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Notes

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NOTES

Constitutional Law—Commerce Clause: Local Discrimination in Environmental Protection Regulation

Since the United States Supreme Court determined in *Cooley v. Board of Wardens*[1] that the Constitution's grant to Congress of the power to regulate commerce[2] did not necessarily exclude states from exercising the same power,[3] state regulation of commerce has been subject to frequent and varying[4] court scrutiny. In *Hackensack Meadowlands Development Commission v. Municipal Sanitary Landfill Authority*[5] the Supreme Court of New Jersey held that a New Jersey statute banning in-state disposal of out-of-state solid waste[6] did not unconstitutionally infringe upon the congressional power to regulate commerce. It is doubtful, however, that federal courts would agree with this conclusion; and it is possible that this statute, although promulgated pursuant to the traditional police power vested in the states, is unconstitutional despite the federal courts' willingness to uphold state police power enactments undertaken in the field of environmental protection.[7]

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1. 53 U.S. (12 How.) 298 (1851).

2. The commerce clause provides: "The Congress shall have Power . . . To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes . . . ." U.S. CONST. art. I, § 8, cl. 3.

3. 53 U.S. at 318-20. Drawing an analogy between the power of taxation and the power to regulate commerce, the Court observed that the existence of each respective power in the Congress could be compatible with the existence of a similar power in the states and that the states could legislate in the commerce area unless such action conflicted with congressional legislation or with a necessary uniformity in the regulation of any one subject matter within the field of commerce. *Id.*

4. The apparent inconsistency in Supreme Court adjudication of cases arising under the commerce clause can be ascribed to two factors: (1) the difficulty in determining the exact meaning and scope of a congressional act in the commerce field, as discussed by the Court in Hines v. Davidowitz, 312 U.S. 52, 67 (1941), and (2) the different tests that the Court has applied at any one time to state regulations challenged on commerce clause grounds. *See* text accompanying notes 24 & 28 *infra.*

5. 68 N.J. 451, 348 A.2d 505 (1975), *prob. juris. noted sub nom.* City of Philadelphia v. New Jersey, 96 S. Ct. 1504 (1976).

6. *See* note 8 *infra.*

7. The New Jersey Supreme Court cited several recent decisions in both federal and state forums that sustained environmental protection statutes against commerce clause attack. 68 N.J. at 476, 348 A.2d at 518. *See* note 40 *infra.*

New Jersey originally forbade disposal of out-of-state waste within the Hackensack Meadowlands District and later extended the ban to cover the entire state.[8] The state agencies implementing the ban, the Hackensack Meadowlands Development Commission (HMDC) and the Department of Environmental Protection (DEP), brought suit to enjoin the Municipal Sanitary Landfill Authority (MSLA) from accepting for disposal in its landfill site within the Hackensack Meadowlands District any solid wastes originating or collected outside of New Jersey.[9] Defendants[10] challenged the constitutionality of the agencies' regulations and the authorizing statute on the grounds that the Waste Control Act and several of the HMDC regulations were arbitrary and unreasonable and that they violated both the commerce clause and the privileges and immunities clause; defendants further contended that the proce-

8. The Hackensack Meadowlands Reclamation and Development Act called for the orderly development of the Meadowlands and special provisions for solid waste disposal there. N.J. STAT. ANN. §§ 13:17-1 to -86 (West Supp. 1976). At the time the state sought development of the area, not merely its preservation, for the objective was "to reclaim, plan, develop and redevelop the Hackensack meadowlands." *Id.* § 13:17-1. The Legislature thereafter passed a Solid Waste Management Act designed to achieve safe and effective disposal of solid waste throughout New Jersey. N.J. STAT. ANN. §§ 13:1E-1 to -37 (West Supp. 1976). Ultimately, the Legislature, after finding that solid waste posed a grave threat to the quality of the state's environment, enacted the Waste Control Act, which in its final form empowered the commissioner of the State Department of Environmental Protection to regulate or ban disposal within New Jersey of out-of-state solid waste. N.J. STAT. ANN. §§ 13:1*I*-1 to -10 (West Supp. 1976). The section of the statute establishing the ban provides:

> The Legislature finds and determines that . . . the volume of solid and liquid waste continues to rapidly increase, that the treatment and disposal of these wastes continues to pose an even greater threat to the quality of the environment of New Jersey, that the available and appropriate land fill sites within the State are being diminished, that the environment continues to be threatened by the treatment and disposal of waste which originated or was collected outside the State and that the public health, safety and welfare require that the treatment and disposal within this State of all wastes generated outside of the State be prohibited.
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> No person shall bring into this State any solid or liquid waste which originated or was collected outside the territorial limits of the State . . . until the commissioner [of Environmental Protection] shall determine that such action can be permitted without endangering the public health, safety and welfare and has promulgated regulations permitting and regulating the treatment and disposal of such waste in this State. Any person violating this provision shall be subject to the penalty and enforcement provisions of the "Waste Control Act."

Id. §§ 13:1*I*-9, -10. Both the Department of Environmental Protection and the Hackensack Meadowlands Development Commission promulgated regulations towards this end. N.J. ADMIN. CODE 7:1-4.2 (1974); N.J. ADMIN. CODE 19:7-1.1 (1973).

9. Hackensack Meadowlands Dev. Comm'n v. Municipal Sanitary Landfill Auth., 127 N.J. Super. 160, 316 A.2d 711 (Ch. 1974).

10. The MSLA is a joint venture wholly owned and operated by other named defendants. The City of Yonkers, New York, whose refuse was being deposited on the MSLA site within the Hackensack Meadowlands District, moved for and was granted leave to intervene as a party defendant. *Id.* at 163, 316 A.2d at 712.

dures adopted by the DEP in promulgating its rule violated due process.[11]

Upholding only defendants' commerce clause claims,[12] the Superior Court of New Jersey found that "[a]lthough the State's objective in attempting to conserve a local natural resource for local needs is a proper police power purpose, that [objective] cannot be accomplished by discrimination based on the source of the refuse."[13] Accordingly, the exclusion of out-of-state solid waste from deposit within the Hackensack Meadowlands District was declared unconstitutional.[14] Subsequently the New Jersey Supreme Court granted certification in *Hackensack*[15] and contemporaneously brought forward for argument and disposition[16] a suit by the City of Philadelphia against New Jersey in which New Jersey's state-wide ban on out-of-state solid waste was declared unconstitutional as effecting an improper discrimination against interstate commerce.[17]

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11. *Id.* at 163, 316 A.2d at 712. The privileges and immunities clause provides: "The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States." U.S. CONST. art. IV, § 2, cl. 1.

12. The court found that the promulgation of the regulations was not arbitrary, nor did it contravene the enabling act under which the regulations were developed, the Hackensack Meadowlands Reclamation and Development Act. *See* note 8 *supra*. The failure to hold a hearing prior to adoption of the DEP rule was found not to have denied defendants due process, inasmuch as no hearing was required by statute or constitution. The court also determined that defendants did not vigorously advance their argument with respect to the privileges and immunities clause and that, regardless of this, there were serious infirmities in that position. 127 N.J. Super. at 167-69, 316 A.2d at 713-15.

13. *Id.* at 174, 316 A.2d at 718.

14. While discussing the validity of the state's action as an exercise of the police power, the court observed that the regulations then under attack did not prohibit disposal of out-of-state solid waste throughout New Jersey, but only banned its disposal within the Hackensack Meadowlands District. Questioning whether such a limited ban could be considered a measure undertaken to protect the public health of the state, the court added, in a footnote, that newly enacted sections 9 and 10 of the Solid Waste Act (quoted in note 8 *supra*) and the new DEP regulation promulgated thereunder might render its decision moot by establishing a state-wide ban against the importation of at least some forms of solid waste. *Id.* at 170 n.1, 316 A.2d at 716 n.1. The widening of the application of the ban, however, did not affect the grounds upon which the decision of the superior court rested, since the regulations were delcared unconstitutional not as an improper or unnecessary exertion of the police power but for discriminating against New Jersey's sister states. Accordingly, the New Jersey Supreme Court, while noting the change the DEP regulation underwent, did not otherwise deal with the issue of the scope of the ban in its discussion of the statute's validity as an exercise under the police power. 68 N.J. at 457 n.2, 348 A.2d at 508 n.2.

15. Hackensack Meadowlands Dev. Comm'n v. Municipal Sanitary Landfill Auth., 66 N.J. 337, 331 A.2d 37 (1974). During this time the judgment of the superior court had been stayed.

16. City of Philadelphia v. State, 67 N.J. 102, 335 A.2d 55 (1974).

17. Hackensack Meadowlands Dev. Comm'n v. Municipal Sanitary Landfill Auth., 68 N.J. 451, 459, 348 A.2d 505, 509 (1975), *prob. juris. noted sub nom.* City of Philadelphia v. New Jersey, 96 S. Ct. 1504 (1976).

The New Jersey Supreme Court in *Hackensack* determined that the disputed solid waste did in fact constitute articles of commerce within the meaning of the commerce clause,[18] and found that the statute was a valid exercise of the state's police power[19] in an area that Congress had not preempted.[20] In disagreement with the lower courts, the supreme court ruled that the New Jersey Waste Act did not discriminate unconstitutionally against sister states.[21] Declaring that the statute would be valid if the burden it imposed on interstate commerce did not outweigh its benefit to the state, the court found that the statute imposed only a "slight" burden on commerce[22] and held that the statute's aim was "crucial to the welfare" of the state.[23] As a result of this balancing the court reversed the judgments of the lower courts and sustained the state's actions.

Whether this particular exercise of the police power to achieve environmental protection would successfully withstand a challenge in the federal courts depends upon the "balancing test" applicable in a commerce clause review.[24] As the New Jersey court observed, the

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18. *Id.* at 468-69, 348 A.2d at 514. The lower court in *Hackensack* had not explicitly stated that solid waste constituted an article of commerce within the commerce clause. *See* 127 N.J. Super. at 169-70, 316 A.2d at 716. The Supreme Court of New Jersey, however, relying on United States v. Pennsylvania Refuse Removal Ass'n, 242 F. Supp. 794 (E.D. Pa. 1965), *aff'd*, 357 F.2d 806 (3d Cir. 1966), *cert. denied*, 384 U.S. 961 (1966), determined that the *disposal* of the solid waste, regardless of the conjectural value of the waste itself, constituted interstate commerce. 68 N.J. at 468-69, 348 A.2d at 514. The holding in *Pennsylvania Refuse* was particularly pertinent to the *Hackensack* situation since in the former case it was determined that "refuse transported from Pennsylvania to New Jersey and disposed of in the latter state . . . was plainly a proper subject of interstate commerce." 357 F.2d at 808.

19. 68 N.J. at 472, 348 A.2d at 516.

20. *Id.* at 471, 348 A.2d at 515.

21. *Id.* at 477, 348 A.2d at 518.

22. *Id.* at 475, 348 A.2d at 517-18.

23. *Id.* at 478, 348 A.2d at 519.

24. The balancing test juxtaposes the burden(s) on interstate commerce flowing from the challenged provision with the benefit(s) to the state derived therefrom. The most recent enunciation of the balancing test by the United States Supreme Court is to be found in Pike v. Bruce Church, Inc., 397 U.S. 137 (1970), in which the Court stated:

> Although the criteria for determining the validity of state statutes affecting interstate commerce have been variously stated, the general rule that emerges can be phrased as follows: Where the statute regulates evenhandedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits. . . . If a legitimate local purpose is found, then the question becomes one of degree. And the extent of the burden that will be tolerated will of course depend on the nature of the local interest involved, and on whether it could be promoted as well with a lesser impact on interstate activities.

Id. at 142. Opposed to this somewhat hesitant espousal of the balancing test is another Court decision, Brotherhood of Locomotive Firemen & Enginemen v. Chicago, R.I. &

commerce clause test applied to state actions has not been uniform.[25] This disparity is in part a result of *Cooley*,[26] the first United States Supreme Court decision to apply a commerce clause test, in which the Court restricted its holding to the facts and declined to articulate a general doctrine for future guidance.[27] Uncertainty is evident in many commerce clause cases,[28] particularly in those like *Hackensack* that deal with state environmental protection statutes.[29] Yet despite divergence in approach by federal and state courts on the issue of environmental regulation the cases uniformly hold that no state action can survive a commerce clause analysis if its effect on interstate commerce is heavily burdensome or if it discriminates against interstate commerce.[30]

It is clear that the New Jersey court was correct in its decision that the area of solid waste disposal was not preempted by Congress,[31] and

P.R.R., 393 U.S. 129 (1968). Upholding the validity of an Arkansas "full-crew" law that required a minimum train crew under certain conditions of railroad operations in the state, the Court strongly implied that such a test, if utilized at all, was to be applied only by another governmental body: "The question of safety in the circumstances of this case is essentially a matter of public policy, and public policy can, under our constitutional system, be fixed only by the people acting through their elected representatives." *Id.* at 138. The Court then noted its doubt as to whether in such a case any balancing test at all could be appropriate: "It is difficult at best to say that financial losses should be balanced against the loss of lives and limbs of workers and people using the highways." *Id.* at 140.

25. 68 N.J. at 473, 348 A.2d at 516.

26. *See* text accompanying notes 1-3 and note 3 *supra.*

27. *See* 53 U.S. (12 How.) at 320.

28. *See* Aldens, Inc. v. Packel, 524 F.2d 38 (3d Cir. 1975). In that case a federal appeals judge, after noting that "[c]lassifying the Supreme Court's commerce clause adjudications for the purpose of analytical application may seem to many an exercise in futility," attempted to devise his own categories in order to determine whether the statute there under challenge transgressed the federal plenary power under the commerce clause. *Id.* at 45.

29. The balancing test as applied in *Pike* and prior decisions is severely criticized in Note, *Use of the Commerce Clause to Invalidate Anti-Phosphate Legislation: Will It Wash?*, 45 U. COLO. L. REV. 487 (1974). This Note cites Professor David Engdahl as a recent commentator on the history of the commerce clause who urges abandonment of the balancing test in cases arising under the clause. The Note refers to Engdahl as taking "the position that if the . . . balancing test is reached, a court should make a presumption in favor of the validity of the legislation." *Id.* at 493. The *failure*, however, to apply such a test by two Oregon state courts reviewing the constitutionality of the Oregon Minimum Deposit Act, *see* text accompanying note 41 *infra*, was criticized in Note, *State Environmental Protection Legislation and the Commerce Clause*, 87 HARV. L. REV. 1762 (1974). Tracing the history of the balancing test to its current form in *Pike*, the Note concludes: "Thus, it appears to be the duty of the courts to balance the harms and benefits of the state's environmental legislation." *Id.* at 1778.

30. Pike v. Bruce Church, Inc., 397 U.S. 137, 142 (1970), *discussed in* note 24 *supra.*

31. The preemption test as applied in the field of interstate commerce was set forth by the United States Supreme Court in Florida Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132 (1963):

> The principle to be derived from our decisions is that federal regulation

in its finding that the New Jersey provisions were a valid exercise of the state's police power, especially in light of the extensive scope of that power as recognized by the Supreme Court.[32] Nonetheless, the *Hackensack* court erred in upholding the validity of the state's solid waste ban; a comparison of *Hackensack* with cases in the environmental protection field reveals that the Waste Control Act, contrary to the New Jersey court's conclusions, discriminates against interstate commerce and significantly burdens the flow of that commerce without providing comparable benefit to the state. The commerce clause standards that environmental regulations must satisfy were articulated in *Huron Portland Cement Co. v. City of Detroit*,[33] the leading decision of the United States Supreme Court in which an environmental protection provision was juxtaposed with the federal interest of ensuring unimpeded interstate commerce. In upholding Detroit's Smoke Abatement Code as a valid exercise of the traditional police power[34] the Court in *Huron* set forth the controlling principle in cases of this nature: "Even-handed local regulation to effectuate a legitimate local public interest is valid unless pre-empted by federal action . . . or unduly burdensome on . . . interstate commerce."[35] Under this broad statement of principle the New Jersey Waste Act might well be found, in a more neutral forum, to constitute an impermissible burden on interstate commerce.

Although the Detroit code in *Huron* resulted in a noticeable impact on at least some elements of interstate commerce,[36] it imposed its requirements in a manner that was "even-handed"; that is, the regulations were "applicable alike to 'any person, firm or corporation' within the city," as well as to those without.[37] By contrast the New Jersey

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of a field of commerce should not be deemed preemptive of state regulatory power in the absence of persuasive reasons—either that the nature of regulated subject matter permits no other conclusion, or that the Congress has unmistakably so ordained.

Id. at 142. The most recent congressional statement in this particular area, the Solid Waste Disposal Act, 42 U.S.C. §§ 3251-3259 (1970 & Supp. V 1975) declares that, despite the nationwide gravity of the solid waste problem, "the collection and disposal of solid wastes should continue to be primarily the function of State, regional, and local agencies . . . ." *Id.* § 3251(a)(6). This recognition of the primacy of the states in the field of solid waste disposal defeats any presumption of federal preemption. For a further discussion of this issue, see Note, 87 HARV. L. REV., *supra* note 29, at 1770-72 (1974).

32. *See* Berman v. Parker, 348 U.S. 26, 32-33 (1954).

33. 362 U.S. 440 (1960).

34. *Id.* at 442.

35. *Id.* at 443.

36. "Structural alterations [to the ships of appellant] would be required in order to insure compliance with the Code." *Id.* at 441.

37. *Id.* at 448.

provisions are aimed solely at out-of-state waste. The New Jersey court declared there had been no discrimination, at least in an economic sense, because out-of-state refuse collectors could continue to collect and dispose of solid waste within the state if the refuse originated within New Jersey.[38] This observation does not adequately dispose of the discrimination issue, however, especially since the court found that solid waste did constitute an article of commerce within the commerce clause.[39] To restrict the service of waste disposal to only those generating solid waste within New Jersey clearly discriminates against non-New Jersey interests since the service of refuse disposal constitutes commerce not only for the disposal agents but also for those whose solid waste is removed. Therefore it is clear that the New Jersey Waste Act's discriminatory impact distinguishes this statute from provisions upheld in *Huron* as well as provisions upheld in other cases utilized by the New Jersey court as supportive authority, thereby rendering the New Jersey laws voidable under the commerce clause standards applied by the Supreme Court in *Huron*.[40]

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38. 68 N.J. at 475, 348 A.2d at 517.

39. *See* text accompanying note 18 *supra*.

40. According to the *Huron* standards, only that "[s]tate regulation, based on the police power, *which does not discriminate against interstate commerce* or operate to disrupt its required uniformity, may constitutionally stand." 362 U.S. at 448 (emphasis added). In Construction Indus. Ass'n v. City of Petaluma, 522 F.2d 897 (9th Cir. 1975), *cert. denied*, 96 S. Ct. 1148 (1976), the *Huron* principle controlled the outcome with respect to the commerce clause attack maintained by appellant. *Id.* at 909. Another case cited by the *Hackensack* court as supportive of its decision, Portland Pipe Line Corp. v. Environmental Improvement Comm'n, 307 A.2d 1 (Me.), *appeal dismissed*, 414 U.S. 1035 (1973), upheld a Maine provision against a commerce clause challenge because the court found that its impact, if any, on interstate commerce was non-discriminatory and even-handed, as required by *Huron*. *Id.* at 40. In that case the validity of a tax on the transfer of oil over water in Maine was sustained because it was levied on oil transferred intrastate as well as on oil traveling through interstate and foreign channels. In contrast the New Jersey Act not only discriminates against interstate commerce but bans rather than merely regulates the importation of material from other states into New Jersey, in essence prohibiting the flow of that element of interstate commerce. As to this issue see text accompanying notes 52-66 *infra*. Procter & Gamble Co. v. City of Chicago, 509 F.2d 69 (7th Cir.), *cert. denied*, 421 U.S. 978 (1975), is also clearly distinguishable from *Hackensack*. In *Procter & Gamble* a modified balancing test was applied to demonstrate that a Chicago ordinance banning the sale of any detergent containing phosphates did not unconstitutionally burden the flow of interstate commerce and could therefore be readily upheld as a reasonable means of achieving a legitimate legislative aim. The Chicago ordinance differed from the New Jersey Waste Act since, designed to prevent the growth of nuisance algae in the Illinois Waterway, the ordinance applied a non-discriminatory ban against the entry into the city (and thus into the city's portion of the Waterway) of any phosphate detergent. To be fully analogous to the Chicago ordinance the New Jersey statute would have to ban the disposal of *all* solid waste in the imperiled areas. Since there were "no discriminatory aspects

If subjected to the exhaustive commerce clause analysis set forth in *American Can Co. v. Oregon Liquor Control Commission*[41] the New Jersey act would be unconstitutional under criteria other than a test of discriminatory intent. In *American Can* the Oregon court determined that the increased costs arising from the state provision under attack were borne by all affected industries without regard to state lines.[42] In obvious contrast to the Oregon approach, the New Jersey Supreme Court ignored the extent of consequential economic discrimination against non-New Jersey groups who benefit from the transfer of waste to New Jersey.[43] Although economic discrimination is a relatively remote effect of the New Jersey statute, it could result in invalidation of the New Jersey Waste Control Act were a court to explore in detail the economic burdens and benefits flowing from the act and apply to its economic findings the balancing test required in a full commerce clause review.

