by allowing use on a first-come first-serve basis might demonstrate the required involvement.[27] In all of these "use" situations, the Court adequately discussed the guidelines for determining state action.

To satisfy the substantive requirement of wrongful discrimination in use of public facilities by segregated private schools, the Court relied on *Brown v. Board of Education*,[28] which had banned discrimination in *public* schools. *Gilmore* refused to allow circumvention of a previous desegregation order for the Montgomery school system[29] by allowing the State to promote segregation indirectly in a *private* school.[30] The Court considered the implementation of a unitary school system to be so important that it overrode countervailing interests.[31]

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22. *Id.*
23. *Id.* at 572.
24. 365 U.S. 715 (1961).
25. In *Burton* the benefits were primarily financial. The Parking Authority would receive revenue from customers parking in the garage while eating at the restaurant and the restaurant received business from people who came primarily to use the garage.
26. 417 U.S. at 574; *see* Norwood v. Harrison, 413 U.S. 455, 465 (1973); Evans v. Newton, 382 U.S. 296, 302 (1966).
27. 417 U.S. at 574.
28. 347 U.S. 483 (1954).
29. Carr v. Montgomery County Bd. of Educ., 232 F. Supp. 705 (M.D. Ala. 1964); 253 F. Supp. 306 (M.D. Ala. 1966); 289 F. Supp. 647 (M.D. Ala. 1968), *aff'd as modified*, 400 F.2d 1 (5th Cir. 1968), *rev'd sub nom.* United States v. Montgomery County Bd. of Educ., 395 U.S. 225 (1969).
30. 417 U.S. at 569.
31. *Id.*

The requirement of a finding of wrongful discrimination received only cursory treatment in the Court's analysis of park use by segregated private groups. In a "word of caution,"[32] the Court suggested that any action restricting access to public facilities would be closely examined when it involved freedom of association. While the Court recognized that freedom of association may conflict with freedom from discrimination,[33] it failed to offer any guidelines to balance these competing constitutional rights. By failing to confront this conflict, the Court continued a trend toward sole reliance on the requirement of state action as the basis for equal protection decisions.[34]

Initially, wrongful discrimination served as the primary basis for finding a violation of equal protection. State action was a secondary limitation.[35] In *Shelley v. Kraemer*,[36] a case often noted for expanding the concept of state action, the Court realized the necessity of finding wrongful discrimination. It satisfied that requirement by reaffirming the principle that "freedom from discrimination by the states in the enjoyment of property rights was among the basic objectives sought to be effectuated by the framers of the Fourteenth Amendment."[37] In recent years, however, the Court has confused the two requirements of the fourteenth amendment to the extent that frequently the sole question posed is whether state action is present.[38] *Burton* studiously avoided the issue of whether wrongful discrimination occurred. In *Reitman v. Mulkey*[39] the Court examined a state constitutional amendment that guaranteed the right of an individual to sell his property to anyone he chose. This amendment was held to have set out the "lawful" right to discriminate and thereby encouraged discrimination. The Court found this to constitute state action and gave little consideration to whether the discrimination was "wrongful."

Gilmore was not the first time the Supreme Court has been faced

32. *Id.* at 575.
33. *Id.*
34. *See* Reitman v. Mulkey, 387 U.S. 369 (1967); United States v. Guest, 383 U.S. 745 (1966); Evans v. Newton, 382 U.S. 296 (1966); Burton v. Wilmington Parking Authority, 365 U.S. 715 (1961).
35. Silard, *supra* note 8; Comment, 37 S. CAL. L. REV., *supra* note 9.
36. 334 U.S. 1 (1948).
37. *Id.* at 20. This principle was firmly established in the landmark case of Buchanan v. Warley, 245 U.S. 60 (1917).
38. This problem troubled Justices Black, White, and Harlan in their dissent in Bell v. Maryland, 378 U.S. 226, 326-35 (1963).
39. 387 U.S. 369 (1967). *But see* Note, *Neutral Statute Held Not To Be a Source of Discriminatory State Action: The Emasculation of Reitman v. Mulkey*, 3 RUTGERS-CAMDEN L.J. 155 (1971).

with the conflict between wrongful discrimination and freedom of association. In *Moose Lodge No. 107 v. Irvis*,[40] a black who was denied service at the dining room of a private club solely because of his race, filed for injunctive relief. The Court decided the case on the grounds that the lodge's state liquor license did not supply the necessary state action to find a denial of equal protection. It did not openly confront the issue of whether the discrimination was wrongful in view of the countervailing right of freedom of association.[41] Justice Douglas in a dissent joined by Justice Marshall and quoted by the majority in *Gilmore*[42] acknowledged the valued right of freedom of association. "The associational rights which our system honors permit all white, all black, all brown, and all yellow clubs to be formed. . . . Government may not tell a man or woman who his or her associates must be. The individual can be as selective as he desires."[43] The Court, however, ignored the opportunity to define the limits of these rights by basing its decision on state action.[44]

In *Gilmore* the Court has again passed over the opportunity to consider this issue. A finding of state action is a valid and necessary determination in deciding whether discrimination falls under the constitutional prohibition. Equally important, however, is the determination that discrimination exists and that there are no countervailing constitutional rights which justify that discrimination.

Language in *Gilmore* stating that "the very exercise of freedom to associate by some may serve to infringe that freedom for others,"[45] indicates that the Court realized that these freedoms conflict.[46] While the Court speaks decisively to the issue of state action, the opinion should have revealed that a balancing[47] of these conflicting rights took place and should also have enunciated the reasons for the decision on that basis. Only if the Court addresses both requirements of the equal protection clause can the lower courts and attorneys be certain on the

40. 407 U.S. 163 (1972). For a discussion of freedom of association see Healy v. James, 408 U.S. 169 (1972); NAACP v. Alabama, 357 U.S. 449 (1958).

41. Note, 23 SYRACUSE L. REV., *supra* note 5; Note, 47 TUL. L. REV., *supra* note 10.

42. 417 U.S. at 575.

43. 407 U.S. at 179-80.

44. Note, 47 TUL. L. REV., *supra* note 10, at 912.

45. 417 U.S. at 575.

46. *See* Silard, *supra* note 8, at 870.

47. For an example of a previous use of a balancing test by the Court in an equal protection issue see Marsh v. Alabama, 326 U.S. 501 (1946).

substantive issue that the conflict of competing constitutional rights has been faced and resolved.

To admit that discrimination may not be wrongful in some circumstances is not a retreat from principles of equality, for the same retreat can be, and arguably is, being made[48] under the colors of state action. Rather it is a move toward honesty; a move for a realistic look at the basic issues that must in fact underlie the Court's decisions.

CRAIG J. TILLERY

Constitutional Law—Tax Exemption for Widows Upheld over Sex Discrimination Challenge

In recent years the fourteenth amendment's equal protection clause and the fifth amendment's due process clause[1] have been used by women to challenge statutes that allegedly discriminated against females on the basis of sex. A few of the cases have reached the United States Supreme Court, and several statutes have been found unconstitutional although no definitive test or rule has emerged from the decisions.[2] In *Kahn v. Shevin*[3] the Court faced a different type of sex discrimination case. Instead of a female plaintiff claiming that she was being denied equal protection, a man brought the suit, charging that a Florida tax exemption discriminated against males. The Court, in

48. Note, *Pennsylvania Liquor Control Board's Licensing at a Private Club Is Not Sufficient State Action Under Equal Protection Clause*, 77 DICK. L. REV. 157 (1972); Note, *Racial Discrimination by Private Club Held Not State Action Despite State Issued Liquor License and Accompanying Regulations*, 41 FORDHAM L. REV. 695 (1973); Note, *Moose Lodge v. Irvis: The Undecided Decision*, 8 NEW ENGLAND L. REV. 251 (1973); Note, *State Liquor License Granted To a Private Club Adhering To Discriminatory Guest Practice Does Not Constitute "State Action" in Violation of the Equal Protection Clause*, 2 TEXAS S.U.L. REV. 338 (1973); Note, *Licensing and Regulation of Private Clubs by State Liquor Control Board Does Not Constitute State Action*, 4 TEXAS TECH. L. REV. 211 (1972).

1. The due process clause in the fifth amendment has been employed by the Supreme Court as an equal protection clause applicable to the federal government; *e.g.*, Frontiero v. Richardson, 411 U.S. 677 (1973).

2. *See* text accompanying notes 25-30 *infra*.

3. 416 U.S. 351 (1974).

a brief opinion by Justice Douglas, upheld the validity of the exemption, saying that, since the statute's purpose was to ameliorate past discrimination against women, the sexual distinction bears a " 'fair and substantial relation to the object of the legislation.' "[4]

Mel Kahn, a Florida widower, applied for a property tax exemption under section 196.191(7) of the Florida Statutes. The statute granted widows a five hundred dollar exemption but made no similar provision for widowers.[5] His application was therefore denied. Seeking a declaratory judgment in the State courts,[6] Kahn claimed that, since the statute established a classification based on sex, it violated the fourteenth amendment's equal protection clause. The Florida Supreme Court held that the exemption was valid.[7] Quoting *Reed v. Reed*,[8] the State court found that, since women as a class earn less money than men, the sex distinction drawn in the statute " 'rest[s] upon some ground of difference having a fair and substantial relation to the object of the legislation.' "[9] The United States Supreme Court then took the case on appeal.[10]

Justice Douglas, speaking for six members of the Court,[11] rejected both of the traditional equal protection tests, strict scrutiny and rational relationship.[12] Instead he looked at the statute in light of "the financial difficulties confronting the lone woman in Florida or in any other State"[13] and applied the same "fair and substantial basis" test that the State supreme court had applied. The Court noted that the exemption "cushion[s] the financial impact of spousal loss upon the sex for which

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4. *Id.* at 355, *quoting* Reed v. Reed, 404 U.S. 71, 76 (1971).

5. The statute challenged by Kahn read as follows:

> The following property shall be exempt from taxation:
>
> . . . .
>
> (7) Property to the value of five hundred dollars ($500.00) to every widow and to every person who is a bonafide resident of the state and has lost a limb or been disabled in war or military hostilities or by misfortune.

FLA. STAT. ANN. § 196.191(7) (Supp. 1971), *as amended*, FLA. STAT. ANN. § 196.202 (1972). It should be noted that this exemption is not a new statute enacted in response to the recent push for equal rights for women. The Court noted that the 1885 Florida constitution had a property tax exemption for widows. 416 U.S. at 352.

6. The suit was filed in the Dade County Circuit Court, which found the statute unconstitutional.

7. Shevin v. Kahn, 273 So. 2d 72 (Fla. 1973).

8. 404 U.S. 71 (1971), discussed in text accompanying notes 26-29 *infra*.

9. 273 So. 2d at 73.

10. Kahn's appeal to the Court was made pursuant to 28 U.S.C. § 1257(2) (1970).

11. Chief Justice Burger and Justices Blackmun, Powell, Rehnquist, and Stewart joined in the opinion of the Court.

12. *See* notes 21-24 and accompanying text *infra*.

13. 416 U.S. at 353.

that loss imposes a disproportionately heavy burden."[14] In addition, the Court noted that in the area of taxation it had "long held that '. . . the States have large leeway in making classifications and drawing lines . . . .'"[15] Because of this leeway[16] and the leeway it was willing to give the states to remedy past discrimination, the Court affirmed the Florida Supreme Court's decision.

There were two separate dissents. Justice Brennan, joined by Justice Marshall, would have held that the statute had to meet the strict scrutiny test. Justice Brennan, however, was willing to hold that the test could be met when "the purpose and effect of the suspect classification are ameliorative . . . ."[17] He stated that "the statute serves the compelling state interest of achieving equality for [women]."[18] Nevertheless, Justice Brennan believed that the exemption was unconstitutional because it was "overinclusive."[19] Justice White, in a separate dissent, also believed that the strict scrutiny test should be applied. Unlike Justice Brennan, he stated that Florida had failed to show a compelling state interest that would justify the classifications.[20]

Prior to *Kahn* the precedent on the issue of discrimination against women was uncertain. The traditional test applied by the Court in equal protection cases has been one of either strict scrutiny or rational relationship.[21] The strict scrutiny test applies to several judicially created suspect classifications[22] and fundamental rights.[23] It requires the defending party to show a compelling governmental interest for the

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14. *Id.* at 355.

15. *Id.*, *quoting* Lehnhausen v. Lake Shore Auto Parts Co., 410 U.S. 356, 359 (1973).

16. A tax statute, of course, cannot be drawn along invidious, *e.g.*, racial, lines. In general, however, much leeway is allowed. *E.g.*, Lenhausen v. Lake Shore Auto Parts Co., 410 U.S. 356 (1973).

17. 416 U.S. at 359.

18. *Id.*

19. *Id.* at 360. *See* note 41 *infra.*

20. 416 U.S. at 361.

