UNC SCHOOL OF LAW

NORTH CAROLINA LAW REVIEW

Volume 54 | Number 4 Article 5

4-1-1976

Notes

North Carolina Law Review

NOTES

Civil Rights—State Action is a Requirement for the Application of Section 1985(3) to First Amendment Rights

For a century after its initial enactment as section 2 of the Ku Klux Klan Act, 42 U.S.C. section 1985(3)[1] was an unpopular and seldomly used civil rights remedy. However, in 1971 in *Griffin v. Breckenridge*[2] the United States Supreme Court revitalized section 1985(3) by eliminating state action[3] as a necessary element for recovery in suits involving racial discrimination. By limiting its holding in *Griffin* to the type of private conspiracy being challenged in that particular case, the Court left two important issues concerning the scope of section 1985(3) unanswered: first, to what forms of discrimination other than racial discrimination would section 1985(3) apply;[4] and second, whether section 5 of the fourteenth amendment empowered Congress to protect fourteenth-amendment-based rights against private action.[5] In *Bellamy*

---

1. 42 U.S.C. § 1985(3) (1970). Section 1985(3) states in relevant part:

> If two or more persons in any State or Territory conspire or go in disguise on the highway or on the premises of another, for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws; . . . in any case of conspiracy set forth in this section, if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages, occasioned by such injury or deprivation, against any one or more of the conspirators.

2. 403 U.S. 88 (1971).

3. *Id.* at 101. The requirement of state action had been imposed twenty years earlier in Collins v. Hardyman, 341 U.S. 651 (1951). The effect of requiring state action was to limit application of section 1985(3) to use in actions that were more easily established under other civil rights statutes. As a result, prior to *Griffin,* section 1985(3) was infrequently and unsuccessfully used. Note, *Constitutional Law—Section 1985(3) of the Civil Rights Act of 1871—Color of Law Element Eliminated*—Griffin v. Breckenridge, 403 U.S. 88 (1971), 1972 U. ILL. L.F. 199, 199.

4. 403 U.S. at 102 n.9. One writer suggests that the Court virtually restricted the holding to cases involving racial discrimination by basing the constitutionality of the section primarily on thirteenth amendment grounds. Note, *Civil Rights: Are Private Conspiracies Redressable in Federal Courts?*, 25 U. MIAMI L. REV. 780 (1971). However, because of the quoted language in the text accompanying note 21 *infra*, and because the Court also based the constitutionality on Congress' power to protect the right to travel and specifically stated that it was not implying the absence of any other constitutional basis, the correctness of this suggestion is unlikely. 403 U.S. at 105-07.

5. The Supreme Court specifically avoided the issue whether Congress has power under section 5 of the fourteenth amendment to reach private conspiracies. 403 U.S. at 107.

v. Mason's Stores, Inc.[6] the Fourth Circuit Court of Appeals was squarely confronted with these questions in determining whether section 1985(3) would protect a person who was allegedly denied his first amendment right of freedom of association by a purely private conspiracy. The Fourth Circuit avoided the first of these questions, failing to consider whether section 1985(3) would cover the non-racial discrimination alleged in *Bellamy*; and, although implying that section 5 authorized Congress to protect fourteenth-amendment-based rights[7] from private action,[8] the court held that section 1985(3) displayed congressional intent that state action be required for an action based on a conspiracy to deprive first amendment rights.[9]

The suit arose after John Bellamy was fired from his position at Mason's, allegedly because of his membership in the Ku Klux Klan. Bellamy sued his former employer under Title VII, 42 U.S.C. sections 2000e-2 and 1985(3) for violating his right of free association.[10] The district court[11] dismissed the complaint for failure to state a claim for which relief could be granted under either statute,[12] and Bellamy appealed. The court of appeals summarily affirmed the district court's holding as to section 2000e-2[13] and addressed whether section 1985(3) protects an individual's first amendment rights from private conspiracies. The court held that section 1985(3) was applicable only when first amendment rights were violated as a result of state action. The court reasoned that the right of association is a first amendment right that is only protected from state action because of incorporation into the

6. 508 F.2d 504 (4th Cir. 1974).

7. "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV, § 1.

"The Congress shall have power to enforce, by appropriate legislation, the provisions of this article." *Id.* § 5. The first amendment right of freedom of association is incorporated into section 1 of the fourteenth amendment. NAACP v. Alabama, 357 U.S. 449 (1958).

8. For the majority's treatment of this issue, see note 42 and text accompanying notes 40-42 *infra*. In his concurring opinion, Judge Boreman states that Congress does not have the power under section 5 to reach private action. 508 F.2d at 508.

9. 508 F.2d at 506-07.

10. *Id.* at 505.

11. Bellamy v. Mason's Stores, Inc., 368 F. Supp. 1025 (E.D. Va. 1973).

12. *Id.* at 1026, 1029.

13. Section 2000e-2 is the modern statute proscribing employment discrimination based on race, color, national origin, sex, and religion. Bellamy alleged that the Ku Klux Klan was a religion "because its meetings were full of 'religious pomp and ceremony.'" 508 F.2d at 505. However, due to a failure to comply with pleading rules, this interesting proposition was not properly before the court. *Id.*

fourteenth amendment and that the language of section 1985(3) parallels the language of section 1 of the fourteenth amendment which requires state action;[14] therefore, it concluded that although Congress may have the power to reach a private conspiracy denying first amendment rights, section 1985(3) is not a reflection of that power.[15]

To consider the *Bellamy* decision in the proper perspective, a detailed examination of *Griffin v. Breckenridge* and subsequent lower court decisions is in order. *Griffin* concerned several black plaintiffs who were physically assaulted after the passage of their car on a public road was blocked by white defendants. The rights allegedly violated included the first amendment rights of freedom of speech, association and assembly.[16] The first issue the Supreme Court addressed was whether section 1985(3) applied to private conspiracies. The Court cited three reasons for answering this issue in the affirmative. First, the language of section 1985(3) indicated congressional intent to reach private parties. The Court focused on the words "go in disguise" and noted that such activity was little associated with official action, yet commonly connected with private marauders.[17] Second, Congress encompassed all types of state action in three companion provisions to section 1985(3). The three possible forms of state action are: (1) under color of state law, covered by the present 42 U.S.C. section 1983; (2) interference with or influence upon state authorities, covered by another clause of section 1985(3); and (3) a private conspiracy so massive and effective that it supplants state authorities, covered by section 3 of the Ku Klux Klan Act. In view of these three provisions, the Court reasoned that section 1985(3) would be a useless duplication unless it applied to private action.[18] Third, the legislative history indicated that the sponsors of section 1985(3) intended the statute to cover private acts. The Court noted that speeches of several supporters of original section 1985(3) stressed the need to reach private action.[19]

After determining that section 1985(3) applied to private conspiracies, the *Griffin* Court considered the requirements for the application

14. *Id.* at 506-07. For a fuller discussion of this aspect of the court's rationale, see notes 40-43 and accompanying text *infra.*

15. 508 F.2d at 508 (Boreman, C.J., concurring).

16. 403 U.S. at 89-91.

17. *Id.* at 96.

18. *Id.* at 98-99. "Given the existence of these three provisions, it is almost impossible to believe that Congress intended, in the dissimilar language of the portion of § 1985(3) now before us, simply to duplicate the coverage of one or more of them." *Id.* at 99.

19. *Id.* at 100-01.

of the statute. The Court first construed section 1985(3) as requiring some "racial, or perhaps otherwise class-based, invidiously discriminatory animus."[20] The Court saw this requisite as necessary to promote the policy of giving a civil rights statute " 'a sweep as broad as [its] language' "[21] without transforming it into a general federal tort statute.[22] The Court's failure to specify the scope of this criterion raises the question what type of discrimination other than racial discrimination is covered by section 1985(3).

The second requirement the Court imposed was the identification of some "source of congressional power to reach the private conspiracy alleged by the complaint in [each] case."[23] The Court found section 2 of the thirteenth amendment and the right of interstate travel to be the sources of congressional power to reach the private conspiracy alleged in *Griffin*.[24] However, the Court specified that

> [i]n identifying these two constitutional sources of congressional power, we do not imply the absence of any other. More specifically, the allegations of the complaint in this case have not required consideration of the scope of the power of Congress under § 5 of the Fourteenth Amendment. By the same token, since the allegations of the complaint bring this cause of action so close to the constitutionally authorized core of the statute, there has been no occasion here to trace out its constitutionally permissible periphery.[25]

The Court's failure to "trace out the constitutionally permissible periphery" of the provision raises the question of the extent of congressional authority under section 5 of the fourteenth amendment. Not surprisingly, lower court opinions since *Griffin* have grappled confusedly with the scope of the *Griffin* criteria.

Most lower court decisions since *Griffin* have treated the "racial, or otherwise class-based, animus" as the initial element of a 1985(3) claim. Therefore, unless this threshold test is met, courts have been able to side-step the question of the extent of congressional power under

20. *Id.* at 102. The statutory basis for the Court's construction of section 1985(3) lies in the statute's language which parallels language of the fourteenth amendment. See notes 1 and 7 *supra* for the relevant language. The Court determined that instead of being merely a reference to the fourteenth amendment, the word "equal" was used to indicate the need of "class" discrimination. *Id.* at 102. *See* Note, 1972 U. ILL. L.F. *supra* note 3, at 205.

21. 403 U.S. at 97.

22. *Id.* at 101-02.

23. *Id.* at 104.

24. *Id.* at 105.

25. *Id.* at 107 (footnote omitted).

section 5. In cases which do not involve state action, some courts have construed the term "class-based discrimination" very narrowly, thereby avoiding the issue whether section 5 authorizes Congress to reach purely private activity.[26] On the other hand, those courts not faced with the section 5 issue, either due to the presence of state action in the claim alleged or due to the court's previous determination that state action is required, tend to interpret "class" very broadly.[27] In other words, most courts have avoided answering one question by a limiting construction of the other issue. As a result, the success of a 1985(3) cause of action absent state action has remained doubtful. However, two courts have found a cause of action under section 1985(3) in the absence of both state action and racial discrimination.

The Eighth Circuit in *Action v. Gannon*[28] held that a private conspiracy to deprive certain church members of first amendment rights mainly on the basis of their economic class was covered by section 1985(3).[29] The Eighth Circuit first found constitutional authority under section 5 by relying on the sentiments of six Supreme Court Justices expressed in two concurring opinions in *United States v. Guest*.[30] *Guest* concerned the criminal counterpart of section 1985(3).[31] In his concurring opinion in that case, Justice Clark summed up the opinion of the six Justices very succinctly: "[T]here now can be no doubt that the specific language of § 5 empowers the Congress to enact laws punishing all conspiracies—*with or without state action*—that interfere with Fourteenth Amendment rights."[32] The

26. Arnold v. Tiffany, 359 F. Supp. 1034, 1036 (C.D. Cal. 1973) (newspaper dealers trade association—no class); America's Best Cinema Corp. v. Fort Wayne Newspapers, Inc., 347 F. Supp. 328, 335 (N.D. Ind. 1972) (all theaters showing unrated adult movies—no class). *See* Note, *Federal Power to Regulate Private Discrimination: The Revival of the Enforcement Clauses of the Reconstruction Era Amendments*, 74 COLUM. L. REV. 449, 517 (1974).

27. Cameron v. Brock, 473 F.2d 608, 610 (6th Cir. 1973) (supporters of political candidate); Dombrowski v. Dowling, 459 F.2d 190, 193 (7th Cir. 1972) (criminal lawyers, case dismissed due to absence of state action); Azar v. Conley, 456 F.2d 1382, 1386 n.5 (6th Cir. 1972) (middle class white family).

28. 450 F.2d 1227 (8th Cir. 1971) (*en banc*).

29. *Id.* at 1232. Although racial implications were present, the court recognized that the primary motivation was based on economic class considerations.

30. 383 U.S. 745 (1966).

31. 18 U.S.C. § 241 (1970).

32. 383 U.S. at 762 (Clark, J., concurring) (emphasis added). *See also id.* at 774 (Brennan, J., concurring in part and dissenting in part). However, one writer notes that only two of the six *Guest* Justices who adhered to the quoted view remain on the Court and that subsequent lower court cases treat the concurring opinions as dicta. Comment, *Civil Rights—Section 1985(3)—Civil Remedy Provided to Redress Interference with First Amendment Right of Religious Freedom by Private Conspiracy—Action v. Gannon*, 47 N.Y.U.L. REV. 584, 587 n.25 (1972).

second basis of the Eighth Circuit's finding of constitutional authority was the intent of the legislature that passed the fourteenth amendment.[33] After examining the legislative history, the *Action* court concurred with the opinion that " '[a]ccording to the purpose and intention of the Amendment as disclosed in the debates in Congress and in the several state Legislatures and in other ways, Congress had the constitutional power to enact direct legislation to secure the rights of citizens against violation by individuals as well as by States.' "[34]

Likewise, the Fifth Circuit in *Westberry v. Gilman Paper Co.*[35] held that a private conspiracy to deny an environmentalist and tax reformer his first amendment right of freedom of speech was reached by section 1985(3). Although this opinion has since been withdrawn[36]—the matter giving rise to the action being moot—and therefore has no precedential value, the court's analysis reflects valid considerations. In addition to the reasons given by the *Action* court, the Fifth Circuit based its finding of section 5 congressional power on the fact that the state action requirement has become so watered down[37] that many state action cases are indistinguishable from private action cases.[38]

Despite the recent varied judicial interpretations of section 1985(3), two aspects of the Fourth Circuit's holding in *Bellamy v. Mason's Stores, Inc.* are unique. First, the court did not discuss, or even recognize, the issue whether discrimination on the basis of membership in the Ku Klux Klan would satisfy *Griffin*'s "otherwise class-based, invidiously discriminatory animus." The court's failure to con-

33. 450 F.2d at 1236. *See* Frantz, *Congressional Power to Enforce the Fourteenth Amendment Against Private Acts*, 73 YALE L.J. 1353 (1964). The author cites two reasons to support his thesis that Congress does have the power to reach private acts under section 5. First, the situation the fourteenth amendment was designed to remedy required action against private wrongs. *Id.* at 1354. Second, "the framers wrote in light of apparently settled constitutional doctrine that the mere recognition of a right in the federal constitution gives Congress implied power to protect it" from private acts, and thus section 5 was intended to broaden congressional power rather than limit it. *Id.* at 1357. *But see* Avins, *The Ku Klux Klan Act of 1871: Some Reflected Light on State Action and the Fourteenth Amendment*, 11 ST. LOUIS U.L.J. 331 (1967).

34. 450 F.2d at 1237, *quoting* H. FLACK, THE ADOPTION OF THE FOURTEENTH AMENDMENT 277 (1908).

35. 507 F.2d 206 (5th Cir.), *vacated*, 507 F.2d 216 (5th Cir. 1975) (per curiam).

36. 507 F.2d at 216.

37. "A constitutional distinction cannot reasonably rest on the mere presense [sic] or absence of a non-injuring state representative if we are to retain the amendment's focus of protection of the victim." 507 F.2d at 214. For a brief summary of the broadening of the "state action" requirement, see Note, *Constitutional Law—Thirteenth Amendment—Federal Civil Remedy Encompassing Private Conduct in Civil Rights Violence*, 46 TUL. L. REV. 822, 824-27 (1972).

38. 507 F.2d at 211.

sider this issue is inconsistent with section 1985(3) litigation since *Griffin,* which has generally considered establishment of a class as a threshold for the application of the statute.[39]

Additionally, although recent case law indicates that a major problem in applying section 1985(3) to private conspiracies is finding constitutional authority for such action, the *Bellamy* court assumed that constitutional authority existed.[40] The Fourth Circuit's major concern was determining whether Congesss intended section 1985(3) to protect first amendment rights. One rationale the court gave for refusing to apply section 1985(3) to first amendment rights concerned the fact that the language of the statute parallels the language of section 1 of the fourteenth amendment.[41] The court relied on *United States v. Guest* for the proposition that no equal protection clause rights exist against purely private action.[42] However, the Supreme Court specifically recognized in *Griffin* that although a century of fourteenth amendment adjudication construing the equal protection clause makes "it understandably difficult to conceive of what might constitute a deprivation of the equal protection of the laws by private persons, . . . there is nothing inherent in the phrase that requires the action working the deprivation to come from the State."[43] In light of the facts that *Griffin* was decided five years after *Guest,* and that *Griffin* dealt with section 1985(3) while *Guest* dealt with that section's criminal counterpart, the *Bellamy* court's reliance on *Guest* seems misplaced.

A second rationale is exhibited in the court's refusal to follow the Eighth Circuit's reasoning in *Action v. Gannon* as to application of section 1985(3) to first amendment rights.[44] This refusal followed from the Fourth Circuit's belief that the Supreme Court must extend the incorporation doctrine to private persons before the statute can be construed to protect first amendment rights. Although the court found

39. See notes 26-27 and accompanying text *supra.*

40. See note 8 *supra.*

41. For the comparative language, see notes 1 & 7 *supra.*

42. 508 F.2d at 507. Actually, this statement was an allegation of the defense. 383 U.S. at 754. Since the Court found allegations of state action, Justice Stewart's agreement with the allegation was not necessary to the Court's holding. However, six Justices in concurring opinions suggest that they were not in agreement as to the allegation. Nonetheless, many lower courts have treated the statement as part of the holding. *See* note 32 *supra.*

43. 403 U.S. at 97.

44. The Fourth Circuit sums up *Action*'s reasoning as going "from statutory language tracking the fourteenth amendment to the amendment itself to incorporation of the first amendment to application of that amendment to private persons, and jettisoning state involvement." 508 F.2d at 507.

the *Action* result appealing, it felt that the right of association was too far removed from the language of section 1985(3) for Congress to have intended its protection in that provision. However, again the court's position seems inconsistent with *Griffin*. The court misconstrued *Griffin* by confusing "source of constitutional authority" with "source of rights deprived." This confusion is illustrated by the court's citation of *Griffin* for the idea that section 1985(3) includes rights based upon the thirteenth amendment.[45] However, none of the rights allegedly denied in *Griffin* was based on the thirteenth amendment; in fact, several, including the right of freedom of association, were based on the first amendment.[46] Rather than being the source of the deprived rights, the thirteenth amendment was the source of constitutional authority for applying the statute in *Griffin*, since the requisite animus was based on race.

Although the *Bellamy* case was ideally suited for further definition of the *Griffin* criteria, the Fourth Circuit failed to take advantage of the opportunity. Based on the district court's finding that the Ku Klux Klan is a political organization,[47] indications are that membership in the Ku Klux Klan would be considered a sufficient class for section 1985(3) purposes. The Supreme Court has held that interference with the right of association for political groups also interferes with the right to vote.[48] In addition, discrimination on the basis of political association indicates a purpose to deny that particular group equal participation in the political process. The federal interest in protecting the right to vote and other political rights justifies considering discrimination on the basis of political association as satisfying the "otherwise class-based discriminatory animus."[49]

Indications are also good that the Supreme Court would uphold section 5 power to reach private action. As the *Action* court noted, although the Supreme Court left open the question of section 5 powers in *Griffin*, the fourteenth amendment and section 1985(3) are too closely related with respect to date of passage, authorship, and purpose to permit the Supreme Court to deny section 5 power to reach private action with consistency.[50] The similarity in language between section

45. *Id.* at 506.
46. 403 U.S. at 101.
47. 368 F. Supp. at 1028.
48. Williams v. Rhodes, 393 U.S. 23, 31 (1968).
49. Note, *Federal Remedy to Redress Private Deprivations of Civil Rights*, 85 HARV. L. REV. 95, 100 (1971).
50. 450 F.2d at 1236.

1985(3) and section 1 of the fourteenth amendment must be of some significance and gives credence to the argument that Congress intended section 1985(3) to protect fourteenth-amendment-based rights against private interference.