The *Hackensack* decision is also vulnerable to close review because it fails properly to refute objections that the act intentionally discriminates against other states—objections that are based primarily on what may be termed the "natural resources cases"[44] cited by the lower court in *Hackensack*. At issue in those cases was the validity of provisions regulating natural gas or petroleum that had the effect of retaining the resource within the producing states. The regulations were

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associated with this purpose [the elimination of nuisance algae] that might invalidate it," the *Procter & Gamble* court found that the purpose and the Chicago ordinance promoting it were not unconstitutional. 509 F.2d at 80. Confronted with the discriminatory aspects of the New Jersey act—which protects only New Jersey's interests, by banning only non-New Jersey solid waste—it is questionable whether the *Procter & Gamble* court would arrive at the same conclusion.

41. 15 Or. App. 618, 517 P.2d 691 (1973). This decision upheld the constitutionality of the Oregon Minimum Deposit Act, OR. REV. STAT. §§ 45.810-.890 (1975), which requires that all beverage containers sold in Oregon be accepted for reuse by distributors and bottlers, and which enacted a ban on pull-top cans.

42. 15 Or. App. at 642, 517 P.2d at 703. *See* Note, 87 HARV. L. REV., *supra* note 29, at 1783, which further analyzes the economic burdens borne by the State of Oregon, its citizens, and the various facets of the industry as a result of the act and concludes, *inter alia*, that the deposit imposes no real handicap on the industry and that the larger portion of the economic burden is internalized and thus borne ultimately by the consumers of the beverages under regulation.

43. The New Jersey statute would lead to an immediate increase in solid waste disposal costs for the litigant cities in *Hackensack*. 68 N.J. at 476, 348 A.2d at 518. It is obvious that such a burden, however "small" or "modest" the *Hackensack* court characterized it, would not be borne by any New Jersey interests associated with either the generation or disposal of solid wate in the state.

44. Pennsylvania v. West Virginia, 262 U.S. 553 (1923); West v. Kansas Natural Gas Co., 221 U.S. 229 (1911). *See* text accompanying note 13 *supra*.

invariably defended, as in *West v. Kansas Natural Gas Co.*,[45] as "exercise[s] of the police power to conserve the natural resources of the state,"[46] but the Supreme Court in *West* ruled such resource conservation was really designed only to serve "the business welfare" of the producing state, and if adopted by each state would unconstitutionally "halt . . . commerce at state lines."[47] The New Jersey Supreme Court found this reasoning inapplicable to the New Jersey Waste Act because of the distinction it discovered between the basic state purposes of the *West* regulations on the one hand and those of the New Jersey act on the other: the distinction between an effort "to preserve and exploit a [natural] resource for selfish economic and commercial gain" and an attempt "to protect the health of its citizens and give some measure of precarious protection to its natural environment."[48]

There nevertheless exists a greater degree of similarity between the two types of state action than the New Jersey court chose to recognize. The original and primary goal of the New Jersey provisions was development, not mere conservation, of the disposal areas.[49] Admittedly the promotion of the wise and productive development of land is a legitimate aim of the police power, but however important and worthwhile the commercial and industrial development of the Hackensack Meadowlands and other landfill sites may be to New Jersey, the promotion of this activity does not constitute health or environmental preservation and cannot successfully be defended as a measure undertaken to achieve either goal.[50] Rather it might be appropriate at this juncture for courts to recognize that in an area as heavily populated as the Northeast Corridor landfill sites and open land of any sort are as valuable a natural resource and economic commodity as gas or oil continue to be. Discriminatory measures designed to prevent utilization of this resource by other states, typified by the New Jersey Waste Act, may therefore be subject to the limiting doctrine set forth in *West*.[51]

45. 221 U.S. 229 (1911).
46. *Id.* at 249.
47. *Id.* at 255.
48. 68 N.J. at 477, 348 A.2d at 518.
49. *See* note 8 *supra.*
50. As the New Jersey Supreme Court observed in *Hackensack*, "garbage and refuse do provide a great threat to the public health." 68 N.J. at 472, 348 A.2d at 516 (citing Shaw v. Township of Byram, 86 N.J. Super. 598, 602, 207 A.2d 570, 572, *cert. denied*, 45 N.J. 35, 210 A.2d 780 (1965)). The *Shaw* decision, however, concerned the open dumping of garbage, which presumably involved a far greater degree of risk to the public health than does sanitary landfill (which is by definition a less hazardous operation), the mode of solid waste disposal adopted in the Hackensack Meadowlands District and other areas in the state.
51. A more recent Supreme Court decision has held that state fixing of natural gas

Finally, the fact that New Jersey chose the extreme recourse of a ban to achieve its purpose subjects the Waste Control Act to a high degree of judicial scrutiny and, accordingly, a high risk of invalidation.[52] Not all outright bans of a given material in commerce are unconstitutional;[53] however, such prohibitions are inevitably reviewed with great assiduity to ensure that they do not "interfere with transportation into or through the State, *beyond what is absolutely necessary for its self-protection*. . . . The Police power of a State cannot obstruct foreign commerce or interstate commerce beyond the necessity for its exercise . . . ."[54] The constitutionality of a total ban must be conditioned on its

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wellhead prices is permissible within the commerce clause as a legitimate effort to conserve valuable natural resources. Cities Serv. Co. v. Peerless Oil & Gas Co., 340 U.S. 179 (1950). The measure was upheld because Oklahoma was "justifiably concerned with preventing rapid and uneconomic dissipation of one of its chief natural resources." *Id.* at 187. The Court noted, however, that there were limits to the ways in which a state might respond to such a concern, limits that might be of some pertinence to *Hackensack*. "The only requirements consistently recognized have been that the regulation *not discriminate or place an embargo* on interstate commerce, that it safeguard an obvious state interest, and that the local interest at stake outweigh whatever national interest there might be in the prevention of state restrictions." *Id.* at 186-87 (emphasis added). Such limitations apparently led to the invalidation of a Texas statute that forbade the exportation of well water to other states without specific legislative approval. City of Altus v. Carr, 255 F. Supp. 828 (W.D. Tex.), *aff'd per curiam*, 385 U.S. 35 (1966). In that case the court noted critically that contrary to the avowed purpose of the statute it did not "operate to conserve water resources of the State of Texas except in the sense that it [did] so for her own benefit to the detriment of her sister States as in the case of *West v. Kansas Natural Gas Co.*" *Id.* at 839-40. The Texas statute, like the New Jersey act, prohibited only out-of-state interests from utilizing the protected natural resource (well water and landfill sites, respectively) while "indulging in the substantial discrimination" of allowing the prohibited activity to be carried on by those within the state. *Id.* at 840. In placing a discriminatory embargo on interstate transportation of the unique natural and environmental resource of water the Texas statute was thus clearly unconstitutional under *West*; it is likely that the New Jersey Waste Control Act, by enacting a ban on out-of-state use of a like resource, is similarly invalid.

52. *See, e.g.*, Portland Pipe Line Corp. v. Environmental Improvement Comm'n, 307 A.2d 1 (Me.), *appeal dismissed*, 414 U.S. 1035 (1973). The court upheld the validity of the Maine provision taxing oil transference because, in part, the statute did not prohibit that aspect of interstate commerce but instead merely undertook to regulate it so as to alleviate the effects of the peril of oil spills. *Id.* at 37.

53. State power to regulate traffic in intoxicating liquor represents one well-recognized exception to the federal plenary powers under the commerce clause. *See* National R.R. Passenger Corp. v. Miller, 358 F. Supp. 1321 (D. Kan.), *aff'd*, 414 U.S. 948 (1973). Additional areas in which pervasive state regulation is permitted are discussed in Note, 87 HARV. L. REV., *supra* note 29, at 1784. Because of the deference accorded to the states, discriminatory regulations in the commerce of firearms or firecrackers, for example, are not likely to be reversed. *But see* Bowman v. Chicago & N. Ry., 125 U.S. 465 (1888), in which the Court held unconstitutional an Iowa law banning the importation (as opposed to the mere sale) of intoxicating liquor.

54. Railroad Co. v. Husen, 95 U.S. 465, 472-74 (1877), *quoted in* Bowman v. Chicago & N. Ry., 125 U.S. 465, 491-92 (emphasis added).

being found nondiscriminatory.[55] Unless shown to be essential to the protection of public health the discriminatory aspects of New Jersey's waste control measures expose the provisions to constitutional attack as impermissible prohibitions on articles within interstate commerce.[56]

It appears that the New Jersey court's decision in *Hackensack* failed to resolve the commerce clause difficulties raised by the statute. The act apparently does not encroach upon an area preempted by the federal government,[57] but it is doubtful that the New Jersey program provides the type of solution for the solid waste disposal problem that Congress envisaged. Consequently, the act might be regarded with disfavor in a federal forum because it fails to coincide with the general direction of federal policy.[58] In addition, were the balancing test to be applied by a federal court similar to the one applied in *American*

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55. *See, e.g.*, Robertson v. California, 328 U.S. 440 (1946). This case upheld the constitutionality of California provisions excluding insurance brokers and agents from doing business within California if they did not satisfy reserve requirements set forth by the state. The Court declared in the determinative part of its opinion: "Exclusion there is, but it is exclusion of what the State has the power to keep out, until Congress speaks otherwise." *Id.* at 459. It sustained the validity of the reserve requirements, finding that they "cannot be held, either on the face of the statute or by any showing that has been made, to be . . . designed or effective either to discriminate against foreign or interstate insurers or to forbid or exclude their activities . . . ." *Id.*

56. *Compare Hackensack with* Palladio, Inc. v. Diamond, 321 F. Supp. 630 (S.D.N.Y. 1970), *aff'd per curiam*, 440 F.2d 1319 (2d Cir.), *cert. denied*, 404 U.S. 983 (1971), which upheld the constitutionality of a New York statute banning the importation and sale of certain wild animal products in New York. Although the New Jersey Waste Act is, like the *Palladio* provision, an exercise of the police power undertaken in an area not preempted by Congress, the New Jersey statute is not so neutral and even-handed in its prohibition. The New York ban was not established to protect or in any way facilitate the state's control of animals native to or otherwise within New York, nor was New York attempting to provide some shield to producers of such products within the state. The New York ban did not distinguish among the animals themselves or the products obtained from them by state or national origin; the New Jersey statute, on the other hand, makes that distinction and does so in order to facilitate the state's disposal of its solid waste and to promote other state interests. Although these interests may be as worthy of protection as those New York sought to promote, the discrimination between New Jersey and non-New Jersey articles is not duplicated in the New York statute. Accordingly, subjected to commerce clause scrutiny, the New Jersey ban, thus distinguishable, may not meet with the same success as the New York statute reviewed in *Palladio*.

57. *See* note 31 and text accompanying note 20 *supra*.

58. The Secretary of Health, Education and Welfare was empowered by the Solid Waste Disposal Act to "encourage the enactment of improved and, so far as practicable, uniform State and local laws governing solid-waste disposal." 42 U.S.C. § 3254 (1970). Although at least one state, Maine, has adopted a statute similar in purpose and effect to the New Jersey Solid Waste Control Act, ME. REV. STAT. tit. 17, § 2253 (1976), New Jersey's neighboring states of Pennsylvania, New York and Delaware have not. Thus, the New Jersey statute, though not intrusive on a federally preempted field, obstructs the uniformity Congress desires to achieve in that area.

Can[59] the Waste Act and its attendant regulations could be held to have engendered an impermissible economic impact on the flow of interstate commerce. In a case such as *Hackensack* it is possible that the balancing test can properly be applied only by a federal court, for in the presence of outright discrimination occurring at the state boundaries the ability of the state courts to apply the test in a proficient and neutral manner may be limited.

The *Hackensack* court described in detail the "crisis proportions" that the solid waste problem had reached in New Jersey[60] and it is undeniable that New Jersey does have the right to undertake appropriate measures to deal with this pressing environmental concern. However, even if the Waste Control Act did not raise troublesome constitutional questions New Jersey would eventually have to adopt alternative methods of solving the state's waste disposal problem, for it is apparent that the New Jersey Waste Act only alleviates the situation on a temporary basis. As the New Jersey Supreme Court stated, the ban on in-state disposal of solid waste originating outside the state would lengthen the lifespan of existing New Jersey landfill sites by a mere eight percent.[61] Therefore, although the statute was enacted to prevent "further virgin wetlands or other undeveloped lands from being devoted to landfill purposes,"[62] it seems that the prohibition would at best only delay for a short time the conversion of such areas into landfill sites. The statute's long-term benefit to the state is miniscule—and compared to the discriminatory burden cast on the flow of interstate commerce and the resulting negative repercussions to out-of-state interests it is doubtful that the statute could survive any thorough application of the balancing test in a federal forum.

Hackensack accentuates the need for a federal uniform approach to the problem,[63] but it is unlikely that Congress will act toward this

59. *See* text accompanying notes 41-43 *supra.*

60. 68 N.J. at 460-65, 348 A.2d at 509-12.

61. *Id.* at 461, 348 A.2d at 510. The court further found that as of January 1, 1974, sanitary landfills within the Hackensack Meadowlands would be usable for only one year longer than expected if the ban were enacted. Prior to the enactment of the ban it was estimated that all land presently committed to landfill operations would be exhausted by 1982; extending the usefulness of those sites by eight percent would not appreciably lengthen the period during which they could be used for disposal. *Id.* at 462 n.7, 348 A.2d at 510 n.7. New Jersey's solid waste could be disposed of in its neighboring states, but it is conceivable that, inspired or irked by New Jersey's Waste Act, those states might pass reciprocal measures, foreclosing New Jersey from employing that avenue.

62. *Id.* at 465, 348 A.2d at 512.

63. *See* Note, *Control of Redeemable Solid Waste: A Proposed National Bill*, 5 SUFFOLK L. REV. 962 (1971).

end.[64] However, the New Jersey Solid Waste Act and the *Hackensack* decision upholding it may impel the federal courts toward the enunciation of a new statement on this statute and others that represent a challenge to the plenary federal commerce powers and toward the invalidation of any environmental protection provision that erects a discriminatory barrier against other states. The only other alternative may be a beginning of the "ecological Balkanization" of this country similar to "the intolerable experience of the economic Balkanization of America that existed in the colonial period and under the Articles of Confederation"[65]—the situation the commerce clause was designed to eliminate.

IRA STEVEN LEFTON

Constitutional Law—Conditions of Confinement for Administratively Segregated Prisoners

It is common for prisoners subjected to segregation or solitary confinement to lose many privileges and rights accorded the general inmate population. The federal courts in recent years have often defined and protected constitutional rights of inmates placed in segrega-

64. A bill to amend the Solid Waste Disposal Act of 1965 was introduced in the House of Representatives in 1975 and was designed to oblige each state to adopt a statewide waste management and resource recovery program implementing, among other objectives: "(10) interstate co-operation in waste management and resource recovery, and (11) consistency of waste management and resource recovery with Federal, state, and local air and water pollution control, noise control, land use, and other environmental policies and regulations." H.R. 5487, 94th Cong., 1st Sess. pt. I, § 251 (1975). As hearings on the bill reveal, however, even these proposed amendments would not have resulted in an increased federal role in the area preempting the states from taking action on their own. Such state action would still be permitted and therefore could continue to result in provisions that, like the New Jersey Waste Act, make no effective contribution to the national effort to deal with the solid waste situation. Thus in response to a query as to the desirability of areawide, rather than state-by-state approaches, the bill's sponsor, Rep. Paul G. Rogers, declared, "Well, I think this is commendable, and I think this should be encouraged. Areawide planning would be encouraged under section 255(b) of my bill, unless the state decides—as Connecticut has—to establish and operate a statewide plan." *Hearings on H.R. 5487 Before the Subcomm. on Transportation and Commerce of the House Comm. on Interstate and Foreign Commerce*, 94th Cong., 1st Sess. 101 (1975).

65. American Can Co. v. Oregon Liquor Control Comm'n, 15 Or. App. 618, 628, 517 P.2d 691, 696 (1973).

tion for "disciplinary" or "punitive" purposes but have less frequently considered rights of inmates segregated for "administrative" purposes. In *Sweet v. South Carolina Department of Corrections*,[1] an inmate who had been held in administrative segregation for five years for protection from assault by other inmates claimed denial of equal protection of the law and imposition of cruel and unusual punishment in that his living conditions were not comparable to those of the general inmate population. The Court of Appeals for the Fourth Circuit, however, ruled that the lack of ordinary privileges, particularly full exercise and shower opportunities, would implicate constitutional rights only if plaintiff's health had been impaired as a consequence of such deprivation or if the deprivation were not necessitated by prison security and order.[2]

Plaintiff Sweet was voluntarily placed in administrative segregation in 1968 following threats of violence by other inmates, who apparently suspected that plaintiff had been giving information to prison officials.[3] Sweet filed suit under 42 U.S.C. section 1983 in federal district court against the Department of Corrections and its director requesting injunctive and monetary relief for unconstitutional imposition of cruel and unusual punishment and for denial of equal protection. He claimed he was given insufficient food, exercise and shower time, opportunity to work, medical attention, reading and writing materials, and opportunity to converse with other inmates.[4] He also claimed that he was denied freedom to exercise his religion and to confer with counsel, and that prison officials failed to investigate his complaints.[5] The conditions of his administrative segregation, he argued, resembled those of prisoners in punitive segregation despite the fact that his segregation was caused by other inmates' threats rather than by his own misconduct.

After an evidentiary hearing, the district court dismissed the complaint.[6] The court of appeals, sitting en banc, found no factual basis for many of the claims and ruled that other clear deprivations were necessary as a practical matter in the maintenance of prison order and

1. 529 F.2d 854 (4th Cir. 1975) (en banc).
2. *Id.* at 866.
3. The record is unclear about the reason for these threats. Both appellant and appellee noted in their briefs that Sweet had given some sort of information to officials. Brief for Appellant at 2; Brief for Appellee at 5.
4. 529 F.2d at 859.
5. *Id.*
6. *Id.* at 857.

security and were thus constitutional. The court noted, however, that the district court had not considered evidence of the effect on Sweet's health of only two showers and two one-hour exercise periods per week for an indefinite period of time.[7] The court of appeals affirmed the dismissal of the monetary claims and remanded to the district court for consideration of the health issue and the practicality of injunctive relief.[8] Three appellate judges concurred, adding that inmates in protective segregation should, so far as possible, be treated like the general inmate population without regard to the expense involved.[9] The concurring judges further stated that the warden should be required to submit a plan for protecting Sweet without imposing deprivations and that if he were unable to do so, an independent consultant should be retained to report feasible changes in Sweet's treatment to the district court.[10]

Recent court decisions examining the rights of segregated prisoners

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7. *Id.* at 866. The record from the evidentiary hearing before the district court disclosed the following facts: (1) Sweet was given three full meals per day but was perhaps denied extras by inmates who served the food and gave extras to others. (2) Sweet had been allowed to work for a few brief periods, but his supervisor testified that Sweet was removed because he could not get along with other inmates and because it was unsafe for him to work in most places. (3) Sweet's cellblock was visited regularly by medical technicians who reported serious cases to a doctor for further treatment. While Sweet received no psychiatric treatment as such, prison records showed he had been seen many times by the doctor and was scheduled for an operation to correct a disability in his leg. (4) Sweet's cellblock was visited regularly by a chaplain who counseled inmates and performed services privately for any inmate requesting such services and who also provided writing materials to inmates on request. The chaplain testified that Sweet had never asked him for anything but writing materials, which were provided. Officials testified that it would be unsafe for Sweet to attend the prison's regular services and that group services in the cellblock would be an unfair imposition on the privacy of other inmates who would not want to be part of the services. The officials stated that group services in an adjacent exercise yard were possible, but the chaplain felt that they would be undesirable because the inconsistent outdoor services caused by the weather changes would agitate the inmates. (5) Sweet admitted being given educational reading materials, and, according to officials, other books were brought to the cellblock. (6) There was no evidence of lack of legal consultation or investigation of Sweet's complaints. (7) Officials testified that Sweet was denied the opportunity to converse with other inmates because he was loud and he aggravated them. *See* Joint Appendix for Appellant and Appellee at 22A, 45A, 69A, 73A, 74A, 79A, 164A-75A, 183A-94A, 204A-05A.