21. For a general discussion of the Supreme Court's treatment of equal protection cases see *Developments in the Law—Equal Protection*, 82 HARV. L. REV. 1065 (1969).

22. The suspect classifications include: (1) alienage or nationality, Graham v. Richardson, 403 U.S. 365 (1971); Korematsu v. United States, 323 U.S. 214 (1944); (2) race, Loving v. Virginia, 388 U.S. 1 (1967); and (3) perhaps illegitimacy, *see* Gomez v. Perez, 409 U.S. 535 (1973) (per curiam); Weber v. Aetna Cas. & Sur. Co., 406 U.S. 164 (1972). *But see* Labine v. Vincent, 401 U.S. 532 (1971).

23. The fundamental rights include: (1) interstate travel, Shapiro v. Thompson, 394 U.S. 618 (1969); (2) voting and related rights, Bullock v. Carter, 405 U.S. 134 (1972); Harper v. Virginia Bd. of Elections, 383 U.S. 663 (1966); (3) procreation, Skinner v. Oklahoma, 316 U.S. 535 (1942); and perhaps marital privacy, *cf.* Griswold v. Connecticut, 381 U.S. 479 (1965). *See also* Eisenstadt v. Baird, 405 U.S. 438 (1972).

Court to uphold the statutory classification. If the distinction drawn by the statute involves neither a suspect class nor a fundamental right, the Court applies the rational relationship test in which the inquiry centers on whether the distinction bears a rational relationship to the purpose of the statute.[24]

Equal protection cases involving women do not fit into these traditional tests. While the older sex discrimination cases were judged under the rational relationship test and the statutes were generally upheld,[25] since 1971 several cases have swung the pendulum to the other side. The most important of these have been *Reed v. Reed*[26] and *Frontiero v. Richardson.*[27] In *Reed* the Court unanimously[28] held that an Idaho statute giving preference to males over females in the choosing of an administrator for a decedent's estate violated the fourteenth amendment. The Court did not say that sex was a suspect classification, but it did seem to require more than a rational relationship.[29] In *Frontiero*, which invalidated a federal statute making it easier for a serviceman to claim his wife as a dependent than for a servicewoman to claim her husband similarly, four of the nine Justices[30] contended that sex was a suspect classification. Thus when Kahn brought his challenge before the Court, classifications based on sex were being scrutinized more strictly than under the rational relationship standard,

24. *E.g.*, Dandridge v. Williams, 397 U.S. 471 (1970) (classification based on wealth).

25. *E.g.*, Hoyt v. Florida, 368 U.S. 57 (1961) (upholding a law making it more difficult for women to serve on a jury than men); Goesaert v. Cleary, 335 U.S. 464 (1948) (upholding a law making it very difficult for women to become bartenders). *But see* Taylor v. Louisiana, 95 S. Ct. — (1975) (strongly disapproving the *Hoyt* case).

26. 404 U.S. 71 (1971).

27. 411 U.S. 677 (1973).

28. The vote was 7-0. Justices Powell and Rehnquist had not been appointed to the Court.

29. The Court claimed not to be applying a new test. The sexual distinction, however, was drawn for administrative efficiency, and the case has widely been read as requiring more than merely a rational relationship because administrative efficiency should meet that test. *E.g.*, Gunther, *The Supreme Court 1971 Term—Forward: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 29-37 (1972); Note, *Constitutional Law—Sex Discrimination—Supreme Court Plurality Declares Sex a Suspect Classification*, 48 TUL. L. REV. 710, 714 (1974). The Court itself admitted that the distinction had "some legitimacy." 404 U.S. at 76. Some writers think this "midway test" applies in several equal protection areas. *See* Gunther, *supra.*

30. Justices Brennan, Douglas, Marshall, and White joined in the plurality opinion saying that sex classifications should be subjected to strict scrutiny. Justice Powell, in an opinion joined by Justice Blackmun and Chief Justice Burger, concurred in the result on the basis of *Reed* without reaching the issue of whether sex should be a suspect classification. Justice Stewart, relying on *Reed*, concurred in the result. Justice Rehnquist was the lone dissenter.

but a majority of the Court was not committed to the strict scrutiny standard.

Only Justice Douglas of the four Court members who stated in *Frontiero* that sex is a suspect classification held that the *Frontiero* plurality's decision and reasoning were *not* applicable to the facts of *Kahn*. He was able, however, to carry a majority of the Court.[31] This distinction drawn by Douglas between *Kahn* and *Frontiero* is the significant aspect of *Kahn*. Unlike *Frontiero* in which the statute discriminated *against* women, the Court dealt "here with a state tax law reasonably designed to further the state policy of cushioning the financial impact of spousal loss upon the sex for whom that loss imposes a disproportionately heavy burden."[32] Therefore, although the case involved a sex classification, it did not involve discrimination against women.[33] Instead it was designed to remedy the effects of past discrimination. Justice Douglas, then, seems willing to apply a less strict constitutional standard when the statute discriminates in favor of rather than against women. Hence the focus of the Douglas approach is on the *purpose* of the statute.

A relevant case in analyzing Douglas' position is the so-called reverse discrimination case, *DeFunis v. Odegaard*.[34] In the reverse discrimination decisions, purpose is also an important focal point.[35] In *DeFunis* the preferential admissions policies[36] at the University of Washington Law School were at issue. DeFunis, a white applicant, challenged the admission procedure on fourteenth amendment equal

31. Note that the other five members of the *Kahn* majority have never said that sex is a suspect category. *See* note 30 and accompanying text *supra*.

32. 416 U.S. at 355.

33. Note that whether a classification does or does not discriminate against women is frequently far from clear. *Compare* Geduldig v. Aiello, 417 U.S. 484 (1974) (majority opinion), *with id.* at 497 (dissenting opinion). *Cf.* Cleveland Bd. of Educ. v. LaFleur, 414 U.S. 632 (1974), where the Court avoided the question by deciding that a school board rule requiring all pregnant teachers to take a leave without pay at the end of the fourth month of pregnancy violated due process.

34. 416 U.S. 312 (1974) (per curiam).

35. "Racially neutral" assignment plans proposed by school authorities to a district court may be inadequate; such plans may fail to counteract the continuing effects of past school segregation resulting from discriminatory location of school sites or distortion of school size in order to achieve or maintain an artificial racial separation. When school authorities present a district court with a "loaded game board," affirmative action in the form of remedial altering of attendance zones is proper to achieve truly non-discriminatory assignments.
Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 28 (1971).

36. These policies called for separate consideration of minority applicants' qualifications. The qualifications of the minority applicants were, in general, lower than those of other applicants. Therefore, separate consideration of these applicants meant that minority applicants were competing against each other rather than against the other, generally better-qualified applicants.

protection grounds, contending that by favoring minority groups, the university discriminated against whites. The Supreme Court did not reach the merits of the case, dismissing it on the ground of mootness.[37] Justice Douglas, however, in his dissenting opinion, did discuss the reverse discrimination issue and the importance of the purpose of the policies of admission.

DeFunis and *Kahn* are similar in several respects. Both involved, in Douglas' view, suspect categories, race in the former and sex in the latter.[38] Both cases involved policies designed to remedy past discrimination. The two opinions indicate that the Court should not apply the strict scrutiny test to a statute that has as its purpose the amelioration of the effects of past discrimination against a group. Although the application of two different standards to the same classification may at first appear inconsistent,[39] a more complete analysis suggests that such application is the most logical one.

To illustrate, assume, first, that the Court condemns a certain type of discriminatory policy and requires a state to show a compelling state interest to continue to discriminate; secondly, that the state, recognizing the error of its past behavior, seeks through legislation to remedy its effects.[40] It would be contradictory for the Court to require remedial legislation to meet the stringent strict scrutiny test. Instead, the Court should give some latitude to the state method since the state is attempting to correct the effects of what the Court has termed its earlier unlawful discrimination.[41]

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37. A discussion of the mootness issue in *DeFunis* is beyond the scope of this note. The Court's action vacated the Washington Supreme Court's decision in favor of the constitutionality of the university's policies. DeFunis v. Odegaard, 82 Wash. 2d 11, 507 P.2d 1169 (1973).

38. The Court as a whole has *not* accepted that view with respect to sex. *See* note 30 and accompanying text *supra*.

39. *Cf.* Kahn v. Shevin, 416 U.S. 351, 360-62 (1974) (White, J., dissenting).

40. The fact that the statute involved in *Kahn* was passed prior to the *Frontiero* line of cases does not affect this analysis.

41. *Cf.* REA v. New York, 336 U.S. 106 (1949). On this point the majority and Justice Brennan differ. Brennan maintained that the statute must be drawn narrowly enough to meet the strict scrutiny test. He believed that such a statute can be constitutional only when a state "demonstratfesl that the challenged legislation serves overriding or compelling interests that cannot be achieved either *by a more carefully tailored legislative classification* or by the use of feasible less drastic means." 416 U.S. at 360 (emphasis added). Brennan's objection to the Florida exemption was apparently the place at which the State drew the line that determined who would benefit from the exemption. Florida believed that *all* women had suffered economic discrimination and that, therefore, all deserved to get the exemption. Brennan, on the other hand, considered only "those widows for whom the effects of past economic discrimination against women have been a practical reality," *i.e.*, the non-wealthy, should benefit from the statute. *Id.* However, Douglas said: "We have long held that '. . . the States have large

Justice Douglas, however, did not clearly state in *Kahn* how much latitude he was willing to give the states. He stated that the widow exemption was constitutional " 'if the discrimination is founded upon a reasonable distinction . . . ,' "[42] which implies that he is willing to hold the state to merely the rational relationship standard. A closer examination of the opinion, however, reveals that this apparently is not true. The quoted language appeared only at the end of the opinion where Justice Douglas quoted from prior tax cases and followed his more thorough discussion of why the exemption " 'rest[s] upon some ground of difference having *a fair and substantial relation* to the object of the legislation.' "[43] Reference to his dissent in *DeFunis* clearly indicates that the rational relationship test will not suffice in such cases. In that opinion, Justice Douglas was very critical of basing law school admissions solely on race. He stated that "racial factors [should] not militate *against an applicant or on his behalf.*"[44] Rather than expressing a willingness to give states the latitude to remedy past discrimination in any rational manner, Douglas said that the fourteenth amendment requires states to proceed more carefully in cases in which invidious discrimination may result from the states' policies. "The Equal Protection Clause commands the elimination of racial barriers, not their creation in order to satisfy our theory as to how society ought to be organized."[45] These ideas are certainly not congruous with the broad rational relationship standard.

Still, Justice Douglas did not require that a compelling state interest be shown. In *DeFunis* he said that if race were the *sole* determining factor, the strict scrutiny test would apply. He concluded, though, that, if it were shown that the *effect* of racial discrimination was the factor being considered, the admissions policy would be constitutional; in other words, if the law school gave a preference to minorities not solely because they were minorities but because their background and culture might have adversely affected their law school

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leeway in . . . drawing lines which in their judgment produce reasonable systems of taxation.' " *Id.* at 355, *quoting* Lehnhausen v. Lake Shore Auto Parts Co., 410 U.S. 356, 359 (1973). For other cases supporting the proposition that it is the legislature's job, and not the Court's, to draw lines see, *e.g.*, Dandridge v. Williams, 397 U.S. 471 (1970); Kotch v. Board of River Port Pilot Comm'rs, 330 U.S. 552 (1947).

42. 416 U.S. at 355, *quoting* Allied Stores of Ohio, Inc. v. Bowers, 358 U.S. 522, 528 (1959).

43. 416 U.S. at 355, *quoting* F.S. Royster Guano Co. v. Virginia, 253 U.S. 412, 415 (1920) (emphasis added).

44. 416 U.S. at 336.

45. *Id.* at 342.

admission tests scores, the admissions policy would not violate the equal protection clause.[46] Similarly, in *Kahn*, Douglas documented his conclusion that the real purpose of the tax exemption was not simply to prefer females over males but to remedy the effects of economic discrimination against women in this country.[47]

Douglas applies a test somewhere between strict scrutiny and rational relationship that he calls a "fair and substantial relationship" test. The term was used in *Reed v. Reed*,[48] a case that was widely read to impose a standard somewhere between the two more traditional equal protection tests.[49] The use of such a test recognizes the importance of encouraging states to legislate in order to provide remedies for past discrimination, and yet, seeks to guard the rights of those against whom such legislation necessarily discriminates.