Besides the court's failure to deal with the scope of *Griffin*'s criteria, the *Bellamy* decision has other shortcomings. The Fourth Circuit virtually ignored the *Griffin* framework of section 1985(3) interpretation, while relying on older and less relevant cases. The court did not consider whether the requisite class discrimination was satisfied. Nor was *Griffin*'s policy of giving civil rights statutes a broad interpretation considered or followed. Finally, the minimum consideration given *Griffin* was based on a misinterpretation of the Supreme Court's holding in that case. Although section 1985(3) has made great strides since 1971 towards becoming a vital civil rights statute, the *Bellamy* decision indicates that, at least until the Supreme Court clearly defines the scope of the statute, application of section 1985(3) will be greatly restricted.

SUSAN C. MALPASS

Constitutional Law—State Action—Golden v. Biscayne Bay Yacht Club: Preventing Discrimination by Private Clubs

Using the bay bottom off Miami as a vantage point, the Fifth Circuit has launched a state action torpedo to sink the membership practices of a private yacht club. Although the Supreme Court has refrained from answering whether the membership policies of private clubs can be attacked on state action grounds,[1] the Court of Appeals for the Fifth Circuit found the question squarely presented to it in *Golden v. Biscayne Bay Yacht Club*[2] and answered the question in the affirmative. In *Golden* the court held that leasing publicly owned bay bottom land to a yacht club for its docks constituted sufficient state involvement to unleash a fourteenth amendment attack on racial and religious discrimination in the club's membership practices.[3]

1. In Moose Lodge No. 107 v. Irvis, 407 U.S. 163, 166-68 (1972), the Supreme Court refused on standing grounds to hear an attack on allegedly discriminatory membership practices of a private social club.

2. 521 F.2d 344 (5th Cir. 1975).

3. *Id.* at 352 (alternative holding).

The Biscayne Bay Yacht Club (hereinafter referred to as the Club) is a private social club with waterfront and dock facilities on Biscayne Bay, Florida.[4] The Club had utilized these facilities for thirty years when in 1962 the City of Miami asserted title to the bay bottom under the Club's docks.[5] Since 1962 the Club has leased the bay bottom from the city for one dollar per year.[6] The most recent lease included provisions prohibiting the Club from discriminating on the basis of race, religion or national origin against persons desiring access to the leased facilities and from requiring applicants for membership to be sponsored as a condition for consideration.[7] Despite this anti-discrimination proviso in the lease, membership in the Club has been by sponsorship and upon approval of the Club's Board of Governors by use of a three-vote veto system.[8]

Two plaintiffs, a black and a Jew, separately sought and were denied membership applications because of the sponsorship requirement.[9] Plaintiffs, alleging that the Club's membership policies were discriminatory, subsequently sought declaratory and injunctive relief against the Club, the City of Miami and its mayor and commissioners under 42 U.S.C. sections 1981 and 1983 and Title II[10] of the Civil Rights Act of 1964.[11] The district court, finding that the sponsorship policy discriminated against black and Jewish applicants and that the lease provided sufficient state involvement to meet the fourteenth amendment state action requirement, enjoined the Club under section 1983 from denying membership to persons solely on grounds of race or religious affiliation.[12]

On appeal, a divided Court of Appeals[13] for the Fifth Circuit affirmed. The court agreed with the district court that the sponsorship policy, in light of the fact that there had been no black or Jewish members since the Club's inception,[14] operated in practice to exclude

4. *Id.* at 347.
5. *Id.*
6. Golden v. Biscayne Bay Yacht Club, 370 F. Supp. 1038, 1040 (S.D. Fla. 1973).
7. *Id.* at 1040-41. The provisions were pursuant to two City of Miami ordinances. *Id.*
8. 521 F.2d at 347.
9. 370 F. Supp. at 1041.
10. 42 U.S.C. §§ 2000a *et seq.* (1970).
11. 370 F. Supp. at 1040-41.
12. *Id.* at 1042-44.
13. The court of appeals split 2-1. Chief Judge Brown wrote for the majority; Judge Coleman dissented.
14. The Commodore of the Jamaica Yacht Club, a black, was an honorary member. 521 F.2d at 347.

blacks and Jews.[15]

The majority devoted the bulk of its opinion to a determination of whether sufficient connection existed between the Club and the City of Miami to satisfy the "color of law" state action prerequisite[16] for relief under section 1983.[17] Noting that the Supreme Court has required that this examination be conducted by "sifting facts and weighing circumstances"[18] on a case-by-case basis, the court studied the similarities between the facts of the instant case and other cases involving discrimination by private individuals.[19] The court determined that there was sufficient state involvement present in *Golden* to constitute state action on either of two grounds. First, the court held that the leasing of publicly owned property *ipso facto* established a sufficient nexus between private and public conduct for a finding of state action when the

15. *Id.* at 348-49. In 1970, Dade County (in which the Club is located) had a combined black and Jewish population of thirty percent. 370 F. Supp. at 1043. The court also noted that the district judge could have found that racial and religious discrimination resulted from the Club's use of a three-vote veto. 521 F.2d at 349 n.10.

16. 42 U.S.C. § 1983 (1970) provides for a civil action for "deprivation of any rights, privileges, or immunities secured by the Constitution and the laws" by any person acting "under color of any statute, ordinance, regulation, custom, or usage of any State . . . ." Section 1983's "color of law" requirement is generally equated with the state action concept of the fourteenth amendment. Originally, there was a controversy over whether a cause of action could lie under section 1983 against anyone other than a state official acting pursuant to state law. A landmark case, Monroe v. Pape, 365 U.S. 167 (1961), settled the issue in favor of a broader reading of the statute. Subsequent cases have equated section 1983's "color of law" concept to the fourteenth amendment state action concept. Gibbs v. Titelman, 502 F.2d 1107, 1110 (3d Cir.), *cert. denied*, 419 U.S. 1039 (1974); Shirley v. State Nat'l Bank, 493 F.2d 739, 741 (2d Cir.), *cert. denied*, 419 U.S. 1009 (1974); Green v. Dumke, 480 F.2d 624, 628 (9th Cir. 1973); *see, e.g.*, Jackson v. Metropolitan Edison Co., 419 U.S. 345 (1974); Moose Lodge No. 107 v. Irvis, 407 U.S. 163 (1972).

17. See 521 F.2d at 349-53. The majority deemed "it unnecessary to reach the question whether the Club's admission policies also violated § 1981 and Title II of the Civil Rights Act of 1964, 42 U.S.C.A. § 2000a." 521 F.2d at 348.

The Biscayne Bay Yacht Club would probably qualify for the private club exemption from Title II of the Civil Rights Act of 1964 under 42 U.S.C. § 2000a(e) (1970). The only Supreme Court case interpreting the scope of this exemption, Daniel v. Paul, 395 U.S. 298 (1969), laid out three criteria that must be satisfied to gain the exemption: 1) a non-business character, 2) membership control over club finances and governance, and 3) genuine selectivity over admissions. Note, *Federal Power to Regulate Private Discrimination: The Revival of the Enforcement Clauses of the Reconstruction Era Amendments*, 74 COLUM. L. REV. 449, 492 (1974). The Biscayne Bay Yacht Club would easily satisfy these requirements. See 370 F. Supp. at 1040-41.

The question of the applicability of section 1981 to private clubs may be illuminated by a case pending in the Supreme Court, Runyon v. McCrary, 363 F. Supp. 1200 (E.D. Va. 1973), *modified*, 515 F.2d 1082 (4th Cir.), *cert. granted*, 44 U.S.L.W. 3279 (U.S. Nov. 11, 1975) (No. 62). For a discussion of section 1981's applicablility to private clubs, see Note, 74 COLUM. L. REV., *supra*, at 494-95.

18. Burton v. Wilmington Parking Authority, 365 U.S. 715, 722 (1961).

19. See 521 F.2d at 349-53.

private entity practiced racial discrimination.[20] Second, in a somewhat confusing discussion of the facts in *Golden*, the court seemed to find that the Club and the city were engaged in a mutually beneficial joint venture.[21] To establish this symbiotic relationship the court pointed to the consensual nature of the lease between the city and the Club, to the benefits provided to the city by the existence of private dock facilities which relieved pressure on crowded public dock facilities, and to the benefits that the lease afforded the Club through making possible docks which were essential to the Club's existence and by providing financial assistance through the token rental fee.[22]

Since the Nineteenth Century *Civil Rights Cases*,[23] the fourteenth amendment has protected citizens from the denial by states of due process or the equal protection of the law but has erected "no shield against merely private conduct, however discriminatory or wrongful."[24] In spite of this limitation the Supreme Court and the lower federal courts have constructed three main theories to find the state action needed to reach and proscribe some types of private discrimination. Two of these theories—the public function theory, designed to reach private conduct that has taken on the character of governmental activity,[25] and the state encouragement or authorization theory, designed to reach private action taken pursuant to government encouragement or authorization[26]—are not apposite in *Golden*.[27]

---

20. *See id.* at 352.
21. *See id.* at 351-52.
22. *See id.*
23. 109 U.S. 3 (1883).
24. Shelley v. Kraemer, 334 U.S. 1, 13 (1948) (footnote omitted).
25. *See, e.g.*, Evans v. Newton, 382 U.S. 296 (1966); Marsh v. Alabama, 326 U.S. 501 (1946).
26. *See, e.g.*, Reitman v. Mulkey, 387 U.S. 369 (1967); Lombard v. Louisiana, 373 U.S. 267 (1963).
27. The public function theory would be applicable in *Golden* only if providing dock facilities could be characterized as a governmental function. This characterization would be problematic here because private conduct has been found to constitute state action under the public function theory generally when the public entities are the sole and usual providers of the particular service. *See* Evans v. Newton, 382 U.S. 296, 300-02 (1966). For a full discussion of what constitutes state action under this theory, see Note, *State Action: Theories for Applying Constitutional Restrictions to Private Activity*, 74 COLUM. L. REV. 656, 690-98 (1974).

The state encouragement theory would probably not be applicable in *Golden* because, far from encouraging private discrimination, the City of Miami attempted to prevent it by including in the lease the anti-discrimination provisions mentioned in the text accompanying note 7 *supra*. Any attempt to find state authorization in *Golden* on the theory that the city's acquiescence in the discriminatory conduct *implied* state authorization would be precluded by the plaintiffs' failure to show that city officials had knowledge of the Club's discriminatory practices. See 370 F. Supp. at 1044. *But see* text accompanying notes 52-54 *infra*.

The third theory—the state involvement or "nexus" theory—which is at issue in the principal case, had its first full statement in *Burton v. Wilmington Parking Authority*,[28] in which the Supreme Court held that the proscriptions of the fourteenth amendment ran against a lessee of public property when the lessee and the state were engaged in a mutually beneficial venture.[29] Various factors established the symbiotic relationship in *Burton*: the operation of the lessee's restaurant within a public parking garage that provided the restaurant with additional demand for its services and with convenient parking facilities for its patrons, and the state's dependence for financing its garage on the rental receipts from its commercial lessees in the building.[30]

Using the state involvement theory, lower federal courts have frequently found that leases of public property, when accompanied by other ties between the state and the private activity, establish the requisite nexus between the state and the challenged private conduct. These cases typically have involved situations in which the state has attempted through a lease to exercise some control over the lessee's conduct or to secure additional benefits for the state.[31] Leases have not been sufficient to constitute state action in a few cases in which the alleged constitutional violation did not involve racial discrimination[32] or

28. 365 U.S. 715 (1961).

29. *See id.* at 724-26.

30. *See id.* at 724.

31. *See* Wimbish v. Pinellas County, 342 F.2d 804 (5th Cir. 1965) (lessee barred from discriminating against blacks where lease of county land required lessee to build a golf course subject to county's approval of plans, gave county powers designed to keep golf course open to general public, and vested title to all improvements in county); Derrington v. Plummer, 240 F.2d 922 (5th Cir. 1956), *cert. denied*, 353 U.S. 924 (1957) (lessee of courthouse basement barred from denying cafeteria service to blacks where express purpose of lease was to furnish cafeteria service for benefit of persons frequenting courthouse). *But cf.* Hampton v. City of Jacksonville, 304 F.2d 320 (5th Cir.), *cert. denied*, 371 U.S. 911 (1962) (barring racially segregated operation of private golf courses where owner purchased the courses from city and where the land would revert to the city should the land fail to be used as golf courses); Jones v. Marva Theatres, Inc., 180 F. Supp. 49 (D. Md. 1960) (lessee barred from continuing segregated seating arrangements where lease of theatre located in city hall granted city right to use the premises four days per year).

32. *See* Greco v. Orange Memorial Hosp. Corp., 513 F.2d 873 (5th Cir.), *cert. denied*, 96 S. Ct. 433 (1975) (White, J., and Burger, C.J., dissenting) (allowing private hospital to refuse to permit physician to perform elective abortions where county built and leased hospital to defendant for nominal consideration but had no control over hospital policies). *Contra*, O'Neill v. Grayson County War Memorial Hosp., 472 F.2d 1140 (6th Cir. 1973) (reversing dismissal of section 1983 claim against private hospital which refused to permit plaintiff doctor to practice there when hospital leased from county for nominal consideration under contract that required specified number of official members on defendant's board of directors).

in which a lease had little or no connection with the challenged practice.[33]

Two recent Supreme Court decisions, *Moose Lodge No. 107 v. Irvis*[34] and *Jackson v. Metropolitan Edison Co.*,[35] which refused to find state action, restricted the use of the state involvement theory enunciated in *Burton*.[36] Although the facts of both of these non-lease cases could easily have been the basis for finding a *Burton* mutually beneficial relationship, the Supreme Court required that the state be directly involved in the challenged private conduct when the challenged action is initiated by the private entity and not the state.[37] This new requirement retreats significantly from the view implicit in *Burton* that the state becomes inextricably involved in a private party's discriminatory practices whenever the state and the private individual have formed a mutually beneficial relationship.[38]

At a time when the Supreme Court is restricting[39] the use of the state action concept, the Fifth Circuit in *Golden* is increasing its scope. The court's holding that a lease of public property *ipso facto* establishes state involvement when the lessee practices racial discrimination is a significant departure from earlier state action cases involving leases. In *Burton* the Supreme Court expressly noted that not all leases of public property would constitute state action.[40] Indeed, the great pains taken in *Burton*[41] and other lease cases[42] to establish additional links between the state and private defendants accused of racial discrimination would have been needless if a lease itself could have sufficed to constitute state action. One Fifth Circuit lease case, *Wimbish v. Pinellas County*,[43]

33. *See* Solomon v. Miami Woman's Club, 359 F. Supp. 41 (S.D. Fla. 1973) (dismissing suit by blacks to enjoin allegedly discriminatory membership practices of private clubs and federation where federation leased land for its state headquarters from a municipality for nominal consideration under a contract requiring lessee to build office which would revert to city and to pay taxes on building).

34. 407 U.S. 163 (1972).

35. 419 U.S. 345 (1974).

36. Note, *Termination of Electrical Service Does Not Constitute State Action for Purpose of the Fourteenth Amendment*, 24 EMORY L.J. 510, 525 (1975); Note, *Public Utilities—State Action and Informal Due Process After Jackson*, 53 N.C.L. REV. 817, 823-24 (1975); see Note, *State Action and the Burger Court*, 60 VA. L. REV. 840, 847 (1974).

37. *See* 419 U.S. at 351, 358; 407 U.S. at 176-77; Note, 60 VA. L. REV., *supra* note 36, at 849-50.

38. *See generally* Note, 24 EMORY L.J., *supra* note 36, at 529.

39. See text accompanying notes 34-38 *supra*.

40. 365 U.S. at 725-26.

41. See *id.* at 722-25.

42. Cases cited note 31 *supra*.

43. 342 F.2d 804 (5th Cir. 1965).

which the court in *Golden* cited,[44] supports this reading of *Burton*. In that case the Fifth Circuit explicitly relied on the lease's additional provisions to tie the state to the private endeavor.[45]

In holding that an unadorned lease could constitute state action, the court in *Golden* appears to have ignored the *Moose Lodge-Jackson* requirement that the state be directly involved in the private conduct that is being challenged. The *Golden* majority held that *Moose Lodge* was not controlling because that case involved a license instead of a lease.[46] This attempt at distinguishing *Golden* from *Moose Lodge* was much too simplistic since the rationale of the *Moose Lodge* and *Jackson* holdings does not appear to be limited to licensing situations. Applied in a leasing situation, the *Moose Lodge-Jackson* requirement would dictate that the state be directly involved in its lessee's discriminatory conduct.

The Fifth Circuit in *Golden* was not compelled to hold that a lease when coupled with racially disciminatory practices constituted sufficient state involvement in order to enjoin those practices under section 1983. The court could have employed the fuller *Burton* analysis as modified by *Moose Lodge* and *Jackson* to find state action in this case.

Golden's facts would clearly seem to fulfill the state involvement theory's basic requirement of a mutually beneficial relationship. The lease of the bay bottom land provided the Club with docks essential to its existence and with financial subsidization through the token rental fee.[47] These benefits seem more important to the Club in *Golden* than the convenient parking and increased patronage[48] that the lease in *Burton* provided the Eagle Restaurant. The lease in *Golden* also benefitted the City of Miami since the existence of private dock facilities relieved the city from having to provide more public dock facilities.[49] The benefits to the City of Miami seem at least as important as the benefits[50] provided the state in *Burton* where the receipts from the lease helped defray the cost of providing parking facilities for the public. In addition, other state involvement lease cases have found state action

44. 521 F.2d at 352.

45. 342 F.2d at 805-06. The *Wimbish* lease contained provisions that gave the county effective control over plans for construction of a golf course which was closed to blacks, control over membership and greens fees, and title to all improvements. *Id.*

46. 521 F.2d at 353.

47. See text accompanying note 22 *supra.*

48. See text accompanying note 30 *supra.*

49. See text accompanying note 22 *supra.*

50. See text accompanying note 30 *supra.*

when the primary benefit to the public entities came from the private provision of recreational facilities open to their citizens.[51]

Not only do the facts in *Golden* satisfy *Burton* but they also meet the *Moose Lodge-Jackson* requirement. The city is directly implicated in the Club's discriminatory membership practices in two ways. First, the city's failure to enforce the anti-discrimination provisions[52] in its lease represents, at a minimum, an acquiescence in the Club's discriminatory practices.[53] More importantly, any time a state provides a scarce public resource for the exclusive use of a private club that has discriminatory membership practices, the state effectively allocates the public resource in a discriminatory manner.[54]

Although *Golden*'s holding appears to be a sweeping one, the Fifth Circuit expressly restricted the applicability of its finding of state action to situations in which racial or religious discrimination is present.[55] The court was compelled to do this because of its inability to distinguish an earlier Fifth Circuit case[56] which did not involve racial discrimination and in which the leasing of a publicly owned facility to be operated as a private hospital was held not to constitute state action. The rationale the

---

51. *See* cases cited in note 31 *supra.*

52. See text accompanying note 7 *supra.*

53. *But cf.* note 27 *supra.*

54. In his dissenting opinion, Judge Coleman argued that since the city does not exercise any control over the Club's internal matters, the case does not satisfy the requisite connection that *Moose Lodge* and *Jackson* demand and argued that the decision by the Court of Appeals for the Second Circuit in New York Jaycees, Inc. v. United States Jaycees, 512 F.2d 856 (2d Cir. 1975), should be followed. In that case, the Second Circuit held that federal funding of public service projects was not a sufficient nexus to attack discriminatory membership policies when non-members were the beneficiaries of the projects. *New York Jaycees* is inapposite to *Golden* because the members in *Golden* are the exclusive beneficiaries of the dock facilities and the financial subsidization that flow from the lease of public land.

It is possible to argue that *Moose Lodge* implicitly rejected the argument contained in the text because no state action was found to inhere when members of the lodge received the benefits that stemmed from a liquor license. On the other hand, *Moose Lodge* is distinguishable from *Golden* because in *Moose Lodge* there was no finding that the liquor license was essential to the lodge's existence and the Court used standing grounds to turn back the attack on the discriminatory membership practices. *See* 407 U.S. at 164-79. *Moose Lodge* is a perplexing case because the indicia of state action which the decision lays out could be satisfied on the case's facts. *See The Supreme Court, 1971 Term,* 86 HARV. L. REV. 50, 73 (1972).