8. 529 F.2d at 866. The majority opinion was written by Judge Russell and joined in by Chief Judge Haynsworth and Judges Field and Widener. As to the propriety of money damages, *see generally* United States v. Demko, 385 U.S. 149 (1966); United States v. Muniz, 374 U.S. 150 (1963); Wright v. McMann, 460 F.2d 126 (2d Cir.), *cert. denied*, 409 U.S. 885 (1972); Sostre v. McGinnis, 442 F.2d 178 (2d Cir. 1971), *cert. denied*, 404 U.S. 1049 (1972); Note, *Prisoners' Rights Under Section 1983*, 57 GEO. L.J. 1270, 1290-97 (1969).

9. 529 F.2d at 866, 869. The concurring opinion was written by Judge Butzner and joined in by Judges Craven and Winter.

10. *Id.* at 869.

have evaluated procedures[11] and official justifications[12] for placing inmates in segregation and the substantive conditions of segregated confinement. The Supreme Court and inferior federal courts have given form to substantive rights relevant to segregated prisoners through the first amendment as well as the fifth and fourteenth amendments' right of access to counsel and the courts.[13] While the Supreme Court has not directly ruled on the many substantive conditions of segregated confinement, the lower federal courts have had to address claims growing out of various forms of prisoner deprivation. Even when an inmate is segregated only briefly, the courts have enjoined unsanitary physical conditions within segregation cells,[14] insufficient medical attention,[15] or clearly inadequate protection from other inmates.[16] When the period of segregation is extended, courts have declared unconstitutional unjustifia-

11. *E.g.*, Wolff v. McDonnell, 418 U.S. 539 (1974); Clutchette v. Procunier, 497 F.2d 809 (9th Cir. 1974), *modified*, 510 F.2d 613 (9th Cir.), *cert. granted*, 421 U.S. 1010 (1975); Wright v. McMann, 460 F.2d 126 (2d Cir.), *cert. denied*, 409 U.S. 885 (1975); Sostre v. McGinnis, 442 F.2d 178 (2d Cir. 1971), *cert. denied*, 404 U.S. 1049 (1972); Nolan v. Scafati, 430 F.2d 548 (1st Cir. 1970); Walker v. Mancusi, 338 F. Supp. 311 (W.D.N.Y. 1971), *aff'd*, 467 F.2d 51 (2d Cir. 1972); Landmann v. Royster, 333 F. Supp. 621 (E.D. Va. 1971); Jackson v. Bishop, 268 F. Supp. 804 (E.D. Ark. 1967), *vacated & remanded*, 404 F.2d 571 (8th Cir. 1968).

12. *E.g.*, Sostre v. McGinnis, 442 F.2d 178 (2d Cir. 1971), *cert. denied*, 404 U.S. 1049 (1972); Seale v. Manson, 326 F. Supp. 1375 (D. Conn. 1971); Davis v. Lindsay, 321 F. Supp. 1134 (S.D.N.Y. 1970). *See generally* Robinson v. California, 370 U.S. 660 (1962); 60 AM. JUR. 2d *Penal and Correctional Institutions* § 46 (1972).

13. *See, e.g.*, Pell v. Procunier, 417 U.S. 817 (1974); Procunier v. Martinez, 416 U.S. 396 (1974); Cruz v. Beto, 405 U.S. 319 (1972) (per curiam); Johnson v. Avery, 393 U.S. 483 (1969); Cooper v. Pate, 378 U.S. 546 (1964) (per curiam). These cases did not deal directly with segregated inmates. *But cf.* Haines v. Kerner, 404 U.S. 519 (1972) (per curiam) (dismissal of pro se complaint); Brooks v. Florida, 389 U.S. 413 (1967) (per curiam) (involuntary confession).

14. *E.g.*, McCray v. Sullivan, 509 F.2d 1332 (5th Cir.), *cert. denied*, 423 U.S. 859 (1975); Gates v. Collier, 501 F.2d 1291 (5th Cir. 1974); Wright v. McMann, 460 F.2d 126 (2d Cir.), *cert. denied*, 409 U.S. 885 (1972); Morris v. Travisono, 310 F. Supp. 857 (D.R.I. 1970) (mem.).

15. *E.g.*, cases cited note 14 *supra*.

16. *E.g.*, McCray v. Sullivan, 509 F.2d 1332 (5th Cir.), *cert. denied*, 423 U.S. 859 (1975); Gates v. Collier, 501 F.2d 1291 (5th Cir. 1974); Holt v. Sarver, 442 F.2d 304 (8th Cir. 1971). The Fourth Circuit in *Sweet* relied on an earlier case in which a nonsegregated inmate claimed he was being unconstitutionally deprived of protection from inmate violence. In Woodhous v. Virginia, 487 F.2d 889 (4th Cir. 1973), plaintiff was in danger of assault, apparently in reprisal for aiding a younger prisoner who was being sexually molested by other inmates. The lower court, after a hearing, dismissed his complaint which alleged that he was being unconstitutionally deprived of protection from inmate violence. 487 F.2d at 889. The Court of Appeals for the Fourth Circuit reversed and remanded, holding that the plaintiff need not show past attacks or fear of attack on his person. Plaintiff could establish cruel and unusual punishment if there were a pervasive risk of harm from other inmates and if the prison officials were not exercising reasonable care to protect him. *Id.* at 890.

ble deprivations involving food, exercise, reading and writing materials, and isolation from human contact.[17]

In a leading case, *Sostre v. McGinnis*,[18] a federal district court held unconstitutional punitive segregation in excess of fifteen days when the prisoner was subject to deprivations including a limit of one hour per day of exercise and one shower per week.[19] The Court of Appeals for the Second Circuit reversed, concluding that the prisoner's indefinite segregation was constitutional for the following reasons: (1) there was no evidence of actual impairment of his own physical or mental health and (2) there was conflicting evidence on the ordinary effects of such segregation on health.[20] The court also noted that plaintiff could secure his release from segregation by agreeing to obey prison rules.[21]

In *Spain v. Procunier*,[22] prisoners held in "administrative" segregation for four years pending disposition of criminal charges arising from the murders of prison guards and inmates brought suit alleging cruel and unusual punishment. In addition to the usual deprivations accompanying segregation that were present in *Sweet* and *Sostre*, plaintiffs were denied any outdoor exercise, were bound in neck chains for all out-of-cell movements, and occasionally were removed from their cells with

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17. Relevant to *Sweet* are recent opinions suggesting that solitary confinement of unlimited duration is per se unconstitutional. *E.g.*, O'Brien v. Moriarty, 489 F.2d 941, 944 (1st Cir. 1974) (dictum); Sostre v. McGinnis, 442 F.2d 178, 207-09 (2d Cir. 1971) (Feinberg, J., dissenting), *cert. denied*, 404 U.S. 1049 (1972).

As to specific deprivations, *see, e.g.*, Sostre v. McGinnis, 442 F.2d 178 (2d Cir. 1971) (en banc), *cert. denied*, 404 U.S. 1049 (1972); Pugh v. Locke, 406 F. Supp. 318, 332 (M.D. Ala. 1976); Berch v. Stahl, 373 F. Supp. 412 (W.D.N.C. 1974); Rhem v. Malcolm, 371 F. Supp. 594, 627 (S.D.N.Y. 1974); Osborn v. Manson, 359 F. Supp. 1107 (D. Conn. 1973); Lollis v. New York State Dep't of Social Serv., 322 F. Supp. 473 (S.D.N.Y. 1970); ABA COMM'N ON CORRECTIONAL FACILITIES & SERV., SURVEY OF UNITED STATES IMPLEMENTATION OF THE UNITED NATIONS STANDARD MINIMUM RULES FOR THE TREATMENT OF PRISONERS 17-18, 51 (1974) [hereinafter cited as UN STANDARD RULES] (noting that South Carolina adopted the Rules by executive order and reported full compliance with rule requiring one hour of exercise per day); AMERICAN CORRECTIONAL ASS'N, MANUAL OF CORRECTIONAL STANDARDS 402-03, 408-20 (3d ed. 1966) (providing for daily exercise for segregated prisoners); M. HERMANN & M. HEFT, PRISONERS' RIGHTS SOURCEBOOK 113-23 (1973); L. ORLAND, JUSTICE, PUNISHMENT, TREATMENT 259 (1973) (quoting CONN. DEP'T OF CORRECTION, POLICY DIRECTIVE ON DISCIPLINARY PROCEDURES) (providing for a minimum of two showers per week); Annot., 18 A.L.R. FED. 7 (1974); Annot., 51 A.L.R.3d 111 (1973); 60 AM. JUR. 2d *Penal and Correctional Institutions* §§ 44-52 (1972).

18. 442 F.2d 178 (2d Cir. 1971), *rev'g* Sostre v. Rockefeller, 312 F. Supp. 863 (S.D.N.Y. 1970), *cert. denied*, 404 U.S. 1049 (1972).

19. Sostre v. Rockefeller, 312 F. Supp. 863 (S.D.N.Y. 1970).

20. 442 F.2d at 193-94 n.24.

21. *Id.* at 193.

22. 408 F. Supp. 534 (N.D. Cal. 1976).

tear gas.[23] There was conflicting evidence as to the effect these deprivations were having on plaintiffs' health.[24] The federal district court held that this combination of conditions was unconstitutional and singled out the use of tear gas (except in riot situations) and neck chains as unconstitutional corporal punishment.[25] The court gave injunctive relief including an order that plaintiffs be permitted one hour per day of outdoor exercise five days per week, weather permitting, except in emergencies.[26] The order was issued despite recognition by the court that its holding would require extensive construction of new facilities and the hiring of new personnel.[27]

Disciplinary segregation is used as a means of discipline or punishment or as a means of protecting guards or other inmates.[28] Administrative segregation, on the other hand, is used for many categories of inmates: those in need of protection from other inmates, those awaiting disciplinary hearings or resolution of criminal proceedings, those who are mentally ill, those awaiting transfer to another institution, and occasionally those who are simply deemed dangerous to themselves, guards, or other inmates.[29] In *Wolff v. McDonnell*,[30] the Supreme Court held that inmates are entitled to a due process hearing prior to placement in disciplinary segregation; such hearings, however, have not been generally required by lower courts for nondisciplinary administrative segregation.[31] The inmate who needs protection may be placed in

23. *Id.* at 541-45.
24. *Id.* at 538, 546.
25. *Id.* at 545.
26. *Id.* at 547.
27. *Id.* at 537.
28. For example, the Federal Bureau of Prisons' policy is that "[a]n inmate may be placed in disciplinary segregation when his continued presence in the general population poses a serious threat to himself, staff, or other inmates or to the security of the institution" and when "the inmate has been found to have committed a serious violation of institution rules or regulations." BUREAU OF PRISONS, U.S. DEP'T OF JUSTICE, POLICY STATEMENT: INMATE DISCIPLINE, No. 7400.5D at ¶ 4 (July 7, 1975).
29. Use of administrative segregation to house inmates who are a threat to other inmates or guards has blurred the distinctions between administrative and disciplinary segregation. *See, e.g.*, Spain v. Procunier, 408 F. Supp. 534 (N.D. Cal. 1976); United States *ex rel.* Walker v. Mancusi, 338 F. Supp. 311 (W.D.N.Y. 1971), *aff'd*, 467 F.2d 51 (2d Cir. 1972); Urbano v. McCorkle, 334 F. Supp. 161 (D.N.J. 1971); L. ORLAND, *supra* note 17, at 258 (quoting CONN. DEP'T OF CORRECTION, POLICY DIRECTIVE ON DISCIPLINARY PROCEDURES); McAninch, *Penal Incarceration and Cruel and Unusual Punishment*, 25 S.C.L. REV. 579, 580 (1973). Officials in *Sweet* who testified about uses of administrative segregation in South Carolina did not list this use.
30. 418 U.S. 539 (1974).
31. Hearings have been required when administrative segregation is used for inmates who are a threat to other inmates or guards. *See* cases cited note 29 *supra*. For other uses of administrative segregation, hearings have not been required. *See, e.g.*, Young v. Wainwright, 449 F.2d 338 (5th Cir. 1971) (per curiam).

administrative segregation by prison officials on their initiative or upon request by the inmate.[32] Although punitive segregation is usually of shorter duration than administrative segregation, many experts criticize the use of punitive segregation, whereas administrative segregation has been generally approved.[33]

Both the majority and concurring judges stressed that Sweet possessed a constitutional right to protection, and that under the circumstances, it was probably the officials' duty to honor his request for protection.[34] The entire court, therefore, apparently felt that a diminution of exercise and shower rights should not ideally condition access to protective segregation.[35] However, while the majority held that considerations of Sweet's health and prison order and security were necessary to a ruling on constitutional issues,[36] the concurring judges would require only a finding that Sweet's treatment could feasibly be improved without regard to the expense involved in such improvements.[37] The concurring judges also made specific recommendations that Sweet be transferred to another prison, that those who made the threats be segregated instead of Sweet, or that extra guards accompany Sweet in the general population.[38]

There are fundamental reasons why such broad constitutional principles, when applied to the treatment of protected, segregated prisoners,

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32. *See generally* cases cited notes 29 & 31 *supra.*

33. *E.g.*, UN STANDARD RULES, *supra* note 17, at 40, 47 (under the Rules, separation of prisoners should be used only for protection, treatment or for supervision of the mentally abnormal); ANNUAL CHIEF JUSTICE EARL WARREN CONFERENCE ON ADVOCACY, A PROGRAM FOR PRISON REFORM 14 n.10 (1972); L. ORLAND, *supra* note 17, at 249 (American Correctional Association policy is to prefer administrative segregation over punitive segregation for long terms); *id.* at 353 (§ 3(d) of the Model Act drafted by the National Council on Crime and Delinquency supports use of segregation only for the protection of inmates and personnel, not for punishment). Extended solitary confinement has been described as the "most widespread, controversial, and inhumane of current penal practices . . . ." NATIONAL ADVISORY COMM'N ON CRIMINAL JUSTICE STANDARDS AND GOALS, CORRECTIONS 32 (1973) [hereinafter cited as CORRECTIONS].

34. 529 F.2d at 859, 867. *See* note 16 *supra.*

35. *See* 529 F.2d at 859, 867-69.

36. Deprivations of mental or physical health, whether intentionally inflicted or not, are being recognized by corrections experts as unwarranted "corporal punishment." *See* L. ORLAND, *supra* note 17, at 248-49; M. RICHMOND, PRISON PROFILES 77, 90 (1965); Note, *supra* note 8, at 1286-87. *See generally* Trop v. Dulles, 356 U.S. 86 (1958).

37. 529 F.2d at 868. *See* Finney v. Arkansas Bd. of Correction, 505 F.2d 194, 201 (8th Cir. 1974) (lack of funds not an acceptable excuse for overcrowded prisons); Jackson v. Bishop, 404 F.2d 571, 580 (8th Cir. 1968) (rejecting claim by Arkansas officials that the use of a strap was valid punishment due to the expense of constructing then unavailable segregation facilities).

38. 529 F.2d at 869.

do not adequately deal with present prison conditions. The courts, in defining constitutional rights of prison inmates, have balanced the rights of the imprisoned individual against the interests of the prison administration. This balancing test fails analytically because it does not take into account a crucial factor: the existence and nature of a unique inmate society within prisons.[39] It is a totalitarian society often characterized by idleness, boredom and inter-inmate hatred and violence; relationships between inmates and guards or officials are less important.[40] Courts are capable of making informed judgments on the constitutional rights of a prisoner as he interacts with the familiar world outside of prison; however, the judiciary seems uncomfortable with the task in cases in which the rights asserted involve the closed world within prisons.[41]

The court in *Sweet* did not adequately consider the fact that plaintiff was suspected by other prisoners of violating one of the most basic norms of inmate society by giving unsolicited information to prison officials. An expected result of this supposed breach of trust is unrelenting, potentially violent hatred directed toward the "informant" by most of the inmate population.[42] As experts acknowledge, prison

39. The writer's opinions on this issue are mostly a result of his experiences and observations while confined in North Carolina youthful offender prisons in 1970. *See* Note, *supra* note 8, at 1287 (courts should give credence to the human interactions within the prison environment, which may make rehabilitation impossible). *See also* Fulwood v. Clemmer, 206 F. Supp. 370 (D.D.C. 1962).

40. Lloyd Ohlin has described prison society as follows: "A prison is not a collection of unrelated individuals. It is a highly organized system of roles, relationships, rules and activities. The treatment preoccupation with individual offenders has obscured the heavy impact of the prison organization on offenders, not as individuals but as members of the social system." M. RICHMOND, *supra* note 36, at 131 (quoting L. OHLIN, TARGETS FOR CHANGE IN CORRECTIONAL INSTITUTIONS). *See* ANNUAL EARL WARREN CONFERENCE ON ADVOCACY, *supra* note 33, at 47-56; L. ORLAND, *supra* note 17, at 127, 153, 167-68, 173-76; U.S. DEP'T OF JUSTICE, PREVENTION OF VIOLENCE IN CORRECTIONAL INSTITUTIONS 16-17, 41 (1973) (a collection of papers presented at the Fourth National Symposium on Law Enforcement Science and Technology).

41. Perhaps this explains the Supreme Court's reluctance to judge the constitutionality of many substantive conditions in this area. Access to counsel and the courts, and visiting and correspondence privileges involve extenuated contacts with the outside world. Conversely, discipline, protection, and classification of inmates are primarily internal processes. *See* M. HERMANN & M. HEFT, *supra* note 17, at 114; Note, *supra* note 8, at 1281-82 n.80.

42. Joint Appendix for Appellant and Appellee at 14A-24A, 88A, 141A; Brief for Appellant at 8, Sweet v. South Carolina Dep't of Corrections, 529 F.2d 854 (4th Cir. 1975). The officials testified that Sweet would be in danger regardless of who was in the inmate population, even in twenty years, and that Sweet could not adapt to the prison population due to a general inability to get along with other inmates. *Id. See* M. RICHMOND, *supra* note 36, at 102 (cooperation and compliance with authority may lead to an inability to take care of oneself).

order is maintained at least partly through the consent of the inmates;[43] Sweet was thus probably as much a threat to order in the prison as an inmate who was considered a "discipline" problem. The concurring judges' recommendation that the officials isolate or transfer those who threatened Sweet instead of segregating Sweet is unrealistic. Given the severity of Sweet's supposed breach and the unanimity of inmate antagonism to such actions, many inmates would probably threaten Sweet. This unanimity and the fact that inmate gossip is regularly passed from prison to prison also make transfer of Sweet to another prison an unwise administrative reaction unless inter-inmate contact and transfer of inmates were unusually rare between the two prisons.[44]

Additionally, the concurring judges oversimplified the problem by suggesting that extra guards be assigned to Sweet as he interacted with the general inmate population and by stating that the expense involved in giving Sweet better treatment was irrelevant. Expense generally dictates the levels of prison physical facilities, programs and personnel.[45] While a court may limit mail censorship, for example, without directly increasing prison expenses, most problems of internal management, even when constitutional rights are involved, require that expense be considered.[46] Many prisoners suffer deprivations that are arguably unconstitutional even when resources available to prisons are correctly allocated.[47] At the very least, any adjustment that necessitates reallocation of resources to one prisoner will in some way deprive another. If Sweet and other prisoners in administrative segregation were given more exercise time, guards would probably have to be transferred to supervise that inmate exercise, and the risk of escape or violence in other areas

43. U.S. DEP'T OF JUSTICE, *supra* note 40, at 17-18.

44. Sweet was convicted of statutory rape. The Department of Corrections had a policy of not allowing sex offenders in minimal security prisons. See UN STANDARD RULES, *supra* note 17, at 15-16 (Rule 8, approving separation of inmates based on criminal record). As a result there were only two institutions at which Sweet could be kept; Sweet had already been at the other institution, where he had problems. Joint Appendix for Appellant and Appellee at 7A, 16A. There is a solution under federal statutes authorizing transfer of certain inmates between a state prison system and the federal prison system. 18 U.S.C. §§ 4002, 5003, 5013 (1970). This alternative has been employed for inmates threatened by other inmates.