CONCLUSION

Kahn establishes that all forms of sex discrimination are not necessarily constitutionally invalid. The case also establishes that the purpose of the legislature in enacting a statute based on a sex classification is a relevant factor in the determination of its constitutionality.[50] Read in conjunction with Douglas' dissent in *DeFunis*, it could have a significant impact on the equal protection clause. Studied in that light, it appears to formulate a "fair and substantial basis" test for statutes involving sex discrimination that result in reverse discrimination, and its effects may spill over into other areas of reverse discrimination. The test involves two inquiries—first, about the purpose of the statute, and secondly, about the effects of the statute on those who suffer discrimination because of it.[51] The first question requires an examination of

46. *Id.* at 340-41. Justice Douglas would have remanded the case for a new trial to give the university a chance to prove that its purpose was to remedy discrimination. *Id.* at 335-36, 344.

47. *Id.* at 353-54.

48. 404 U.S. 71 (1971). *See* text accompanying notes 26-29 *supra.*

49. *See* note 29 and accompanying text *supra.*

50. Justice Douglas' opinion clearly notes the importance of the fact that the statute works to remedy past discrimination rather than to discriminate further against women. 416 U.S. at 355.

51. Justice Douglas appears to have been influenced to some extent by prior reasoning of Justice Marshall. *See* San Antonio Independent School Dist. v. Rodriguez, 411 U.S. 1, 98-110 (1973) (dissenting opinion); Dandridge v. Williams, 397 U.S. 471, 520-21 (1970) (dissenting opinion). In *Dandridge* Justice Marshall named as important factors in all equal protection analyses "the character of the classification in question, the relative importance to individuals in the class discriminated against of the governmental benefits that they do not receive, and the asserted state interests in support of the classification." *Id.* at 521. In *Kahn* Justice Marshall was a dissenter, joining

what the state is trying to accomplish. In *Kahn* the statute sought to ease the effects of economic discrimination. Douglas' opinion in *DeFunis*, however, clearly states that, if the state tries to go beyond remedying the effects of past discrimination, the statute will be struck down. The second question asks whether the effect of the statute will be invidiously to discriminate against anyone. This part of the "fair and substantial basis" test cannot be positively defined. It turns primarily on the facts of each case. Factors such as the significance of the right being asserted[52] and whether one person will be denied a position or opportunity because of the preference[53] are examples of relevant considerations.[54] In general, the second inquiry of the test examines what harm will result from the reverse discrimination.

Although it is loosely defined, this two-pronged test is sufficiently clear for states to understand that the Supreme Court is willing to give them some leeway in drafting statutes designed to rectify past discrimination against women.[55] The test allows states to pass such remedial legislation as long as that legislation does not invidiously discriminate against men. It is important to note that by giving them this latitude

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in the opinion of Justice Brennan. *See* text accompanying notes 17-19 *supra*. For a view similar to Justice Marshall's see Williams v. Rhodes, 393 U.S. 23 (1968) (Black, J.).

52. *Kahn*, for example, involved the relatively insignificant right to a tax exemption; *cf.* Lehnhausen v. Lake Shore Auto Parts Co., 410 U.S. 356 (1973). Two important points should be noted here. First, even though Justice Douglas speaks of the special nature of leeway in tax cases, his much more extensive discussion of remedial statutory purpose clearly has import beyond cases of discrimination caused by tax exemptions. The significance of the right is only one factor to be considered in the "fair and substantial basis" test. Secondly, the fact that *Kahn* is both a tax case and a sex discrimination case is only one of several distinctions between *Kahn* and *DeFunis*. Therefore the holding in *Kahn* in no way will control the next *DeFunis*-type racial reverse discrimination case that reaches the Supreme Court; and how much spillover into reverse discrimination fields other than sex the *Kahn* opinion will have is purely speculative. It would be unfair, however, not to note the many similarities between the cases, *e.g.*, the three justices who wrote opinions in *Kahn* (plus the other dissenting justice) all consider both race and sex to be suspect; *see* note 29 and accompanying text *supra*. For legal commentaries on how the Court should decide a racial reverse discrimination case see, *e.g.*, Morris, *Equal Protection, Affirmative Action and Racial Preferences in Law Admissions: DeFunis v. Odegaard*, 49 WASH. L. REV. 1 (1973); O'Neil, *Preferential Admissions: Equalizing the Access of Minority Groups to Higher Education*, 80 YALE L.J. 699 (1971).

53. In *DeFunis*, for example, Justice Douglas noted the "bumping" effect on white applicants that admissions of minorities would have. 416 U.S. at 332-33.

54. The most important factor that could arise under this prong of the test would be the denial of a fundamental right, *see* note 22 and accompanying text *supra*, to members of the group discriminated against, *e.g.*, giving minority group members two votes each. This question was raised by the facts of neither *Kahn* nor *DeFunis*.

55. Depending upon the extent of spillover from *Kahn*, the same may be true of statutes designed to rectify past discrimination against many minority groups.

to enact such laws, the Court will allow the states to experiment with different ways to rectify the effects of past discrimination.[56]

A. W. TURNER, JR.

Criminal Procedure—No Right to Counsel on Discretionary Appeal

In *Douglas v. California*[1] the United States Supreme Court held that the failure to appoint counsel to represent an indigent criminal appellant in his "*one and only appeal*" of right[2] violates the fourteenth amendment. The extension of the *Douglas* right to counsel to indigents seeking discretionary state and federal review of their convictions led to conflict in the circuits.[3] Resolution came in *Ross v. Moffitt*.[4]

56. Three cautionary statements are apposite here. First, as Justice Brennan pointed out, the Florida exemption is neither mandatory nor automatic. That is, a widow, in order to receive the exemption, must apply for it. Whether or not a mandatory reverse discrimination statute will be invidious is not decided by *Kahn*. 416 U.S. at 359 n.5. It seems, however, that the distinction would make little difference. It is up to the state legislature to draw the lines, *see* note 41 *supra*, and if it decides to remedy the discrimination against all women who have suffered it rather than merely those who apply for the exemption, then it is not the function of the Court to tell the state it cannot draw its line there.

Secondly, the continuing validity of the statute involved in *Kahn* if and when the effects of past discrimination are erased is a different question which is beyond the scope of this note.

Thirdly, the effect that the passage of the proposed Equal Rights Amendment might have on legislation such as Florida's tax exemption for widows is beyond the scope of this note. There has been speculation on the issue, though. *See, e.g.*, Brown, Emerson, Falk, & Freedman, *The Equal Rights Amendment: A Constitutional Basis for Equal Rights for Women*, 80 YALE L.J. 871, 903-05 (1971).

1. 372 U.S. 353 (1963).

2. *Id.* at 357 (emphasis in original). The term "appeal of right" refers to review by an appellate court of the merits of a claim guaranteed by a state statute or constitution. The term "discretionary appeal" or "discretionary review" refers to review where, although there exists a statutory or constitutional right to *seek* review, the appellate court may decline to hear the appeal in its discretion.

3. *Compare* Moffitt v. Ross, 483 F.2d 650 (4th Cir. 1973), *rev'd*, 417 U.S. 600 (1974), *with* United States *ex rel.* Pennington v. Pate, 409 F.2d 757 (7th Cir. 1969), *cert. denied*, 396 U.S. 1042 (1970) *and* Peters v. Cox, 341 F.2d 575 (10th Cir.) (per curiam), *cert. denied*, 382 U.S. 863 (1965). *See also* United States *ex rel.* Coleman v. Denno, 313 F.2d 457 (2d Cir. 1963).

4. 417 U.S. 600 (1974).

In reversing a unanimous Fourth Circuit panel,[5] the Supreme Court refused to extend the *Douglas* right to counsel to discretionary appeals in the North Carolina Supreme Court or to writs of certiorari in the United States Supreme Court.

THE CASE

Moffitt, an indigent, was convicted of forgery and uttering a forged instrument in two separate North Carolina prosecutions in Guilford and Mecklenburg Counties. Both convictions were affirmed[6] on separate appeals of right[7] to the North Carolina Court of Appeals. Moffitt's Mecklenburg counsel sought and was denied appointment by the Mecklenburg Superior Court[8] to petition for discretionary review[9] to the North Carolina Supreme Court. The Guilford Superior Court, however, appointed the Public Defender[10] to petition for such review. After this petition was denied by the North Carolina high court,[11] Moffitt requested the trial court and the North Carolina Court of Appeals to assign counsel to prepare a writ of certiorari to the United States Supreme Court. This petition was also denied. Thereafter, Moffitt sought federal habeas corpus relief[12] claiming the State's refusal to appoint counsel both to petition for discretionary review in the North Carolina Supreme Court of his Mecklenburg conviction and to prepare a writ of certiorari to the United States Supreme Court in his Guilford conviction constituted a denial of due process and equal protection.[13]

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5. Moffitt v. Ross, 483 F.2d 650 (4th Cir. 1973), *noted in* 4 MEMPHIS ST. L. REV. 616 (1974), 27 VAND. L. REV. 365 (1974) *and* 9 WAKE FOREST L. REV. 579 (1973).

6. State v. Moffitt, 11 N.C. App. 337, 181 S.E.2d 184 (1971), *appeal dismissed*, 279 N.C. 396, 183 S.E.2d 247 (1971) (Guilford); State v. Moffitt, 9 N.C. App. 694, 177 S.E.2d 324 (1970) (Mecklenburg).

7. *See* N.C. GEN. STAT. § 7A-27 (1969).

8. The superior court is a trial court with general criminal jurisdiction. *Id.* § 7A-270.

9. *See id.* § 7A-31.

10. North Carolina provides for representation of indigent criminal defendants by Public Defender Offices in the 12th (Cumberland and Hoke Cos.), 18th (Guilford Co.), and 28th (Buncombe Co.) Judicial Districts. In the 26th Judicial District (Mecklenburg Co.) counsel is appointed from a local Bar roster. *See* 1973 REPORT OF THE ADMINISTRATIVE OFFICE OF THE COURTS, NORTH CAROLINA 96-100.

11. State v. Moffitt, 279 N.C. 396, 183 S.E.2d 247 (1971).

12. Pursuant to 28 U.S.C. § 2254 (1970). The petitions were filed in the United States District Courts for the Western (Mecklenburg) and Middle (Guilford) Districts of North Carolina.

13. Moffitt's additional allegation that he had a statutory right to counsel based on N.C. GEN. STAT. § 7A-451 (1969) was denied in the habeas corpus hearing. Moffitt v. Blackledge, 341 F. Supp. 853, 854 (W.D.N.C. 1972). The Fourth Circuit, however, agreed with Moffitt's interpretation of the statute but lacked jurisdiction to enforce state statutory rights. Moffitt v. Ross, 483 F.2d 650, 652 (4th Cir. 1973).

The habeas corpus petitions were denied,[14] and the cases were consolidated for appeal to the United States Court of Appeals for the Fourth Circuit.

The Fourth Circuit unanimously held that due process required appointment of counsel to indigents seeking discretionary review in both state and federal systems.[15] Reasoning that as the Bar has grown there has been a correlative growth in the ability of the courts to implement "basic notions of fairness,"[16] the court found in the context of *Douglas* "no basis for differentiation between appeals as of right and permissive appeals or between first appeals and second or third stage review."[17]

The Supreme Court granted the North Carolina Attorney General's petition for certiorari[18] and reversed.[19] Initially, the Court reviewed and analyzed prior cases representative of the "extensive consideration"[20] given to indigents' rights on appeal. This precedent was viewed as falling into two distinct lines of cases. The first line, beginning with *Griffin v. Illinois*,[21] stands for the proposition that a state violates the fourteenth amendment by granting an appeal right but erecting financial barriers that arbitrarily cut off access to that right to

14. Moffitt v. Blackledge, 341 F. Supp. 853 (W.D.N.C. 1972).

15. The court expressed confusion over the basis of the *Douglas* holding. "If the holding [of *Douglas*] be grounded on the equal protection clause, inequality in the circumstances of these cases is as obvious as it was in the circumstances of *Douglas*. If the holding in *Douglas* were grounded on the due process clause, . . . due process encompasses elements of equality." 483 F.2d at 655. There was no explanation why the court chose to ground its decision in due process. *See id.* at 654.

16. *Id.* at 655. This transition is illustrated by Betts v. Brady, 316 U.S. 455 (1942) (fourteenth amendment does not require appointment of counsel in every noncapital state prosecution); Gideon v. Wainwright, 372 U.S. 335 (1963) (right to counsel is a fundamental right essential to a fair trial and is made obligatory on the states by the fourteenth amendment); Argersinger v. Hamlin, 407 U.S. 25 (1972) (absent a knowing and intelligent waiver, no person may be imprisoned for any offense unless represented by counsel).

17. 483 F.2d at 651. Judge Haynesworth noted that Moffitt had been represented by assigned counsel in his petition for review to the North Carolina Supreme Court in the Guilford charge but not in the Mecklenburg charge and that there were no guidelines for trial judges in exercising their discretion in these appointments. *See* Brief for Appellant at 48a, Moffitt v. Ross, 483 F.2d 600 (4th Cir. 1973). He implied that, had a sufficient basis for consideration been laid, the court would have inquired closely whether the denial of counsel to indigents situated similarly to those for whom counsel was provided would in itself work a denial of equal protection. 483 F.2d at 652.