55. See 521 F.2d at 350-53. Although the cases the majority cited to justify its position all involve racial discrimination, the majority equates religious discrimination to racial discrimination because it "carries the same stigma of inferiority and badge of opprobrium . . . ." *Id.* at 351.

56. Greco v. Orange Memorial Hosp. Corp., 513 F.2d 873 (5th Cir.), *cert. denied,* 96 S. Ct. 433 (1975) (White, J., and Burger, C.J., dissenting).

court gave for attacking racially motivated constitutional violations more vigorously than other violations was that such denials "precipitated enactment of the Fourteenth Amendment."[57] Whatever the original impetus behind the fourteenth amendment's enactment, its protection has been extended to all citizens. If other challenged private actions are constitutional violations, there would seem to be no reason to permit them to go unredressed unless there are countervailing policy reasons. The *Golden* court failed to mention any.[58]

While lower federal courts have split over whether a lesser degree of state involvement is required to proscribe private racial discrimination than to proscribe other constitutional violations,[59] the Supreme Court has not expressly embraced either view.[60] The *Golden* majority, citing the results of a number of Supreme Court cases, attributed to the Court an unwillingness to condone *any* degree of state involvement in cases involving racially discriminatory conduct.[61] The Fifth Circuit, however, ignored the Supreme Court case most directly on point with *Golden—Moose Lodge*—in which the high Court upheld a private club's right to refuse to serve a black guest.[62] In that case the Supreme Court seemed to give greater weight to the associational rights of the private defendant than to the black plaintiff's interests.[63] Although the Court rested its holding on the lack of direct state involvement in the discriminatory conduct, commentators have suggested that the high Court must have been influenced by the defendant's associational rights

57. 521 F.2d at 351.

58. The *Golden* court implied that there might be countervailing policy reasons. *See id.* at 350 n.12. The majority cited Greco v. Orange Memorial Hosp. Corp., 513 F.2d 873, 879 (5th Cir.), *cert. denied*, 96 S. Ct. 433 (1975), to the effect that the "potentially explosive impact of the application of state action concepts designed to ferret out racially discriminatory policies in areas unaffected by racial considerations has led courts to define more precisely the applicability of the state action doctrine." 521 F.2d at 350 n.12. The *Golden* court, however, excluded the most likely countervailing reason: the Club's associational rights. See text accompanying note 70 *infra*.

59. See Greco v. Orange Memorial Hosp. Corp., 513 F.2d 873 (5th Cir.), *cert. denied*, 96 S. Ct. 433 (1975); Jackson v. Statler Foundation, 496 F.2d 623 (2d Cir. 1974); Grafton v. Brooklyn Law School, 478 F.2d 1137 (2d Cir. 1973); Powe v. Miles, 407 F.2d 73 (2d Cir. 1968); *cf.* Chiaffitelli v. Dettmer Hosp., Inc., 437 F.2d 429 (6th Cir. 1971) (per curiam); Meredith v. Allen County War Memorial Hosp. Comm'n, 397 F.2d 33 (6th Cir. 1968). *Contra*, O'Neill v. Grayson County War Memorial Hosp., 472 F.2d 1140, 1143-44 n.3 (6th Cir. 1973).

60. Jackson v. Metropolitan Edison Co., 419 U.S. 345, 373-74 (1974) (Marshall, J., dissenting).

61. 521 F.2d at 350, 351 n.14.

62. *See* 407 U.S. 163.

63. *See id.*

because the other facts of the case are indistinguishable from earlier cases finding state action.[64]

The Supreme Court's handling of *Moose Lodge* and other recent state action cases has suggested to commentators that the high Court is actually employing a state action analysis that balances the rights of plaintiffs against the competing interests of private defendants in deciding whether there is state action.[65] One commentator has argued that such a covert balancing approach obscures the basic issues involved in answering whether the fourteenth amendment should run against private individuals in a given case.[66] He recommended using a two-stage analysis which balances conflicting constitutional rights of the parties after an initial determination that the state is involved in the challenged conduct.[67] The Supreme Court has not expressly adopted such an approach but instead has continued overtly to rest its decisions solely on the failure to find a sufficient quantum of state involvement in the private conduct.[68]

The high Court's failure to explain the considerations that lie at the heart of its decisions, when added to the "sifting facts and weighing circumstances" approach of the state action cases, permits haphazard results as lower courts pick and choose among conflicting Supreme Court opinions for guidance.[69] It also promotes haphazard consideration of the competing policies at stake. For instance, the Fifth Circuit in *Golden*, while emphasizing the invidious nature of racial discrimination, perfunctorily disposed of the Club's associational rights in a single paragraph by asserting that the private exercise of freedom of association deserves no consitutional protection when it involves state action.[70] Yet this is in conflict with the weight seemingly given private associational rights in *Moose Lodge* in the face of charges of racial discrimina-

64. *See* Note, 60 VA. L. REV., *supra* note 36, at 849-50; *cf.* Note, 53 N.C.L. REV., *supra* note 36, at 825-26.

65. Note, 53 N.C.L. REV., *supra* note 36, at 825; *see* Note, *Gilmore v. City of Montgomery: Is There More to Equal Protection Than State Action?*, 53 N.C.L. REV. 545, 550 (1975); Note, 60 VA. L. REV., *supra* note 36, at 850.

66. Note, 53 N.C.L. REV., *supra* note 65.

67. *Id.*

68. *Id.* at 549-50.

69. *See The Supreme Court, 1974 Term*, 89 HARV. L. REV. 49, 150 (1975).

70. 521 F.2d at 353. For a discussion of the absolutionist approach to associational freedom, see Note, 60 VA. L. REV., *supra* note 36, at 854-63. For an argument that a rule of reason should be employed to balance the competing values, see Black, *The Supreme Court, 1966 Term, Foreword: "State Action," Equal Protection, and California's Proposition 14*, 81 HARV. L. REV. 69, 101-03 (1967). For a discussion of how and when the rights of private individuals should give way to constitutional proscriptions, see Note, 74 COLUM. L. REV., *supra* note 27.

tion. While in *Golden* the rights of religious and racial minorities may well outweigh the Club's associational rights, the case, as the first[71] imposition of fourteenth amendment duties on what would traditionally have been considered a private club, warrants a much fuller discussion of the associational freedoms of the Club.

In sum, *Golden*'s assault on the Club's membership practices was misplaced because the Fifth Circuit refused to base its holding solely on a *Burton-Moose Lodge-Jackson* state involvement analysis. Its reliance on the lease as an adequate basis for finding state action seems to run counter to the latest pronouncements on the issue by the Supreme Court. The court's overly broad construction of state action was partly excusable because the Supreme Court has not articulated the relative importance it attaches to the nature of the constitutional right asserted by plaintiffs and the countervailing interests of private defendants. Unless the high Court dispels the confusion that has arisen from its handling of these cases, state action assaults on private discrimination will continue to be hit-or-miss attacks.

MICHAEL W. PATRICK

Criminal Procedure—Michigan v. Mosley: A New Constitutional Procedure

In *Miranda* v. *Arizona*[1] the United States Supreme Court set out specific guidelines, which, if not followed, required that statements obtained through custodial interrogation not be used against the accused.[2]

71. This conclusion depends on which definition of private club is used. Using the definition discussed at note 17 *supra*, *Golden* represents the first decision imposing constitutional restrictions on membership in a private social club. *See* 521 F.2d at 353 (Coleman, J., dissenting). *But cf.* Goodloe v. Davis, 514 F.2d 1274 (5th Cir. 1975).

1. 384 U.S. 436 (1966).

2. Briefly stated *Miranda* held:

> the prosecution may not use statements, whether exculpatory or inculpatory, stemming from custodial interrogation of the defendant unless it demonstrates the use of procedural safeguards effective to secure the privilege of self-incrimination. By custodial interrogation, we mean questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way. As for the procedural safeguards to be employed, unless other fully effective means are devised to inform accused persons of their right to remain silent and to assure a continuous opportunity to exercise it, the following measures are required. Prior to any questioning, the person must be warned that he has a right to remain si-

Miranda embodied a decision[3] that it was better for some guilty persons to go free than to allow the police to engage in improper conduct.[4] The decision produced a strong adverse public reaction that has been partly reflected[5] in a series of decisions since 1971 that have expanded the admissibility of custodially derived evidence.[6] In *Michigan v. Mosley*[7] the Court has again diminished the impact of *Miranda* by sanctioning the renewed questioning of a suspect after an expressed desire to remain silent. In doing so, the Court created a new constitutionally required procedure—that the police must "scrupulously honor" the accused's right to cut off questioning—but defined the procedure so vaguely that it offers little guidance to lower courts or the police.

The defendant, Robert Mosley, was arrested pursuant to an anonymous tip implicating him in two recent robberies as well as a robbery/murder that had occurred three months previously. After receiving his *Miranda* warnings from the arresting officer, Mosley said that he did not want to answer "any questions about the robberies."[8] Accordingly, that officer asked no more questions, and Mosley was charged with the two recent robberies (but not with the robbery/murder) and jailed. More than two hours later a different police officer took Mosley to a different interrogation room and again informed him of his rights. After Mosley waived his rights the officer proceeded to question him about the murder, which had not been discussed at the previous interrogation. Upon being confronted with an incriminating statement of a confederate, Mosley confessed.[9]

The confession was admitted into evidence at Mosley's trial over his objection that the second interrogation violated his constitutional

---

lent, that any statement he does make may be used as evidence against him, and that he has a right to the presence of an attorney, either retained or appointed. The defendant may waive effectuation of these rights, provided the waiver is made voluntarily, knowingly and intelligently. If however, he indicates in any manner and at any stage of the process that he wishes to consult an attorney before speaking, there can be no questioning. Likewise, if the individual is alone and indicates in any manner that he does not wish to be interrogated, the police may not question him.

Id. at 444-45 (footnote omitted).

3. Among those reasons were the danger of false confession resulting from the psychological pressures of custodial interrogation, *id.* at 447-48, and "the respect a government—state or federal—must accord the dignity and integrity of its citizens." *Id.* at 460.

4. *Id.* at 457.

5. Kaplan, *The Limits of the Exclusionary Rule*, 26 STAN. L. REV. 1027, 1039 (1974).

6. See text accompanying notes 32-36 *infra*.

7. 96 S. Ct. 321 (1975).

8. *Id.* at 323.

9. *Id.*

right against self-incrimination because his expressed desire to remain silent was not honored.[10] The conviction that resulted from his trial was overturned by the Michigan Court of Appeals,[11] holding that the second interrogation was a per se violation of *Miranda*.[12] The Michigan Supreme Court refused further appeal,[13] but the United States Supreme Court granted certiorari.[14]

Justice Stewart, writing for five members of the Court,[15] declared the issue in the case to be whether the police conduct complained of violated the *Miranda* guidelines so that Mosley's confession was inadmissible at his trial.[16] Answering this question required interpretation of the following passage from *Miranda*:

> "Once warnings have been given, the subsequent procedure is clear. If the individual indicates in any manner, at any time prior to or during questioning, that he wishes to remain silent, the interrogation must cease. At this point he has shown that he intends to exercise his Fifth Amendment privilege; any statement taken after the person invokes his privilege cannot be other than the product of compulsion, subtle or otherwise. Without the right to cut off questioning, the setting of in-custody interrogation operates on the individual to overcome free choice in producing a statement after the privilege has been once invoked."[17]

The Court rejected a reading of the passage that would result in finding a per se violation of *Miranda*.[18] Instead, the Court adopted a new rule that would exclude the use of custodially obtained statements if the accused's right to cut off questioning, in light of all the circum-

---

10. *Id.* at 324.

11. People v. Mosley, 51 Mich. App. 105, 214 N.W.2d 564 (1974).

12. "*Miranda* cannot be circumvented by the simple expedient of shuttling a person from one police officer to another for purposes of questioning and thus justifying subsequent interrogations after an election to remain silent." *Id.* at 566.

13. People v. Mosley, 392 Mich. 764 (1974).

14. Michigan v. Mosley, 419 U.S. 1119 (1975).

15. The other four were Chief Justice Burger, and Justices Blackmun, Powell and Rehnquist. Justice White filed a concurrence, see text accompanying notes 21-22 *infra*. Justice Brennan filed a dissenting opinion in which Justice Marshall joined, see text accompanying notes 23 and 24 *infra*.

16. 96 S. Ct. at 324. The Court's formulation of the issue can be found in text accompanying note 54 *infra*.

17. *Id.* at 325, *quoting* 384 U.S. at 473-74.

18. The Court noted that there were two literal interpretations of the passage that "would lead to absurd and unintended results." The first would read the passage to mean that once a person invoked his right, he could never again be questioned "by any police officer at any time or place on any subject." The second would read it to require only a momentary cessation and "permit a resumption of interrogation after a momentary respite." 96 S. Ct. at 325.

stances of the case, was not "scrupulously honored."[19] Although the Court did not attempt to define what "scrupulously honoring" an accused's right to cut off questioning means, the Court did hold that Mosley's right was so honored, and that his confession was admissible.[20] In reaching this conclusion the Court relied on the following facts of the Mosley case: the amount of time separating the two interrogations, the different subject matter discussed at each session, the absence of discernable police techniques designed to wear down the accused, the different interrogators, and the ambiguous nature of Mosley's statement that he did not wish to answer questions about the "robberies."[21] Thus the Court announced a new procedure to protect the accused's right to remain silent, but declined to define it specifically.

While Justice White, concurring in the result, and Justices Brennen and Marshall, dissenting, agreed with the majority that *Miranda* did not create a per se proscription of renewed questioning for an indefinite period,[22] both the concurrence and the dissent objected to the "scrupulously honored" procedure. Justice White deplored the possibility that some "voluntary" statements could be excluded under the procedure, and would re-adopt the pre-*Miranda* rule of admitting any statement that in view of all the circumstances was found to be voluntary.[23] Justices Brennan and Marshall, on the other hand, faulted the vagueness of the new procedure and suggested instead that the Court adopt

---

19. *Id.* at 326. Although a violation of the "scrupulously honored" procedure evidently would prevent the prosecution from using a statement so obtained to prove Mosley's guilt, the State would still be able to use the statement for impeachment purposes. See text accompanying notes 32-34 *infra.*

20. 96 S. Ct. at 326, 328.

21. *Id.* at 326-27. See text accompanying notes 59-62 *infra.*

22. *Id.* at 328-30, 330-34. The Court's unanimous rejection of a per se proscription of renewed questioning is in contrast to section 140.8(2)(d) of the ALI MODEL CODE OF PRE-ARRAIGNMENT PROCEDURE (Prop. Official Draft, Apr. 15, 1975), which states: "No waiver shall be sought from an arrested person at any time after he has indicated in any manner that he does not wish to be questioned or that he wishes to consult counsel before submitting to questioning." In commenting on section 140.8(2)(d), the Institute said:

> As the investigation in the case develops, it may be quite natural for the police to inquire of an arrested person whether he wished to change his mind and make a statement or submit to questioning, and there may be cases where such a change of mind can occur without any semblance of coercion. On the other hand, even a seemingly voluntary waiver given after a person has once indicated he does not wish to cooperate may be the product of subtle coercion . . . .

Id. at 52.

23. 96 S. Ct. at 328-30. Justice White's test for admissibility would be virtually identical to the pre-*Miranda* "totality of the circumstances" test for voluntariness and admissibility. *See, e.g.*, Haynes v. Washington, 373 U.S. 503, 513 (1963); Leyra v. Denno, 347 U.S. 556, 558 (1954); Bram v. United States, 168 U.S. 532, 561 (1897).

concrete, objective guidelines for the police to follow; if the guidelines were ignored the statement taken upon requestioning would be excluded.[24] The dissent concluded that the "scupulously honored" procedure "signals a rejection of *Miranda*'s basic premise."[25]

The *Miranda* premise was that the combination of modern police interrogation technique and a custodial setting,[26] in which the accused was cut off from familiar surroundings, produced an inherently coercive[27] effect such that the confession, although "voluntary" in traditional terms,[28] could not "truly be the product of his free choice."[29] That premise reflected the Court's judgment that the interest in the protection of "precious Fifth Amendment rights"[30]—not lessened because a confession was ostensibly voluntary—necessitated a *presumption* that a custodial confession was the result of coercion unless the State could prove that the confession resulted from an informed and intelligent waiver of those rights.[31] To determine if those rights had been so waived, the Court established concrete, objective guidelines which, if not followed, required the exclusion of the accused's confession.[32]

The first indication that the Burger Court was inclined to broaden the admissibility of "voluntary" statements taken in violation of *Miranda* came in *Harris v. New York*.[33] In that case the Court interpreted *Miranda* to mean that a statement taken in violation of *Miranda*, if trustworthy, could be used to impeach the accused if he chose to take the stand. However, *Harris* continued to bar "the prosecution from making its case" with a statement taken in violation of *Miranda*.[34]

The *Harris* theme was expanded in *Oregon v. Hass*.[35] In that case the Court allowed the use of a statement for impeachment purposes even though it was taken in the absence of counsel after the accused expressed a desire to see an attorney. Thus, for impeachment purposes at

24. 96 S. Ct. at 332.
25. *Id.* at 333.
26. 384 U.S. at 449-54.
27. *Id.* at 458.
28. *See* note 22 *supra.*
29. 384 U.S. at 458.
30. *Id.* at 457.
31. *Id.* at 479.
32. *See* note 2 *supra.*
33. 401 U.S. 222 (1971).
34. *Id.* at 224. "The impeachment process here undoubtedly provided valuable aid to the jury in assessing petitioner's credibility, and the benefits of this process should not be lost, in our view, because of the speculative possibility that impermissible police conduct will be encouraged thereby." *Id.* at 225.
35. 95 S. Ct. 1215 (1975).

least, the giving or not giving of *Miranda* warnings will not affect a custodial confession.

The admissibility of custodial confessions was expanded further in *Lego v. Twomey*.[36] In that case the Court set the State's burden of proof on the issue of the voluntariness of the accused's waiver of his rights at the "preponderance of the evidence" level, rather than at the "beyond a reasonable doubt" level.

But the decision that sheds the most light on the Burger Court's attitude toward *Miranda* came in *Michigan v. Tucker*.[37] In *Tucker* the police failed to inform the accused that an attorney could be appointed without cost to handle his case, and subsequently the accused made a statement that led the police to a witness whose testimony implicated Tucker in the crime. In declining to exclude this "fruit" of the statement[38] taken in violation of the *Miranda* guidelines, the Court used a novel analytical framework to decide the case.[39]

Before *Tucker*, the accused's fifth amendment right against compulsory self-incrimination *as such* was considered violated unless the *Miranda* guidelines, or some other set of procedures adequate to protect the right, were followed. If such procedures were not followed, any statement taken was automatically excluded.[40] The procedural rules set out in *Miranda* were never deemed constitutionally protected[41] because their violation was thought to violate the fifth amendment right itself: if adequate procedures were not taken to inform the accused of his constitutional rights, any statement was presumed to be taken in violation of the right against compulsory self-incrimination.[42] However, *Tucker* destroyed this identity by divorcing the right against compulsory self-incrimination, *as such*, from the procedures that were taken to protect

36. 404 U.S. 477 (1972).

37. 417 U.S. 433 (1974).

38. A dog found at the scene of the crime (a rape) led the police to Tucker. The police questioned Tucker about his activities on the night of the rape and he replied that he had been with a man named Henderson. Henderson, however, gave the police information that incriminated Tucker. *Id.* at 436-37.

39. "We will . . . first consider whether the police conduct complained of directly infringed upon respondent's right against compulsory self-incrimination or whether it instead violated only the prophylactic rules developed to protect that right. We will then consider whether the evidence derived from this interrogation must be excluded." *Id.* at 439.

40. *See* note 2 *supra*.

41. 384 U.S. at 467.