45. *See* UN STANDARD RULES, *supra* note 17, at 53 (lack of resources at the heart of most noncompliance with the Rules); N.C. PENAL SYS. STUDY COMM'N, N.C. BAR ASS'N, INTERIM REPORT (1971) (finding that North Carolina is trying to operate a twentieth-century system with nineteenth-century facilities).

46. *See* note 41 *supra*. *Cf.* Brief for Appellant at 32 (arguing particularly that expenses cannot justify first amendment restrictions).

47. This is most obvious when basic resources such as housing are lacking. *See* Spain v. Procunier, 408 F. Supp. 534, 537 (N.D. Cal. 1976); sources cited note 45 *supra* and note 55 *infra*.

would increase.[48] An alternative solution worth consideration would be to shift employees from education, training, and counseling to custodial duties.[49] However, it is likely that requests for administrative segregation (from inmates truly in fear of violence,[50] as well as those who might like the rare privacy afforded by segregation) would increase far beyond prison facility capabilities if such segregation were not accompanied by a loss of some privileges. Some concomitant "deprivation" operates to allocate the prison's scarce resources in such a way as to accommodate the needs of inmates.

Nevertheless, official justification for prisoner deprivations based on the necessity of prison order or on expense should be closely scrutinized by the courts. For example, the officials in *Sweet* testified that they could not allow Sweet to exercise, work, or worship with the general prison population because he would have to be accompanied and protected by a guard on all occasions, but these officials contradicted themselves by saying that, although they would not recommend it, they would allow Sweet to move out of segregation and back into the general prison population if he chose to do so.[51] Considering the duty of officials to take all reasonable precautions for Sweet's protection,[52] he should probably be retained in administrative segregation even if he desired to move back in the population. This apparent contradiction should have been recognized, if not resolved, in *Sweet*.

The court was wise in remanding to the district court for further fact-finding,[53] and sensitive in its concern that long term segregation can

48. Prison officials in *Sweet* stated that religious services were once held in plaintiff's cellblock but were discontinued due to a lack of personnel. They argued that in order to double the showers and exercise time of the inmates in the cell block, it would be necessary to double the number of guards assigned there during those periods. Joint Appendix for Appellant and Appellee at 45A, 57A; Brief for Appellee at 7. Such a lack of resources is widespread; given these scarcities, classification of inmates is argued as the best means of allocating resources and in fact has that goal as its primary purpose. CORRECTIONS, *supra* note 33, at 210; L. ORLAND, *supra* note 17, at 219. *See also* U.S. DEP'T of JUSTICE, *supra* note 40, at 16-17; Note, *Constitutional Limitations on the Conditions of Pretrial Detention*, 79 YALE L.J. 941, 955 n.90 (1970).

49. This solution draws support from a recent realization by corrections experts that "rehabilitation" does not usually occur in prisons and that emphasis is more properly placed on providing humane conditions in prisons. *See* note 39 *supra*.

50. It has been said that to eliminate the possibility of violence, all detainees in jails would have to be kept under maximum security. Note, *supra* note 48, at 955. Thus, a doctrine that a prisoner has an absolute right to be free from harm seems impossible to put into effect and therefore unwise. *See* CORRECTIONS, *supra* note 33, at 32; Note, *supra* note 8, at 1297.

51. Joint appendix for Appellant and Appellee at 159A.

52. *See* note 16 *supra*.

53. The Fourth Circuit thus required more serious consideration of the conditions

impair physical and mental health. When such adverse effects on health occur, the inmate's deprivations deserve special attention by the courts.[54] The success of such judicial entry into areas formerly controlled by prisoners and administrators requires not only the courts' sense of justice but also their ability and willingness to become familiar with the strange society and the allocation of resources within prisons.[55]

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of administrative segregation than in Breedon v. Jackson, 457 F.2d 578 (4th Cir. 1972). In that case, plaintiff was voluntarily placed in segregation to protect him from inmate assaults. He claimed that as a result of segregation he was subjected to unconstitutional deprivations including limited exercise and bathing opportunities and demanded monetary relief. The court of appeals affirmed the lower court's dismissal without a hearing and concluded as a matter of law that there was no violation of the Constitution. 457 F.2d at 581.

In two recent cases involving suits brought by inmates in segregation, the Supreme Court has reversed lower courts' dismissals without hearings. Cruz v. Beto, 405 U.S. 319 (1972) (per curiam); Haines v. Kerner, 404 U.S. 519 (1972) (per curiam).

The concurring judges in *Sweet* were realistic in recognizing the need for ascertaining the informed advice of an independent consultant to suggest constitutionally acceptable means of initiating effective segregated confinement. It is interesting to note that South Carolina is one of the few jurisdictions with a formal prison inspection system. UN STANDARD RULES, *supra* note 17, at 35.

54. The court's holding in *Sweet* was applied recently in Dorrough v. Hogan, No. C74-1823A (N.D. Ga. Sept. 29, 1976). Plaintiffs filed a class action; they were being held in administrative segregation and limited to two one-hour exercise periods a week. After a full trial, the court entered an order allowing twenty more days before entering a final ruling for parties to submit pleadings on the health and practicality issues. The court expressed another concern:

> This court tends to agree with the court in [Jordan v. Arnold, 408 F. Supp. 869, 876-77 (M.D. Pa. 1976)] when it held that a court order requiring daily exercise is appropriate when overall conditions are found to be substandard, but that an order requiring the prison officials to merely change their exercise schedule might be an unwarranted intrusion into an area governed by official discretion.

No. C74-1823A, slip op. at 2.

55. *See* ANNUAL EARL WARREN CONFERENCE ON ADVOCACY, *supra* note 33, at 49, 53-59. Since the courts cannot force legislatures to appropriate more funds to prisons, courts may be tempted to force quick changes by simply ordering the release of prisoners held under unconstitutional conditions. *See generally* Morales v. Schmidt, 340 F. Supp. 544, 548-49 (W.D. Wis. 1972), *rev'd*, 489 F.2d 1335 (7th Cir. 1973); Hamilton v. Love, 328 F. Supp. 1182 (E.D. Ark. 1971); Holt v. Sarver, 309 F. Supp. 362 (E.D. Ark. 1970), *aff'd*, 442 F.2d 304 (8th Cir. 1971).

Environmental Law — Kleppe v. Sierra Club: Addressing the Question of Programmatic Impact Statements

Section 102(2)(C)[1] of the National Environmental Policy Act of 1969 (NEPA)[2] requires federal[3] officials to prepare an environmental impact statement (EIS) for "every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment."[4] Because of the inevitable conflict between the broad language of the Act[5] and existing agency decisional procedures, a constant stream of litigation concerning the required scope of an EIS has followed NEPA's enactment. One of the questions that has arisen from agency conflict has been: if, within a given region, a federal agency is involved in related projects for which individual impact statements have already been prepared, does NEPA require the agency to prepare a regional (programmatic)[6] impact statement as well? Reversing a District of Columbia Circuit Court of Appeals decision,[7] the United States Supreme Court, in *Kleppe v. Sierra Club*,[8] held that the Department of the Interior was not required by NEPA to prepare a regional EIS for the Northern Great Plains region where the Department was leasing coal mines for development.

The Northern Great Plains region, a rich coal basin covering portions of Wyoming, Montana, North Dakota and South Dakota,[9] is

1. 42 U.S.C. § 4332(2)(C) (1970).
2. 42 U.S.C. §§ 4321-4347 (1970).
3. *Id.* § 4332(2)(D) (Supp. V 1975), added by the National Environmental Policy Act Amendments of 1975, Pub. L. No. 94-83, 89 Stat. 424, allows, under certain conditions, a state agency or official to prepare an impact statement.
4. *Id.* § 4332(2)(C).
5. The scope of federal activity to be covered by an EIS is broad because of NEPA's requirements that the federal government "improve and coordinate Federal plans, functions, programs, and resources . . . to attain the widest range of beneficial uses of the environment without degradation . . . ." *id.* § 4331(b)(3); "utilize a systematic, interdisciplinary approach," *id.* § 4332(2)(A); develop alternatives to recommended projects, *id.* § 4332(2)(E); and "recognize the worldwide and long-range character of environmental problems," *id.* § 4332(2)(F).
6. In this Note, the phrases "programmatic EIS" and "comprehensive EIS" will be used synonymously with "regional EIS." The first two phrases, however, are not always synonymous with "regional" since programs involve several projects that may extend beyond a given region. In *Kleppe*, the phrases were synonymous since all the projects were within the same region.
7. Sierra Club v. Morton, 514 F.2d 856 (D.C. Cir. 1975).
8. 96 S. Ct. 2718 (1976).
9. According to the Brief for Petitioners at 4 n.2, Kleppe v. Sierra Club, 96 S. Ct. 2718 (1976), the Department of the Interior has divided the Nation's coal lands into six provinces, one of which is the Northern Great Plains province. The Department

owned to a large extent by the United States government. Under the Mineral Lands Leasing Act of 1920,[10] the Secretary of the Interior (Secretary) is authorized to divide and lease for development any coal lands owned by the federal government.[11] In 1972, the Department of the Interior (Department) undertook the Northern Great Plains Resources Program (NGPRP), a federal-state, interagency study[12] devoted entirely to environmental concerns of the region.[13] Further, in 1973, the Secretary announced a complete review of the Department's national coal leasing program, which was designed "to study the environmental impact of the Department's entire range of coal related activities and to develop a planning system to guide the national leasing program."[14]

In July 1973, Sierra and other environmental groups brought suit against the Secretary, seeking declaratory and injunctive relief against further coal development within the region[15] pending preparation of

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defines that province as including the Dakotas, Montana, Wyoming, Idaho, Nebraska and Colorado.

10. 30 U.S.C. §§ 181-287 (1970).

11. *Id.* § 201(a).

12. The court of appeals noted that the Secretary of the Interior had shown concern over NEPA's effect on development of the Northern Great Plains province and had recognized that NEPA might require comprehensive development of the province and a more comprehensive environmental impact analysis than would be allowed by impact statements for individual mines. The court attributed the NGPRP and an earlier study, the North Central Power Study of 1970, to this recognition on the part of the Secretary. Sierra Club v. Morton, 514 F.2d 856, 862-63 (D.C. Cir. 1975).

13. 96 S. Ct. at 2724. The court of appeals described the purpose of the NGPRP as follows: "to assess the potential social, economic, and environmental impacts that development of the Province would cause." 514 F.2d at 863.

14. 96 S. Ct. at 2725. The study resulted in a "Coal Programmatic EIS" that was finalized in September 1975. From the study came a proposed leasing program based on the Energy Minerals Activity Recommendation System and an evaluation of the possible environmental impact of the national program as well as alternatives to the program. While the study was being conducted, the Secretary put into effect a "short term leasing policy" to restrict new leasing during the review. *Id.* The District of Columbia Circuit Court of Appeals later found large loopholes in the restrictions imposed upon development of the province allowing federal activity to proceed:

> (1) [T]he short-term leasing program applies only to new leases and does not interfere with the Department's ability to approve mining plans for pre-existing leases in the area; (2) some leases may be issued under the short-term leasing policy itself; and (3) federal activity in the Province is not really suspended pending issuance of the NGPRP, but rather can continue upon approval of the Under Secretary.

514 F.2d at 864-65. In fact, between the time restrictions were imposed in February 1973 and the June 1975 decision of the court of appeals, at least four mining plans were approved and approval of four more mines in the Eastern Powder River Coal Basin was pending. *Id.* at 865.

15. For a discussion of the activity in the province, see 514 F.2d at 864-66.

a regional EIS.[16] The district court found no regional federal action within the meaning of NEPA and held that a regional impact statement is not necessary for individual projects related only by geography. After oral argument on appeal by Sierra Club,[17] the Court of Appeals for the District of Columbia Circuit granted a motion for a limited injunction pending its decision: the Secretary was ordered to take no further action regarding mining plans and railroad rights-of-way in the Eastern Powder River Coal Basin.[18] Thereafter, the court of appeals reversed and remanded,[19] concluding that

> when the federal government, through exercise of its power to approve leases, mining plans, rights-of-way, and water option contracts, attempts to "control development" of a definite region, it is engaged in a regional program constituting major federal action within the meaning of NEPA, whether it labels its attempts a "plan," a "program," or nothing at all.[20]

The court of appeals believed that a comprehensive major federal action was "contemplated" in the Northern Great Plains; therefore, a balancing of four factors[21] used in an earlier decision[22] would be necessary to determine the time during the program when the EIS would be required.[23] The temporary injunction was continued,[24] however, to allow the Department to determine its future role in the region and,

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16. Jurisdiction was asserted under 5 U.S.C. §§ 701-706 (1970) and 28 U.S.C. §§ 1331(a) & 1361 (1970).

17. The district court had found that the region identified by Sierra Club was not " 'an entity, region or area which has been defined by the Federal Government by statute or executive action' for purposes of any Federal program, project, or action." 514 F.2d at 867. It had further concluded that " '[t]here is no existing or proposed Federal regional program, plan, project, or other regional "federal action" within the meaning of NEPA Section 102(2) for the development of coal or other resources' in the Northern Great Plains region." *Id.* Having so determined, the court held that "in the absence of regional federal action, multiple applications for individual federal action in connection with individual private projects which are unrelated to one another except geographically do not either constitute regional federal action or mandate a regional impact statement." *Id.*

18. *Id.* at 868.

19. *Id.* at 884.

20. *Id.* at 878.

21. The four factors were: (1) How likely and how soon is the program to come to fruition? (2) To what extent is valid information now available on the effects of implementation of the program and of alternatives? (3) To what extent are irretrievable commitments being made and options being precluded as the proposal progresses? (4) How severe will the environmental effects of program implementation be? *Id.* at 880.

22. Scientists' Inst. for Pub. Info., Inc. (SIPI) v. AEC, 481 F.2d 1079 (D.C. Cir. 1973).

23. 514 F.2d at 880.

24. *Id.* at 883.

based upon that role, to determine whether an impact statement was necessary.[25]

In early 1976, the Supreme Court stayed the injunction and granted the Secretary's petition for certiorari.[26] Noting that the Secretary agreed that NEPA section 102(2)(C) required both individual impact statements for the single leases involved and a Coal Programmatic EIS to accompany the new national leasing program,[27] the Court agreed with the Secretary: NEPA did not require the Secretary to prepare an EIS on the entire Northern Great Plains region because there had been no report or recommendation on a proposal for major federal action with respect to that region.[28] In addition, the Court specifically agreed with the district court that the NGPRP was not a recommendation or report on a proposal for major federal action and, hence, did not fall within NEPA's section 102(2)(C).[29]

In response to the court of appeals' opinion, the Supreme Court concluded that the Secretary had not contemplated a regional plan or proposal[30] and that, even if he had contemplated such a plan, NEPA does not require an impact statement prior to "the time at which it makes a recommendation or report on a *proposal* for federal action."[31] According to the Court NEPA requires no balancing test such as was promulgated by the court of appeals.[32] Before the Supreme Court, the Sierra Club contended[33] that a regional impact statement is required

25. The court of appeals was unable, due to an incomplete record, to conclude an analysis of the four balancing factors; it therefore remanded to allow the Department to complete the NGPRP. Based on the NGPRP, the Department was to determine its role in the region and the necessity for a programmatic EIS. *Id.* at 882.

26. 96 S. Ct. at 2714. The Court noted that shortly after the injunction was stayed, the Secretary approved the four mining plans in the East Powder River Coal Basin. *Id.*

27. *Id.* at 2726.

28. *Id.* at 2726-27.

29. *Id.* at 2726. The Court, relying on a statement by the Secretary, found irrelevant, for purposes of a regional EIS, the NGPRP. Such a study, according to the Secretary, is a "prelude to informed agency planning and provide[s] the data base on which the Department may decide to take specific actions for which impact statements are prepared." *Id.* at 2731.

30. *Id.* at 2727.

31. *Id.* at 2728 (quoting Aberdeen & Rockfish R.R. v. SCRAP, 422 U.S. 289, 320 (1975) (*SCRAP II*)).

32. *Id.* at 2729.

33. Sierra Club had decided not to support the court of appeals' decision for obvious reasons: *SCRAP II*, 422 U.S. 289 (1975), and Sierra Club v. Morton, 514 F.2d 856 (D.C. Cir. 1975), were both decided in June 1975. *SCRAP II* essentially silenced the court of appeals' opinion since it clearly held that an EIS is necessary only at the time an agency makes a recommendation or report on a proposal for major federal action. After that, by order of the Supreme Court the Second Circuit Court of Appeals

on all coal-related projects in the region "because they are intimately related."[34] The Court considered this argument susceptible of two interpretations.[35] The first interpretation imposed upon Sierra's contention was that the individual impact statements were inadequate. The Court refused to consider this interpretation since the case was not brought as a challenge to a particular EIS and there was no EIS in the record. Second, the Court considered that Sierra's contention could be interpreted as an attack on the Secretary's decision not to prepare one regional EIS. The Court agreed with this second view that section 102(2)(C) may require a comprehensive EIS in limited situations in which several proposed actions are pending at the same time; the decision to prepare a comprehensive EIS, however, was considered to be one for the agency. Accordingly, the Court refused to reverse the agency's decision unless it could be shown to be arbitrary and capricious.[36] In *Kleppe*, the Court found nothing arbitrary in the Secretary's decision not to prepare a regional EIS;[37] therefore, in a seven-two split,[38] the Supreme Court reversed the court of appeals' decision.

The first involvement of the Supreme Court in the chain of cases leading to *Kleppe* was *Aberdeen & Rockfish Railroad v. SCRAP (SCRAP II)*.[39] There the Court answered, at least superficially, the question of when, in the life of a project, a final EIS is required. The Court interpreted section 102(2)(C) literally: an agency must prepare the final EIS at the "time at which it makes a recommendation or report on a *proposal* for federal action."[40] Subsequently the *SCRAP II* analysis was applied to a programmatic impact statement case in

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in Conservation Soc'y, Inc. v. Secretary of Transp., 531 F.2d 637 (2d Cir. 1976) (per curiam), was required to apply *SCRAP II* to a highway segmentation case. The court found that, since there was no comprehensive program, no comprehensive EIS was required. The Sierra Club, therefore, relied upon another argument made before the court of appeals but not reached by that court.

34. 96 S. Ct. at 2730.

35. *Id.*

36. *Id.* at 2731.

37. *Id.*

38. Justice Marshall, with whom Justice Brennan joined, concurred in part and dissented in part. His disagreement with the majority was based on his belief that although a final EIS is due at the time at which an agency makes a recommendation or report on a program for federal action, preparation of that statement must be commenced early in the process. *Id.* at 2734. This approach is necessary, Marshall reasoned, to comply with the mandate of NEPA that early consideration of environmental consequences be made possible through production of the EIS. *Id.* Marshall found that the test devised by the Second Circuit was an effective remedy. *Id.* at 2735.

39. 422 U.S. 289 (1975).

40. *Id.* at 320.

Conservation Society, Inc. v. Secretary of Transportation.[41] The district court[42] had required a comprehensive impact statement for an entire highway despite the absence of a federal plan for the entire route, because it found that the three states through which the highway passed were looking toward development of the entire corridor into a superhighway.[43] On the basis of *SCRAP II*[44] the Supreme Court reversed and remanded, and on remand the Second Circuit held that a comprehensive EIS could not be required since there was "no overall federal plan."[45]

The purpose of an environmental impact statement is "to aid in the agencies' own decision making process and to advise other interested agencies and the public of the environmental consequences of planned federal action."[46] The initial determination to prepare an environmental impact statement, the so-called threshold decision, rests with the agency responsible for the federal action. NEPA requires that impact statements be prepared for major federal actions "significantly affecting the quality of the human environment."[47] Before *Kleppe*, the standard of judicial review of threshold determinations had varied among the federal courts.[48] The majority of courts had adopted

41. 508 F.2d 927 (2d Cir. 1974), *vacated and remanded sub nom.* Coleman v. Conservation Soc'y, Inc., 423 U.S. 809 (1975), *rev'd per curiam sub nom.* Conservation Soc'y, Inc. v. Secretary of Transp., 531 F.2d 637 (2d Cir. 1976).

42. Conservation Soc'y, Inc. v. Secretary of Transp., 362 F. Supp. 627 (D. Vt. 1973).

43. *Id.* at 636.

44. The Court also reversed in light of the National Environmental Policy Act Amendments of 1975, Pub. L. No. 94-83, 89 Stat. 424 (adding 42 U.S.C. § 4332(2)(D) (Supp. V 1975), which allows state agencies and officers, under certain conditions, to prepare an EIS).