18. 414 U.S. 1128 (1974).

19. 417 U.S. 600 (1974). Justice Rehnquist wrote for the majority of himself, Chief Justice Burger, Justices Stewart, White, Blackmun, and Powell. Justice Douglas wrote for the dissent, joined by Justices Brennan and Marshall.

20. *Id.* at 605.

21. 351 U.S. 12 (1956).

indigents.[22] The *Douglas* line, however, represents a departure from the "limited doctrine"[23] of *Griffin* by inquiring into the *adequacy* of the indigent's access to the appellate system. Thus, the Court framed the issue for determination in *Ross* as whether *Douglas* should be extended to require appointment of counsel to indigent defendants for discretionary state appeals and writs of certiorari to the Supreme Court.[24]

The Court then set out to clarify the previously unstated and confused constitutional underpinnings of the precedent by explicating the due process and equal protection bases of the *Douglas* and *Griffin* lines.[25] Due process concerns fairness between the state and the individual. Provision of an appeal is completely within a state's legislative discretion,[26] and unfairness does not automatically flow from failure to provide counsel to an indigent for an appeal as it would if counsel were denied during the indispensable trial stage.[27] Therefore, North Carolina would violate due process only by denying the indigent "meaningful access"[28] to the appellate system because of his poverty. The determination of "meaningful access" is to be made under an equal protection analysis.

The Court viewed the equal protection mandate as a matter of degrees rather than absolutes. While a state is not required to eliminate all differences between rich and poor,[29] it may not adopt appellate procedures that "entirely cut off" an indigent's appeal or that merely provide him with a "meaningless ritual" while the rich are af-

22. 417 U.S. at 607. *See, e.g.*, Draper v. Washington, 372 U.S. 487 (1963); Lane v. Brown, 372 U.S. 477 (1963); Smith v. Bennett, 365 U.S. 708 (1961); Burns v. Ohio, 360 U.S. 252 (1959).

23. 417 U.S. at 607.

24. *Id.* at 602-03. This note will examine only the issue of right to counsel on discretionary state appeals. The Court applied similar reasoning in finding no constitutional right to counsel for preparation of writs of certiorari to the United States Supreme Court, but declared that the *Griffin* and *Douglas* cases were inapplicable since the right to seek access to the United States Supreme Court comes from a federal, not a state, statute. *Id.* at 617. For a discussion of the federal approach to appointed counsel see 9 WAKE FOREST L. REV. 579, 586-88 (1973).

25. *See* 417 U.S. at 609-16.

26. *See* McKane v. Durston, 153 U.S. 684, 687 (1894).

27. *Cf.* Gideon v. Wainwright, 372 U.S. 335 (1963). The Court in *Ross* articulated the distinction as follows: "[t]he defendant needs an attorney on appeal not as a shield to protect him against being 'hauled into court' by the State and stripped of his presumption of innocence, but rather as a sword to upset the prior determination of guilt." 417 U.S. at 610-11.

28. 417 U.S. at 611.

29. *See, e.g.*, San Antonio Independent School Dist. v. Rodriguez, 411 U.S. 1 (1973); Rinaldi v. Yaeger, 384 U.S. 305 (1966); Baxtrom v. Herald, 383 U.S. 107 (1966); Griffin v. Illinois, 351 U.S. 12, 20 (1956) (Frankfurter, J., concurring).

forded a "meaningful appeal."[30] The issue thus devolved to an examination of the indigent's status within the tri-level North Carolina appellate system.[31]

The Court in *Ross* found several benefits available to an indigent seeking discretionary review by the North Carolina Supreme Court. His appointed counsel, guaranteed on his first appeal of right by *Douglas*, will have examined the trial record and prepared an appellate brief. The intermediate court will have passed on the merits of the appeal. In addition he approaches the supreme court armed with some form of trial record and often with a court of appeals opinion setting forth claimed errors. Finally, the appellant is given the opportunity to make *pro se* submissions. These benefits were found sufficiently meaningful relative to the wealthy appellant to work no denial of equal protection.[32] Additional support for this conclusion was drawn from the absence in the statutory standards of a requirement that the supreme court determine if "a correct adjudication of guilt"[33] were made below.[34]

BACKGROUND AND ANALYSIS

The equal protection-due process analysis examined in *Ross* has been traditionally applied to determine the constitutionality of post-conviction state procedures that seem to impinge on an indigent due to his poverty.[35] The first case in this area, *Griffin v. Illinois*,[36] invalidated a state procedure that required a criminal appellant to pur-

30. Douglas v. California, 372 U.S. 353, 358 (1963).

31. North Carolina employs a tri-level court structure including an intermediate court of appeals and a supreme court. An appeal of a criminal conviction lies as of right to the intermediate court except when a death or life imprisonment sentence is imposed, in which case appeal lies directly to the supreme court. N.C. GEN. STAT. § 7A-27 (1969). An appeal of right of a court of appeals' decision to the supreme court exists only in criminal cases involving a substantial constitutional question or in which there is a dissent. *Id.* § 7A-30. In all other cases review of court of appeals' decisions is within the supreme court's discretion as defined by statutory guidelines. *Id.* § 7A-31(c).

32. *See* 417 U.S. at 614-16.

33. *Id.* at 615, *citing* Griffin v. Illinois, 351 U.S. 12, 18 (1956).

34. Justice Douglas, for the three-member dissent, found the reasoning of the court of appeals below, Moffitt v. Ross, 483 F.2d 650 (4th Cir. 1973), completely persuasive. He saw the *pro se* petitioner at a "substantial" disadvantage due to the complexities of certiorari practice and the failure of the counsel-prepared court of appeals brief to address the North Carolina discretionary review criteria of public policy and jurisprudential significance. *See* 417 U.S. at 619-21; N.C. GEN. STAT. § 7A-31(c) (1969); Boskey, *The Right to Counsel in Appellate Proceedings*, 45 MINN. L. REV. 783, 797 (1961).

35. *But see* Roberts v. LaVallee, 389 U.S. 40 (1967) (per curiam).

36. 351 U.S. 12 (1956).

chase and make available a transcript of his trial to secure full appellate review. There was, however, no majority agreement on the exact consitutional basis for the decision.[37] This ambiguity remained in a series of cases that relied on *Griffin* to strike down state practices imposing similar contingencies between the indigent and a statutory appellate right.[38]

Douglas v. California[39] first applied *Griffin* and its progeny to the right to counsel.[40] Under scrutiny was the California practice of allowing the intermediate appellate court to determine after *ex parte* examination of the trial record whether appointment of counsel would be beneficial to the indigent or the court. Forcing the indigent "to run this gantlet of a preliminary showing of merit"[41] was held constitutionally impermissible, and the Court imposed a duty on the state to provide counsel. The holding, however, was explicitly limited to the first appeal of right.[42] Predictably, the decision contained language evocative of both equal protection[43] and due process.[44]

Justice Rehnquist, writing for the *Ross* majority, viewed *Griffin* and *Douglas* as analytically separable. To the Court, *Griffin* mandated that states not "cut off appeal rights for indigents" while the affluent

37. Four Justices felt "[t]here can be no equal justice where the kind of trial a man gets depends on the amount of money he has. Destitute defendants must be afforded *as adequate appellate review* as defendants who have money enough to buy transcripts." *Id.* at 19 (emphasis added). Justice Frankfurter cast the deciding vote but objected to this language. "Of course a State need not equalize economic conditions." *Id.* at 23.

38. Eskridge v. Washington Prison Bd., 357 U.S. 214 (1958) (per curiam), invalidated a transcript procedure as a denial of "a constitutional right guaranteed by the Fourteenth Amendment." *Id.* at 216. *See* note 51 *infra*. Burns v. Ohio, 360 U.S. 252 (1959), invalidated the requirement of a twenty-dollar filing fee before the Ohio Supreme Court would entertain motions to invoke its discretionary review of an intermediate appellate court's decision in a felony case in language suggestive of equal protection. *See id.* at 258. Smith v. Bennett, 365 U.S. 708 (1961), invalidated a four-dollar habeas corpus filing fee in similar equivocal language. *See id.* at 710-11, 714. Lane v. Brown, 372 U.S. 477 (1963), struck down an Indiana procedure where a prisoner could obtain a transcript which was a condition precedent to a writ of error *coram nobis* only if the Public Defender requested it as a violation of the "Fourteenth Amendment of the United States Constitution." *Id.* at 478.

39. 372 U.S. 353 (1963).

40. The Court could see no substantive distinction between denial of a transcript and denial of counsel. "In either case the evil is the same: discrimination against the indigent." *Id.* at 355.

41. *Id.* at 357.

42. *Id.* at 356.

43. "[W]here the merits of *the one and only appeal* an indigent has as of right are decided without benefit of counsel, we think an unconstitutional line has been drawn between rich and poor." *Id.*

44. "When an indigent is forced to run this gantlet of a preliminary showing of merit, the right to appeal does not comport with fair procedure." *Id.* at 357.

have "open avenues of appeal." *Douglas*, however, mandated standards of adequacy of the indigent's access to the appellate system.[45] Conflicts develop in utilizing this dichotomy to analyze these cases. The Illinois practice struck down in *Griffin* did not "cut off" the indigent's appeal. Rather, submission of the transcript to the appellate court resulted in full review of the conviction as opposed to limited review on the face of the "mandatory trial record" available as a matter of right without cost.[46] The Court in *Griffin* required the state to furnish the indigent a transcript but left open an opportunity for the states to develop less costly alternatives to the transcript that would still afford "adequate and effective" review to the indigent.[47] Thus the Court was expressing the same concern for the *quality* of the indigent's appellate rights as later echoed in *Douglas*.

There is much additional evidence of the novelty of the *Ross* view of *Douglas* and *Griffin*. Prior to *Douglas*, *Griffin* was used dispositively to determine unconstitutionality of other non-doorclosing state appellate procedures.[48] After *Douglas* the adequacy of alternatives to transcripts was tested by reliance on the principles in *Griffin* without reference to *Douglas*.[49] Indeed, *Griffin* has been used to set standards of conduct for attorneys representing indigents on appeal to insure the adequacy of the *Douglas* right to counsel.[50]

An alternative to the Court's belief that *Griffin* represents a "limited doctrine"[51] is the view that *Griffin*, as the origin of a single line of cases of which *Douglas* is a part, has developed a method for determining the constitutional adequacy of a state's treatment of indigents within its appellate structure. Unconstitutional treatment can consist either of precluding access to the "open avenues of appeal"[52] available to the wealthy[53] or of admitting the indigent without providing

45. 417 U.S. at 607. *See* text accompanying notes 22-27 *supra*.

46. *See* Griffin v. Illinois, 351 U.S. 12, 13-14 n.2 (1956).

47. *Id.* at 20.

48. In Eskridge v. Washington Prison Bd., 357 U.S. 214 (1958) (per curiam), two years after *Griffin* the Court relied on *Griffin* to strike down a Washington practice of granting a free transcript to an indigent only if the trial judge were satisfied that "justice [would] thereby be promoted." *Id.* at 215. The transcript was not a condition precedent to appeal, but the Court felt that without it the appellant was denied *effective* appeal. *See id.* at 216.

49. *See* Mayer v. City of Chicago, 404 U.S. 189 (1971).

50. *See* Anders v. California, 386 U.S. 738 (1967).

51. 417 U.S. at 607. *See* text accompanying notes 22-27 *supra*.

52. 417 U.S. at 607.

53. *See, e.g.*, Williams v. Oklahoma City, 395 U.S. 458 (1969) (per curiam); Lane v. Brown, 372 U.S. 477 (1963); Smith v. Bennett, 365 U.S. 708 (1961); Burns v. Ohio, 360 U.S. 252 (1959).

him a constitutionally adequate appeal.[54]

Ross consciously attempted to eliminate the confusion that has surrounded the due process-equal protection principles applicable to indigents' appellate rights since *Griffin*.[55] Noting that "[n]either clause by itself provides an entirely satisfactory basis for the result reached"[56] in the *Griffin* and *Douglas* lines, the Court viewed due process and equal protection as symbiotic by virtue of "meaningful access." The primary consideration is whether the state denies due process by failing to provide the indigent "meaningful access" to the appellate system, and this determination is made under an equal protection analysis.[57] This statement alone fails to achieve the clarity sought by the Court. "Meaningful access" is treated as neither a substantive standard nor a term of art. The concept reappears in *Ross* as questions of whether the North Carolina Supreme Court has an "adequate basis" on which to make its decision to review[58] and whether the indigent is given an "adequate opportunity" to present his claims.[59]

More significant than the bare statement of the relationship of due process and equal protection is that the Court retained the methodology of the *Griffin* and *Douglas* cases to determine an indigent's right to counsel on discretionary appeal. The Court determined the benefit available to the uncounseled indigent relative to the wealthy and compared this disparity to principles of due process and equal protection.[60] In its statements of these principles, the Court avoided mention of language in *Griffin* that the states must provide equally adequate appellate review for indigents and wealthy. Rather, the Court twice referred[61] to the concurring opinion of Justice Frankfurter in *Griffin* who objected strongly to this implication[62] and reaffirmed the idea ex-

54. *See, e.g.*, Mayer v. City of Chicago, 404 U.S. 189 (1971); Roberts v. LaVallee, 389 U.S. 40 (1967) (per curiam); Anders v. California, 386 U.S. 738 (1967); Long v. District Ct., 385 U.S. 192 (1966) (per curiam); Draper v. Washington, 372 U.S. 487 (1963); Douglas v. California, 372 U.S. 353 (1963); Eskridge v. Washington Prison Bd., 357 U.S. 214 (1957) (per curiam).