42. "The requirement of warnings and waiver of rights is a fundamental with respect to the Fifth Amendment privilege and not simply a preliminary ritual to existing methods of interrogation." *Id.* at 476.

that right.[43] If the right itself were violated, then the statement would still be excluded. But if only the procedures were violated, under *Tucker*, the question remained whether that violation should require exclusion of evidence derived from the interrogation.[44]

In applying this analysis to the facts in *Tucker*, the Court found that the accused's right against compulsory self-incrimination was not violated because the police conduct in the case did not include "the historical practices at which the right . . . was aimed."[45] Evidently, such "historical practices" are the crude police techniques used in the past to compel confessions, such as torture,[46] starvation,[47] or lengthy incommunicado interrogation.[48] Since these practices were not found in *Tucker*, the accused's fifth amendment right was held not violated, and the Court's next inquiry was whether to exclude the evidence derived from an interrogation that violated only the *Miranda* guidelines.[49] Because the reliability of the evidence involved in *Tucker* was not at issue, and because the interrogation took place before *Miranda* was decided—so that the primary purpose of the exclusionary rule, the deterrence of improper police conduct, would not be furthered—the Court concluded that the violation of the *Miranda* guidelines in *Tucker* should not trigger the exclusionary rule.[50]

Although the Court held that the police's pre-*Miranda* violation of the *Miranda* procedure in *Tucker* would not trigger the exclusionary rule, there was an implication in the case that a violation of a procedure *could* trigger the exclusionary rule, even in a state proceeding.[51] Exclusion of evidence in a state proceeding, however, can be mandated by the Supreme Court only in cases in which a constitutional right has been

43. *See* note 39 *supra.*
44. *Id.*
45. 417 U.S. at 444.
46. Brown v. Mississippi, 297 U.S. 278 (1936).
47. Payne v. Arkansas, 356 U.S. 560 (1958).
48. Davis v. North Carolina, 384 U.S. 737 (1966).
49. 417 U.S. at 446.
50. *Id.* at 450. As in *Harris v. New York*, note 32 and accompanying text *supra*, the *Tucker* Court discounted or ignored the reasons set forth in *Miranda*, note 3 *supra*, for the exclusionary rule and instead stressed deterrence as the main rationale for the rule. In United States v. Calandra, 414 U.S. 338, 347 (1974), the Court has developed this to the point at which deterrence has become almost the sole justification for the rule. And in *Oregon v. Hass*, note 34 and accompanying text *supra*, the Court refused to apply the exclusionary rule even though without it the Court admitted the police would be encouraged to act improperly. 95 S. Ct. at 1221.
51. "[I]n deciding whether Henderson's testimony must be excluded, there is no controlling . . . precedent to guide us." 417 U.S. at 446. By discussing *whether* violation of the procedure should trigger the exclusionary rule, the Court is implying that the violation *could* trigger the rule.

violated.[52] Thus, if the Supreme Court invokes the exclusionary rule in a state court for the violation of a procedure designed to protect the right against self-incrimination, it follows that the procedure must itself be guaranteed by the Constitution. However, this conclusion is seemingly contradicted by the *Tucker* holding that the *Miranda* guidelines are "not themselves guaranteed by the Constitution."[53] A possible explanation of this apparent contradiction is that although the procedures set forth in *Miranda* are not themselves constitutionally required, there are *some* "constitutional" procedures, which if not followed, require the invocation of the exclusionary rule.

Michigan v. Mosley is the first case to identify such a "constitutional" procedure, although it did not do so explicitly. The elevation of a procedure to a constitutional level in *Mosley* was accomplished through the analysis set out in *Tucker*, although once again, this was not done explicitly.

In *Mosley* the Court simply assumed, without discussion, that the accused's right against compulsory self-incrimination was not violated.[54] Since Mosley did not assert that the police had employed "historical practices" to obtain his confession, the Court evidently did not feel constrained even to deliberate whether Mosley's confession was obtained in violation of his fifth amendment right against compulsory self-incrimination, *as such.*

Instead, the Court immediately launched into the next stage of the *Tucker* analysis, "whether the conduct of the Detroit police that led to Mosley's incriminating statement did in fact violate the *Miranda* 'guidelines' so as to render the statement inadmissible against Mosley at his trial."[55] The Court went on to identify the procedure in question to be whether the police "scrupulously honored" the accused's right to cut off questioning.[56]

By formulating the issue in *Mosley* as quoted above, the Court appeared to be answering by negative implication the final stage of the

52. Mapp v. Ohio, 367 U.S. 643, 678 (1961) (Harlan, J., dissenting); McNabb v. United States, 318 U.S. 332, 340 (1943); United States v. Navarro, 441 F.2d 409, 411 (5th Cir. 1971); *The Supreme Court, 1973 Term*, 88 HARV. L. REV. 43, 201 (1974); Note, *Michigan v. Tucker: A Warning About Miranda*, 17 ARIZ. L. REV. 188, 197 (1975).

53. 417 U.S. at 444.

54. This conclusion is based on the total absence of discussion of the issue of voluntariness of Mosley's confession.

55. 96 S. Ct. at 324.

56. *Id.* at 326.

Tucker analysis:[57] that if a violation of the "scrupulously honored" procedure is found, exclusion *will* follow. The validity of this negative implication is reinforced by the Court's holding: "We therefore conclude that the *admissibility* of statements obtained after the person in custody has decided to remain silent *depends* under *Miranda* on whether his 'right to cut off questioning' was 'scrupulously honored.' "[58] Since exclusion of evidence in a state court can only be triggered by a constitutional violation,[59] it follows that the Court's new "scrupulously honored" procedure is one guaranteed by the Constitution.

Although *Mosley* went beyond *Miranda* by creating a "constitutional" procedure, it also disposed of the fundamental principle of *Miranda*—that inherent coercion is always present in a custodial atmosphere—by simply stating that the "scrupulously honored" procedure "counteracts the coercive pressures of the custodial setting."[60] As evidence of this "counteraction," the Court cited the more than two-hour delay between interrogations.[61] But under *Miranda*, this delay would be characterized as part of the custodial atmosphere that cannot help but wear down the accused's will to resist.[62] Similarly, the fact that a different police officer conducted each interrogation and that different subjects were discussed at each could also be cited as evidence of inherent coercion rather than police respect for Mosley's rights. Finally, the Court held that the police could "reasonably interpret" Mosley's statement that he did not want to answer "any questions about the robberies" as not applying to subsequent questioning concerning a robbery/murder.[63] Although this interpretation is reasonable, an equally reasonable reading would hold that the statement did apply to the crime for which Mosley confessed.

By relying on circumstances peculiar to *Mosley*, and refusing to define specifically under what circumstances renewed police questioning will be held to "scrupulously honor" an accused's right to cut off

57. The Court was able to avoid making an explicit ruling on the last stage of the Tucker analysis, note 38 *supra*, by simply defining the procedural rule so that the police conduct in question was found permissible.

58. 96 S. Ct. at 326 (emphasis added).

59. *See* note 51 *supra*.

60. 96 S. Ct. at 326.

61. *Id.*

62. [T]he very passage of time, while a person continues to be in police detention will create fears and pressures undermining the will to insist on one's right to silence and right to counsel. . . . The Court's language in *Miranda* seems to be consistent with this view: [citing passage quoted in text accompanying note 16 *supra*].

ALI MODEL CODE OF PRE-ARRAIGNMENT PROCEDURE § 140.8(2)(d), comment at 52 (Prop. Official Draft, Apr. 15, 1975).

63. 96 S. Ct. at 327.

questioning, the Court has clearly rejected the *Miranda* approach of providing concrete, objective guidelines which would enable a quick and easy answer to the question whether the coercive pressures of custodial interrogation had been overcome. Under the *Mosley* Court's vague approach, each federal and state trial court must make a finding, based on the facts unique to each case, whether the accused's right to cut off questioning had been "scrupulously honored." The practical result will be a lessening of appellate review in such cases because findings of fact are difficult to overturn.[64] Consequently, the courts will, in all probability, admit confessions taken under conditions more coercive than those that existed in *Mosley*.[65]

It seems clear that the minority's conclusion that *Mosley* "signals rejection of *Miranda*'s basic premise" is correct.[66] *Mosley*'s holding, that the inherent coercion of the custodial setting is dispelled by the "scrupulous honoring" of the accused's right to cut off questioning, is directly contrary to the principles of *Miranda*, which would hold that "Mosley's failure to exercise the right upon renewed questioning was presumptively the consequence of an overbearing in which detention and that subsequent questioning played a central role."[67] Thus, *Mir-*

64. As a result of pre-*Miranda* ambiguity in the area of fifth amendment rights, "[T]he Supreme Court repeatedly was presented with findings of voluntary confessions in situations where the records made coercion quite likely. Powerless to overturn such findings of fact, the Supreme Court stretched the definition of coercion to include the lower courts' factual determinations." Kaplan, *The Limits of the Exclusionary Rule*, *supra* note 5, at 1039. *See, e.g.*, Greenwald v. Wisconsin, 390 U.S. 519 (1968), in which the court found as a matter of law that the defendant's confession was involuntary.

65. Let there be no mistake about it. To a mind-staggering extent—to an extent that conservatives and liberals alike who are not trial lawyers simply cannot conceive—the entire system of criminal justice below the level of the Supreme Court of the United States is solidly massed against the criminal suspect. Only a few appellate judges can throw off the fetters of their middle-class backgrounds—the dimly remembered, friendly face of the school crossing guard, their fear of a crowd of "toughs", their attitudes engendered as lawyers before their elevation to the bench, by years of service as prosecutors or as private lawyers for honest, respectable business clients—and identify with the criminal suspect instead of with the policeman or with the putative victim of the suspect's theft, mugging, rape, or murder. Trial judges still more, and magistrates beyond belief, are functionally and psychologically allied with the police, their co-workers in the unending and scarifying work of bringing criminals to book.

Amsterdam, *The Supreme Court and Rights of Suspects in Criminal Cases*, 45 N.Y.U.L. REV. 785, 792 (1970).

See, e.g., United States v. Collins, 462 F.2d 792 (2d Cir. 1972) (en banc) (confession held admissible even though defendant declined to talk on four separate occasions); United States v. Brady, 421 F.2d 681 (2d Cir. 1970) (confession admitted despite four previous assertions of the right to silence); United States v. Choice, 392 F. Supp. 460 (E.D. Pa. 1975) (confession held admissible even though severely injured defendant declined to talk once, and refused to sign the waiver form at subsequent interrogation).

66. 96 S. Ct. at 333.

67. *Id.* at 332 (Brennan, J., dissenting).

anda has been overruled in effect by *Mosley*. However, the case affirms *Miranda* in name and uses language from *Miranda* to identify the first constitutionally required police procedure for custodial interrogations.

But protecting a procedural right with the Constitution is of little help to the accused if the "constitutional" procedure is defined so vaguely that the police and courts can easily circumvent it. This vagueness, combined with the Court's attitude of expanding the admissibility of custodial confessions and a willingness to read facts to fit the procedural requirement, seems certain to have the effect of freeing the police from the restraint of *truly* honoring the rights of the accused.

PHILIP P.W. YATES

Criminal Procedure—The Right to Proceed Pro Se: Judicial Gymnastics with the Sixth Amendment

Within the past two decades the United States Supreme Court has been zealous in ensuring the right of defendants in state criminal prosecutions to receive the assistance of counsel. The sixth amendment guarantee of assistance of counsel to defendants in federal criminal prosecutions has been extended to state criminal prosecutions under the auspices of the due process clause of the fourteenth amendment.[1] The underlying premise of the "assistance of counsel" cases is that inherent unfairness exists in any criminal proceeding in which the accused has been denied the assistance of counsel to prepare his defense.[2] Arguably, a natural extension of this reasoning might indicate that *any* conviction obtained in a criminal trial absent representation by an attorney for the accused is per se tainted and unfair. However, such an extension clashes with an attempt by a criminal defendant to exercise the right of self representation recognized on either a constitutional or a statutory level by most state and all federal courts. This quandary raises the question whether a state may constitutionally deny a valid request by a

1. Argersinger v. Hamlin, 407 U.S. 25 (1972) (requirement of assistance of counsel before imprisonment for any offense); Gideon v. Wainwright, 372 U.S. 335 (1963) (requirement of assistance of counsel for defendants in state felony prosecutions); *see* Powell v. Alabama, 287 U.S. 45 (1932) (requirement of assistance of counsel for defendants in state capital offense prosecutions).

2. Gideon v. Wainwright, 372 U.S. 335, 344 (1963).

criminal defendant to proceed *pro se* and instead require that the defendant be represented by an attorney, to forestall any subsequent claim of prejudice by the accused based upon the absence of legal guidance. Facing this novel issue in *Faretta v. California*,[3] a divided United States Supreme Court unequivocally held that state criminal defendants have a constitutional right to proceed *pro se* upon a free and knowledgeable waiver of assistance of counsel.[4]

The *Faretta* case arose out of a grand theft charge filed against the defendant, Anthony Faretta, in the Superior Court of Los Angeles, California. The trial judge granted defendant's request to proceed *pro se* but retained flexibility to withdraw the ruling if it should later become evident to the court that Faretta was incapable of effective self-representation.[5] The judge subsequently examined Faretta's ability to represent himself and withdrew Faretta's permission to proceed *pro se* after expressing dissatisfaction with Faretta's responses concerning questions of law.[6] The trial judge appointed a defense counsel[7] and denied Faretta's requests for permission to act as co-counsel, forcing Faretta to present his defense solely through his attorney.[8] After his subsequent

3. 95 S. Ct. 2525 (1975). Mr. Justice Stewart wrote the majority opinion. Mr. Chief Justice Burger, Mr. Justice Blackmun, and Mr. Justice Rehnquist dissented and joined in separate opinions written by Mr. Chief Justice Burger and Mr. Justice Blackmun.

4. *Id.* at 2541.

5. The trial court based this ruling upon an earlier decision of the Supreme Court of California in People v. Sharp, 7 Cal. 3d 448, 499 P.2d 489, 103 Cal. Rptr. 233 (1972). In *Sharp*, the California Supreme Court held that an accused had no constitutional right of federal or state origin to proceed *pro se* in California criminal trials. Consequently, under the *Sharp* rule, permission to proceed *pro se* was a matter of discretion for the trial judge. *Sharp* was decided under CAL. CONST. art. I, § 13 (1879): "In criminal prosecutions, in any court whatever, the party accused shall have the right . . . to appear and defend in person *and with counsel* . . . . (emphasis added)." Before the *Sharp* decision was announced, section 13 was amended to clarify the status of self-representation in California (the amendment was prospective only): "In criminal prosecutions, in any court whatever, the party accused shall have the right . . . to have the assistance of counsel . . . and to be *personally present with counsel. . . . The Legislature shall have power to require the defendant in a felony case to have the assistance of counsel* . . . ." CAL. CONST. art. I, § 13 (emphasis added). In contrast, thirty-six state constitutions explicitly provide criminal defendants with the right to proceed *pro se*. Citations to the state constitutions are found in 95 S. Ct. at 2530 n.10.

Additionally, several state courts have declared that the United States Constitution guarantees the right to proceed *pro se*. *E.g.*, State v. Mems, 281 N.C. 658, 190 S.E.2d 164 (1972); Zasada v. State, 19 N.J. Super. 589, 89 A.2d 45 (App. Div. 1952).

6. Faretta was a high school graduate who had previously proceeded *pro se* in a criminal prosecution. 95 S. Ct. at 2527. For excerpts from the colloquy between the trial judge and Faretta at the sua sponte hearing, see *id.* at 2528 n.3.

7. Faretta's dissatisfaction with the public defender's office had precipitated his request to proceed *pro se*. *Id.* at 2527.

8. *Id.* at 2529.

conviction and the exhaustion of all avenues of appeal within the California court system,[9] Faretta's petition for certiorari was granted by the United States Supreme Court.[10]

The Supreme Court articulated the *Faretta* issue as "[w]hether the Constitution forbids a State from forcing a lawyer upon a defendant . . . ."[11] The Court held that no state can constitutionally require a criminal defendant to be represented by an attorney over the defendant's protestations. Support for this conclusion came from three distinct sources. First, the Supreme Court surveyed the unwavering protection that the federal courts have afforded the right to proceed *pro se* in federal criminal trials.[12] Then, the Court analyzed the evolution of the right to proceed *pro se* from the perspectives of the English common law, colonial judicial practices, and the historical evolution of the sixth amendment.[13] Finally, the Court examined the tension between individual autonomy and the potential unfairness of a criminal trial in which the defendant represents himself.[14]

The right to proceed *pro se* in the federal court system is unquestioned since it has been expressly guaranteed to federal criminal defendants under the Judiciary Act of 1789[15] and its successors.[16] Yet, historically the federal courts have taken a broader position with regard to the right of self-representation than mere statutory fiat. In *Adams v. United States ex rel. McCann*[17] the trial judge allowed a criminal defendant to proceed *pro se* and to waive trial by jury. The subsequent trial court conviction was reversed by the court of appeals on the ground that waiver of trial by jury is only effective when made with assistance of counsel.[18] However, the Supreme Court affirmed the trial court conviction, holding that a defendant may waive his constitutional rights to trial

9. Faretta's contentions concerning a constitutional right to proceed *pro se* were summarily dismissed by the California appellate courts pursuant to the *Sharp* ruling. *Id.*

10. 415 U.S. 975 (1974).

11. 95 S. Ct. at 2531.

12. *Id.* at 2530-32.

13. *Id.* at 2532-40.

14. *Id.* at 2540-41.

15. Judiciary Act of 1789, § 35, 1 Stat. 92.

16. 28 U.S.C. § 1654 (1970) currently provides that: "In all courts of the United States the parties may plead and conduct their own cases personally or by counsel as, by the rules of such courts, respectively, are permitted to manage and conduct causes therein." The right to proceed *pro se* also is granted to criminal defendants under FED. R. CRIM. P. 44(a).

17. 317 U.S. 269 (1942).

18. United States *ex rel.* McCann v. Adams, 126 F.2d 774 (2d Cir. 1942). Learned Hand delivered the opinion of the court of appeals.

by jury and to assistance of counsel provided that the waivers are knowingly and freely made.[19]

The main issue in *Adams* was the validity of a waiver of an affirmative constitutional right, *e.g.*, trial by jury, in the absence of assistance of counsel to advise the defendant of the consequences of such a waiver. But the Supreme Court nevertheless outlined its views on the right to proceed *pro se* via dictum:

> The right to assistance of counsel and the correlative right to dispense with a lawyer's help are not legal formalisms. They rest on considerations that go to the substance of an accused's position before the law. The public conscience must be satisfied that fairness dominates the administration of justice. An accused must have the means of presenting his best defense. He must have time and facilities for investigation and for the production of evidence. But evidence and truth are of no avail unless they can be adequately presented. Essential fairness is lacking if an accused cannot put his case effectively in court. *But the Constitution does not force a lawyer upon a defendant.* He may waive his Constitutional right to assistance of counsel if he knows what he is doing and his choice is made with eyes open . . . .[20]

Subsequently, in *Carter v. Illinois*[21] the Supreme Court reinforced the *Adams* dictum by declaring that "[n]either the historic conception of Due Process nor the vitality it derives from progressive standards of justice denies a person the right to defend himself . . . ."[22] But the Court retreated from interference into state criminal procedure concerning the waiver of constitutional rights by stating:

> But the Due Process Clause has never been perverted so as to force upon the forty-eight States a uniform code of criminal procedure. . . . *The Constitution commands the States to assure fair judgment.* Procedural details for securing fairness it leaves to the States.[23]

Thus, in *Carter* the focus of the Court centered upon achieving a fair outcome in a criminal proceeding rather than providing the defendant with an opportunity to proceed *pro se*. Although the actual holding is expansive with regard to the latitude given a criminal defendant to waive the affirmative constitutional right of trial by jury without assistance of

---

19. 317 U.S. at 275.

20. *Id.* at 279 (citations omitted and emphasis added).

21. 329 U.S. 173 (1946). In *Carter*, the Supreme Court upheld the conviction of petitioner who had pleaded guilty to murder without the assistance of counsel. The Court refused to carry its scrutiny past the common law record of the case to determine the validity of the waiver.

22. *Id.* at 174.

23. *Id.* at 175 (emphasis added).

counsel, the fairness concerns expressed by the Court put the decision into a different perspective, casting shadows on the reach of the *Adams* dictum.