45. Based on *SCRAP II* and *Conservation Society*, the result in *Kleppe* comes as no surprise. In fact, those two opinions appear to render the *Kleppe* opinion unnecessary. A closer consideration of *Kleppe*, however, yields two reasons for which the Court decided the case. First, on the issue of timing, the Court rejected specifically the four factor balancing test first promulgated by the District of Columbia Circuit in 1973 and revived by the same lower court in this case. Second, on the issue of the scope of an EIS, the Court provided some guidance as to the circumstances under which a programmatic EIS will be necessary even in the absence of a proposal. This Note will focus only on the latter issue and will analyze the Court's treatment of programmatic impact statements.

46. Calvert Cliffs' Coordinating Comm., Inc. v. AEC, 449 F.2d 1109, 1114 (D.C. Cir. 1971). *See also* Environmental Defense Fund, Inc. v. Corps of Engineers, 348 F. Supp. 916 (N.D. Miss. 1972); Environmental Defense Fund v. TVA, 339 F. Supp. 806 (E.D. Tenn. 1972).

47. 42 U.S.C. § 4332(2)(C) (1970).

48. For discussions of judicial review of agency determinations, see Anderson, *The National Environmental Policy Act*, in FEDERAL ENVIRONMENTAL LAW 238, 356-62 (E. Dolgin & T. Guilbert eds. 1974); Comment, *Environmental Law: Judicial Review of Federal Agency Actions under NEPA*, 28 OKLA. L. REV. 866 (1975).

an extremely lenient standard: an agency's decision would not be overturned unless deemed arbitrary and capricious. Other courts had required that an agency's threshold determination be reasonable—an approach that allows a closer examination of an agency decision than does the arbitrariness standard.[49] A third standard adopted by some courts was de novo review, a strict standard by which the court construed the relevant statutory terms[50] and then applied them to the facts in the case.[51]

The arbitrary and capricious standard adopted by the *Kleppe* Court has not been a clearly defined standard in environmental law cases; even among courts that agreed that arbitrariness is the standard, there was little agreement on the meaning of the term. Some courts have looked at an agency's decision with closer scrutiny than an arbitrariness standard requires. In *Hanly v. Kleindienst*,[52] for example, the Second Circuit, having already required a "reviewable environmental record,"[53] also set forth procedural requirements for the threshold determination[54] that, in the long run, might make the impact statement itself the less arduous alternative.[55]

In determining whether an EIS is necessary, federal officials have little guidance in the broad language of NEPA. The Act does not set forth factors to be considered in making the determination, and courts have reached no consensus as to what those factors should be. At least one attempt to establish procedures to be followed and factors to be considered has led to criticism that the threshold determination would itself become a mini-impact statement.[56] Due to the scale of federal action potentially necessitating a programmatic EIS, the threshold determination for a programmatic statement is not likely to be any easier than for a project EIS. Furthermore, the programmatic statement is designed to achieve something beyond that which is achieved by a single project statement so that an agency's determination of the necessity of a programmatic EIS should involve other considerations.

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49. *E.g.*, Save Our Ten Acres v. Kreger, 472 F.2d 463 (5th Cir. 1973); Wyoming Outdoor Coordinating Council v. Butz, 484 F.2d 1244 (10th Cir. 1973).

50. *See* text accompanying note 47 *supra.*

51. *E.g.*, Natural Resources Defense Council, Inc. v. Grant, 341 F. Supp. 356 (E.D.N.C. 1972).

52. 471 F.2d 823 (2d Cir. 1972), *cert. denied*, 412 U.S. 908 (1973) (*Hanly II*).

53. Hanly v. Mitchell, 460 F.2d 640, 647 (2d Cir. 1972) (*Hanly I*).

54. 471 F.2d at 835.

55. See Anderson, *supra* note 48, at 358 for an analysis of *Hanly II*.

56. 471 F.2d at 837 (Friendly, J., dissenting).

Prior to *Kleppe*, there had been a split of authority on the question of the necessity of a programmatic impact statement.[57] Even when a program has been proposed by a federal agency, thereby meeting *SCRAP II* requirements, the courts have failed to agree on the question of requiring a programmatic EIS. The majority approach, derived from a case involving one segment of a highway program,[58] has applied an "independent utility" test. Generally, the independent utility test mandates "so long as each major federal action is undertaken individually and not as an indivisible integral part of an integrated . . . system, then the requirements of NEPA are determined on an individual major federal action basis."[59] Cases applying the independent utility test[60] generally have involved highway projects, multi-phased dam systems or reservoir systems.[61] Rarely, however, in cases involving resource development, have the courts required a comprehensive EIS.[62]

57. While NEPA does not specifically mandate a detailed statement to cover geographically related major federal actions, various sections of the Act, when read together, may be interpreted to require such statements. *See* note 5 *supra*. The Council on Environmental Quality has issued guidelines stating that "[i]ndividual actions that are related either geographically or as logical parts in a chain of contemplated actions may be more appropriately evaluated in a single, program statement." Council on Environmental Quality, Memorandum to Federal Agencies on Procedures for Improving Environmental Impact Statements (May 16, 1972), *quoted in* Scientists' Inst. for Pub. Info., Inc. v. AEC, 481 F.2d 1079, 1087 (D.C. Cir. 1973). Furthermore, the foremost authority on NEPA has interpreted the Act as rejecting an incremental approach to planning and as depending upon programmatic impact statements for its success. Anderson, *supra* note 48, at 321.

58. Indian Lookout Alliance v. Volpe, 484 F.2d 11, 19 (8th Cir. 1973). The court balanced the need for long-range planning and the advisability of considering long-range environmental effects of a state highway system against the practical necessities of project completion and concluded that the EIS must, at a minimum, cover the length of a federally funded highway that is "supportable by logical termini at each end." *Id.*

59. Environmental Defense Fund, Inc. v. Armstrong, 356 F. Supp. 131, 139 (N.D. Cal.), *aff'd*, 487 F.2d 814 (9th Cir. 1973), *cert. denied*, 416 U.S. 974 (1974).

60. The "independent utility" test was originally a standard used to determine minimum project size but was soon adopted as a measure of the need for a programmatic EIS. One student author has criticized the latter application of the test, stating that, as applied, it means: "[s]o long as a project has some independent justification, its role as part of a larger program of interrelated, although not completely interdependent, units is usually ignored." Comment, *Planning Level and Program Impact Statements under the National Environmental Policy Act: A Definitional Approach*, 23 U.C.L.A. L. REV. 124, 142 (1975).

61. *See, e.g.*, Daly v. Volpe, 514 F.2d 1106 (9th Cir. 1975) (highway segment); Trout Unlimited v. Morton, 509 F.2d 1276 (9th Cir. 1974) (two-phased dam system); Sierra Club v. Stamm, 507 F.2d 788 (10th Cir. 1974) (system of reservoirs); Indian Lookout Alliance v. Volpe, 484 F.2d 11 (8th Cir. 1973) (interstate highway projects); Sierra Club v. Froehlke, 359 F. Supp. 1289 (S.D. Tex. 1973), *rev'd sub nom.* Sierra Club v. Callaway, 499 F.2d 982 (5th Cir. 1974) (system of reservoirs); Environmental Defense Fund, Inc. v. Armstrong, 356 F. Supp. 131 (N.D. Cal.), *aff'd*, 487 F.2d 814 (9th Cir.), *cert. denied*, 416 U.S. 974 (1973).

62. In one case, Minnesota PIRG v. Butz, 358 F. Supp. 584 (D. Minn. 1973),

Generally, three approaches have been used in refusing to require programmatic statements in resource development cases:[63] (1) an independent utility test;[64] (2) a test of interdependence so refined that a programmatic EIS would be required only if the projects are essentially indivisible;[65] (3) a federal funding test, meaning that separate funding of a project is interpreted as evidence showing independence.[66]

While the *Kleppe* opinion did not refer to the independent utility test or to any other test, the language used by the court may be read to spell the demise of such tests, at least as sole determinants of whether a programmatic statement is necessary.[67] The test, it appears, for determining whether, in the absence of a federal program, a programmatic impact statement is necessary, is whether the federal agency can meet its duty under section 102(2)(C) to "assure consideration of the environmental impact of their action in decisionmaking."[68] The Supreme Court stated:

> A comprehensive impact statement may be necessary in some cases for an agency to meet this duty. Thus, when several proposals for coal-related actions that will have cumulative or synergistic environmental impact upon a region are pending concurrently before an agency, their environmental consequences must be consid-

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aff'd, 498 F.2d 1314 (8th Cir. 1974), a federal district court did require a comprehensive statement for a resource development plan. The United States Forest Service, pursuant to a plan adopted prior to NEPA's effective date, was administering timber sales in the Boundary Waters Canoe Area (BWCA) of the Superior National Forest. A Minnesota federal district court found that the cumulative effect of timber sales by the Forest Service since NEPA's effective date constituted a major federal action requiring a programmatic EIS.

After the BWCA EIS and Management Plan were published by the Forest Service, plaintiffs filed another action claiming, *inter alia*, that the EIS and Management Plan were procedurally and substantively inadequate under NEPA. The federal district court agreed. Minnesota PIRG v. Butz, 401 F. Supp. 1276 (D. Minn. 1975). In 1976, the Eighth Circuit Court of Appeals reversed, finding the EIS prepared by the Forest Service adequate for past actions in the BWCA. Citing *Kleppe*, the court of appeals, however, did continue the injunction as to future timber sales since it found that the Forest Service had not completed its plan for such sales and that, upon its completion a comprehensive EIS would be necessary. 9 ENVIR. REP. (BNA) 1220, 1232 (8th Cir. 1976). *See* note 86 *infra*. The distinction between this case and *Kleppe* is that here the Forest Service did have a plan for further timber sales.

63. Comment, *supra* note 60, at 144-46.

64. Sierra Club v. Stamm, 507 F.2d 788 (10th Cir. 1974).

65. Trout Unlimited v. Morton, 509 F.2d 1276 (9th Cir. 1974).

66. Sierra Club v. Froehlke, 359 F. Supp. 1289 (S.D. Tex. 1973), *rev'd sub nom.* Sierra Club v. Callaway, 499 F.2d 982 (5th Cir. 1974).

67. 96 S. Ct. at 2730.

68. *Id.* (quoting Conference Report on NEPA, 115 CONG. REC. 40416 (1969) (Senate)).

> ered together. Only through comprehensive consideration of pending proposals can the agency evaluate different courses of action.[69]

While the Court would impose programmatic impact statements only in narrow circumstances when there is not a federal program, the Court appears aware of the value of such statements.

The value of programmatic impact statements has been attributed to their practical contributions to the planning process.[70] A programmatic EIS is especially helpful in providing information to analyze (1) alternatives to individual major federal actions and (2) cumulative and synergistic environmental effects of a number of federal projects. Generally, the alternatives to a major federal action that must be considered are those "reasonably related to the purpose of the project."[71] The question of the extent to which environmental consequences of alternatives to a given federal project must be considered was addressed by *Natural Resourses Defense Council, Inc. v. Morton (NRDC).*[72] In *NDRC*, the District of Columbia Circuit held inadequate an EIS prepared by the Department of the Interior on its proposed sale of offshore leases because the EIS failed to consider the environmental consequences of alternative courses of action, even though those alternatives were available not to Interior, but to other federal agencies. Despite the result, *NRDC*'s contribution to the issue of alternatives consideration has been attributed to its rule of reasonableness. The *NRDC* court stated that "[i]n the last analysis, the requirement as to alternatives is subject to a construction of reasonableness . . . . Where the environmental aspects of alternatives are readily identifiable by the agency, it is reasonable to state them . . . ."[73]

Another reason for programmatic impact statements is to provide a clearer basis for understanding cumulative and synergistic impacts of the various projects at a time that is meaningful for the decision process. The Council on Environmental Quality has stated that the phrase "major Federal actions" of NEPA section 102(2)(C)

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69. *Id.* at 2730-31 (footnotes omitted).

70. The Council on Environmental Quality has issued guidelines stating the advantages of a programmatic EIS: "it provides an occasion for a more exhaustive consideration of effects and alternatives than would be practicable in a statement on an individual action. It insures consideration of cumulative impacts that might be slighted in a case-by-case analysis. And it avoids duplicative reconsideration of basic quality questions." Council on Environmental Quality, Memorandum to Federal Agencies on Procedures for Improving Environmental Impact Statements (May 16, 1972), *quoted in* Scientists' Inst. for Pub. Info., Inc. v. AEC, 481 F.2d 1079, 1087-88 (D.C. Cir. 1973).

71. *E.g.*, Trout Unlimited v. Morton, 509 F.2d 1276, 1286 (9th Cir. 1974).

72. 458 F.2d 827 (D.C. Cir. 1972).

73. *Id.* at 837.

> is to be construed by agencies with a view to the overall, cumulative impact of the action proposed, related Federal actions and projects in the area, and further actions contemplated. . . . [A]n environmental statement should be prepared if it is reasonable to anticipate a cumulatively significant impact on the environment from Federal action.[74]

Despite a vague realization by some courts that a programmatic EIS will provide a better understanding of cumulative environmental impacts and, thus, a better basis upon which to make decisions about individual projects,[75] no case has dealt specifically with its planning value insofar as cumulative impacts are concerned. A comprehensive EIS allows the planner to select among alternative projects in a manner that will maximize resource development while maintaining an "acceptable" cumulative level of adverse environmental impacts. This result is, of course, consistent with NEPA section 101(b)(3),[76] which makes it the responsibility of federal agencies to "attain the widest range of beneficial uses of the environment without degradation . . . ."[77] In many cases, a comprehensive EIS is necessary if the federal agency, according to the NEPA mandate, is to "utilize a systematic . . . approach"[78] in making decisions affecting the human environment.

Under the *Kleppe* formulation, there are two possible situations in which a programmatic statement will be required when there is in fact no program. First, the federal agency itself may determine its necessity. The Court seemed optimistic about this possibility, noting that the Secretary had recently adopted an approach that would require, in certain situations, the preparation of a single EIS instead of multiple statements.[79] The Court, however, overlooked the premise of NEPA that environmental concerns are likely to be secondary considerations to agencies whose goals are nonenvironmental.[80] With a history of emphasis on agency goals as opposed to agency planning processes, agencies may be expected to skirt additional steps in order to

74. 40 C.F.R. § 1500.6(a) (1975), *quoted in* Note, *Major Federal Actions under the National Environmental Policy Act*, 44 FORDHAM L. REV. 580, 593-94 (1975).

75. *See, e.g.*, Swain v. Brinegar, 517 F.2d 766 (7th Cir. 1975); Minnesota PIRG v. Butz, 358 F. Supp. 584 (D. Minn. 1973), *aff'd*, 498 F.2d 1314 (8th Cir. 1974).

76. 42 U.S.C. § 4331(b)(3) (1970).

77. *Id.*

78. *Id.* § 4332(2)(A).

79. 96 S. Ct. at 2731. To environmentalists this approach will still be insufficient in some cases in which both a programmatic EIS and individual statements are necessary for NEPA purposes. *See, e.g.*, F. ANDERSON, NEPA IN THE COURTS 122 (1973).

80. For a statement of that premise, see Leventhal, *Environmental Decisionmaking and the Role of the Courts*, 122 U. PA. L. REV. 509, 515 (1974).

achieve agency aims.[81] Second, the threshold decision of an administrator not to prepare a comprehensive EIS may be attacked as arbitrary and capricious. This standard of judicial review is the most lenient of the approaches used previously by federal courts; as applied by some of the courts in EIS cases, however, the arbitrariness standard has required stricter procedures than in other cases.[82] Perhaps some stricter procedure will also be expected when courts review the threshold decision in programmatic EIS cases.

The *Kleppe* opinion contains unclear signals to administrators on the issue of factors that must be considered in determining whether the programmatic statement is necessary. The Court suggested that evaluation of "different courses of action" might prompt the need for a programmatic statement;[83] the Court, however, did not discuss the extent to which an agency must consider alternatives to a program, thus appearing to leave *NRDC*[84] as the leading case on that question. The Court also stated that "[c]umulative environmental impacts are, indeed, what require a comprehensive impact statement."[85] This flat assertion and the Court's treatment of the timing issue in *SCRAP II* combined, suggest that the Court did not understand the impact NEPA was intended to have on the planning process. When a programmatic EIS is considered for separate major federal actions already requiring individual impact statements, each one of those separate projects, by definition, has an environmental impact and, consequently, a cumulative impact. It is, therefore, difficult to understand what the Court meant in its statement that such impacts necessitate a comprehensive EIS.[86] The purpose of requiring a programmatic EIS is twofold: first, it provides an agency with sufficient information to evaluate the program against alternative programs; second, it provides data by which individual projects and combinations of projects within the program may be evaluated against the other individual projects and combinations.

81. *See generally* Comment, *supra* note 60.
82. *See* text accompanying notes 53-56 *supra.*
83. 96 S. Ct. at 2731.
84. 458 F.2d 827 (D.C. Cir. 1972). *See* text accompanying notes 72-73 *supra.*
85. 96 S. Ct. at 2732.
86. The Court in another place refers to "cumulative or synergistic" impact of multiple projects. 96 S. Ct. at 2730. *See* text accompanying note 69 *supra.* "Synergistic" certainly makes more sense.

One federal court has already cited *Kleppe* as recognizing that a comprehensive EIS will be necessary where proposed federal actions will have a cumulative or synergistic impact upon an area. The court in that case further stated that the requirement for a programmatic statement will depend upon the facts of each case. Minnesota PIRG v. Butz, 9 ENVIR. REP. (BNA) 1220, 1232 (8th Cir. 1976).

In the latter case, the ultimate plan will be a selection of the projects that will maximize development while minimizing the cumulative adverse environmental impacts. The Court's analysis of these factors—alternatives and cumulative impacts—indicated a failure to understand this twofold purpose.

Furthermore, any consideration of factors relevant to programmatic statements is meaningless unless such considerations are made at a time early enough for the choice of alternatives to be more than an academic exercise. Natural resource planning and development require sophisticated and systematic assessments of alternative resources, alternative sources of the same resource, and the environmental impacts of all comparable resources and of all alternative sources. That job as envisioned by the founders of NEPA was not intended to be easy, but as supplies of resources have decreased, the job has become more necessary; as information technology has increased, the job has become more possible.

The analysis in *Kleppe* may have dealt a serious blow to the future impact of NEPA. With a narrowly drawn exception[87] programmatic impact statements are not necessary unless there is a "recommendation or report on proposals" for programs, a prerequisite that may be avoided easily enough by federal officials whose primary goals are often in conflict with environmental concerns. In the absence of a program, there is the possibility, albeit remote, of showing that the federal official acted arbitrarily and capriciously in refusing to require a programmatic EIS for projects pending at the same time.

The Court, therefore, has made an exception to *SCRAP II* by requiring an EIS under certain circumstances even in the absence of a proposed program. Although the Court successfully escaped the literalism of that opinion, it fell into a different trap: it succumbed to agency pressures and restricted the planning mandate of NEPA by narrowly construing the necessity of a programmatic environmental impact statement. Instead of imposing that restriction, the Court should have begun the long and difficult formulation of standards that will force agencies, before the fact, to develop comprehensive national and regional plans and impact statements that will allow maximum

87. The exception is that when several project proposals having cumulative or synergistic impacts upon a region are pending concurrently before an agency a programmatic EIS is necessary. In the absence of a federal program, therefore, programmatic impact statements, according to the Court, do not cross regional boundaries and are confined to projects pending at the same time and before the same agency.

resource development with minimal environmental impacts. Long-range planning is the mandate of NEPA that has been ignored because of the initial high cost to governmental agencies in traditional terms of agency output. In the long run, however, this command of NEPA should provide the impetus for the most effective resource management program possible.