55. "The precise rationale for the *Griffin* and *Douglas* lines of cases has never been explicitly stated, some support being derived from the Equal Protection Clause of the Fourteenth Amendment, and some from the Due Process Clause of that Amendment." 417 U.S. at 608-09.

56. *Id.*

57. *See* text accompanying notes 28-31 *supra.*

58. *Cf.* 417 U.S. at 615.

59. *Cf. id.* at 617.

60. *Cf.* cases cited notes 56-57 *supra.*

61. *See* 417 U.S. at 606, 612.

62. *See* note 40 *supra.*

pressed in *Douglas* that "[a]bsolute equality is not required; lines can be and are drawn and we often sustain them."[63]

The implication is clear that the Court intended *Ross* to dispose of future claims to a constitutional right to counsel on discretionary appeal. The decision in *Ross* was reached, however, only after analysis of the benefits available to indigents within the North Carolina appellate system.[64] The full impact of the case, therefore, can best be assessed by identifying illustrative examples of the different state appellate systems to which the learning of *Ross* can be applied.

In determining whether counsel must be appointed to represent an indigent under any particular state appellate system, the initial consideration is whether state statutory[65] or case law[66] confers a right to counsel. *Ross* not only affirmed the notion that states may provide benefits beyond constitutional mandates, but also disclaimed that the holding should discourage them from doing so.[67] It is the extent of the constitutional mandate that is in issue here.

The second step in determining the indigent's right to counsel is a consideration of the particular appellate system, the point in that system at which counsel is sought, and whether the appeal is discretionary or a matter of right. First examined are the various situations arising in the twenty-four state systems[68] utilizing an intermediate appellate court.[69]

First appeal of right. Generally, an appeal of right lies to the intermediate court in all serious criminal charges,[70] although it is quite common to find provisions bypassing the intermediate court giving an appeal of right direct to the highest court where serious punishment

63. 417 U.S. at 608, *citing* Douglas v. California, 372 U.S. 353, 357 (1963).

64. *See* notes 32-34 and accompanying text *supra.*

65. *See, e.g.*, COLO. REV. STAT. ANN. § 40-1-503 (Supp. 1971); N.C. GEN. STAT. § 7A-451 (1969). *But see* note 14 *supra.*

66. *See, e.g.*, Hutchins v. State, 227 Tenn. —, 504 S.W.2d 758 (1974); Cabaniss v. Cunningham, 206 Va. 330, 143 S.E.2d 911 (1965).

67. *See* 417 U.S. at 618-19.

68. The states are Alabama, Arizona, California, Colorado, Florida, Georgia, Illinois, Indiana, Louisiana, Maryland, Massachusetts, Michigan, Missouri, New Jersey, New Mexico, New York, North Carolina, Ohio, Oklahoma, Oregon, Pennsylvania, Tennessee, Texas, and Washington.

69. These systems were instituted primarily to relieve appellate court congestion. *See* AMERICAN JUDICATURE SOCIETY, INTERMEDIATE APPELLATE COURTS (Report No. 20, 1968).

70. *See, e.g.*, CAL. CONST. art. VI, §§ 10, 11; ILL. CONST. art. VI, § 6; WASH. REV. CODE ANN. § 2.06.030 (Supp. 1973).

is imposed.[71] *Douglas*, neither extended nor overruled by *Ross*, dictates appointment of counsel at this level.

Second appeal of right. There exist circumstances in which state high court review of intermediate court decisions is also a matter of right, thus giving two appeals of right. These appeals are triggered by either a dissent in the intermediate court's opinion,[72] the initial construction of a state or federal statute or constitutional provision,[73] or some preliminary showing by the appellant of a significant constitutional issue.[74] This situation is covered explicitly by neither *Douglas* nor *Ross*. Although it is an appeal of right, it is a second appeal, and *Douglas* was limited to the first appeal.[75] *Ross* declined to find a constitutional right to counsel on a second appeal, but the appeal under consideration there was discretionary.

Two factors indicate that the presence of a second appeal of right is an insufficient basis for distinguishing *Ross*. First, *Ross* held that the mere presence of a state right to seek discretionary review did not of itself mandate appointment of counsel;[76] thus, by analogy, the *right* of second appeal should not control. Secondly, the benefits available to the uncounseled indigent on his second appeal of right are substantially the same as those that were available to Moffitt as he sought subsequent discretionary review by the North Carolina Supreme Court. The indigent has had benefit of counsel on his first appeal, and the high court has a trial record, an intermediate court opinion, and the indigent's *pro se* submissions on which to make its decision. Thus the appellant, in *Ross* terms, would have meaningful access to the appellate system.[77]

However, a distinction may be drawn between a right of appeal at any level and a right to seek discretionary review. Once a state grants a right of appeal, it makes a commitment to review the merits of the claim, and the setting becomes clearly adversarial. The role of counsel in an appeal of right is to argue the case before the appellate court. It is unclear whether benefits available to the uncounseled indigent will provide him an adequate opportunity to present his claims or an adequate basis for the court to make its determination on the merits,

71. *See, e.g.*, ARIZ. REV. STAT. ANN. § 12-120.21 (Supp. 1974); N.C. GEN. STAT. § 7A-27(a) (1969).
72. *See, e.g.*, N.C. GEN. STAT. § 7A-30(2) (1969).
73. *See, e.g.*, FLA. CONST. art. 5, § 4.
74. *See, e.g.*, N.C. GEN. STAT. § 7A-30(1) (1969).
75. *See* text accompanying note 42 *supra.*
76. *Cf.* text accompanying notes 26-27 *supra.*
77. *See* text accompanying note 28 *supra.*

as opposed to a decision whether to grant review at all. Current United States Supreme Court practice reflects this distinction by appointing counsel to indigents convicted of state crimes only after certiorari has been granted.[78]

Second appeal discretionary. In most circumstances review of intermediate court decisions is within the high court's discretion. It was within this situation that the *Ross* case arose. In *Ross*, however, the high court's discretion was governed by statute.[79] While many states similarly limit the scope of the high court's discretion by statutory or constitutional[80] standards, in some states the discretion is unfettered[81] or merely defined by non-controlling statutory guidelines.[82]

This divergence in state practice seems to be of little assistance in distinguishing *Ross*. The Court reached its decision that there was no constitutional requirement to appoint counsel for indigents seeking discretionary review prior to a consideration of the North Carolina statutory standards. The Court was only "fortified in this conclusion"[83] by the nature of these standards; it did not reach its conclusion based on them.[84]

In determining the right to counsel in the twenty-six states utilizing the traditional two-level appellate system, the same consideration must be given to the nature of the appeal right.

First appeal of right. In the vast majority of two-level systems, appeal of all criminal convictions lies as of right to the high court.[85] *Douglas* clearly controls here and requires that counsel be appointed.

First appeal discretionary. In a few situations the first and only appeal from a criminal conviction is within the discretion of the high court.[86] This presents another example where neither *Douglas* nor *Ross* are apposite.[87] While *Ross* reaffirms the principle that states need provide no appeal at all,[88] here the benefits available to the un-

78. U.S. SUP. CT. R. 53.
79. N.C. GEN. STAT. § 7A-31(c) (1969).
80. *E.g.*, FLA. CONST. art. 5, § 4.
81. *See, e.g.*, GA. CODE ANN. § 2-3704 (1945).
82. *See, e.g.*, ILL. ANN. STAT. ch. 110A, § 315(a) (Smith-Hurd 1968).
83. 417 U.S. at 615.
84. *See* text accompanying notes 33-34 *supra.*
85. *See, e.g.*, ALASKA STAT. § 22.05.010(a) (1962); MISS. CODE ANN. § 99-35-101 (1972).
86. *See, e.g.*, KY. REV. STAT. ANN. § 21.140(1), (2) (1971) (appeal discretionary if sentence imposed is less than twelve months).
87. *See* text accompanying note 75 *supra.*
88. *See* text accompanying note 26 *supra.*

counseled indigent include only a trial record and *pro se* submissions. Conspicuously absent are the prior assistance of counsel in examination of the trial record and preparation of arguments to the appellate court, and an intermediate appellate court once passing on those claims.[89] The inference is compelling that this treatment falls below the line of adequacy drawn in *Ross*, thus giving rise to a constitutional right to counsel.

CONCLUSION

Over a decade ago the Supreme Court, examining the rights of indigent persons, stated that "[t]he methods we employ in the enforcement of our criminal law have aptly been called the measures by which the quality of our civilization may be judged."[90] More recently, in finding a sixth amendment guarantee of counsel at trial whenever there exists a possibility of a prison sentence, the Court felt that "the adversary system functions best and most fairly only when all parties are represented by competent counsel."[91] *Ross v. Moffitt*, in disposing of a constitutional claim of right to counsel on discretionary appeals in all but atypical situations, contrasts strikingly with these principles. A state's highest court, as final arbiter of interpretation of state common law, might provide the most meaningful review of a criminal conviction.[92] This fact is unaffected by whether access to that court is by right or discretion. *Ross* describes certiorari practice as a "somewhat arcane art."[93] If this be true, lawyers, not *pro se* indigent appellants, should unravel its mysteries.

STANLEY D. DAVIS

Labor Law—Preemption of State Damage Remedies for Discharge

Since the Taft-Hartley amendments to the National Labor Rela-

89. *See* text accompanying note 32 *supra*.
90. Coppedge v. United States, 369 U.S. 438, 449 (1962).
91. Argersinger v. Hamlin, 407 U.S. 25, 65 (1972) (Powell, J., concurring).
92. *See, e.g.*, State v. Dix, 282 N.C. 490, 193 S.E.2d 897 (1973), *rev'g* State v. Dix, 14 N.C. App. 328, 188 S.E.2d 737 (1972) (modifying elements of common law kidnapping relied on by lower court).
93. 417 U.S. at 616.

tions Act[1] excluded supervisors[2] from the protection of the Act,[3] the question of whether supervisors could be protected by state law has gone unanswered. In *Beasley v. Food Fair, Inc.*[4] the United States Supreme Court faced this question squarely[5] and held that the remedy, granted by North Carolina's Right-to-Work Law,[6] for discharge because of union membership was preempted by section 14(a)[7] of the National Labor Relations Act.[8] In reaching this conclusion, the Court appears to have relied on the policy rather than the language of section 14(a). As a result, the impact of section 14(a) on state laws regulating the conduct of supervisors will be much more devastating than was intended by Congress.[9]

The petitioners, managers of meat departments in respondent Food Fair's stores, were discharged because of their union membership. Their union filed charges with the National Labor Relations

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1. Labor-Management Relations Act, 29 U.S.C. §§ 151-64 (1970).

2. *Id.* § 152(11) provides:

> The term "supervisor" means any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

3. *Id.* § 152(3) provides in the relevant portion as follows: "The term employee . . . shall not include . . . any individual employed as a supervisor . . . ."

4. 416 U.S. 653 (1974).

5. *Id.* at 657.

6. N.C. GEN. STAT. §§ 95-78 to -84 (1965). The relevant sections provide as follows:

> § 95-81. . . . No person shall be required by an employer to abstain or refrain from membership in any labor union or labor organization as a condition of employment or continuation of employment.
>
> . . . .
>
> § 95-83. . . . Any person who may be denied employment or be deprived of continuation of his employment in violation of . . . § 95-81 . . . shall be entitled to recover from such employer and from any other person, firm, corporation, or association acting in concert with him by appropriate action in the courts of this State such damages as he may have sustained by reason of such denial or deprivation of employment.

7. 29 U.S.C. § 164(a) (1970). This section provides as follows: "Nothing herein shall prohibit any individual employed as a supervisor from becoming or remaining a member of a labor organization, but no employer subject to this subchapter shall be compelled to deem individuals defined herein as supervisors as employees for the purpose of any law, either national or local, relating to collective bargaining."