The courts of appeals have directly held in several cases that the right to proceed *pro se* is constitutionally protected by the sixth amendment and the due process clause of the fourteenth amendment.[24] The first analytically significant case espousing the right of self-representation as an affirmative constitutional right is *United States v. Plattner*.[25] In *Plattner*, the Second Circuit Court of Appeals elevated the right to proceed *pro se* to the level of the constitutional safeguards expressly enumerated in the sixth amendment and further stated that the right of self-representation could not be construed as merely statutory in origin.[26] The court of appeals then declared that denial of self-representation was prejudicial per se[27] and required automatic reversal when a defendant had been denied the right to proceed *pro se* without any attempt by the trial court to ascertain the adequacy of the accused to waive his constitutional right to assistance of counsel.[28]

Although the majority in *Faretta* was quite comfortable with the prevailing court of appeals viewpoint, the dissenters were reluctant to embrace a court of appeals doctrine founded, at least in part, upon the sketchy *Adams* and *Carter* dicta. Mr. Chief Justice Burger pointed out in his dissent that *Adams* and *Carter* dealt specifically with the consequences of a waiver of trial by jury and a guilty plea, repsectively, made without the assistance of counsel. Hence, the issue was not whether the accused had an affirmative right to proceed *pro se* but whether uncounseled *waivers* of fundamental constitutional rights were per se defec-

24. *E.g.*, United States v. Warner, 428 F.2d 730 (8th Cir.), *cert. denied*, 400 U.S. 930 (1970); Lowe v. United States, 418 F.2d 100 (7th Cir. 1969), *cert. denied*, 397 U.S. 1048 (1970); United States v. Sternman, 415 F.2d 1165 (6th Cir. 1969), *cert. denied*, 397 U.S. 907 (1970); Arnold v. United States, 414 F.2d 1056 (9th Cir. 1969), *cert. denied*, 396 U.S. 1021 (1970); United States *ex rel.* Maldonaldo v. Denno, 348 F.2d 12 (2d Cir. 1965), *cert. denied*, 384 U.S. 1007 (1966); United States v. Plattner, 330 F.2d 271 (2d Cir. 1964). *Contra*, Van Natton v. United States, 357 F.2d 161 (10th Cir. 1966) (right of self-representation solely statutory right).

25. 330 F.2d 271 (2d Cir. 1964). The case involved the use of assigned counsel to argue a petition for a writ of error *coram nobis* filed by defendant after his conviction for interstate transportation of a stolen motor vehicle. Defendant had prepared the petition himself, and he appealed from the district court order dismissing the petition on the ground that the district court erred in refusing to allow him to represent himself at the hearing.

26. *Id.* at 273.

27. *Id.*

28. *Id.* at 276.

tive.[29] Since the Supreme Court affirmed the convictions in both *Adams* and *Carter*, the obvious answer is that a defendant may *waive* his constitutional rights in some circumstances. However, in *Singer v. United States*[30] the Supreme Court declared that "[t]he ability to waive a constitutional right [*e.g.*, trial by jury] does not ordinarily carry with it the right to insist upon the opposite of that right."[31] The Court in *Singer* found that no prejudice could result from a refusal to permit waiver of a constitutional safeguard because the defendant then receives exactly what the Constitution requires for his protection.[32] This logic could arguably be extended to the issue of self-representation in that denial of the right to proceed *pro se* may be viewed as resulting merely in the exercise of the constitutional right of assistance of counsel. In any event, the judicial background on the right of self-representation, standing alone, is somewhat less than conclusive in forming a constitutional basis for an affirmative right to proceed *pro se*.

As a supplement to the judicial viewpoint, the majority finds support for its position in parallel developments in the English common law, colonial trial practices, and the legislative context of the sixth amendment itself. Presently, an individual has an affirmative right of self-representation under the English common law.[33] But this is hardly surprising or probative in that common-law defendants were historically forced to proceed *pro se*.[34] Indeed, it was not until 1836 that the last vestiges of compulsory self-representation in felony prosecutions were removed by statute.[35] Similarly, colonial trial procedures regularly afforded the defendant the opportunity to represent himself,[36] but whether this practice arose from respect for individual liberties or whether the practice was fostered by common law traditions derived from the dearth of trained counsel in the colonies is not readily ascertainable.

The majority also cited the legislative history of the sixth amendment as indicative of an affirmative constitutional right to proceed *pro*

29. 95 S. Ct. at 2544.

30. 380 U.S. 24 (1965). In *Singer*, defendant was convicted of federal mail fraud charges in a jury trial despite repeated demands by him for trial by the judge alone. The Supreme Court affirmed the conviction. *Id.* at 25, 36.

31. *Id.* at 34-35.

32. *Id.* at 36.

33. R. v. Woodward, [1944] K.B. 118.

34. 1 F. POLLOCK & F. MAITLAND, THE HISTORY OF ENGLISH LAW 211 (2d ed. 1923).

35. 6 & 7 Will. 4, c. 114, § 1 (1836).

36. 95 S. Ct. at 2537.

se. Congress passed the Judiciary Act of 1789,[37] guaranteeing the right of self-representation in the federal courts, just one day prior to the submission of the sixth amendment to Congress for its approval.[38] In the subsequent congressional debate on the sixth amendment, reference to the right to proceed *pro se* was conspicuously absent.[39] The majority propounded that this was indicative that the right to self-representation was deemed by all to be so pervasive and fundamental that it was a non-issue.[40] However, this logic raised the inevitable question of why Congress affirmatively granted the right to proceed *pro se* in a federal statute if such a right was considered inherent and patently obvious. The dissenters found the Court's argument unpersuasive in that the statutory grant of the right to proceed *pro se* and the corresponding omission in the sixth amendment, which had been drafted by essentially the same persons, lent credence to the inference that the exclusion was purposeful.[41] Neither viewpoint could legitimately be termed persuasive.

The final and most compelling argument of the majority was the necessity of protecting individual autonomy.[42] The Court made no effort to side-step the central premise in *Gideon v. Wainwright*[43] and *Argersinger v. Hamlin*[44] that fundamental fairness requires that an accused be represented by counsel.[45] Rather, the Court conceded that the average criminal defendant who proceeds *pro se* will indeed diminish the likelihood of a successful defense in his case.[46] However, the

37. Judiciary Act of 1789, § 35, 1 Stat. 92.
38. 95 S. Ct. at 2539.
39. *Id.*
40. *Id.*
41. *Id.* at 2546.
42. *See generally* Grano, *The Right to Counsel: Collateral Issues Affecting Due Process*, 54 MINN. L. REV. 1175 (1970); Comment, *Self-Representation in Criminal Trials: The Dilemma of the Pro Se Defendant*, 59 CALIF. L. REV. 1479 (1971); Note, *Constitutional Law—Right to Counsel—Self-Representation Not Guaranteed by Sixth Amendment*, 18 N.Y.L.F. 990 (1973).
43. 372 U.S. 335 (1963).
44. 407 U.S. 25 (1972).
45. *See* text accompanying note 1 *supra*.
46. 95 S. Ct. at 2540. Mr. Justice Sutherland in Powell v. Alabama, 287 U.S. 45, 68-69 (1932), presented the classic critique of the *pro se* defense:

> The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel. Even the intelligent and educated layman has small and sometimes no skill in the science of law. If charged with crime, he is incapable, generally, of determining for himself whether the indictment is good or bad. He is unfamiliar with the rules of evidence. Left without the aid of counsel he may be put on trial without a proper charge, and convicted upon incompetent evidence, or evidence irrelevant to the issue or otherwise inadmissible. He lacks both the skill and knowledge adequately to prepare his defense, even though he had a perfect one. He requires the guiding hand of counsel at every step in the proceedings against him. Without it,

Court refused to entwine personal liberties with statistical probabilities and stated that respect for individual freedom, even if exercised in an apparently self-destructive manner, demands an affirmative right for an individual to conduct his own defense.[47] At no other time are individual liberties more precious to a citizen than when a state subjects that citizen to the rigors of its criminal justice process.[48] Accordingly, in the very hour of need, a defendant should be afforded the widest possible latitude to prove his innocence to give the constitutional safeguards of the sixth amendment their fullest meaning.

The dissenting opinions did not belittle the value of individual autonomy and free choice within the criminal justice system. But the dissenters found a preeminent government interest in insuring a just result through compulsory assistance of counsel.[49] In the criminal courts the prosecution and the trial judge must insure that true justice is realized to maintain public confidence in the efficacy of the criminal justice process.[50] Objective standards of impartiality require that court systems appoint attorneys for defendants without counsel since the majority of the populace feels that representation by counsel is a neces-

---

though he be not guilty, he faces the danger of conviction because he does not know how to establish his innocence.

47. 95 S. Ct. at 2540.

48. *See* United States v. Dougherty, 473 F.2d 1113 (D.C. Cir. 1972) (reversal of conviction of "D.C. Nine" who had vandalized the Dow Chemical Corporation's District of Columbia offices). Although the trial judge had granted defendants latitude with respect to addressing the trial court, he had denied defendants' petition to proceed *pro se*. In reversing the conviction, the court of appeals expounded on the nature of the right to proceed *pro se*:

> It [the right of self-representation] is designed to safeguard the dignity and autonomy of those whose circumstances or activities have thrust them involuntarily into the criminal process. An accused has a fundamental right to confront his accusers and his "country," to present himself and his position to the jury not merely as a witness or through a "mouthpiece," but as a man on trial who elects to plead his own cause. He is not obliged to seek what counsel would record as a victory but what he sees as tantamount to condemnation or doubt rather than vindication. A defendant has the moral right to stand alone in his hour of trial. The denial of that right is not to be redeemed through the prior estimate of someone else that the practical position of the defendant will be enhanced through representation by another, or the subsequent conclusion that defendant's practical position has not been disadvantaged.

Id. at 1128.

49. 95 S. Ct. at 2543, 2548.

50. Grano, *supra* note 42, at 1196. The Supreme Court articulated this view in Berger v. United States, 295 U.S. 78 (1935) (conviction of petitioner for conspiracy to utter counterfeit notes). In reversing the conviction because of improper prosecutorial conduct, the Supreme Court declared: "The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done." *Id.* at 88. Similar language may be found in Brady v. Maryland, 373 U.S. 83, 87 (1963).

sary precondition to a fair trial.[51] Continued public support for the judicial process is dependent upon widespread popular sentiment that no arm of the state or federal governments will strip a citizen of his rights except through meticulous adherence to procedures deemed most likely to produce just results.[52] Mr. Justice Blackmun concluded that the criminal justice system could not assuage the damage to society inherent in unjust outcomes by pointing to the vindication of an individual's right to proceed *pro se*. Conversely, Mr. Justice Blackmun reasoned that any damage to individual freedom resulting from denial of the *pro se* privilege would be mitigated by the greater fairness of a trial with assistance of counsel. Complaints about the fairness of criminal proceedings from a convicted defendant who received the full benefit of the express constitutional right to assistance of counsel ring hollow despite the abridgement of individual autonomy.[53]

Despite the skepticism of the dissenters, there are rational reasons for a criminal defendant to seek to proceed *pro se*.[54] The glaring flaw in the dissenters' position is their assumption that appointed counsel will provide effective representation for indigent defendants. Patently, the empirical norm for appointed counsel does not approach total effectiveness. Blatant incompetence has appropriate remedies both in the trial court and at the appellate level. But marginally inadequate representation presents an insidious dilemma for the indigent defendant under the minority view. Faretta's request to proceed *pro se* was rooted in his belief that the public defender could not devote the time that Faretta felt was necessary for a successful defense.[55] Under California law, the sole basis for reversal for ineffective representation is a showing by the accused that the errors of defense counsel reduced the trial to a "sham and a farce."[56] Clearly, a defense limited by the time and budgetary constraints of the public defender's office might be "inadequate" in certain circumstances and yet not constitute a "sham and a farce." If the appointed counsel proves ineffective, the accused must either sit mute and sustain the consequences or he must waive his fifth amend-

51. Grano, *supra* note 42, at 1195-96.
52. *Id.*
53. 95 S. Ct. at 2548.
54. Possible rational reasons for seeking to proceed *pro se* are: (1) distrust of appointed counsel and/or the legal process as a whole; (2) political motivations; (3) faith in the ultimate vindication of an innocent defendant by the judicial system; and (4) the tactical desire to gain empathy with the jury. Note, 18 N.Y.L.F., *supra* note 42, at 996.
55. 95 S. Ct. at 2527.
56. People v. Ibarra, 60 Cal. 2d 460, 386 P.2d 487, 34 Cal. Rptr. 863 (1963).

ment right to silence and testify in his own behalf. This situation is constitutionally untenable as the accused is, in fact, forced to waive his right to remain silent to present a viable defense. To forestall this dilemma, qualitative guarantees of effective representation must accompany any denial of the right to proceed *pro se*. Without such guarantees, the dissenters' position is constitutionally defective.

The majority opinion is praiseworthy at the very least for its concern with freedom of individual choice. With the present awesome concentration of power in governmental bodies, any minor victory for individual autonomy is meritorious on its face. However, society's interest in achieving a fair and impartial judicial process must predominate over the autonomy interest. Public doubt concerning the fairness of criminal proceedings strikes at the very core of government. While paying lip service to this ideal, the minority's position fails to insure the essence of a fair trial, *i.e. effective* assistance of counsel. Until the Supreme Court deals decisively with the spectre of inadequate representation for indigent defendants that haunts many criminal proceedings, the right of self-representation must remain unfettered. Hopefully, if the Supreme Court does promulgate guidelines to guarantee effective representation for indigent defendants, the Court will re-examine the *Faretta* decision in the context of the preeminent public interest in ensuring justice in the trial courts.

MICHAEL S. IVES

Federal Income Tax—Use of Installment Sale Reporting for Sales Between Related Taxpayers: The Separate v. Single Economic Entity Argument

Nye v. United States,[1] a case of first impression,[2] presented the issue whether a purported installment sale by a wife to her husband, followed by an outright disposition of the property by the husband to a

1. No. C-374-D-73 (M.D.N.C., May 16, 1975) [hereinafter cited as The District Court Opinion]. The case was decided on a stipulation of facts and cross motions for summary judgment. The United States initially appealed the case to the Court of Appeals for the Fourth Circuit (Court of Appeals No. 75-1905) but subsequently withdrew the appeal. Counsel for plaintiffs in *Nye* reports that he has received correspondence from attorneys in a number of other jurisdictions who are currently involved with factually similar cases. Interview with R. Roy Mitchell Jr., attorney for plaintiffs, in Durham, North Carolina, Jan. 20, 1976. Apparently the Internal Revenue Service has decided to

third party, could qualify for installment sale treatment under section 453 of the Internal Revenue Code.[3] The court, after determining that the form of the transaction comported with the requirements for installment sales treatment,[4] approached the section 453 question on the basis of whether the marriage relationship alone was sufficient to preclude use of the installment sale reporting method.[5] Although noting that transactions between husband and wife that have significant tax consequences are traditionally viewed with suspicion,[6] the court, by holding for the taxpayers here, refused to allow that relationship, standing alone, to defeat an otherwise valid installment sales agreement.[7]

Plaintiffs, husband and wife, were both active professionals, he a lawyer and she a medical doctor.[8] Both had achieved a considerable degree of financial success and maintained completely separate records and accounts of their respective financial affairs.[9] In 1964 plaintiff wife, on the advice of her husband, purchased certain stock for approximately 30,000 dollars.[10] For this purchase she used money from her separate account, and after acquisition of the stock always listed it as her separate property on state tax returns.[11] The investment was a significant financial success and by early 1969, when she sold the stock to her husband, the stock was worth slightly more than ten times the original purchase price.[12]

As part of his separate business dealings plaintiff husband was obligated under a construction financing agreement to make a 100,000 dollar payment to a third party in mid-1969 and had clearly sufficient personal resources to meet this obligation.[13] However, instead of using

---

let *Nye* stand as the law in the Middle District of North Carolina while continuing to litigate the point in other jurisdictions. This is a fairly standard tactical approach by the Service in hopes of getting a favorable trial court decision on similar facts, and approaching any appellate resolution in the position of appellee rather than appellant.

2. The District Court Opinion at 8.
3. INT. REV. CODE OF 1954, § 453(b).
4. The District Court Opinion at 10.
5. *Id.*
6. *Id.*
7. *Id.* at 11-12.
8. *Id.* at 3.
9. *Id.*
10. *Id.*
11. *Id.*
12. Plaintiff wife initially invested $30,134.00 in the stock of Colorcraft Corp. After a corporate reorganization she received 834 shares of Fuqua Industrial Preferred "B" stocks in exchange for her Colorcraft shares. At the time of the transaction between plaintiffs husband and wife, the husband purchased from her 334 shares of the Fuqua stock. Her per/share basis at the time of sale was $36.13 with a per/share market price at that time of $363.77. *See id.* at 3-4.
13. *Id.* at 4.

his own resources outright, he decided to purchase a portion of the greatly appreciated stock from his wife with a view toward resale to obtain the required cash.[14] Both plaintiffs were aware of the planned resale and of the tax postponement reasons for the initial sale.[15] The sale of the wife's stock to her husband was structured as an installment purchase at four percent interest[16] and met all of the technical requirements set forth in section 453 of the Internal Revenue Code for such a transaction.[17]

Plaintiff husband resold most of his newly acquired shares within a six month period, realizing and reporting a short-term capital loss on the plaintiffs' 1969 joint tax return. On the stock sold to her husband plaintiff wife reported a long-term capital gain totaling more than 109,000 dollars on plaintiffs' joint 1969 and 1970 tax returns using the installment reporting method.[18] The stipulated purpose of the transaction was to allow the wife to postpone the full payment of the long-term capital gains tax by spreading it over a twelve year period.[19]

The Internal Revenue Service disallowed the installment sale reporting method and its attendant tax consequences upon audit of plaintiffs' 1969 and 1970 tax returns and assessed a deficiency plus interest, which totaled more than 30,000 dollars. Plaintiffs paid the deficiency and, after having exhausted all administrative remedies, sued for refund of the deficiency assessment in United States District Court.[20]

At trial the government advanced two arguments, both of which viewed plaintiffs as a single economic entity with the effect of placing the seller wife in the position of having at least indirect control of the entire sale proceeds[21] rather than a fractional share as required by section 453. The government first pressed a "substance over form" argument on the basis of its assertion that the sale in question was no

14. *Id.*

15. *Id.* at 6.

16. *Id.* at 4. Some point is made in the opinion and briefs about the low four percent interest rate involved here. However, the rate is clearly irrelevant to the discussion or resolution of the problem as it will result in a "wash" on plaintiffs' joint return. So long as the interest is actually paid and reported, as was the case here, the income that was received by the wife would exactly equal the income deduction allowable to the husband. INT. REV. CODE OF 1954, §§ 163, 267.

17. INT. REV. CODE OF 1954, § 453(b). For the form of the transaction in the instant case see The District Court Opinion at 4.

18. The District Court Opinion at 5.

19. *Id.* at 4, 6.

20. The suit was filed pursuant to 28 U.S.C. § 1346(a)(1) (1970). The District Court Opinion at 2.

21. Brief for Defendant at *i*, Nye v. United States, No. C-374-D-73 (M.D.N.C., May 16, 1975).

more than a single complete transaction involving one taxpaying unit, the plaintiffs husband and wife.[22] Relying on *Commissioner v. South Texas Lumber Co.*,[23] which states that the installment method of reporting was included in the Internal Revenue Code as a relief provision for taxpayers who receive only a small portion of the sale price in the year of sale, the government argued that this "well-coordinated tandem"[24] (referring to the plaintiffs) indeed received the entire selling price in the year of sale. The second argument advanced by the government was the "step transaction doctrine,"[25] a theory under which ostensibly separate transactions are viewed merely as steps in completing a single transaction. Here again the entire argument hinged on the treatment of the plaintiffs as a single unit or entity, because the argument is simply that despite the separate sales actually involved, the effect of the transaction was no more than a single sale of stock by the plaintiffs husband and wife.