ELIZABETH GORDON MCCRODDEN

Interstate Commerce—A Shipper's Remedy for Discrimination Prohibited by the Motor Carrier Act

Section 216(d)[1] of the Motor Carrier Act of 1935[2] (Part II of the Interstate Commerce Act) makes it unlawful for a regulated[3] carrier to subject a shipper "to any unjust discrimination."[4] There have been few cases in which the federal judiciary has been required to interpret the nondiscrimination language contained in section 216(d)[5] and thus it has remained a relatively obscure provision of a major federal regulatory act. However, the recent decision by the United States Court of Appeals for the Fourth Circuit in *Hubbard v. Allied Van Lines, Inc.*[6] may signal the emergence of section 216(d) as an important weapon in the legal arsenal of shippers. In this case of first impression, the Fourth Circuit, relying exclusively on the reasoning of cases interpreting a similar provision[7] of the Federal Aviation Act of

1. 49 U.S.C. § 316(d) (1970).
2. *Id.* §§ 301-327.
3. Some motor carriers, including school busses, taxicabs and farm vehicles, are excluded from the Act's coverage. *Id.* § 303(b).
4. *Id.* § 316(d). This section provides, in pertinent part:
It shall be unlawful for any common carrier by motor vehicle engaged in interstate or foreign commerce to make, give, or cause any undue or unreasonable preference or advantage to any particular person, port, gateway, locality, region, district, territory, or description of traffic, in any respect whatsoever; or to subject any particular person, port, gateway, locality, region, district, territory, or description of traffic to any unjust discrimination or any undue or unreasonable prejudice or disadvantage in any respect whatsoever . . . .
5. See note 33 *infra* for a discussion of the cases that have interpreted section 216(d)'s prohibition of discriminatory conduct.
6. 540 F.2d 1224 (4th Cir. 1976).
7. 49 U.S.C. § 1374(b) (1970). This section provides:
No air carrier or foreign air carrier shall make, give, or cause any undue or unreasonable preference or advantage to any particular person, port, locality,

1958,[8] found that an implied damage remedy[9] is available to a shipper for a carrier's breach of its statutory duty of nondiscrimination.[10] Moreover, the court decided that in a proper case punitive damages can be assessed against the breaching carrier.[11]

Plaintiffs in *Hubbard*, a law professor and his wife, had contracted with defendant motor carrier to have their furniture picked up at New Haven, Connecticut and delivered to Columbia, South Carolina by a certain date.[12] Most of the furniture was delivered approximately three weeks after the date specified by the contract while the remainder arrived eleven weeks overdue.[13] Plaintiffs brought suit in federal district court[14] alleging that defendant had violated its section 216(d) duty of nondiscrimination by using its facilities to transport the goods "of other unknown persons instead of plaintiffs' goods . . . ."[15] They further alleged[16] that this was done "in a reckless, wilfull, and wanton manner" and sought $25,000 in actual and punitive damages.[17] De-

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or description of traffic in air transportation in any respect whatsoever or subject any particular person, port, locality, or description of traffic in air transportation to any unjust discrimination or any undue or unreasonable prejudice or disadvantage in any respect whatsoever.

8. *Id.* §§ 1301-1542.

9. The phrase "implied damage remedy" is used in this Note to mean the implication of a private cause of action from a statute not expressly providing one in favor of the plaintiff.

10. 540 F.2d at 1226.

11. *Id.* at 1229. The Fourth Circuit also held that damages for mental distress could be recovered in an action brought under section 216(d) of the Motor Carrier Act. *Id.* at 1230. *See* note 16 *infra.*

12. 540 F.2d at 1225.

13. *Id.* The date named in the contract was July 18, 1973. Eighty percent of the furniture was delivered on August 8, 1973 and the remaining twenty percent on October 10, 1973.

14. Hubbard v. Allied Van Lines, Inc., No. 74-1819 (D.S.C. Jan. 10, 1975) (unreported).

15. 540 F.2d at 1226.

16. Plaintiffs also alleged a right to recover damages for mental distress. They argued that defendant's conduct forced them to delay setting up their new home and thereby caused them to suffer compensable anxiety. *Id.* at 1225. The district court granted defendant's motion to strike all mention of damages for mental distress from the complaint on the grounds that recovery of such damages was precluded by the Carmack Amendment, 49 U.S.C. § 20(11) (1970), *see* note 74 and text accompanying notes 74-77 *infra*, and by the fact that there was no precedent for an award of damages for mental distress for delay in shipping property. Order of the Dist. Ct., No. 74-1819, *reproduced in* Brief for Appellant at 7a; *see* 540 F.2d at 1226. The Fourth Circuit vacated this order, holding that damages for mental distress due to delay in shipment are recoverable and that plaintiffs should have been allowed to take this question to the jury. The controlling inquiry, according to the court, was whether the claim could withstand " 'a careful scrutiny of the evidence supporting [it]' " and not be considered trivial or fictitious. 540 F.2d at 1229 (quoting W. PROSSER, LAW OF TORTS § 12, at 51 (1971)).

17. *Id.* at 1226.

fendant's preanswer motion to strike from the complaint the portion that described its conduct as reckless, wilfull and wanton was granted by the district court[18] on the ground that recovery of punitive damages for injury to property was precluded by the Fourth Circuit's decision in *Chandler v. Aero Mayflower Transit Co.*,[19] a common law case. An agreed stipulation of actual damages was entered as judgment.[20]

On appeal, the Fourth Circuit vacated the order of the district court and remanded the case for further proceedings.[21] In so doing, the court found it necessary to face a threshold issue that the district court had not perceived as an obstacle to recovery: whether plaintiffs had a cause of action against defendant on the basis of section 216(d).[22] Following a line of cases holding that section 404(b) of the Federal Aviation Act[23] implies a private damage remedy in favor of a passenger who is denied his confirmed reservation on an airline flight,[24] the Fourth Circuit concluded that a remedy is similarly implied by section 216(d).[25] On the question of punitive damages, the court again adopted the reasoning of the Federal Aviation Act cases, holding that punitive damages are a possibility in the section 216(d) action and that plaintiffs should have been allowed to take their evidence of malicious conduct to the jury.[26] The court rejected the contention of defendant that the Carmack Amendment,[27] a limitation of liability provision contained in Part I of the Interstate Commerce Act[28] that is applicable to motor carriers but not to air carriers,[29] prevents the recovery of punitive damages.[30] The Fourth Circuit also dismissed

18. Order of the Dist. Ct., *reproduced in* Brief for Appellant at 7a.

19. 374 F.2d 129 (4th Cir. 1967). This case held that a shipper could not recover punitive damages in an action for destruction of the shipper's furniture by the carrier. *Id.* at 137.

20. 540 F.2d at 1226. This stipulation included "out-of-pocket expenses and damages for loss and breakage of property . . . ." *Id.*

21. *Id.* at 1230.

22. *Id.* at 1226.

23. 49 U.S.C. §§ 1301-1542 (1970). Section 404(b) is codified at *id.* § 1374(b).

24. See note 52 and text accompanying notes 52-59 *infra* for a discussion of these cases.

25. 540 F.2d at 1226.

26. *Id.* at 1229.

27. 49 U.S.C. § 20(11) (1970). *See* note 74 and text accompanying notes 74-77 *infra.*

28. 49 U.S.C. §§ 1-300 (1970). Part I of the Interstate Commerce Act deals generally with the regulation of railroads.

29. *Id.* § 319. This section incorporates the Carmack Amendment into Part II (motor carriers) of the Interstate Commerce Act. There is no similar provision with respect to the Federal Aviation Act.

30. 540 F.2d at 1228.

Chandler[31] as inapplicable because it "was an action based on the common law liability of a carrier for damage to goods in transit, not a discrimination case brought under [section 216(d)]."[32]

Since *Hubbard* was a case of first impression, there was no body of case law interpreting the antidiscrimination provision of section 216(d) upon which the court could have based its holding.[33] Therefore, in order to place this decision in the appropriate perspective, it is necessary to examine both the test developed by the courts to determine when it is proper to imply a private cause of action under a federal statute and the cases that have dealt with this question in the context of other provisions of the Motor Carrier Act and section 404(b) of the Federal Aviation Act. In regard to the issue of punitive damages, the section 404(b) cases and the interpretation of the Carmack Amendment constitute the relevant background.

A private damage remedy was first implied from a federal statute in 1916 in *Texas & Pacific Railroad v. Rigsby*,[34] a case in which the United States Supreme Court enunciated a broadly inclusive test for implication. The Court held that a cause of action arose by implication when a member of "the class for whose *especial* benefit the statute was enacted" was damaged as a result of a violation of the statute.[35] Since 1916 this test has been subject to a series of modifications and obfuscations[36] that have successively restricted[37] and broadened[38] the applica-

31. *See* note 19 and accompanying text *supra*.

32. 540 F.2d at 1229.

33. Although the court stated: "We have found no case discussing the issue of whether a private damage remedy will lie for breach of the duty imposed by this section," *id.* at 1226, there is at least one case that has considered this issue. Lyons v. Illinois Greyhound Lines, Inc., 192 F.2d 533 (7th Cir. 1951), held that a black woman who was forced to give up her seat and move to the rear of the bus had an action under section 216(d) for the physical injuries she suffered. *Id.* at 534. This case has not been widely cited and, because of the difference in factual bases, should not be considered as a possible precedent for the holding in *Hubbard*. Another case, Merchandise Warehouse Co. v. A.B.C. Freight Forwarding Corp., 165 F. Supp. 67 (S.D. Ind. 1958), discussed section 216(d) in regard to discrimination and held that plaintiff had a cause of action against a freight forwarder (who was regulated by section 216(d)) for his refusal to cross picket lines at plaintiff's place of business and deliver goods. It is unclear, however, whether the action was based on section 216(d) or the common law.

34. 241 U.S. 33 (1916).

35. *Id.* at 39.

36. *See generally* Comment, *Private Rights of Action under Amtrak and Ash: Some Implications for Implication*, 123 U. PA. L. REV. 1392, 1393-97 (1975).

37. *See, e.g.*, Montana-Dakota Utils. Co. v. Northwestern Public Serv. Co., 341 U.S. 246 (1951), which found that the implication of a private damage remedy was improper when the express provisions of the statute were limited to prospective relief.

38. *See, e.g.*, J.I. Case Co. v. Borak, 377 U.S. 426 (1964), which held that a private damage remedy is implied to carry out the congressional purpose of protecting federal rights.

bility of the implication doctrine. In *Cort v. Ash*,[39] the Supreme Court clarified the state of the doctrine and indicated a move in the direction of the more restrictive view of when a private right of action is implied.[40] The Court held that a stockholder does not have an implied cause of action against the directors of a corporation for violation of a federal statute[41] that prohibits dispersal of corporate funds in connection with a federal election.[42] In reaching this conclusion the Court outlined the relevant pattern of inquiry in deciding the question of implication as: 1) whether the statute was enacted especially to benefit a class of which plaintiff is a member; 2) whether there was an expression of legislative intent that a private damage remedy be implied or denied; 3) whether such a remedy is "consistent with the legislative scheme"; and 4) whether the action involved is one more appropriately left to the states.[43]

Although section 216(d)'s prohibition of unjust discrimination has not been conclusively interpreted, another provision of the same section of the Motor Carrier Act has been examined by the Supreme Court. In *T.I.M.E. Inc. v. United States*,[44] the Court held that the language of section 216(d) making it unlawful for a carrier to charge unjust rates[45] does not imply a cause of action for recovery of overcharges.[46] The Court based its decision on the conclusion that since such an action was expressly provided for in Parts I (railroads)[47] and III (water carriers)[48] of the Interstate Commerce Act, the legislative intent in regard to Part II (motor carriers)[49] was to deny the remedy.[50] In

39. 422 U.S. 66 (1975).

40. *See* Comment, *Implying Private Causes of Action from Federal Statutes: Amtrak and Cort Apply the Brakes*, 17 B.C. INDUS. & COM. L. REV. 53 (1976).

41. 18 U.S.C. § 610 (1970 & Supp. V 1975).

42. 422 U.S. at 69.

43. *Id.* at 78.

44. 359 U.S. 464 (1959).

45. 49 U.S.C. § 316(d) (1970), which remains unchanged since the time the case was decided, provides in pertinent part that:

> All charges made for any service rendered or to be rendered by any common carrier by motor vehicle engaged in interstate or foreign commerce in the transportation of passengers or property as aforesaid or in connection therewith shall be just and reasonable, and every unjust and unreasonable charge for such service or any part thereof, is prohibited and declared to be unlawful.

46. 359 U.S. at 472. *Cf.* Wolf v. Trans World Airlines, Inc., 45 U.S.L.W. 1069 (10th Cir. 1976) (Federal Aviation Act provision barring an air carrier from charging more than the rates and charges specified in the carrier's tarrifs does not create an implied cause of action in passengers who are overcharged).

47. 49 U.S.C. §§ 1-300 (1970).

48. *Id.* §§ 901-923.

49. *Id.* §§ 301-327.

50. 359 U.S. at 470-71. The Court also relied on the failure of Congress to enact

1965, six years after the decision in *T.I.M.E.* was announced, Congress reacted by amending the Motor Carrier Act to provide an action to recover overcharges.[51]

As to the existence of an implied cause of action under section 404(b) of the Federal Aviation Act, the District of Columbia Circuit Court of Appeals held in *Nader v. Allegheny Airlines, Inc.*[52] that "it is well settled that a private damage action is available to remedy violations of this provision."[53] One of the principal cases that underlied the *Nader* court's assumption that the question of implication under section 404(b) had been answered was *Wills v. Trans World Airlines, Inc.*[54] In that case plaintiff made and confirmed a reservation on defendant's flight. However, since defendant had "overbooked"[55] the flight, plaintiff was not allowed to board.[56] The District Court for the Southern District of California, after finding that defendant's actions had reached the level of unjust discrimination prohibited by the statute,[57] concluded that a cause of action was implied in plaintiff's

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amendments to Part II suggested by the Interstate Commerce Commission that would have expressly provided this remedy. *Id.* at 471-72.

51. Congress passed Act of Sept. 6, 1965, Pub. L. No. 83-170, § 6, 79 Stat. 648 (codified at 49 U.S.C. §§ 304(a)(2), (5) (1970)), to provide this remedy.

52. 512 F.2d 527 (D.C. Cir. 1975), *rev'd on other grounds*, 96 S. Ct. 1978 (1976). In this case, plaintiff was not allowed to board defendant's flight even though he held a confirmed reservation. Plaintiff brought suit in federal district court alleging both section 404(b) and common law misrepresentation causes of action. The district court allowed him to recover on the basis of both of these claims. 365 F. Supp. 128, 132 (D.D.C. 1973). On appeal, the District of Columbia Circuit remanded the section 404(b) cause of action for further findings of fact, and ordered that the common law misrepresentation cause be stayed pending a decision by the Civil Aeronautics Board on the question whether defendant's policy of overbooking flights was a deceptive practice. 512 F.2d at 552. The only issue appealed to the Supreme Court was the correctness of the District of Columbia Circuit's order to stay proceedings on the misrepresentation claim, and it was on this issue that the Supreme Court reversed the District of Columbia Circuit. 96 S. Ct. at 1981.

53. 512 F.2d at 537.

54. 200 F. Supp. 360 (S.D. Cal. 1961). *Accord*, Archibald v. Pan Am. World Airways, Inc., 460 F.2d 14 (9th Cir. 1972); Fitzgerald v. Pan Am. World Airways, Inc., 229 F.2d 499 (2d Cir. 1956); Mortimer v. Delta Air Lines, 302 F. Supp. 276 (N.D. Ill. 1969).

55. "Overbooking" refers to the standard practice among airlines of selling and confirming more tickets than there are seats on the airplane. This is done in order to maximize the number of passengers on flights while, at the same time, allowing ticket purchasers a great degree of freedom to cancel their reservations without incurring a penalty. *See* the District of Columbia Circuit's discussion of this practice in *Nader*, 512 F.2d at 533-37.

56. 200 F. Supp. at 362. The airline did not allow plaintiff, a tourist class ticket-holder, to board, in order to accommodate a first-class passenger in the tourist section.

57. *Id.* at 365. This does not mean that every instance in which a passenger holding a confirmed reservation is denied a seat is a per se violation of section 404(b). 512 F.2d at 538. Airlines are required by an order of the Civil Aeronautics Board, 14

favor.[58] The basis for the holding in *Wills* was that the Federal Aviation Act only provided measures to insure future complicance with the statute and without implication of a private cause of action the anti-discrimination provision "would be robbed of vitality and the purposes of the Act substantially thwarted."[59]

A more recent case involving section 404(b) is *Polansky v. Trans World Airlines, Inc.*[60] in which the Third Circuit held that passengers who had alleged discrimination in the quality of ground services provided by the defendant airline[61] did not have a remedy implied by section 404(b).[62] In reaching this result the court noted that a remedy had been properly implied under section 404(b) in the overbooking cases[63] but concluded that the factors set out by the Supreme Court in *Cort v. Ash* precluded implication of a remedy in this case.[64] While the Third Circuit premised its holding on the impropriety of implying a remedy in this instance, the true basis for the result appears to be plaintiffs' failure to allege conduct that violated section 404(b).[65] In determining what constituted discrimination under the statute, the *Polansky* court stated that it is "discriminatory denial of *access* to air facilities . . . which is critical."[66] The court concluded that the airline's actions amounted only to breach of a contract of service, which left plaintiffs with an action on the contract under appropriate state law but did not allow them access to the federal courts under section 404(b). If the breach of contract by defendant in *Polansky* were viewed as discrimination condemned by the statute, the Third Circuit speculated that "[t]here would always be another unbreached contract to which the disgruntled air passenger could compare the services per-

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C.F.R. § 250.3 (1976), to "establish and enforce nondiscriminatory priority rules" to determine who should be seated when a flight is overbooked. 512 F.2d at 538. In order to make out a case of unjust discrimination, a passenger must allege "(1) that [he] possessed a designated priority, and (2) that the carrier boarded persons with a lower priority . . . ." *Id.*

58. 200 F. Supp. at 365.

59. *Id.* at 364.

60. 523 F.2d 332 (3d Cir. 1975).

61. *Id.* at 333. Plaintiffs were part of a tour sponsored by defendant airline. They claimed that their "first class" hotel accommodations were inferior to those provided to other members of the tour at tourist rates. *Id.*

62. *Id.* at 338.

63. *Id.* at 335. *See* note 52 and text accompanying notes 52-59 *supra.*

64. 523 F.2d at 335-36. *See* text accompanying note 43 *supra.*

65. The Third Circuit stated that: "[t]he words of the statute and the decided cases suggest that [section 404(b)] does not seek to prevent the harm alleged by these plaintiff-appellants." 523 F.2d at 336.

66. *Id.*

formed for him" and section 404(b) would provide a federal remedy for every violation of a contract of service by an airline.[67]

Apart from section 404(b) of the Federal Aviation Act, there have been few developments in the area of punitive damages in implied rights of action under federal statutes.[68] In *Wills* such damages were assessed against defendant on the theory that since punitive damages are a possibility in common law tort actions, they are also available when a statutory cause of action sounds in tort.[69] The court enunciated the purposes served by punitive damages as being to vindicate the right of plaintiff and to deter similar conduct by "supplement[ing] the criminal and *in futuro* remedial provisions of the Act . . . ."[70] *Nader*, while refusing to allow punitive damages because of a failure of proof of malicious conduct by defendant airline,[71] did not reject the holding in *Wills* that such damages can be properly awarded in an implied action under section 404(b).[72] The *Nader* opinion, however, questioned the extent to which deterrence can be used as a justification for allowing punitive damages without infringing upon the primary jurisdiction of the Civil Aeronautics Board.[73]

A provision of the Motor Carrier Act that could affect the availability of punitive damages in a section 216(d) action is the Carmack Amendment.[74] The essence of this section is that a motor carrier

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67. *Id.*

68. Punitive damages have been awarded in an implied action under section 10(b) of the Securities Act of 1934, 15 U.S.C. § 78j (1970). *See, e.g.*, deHaas v. Empire Petroleum Co., 302 F. Supp. 647 (D. Colo. 1969). *But see* Green v. Wolf Corp., 406 F.2d 291, 303 (2d Cir. 1968), *cert. denied*, 395 U.S. 977 (1969). *See generally* Note, *Punitive Damages in Implied Actions for Fraud Under the Securities Laws*, 55 CORNELL L. REV. 646 (1970).

69. 200 F. Supp. at 367.

70. *Id.* at 368.

71. In *Wills*, the requisite degree of malicious conduct was established by defendant's intentional violation of its priority rules in favoring a first class ticketholder over plaintiff and by the fact that the overbooking could be characterized as substantial. *Id.* at 367. While it is arguable that the overbooking in *Nader* was also substantial, the court held that if there had been a violation of defendant's priority rules, it was not intentional and therefore could not be construed as malicious. 512 F.2d at 550.

72. 512 F.2d at 550.