8. 416 U.S. at 658.

9. Congressional intent is evidenced by the Senate Committee on Labor and Public Welfare Report on the Labor-Management Relations Act. S. REP. No. 105, 80th Cong., 1st Sess. (1947). The relevant language is: "This is a new section which makes it clear . . . that it is contrary to national policy for other Federal or state agencies to compel employers . . . to treat supervisors as employees for the purpose of collective bargaining or organizational activity." *Id.* at 28.

Board alleging violation of section 8(a)(1)[10] of the National Labor Relations Act. The Regional Director refused to issue a complaint, and the General Counsel denied the appeal that followed on the ground that petitioners were supervisors[11] and therefore not entitled to the protections of the Act.[12]

Following the refusal to issue a complaint, the petitioners sued in North Carolina Superior Court alleging that their discharge violated sections 95-81 and 95-83[13] of North Carolina's Right-to-Work Law. The trial court granted summary judgment to the respondents on the ground that the second clause of section 14(a)[14] of the National Labor Relations Act prohibited enforcement of the State law in favor of supervisors.[15] The North Carolina Court of Appeals reversed, holding that the State law was not preempted.[16] The court reasoned that since supervisors are excluded from the protections of the National Labor Relations Act[17] their activities could not fall within the "arguably prohibited or arguably protected" test for preemption.[18] The North Carolina Supreme Court reversed and reinstated the trial court decision.[19]

The United States Supreme Court granted certiorari[20] and affirmed the decision of the North Carolina Supreme Court. It reasoned as follows:

> the second clause of §14(a) relieving the employer of obligations under "any law, either National or local, relating to collective bargaining" applies to any law that requires an employer "to accord to

10. 29 U.S.C. § 158(a)(1) (1970). This section makes it an unfair labor practice for an employer "to interfere with, restrain or coerce employees in the exercise of the right to form, join, or assist labor organizations." The theory of the union was that the discharge of supervisors would interfere with the organizational activities of the employees; if supervisors are discharged because of union membership, other employees might think they also could be discharged. Such subtle coercion by employers violates section 8(a)(1) and will be remedied by an order for reinstatement with back pay of the discharged supervisors. NLRB v. Better Monkey Grip Co., 243 F.2d 836 (5th Cir.) (per curiam), *cert. denied*, 355 U.S. 864 (1957); NLRB v. Talladega Cotton Factory, Inc., 213 F.2d 209 (5th Cir. 1954).

11. The union had asked for and been granted a representation election by the Board prior to the discharge. In considering the election petition, the Board had determined the petitioners were supervisors and had excluded them from the bargaining unit. This finding was a clear and binding determination of the petitioners' supervisory status.

12. *See* text accompanying note 28 *infra.*

13. *See* note 6 *supra.*

14. *See* note 7 *supra.*

15. 416 U.S. at 656.

16. 15 N.C. App. 323, 329-30, 190 S.E.2d 333, 337 (1972).

17. *See* note 28 and accompanying text *infra.*

18. *See* text accompanying note 33 *infra.*

19. 282 N.C. 530, 193 S.E.2d 911 (1973).

20. 414 U.S. 907 (1973).

> the front line of management the anomalous status of employees." Enforcement against respondent in this case of §§ 95-81 and 95-83 would plainly put pressure on respondent "to accord to the front line of management the anomalous status of employees" and would therefore flount the national policy against compulsion upon employers from either federal or state agencies to treat supervisors as employees.[21]

To appreciate the complex nature of the policies underlying the *Beasley* decision, it will be helpful to review the treatment of supervisors under both the National Labor Relations Act and state law.

Prior to the 1947 Taft-Hartley amendments, the status of supervisors under the National Labor Relations Act was unclear. Congress had not elected to exclude them from the definition of employee.[22] Yet, when supervisors organized a union, the National Labor Relations Board's policy was that such an organization of supervisors could not be an appropriate bargaining unit.[23] This discrepancy between the language of the statute and the Board's interpretation of that language was resolved in *Packard Motor Co. v. NLRB*,[24] in which the United States Supreme Court said, "we see no basis in this Act whatever for holding that foremen are forbidden the protection of the Act when they take collective action to protect their collective interests."[25] Congress reacted to this decision by including sections 2(3), 2(11), and 14(a) in the 1947 Taft-Hartley amendments.[26] Its purpose was to remove supervisors from the protections of the Act and to relieve employers "from any compulsion by this National Board or any local agency to accord to the front line of management the anomalous status of employees."[27] Since the passage of those sections, the National Labor Relations Act has afforded no protection to supervisors who have been discharged for union activity.[28]

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21. 416 U.S. at 662.

22. Ch. 372, § 2, 49 Stat. 450 (1935), *as amended*, 29 U.S.C. § 152(3) (1970) read as follows:

> The term "employee" shall include any employee, and shall not be limited to the employees of a particular employer, unless this subchapter explicitly states otherwise, and shall include any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment, but shall not include any individual employed as an agricultural laborer, or in the domestic service of any family or person at his home, or any individual employed by his parent or spouse . . . .

23. Maryland Drydock Co., 49 N.L.R.B. 733 (1943).

24. 330 U.S. 485 (1947).

25. *Id.* at 490.

26. *See* notes 2, 3, and 7 *supra.*

27. S. REP. No. 105, *supra* note 9, at 5.

28. NLRB v. Big Three Welding Equip. Co., 359 F.2d 77 (5th Cir. 1966); NLRB

Subsequent to the amendments the United States Supreme Court first faced the issue of state regulation of supervisor activity in *Hanna Mining Co. v. District 2, Marine Engineers Beneficial Association.*[29] In that case plaintiffs brought suit under Wisconsin's anti-picketing statute to enjoin the union from picketing plaintiffs' vessels. The Supreme Court of Wisconsin affirmed[30] the trial court's dismissal for lack of jurisdiction over the subject matter because the picketing was arguably prohibited by the National Labor Relations Act and, thus, state regulation of the activity was preempted. The Supreme Court reversed, holding that the Act did not preempt the state regulation under the circumstances of the case.[31] The Court first summarized the ground rules for preemption in labor law:[32] "[I]n general, a State may not regulate conduct arguably 'protected by § 7, or prohibited by § 8' of the National Labor Relations Act, . . . and the legislative purpose may further dictate that certain activity 'neither protected nor prohibited' be deemed privileged against state regulations. . . ."[33] Because of an earlier Board decision that Hanna's engineers were supervisors,[34] the Court said their activities could not be arguably protected by section 7 or prohibited by section 8, thus removing this ground for preemption.[35] The Court then considered whether "legislative purpose" required preemption. The union argued that the first clause of section 14(a) of the Act—"Nothing herein shall prohibit any individual employed as a supervisor from becoming or remaining a member of a labor organization"—signified a policy of *laissez faire* toward supervisors that ousted both federal and state authority over supervisors' conduct.[36] In response, the Court stated: "This broad argument fails utterly in light of the legislative history, for the Committee reports re-

v. Fullerton Publishing Co., 283 F.2d 545 (9th Cir. 1960); NLRB v. Inter-City Advertising Co., 190 F.2d 420 (4th Cir. 1951), *cert. denied*, 342 U.S. 908 (1952); NLRB v. Edward G. Budd Mfg. Co., 169 F.2d 571 (6th Cir. 1948), *cert. denied*, 335 U.S. 908 (1949). *But see* cases cited note 10 *supra.*

29. 382 U.S. 181 (1965).

30. 23 Wis. 2d 433, 127 N.W.2d 393 (1964), *rev'd*, 382 U.S. 181 (1965).

31. 382 U.S. at 194.

32. The development of federal preemption in labor law has been thoroughly analyzed in Cox, *Labor Law Preemption Revisited*, 85 HARV. L. REV. 1337 (1972).

33. 382 U.S. at 187. In essence, section 7 protects the rights of employees to self organization and collective bargaining. Section 8 lists a number of activities prohibited as unfair labor practices.

34. In *Hanna*, as in *Beasley*, the Board had made an earlier determination that the employees involved were supervisors and thus, were not subject to the protections of the National Labor Relations Act. *See* note 11 *supra.*

35. 382 U.S. at 188.

36. *Id.* at 189.

veal that Congress' propelling intention was to relieve employers from any compulsion under the Act and under state law to countenance or bargain with any union of supervisory employees."[37] However, since the state law involved in *Hanna* protected the *employer* by allowing him to petition the state courts for an injunction against picketing, the Court concluded that this legislative purpose would not be violated by allowing the state injunction.[38] The question remaining after *Hanna* was whether "legislative" purpose would require the preclusion of a state law protecting the supervisor, rather than the employer.

In *Beasley* the United States Supreme Court began its inquiry by stating that *Hanna* had construed only the first clause of section 14(a) and in doing so had allowed state regulations only when such regulation furthered, not hindered, the "legislative purpose" of the Act.[39] *Hanna* did not, in the Court's view, foreclose preemption in cases like *Beasley* in which state regulations violated the command of the second clause of section 14(a).[40]

At this point the Court turned to the petitioners' contention that state damage remedies for discharge because of union membership do not come within the ambit of the second clause of section 14(a)—"no employer subject to this Act shall be compelled to deem individuals defined herein as supervisors as employees for the purpose of any law, either national or local, relating to collective bargaining"—because they do not relate to *collective bargaining*. Examination of the Court's attempt to dispose of this contention discloses a weak link in the Court's chain of logic.

The petitioners argued that because of the phrase "relating to collective bargaining," the second clause of section 14(a) was a "limited prohibition against state regulations that compel an employer to bargain collectively with unions that include supervisors as members,"[41] and that state damage remedies for discharge because of union membership would not violate such a prohibition. The Court rejected this construction as too narrow. It stated that Congress' intention in passing sections 2(3), 2(11), and 14(a) was to "redress a perceived imbalance in labor-management relationships that was found to arise from putting supervisors in the position of serving two masters with opposed inter-

37. *Id.*
38. *Id.* at 190.
39. 416 U.S. at 657.
40. *Id.*
41. *Id.* at 658.

ests."[42] Thus, the Court concluded that state damage remedies like sections 95-81 and 95-83 of the North Carolina General Statutes would, if applied, contradict this policy.

Unquestionably, Congress was concerned that, when supervisors join unions, conflicts might result because of the supervisors' divided loyalties between the employer and the rank and file workers.[43] It is equally clear that a law that might force an employer to retain a supervisor who belongs to a union would be within that concern.[44] It does not, however, follow that such a law necessarily is one "relating to collective bargaining" as required by the second clause of section 14(a).[45] The fact that an employer may be forced to retain a supervisor does not mean that he will also be forced to bargain with the supervisor either collectively or individually. The employer cannot be compelled to bargain with or about supervisors under federal law,[46] and the second clause of section 14(a) seemingly would prevent a similar compulsion under state law.[47] The legislative history as discerned in *Hanna* supports this conclusion.[48]

Beasley's failure to follow the specific language of the second clause of section 14(a) may have unforeseen consequences. First, the Court's disregard of the "relating to collective bargaining" language extends the prohibition of 14(a) to any law that requires an employer to deem a supervisor an employee for *any purpose*. Since any state

42. *Id.* at 661-62.

43. The evidence before the committee shows clearly that unionizing supervisors under the Labor Act is inconsistent with the purpose of the act to increase output of goods that move in the stream of commerce, and thus to increase its flow. It is inconsistent with the policy of Congress to assure to workers freedom from domination or control by their supervisors in their organizing and bargaining activities. It is inconsistent with our policy to protect the rights of employers; they, as well as workers, are entitled to loyal representatives in the plants, but when the foremen unionize, even in a union that claims to be "independent" of the union of the rank and file, they are subject to influence and control by the rank and file union, and, instead of their bossing the rank and file, the rank and file bosses them.

H.R. REP. No. 245, 80th Cong., 1st Sess. 14 (1947); S. REP. No. 105, *supra* note 9.

44. The North Carolina remedy for discharge arguably could have this effect since the employer would either have to retain the supervisor or be liable in money damages for his discharge.

45. The North Carolina law does not compel an employer in any way. It merely subjects him to liability for discrimination in employment on the basis of union membership or non-membership. N.C. GEN. STAT. § 95-83 (1965).

46. NLRB v. Metropolitan Life Ins. Co., 405 F.2d 1169 (2d Cir. 1968); West Pa. Power Co. v. NLRB, 337 F.2d 993 (3d Cir. 1964); Deaton Truck Line, Inc. v. NLRB, 337 F.2d 697 (5th Cir. 1964); NLRB v. Retail Clerks Int'l Ass'n, 203 F.2d 165 (9th Cir. 1953).