The basic problem in any case involving an installment sales agreement, and one specifically confronted by the court in *Nye*,[26] is to establish an appropriate standard by which to test the validity of the transaction. As the court in *Nye* recognized,[27] no prior case offered a sufficiently similar fact pattern to be of serious precedential value in the context of installment sales between related taxpayers. The court, however, found in *Rushing v. Commissioner*[28] a standard which could be applied to installment sales transactions in general.[29] *Rushing* established as the test for validity whether the seller has achieved, regardless of the form employed, the same result as if he had made an outright sale.[30] If he has, then installment treatment will be disallowed because the seller

22. *Id.* at 13.

23. 333 U.S. 496, 503 (1948), *cited in* Brief for Defendant at 10.

24. Brief for Defendant at 13.

25. *Id.* at 17. For more on the "step transaction doctrine" see B. BITTKER & J. EUSTICE, FEDERAL INCOME TAXATION OF CORPORATIONS AND SHAREHOLDERS 101-03 (3d ed. 1971).

26. The District Court Opinion at 9.

27. *Id.* at 8.

28. 441 F.2d 593 (5th Cir. 1971). In *Rushing* the taxpayers' wholly owned corporation had sold all of its assets pursuant to a section 337 plan of liquidation. After the sale they created an irrevocable trust for their children with a bank as trustee and sold their corporate stock to the trust in an installment sale transaction. The trustee then authorized and received the distribution of the corporate assets. The government argued that plaintiffs were then taxable on the entire liquidating distribution. The court found the controlling factor to be whether the taxpayer had ever gained or retained control over the proceeds. Relying on the independent nature of the trustee, the court ruled that he had not and that the installment sale was therefore valid.

29. The District Court Opinion at 9.

30. 441 F.2d at 598.

will have the full economic return of the transaction at his immediate disposal and thereby be able currently to absorb the full tax consequences. Thus the question in the husband and wife context presented in *Nye* is indeed reduced to whether the couple will be treated as single or separate economic entities. This is the crucial issue because the *Rushing* test would disallow installment sales treatment when the seller received even indirect control of the proceeds or economic benefit of the entire transaction.[31]

It is clear that for most non-tax purposes husband and wife are treated as separate legal entities. Unlike the earlier common-law approach, it is now well settled that they may own separate property, that their individual contracts are binding even with each other,[32] and that they may establish legitimate debtor-creditor relationships.[33] The legal trend is quite obviously toward more individual autonomy for each spouse. Of course, to say that husband and wife are separate legal entities may not be to say that they are or should be separate economic entities for purposes of the special situation of joint filers under the federal income tax law. The filing of a joint return is an election by married taxpayers to be treated as an economic unit for tax purposes,[34] and because it is elective it is chosen by the informed taxpayer (as the plaintiffs in *Nye* unquestionably were) only when it produces a tax advantage.[35]

The court in *Nye* decided that on the facts presented the wife and husband were indeed separate economic entities,[36] even though they filed jointly for federal tax purposes. The court found it impossible on the facts presented to find that plaintiff wife maintained either direct or indirect control over the economic benefit of the outright sale of the stock by her spouse to a third party.[37] At the very least, the opinion if followed means that the Internal Revenue Service may not "automatical-

31. *Id.*

32. N.C. GEN. STAT. § 52-10 (1966). This statute establishes the validity of contracts between husband and wife in North Carolina.

33. *See* Battle v. Mayo, 102 N.C. 413, 9 S.E. 384 (1889). This case held that notes executed by husband payable to wife constitute a valid indebtedness.

34. INT. REV. CODE OF 1954, § 6013 governs joint returns.

35. The use of a joint return will produce a tax advantage when there is a difference in the percentage contributed by each spouse to the net taxable income. This is true even in the higher tax brackets. For example, if we assume a total net taxable earned income of $60,000 split 40/20, the total tax filing separately would be $22,740; while the tax filing jointly would be $22,300 or a savings of $440. This result is produced using the 1975 tax rates.

36. The District Court Opinion at 10.

37. *Id.*

ly and perfunctorily [conclude] that any person is the agent of his or her spouse for the purposes of section 453(b) installment method reporting,"[38] even though in the court's own words such a rule would be "valid in the vast majority"[39] of such transactions.

The court did not discuss Revenue Ruling 73-157[40] which states: "A taxpayer may not use the installment method to report gain from sale to a related taxpayer who pursuant to a prearranged plan resells the property to a third party and receives full payment in the year of sale."[41] The ruling seems to be on point in a situation like that presented in *Nye*. Surprisingly, the court did not mention the ruling although it was cited by one of the parties.[42] The only logically consistent conclusion given the facts here is that the court rejects the ruling's validity. While plaintiffs in *Nye* asserted that the ruling was not applicable because the transaction involved did not fit the "prearranged plan" language,[43] this is a strange position given the stipulation that both plaintiffs were at all times aware of the planned resale to a third party.[44] Indeed if the arrangement in *Nye* did not fit the ruling it is impossible to imagine any set of facts that would, and the court's failure even to mention the ruling may only be construed as an absolute rejection of it.

The opinion in *Nye* also stands in sharp contrast to earlier decisions that rejected attempts by taxpayers to interject controlled corporations between themselves and third party purchasers when the controlled corporation paid the purchase price to the seller in installments and the seller in turn reported the sale using the installment method.[45] Of course, in that context there is no question about the seller's control of the resale transaction, a control that the court in *Nye* refused to find in the husband-wife context when the only evidence was the existence of the marriage relationship.[46]

In holding for plaintiffs in *Nye* the court was strongly influenced by the separate and individually successful careers of the taxpayers and

38. *Id.*
39. *Id.*
40. Rev. Rul. 157, 1973-1 CUM. BULL. 213.
41. It is interesting to note that this Revenue Ruling was not issued until after the controversy in *Nye* arose. It is fairly common for the Internal Revenue Service to attempt to create favorable "law" in this manner looking toward trial, and this may explain the court's complete disregard of the ruling.
42. Brief for Plaintiff at 5, Nye v. United States, No. C-374-D-73 (M.D.N.C., May 16, 1975).
43. *Id.*
44. The District Court Opinion at 6.
45. *E.g.*, Griffiths v. Commissioner, 308 U.S. 355 (1939).
46. The District Court Opinion at 11-12.

their maintenance of "substantial personal estates separate and apart from each other."[47] The court apparently believed that such circumstances are extremely unusual (as evidenced by the comment that the government's approach would be "valid in the vast majority" of such cases), and that any opportunity for tax savings that might arise under this decision will therefore be limited.[48] In fact, at a time when the number of families in which the husband and wife have separate careers is increasing, the impact of the decision may be greater than the court seemed to believe. While few husbands and wives may find it necessary to keep separate business records and accounts, those for whom it is necessary are likely to have the largest combined incomes and, therefore, are most likely to own property of sufficient value to derive appreciable benefit from use of an installment sales agreement. This could mean that the dollar effect of the decision in *Nye* will be significant.

CONCLUSION

Given the facts presented in *Nye*, the current state of the relevant statutory law regarding treatment of spouses as separate legal entities and the evident trend toward expansion of such treatment, the decision must be viewed as sound. It is difficult to fault the court's reasoning as to its finding that the husband and wife in *Nye* are separate economic entities, however easy it may be to question its evident conclusions about the potential effect of the decision. Nonetheless, when taxpayers choose to avail themselves of the advantages of the joint filing method, it would not be unreasonable to require by *statutory* modification of the Internal Revenue Code that couples so reporting be denied the use of the installment reporting method for sales to each other. Completely denying installment reporting for sales between related persons would ignore the clear realities of some modern transactions between husband and wife. The former suggestion would have the effect of requiring couples who wish to use the installment reporting method to establish the requisite criteria for treatment as separate economic entities *and* to declare a willingness to be taxed as such by foregoing the advantages of the joint return.

JOHN GARRETT PARKER

47. *Id.* at 10.
48. *Id.*

Labor Law—The Relationship of Title VII to the National Labor Relations Act

In *Emporium Capwell Co. v. Western Addition Community Organization*[1] the United States Supreme Court was faced with the problem of reconciling the national policy of non-discrimination in employment as embodied in Title VII of the Civil Rights Act of 1964 (Title VII)[2] with the exclusive bargaining principle of the National Labor Relations Act (NLRA or the Act).[3] The Court held that concerted activities by a group of minority employees attempting to bargain collectively with their employer over allegedly racially discriminatory employment practices would not be protected by the NLRA. Resolving this issue in favor of the traditional approaches to exclusive bargaining, the Court dealt reformers a temporary setback, but preserved the integrity of the procedures of the Act.

The National Labor Relations Act was enacted by Congress "to promote industrial peace and the improvement of wages and working conditions by fostering a system of employee organization and collective bargaining."[4] The Act establishes the National Labor Relations Board (NLRB or Board) to oversee and carry out its provisions.[5] Section 7 of the Act[6] creates certain basic rights of employees; section 8 of the Act[7] protects these rights from interference by employers or unions.[8] However, other sections and policies of the Act restrict the scope of section 7. Therefore, although certain employee conduct may conform to the precise language of section 7, that section will afford the individu-

1. 420 U.S. 50 (1975).
2. 42 U.S.C. §§ 2000e to e-17 (Supp. II, 1972).
3. 29 *id.* §§ 141-87 (1970).
4. Vaca v. Sipes, 386 U.S. 171, 182 (1967); *see* NLRA §§ 1, 101, 29 U.S.C. §§ 141, 151 (1970).
5. NLRA §§ 3-6, 29 U.S.C. §§ 153-56 (1970).
6. 29 U.S.C. § 157 (1970) provides:

> Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 158(a)(3) of this title.

7. *Id.* § 158(a).
8. *Id.* § 158(b).

al no protection if his actions are repugnant to other provisions of the Act.[9]

One of the recognized section 7 rights is the employee's right "to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection."[10] In cases such as *NLRB v. Allis-Chalmers Mfg. Co.*[11] the courts have interpreted this right to be limited by the principle of section 9(a)[12] that the authorized bargaining agent will be the exclusive representative of all employees in the bargaining unit.[13] As a result, it has generally been held that section 7 does not protect employees who undertake to utilize economic pressure independent of their bargaining representative in seeking to deal with the employer over wages, hours or other conditions of employment.[14]

The underlying policy of Title VII is the achievement of equality in employment through the elimination of discrimination on the basis of race, color, religion, sex or national origin.[15] The Equal Employment

9. An unprotected employee is subject to employer discipline, which is otherwise proscribed by section 8(a)(1).

10. See note 6 *supra.*

11. 388 U.S. 175 (1967).

12. 29 U.S.C. § 159(a) (1970) provides in part: "Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment . . . ."

13. *E.g.,* Vaca v. Sipes, 386 U.S. 171 (1967); Ford Motor Co. v. Huffman, 345 U.S. 330 (1953); Medo Photo Supply Corp. v. NLRB, 321 U.S. 678 (1944); J.I. Case Co. v. NLRB, 321 U.S. 332 (1944); NLRB v. Tanner Motor Livery, Ltd., 419 F.2d 216 (9th Cir. 1969); NLRB v. Draper Corp., 145 F.2d 199 (4th Cir. 1944).

14. NLRB v. Tanner Motor Livery, Ltd., 419 F.2d 216 (9th Cir. 1969); NLRB v. Draper Corp., 145 F.2d 199 (4th Cir. 1944); Getman, *The Protection of Economic Pressure by Section 7 of the National Labor Relations Act,* 115 U. PA. L. REV. 1195, 1197, 1242 (1967).

The employee's right to individually order his relations with his employer are sacrificed under the Act in order to promote the policy that the most effective bargaining tool of employees is that of pooling their economic strength and acting through a chosen labor organization. NLRB v. Allis-Chalmers Mfg. Co., 388 U.S. at 180. Therefore, "the majority-rule concept is today unquestionably at the center of our federal labor law policy." Wellington, *Union Democracy and Fair Representation: Federal Responsibility in a Federal System,* 67 YALE L.J. 1327, 1333 (1958).

However, in order to prevent a tyranny of the majority and safeguard the interests of the minority of bargaining unit members, the courts have imposed upon the bargaining agent a concomitant duty to fairly represent all members of the bargaining unit. Steele v. Louisville & N.R.R., 323 U.S. 192 (1944). *Accord,* Ford Motor Co. v. Huffman, 345 U.S. 330 (1953). The duty can be enforced either by a suit for damages, *see, e.g.,* Steele v. Louisville & N.R.R., *supra,* or by filing an unfair labor practice charge with the Board, *see, e.g.,* Local 12, United Rubber Workers v. NLRB, 368 F.2d 12 (5th Cir. 1966), *cert. denied,* 389 U.S. 837 (1967).

15. Alexander v. Gardner-Denver Co., 415 U.S. 36, 44 (1974); McDonnell Douglas Corp. v. Green, 411 U.S. 792, 800 (1973); Griggs v. Duke Power Co., 401 U.S. 424, 429-30 (1971).

Opportunities Commission (EEOC) was created to implement this policy through a system of voluntary compliance.[16] Title VII prohibits discrimination by both employers[17] and unions[18] and can be seen as a response to unfair treatment of minorities by both and a reflection of a national policy against discriminatory employment practices.[19] One of the protections offered by Title VII is section 704(a)[20] which makes it unlawful for an employer to discriminate against an employee because he has opposed practices made unlawful by the statute. Although there has been no definitive pronouncement on the scope of the provision,[21] the Supreme Court has implicitly recognized that section 704(a) will cover employee "participation in legitimate civil rights activities or protests."[22]

The dispute before the Court in *Emporium Capwell* originated in a report issued by the Department Store Employees Union (the Union) supporting charges made by a group of employees that the Emporium Capwell Co. (the Company or the Employer) was engaging in racially discriminatory employment practices.[23] The collective bargaining agreement between the Union and the Company contained, among other provisions, a no-discrimination clause[24] and a system of grievance and

16. Alexander v. Gardner-Denver Co., 415 U.S. 36, 44 (1974); McDonnell Douglas Corp. v. Green, 411 U.S. 792, 800 (1973); Griggs v. Duke Power Co., 401 U.S. 424, 429-30 (1971).

17. 42 U.S.C. § 2000e-2(a)(2) (Supp. II, 1972).

18. *Id.* § 2000e-2(c)(2).

19. Comment, *Federal Courts as Primary Protectors of Title VII Rights*, 28 RUTGERS L. REV. 162, 165 (1974).

20. 42 U.S.C. § 2000e-3(a) (Supp. II, 1972) provides:

> It shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment, for an employment agency, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs, to discriminate against any individual; or for a labor organization to discriminate against any member thereof or applicant for membership, because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter.

21. Emporium Capwell Co. v. Western Addition Community Organization, 420 U.S. at 71-72 n.25.

22. McDonnell Douglas Corp. v. Green, 411 U.S. 792, 799 (1973).

23. The main concern of the employees was the case of Russell Young, a black passed over for promotion allegedly because of his race. On the basis of the Union's report, Young was later promoted to the position of first assistant manager prior to the start of the picketing. The Emporium and Western Addition Community Organization, 192 N.L.R.B. 173, 180-81 (1971) (trial examiner's decision). The trial examiner's decision is found appended to the NLRB decision. *Id.* at 179-86.

24. Section 21(E) provided: "No person shall be discriminated against in regard to hire, tenure of employment or job status by reason of race, color, creed, national origin, age or sex." *Id.* at 180 (trial examiner's decision).

arbitration procedures to handle all alleged contract violations.[25] The Union stated that it was prepared to take these allegations before the Adjustment Board and all the way to arbitration, if necessary.[26] A meeting of the Adjustment Board was set, and employees Tom Hawkins and James Joseph Hollins, the subjects of this litigation, were scheduled to testify on behalf of the Union. However, when called upon at the proceeding, they refused to participate,[27] thus preventing resolution of the grievance. Later, Hawkins and Hollins held a press conference and publicly charged the Company with employment discrimination against racial minorities.[28] Afterwards, they commenced picketing and pamphleting in front of the Company's store,[29] and were subsequently notified by the Company that repeated acts or statements of this nature would result in their discharge.[30] In spite of this, they resumed their activities and, as a result, received discharge slips.[31]

A charge against the Company was subsequently filed with the NLRB by the Western Addition Community Organization[32] on behalf

25. Section 5(B) provided: "Any act of any employer, representative of the Union, or any employee that is interfering with the faithful performance of this agreement . . . may be referred to the Adjustment Board for such action as the Adjustment Board deems proper, and is permissive within this agreement." *Id.* (trial examiner's decision).

Sections 36(B)-(F) described the functions of the Adjustment Board and provided for submission of a grievance to final and binding arbitration at the request of either of the parties if the Adjustment Board cannot settle the issue. *Id.*

The collective bargaining agreement also contained a no-strike-no-lockout clause in section 36(A), *id.*, and provided that the Union would be the sole bargaining agent for all employees. 420 U.S. at 53.

26. The feeling was expressed by some employees that the contract procedures were insufficient and that something "dramatic" was needed. They urged the Union to picket the Company. The Union responded by saying that the collective bargaining agreement prohibited picketing and that, although the proceedings would take time, the beneficial effects would be more widespread and longer lasting. 420 U.S. at 54.

27. At the meeting, Hawkins and Hollins read a statement objecting to processing the grievance on an individual basis, calling for group action and demanding a meeting with the Company's president. They then walked out. 192 N.L.R.B. at 181 (trial examiner's decision).

28. The conference was held with the local media after an unsuccessful attempt by Hollins to meet and negotiate with the Company's president. *Id.*

29. The pamphlets basically reiterated the charges made at the press conference and called for a boycott of the Employer's store. They referred to the Company as a "racist pig" and "a 20th century colonial plantation" and compared its operations to those of "the slave mines of South Africa." *Id.*

30. In a written warning, the Company claimed that the charges made by the employees were untrue and deliberately designed to injure its reputation. After stating that there were ample remedies already in existence to correct any alleged discrimination, the Company warned that discharge would follow a repetition of the same conduct. *Id.* at 181-82.

31. The Union did not advise the parties to picket and later urged them to follow the Union's program through arbitration, warning them that their picketing could result in their being fired. *Id.* at 182.

32. The Western Addition Community Organization is a local San Francisco civil

of Hawkins and Hollins, alleging that their discharge violated section 8(a)(1) of the NLRA.[33] After conducting a hearing, the NLRB Trial Examiner found in favor of the Company,[34] concluding that the conduct of the employees was not protected by section 7 because it was disruptive of the collective bargaining relationship existing between the Union and the Company.[35] The NLRB, on review, adopted and affirmed the findings and conclusions of the trial examiner.[36]

On appeal, the Court of Appeals for the District of Columbia Circuit reversed,[37] stating that "concerted activity involving racial discrimination has a unique status"[38] and cannot be treated as limited by section 9(a) in the same manner as are other section 7 concerted activities. The principle of the exclusivity of the bargaining representative must be read as restricted by the national policy against racial discrimination in employment incorporated in Title VII.[39] On certiorari, a majority of the Supreme Court reversed the court of appeals in an opinion written by Mr. Justice Marshall.[40]

---

rights association. Both Hawkins and Hollins were members at the time of their discharge. 420 U.S. at 57.

33. 29 U.S.C. § 158(a)(1) (1970).

34. 192 N.L.R.B. at 179 (trial examiner's decision).

35. In keeping with the traditional view that section 9(a) acts as a limitation on section 7 rights, the trial examiner stated:

> [T]o extend the protection of the Act to the two employees named . . . would seriously undermine the right of employees to bargain collectively through representatives of their own choosing, handicap and prejudice the employees' duly designated representative in its efforts to bring about a durable improvement in working conditions among employees belonging to racial minorities, and place on the Employer an unreasonable burden of attempting to placate self-designated representatives of minority groups while abiding by the terms of a valid bargaining agreement and attempting in good faith to meet whatever demands the bargaining representative put (*sic*) forth under that agreement.

Id. at 186.

36. The Emporium and Western Addition Community Organization, 192 N.L.R.B. 173 (1971) (mem.). Members Jenkins and Brown filed dissenting opinions. The former based his conclusion on the belief that the conduct was protected by section 7 as a concerted activity in spite of the limitations of section 9(a), while the latter found that the employees were not seeking to collectively bargain with the Employer, but rather to discuss the situation with the Company.