73. *Nader* intimates that, if the courts award punitive damages in order to force the airlines to end the practice of overbooking, they have infringed upon the primary jurisdiction of the Civil Aeronautics Board first to consider the propriety of airline policies. *Id.*

74. 49 U.S.C. § 20(11) (1970), made applicable to Part II (motor carriers) of the Interstate Commerce Act by *id.* § 319, provides in pertinent part:

> Any common carrier . . . receiving property for transporation . . . shall be liable . . . for any loss, damage, or injury to such property caused by it . . . and any such common carrier . . . shall be liable . . . for the full actual loss, damage, or injury to such property caused by it . . . notwithstanding any

accepting goods for transport must issue a bill of lading to the shipper that establishes the issuing carrier's responsibility for the goods during the entire time they are in transit. While the Carmack Amendment establishes a limitation on liability when a carrier files a value based tariff with the Interstate Commerce Commission, its main purpose is not to limit the carrier's liability, but rather to provide the shipper with a readily available source of recovery.[75] The amendment could be construed as a roadblock to recovery of punitive damages in that its language states that a carrier "shall be liable . . . for the full actual loss, damage, or injury to such property . . . ."[76] While a technical interpretation of "actual" and "to such property" might possibly lead to the conclusion that punitive damages are precluded by the Carmack Amendment, the courts have refrained from such a literal reading.[77]

The significance of the *Hubbard* decision is its invigoration of the Motor Carrier Act's dormant antidiscrimination provision. The Fourth Circuit added substance to the mere words of the congressional enactment by implying a cause of action for a violation of section 216(d) that carries with it the possibility of a punitive damage award. Without such an implied remedy, a shipper suffering unjust discrimination at the hands of a carrier would be left to bring suit for breach of contract, an action in which actual damages are likely to be small[78] and punitive damages generally unavailable.[79]

An analysis of the reasoning in *Hubbard* begins with an inquiry into the soundness of the court's reliance on section 404(b) precedent. While the language of sections 216(d) and 404(b) is substantially the same, and they are both parts of regulatory acts governing common carriers, the *Hubbard* situation can be distinguished from the section 404(b) overbooking cases on the basis that it involved discrimination against property rather than against people. The Fourth Circuit merely

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limitation of liability or limitation of the amount of recovery or representation or agreement as to value in any . . . receipt or bill of lading, or in any contract, rule, regulation, or in any tariff filed with the Interstate Commerce Commission; and any such limitation, without respect to the manner or form in which it is sought to be made is declared to be unlawful and void . . . .

75. *See* Atlantic Coast Line R.R. v. Riverside Mills, 219 U.S. 186, 199-203 (1911).

76. 49 U.S.C. § 20(11) (1970).

77. *See* Southeastern Express Co. v. Pastime Amusement Co., 299 U.S. 28 (1936); New York, P. & N.R.R. v. Peninsula Exch., 240 U.S. 34 (1916). These cases were cited in the *Hubbard* opinion. 540 F.2d at 1227.

78. In *Wills*, actual damages amounted to only $1.54. 200 F. Supp. at 367.

79. Plaintiffs in *Hubbard* sought punitive damages on the basis of defendant's breach of contract. Brief for Appellant at 28, Hubbard v. Allied Van Lines, Inc., 540 F.2d 1224 (4th Cir. 1976), but the court's failure to consider this claim in the opinion evidences the amount of credence generally given to such an argument.

states in conclusory terms that this distinction is not valid,[80] but the court could have supported its conclusion by citing the language of other provisions of the Motor Carrier Act. The Act regulates transportation of both freight and people[81] and makes certain provisions expressly applicable to only one of these categories.[82] It is significant that parts of section 216 apply only to "carrier[s] of passengers"[83] or "carrier[s] of property"[84] while section 216(d) contains no such limitation.[85]

Although the section 404(b) overbooking cases provide a valid argument for implication of a remedy in *Hubbard*, the Fourth Circuit could have augmented the persuasiveness of its decision on this issue by also considering the impact of the four factors set out by the Supreme Court in *Cort v. Ash*.[86] Such an analysis would have been highly relevant because the section 404(b) cases upon which the *Hubbard* court placed exclusive reliance either preceded the Supreme Court's tightening of the implication doctrine in *Cort* or ignored that decision altogether.

The requirement, first stated in *Texas & Pacific Railroad* and restated in *Cort*, that plaintiff be "one of the class for whose *especial* benefit the statute was enacted,"[87] presents no real problem for implication of a shipper's action under section 216(d). The Motor Carrier Act represents "a pervasive legislative scheme governing the relationship between the plaintiff class and the defendant class . . ." and thus places a shipper in the benefited position.[88]

The second *Cort* factor, the existence of legislative intent either to create or to deny a remedy, is not so readily overcome. While the legislative history, like the Motor Carrier Act itself, is silent on the matter of a private damage remedy in favor of a shipper for a violation of section 216(d)'s nondiscrimination provision, the Supreme Court's holding in *T.I.M.E.* could be advanced to support a conclusion that congressional silence evidenced an intent that there be no implied remedy.[89] Discrimination in service, like charging unjust rates, is pro-

80. 540 F.2d at 1226.
81. 49 U.S.C. § 302(a) (1970).
82. *See* statutes cited notes 83 & 84 *infra*.
83. 49 U.S.C. § 316(a) (1970).
84. *Id.* §§ 316(b), (c).
85. *Id.* § 316(d) is applicable to "any common carrier by motor vehicle."
86. 523 F.2d at 335-36; *see* text accompanying note 43 *supra*.
87. 241 U.S. at 39.
88. Cort v. Ash, 422 U.S. 66, 82 (1975).
89. *See* text accompanying notes 44-50 *supra*.

hibited and a private right of action is expressly provided to redress such a violation in Parts I (railroads)[90] and III (water carriers)[91] of the Interstate Commerce Act. However, the Fourth Circuit could possibly have escaped from the meaning that *T.I.M.E.* drew from congressional silence by finding an expression of legislative intent in the 1965 amendment to Part II of the Interstate Commerce Act (motor carriers) that expressly provides the remedy sought by plaintiff in *T.I.M.E.*[92] While this amendment only provides a remedy for overcharges, it could nevertheless be viewed as expressing an intent that the remedies under Part II be the same as those provided in Parts I and III of the Interstate Commerce Act.[93]

An examination of the third *Cort* factor, whether implication is "consistent with the underlying purposes of the legislative scheme,"[94] supports the result reached in *Hubbard*. The Motor Carrier Act was passed in order to regulate a rapidly growing industry. The aim of regulation was not only to protect carriers from the unbridled competition of other carriers and the railroads from the competition of an unregulated mode of transport, but also to protect shippers from being damaged by the conditions that chaotic competition nurtured.[95] Thus, implication of a remedy in favor of a shipper under section 216(d) furthers a primary purpose of the Act.

Whether *Hubbard* implied a remedy that is "traditionally relegated to state law, in an area basically the concern of the States"[96] and thus violated the final *Cort* requirement is unclear. *Polansky* indicated

90. 49 U.S.C. § 3(1) (1970) prohibits discrimination and *id.* §§ 8 & 9 expressly provide for an action in the federal courts.

91. *Id.* § 905(c) prohibits discrimination and *id.* § 908(c) expressly provides an action in the federal courts.

92. Pub. L. No. 89-170, 79 Stat. 648 (1965) (codified in scattered sections of 49 U.S.C.).

93. *See* Letter from Charles A. Webb to Oren Harris, March 29, 1965, *reprinted in* [1965] U.S. CODE CONG. & AD. NEWS 2939. This letter was written by the chairman of the Interstate Commerce Commission at the request of the House of Representatives Committee on Interstate and Foreign Commerce to justify the amendment of 49 U.S.C. § 304(a). The letter stated:

> The Motor Carrier industry has attained stature and stability as one of the chief agencies of public transportation, handling a substantial volume of the Nation's traffic. It seems appropriate, therefore, that shippers should have the same rights of recovery against motor carriers as they have against rail and water carriers for violations of the act.

Id. at 2940.

94. 422 U.S. at 78.

95. S. Rep. No. 482, 74th Cong., 1st Sess. 1 (1935). The report stated that "[the] present chaotic transportation conditions are not satisfactory to investors, labor, shippers, or the carriers themselves." *Id.* at 2.

96. Cort v. Ash, 422 U.S. 66, 78 (1975).

that the overbooking cases complied with this stricture because "federal regulatory control" in the area of boarding priority is total and thus without implication of a federal remedy a bumped passenger would have no action at all.[97] The total control exercised by the Civil Aeronautics Board distinguishes the section 404(b) cases from section 216(d) as there is no similar degree of control exercised by the Interstate Commerce Commission. This difference, however, should not lead to the automatic conclusion that implication is improper under section 216(d). The *Cort* opinion itself cast a significant degree of doubt on the importance of this factor in relation to the first three by recognizing that in some instances state law will be supplemented by implied federal actions in order to avoid frustration of the congressional intent behind the particular statute.[98]

While the *Hubbard* court's finding that a private cause of action is implicit in section 216(d) is highly significant, the court left the ultimate importance of its decision in doubt by choosing not to resolve the question of what constitute the proper elements of this cause of action.[99] It is clear from the text of section 216(d) that unjust discrimination must be alleged, but this conclusion merely leads to a more difficult inquiry into what is meant by unjust discrimination. *Hubbard*'s reference to the discussion in *Nader* of the elements of a section 404(b) cause of action[100] is not directly helpful. *Nader* held that a prima facie case of unjust discrimination is established when an air carrier violates its own priority rules and boards a passenger with a priority lower than that of the person claiming discrimination.[101] Since motor carriers are not required to establish priority rules, a section 216(d) action cannot be alleged in these terms. However, *Polansky* illuminates this problem in relation to section 216(d) by interpreting the *Nader* requirement that priority rules be violated as meaning that denial of access to the carrier's facilities is necessary to make out a case of unjust discrimination.[102] Thus, plaintiffs in *Hubbard* face the prospect that, on remand, the district court will hold that they failed to allege the elements of a section 216(d) cause of action because the conduct that they attribute to defendant amounts to a poor performance

97. 523 F.2d at 338.
98. 422 U.S. at 85.
99. 540 F.2d at 1226 n.1.
100. *Id.*
101. 512 F.2d at 538. *See* note 57 *supra.*
102. 523 F.2d at 336.

of its contractual duties but not a discriminatory denial of access to its transport facilities.

An analysis of the *Hubbard* decision on the issue of punitive damages focuses on the court's conclusion that section 404(b) damages precedent is applicable and controlling. The Fourth Circuit presents a strong case based on statutory interpretation and policy considerations for not precluding punitive damages on the basis of the Carmack Amendment.[103] In contrast, the court's basis for distinguishing its holding in *Chandler* is not so convincing. Although *Chandler* did in fact involve a common law rather than a statutory claim, this distinction should not control the availability of punitive damages in light of the fact that the theoretical justification for such an award in a statutory claim is that punitive damages are available in a common law action.[104] A better reason for distinguishing *Chandler* is that it does not really concern the issue of punitive damages.[105]

The *Hubbard* court's recognition of an implied cause of action with a possibility of punitive damages under section 216(d) was a reasonable exercise of judicial interpretation of a statute. Implication of this remedy promotes the just result that the rights of persons subjected to unjust discrimination in contravention of the public policy expressed in section 216(d) are recognized and safeguarded in the federal courts. The critical weakness of the *Hubbard* decision, however, is its failure to perceive that, although implication of a section 216(d) cause of action is valid, the facts of the case before the court clearly revealed that there was no discrimination. Instead of avoiding the question of the elements of the cause of action, the Fourth Circuit should have held that discriminatory denial of access to the carrier's facilities is necessary to constitute discrimination under section 216(d).

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103. 540 F.2d at 1247-48.

104. *See* text accompanying note 69 *supra.*

105. The facts of the *Chandler* case centered around the existence of a disputed bill of lading. Punitive damages were not mentioned until the next to the last paragraph of the opinion where the court stated in conclusory terms that they were unavailable and cited the Carmack Amendment and four cases. 374 F.2d at 137. None of these cases involved allegations of malicious conduct on the part of carriers and requests for punitive damages, but rather all were concerned with the general rule for computing the shipper's actual damages when a carrier has made faulty performance of his contractual obligations. The cases cited in *Chandler* are Gulf, C. & S.F. Ry. v. Texas Packing Co., 244 U.S. 31 (1917); Stackpole Motor Transport, Inc. v. Malden Spinning & Dyeing Co., 263 F.2d 47 (1st Cir. 1958); Missouri Pac. R.R. v. Rouw Co., 258 F.2d 445 (5th Cir. 1958); Illinois Cen. R.R. v. Zucchero, 221 F.2d 934 (8th Cir. 1955).

Taxation—Promissory Notes Held Not To Be Appropriate Form of "Payment" to Profit-Sharing Plan

Section 404(a) of the Internal Revenue Code[1] allows an employer to deduct on its tax return payments made to a qualified pension or profit-sharing plan, within limits as to the amount.[2] Under section 404(a)(6), this deduction is available if the liability is incurred within the taxable year and actual payment is made within the deadline for filing tax returns;[3] however, uncertainty has arisen as to what satisfies the "payment" requirement of this section of the Code. Recently the Seventh Circuit Court of Appeals, in *Don E. Williams Co. v. Commissioner*,[4] held that delivery of a secured, interest-bearing, demand promissory note within the period prescribed by statute to the trustees of a qualified employee profit-sharing plan established by a company did not entitle the company to a deduction for the contribution under the statute.[5]

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1. I.R.C. § 404(a) reads as follows:

> (a) **General Rule.**—If contributions are paid by an employer to or under a stock bonus, pension, profit-sharing, or annuity plan, or if compensation is paid or accrued on account of any employee under a plan deferring the receipt of such compensation, such contributions or compensation shall not be deductible under section 162 (relating to trade or business expenses) or section 212 (relating to expenses for the production of income); but, if they satisfy the conditions of either of such sections, they shall be deductible under this section, subject, however, to . . . limitations as to the amounts deductible in any year.

2. The limits as to amount are set forth in I.R.C. § 404(a)(1) (pension trusts), § 404(a)(2) (employees' annuities) and § 404(a)(3) (stock bonus and profit-sharing trusts).

3. I.R.C. § 404(a)(6) provides as follows:

> (6) **Time when contributions deemed made.**—For purposes of paragraphs (1), (2), and (3), a taxpayer shall be deemed to have made a payment on the last day of the preceding taxable year if the payment is on account of such taxable year and is made not later than the time prescribed by law for filing the return for such taxable year (including extensions thereof).

Before 1974, I.R.C. § 404(a)(6) applied only to accrual basis taxpayers:

> (6) **Taxpayers on accrual basis.**—For purposes of paragraphs (1), (2), and (3), a taxpayer on the accrual basis shall be deemed to have made a payment on the last day of the year of accrual if the payment is on account of such taxable year and is made not later than the time prescribed by law for filing the return for such taxable year (including extensions thereof).

Int. Rev. Code of 1954, 68A Stat. 138, 141.

The change in the language of § 404(a)(6) was included in the Employee Retirement Income Security Act of 1974 (ERISA), Pub. L. No. 93-406, 88 Stat. 829 (codified in scattered sections of 5, 18, 26, 29, 31, 42 U.S.C.). As a result, cash basis taxpayers are allowed the same grace period for making payment previously afforded only accrual basis taxpayers.

4. 527 F.2d 649 (7th Cir. 1975), *aff'd*, 45 U.S.L.W. 4160 (U.S. Feb. 22, 1977).

5. *Id.* at 653. *See generally* Brandis, *The Treatment Accorded Promissory Notes Under the Federal Income Tax*, 52 N.C.L. REV. 93 (1973).

For each of three taxable years[6] the Williams Company, an accrual basis taxpayer, had entered a liability on its books for contributions to the employee profit-sharing fund established by the company.[7] Instead of making payment in cash before expiration of the statutory grace period, the company in each of the three years delivered to the trustees a secured, interest-bearing demand note for the amount of the liability.[8] Collateral for the notes consisted of shares of stock in the company and interests of two of the shareholders of the plan.[9] The value of the collateral, it was stipulated, exceeded the face amount of the notes for each of the three taxable years;[10] nevertheless, the Seventh Circuit, affirming the Tax Court,[11] reasoned that the statute contemplates a form of "payment" more akin to cash than a promissory note and accordingly upheld the Commissioner's disallowance of the deduction.[12]

A primary source of authority utilized by the *Williams* court was a 1932 Supreme Court decision, *Eckert v. Burnet*,[13] which established conclusively that the issuance of a cash basis taxpayer's promissory note is not the equivalent of payment.[14] Thus, the issue presented to the court was whether, in light of *Eckert*, accrual basis taxpayers are to be distinguished from cash basis taxpayers with regard to promissory notes; the *Williams* court could find no such distinction. In arriving at this conclusion, the court cited a 1948 House Ways and Means Committee Report that stated, "[a]n employer on the accrual basis of accounting may under existing law deduct contributions *actually paid* within the first 60 days of the subsequent year."[15] The Committee's use of the phrase "actually paid" intimated a congressional intent to require a "liquid form of payment and not a promissory note . . . ."[16] On the basis of this legislative guidance, coupled with the absence of any language in the statute distinguishing cash and accrual basis taxpayers, *Williams* refused to follow the holdings of courts of

6. The taxable years involved were 1967, 1968 and 1969.
7. 527 F.2d at 650.
8. *Id.*
9. *Id.*
10. *Id.*
11. The Tax Court opinion is reported at 62 T.C. 166 (1974).
12. 527 F.2d at 651.
13. 283 U.S. 140 (1931).
14. *Id.* at 141.
15. 527 F.2d at 651 (quoting H.R. REP. No. 2087, 80th Cong., 2d Sess. 13 (1948)) (emphasis in original).
16. *Id.*

appeals of three other circuits and ruled instead that promissory notes are not an acceptable form of payment.[17]

The controversy concerning the use of promissory notes as an acceptable medium of payment to pension and profit-sharing plans first arose in 1949 under the statutory predecessor[18] to section 404(a)(6). In *Logan Engineering Co.*[19] the Tax Court found that the issuance and delivery of negotiable, interest-bearing notes was not a sufficient mode of payment.[20] Since *Logan*, three federal courts of appeals have addressed the issue and all three have overruled the Tax Court's position.[21] The first reversals came in 1953 in the companion cases of *Sachs v. Commissioner* and *Slaymaker v. Commissioner*,[22] two cases with essentially identical fact patterns in which the taxpayers delivered a "negotiable demand note made payable at a bank to the trustee of its exempt employees' pension trust."[23] The Third Circuit accepted the promissory note as payment in *Slaymaker* because of undisputed evidence of the company's solvency; the court remanded the *Sachs* case for a factual determination by the Tax Court of whether that corporation was solvent.[24] In *Sachs* the court found that on the basis of cases interpreting another section of the Code[25] in which promissory notes were deemed adequate forms of payment, " 'payment' or 'paid' does not invariably mean 'in cash.' "[26] The court reasoned that negotiable notes are, under contemporary commercial law, very similar to checks, which are undoubtedly an acceptable form of payment.[27]

Undaunted by these reversals, the Tax Court held firm to its

17. *Id.* at 653.

18. Int. Rev. Code of 1939, ch. 1, § 23(p)(1), 53 Stat. 15, *as amended by* Revenue Act of 1942, Pub. L. No. 77-753, 56 Stat. 865 (similar provisions now contained in I.R.C. § 404(a)).

19. 12 T.C. 860 (1949).

20. *Id.* at 868.

21. Wasatch Chem. Co. v. Commissioner, 313 F.2d 843 (10th Cir. 1963); Time Oil Co. v. Commissioner, 258 F.2d 237 (9th Cir. 1958); Sachs v. Commissioner, 208 F.2d 313 (3d Cir. 1953). Additionally, two federal district courts have reached similar conclusions: Advance Constr. Co. v. United States, 356 F. Supp. 1267 (N.D. Ill. 1972); Steele Wholesale Builders Supply Co. v. United States, 226 F. Supp. 82 (N.D. Tex. 1963).

22. The two cases were combined and the decision for both is reported at 208 F.2d 313 (3d Cir. 1953).

23. *Id.* at 314.

24. *Id.* at 316.

25. Int. Rev. Code of 1939, ch. 1, § 24(b)(1)(A), 53 Stat. 16 (similar provisions now contained in I.R.C. § 267).

26. 208 F.2d at 315.