47. *See* note 7 *supra.*

48. *See* text accompanying note 37 *supra.*

law that offers protection to supervisors would require an employer to so deem a supervisor,[49] all such laws will be preempted. This result seems to go beyond the specific intent of Congress in passing section 14(a).[50]

Secondly, in view of the Court's disregard of the language of section 14(a), it could be argued that the Court, in reaching its decision to preempt, relied primarily on the general policy supporting the exclusion of supervisors from the *federal* act.[51] This argument could easily be extended to preempt state laws that offer protection to other classes of persons excluded from the National Labor Relations Act. If successful, this would leave agricultural and domestic workers[52] in the same situation that *Beasley* has left supervisors—without any protections under either federal or state laws. Again, it is questionable whether Congress intended such a result.[53]

Because of the questions raised by *Beasley* about the continued effectiveness of state laws that protect those excluded from the National Labor Relations Act, congressional action is imperative. Congress should amend the National Labor Relations Act to allow supervisors to organize and bargain with their employers under the protection of the Act so long as they do not join unions composed of rank and file employees. This action would solve the problem of conflicting loyalties owed to the employer and the rank and file. At the same time, such amendments would place supervisors on a more equal footing with the employer in bargaining about working conditions, wages, and tenure.

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49. Any law that affords supervisors any rights and protections similar to those granted to employees under the National Labor Relations Act would seem to be a law "which compels an employer to deem a supervisor as an employee."

50. *See* note 9 *supra.*

51. *See* text accompanying note 21 *supra.* The language quoted by the Court is the same as that used by Congress when it considered the exclusion of supervisors from the federal Act. *See* text accompanying note 27 *supra.*

52. 29 U.S.C. § 152(3) (1970) excludes both agricultural and domestic workers from the definition of "employee" and thus denies them the protections of the Act.

53. Had Congress intended to preclude state as well as federal protection of these persons it could easily have so provided.

Remedies—The High Price of Cotton and the Breaching Farmer: Liquidated Damages, Specific Performance and Other Remedies

During the 1973 cotton crop year in the southeastern United States the price of cotton rose from approximately thirty cents per pound to approximately ninety cents per pound between the spring and fall. This was the fastest rise in more than a century. Consequently, many farmers who had entered into cotton sales contracts[1] in the spring breached or sought to avoid these contracts in the fall in order to sell their cotton on the open market. In the resulting lawsuits, many farmers defended on the ground that the liquidated damages clauses in their contracts provided purchasers with their sole remedy. There are two main issues in these cases—whether the liquidated damages clause is the exclusive remedy and, assuming a negative response to the first question, whether the buyers are entitled to either specific performance or actual damages.

One of the first of these so-called "cotton contract cases," *Carolinas Cotton Growers Association, Inc. v. Arnette*,[2] involved farmers who had signed marketing agreements with the plaintiff, an agricultural cooperative, in which the farmers agreed to sell and deliver to plaintiff all the cotton produced on specified acreage.[3] The marketing agreements were executed before the cotton crop was planted, and each contained a liquidated damages clause. Each of the defendants refused to deliver the cotton as contracted and some sold to third parties. The

1. These contracts are known in the trade as "forward contracts" because they are made in the spring at or before the planting of the cotton crop, and establish the price to be paid to the farmer for his cotton when it is harvested in the fall. Such contracts have become common in recent years because they allow the farmer to know in advance the price he will receive for his cotton. This knowledge benefits the farmer in two respects. He is able to determine in advance if it is economically wise for him to plant, cultivate and harvest his crop in light of the price he is to receive. Also, the farmer is relieved of the risk of loss in the event that cotton prices decrease prior to the time for harvest.

These forward contracting arrangements also have advantages for the ultimate, if not the immediate, purchaser, the textile manufacturer, because he knows the cost of his raw material six to eight months prior to harvest. Carolinas Cotton Growers Ass'n, Inc. v. Arnette, 371 F. Supp. 65 (D.S.C. 1974).

2. 371 F. Supp. 65 (D.S.C. 1974). *See also* Mitchell-Huntley Cotton Co. v. Lawson, 377 F. Supp. 661 (M.D. Ga. 1973).

3. These "forward contracts" usually cover all the cotton produced on specified acreage rather than a certain number of bales; therefore, they are output contracts. It should be noted, however, that the usual number of bales produced on a given farm is a fairly constant figure unless some unexpected natural disaster occurs. 371 F. Supp. at 66.

plaintiff sought specific performance and the defendants contended that the liquidated damages clause in the contract provided plaintiff with its exclusive remedy.

The court held that under the Uniform Commercial Code[4] liquidated damages were not the exclusive remedy available to plaintiff and that it was entitled to specific performance as provided by the South Carolina Cooperative Marketing Act.[5] This note will analyze the possible impact of *Arnette* with respect to similar cases now pending, particularly those in North Carolina.[6]

Analysis of the *Arnette* case must begin by considering the question of the applicability of the Uniform Commercial Code to "cotton contracts." Article Two of the U.C.C. applies to sales and other "transactions in goods."[7] In section 2-105(1) "goods" are defined to include "growing crops." Sections 2-501(1)(c) and 9-204(2)(a) clearly establish that crops are considered as growing once they are planted. Thus, a contract for the sale of a crop which is planted at the time the contract is made is a contract for the sale of goods.[8]

Although the *Arnette* court in applying the U.C.C. to the liquidated damages issue did not discuss the threshold question of whether the U.C.C. applies to a contract for the sale of *unplanted* crops, the language and purpose of section 2-105 support such an application. "Goods" are defined in the first sentence of section 2-105 (1) as "things . . . which are movable *at the time of identification* to the contract for sale. . . ."[9] In extending the definition of goods specifically to include "growing crops," the draftsmen intended that this status again be defined as of "the time of identification," not as of the time of the making of the contract. Since crops are not identified to the contract until they begin growing,[10] unplanted crops will be

4. UNIFORM COMMERCIAL CODE § 2-719(1)(b).

5. S.C. CODE ANN. § 12-973 (1962).

6. Even though *Arnette* is a South Carolina case, North Carolina courts have looked to cases in other states as a method of interpreting the Uniform Commercial Code, remembering that one of the purposes of the U.C.C. is "to make uniform the law among various jurisdictions." Evans v. W.B. Everett, Early & Winborne, Inc., 10 N.C. App. 435, 437, 179 S.E.2d 120, 122 (1971), *citing* N.C. GEN. STAT. § 25-1-102(2)(c) (1965).

7. UNIFORM COMMERCIAL CODE § 2-102.

8. *See, e.g.*, Exchange Nat'l Bank v. Alturas Packing Co., 269 So. 2d 733 (Fla. Dist. Ct. App. 1972) (citrus fruit); Barron v. Edwards, 45 Mich. App. 210, 206 N.W.2d 508 (1973) (sod); Azevedo v. Minister, 86 Nev. 576, 471 P.2d 661 (1970) (hay).

9. N.C. GEN. STAT. § 25-2-105(1) (1965) (emphasis added).

10. "In the absence of explicit agreement identification occurs . . . (c) when the crops are planted or otherwise become growing crops . . . ." UNIFORM COMMERCIAL CODE § 2-501(1)(c).

growing crops at the time of identification and are thus "goods."[11]

Under U.C.C. section 2-105(2), unplanted crops, like unproduced manufactured articles, are "future goods," for they are not yet in existence and identified to the contract. Official Comment Two to this section makes clear that contracts to sell future goods are covered by the U.C.C.

As noted previously, many, though not all, cotton sales contracts contain liquidated damages clauses.[12] The U.C.C. clearly answers the question of whether such clauses are presumed to be exclusive remedies. Section 2-719(1)(b) provides that resort to a contract remedy is optional unless expressly provided to be exclusive. Official Comment Two to this section further states that, if the parties intend a contract term to describe a sole remedy, "this must be clearly expressed." Together, these two provisions compel the conclusion that a contract remedy is not exclusive unless the agreement so specifies.[13]

Even if an agreement does not expressly make liquidated damages the sole remedy, thus permitting the injured party to seek an equitable remedy,[14] a valid liquidated damages clause apparently will preclude the injured party from seeking his actual damages. The general rule under pre-Code law was that a valid liquidated damages clause substituted the amount agreed upon for the actual damages resulting from the breach of the contract.[15] There is no compelling reason to believe that section 2-719(1)(b) alters that rule; it simply makes clear that

11. This interpretation is supported by the fact that it does not distinguish between crops and manufactured goods. Manufactured articles that have not been produced at the time the contract is made are "goods" under section 2-105(1) because they will be movable when they are identified to the contract. There is no policy reason for the Code to cover unproduced manufactured articles but to exclude unplanted crops. Moreover, it is too important and unusual a distinction to have been made without clearer delineation in the Code itself and without any explanation in the comments to the Code. *See* Mitchell-Huntley Cotton Co. v. Lawson, 377 F. Supp. 661 (M.D. Ga. 1973).

12. Such clauses are found most often in contracts involving marketing associations such as Carolinas Cotton Growers Association, Inc. Obviously, if there is no liquidated damages clause in the contract, the main issue will be whether the non-breaching plaintiff is entitled to specific performance, or some other equitable remedy, or to the recovery of his actual damages.

13. Carolinas Cotton Growers Ass'n, Inc. v. Arnette, 371 F. Supp. 65, 70 (D.S.C. 1974). *See* RESTATEMENT OF CONTRACTS § 378 (1932).

14. Such an equitable remedy might be specific performance or an injunction forbidding sales to third parties. UNIFORM COMMERCIAL CODE § 2-716(1).

15. *See, e.g.*, Quaile & Co. v. William Kelly Milling Co., 184 Ark. 717, 43 S.W.2d 369 (1931); Robbins v. Plant, 174 Ark. 639, 297 S.W. 1027 (1927); U-Haul Co. of N.C., Inc. v. Jones, 269 N.C. 284, 152 S.E.2d 65 (1967) (holding that a liquidated damages clause will not preclude an equitable remedy but does settle the amount of damages if there is a suit for such).

non-damage remedies are not precluded.[16] Furthermore, some courts have held that the U.C.C. allows the injured party to recover actual damages *if* liquidated damages have not been stipulated.[17] By inference, if liquidated damages *are* stipulated, the Code would not permit recovery of actual damages despite section 2-719(1)(b). Therefore, an injured party seeking damages is limited to the amount stipulated in the liquidated damages clause, unless he can show that the clause itself is invalid.

A liquidated damages clause must meet two requirements in order to be enforceable. First, the damages that the parties might reasonably anticipate from a breach must be incapable or very difficult of accurate estimation. Secondly, the amount stipulated must be either a reasonable estimate of the damages that would probably be caused by a breach or reasonably proportionate to the damages actually caused by the breach.[18]

Liquidated damages clauses are most frequently attacked on the theory that the damages stipulated are excessive and therefore constitute an unenforceable penalty.[19] In the recent cotton contract cases, the liquidated damages, if provided for, have been disproportionately *small,* especially if actual damages are to be measured by the market price-contract price differential. Some courts and authorities have held that an unreasonably small amount of liquidated damages constitutes a penalty and therefore does not bind the parties.[20] However,

16. An argument could be made that section 2-719(1)(b) does not preclude damage remedies either. Section 2-719(1)(b) provides that resort to a contract remedy is optional unless the agreement expressly provides for the contrary. Assuming no such express language, if an injured party chooses not to seek the contract remedy, in this case liquidated damages, he should be able to seek *any* available alternative remedy, including actual damages, computed according to section 2-713, for example. Holding that he may not seek actual damages in effect would mean that the liquidated damages clause *is* exclusive.

17. Procter & Gamble Distrib. Co. v. Lawrence Am. Field Warehousing Corp., 16 N.Y.2d 344, 213 N.E.2d 873, 266 N.Y.S.2d 785 (1965); Silverman v. Alcoa Plaza Associates, 9 UCC Rep. Serv. 429 (N.Y. App. Div. 1971).

18. Knutton v. Cofield, 273 N.C. 355, 160 S.E.2d 29 (1968); Bradshaw v. Millikin, 173 N.C. 432, 92 S.E. 161 (1917); RESTATEMENT OF CONTRACTS § 339 (1932).

19. Knutton v. Cofield, 273 N.C. 355, 160 S.E.2d 29 (1968); City of Kinston v. Suddreth, 266 N.C. 618, 620, 146 S.E.2d 660, 662 (1966); UNIFORM COMMERCIAL CODE § 2-718(1). For discussions of factors influencing the determination of whether a contract term is a penalty see Knutton v. Cofield, *supra;* Bradshaw v. Millikin, 173 N.C. 432, 92 S.E. 161 (1917); Henderson v. Cansler, 65 N.C. 542 (1871); Lindsay v. Anesley, 28 N.C. 186 (1845).