37. Western Addition Community Organization v. NLRB, 485 F.2d 917 (D.C. Cir. 1973) (Wyzanski, J., dissenting).

38. *Id.* at 927.

39. The appellate court held: "[T]he Labor Board should inquire, in cases such as this, whether the union was actually remedying the discrimination to the *fullest extent possible by the most expedient and efficacious means.* Where the union's efforts fall short of this high standard, the minority group's concerted activity cannot lose its section 7 protection." *Id.* at 931 (emphasis in original).

In his dissenting opinion, Judge Wyzanski objected to the use of this test on the grounds that minority concerted activities in opposition to racial discrimination should be protected in all circumstances, regardless of the conduct of the union. *Id.* at 932.

40. 420 U.S. 50. The Supreme Court accepted the conclusion of both the trial

In reaching its holding that plaintiffs' picketing was not protected by the NLRA, the Court reaffirmed the traditional interpretations of three central areas of the Act. First, the Court asserted that the rights of employees as delineated in section 7 are to be viewed as collective, not individual, rights which will be protected only to the extent that employees act in furtherance of the NLRA policy of fostering collective bargaining.[41] Second, the Court upheld section 9(a)'s principle of exclusive representation as a limitation on section 7, even in cases of racial discrimination, thus rejecting the view of the appellate court.[42] Finally, the Court reemphasized the importance of the grievance-arbitration procedures established in the collective bargaining agreement, especially when, as in *Emporium Capwell*, the contract contains a no-discrimination clause.[43] Arbitration is to be preferred to separate bargaining or economic pressure, in keeping with the strong federal policy in favor of arbitration of labor disputes.[44]

The Court also addressed itself to the question of the proper weight to be afforded the policies of Title VII in the context of an NLRA proceeding. The decision makes it clear that the NLRB is not the proper forum for the pursuit of relief for Title VII violations and that these violations will not be treated as per se unfair labor practices under the Act.[45] However, as has been required by prior Supreme Court decisions,[46] a government agency, such as the NLRB, cannot ignore other congressional policies in administering an act entrusted to

---

examiner and the Board that the employees were seeking to bargain collectively with the Employer, rather than just to present grievances or discuss the situation. The Court confined its consideration of the case to this issue. *Id.* at 60-61.

Mr. Justice Douglas filed the lone dissent and would have affirmed the appellate court decision based on the belief that minority concerted activities are protected by section 7 and that to find otherwise is to make all employees prisoners of their union. *Id.* at 73.

41. *Id.* at 61-62.

42. *Id.* at 65-66.

43. *Id.* at 66-67.

44. The federal policy favoring the arbitration process is specifically recognized by the NLRA in section 203(d), 29 U.S.C. § 173(d) (1970), and has been judicially developed in a long line of cases. *See, e.g.*, Gateway Coal Co. v. UMW., 414 U.S. 368 (1974); Boys Market, Inc. v. Clerks Local 770, 398 U.S. 235 (1970); Steelworkers v. Enterprise Wheel and Car Corp., 363 U.S. 593 (1960); Steelworkers v. Warrior & Gulf Navigation Co., 363 U.S. 574 (1960); Steelworkers v. American Mfg. Co., 363 U.S. 564 (1960); Textile Workers v. Lincoln Mills, 353 U.S. 448 (1957).

45. 420 U.S. at 70-72. The contrary result has been argued for by a number of parties, including respondents in this case, because of what is seen as the inadequacy of the Title VII remedies and the ineffectiveness of the EEOC in processing complaints.

46. Southern S.S. Co. v. NLRB, 316 U.S. 31, 47 (1942); *cf.* McLean Trucking Co. v. United States, 321 U.S. 67, 80 (1944).

it. As the Court conceded,[47] the rights created by the Act might have to be broadened to accommodate the policies of Title VII, under the proper circumstances. Nevertheless, although such outside policies should be considered, the Court implied that they should not be given preeminence over policies inherent in the Act without a more express congressional mandate.

Specifically, the Court announced that the primary policy of the NLRA will continue to be the encouragement and protection of the system of collective bargaining. The standards and requirements of Title VII will not be read into the Act. As the Court stated:

> This argument [by employee-plaintiffs] confuses employees' substantive rights to be free of racial discrimination with the procedures available under the NLRA for securing these rights. Whether they are thought to depend upon Title VII or have an independent source in the NLRA, they cannot be pursued at the expense of the orderly collective bargaining process contemplated by the NLRA.[48]

The Court thus refused to follow the recommendations of certain commentators that the role of the Board and of the Act be expanded in the area of racial discrimination.[49] The contentions that concerted activities aimed at the elimination of racial discrimination should receive special status under the Act and that the NLRA should thus provide yet another remedy for aggrieved racial minorities were rejected. Policies of racial non-discrimination were treated as secondary to the NLRA's preeminent policy of insuring industrial tranquility through a system of collective bargaining.

Although not expressed by the Court, the subordination of the policy of antidiscrimination in employment to that of fostering collective bargaining can be explained in the following manner. The elimination of racial discrimination has always been a valid concern of the NLRA, as safeguards have been provided against its occurrence.[50] However,

---

47. 420 U.S. at 73 n.26.

48. *Id.* at 69.

49. Gould, *Racial Protest and Self Help Under Taft-Hartley: The Western Addition Case*, 29 ARB. J. (n.s.) 161 (1974); Comment, *Labor Law Meets Title VII: Remedies for Discrimination in Employment*, 6 CONN. L. REV. 66 (1974); Comment, *The Inevitable Interplay of Title VII and the National Labor Relations Act: A New Role for the NLRB*, 123 U. PA. L. REV. 158 (1974).

50. These safeguards include, among others, the duty of fair representation imposed upon the bargaining agent. *See* note 14 *supra*. Also, the Board has held that racial discrimination on the part of the union is an unfair labor practice. Hughes Tool Co., 147 N.L.R.B. 1573 (1964); Miranda Fuel Co., 140 N.L.R.B. 181 (1962), *enforcement denied*, 326 F.2d 172 (2d Cir. 1963).

this concern springs not out of an express policy within the Act, but from the realization that the existence of racial discrimination in employment invites industrial strife. Employees are thus protected from discriminatory practices by the Act not as an end in itself, but as a means to the end of industrial peace. This conclusion is supported by recent statements made by the Board's former General Counsel[51] and the Board decision in the case of *Jubilee Mfg. Co.*[52]

There appear to be only two flaws in this otherwise well-reasoned opinion by the Court. The first of these involves the Court's reaffirmation of the arbitration process in the context of charges of employer racial discrimination.[53] This language would seem to run counter to the Court's decision in *Alexander v. Gardner-Denver Co.*[54] which held that weaknesses present in the arbitration system render it inferior to the federal courts as a proper forum for determination of Title VII violations. However, this inconsistency may be resolved by reading the Court's approval of arbitration in *Emporium* to be limited solely to its appropriateness as a procedure for determining whether racial discrimination has in fact occurred, when the collective bargaining agreement contains a no-discrimination clause.[55]

The second problem presented by the Court's decision occurs in part III of the opinion. Having established that the concerted activities of the employees were not protected by section 7 and, therefore, that discharge by the Employer was proper, the Court stated that this "does not mean that the discharge is immune from attack on other statutory grounds in the appropriate case."[56] The Court implied that, in a

---

51. Nash, *Board Referral to Arbitration and Alexander v. Gardner-Denver: Some Preliminary Observations*, 25 LAB. L.J. 259, 264-65 (1974).

52. 202 N.L.R.B. 272 (1973), wherein the Board stated:

> [I]n our view, discrimination based on race, color, religion, sex or national origin, standing alone . . . is not "inherently destructive" of employees' Section 7 rights and therefore is not violative of Section 8(a)(1) and (3) of the Act. There must be actual evidence . . . of a nexus between the alleged discriminatory conduct and the interference with, or restraint of, employees in the exercise of those rights protected by the Act.
>
> . . . .
>
> Such discrimination can be violative of Section 8(a)(1), (3) and (5) in certain contexts. . . . However, in each of these areas in which we have decided issues involving discrimination there has been the necessary direct relationship between the alleged discrimination and our traditional and primary functions of fostering collective bargaining . . . .

Id. at 272-73.

53. 420 U.S. at 66-67.

54. 415 U.S. 36 (1974). The Court held that an adverse arbitration decision will not foreclose to the employee-complainant the right to file charges with the EEOC.

55. The Court stated: "The grievance procedure is directed precisely at determining whether discrimination has occurred." 420 U.S. at 66 (footnote omitted).

56. *Id.* at 72.

separate action filed before the EEOC challenging the validity of the discharge under section 704(a), the Employer's conduct might be found to violate Title VII. Thus, under the remedial provisions of Title VII, Hawkins and Hollins could conceivably be reinstated in their jobs and awarded back pay.[57] The end result of the *Emporium Capwell* litigation would then be merely that plaintiffs sought a proper remedy through an improper forum. This incongruous result seems to stem from the Court's overly zealous desire to segregate the spheres of influence of Title VII and of the NLRA. Although the Court's language was purely dictum, this possibility of an inconsistent result under Title VII should have been foreclosed.

Another significant aspect of the *Emporium* opinion is presented in footnote 12,[58] wherein the Court for the first time dealt with the question of the proper interpretation of the proviso of section 9(a).[59] Although this treatment is dicta, the Court took the opportunity to endorse the interpretation of the proviso advanced by the Second Circuit in *Black Clawson Co. v. International Ass'n of Machinists.*[60] *Black Clawson* held that the individual employee's "right" under the proviso to approach the employer to present grievances was not an "absolute" right, but rather conferred upon the employee only the privilege of presenting such grievances. The employer is not placed under a duty to entertain these complaints.[61] With regard to the purpose of the statutory language, the Second Circuit stated:

> The proviso was apparently designed to safeguard from charges of violation of the act [section 8(a)(5)[62]] the employer who voluntarily processed employee grievances at the behest of the individ-

57. *Id.*

58. *Id.* at 61 n.12.

59. 29 U.S.C. § 159(a) (1970), wherein the proviso states:

> *Provided*, That any individual employee or a group of employees shall have the right at any time to present grievances to their employer and to have such grievances adjusted, without the intervention of the bargaining representative, as long as the adjustment is not inconsistent with the terms of a collective-bargaining contract or agreement then in effect: *Provided further*, That the bargaining representative has been given opportunity to be present at such adjustment.

For a history of the section 9(a) proviso prior to the passage of the Taft-Hartley amendments to its language and a discussion of those amendments, see Sherman, *The Individual and His Grievance—Whose Grievance Is It?*, 11 U. PITT. L. REV. 35 (1949).

60. 313 F.2d 179 (2d Cir. 1962); *accord*, Broniman v. A.&P. Tea Co., 353 F.2d 559 (6th Cir. 1965), *cert. denied*, 384 U.S. 907 (1966).

61. 313 F.2d at 185.

62. 29 U.S.C. § 158(a)(5) (1970), which states: "It shall be an unfair labor practice for an employer—to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 159(a) [NLRA 9(a)] of this title."

> ual employee, and to reduce what many had deemed the unlimited power of the union to control the processing of grievances.[63]

Thus, the Supreme Court adopted the so-called "employer defense" reading of the section 9(a) proviso. By so doing, the Court further indicated that the NLRA does not permit employees to utilize economic pressure in order to influence the employer's decision whether to exercise his proviso option. This conclusion is consistent with the Court's disposition of *Emporium*.[64]

The *Emporium* decision raises a significant question: Would the result have been the same had the union been unwilling and unready to properly process the employees' grievances? Although a resort to self-help by minority employees would appear to be more easily justified in this situation, there are several factors that militate towards an extension of the application of the picketing prohibition of *Emporium* to these facts as well. First and foremost, employees have access to a sufficient number of alternative remedies to preclude the need for the additional one sought by respondents. The most obvious remedy is a suit against the union for breach of its duty to ensure fair representation of all employees.[65] Employees can also utilize the statutory cause of action for employment discrimination provided by Title VII. Finally, the District of Columbia Circuit has held that racial discrimination by an employer sufficiently interferes with an employee's section 7 rights to constitute an unfair labor practice under section 8(a)(1) of the NLRA.[66] Although these remedies may arguably lack the speed and effectiveness of picketing, they should be preferred because they are less disruptive of the labor-management relationship than picketing, provide for an orderly determination of whether racial discrimination does in fact exist before action is taken and are already in existence and would not require any strained re-interpretation or restructuring of the provi-

63. 313 F.2d at 185.

64. A resort to self-help either for the purpose of forcing an employer to bargain collectively with a minority of employees or to pressure an employer to hear individual grievances under the section 9(a) proviso is proscribed by the opinion in *Emporium*. Therefore, the proviso has been rendered a hollow promise, since it cannot be enforced by a proceeding under the Act or by economic coercion.

65. *See* note 14 *supra*. However, a violation of the duty of fair representation occurs only when the union's conduct is arbitrary, discriminatory, or in bad faith. Vaca v. Sipes, 386 U.S. 171, 190 (1967), *citing* Humphrey v. Moore, 375 U.S. 335 (1964) *and* Ford Motor Co. v. Huffman, 345 U.S. 330 (1953).

66. United Packinghouse Workers Union v. NLRB, 416 F.2d 1126 (D.C. Cir.), *cert. denied*, 396 U.S. 903 (1969). However, the Board has specifically refused to follow this approach in Jubilee Mfg. Co., 202 N.L.R.B. 272 (1973).

sions of the Act.[67] Second, to allow minority self-help, even when the union is not aiding the minority, would be inequitable to the employer. In addition to the examples mentioned by the Court,[68] the prejudice to the employer is demonstrated by the fact that during the course of collective bargaining, an employer will make concessions in order to avoid the disruption of his business occasioned by employee picketing. To allow minority employees to picket him because of derelictions on the part of the union is to injure him doubly. Therefore, industrial peace will be preserved without undue interference with the rights of the minority employees by prohibiting minority economic pressure in accordance with the decision in *Emporium*.

The decision in *Emporium* should not be read to indicate a weakening of the Supreme Court's commitment to the eradication of racial discrimination in employment. Rather, it evidences a balancing of policy considerations, resulting in the emphasis of the smooth operation of the federal system of labor relations at what the Court views as a nominal inconvenience to the civil rights movement. If employee protection beyond that offered by the present provisions of Title VII is needed, Congressional legislation is the proper solution. The Supreme Court should not, and apparently has declined to, judicially redirect the NLRA to achieve this result.

STEVEN WILLIAM SUFLAS

Securities Regulation—United Housing Foundation, Inc. v. Forman: The Supreme Court Refines the Howey Formula

For the sixth time[1] since the passage of the Securities Act of 1933, the United States Supreme Court in *United Housing Foundation, Inc. v. Forman*[2] has gone in search of a workable definition of "security." The

67. For a discussion of these and other alternative remedies see Note, *Racial Discrimination in Employment and the Remedy of Self-Help: An Unwarranted Addition*, 15 WM. & MARY L. REV. 615 (1974).

68. 420 U.S. at 67-69.

1. SEC v. C.M. Joiner Leasing Corp., 320 U.S. 344 (1943); SEC v. W.J. Howey Co., 328 U.S. 293 (1946); SEC v. Variable Annuity Life Ins. Co., 359 U.S. 65 (1959); SEC v. United Benefit Life Ins. Co., 387 U.S. 202 (1967); Tcherepnin v. Knight, 389 U.S. 332 (1967).

2. 421 U.S. 837 (1975).

Depression-era Congress that passed the 1933 Act[3] left the definition[4] unbounded in its haste to write legislation halting the virtually unregulated[5] traffic in speculative, groundless stock.[6] The Supreme Court must walk along the penumbra of the Act, sorting those interests which fall within its light from those without. If the interests the purchaser-litigant holds are "securities" within the Act, he gets the advantage of a federal forum[7] and lenient fraud rules.[8] For the issuer-litigant, inclusion in the Act means that his securities must undergo a lengthy and expensive registration or exemption process[9] before they may reappear on the market. The Court's principal tool for distinguishing a security from other interests is the test developed in *SEC v. W. J. Howey Co.*,[10] which finds a "security" whenever "the scheme involves an investment of money in a common enterprise with profits to come solely from the efforts of others."[11] The Court in *Forman* refined the test so that now a transaction comes within the definitional sections of the Securities Act whenever investors are motivated to risk their capital by a *significant, realistic*[12] expectation of *substantial*[13] profits (capital appreciation or

3. *See* Landis, *The Legislative History of the Securities Act of 1933*, 28 GEO. WASH. L. REV. 29 (1959).

4. Securities Act of 1933, § 2(1), 15 U.S.C. § 77b(1) (1970) [hereinafter cited as 1933 Act]:

> The term "security" means any note, stock, treasury stock, bond, debenture, evidence of indebtedness, certificate of interest or participation in any profit-sharing agreement, collateral-trust certificate, preorganization certificate or subscription, transferable share, investment contract, voting-trust certificate, certificate of deposit for a security, fractional undivided interest in oil, gas, or other mineral rights, or, in general, any interest or instrument commonly known as a "security", or any certificate of interest or participation in, temporary or interim certificate for, receipt for, guarantee of, or warrant or right to subscribe to or purchase, any of the foregoing.

The definition of "security" in the Securities Exchange Act of 1934, § 3(a)(10), 15 U.S.C. 78c(a)(10) (1970) [hereinafter cited as 1934 Act], is virtually identical and for present purposes the coverage of the two Acts may be considered the same. 421 U.S. at 847 n.12.

5. By 1933, all forty-eight states except Nevada attempted in some degree to regulate the sale of securities. However, state "Blue Sky" laws, designed to halt "speculative schemes which have no more basis than so many feet of 'blue sky'," Hall v. Geiger-Jones Co., 242 U.S. 539, 550 (1917), were unable to cope with interstate sales.

6. See the parade of horribles in F. PECORA, WALL STREET UNDER OATH (1939). Mr. Pecora was counsel to the U.S. Senate Committee on Banking and Currency during the 1933-1934 investigation of securities abuses.

7. 1933 Act, § 22(a), 15 U.S.C. § 77v(a) (1970).

8. 1934 Act, § 10b, 15 U.S.C. § 78j(b) (1970); rule 10b-5, 17 C.F.R. § 240.10b-5 (1975).

9. 1933 Act, § 5, 15 U.S.C. § 77e (1970).

10. 328 U.S. 293 (1946).

11. *Id.* at 301.

12. See text accompanying note 52 *infra*.

13. See text accompanying note 55 *infra*.

participation in earnings)[14] to come solely from the efforts of others.

Plaintiffs in *Forman* are residents of Co-Op City in the Bronx, New York City. Reputed to be the largest housing cooperative[15] in the United States,[16] the development's 200-acre site containing thirty-five high rise buildings and 236 townhouses is home for approximately 50,000 people. The project was built between 1965 and 1971 primarily with funds procured under the New York Private Housing Finance Law, known as the Mitchell-Lama Act.[17] The Act is designed to encourage private developers to build low-cost cooperative housing by providing them with long-term low interest mortgage loans and substantial tax exemptions. In return, the developer must agree to operate the facility "on a non-profit basis," and to submit to state review of the project.[18]

Defendant United Housing Foundation (UHF) is a non-profit amalgam of labor unions and civic groups formed to secure decent housing for low and moderate income persons. UHF organized Riverbay Corporation to issue the Co-Op stock and to operate the project. UHF contracted with its wholly-owned for-profit subsidiary, Community Services, Inc. (CSI), to serve as general contractor for Co-Op City. The Mitchell-Lama Act allowed UHF to lease only to low income individuals who were approved by the state, with preference given to veterans, the aged and the handicapped.[19] In May, 1965, Riverbay circulated an Information Bulletin[20] seeking to attract residents to Co-Op City. To acquire an apartment, a prospective tenant had to purchase 450 dollars worth of Riverbay stock for each room desired. There

14. See text accompanying note 51 *infra.*

15. In a cooperative, a corporation is formed to purchase an apartment building. Tenants buy stock in the corporation entitling them to a lease in the apartment building and a vote in the election of directors who manage the corporation. Miller, *Cooperative Apartments: Real Estate or Securities?*, 45 B.U.L. REV. 465 (1965). In a condominium the owner is given fee title in the unit with all the tax advantages of home ownership. The fee interest is restricted to the interior walls and the air space contained between them; all other parts of the dwelling, such as the exterior walls, are held in common ownership with the other owners. Comment, *Community Apartments: Condominium or Stock Cooperative?*, 50 CALIF. L. REV. 299, 300-01 (1962).

16. Forman v. Community Serv., Inc., 366 F. Supp. 1117, 1121 (S.D.N.Y. 1973).

17. N.Y. PRIV. HOUS. FIN. LAW § 1 *et seq.* (McKinney 1962), *as amended*, (McKinney Supp. 1975).

18. 421 U.S. at 840-41.

19. *Id.* at 841 & n.1, 842.

20. The Bulletin estimated the total cost of the project, based on an anticipated construction contract with CSI, to be 283.7 million dollars. Of this sum, 250.9 million dollars (88.4 percent) was to be financed by a forty-year low interest mortgage loan from the state. The remaining 32.8 million dollars (11.6 percent) was to be raised by the sale of Riverbay stock to tenants. *Id.* at 843.

was no possibility of capital appreciation on resale of the stock since a departing tenant was required to offer the shares at their initial selling price to Riverbay or to a state-approved prospective tenant. The shares could not be pledged or encumbered and would descend, along with the apartment, only to a surviving spouse. Each apartment was entitled to one vote in the affairs of the cooperative irrespective of the number of shares owned. The Bulletin stated that after construction of the project, mortgage payments and current operating expenses would be defrayed by the tenants' monthly rent. The Bulletin estimated that the average monthly cost would be twenty-three dollars per room. Several times during construction of Co-Op City, Riverbay secured state approval and revised its contract with CSI to compensate the latter for increased construction costs and expenses not reflected in the Bulletin. To meet these increases, Riverbay procured 125 million dollars in additional mortgage loans from the state. As a result, the average monthly rental charges increased periodically, reaching almost forty dollars per room as of July, 1974.[21]

Faced with a rental charge that had skyrocketed to 73 percent above that predicted in the Information Bulletin, purchasers of the Co-Op stock sued in federal court alleging violations of section 17(a) of the 1933 Act and rule 10b-5 promulgated under the 1934 Act.[22] Plaintiffs claimed that the Bulletin misrepresented that CSI would absorb any subsequent cost increases above the contract price, and that the Bulletin failed to disclose material facts about CSI.[23] Defendants (UHF, CSI, Riverbay, individual directors of these organizations, the State of New York and the State Private Housing Finance Agency) moved to dismiss for want of federal jurisdiction in that the Riverbay shares were not "securities" within the definitional sections of the federal Securities Acts.

The District Court granted the motion to dismiss based on "the fundamental nonprofit nature of this transaction" that presented "the insurmountable barrier to plaintiffs' claims in this federal court."[24] The

21. *Id.* at 845-46.

22. 15 U.S.C. § 77q(a) (1970); 17 C.F.R. § 240.10b-5 (1975) promulgated under section 10(b) of the 1934 Act, 15 U.S.C. § 78j(b) (1970).

23. The alleged omissions are noted in 421 U.S. at 844 n.8. Plaintiffs also presented a claim against the State Financing Agency under the Civil Rights Act, 42 U.S.C. § 1983 (1970), and ten pendent state law claims. However, the resolution of the jurisdictional issue precluded a hearing on the merits of these causes. 421 U.S. at 845, 859-60.

24. 366 F. Supp. 1117, 1128 (S.D.N.Y. 1973). However, noted Judge Pierce "[I]f ever there was a group of people who need and deserve full and careful disclosure in connection with proposals for the use of their funds, it is this type of group. By law, they

Court of Appeals for the Second Circuit reversed on two grounds.[25] Since the Information Bulletin called the shares "stock," the Second Circuit first held that the Securities Acts, which explicitly include "stock" in their definitional sections, were literally applicable. The court reached the same result by alternatively concluding that the shares plaintiffs held were "investment contracts" under the definitional sections of the Acts as identified by the profit test developed in *Howey*.[26] The court of appeals found an expectation of profits sufficient to satisfy *Howey* from three sources: 1) rental reductions resulting from the income produced by commercial facilities that were also established at Co-Op City (professional offices, parking spaces and community washing machines); 2) tax deductions;[27] and 3) savings resulting from Co-Op City's low rent.[28]

The Supreme Court reversed the Second Circuit, holding that the Riverbay shares were not "securities" within the Securities Acts. The majority began by calling attention to Congress' stated intent in defining the term "security" in the 1933 Act "to include . . . the many types of instruments that in our *commercial* world fall within the ordinary concept of a security."[29] The Court rejected a literal reading of the definitional section's inclusion of "stock," holding that form should be disregarded in favor of substance and that the emphasis should be on economic reality.[30] However, said the Court, the name given to an interest is not wholly irrelevant. As a matter of evidence, the name an issuer appends to the interests he sells may be relevant to show that investors justifiably assume that the federal securities laws apply. In the present case, however, "[c]ommon sense suggest[ed] that people who intend to acquire only a residential apartment . . . for their personal

---

would not be eligible for occupancy in Co-op [*sic*] City unless their financial resources were limited. . . . The cost of housing demands a good percentage of their incomes. Their savings are most likely to be minimal, and they probably don't have lawyers or accountants to guide them. Further, they are people likely to put a great deal of credence in statements made . . . by reputable civic groups and labor unions, particularly when the proposal is stamped with the imprimatur of the state." *Id.* at 1125.

25. 500 F.2d 1246 (1974).

26. *Id.* at 1252-53.

27. INT. REV. CODE OF 1954, § 216 allows Co-Op City tenants to deduct their proportionate share of real estate taxes paid by the cooperative housing corporation on the land and buildings, and for interest paid by the corporation on its indebtedness under the contract of acquisition, construction and maintenance. A tenant who used his apartment for business purposes could depreciate the portion of the building used in a trade or business or for the production of income.

28. 500 F.2d at 1254.

29. H.R. REP. No. 85, 73d Cong., 1st Sess. 11 (1933) (emphasis added).

30. 421 U.S. at 848, *citing* Tcherepnin v. Knight, 389 U.S. 332, 336 (1967).

use, are not likely to believe that in reality they are purchasing investment securities simply because that transaction is evidenced by something called a share of stock."[31] The Court also held that a Riverbay share was not an investment contract since a crucial element of the *Howey* test—profit—was found lacking. The Court undertook to define profit as "capital appreciation" or a "participation in earnings resulting from the use of investors' funds."[32] Two of the indicia of profit used by the court of appeals were rejected summarily. The tax benefits, said the Court, "are nothing more than that which is available to any homeowner who pays interest on his mortgage."[33] The reduced rental charge, which the Court attributed to the state's mortgage loan, "no more embodies the attributes of income or profits than do welfare benefits, food stamps or other government subsidies."[34] The Court admitted that income from the commercial leases "is the kind of profit traditionally associated with a security investment."[35] However, it found this income "far too speculative and insubstantial to bring the entire transaction within the Securities Acts."[36]

The term "investment contract," which has become the outer edge of at least one facet of the federal definition of "securities," came into the 1933 Act via[37] the Uniform Sale of Securities Act.[38] When the

31. 421 U.S. at 851.
32. *Id.* at 852.
33. *Id.* at 855.
34. *Id.*
35. *Id.* at 856.
36. *Id.* Justice Brennan, joined by Justices Douglas and White, dissented in an opinion supportive of the Second Circuit's reasoning. *Id.* at 860.
37. "With regard to the subject of definitions, I may say that we have attempted to follow the Uniform Sale of Securities Act; and so when we come to the definition of securities I think you will find that we have taken almost verbatim the language of the Uniform Sale of Securities Act." Testimony of Houston Thompson, one of the drafters of H.R. 4314 (which definition was used in the conference bill, H.R. 5480, the Securities Act of 1933). *Hearing on H.R. 4314 Before the House Comm. on Interstate and Foreign Commerce*, 73d Cong., 1st Sess. 13 (1933).
38. HANDBOOK OF THE NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS 171, 173 (1929). UNIFORM SALE OF SECURITIES ACT § 1(1):

> "Security" shall include any note, stock, treasury stock, bond, debenture, evidence of indebtedness, certificate of interest or participation, or right to subscribe to any of the foregoing, certificates of interest in a profit-sharing agreement, certificates of interest in an oil, gas or mining lease, collateral trust certificate, pre-organization certificate, pre-organization subscription, any transferable share, investment contract, or beneficial interest in title to property, profits or earnings or any other instrument commonly known as a security; including an interim or temporary bond, debenture, note, certificate, or receipt for a security or for subscription to a security.

The Act was withdrawn by the commissioners in 1943 to be replaced in 1956 with the Uniform Securities Act. As of 1974 this legislation has been adopted in some form by twenty-eight states and the District of Columbia, including North Carolina. HANDBOOK

Uniform Commissioners picked up the term in 1929, it had already acquired a fixed judicial definition.[39] The leading case interpreting the phrase was *State v. Gopher Tire and Rubber Co.*,[40] which held that an investment contract was created whenever an issuer "sold its certificates to purchasers who paid their money justly expecting to receive an income or profit from the investment. . . ."[41]

The Supreme Court first confronted "investment contracts" in *SEC v. C.M. Joiner Leasing Corp.*[42] Defendant Joiner acquired leases to 3,002 acres of McCulloch County, Texas, to drill an oil well. In order to finance drilling, Joiner offered sub-leases of parcels ranging in size from two and one-half to twenty acres. The sub-leaseholds would appreciate astronomically if oil were struck. Mr. Justice Jackson chose not to define "investment contract," holding rather that "the reach of the [Securities] Act does not stop at the obvious and commonplace. Novel, uncommon, or irregular devices, whatever they appear to be, are also reached if it be proved as a matter of fact that they were widely offered or dealt in under terms or courses of dealing which established their character in commerce as 'investment contracts,' or as 'any interest or instrument commonly known as a "security." ' "[43] Mr. Justice Murphy crystallized the definition of investment contract three years later when he wrote the *Howey* opinion.[44] "[A]n investment contract for purposes of the Securities Act means a contract, transaction or scheme whereby a person invests his money in a common enterprise and is led to expect profits solely from the efforts of the promoter or a third party . . . ."[45]

State courts began to chafe under the restrictive federal definition. Judge Traynor was the first to break away in *Silver Hills Country Club*

OF THE NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS 1013, 1024 (1974). See N.C. GEN. STAT. §§ 78A-1 to -64 (1975).

39. People v. White, 124 Cal. App. 548, —, 12 P.2d 1078, 1081 (Dist. Ct. App. 1932).

40. 146 Minn. 52, 177 N.W. 937 (1920).

41. *Id.* at 56, 177 N.W. at 938. One can argue that the Supreme Court's restrictive definition of profit was alien to the *Gopher* court and the framers of the 1933 Act. Purchasers of certificates in *Gopher* received monetary dividends and a ten percent discount on all purchases from the issuer. Chancellor Lees arguably used the alternative form "income or profits" in his definition to distinguish cash returns (income) from non-monetary benefits (profits). However, this argument does not take into account the philosophy of Blue Sky laws, which is generally more paternalistic than that of the federal Securities Acts.

42. 320 U.S. 344 (1943).

43. *Id.* at 351.

44. 328 U.S. 293 (1946).

45. *Id.* at 298-99.

v. Sobieski[46] in which he developed the "risk capital" approach. Promoters in *Silver Hills* were selling memberships in a yet to be developed country club to the public. Judge Traynor held that those who risked their capital along with others in a common venture in the expectation of some benefit—not restricted to monetary profit—were entitled to the protection of California's Blue Sky law. The Supreme Court of Hawaii followed this lead in *State v. Hawaii Market Center, Inc.*,[47] with the best articulated alternative to the *Howey* test. The court held that for purposes of the Hawaii Act, an investment contract is created whenever:

> "(1) An offeree furnishes initial value to an offeror, and (2) a portion of this initial value is subjected to the risks of the enterprise, and (3) the furnishing of the initial value is induced by the offeror's promises or representations which give rise to a reasonable understanding that a valuable benefit of some kind, over and above the initial value, will accrue to the offeree as a result of the operation of the enterprise, and (4) the offeree does not receive the right to exercise practical and actual control over the managerial decisions of the enterprise."[48]

The *Forman* Court's definition of profit as capital appreciation or participation in earnings constitutes a rejection of the broader benefit analysis undertaken in *Silver Hills* and *Hawaii Market*. Judge Traynor in *Silver Hills* held that purchasers of the country club memberships were entitled to the protection of the securities laws "whether or not they expect[ed] a return on their capital in one form or another."[49] The Supreme Court of Hawaii adopted this reasoning when it required for application of the state Blue Sky law only that purchasers have a reasonable expectation "that a valuable benefit of some kind, over and above the initial value, will accrue . . . ."[50] Plaintiffs in *Forman* advocated a similar benefit profit analysis, urging the Court to accept as profit the savings of money that might otherwise have gone for more expensive housing and higher taxes. The Court rejected this argument, however, stating that such a finding would be overly broad, in that a desire to obtain the greatest amount at least cost "characterizes every form of commercial dealing."[51]

The Court's requirement and definition of "profits" in *Forman* has the effect of clarifying and constricting the already narrow *Howey* prof-

46. 55 Cal. 2d 811, 361 P.2d 906, 13 Cal. Rptr. 186 (1961).
47. 52 Hawaii 642, 485 P.2d 105 (1971).
48. *Id.* at 648-49, 485 P.2d at 109.
49. 55 Cal. 2d at 815, 361 P.2d at 909, 13 Cal. Rptr. at 189.
50. 52 Hawaii at 649, 485 P.2d at 109.
51. 421 U.S. at 858.

its test. The added requirement that investors be motivated to risk their capital by a *significant, realistic* expectation of a profit excludes those interests that attract consumers rather than investors. Purchasers who buy an interest with the intent to realize enjoyment through use of the interest are consumers. They cannot at the same time, the Court implied, have a significant, realistic expectation of realizing *Howey*-type profit on their investment. This follows despite the fact that many interests will show capital appreciation upon resale, regardless of use during ownership.[52]

In discussing the net income derived from leasing Co-Op City space to commercial facilities as "too speculative and insubstantial to bring the entire transaction within the Securities Acts"[53] the Court served notice that only the expectation of *substantial* profits will trigger inclusion of an interest in the Acts. This introduces a threshold concept into the securities definition absent from previous cases that may give the Court and the securities bar additional headaches. The threshold of substantial profits in *Forman* was to be considered in relation to the volume of income the project generated. True, said the Court,[54] the commercial leases bring in more than one million dollars per year, but this sum is a gross income figure calculated before expenses are netted out. In any case, the majority believed that the net income from commercial leases was insignificant in relation to Co-Op Citys' total income. Despite the vagueness that such a threshold concept introduces, it is in harmony with the Court's purpose of looking beyond form to economic reality. Where the profit element is such a minor inducement to potential purchasers as it was in the *Forman* case, the Court does not believe that the potentially burdensome protections of the Securities Acts are warranted.[55]

Among the unstated assumptions of the Court in *Forman* was the

52. An exception to this rule is the sale of interests in certain resort condominiums and cooperatives, which interests the SEC treats as securities. This result follows where the interests are offered and sold with the emphasis on the economic benefits to be derived by purchasers from the managerial interest of others through participation in a rental pool arrangement. Here the SEC apparently believes that the character of the issuer's offering is so compelling that purchasers must have a significant, realistic expectation of profit from the transaction. Release No. 5347, Securities Act of 1933, 38 Fed. Reg. 1735 (1973).

53. 421 U.S. at 856.

54. *Id.*; see note 22 *supra.*

55. The requirement of substantial profit would seem to undercut the SEC's inclusion of all resort condominium offerings which meet the tests in Release No. 5347, note 52 *supra,* in the Securities Acts. Arguably, only those plans in which the income a purchaser can receive from rental pooling is substantial qualify as securities.

idea that the Securities Acts should only take cognizance of *investment* risk taking. Since to date every family that has withdrawn from Co-Op City has received back its full original payment, the Court found that Co-Op purchasers "take no risk in any significant sense."[56] It is true that plaintiffs do risk loss of their initial investment if Co-Op City becomes bankrupt. But, said the Court, in view of the state's 375 million dollar sunken investment, "bankruptcy in the normal sense is an unrealistic possibility."[57] Plaintiffs in *Forman* risked only the loss of the benefit of their bargain, a risk the Court says is unlike the kind of fluctuating value risk associated with securities investments.[58]

Another consideration that may have influenced the Court was the risk of ruinous civil liablilty that non-profit issuers like Co-Op City face under the Securities Acts, even if they are exempted from disclosure requirements of registration. This risk could frighten away charitable organizations from participation in similar future ventures. The most fearsome of these civil liabilities arises under rule 10b-5, promulgated under section 10(b) of the 1934 Act, which makes it illegal to engage in any manipulative or deceptive practices in connection with the sale of *any* security. The rule also forbids the making of any untrue statement of material fact, or the omission of any fact necessary to prevent a statement from being misleading.[59] While the amount of scienter that plaintiff must show to establish a 10b-5 cause of action is unsettled, it is clearly less than that required for common law fraud.[60] The requirement of reliance on the misrepresented fact or material omission appears to have been relaxed,[61] and the Supreme Court has held that in considering the causal link between defendant's actions and plaintiff's loss, the fraud need only "touch" the sale of the securities.[62] Although the Court disposed of *Forman* on the jurisdictional issue, had plaintiffs penetrated this first line of defense it appears that they would have had no difficulty surviving a motion to dismiss for failure to state a claim under 10b-5.

---

56. 421 U.S. at 857 n.24.
57. *Id.*
58. *Id.*
59. 15 U.S.C. § 78j(b) (1970); 17 C.F.R. § 240.10b-5 (1975).
60. *Compare* Lanza v. Drexel, 479 F.2d 1277 (2d Cir. 1973) *with* White v. Abrams, 495 F.2d 724 (9th Cir. 1974).
61. SEC v. Texas Gulf Sulphur, 401 F.2d 833, 860 (2d Cir. 1968) (*en banc*), *cert. denied*, 394 U.S. 976 (1969). Reliance was presumed where the device employed was such as would cause reasonable investors to rely thereon. However, the case involved an enforcement action by the SEC rather than a private suit for damages.
62. Superintendent of Ins. v. Bankers Life & Cas. Co., 404 U.S. 6, 12 (1971).

The Court may have also worried that inclusion of the Co-Op interests in the Securities Acts would confer on the SEC jurisdiction that might interfere with other state and federal regulatory schemes. The Co-Op City interests are functionally similar to real property interests, and the regulation of real property in our federal system has traditionally been entrusted to the states. In addition, said the Court, New York's Housing Commissioner reviewed "virtually every step" in the development of Co-Op City.[63] Given an existing state regulatory mechanism operating in an area traditionally the domain of the states, the Court may have been reluctant to impose on this project a competing regulatory scheme. While no federal agency presently regulates condominium and cooperative housing such as that involved in *Forman,* the Court noted[64] that Congress recently ordered the Secretary of Housing and Urban Development to conduct a thorough review of these relatively new property interests.[65] HUD was named as lead agency and the SEC was given no role in the study. If the exclusive choice of HUD for the investigation represents Congressional intent rather than Congressional oversight, the SEC's limited jurisdiction over resort condominiums and cooperatives[66] may soon terminate.

Two significant and related trends emerge from the *Forman* decision. First, the majority opinion represents a significant narrowing of the *Howey* test. For an interest to be classified as a security after *Forman,* it must produce capital appreciation upon resale or periodic returns on the investment, in substantial amounts, and purchasers must have a significant, realistic expectation of such profits. The second trend, the result of the narrowing of *Howey,* is the closing of the Securities Acts to consumer interests like those involved in *Forman.* The Court has clearly pronounced that consumers must look elsewhere than to the Securities Acts for protection.

W. WOODS DOSTER

63. 421 U.S. at 841.
64. *Id.* at 859 n.26.
65. Housing and Community Development Act of 1974, 88 Stat. 740.
66. See note 46 *supra.*