20. Horn v. Poindexter, 176 N.C. 620, 622, 97 S.E. 653 (1918) ("[w]here the stipulated sum to be paid in a breach of the contract is of such a nature that the damages arising from a breach may be either much greater or much less than the sum fixed it will be construed to be a penalty."); BENDER'S UCC SERV., R. DUESENBERG & L. KING,

the North Carolina Supreme Court arguably disagreed with this theory in *City of Kinston v. Suddreth*.[21] There, plaintiff attacked the stipulated contract damages as a penalty in order to recover his actual damages that exceeded the penalty.[22] The court, however, refused to determine whether the stipulated sum in the contract was a penalty, noting that the result would be the same regardless of the classification. "If a provision denominated liquidated damages be deemed one for a penalty, 'the measure of damages is compensation for the actual loss, *not exceeding the penalty named.*' "[23] A close analysis of *Suddreth*, however, suggests that an earlier North Carolina case was more precise and reached a better result.[24]

Even when stipulated damages are not declared invalid as a penalty, a liquidated damages provision may still be declared invalid if damages from breach were easily ascertainable[25] at the time the contract was executed.[26] If a formula or some other method of calculating

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SALES AND BULK TRANSFERS, § 14.08, at 64 (1974). *See* UNIFORM COMMERCIAL CODE § 2-718, Comment 1.

21. 266 N.C. 618, 146 S.E.2d 660 (1966). *But see* Horn v. Poindexter, 176 N.C. 620, 622, 97 S.E. 653 (1918).

22. This same allegation could be made in a cotton contract case.

23. 266 N.C. at 621, 146 S.E.2d at 662, *quoting* Wheedon v. American Bonding & Trust Co., 128 N.C. 69, 71, 38 S.E. 255 (1901).

24. *See* note 20 *supra*. For three reasons the impact of *Suddreth* should be limited: (1) The strong reliance that the court placed upon Wheedon v. American Bonding & Trust Co., 128 N.C. 69, 38 S.E. 255 (1901), appears to be misplaced. *Wheedon*, which involved the liability of a surety on his bond, stated: "In an action on a *penal bond* for the perforcance [*sic*] of a contract, equity always interposes to relieve, and the measure of damages is compensation for actual loss, *not exceeding the penalty named.*" *Suddreth*, however, did not even acknowledge the possible distinctions between liquidated damages and bond liability.

(2) If *Suddreth* had been decided under the U.C.C., the same result would probably have been reached, *i.e.* the liquidated damages would have been awarded on the theory that they were "reasonable in the light of the . . . actual harm caused by the breach . . . ." UNIFORM COMMERCIAL CODE § 2-718(1). Therefore, the issue that the court avoided—whether the stipulated amount was liquidated damages or a penalty—would have been found to be valid liquidated damages.

(3) *Suddreth* ignored the possibility that an unreasonably small stipulated sum in a contract might constitute a penalty and thus might not bind the parties, as was recognized in Horn v. Poindexter, 176 N.C. 620, 97 S.E. 653 (1918). In fact it might be argued that *Suddreth* was concerned with the term "penalty" only in the context of unreasonably *high* stipulated damages. Thus, the holding in *Suddreth* might not apply to a "penalty" that is unreasonably *low*. Such a theory would reconcile *Suddreth* and *Wheedon* with the authorities cited in note 20 *supra*.

25. *See, e.g.*, Horn v. Poindexter, 176 N.C. 620, 97 S.E. 653 (1918); Winston-Salem Cigarette Mach. Co. v. Wells-Whitehead Tobacco Co., 141 N.C. 284, 53 S.E. 885 (1906); Thoroughgood v. Walker, 47 N.C. 16 (1854); UNIFORM COMMERCIAL CODE § 2-718(1); 22 AM. JUR. 2d *Damages* § 218 (1965); RESTATEMENT OF CONTRACTS § 339(1)(b) (1932).

26. The time of execution, not the time of the breach, is the proper time for determining whether damages were ascertainable. Robbins v. Plant, 174 Ark. 639, 297 S.W.

and ascertaining damages is available, the liquidated damages usually will be held invalid.[27] For example, some courts have held that, with a contract for the sale of goods having a readily available market price, damages for breach are ascertainable by applying the contract price-market price differential rule,[28] therefore invalidating the liquidated damages clause.[29]

As previously mentioned, a valid liquidated damages clause will not prevent the injured party from seeking the equitable remedy of specific performance absent express language in the contract to the contrary.[30] U.C.C. section 2-716(1) provides: "Specific performance may be decreed where the goods are unique or in other proper circumstances." While this language is vague, it is clear that the draftsmen desired to increase the availability of specific performance as a remedy.[31] If specific performance would have been available under prior law, it is available under the Code.[32] Under pre-Code law, specific performance was granted only in the "absence of an adequate and complete remedy at law."[33] Although courts have been particularly willing to grant specific performance of output contracts,[34] such as the cotton contracts in issue, such a grant has not been automatic.[35]

1027 (1927); Downtown Harvard Lunch Club v. Racso, Inc., 201 Misc. 1087, 107 N.Y.S.2d 918 (Sup. Ct. 1951); Knapp v. Ottinger, 206 Okla. 113, 240 P.2d 1083 (1951).

27. *See, e.g.*, Plymouth Sec. Co. v. Johnson. 335 S.W.2d 142 (Mo. 1960); City of St. Louis v. Parker-Washington Co., 271 Mo. 229, 196 S.W. 767 (1917); Horn v. Poindexter, 176 N.C. 620, 97 S.E. 653 (1918); Wilson v. Dealy, 222 Tenn. 196, 434 S.W.2d 835 (1968); Schwarz v. Lee, 287 S W. 519 (Tex. Civ. App. 1926).

28. UNIFORM COMMERCIAL CODE § 2-713.

29. Home Land & Cattle Co. v. McNamara, 145 F. 17 (7th Cir. 1906) (contract for the sale of cattle); Rice v. Schmid, 18 Cal. 2d 382, 115 P.2d 498 (1941); Stark v. Shemada, 187 Cal. 785, 204 P. 214 (1922) (contract for the sale of furniture); Marshall Milling Co. v. Rosenbluth, 231 Ill. App. 325 (1924); Nichols & Shepard Co. v. Beyer, 168 Mo. App. 686, 153 S.W. 794 (1913) (contract for the sale of threshing machines). *See* Sweet, *Liquidated Damages in California*, 60 CALIF. L. REV. 84 (1972). *But see* Calvin Hosmer, Stolte Co. v. Paramount Cone Co., 285 Mass. 278, 189 N.E. 192 (1934) (contract for the sale of flour).

30. UNIFORM COMMERCIAL CODE § 2-719(1)(b); *see, e.g.*, Tobacco Growers Cooperative Ass'n v. Pollock, 187 N.C. 409, 121 S.E. 763 (1924); Tobacco Growers Cooperative Ass'n v. Jones, 185 N.C. 265, 117 S.E. 174 (1923); Bradshaw v. Millikin, 173 N.C. 432, 436, 92 S.E. 161, 163 (1917). *See also* RESTATEMENT OF CONTRACTS § 378 (1932).

31. *See* UNIFORM COMMERCIAL CODE § 2-716, Comment 1; *id.* § 1-106(1).

32. *Id.* §§ 1-103, 2-716, Comment 1.

33. Annot., 152 A.L.R. 4, 47 (1944).

34. S. WILLISTON, A TREATISE ON THE LAW OF CONTRACTS § 1419B (3d ed. 1968); Van Hecke, *Changing Emphases in Specific Performance*, 40 N.C.L. REV. 1, 4-8 (1961).

35. In determining the adequacy of the remedy in damages, as to contracts other than for the transfer of an interest in land, the following factors are influential and may singly or in combination justify specific enforcement: (a) the degree of difficulty and uncertainty in making an accurate valuation of the subject matter involved, in determining the effect of a breach, and in estimating

In North Carolina specific performance of contracts for the sale and delivery of personal property normally would not be granted, but it was granted when damages did not afford a complete remedy.[36] Several North Carolina cases in the 1920's, analogous to the present cotton contract cases, involved forward contracts, containing liquidated damages clauses, for the sale and delivery of tobacco.[37] The farmers later breached the contracts and attempted to sell their tobacco elsewhere. When the purchasers sued for specific performance, defendants contended that the liquidated damages clauses provided the exclusive remedy. However, the courts held that despite the liquidated damages clauses, plaintiffs were in effect entitled to specific performance in the form of an injunction forbidding the farmers from delivering the tobacco to anyone other than plaintiff.[38]

Since specific performance was available under pre-Code law, it should be granted under the U.C.C. in the present cases.[39] Further, recent authorities suggest that a party should be granted specific performance when the equities strongly favor him, regardless of whether such a remedy would have been appropriate under pre-Code law.[40] In

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the plaintiff's harm; (b) the existence of sentimental associations and esthetic interests, not measurable in money, that would be affected by breach; (c) the difficulty, inconvenience, or impossibility of obtaining a duplicate or substantial equivalent of the promised performance by means of money awarded as damages; (d) the degree of probability that damages awarded cannot in fact be collected; (e) the probability that full compensation cannot be had without multiple litigation.

RESTATEMENT OF CONTRACTS § 361 (1932).

36. Virginia Trust Co. v. Webb, 206 N.C. 247, 173 S.E. 598 (1934); Tobacco Growers Cooperative Ass'n v. Battle, 187 N.C. 260, 121 S.E. 629 (1924).

37. The courts did not rely on a marketing act in reaching their decisions as did the court in *Arnette*, despite the fact that an agricultural cooperative was involved.

38. Tobacco Growers Cooperative Ass'n v. Pollock, 187 N.C. 409, 121 S.E. 763 (1924); Tobacco Growers Cooperative Ass'n v. Battle, 187 N.C. 260, 121 S.E. 629 (1924); Tobacco Growers Cooperative Ass'n v. Jones, 185 N.C. 265, 117 S.E. 174 (1923); *see* Campbell Soup Co. v. Diehm, 111 F. Supp. 211 (E.D. Pa. 1952) (injunction); Fraser v. Cohen, 159 Fla. 253, 31 So. 2d 463 (1947) (specific performance); Thompson v. Winterbottom, 154 Md. 581, 141 A. 343 (1928) (specific performance and injunction); Curtice Bros. Co. v. Catts, 72 N.J. Eq. 831, 66 A. 935 (Ch. 1907) (specific performance and injunction). *Contra*, Hearn v. Ruark, 148 Md. 354, 129 A. 366 (1925) (injunction denied, damages adequate). *See also* Van Hecke, *supra* note 34, at 4-5.

39. *See* text accompanying note 32 *supra*. In addition, the U.C.C. extends the availability of this equitable remedy to cases in which securing substitute goods is subjectively, highly difficult rather than objectively, virtually impossible. *See* UNIFORM COMMERCIAL CODE § 2-716, Comment 2; Peters, *Remedies for Breach of Contracts Relating to the Sale of Goods Under the Uniform Commercial Code: A Roadmap for Article Two*, 73 YALE L.J. 199, 232-33 (1963).

40. Hale v. Higginbotham, 228 Ga. 823, 188 S.E.2d 515 (1972); Schweber v. Rallye Motors, Inc., 12 UCC REP. SERV. 1154 (N.Y. Sup. Ct. 1973); Comment, *Specific Performance Under Section 2-716 of the Uniform Commercial Code—What "Other Proper Circumstances"?*, 33 U. PITT. L. REV. 243 (1971).

the present cases the equities appear to favor the purchasers. First, the farmers are the breaching parties. Secondly, their sole reason for breaching was to enable them to obtain higher prices on the open market. Thirdly, in most cases the buyers, in reliance on the farmers' promises to deliver, entered second contracts with textile manufacturers for the sale and delivery of the cotton. The *Arnette* court further suggests that cotton contracts may be specifically enforced due to the "unusual interdependency of the various persons handling cotton from the time of its planting, through its sale, manufacture and delivery to the ultimate consumer."[41]

CONCLUSION

Arnette properly applied the U.C.C. and held the liquidated damages clause not to be an exclusive remedy. For those currently pending cotton contract cases involving similar factual situations in jurisdictions that have marketing acts similar to those in South Carolina and North Carolina, *Arnette* represents valid precedent for awarding specific performance. Whether specific performance will be available to non-agricultural-cooperative plaintiffs depends on interpretation of the U.C.C. and pre-Code case law. Fortunately for such plaintiffs the U.C.C. favors the granting of specific performance.[42] Indeed, the simple, equitable solution to these cases would be to grant such relief in the absence of a contract term permitting the farmer an election to perform or to pay liquidated damages.[43] This solution is based primarily on the axiom that a man should be required to perform any arms-length agreement that he enters, even when it later proves to be a bad bargain.

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41. 371 F. Supp. at 70.
42. *See* text accompanying notes 30-32 *supra*.
43. Bell v. Smith Concrete Prods., Inc., 263 N.C. 389, 139 S.E.2d 629 (1965).