27. *Id.*

position when the issue next arose in 1956 in *Time Oil Co.*[28] Once again the Tax Court was reversed—this time by the Ninth Circuit Court of Appeals.[29] When the issue was presented again in 1962 in *Wasatch Chemical Co.*[30] the Tax Court attempted to distinguish *Slaymaker* and *Time Oil Co.* from the facts in *Wasatch* on the ground that the notes given in the two earlier cases were demand notes, whereas the notes given in *Wasatch* were five year term notes.[31] Consequently, the court held that the term notes did not possess sufficient similarity to a check as did the demand notes in *Slaymaker.*[32] This distinction did not persuade the Tenth Circuit Court of Appeals—the Tax Court was again reversed upon appeal.[33] In spite of these reversals, the Tax Court in *Williams* reaffirmed the rationale that it first enunciated in *Logan.*[34] Finally, in *Williams* the Tax Court and the Commissioner reaped the fruits of their perseverence—an affirmance by the Seventh Circuit Court of Appeals.[35]

Other than the 1948 House Ways and Means Committee Report cited by *Williams,*[36] there is no congressional guidance on the issue of what constitutes payment for the purposes of section 404(a)(6). As a result courts have been forced to choose between strict statutory construction on the one hand, exemplified by the *Eckert* court's interpretation of "payment,"[37] and a more lenient result brought about through liberal construction on the other hand, as was done in the Third, Ninth and Tenth Circuits.[38] The *Williams* court opted for a strict statutory construction of the "payment" requirement, finding no basis in the statute to distinguish between cash and accrual method taxpayers regarding the use of promissory notes as an acceptable form of payment.[39] *Eckert v. Burnet* had established the notion that, with regard to cash method taxpayers,[40] promissory notes are not an appropriate mode of "payment" in the context of a deduction for a bad debt: "[a] dededuction may be permissible in the taxable year in which the *peti-*

28. 26 T.C. 1061 (1956).
29. Time Oil Co. v. Commissioner, 258 F.2d 237 (9th Cir. 1958).
30. 37 T.C. 817 (1962).
31. *Id.* at 819-20.
32. *Id.*
33. Wasatch Chem. Co. v. Commissioner, 313 F.2d 843, 847 (10th Cir. 1963).
34. 62 T.C. at 168.
35. *See* text accompanying notes 4, 5, 10-12 *supra.*
36. 527 F.2d at 651 (quoting H.R. REP. No. 2087, 80th Cong., 2d Sess. 13 (1948)).
37. Eckert v. Burnet, 283 U.S. 140, 141-42 (1931).
38. *See* text accompanying notes 21-35 *supra.*
39. 527 F.2d at 650-51.
40. 283 U.S. 140 (1931), discussed in text accompanying notes 13 & 14 *supra.*

tioner pays cash."[41] Thus, according to the Seventh Circuit in *Williams*, if accrual method taxpayers are to be treated like cash method taxpayers, and if promissory notes are not a proper form of payment for cash method taxpayers, it logically follows that the use of promissory notes is also forbidden for accrual method taxpayers.[42]

The notion of similarity of treatment between cash and accrual method taxpayers under section 404(a)(6), as presented by the *Williams* court, is bolstered by the fact that in other sections of the Code in which a distinction between the two types of taxpayers is intended the language "paid or accrued" or "paid or incurred" is normally employed.[43] By contrast, in section 404(a)(6) this language is missing; the statute merely uses the term "paid." The *Williams* court's distinction based on contrasting terminology is by no means perfect, however. In at least one other section of the Code in which the term "paid" is used,[44] the courts have allowed promissory notes to satisfy the payment requirement.[45] The Tax Court has attempted to distinguish between the two situations in that the sections allowing promissory notes as "payment" merely limit a deduction already granted, whereas section 404(a)(6) is an affirmative grant of a deduction and as such is to be more strictly construed[46]—further indication that something more resembling cash than a promissory note must be offered as payment.[47]

Unfortunately the court's reliance on this definition of "paid" or "payment" does not withstand close examination; even the Tax Court has admitted that the definition of payment that requires liquidation of a liability in cash does not foreclose the use of checks as an acceptable method of payment.[48] No one would seriously argue that a check is anything other than a substitute form of cash, and contemporary commercial law reflects this assumption. The inconsistency of the Tax Court's position, which rejects promissory notes as payment while accepting other forms of noncash substitutes as payment, is illustrated

41. 283 U.S. at 141-42 (emphasis added).

42. *See* 527 F.2d at 651.

43. *E.g.*, I.R.C. §§ 163(a), 164(a), 174(a)(1), 175(a), 212, 216(a).

44. Int. Rev. Code of 1939, ch. 1, § 24(c)(1), 53 Stat. 17 (now I.R.C. § 267).

45. *See, e.g.*, Anthony P. Miller, Inc. v. Commissioner, 164 F.2d 268 (3d Cir. 1947) (promissory note given by a corporation to one of its officers as salary constituted payment of the salary).

46. The Tax Court first enunciated this position in Logan Eng'r Co., 12 T.C. 860, 868-69 (1949).

47. *See* 527 F.2d at 651.

48. *E.g.*, in Wasatch Chem. Co., 37 T.C. 817 (1962), the Tax Court stated that "[t]he act of payment for tax purposes, and generally, may be accomplished by the transfer of funds directly or by check." *Id.* at 819.

further in a decision rendered by the Tax Court in 1958,[49] nine years after its first promissory note decision[50] under section 404(a)(6)'s predecessor. In *Colorado National Bank*[51] the taxpayer transferred a piece of real property to a qualified pension plan in order to satisfy its obligation for the taxable year in question.[52] The Commissioner relied on the Tax Court's earlier decisions involving promissory notes to argue that the transfer of land was not a payment in cash or its equivalent as arguably required by the statute, and accordingly disallowed the deduction.[53] Rejecting the Commissioner's argument, the Tax Court found that the taxpayer transferred an income-producing asset with an ascertainable value to the pension trust and that this payment was "within the words and intent of the applicable statutory provisions."[54] The Seventh Circuit made no mention of *Colorado National Bank* in the *Williams* decision.

Colorado National Bank points out in the context of a transfer of land what the three circuit courts[55] that had ruled on the promissory note issue prior to *Williams* had emphasized: in certain situations, promissory notes, like a piece of land or cash or a check, do indeed have a "value" that can be ascertained.[56] Moreover, promissory notes also have income-producing capabilities; in two of these cases the notes paid interest until they were satisfied.[57] Indeed in situations involving negotiable demand notes, there is probably a closer "cash equivalency" than with a parcel of land.

As suggested in *Colorado National Bank* and by the Third, Ninth and Tenth Circuits, the most logical approach to the problem is not to emphasize the form of payment, but rather to inquire whether anything of value has been transferred; such a determination presents no insurmountable problems. In *Slaymaker*, for example, the circuit court found that the notes were worth their face amount.[58] This finding was based on the fact that the corporation was solvent and the notes were adequately secured.[59] Additionally, the same court remanded the

49. Colorado Nat'l Bank v. Commissioner, 30 T.C. 933 (1958).
50. *See* note 46 and accompanying text *supra*.
51. 30 T.C. 933 (1958).
52. *Id.* at 934.
53. *Id.* at 934-35.
54. *Id.* at 936.
55. *See* note 21 and accompanying text *supra*.
56. 30 T.C. at 935-36.
57. Wasatch Chem. Co. v. Commissioner, 313 F.2d 843, 844 (10th Cir. 1963); Sachs v. Commissioner, 208 F.2d 313, 314 (3d Cir. 1953).
58. 208 F.2d at 314.
59. *Id.*

Sachs case because no finding was made below on the "value" question.[60] The *Slaymaker-Sachs* court was not willing to allow promissory notes per se to satisfy the "value" requirement; instead there was an inquiry into the underlying worth of the notes.

This "value" approach, first taken by the Third Circuit Court of Appeals in *Sachs* and *Slaymaker*, followed by the Ninth and Tenth Circuits, and subsequently rejected in *Williams* is an eminently workable and sensible approach. As was suggested by the circuit court in *Sachs*, findings of fact could easily be made to determine if the notes had any value. This approach allows the best of both worlds. When a solvent corporation is temporarily caught in a cash-flow squeeze, contributions could still be made in the form of notes; the pension plans would not have to be slighted in that year and the corporation could take a deduction for its contribution. On the other hand, when the notes are of no value or worth less than their face value, the deduction would properly be disallowed or reduced. Certainly such an approach does not require an overly strained interpretation of the statute, and the legislative history on this issue is so scanty as to be meaningless.

Aside from the strict statutory construction applied by the *Williams* court, an obvious underlying concern throughout these cases is the protection of the pension and profit-sharing plans from employer contributions of worthless promissory notes. Yet the fact remains that under the law, trustees of pension and profit-sharing plans are perfectly free to invest in the stocks and securities of the employer corporation.[61] Apparently, such investments are a common practice in many of the large pension plans.[62] Hence, the value of the plan in such situations depends ultimately upon the solvency of the corporation. If the corporation's promissory notes are of little or no value, then surely its securities are not very valuable, and the plan remains in jeopardy. Allowing trustees to hold securities but not promissory notes makes

60. *Id.* at 316.

61. Rules concerning investments in employer securities by pension and profit-sharing trusts were tightened considerably with the passage of ERISA, cited note 3 *supra*. Nevertheless, pension and profit-sharing plans may still invest in employer securities, within the percentage limitations set forth in § 407(a)(2) of ERISA, 29 U.S.C. § 1107 (a)(2) (Supp. V 1975), if the security is an "employer security" as defined in ERISA § 407(a)(1)(D)(5), 29 U.S.C. § 1107(a)(1)(D)(5) (Supp. V 1975). *See* Sollee & Shapiro, *(ERISA) Profit-sharing Plans—Qualification*, 310 TAX MANAGEMENT A-40 (1975); Sollee & Shapiro, *(ERISA) Pension Plans—Qualification*, 309 TAX MANAGEMENT A-44 (1975).

62. *See* D. MCLAUGHLIN, THE EXECUTIVE MONEY MAP 11 (1975).

little sense if the ultimate goal is to protect these plans and ensure their survival.

The issue in the *Williams* case is a close one and perhaps should receive specific congressional attention; in the absence of more illuminating congressional guidance, however, encouragement of pension and profit-sharing plans and the preservation of their integrity demand a judicial definition of "payment" that includes promissory notes within its ambit—a broader definition than that adhered to for almost thirty years by the Tax Court and, more recently, by the Seventh Circuit. Admittedly this result would have to be achieved at the expense of a strict statutory construction; however, this broader definition of "payment" would be tempered by an inquiry into the underlying worth of the notes as suggested by the *Slaymaker-Sachs* approach. This result would encourage more corporations to adopt or retain pension plans, which is, after all, the basic purpose of section 404(a).

ALLEN W. WOOD III

Zoning — Adjudication by Labels: Referendum Rezoning and Due Process

In recent years, the use of procedural devices providing for direct citizen participation[1] in land use planning decisions has proliferated.[2] The use of these devices to regulate change in land use patterns previously established by zoning ordinances[3] has given rise to due process

1. Popular participation is facilitated by the availability of two devices: the initiative and the referendum. The initiative permits citizens to legislate directly by having a proposed measure placed on the ballot and submitted to a popular vote. The referendum permits citizens to have measures already approved by a legislative body submitted to voter review. The operation of these devices is usually conditioned on the receipt of appropriate petitions requesting the particular initiative or referendum. Comment, *The Initiative and Referendum's Use in Zoning*, 64 CALIF. L. REV. 74, 74 nn.1 & 2 (1976).

2. *See, e.g.*, City of Scottsdale v. Superior Court, 103 Ariz. 204, 439 P.2d 290 (1968); San Diego Bldg. Contractors Ass'n v. City Council, 13 Cal. 3d 205, 529 P.2d 570, 118 Cal. Rptr. 146 (1974), *appeal dismissed*, 96 S. Ct. 3184 (1976); Associated Home Builders v. City of Livermore, 41 Cal. App. 3d 677, 116 Cal. Rptr. 326 (Ct. App. 1974); West v. City of Portage, 392 Mich. 458, 221 N.W.2d 303 (1974); Bird v. Sorenson, 16 Utah 2d 1, 394 P.2d 808 (1964).

3. Land use restrictions imposed by a local zoning ordinance can be altered by the use of three procedures. When the application of zoning restrictions to a particular

challenges attacking such popular participation as an arbitrary and unreasonable exercise of the police power. The United States Supreme Court had not addressed itself to this issue in almost fifty years,[4] and its early decisions did not provide a meaningful due process test. In *Eastlake v. Forest City Enterprises, Inc.*[5] the Court confronted the question whether the imposition of a mandatory[6] referendum process on those seeking amendment of a comprehensive zoning ordinance was such an unreasonable exercise.[7] In upholding the referendum requirement by relying on state law and by reciting rather than analyzing the relevant federal precedent, the Court failed to provide a more precise due process measure of constitutionality. The decision strongly suggests, however, that rezoning by referendum will be upheld against similar future challenges, even when there is little or no support in the record to justify community-wide decisionmaking.

Plaintiff[8] in *Eastlake* brought suit in the Ohio Court of Common Pleas to challenge the constitutionality[9] of a newly enacted provision

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parcel is unusually harsh, a variance may be obtained from a local administrative body to waive or alter the restriction. 5 N. WILLIAMS, AMERICAN PLANNING LAW § 129.02 (1975). Also, a local ordinance may provide that certain uses, while not permitted as of right, may be allowed by special permit upon the approval of a local administrative body. The administrative body must evaluate the proposal according to specified criteria not necessarily related to hardship. *Id.* § 148.01. In addition, the zoning ordinance itself may be amended. *Id.* § 147.01. The initiative and referendum cannot be utilized to affect the availability of variances or special permits. The grant or denial of a request for a variance or special permit is an administrative act; the initiative and referendum are restricted in application to powers vested in the legislative body. *See, e.g.*, note 20 *infra*.

4. Until this year, the Court's most recent statement was to be found in Washington *ex rel.* Seattle Title Trust Co. v. Roberge, 278 U.S. 116 (1928).

5. 96 S. Ct. 2358 (1976).

6. The referendum provision involved in *Eastlake* is atypical in that the requirement of voter review is applied to an entire class of legislation, thereby obviating the need for gathering petitions to combat a legislatively approved amendment. *See* note 12 *infra*.

7. 96 S. Ct. at 2362-63. The court below stated the claim as follows: "[A]ppellant's narrow claim is that Eastlake's charter provision constitutes a delegation of legislative power to the people, and *as such* violates the requirement that the police powers be exercised in a reasonable and unarbitrary fashion." Forest City Enterprises, Inc. v. City of Eastlake, 41 Ohio St. 2d 187, 191, 324 N.E.2d 740, 744 (1975) (emphasis added).

8. Plaintiff was an Ohio corporation and the owner of an eight acre parcel of land situated in the city of Eastlake, Ohio. 96 S. Ct. at 2360.

9. Challenges were made on both state and federal constitutional grounds. In addition to the fourteenth amendment claim, plaintiff asserted that the ordinance was in violation of the referendum provisions of OHIO CONST. of 1851, art. II, § 1(f) (1912). Plaintiff also challenged the requirement of 55% voter approval, the requirement of having to bear the costs of the referendum, and the applicability of the referendum provision (which had been incorporated into the city charter only after its application for rezoning) to his request. 96 S. Ct. at 2361 nn.2-4.

of the Eastlake city charter[10] that required that plaintiff's request for rezoning[11] its property be submitted to a city-wide referendum after city council approval of the proposed change.[12] Both the court of common pleas and the Ohio Court of Appeals sustained the validity of the ordinance against the due process challenge.[13]

The Ohio Supreme Court reversed. After finding that the type of rezoning requested by plaintiff was a legislative function under Ohio law,[14] the court interpreted a line of United States Supreme Court due process cases from the early 1900's[15] to mean that "[a] reasonable use of property, made possible by appropriate legislative action, may not be made dependent upon the potentially arbitrary and unreasonable whims of the voting public."[16] Applying this test, the court found that the charter provision "blatantly delegated legislative authority"[17] in contravention of the due process clause of the fourteenth amendment.[18]

On certiorari, the United States Supreme Court reversed,[19] upholding the constitutionality of the charter provision on three grounds.

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10. EASTLAKE, OHIO CHARTER art. VIII, § 3 (1971), *quoted in* 96 S. Ct. at 2368 n.8.

11. Plaintiff had requested that its parcel be rezoned from industrial to multi-family, high-rise residential use. 96 S. Ct. at 2360; 41 Ohio St. 2d at 187, 324 N.E.2d at 742.

12. The new ordinance provides in pertinent part:

> [A]ny change to the existing land uses or any change whatsoever to any ordinance, or the enactment of any ordinance referring to other regulations controlling the development of land . . . cannot be approved unless and until it shall have been submitted to the Planning Commission, for approval or disapproval. That in the event the city council should approve any of the preceding changes, or enactments . . . it shall not be approved or passed by the declaration of an emergency, and it shall not be effective, but it shall be mandatory that the same be approved by a 55% favorable vote of all votes cast of the qualified electors of the City of Eastlake . . . .

96 S. Ct. at 2368 n.8.

13. 41 Ohio St. 2d at 188, 324 N.E.2d at 742. The Court of Common Pleas struck the cost-bearing provision. Defendant did not appeal this holding to the state supreme court, and plaintiff did not appeal the rejection of its contention that the ordinance could not be applied to its particular request. *Id.*

14. *Id.* at 189-90, 324 N.E.2d at 743.

15. Washington *ex rel.* Seattle Title Trust Co. v. Roberge, 278 U.S. 116 (1928); Thomas Cusack Co. v. City of Chicago, 242 U.S. 526 (1917); Eubank v. City of Richmond, 226 U.S. 137 (1912). The latter two are discussed in text accompanying notes 31-42 *infra.*

16. 41 Ohio St. 2d at 195, 324 N.E.2d at 746.

17. *Id.* at 196, 324 N.E.2d at 746.

18. Assuming that the Ohio Supreme Court properly interpreted the due process line of cases cited in note 15 *supra,* the result it reached does not necessarily follow. Since the charter had been amended *before* the city council approved plaintiff's rezoning proposal, it is arguable that the council action never "made possible" the land use proposed, but rather that it only "made possible" the necessity of a referendum.

19. Justices Brennan, Powell and Stevens dissented.

First, Chief Justice Burger, writing for the Court, interpreted the Ohio Constitution as reserving, rather than delegating, to the citizens of Ohio the referendum power over legislative affairs.[20] There having been no delegation of power, the Court reasoned, there was no delegation in violation of the due process clause.[21] Second, the Court accepted as binding for the purpose of its due process analysis the finding of the Ohio court that the rezoning process at bar was legislative in nature[22] and summarily concluded that the only due process doctrine available to plaintiff was that of freedom from an unreasonable zoning classification, as opposed to freedom from an unreasonable procedure for obtaining a (new) classification.[23] Finally, the Court distinguished the "standardless delegation of power" struck down in the due process cases relied on by the Ohio court from the Eastlake referendum process and its concomitant virtues.[24] While borrowing language from two recent federal decisions[25] to support this latter distinction, the Court failed to provide any factual analysis to demonstrate comparability between the case at bar and the cases it cited.

In dissent, Justice Stevens[26] ignored the delegation of power issue entirely, arguing instead that the decision whether to rezone[27] a particular parcel of land is, absent some evidence in the record of a potential for community-wide impact, adjudicative in nature.[28] He

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20. OHIO CONST. art. II, § 1(f) provides in part: "The initiative and referendum are hereby reserved to the people of each municipality on all questions which such municipality may now or hereafter be authorized by law to control by legislative action . . . ."

21. 96 S. Ct. at 2363. Although the language of art. II, § 1(f), quoted in note 20 *supra*, does suggest this interpretation, *see* Note, *Mandatory Referendum for Zoning Amendments—Unlawful Delegation of Legislative Power—Denial of Due Process*, 9 AKRON L. REV. 175, 183 (1975), it is arguable that the Ohio Supreme Court implicitly rejected this conclusion in its finding that a delegation had occurred. 41 Ohio St. 2d at 196, 324 N.E.2d at 746.

22. 96 S. Ct. at 2362.

23. *Id.* at 2363 (citing Euclid v. Ambler Realty Co., 272 U.S. 365 (1926)).

24. 96 S. Ct. at 2364-65.

25. James v. Valtierra, 402 U.S. 137 (1971); Southern Alameda Spanish Speaking Org. v. Union City, 424 F.2d 291 (9th Cir. 1970). The latter is discussed in text accompanying notes 55-61 *infra*.

26. Justice Brennan joined with Justice Stevens in dissent. Justice Powell wrote a separate dissenting opinion.

27. Both Justice Stevens and the Chief Justice relied heavily on state court decisions to support their respective legislative/non-legislative dichotomies. 96 S. Ct. at 2362, 2366, 2370. The significant distinction between the two views is that Justice Stevens would categorize according to the prospective impact of the rezoning, *id.* at 2371, while Chief Justice Burger would take a formalistic approach, adopting as controlling the state law determination, *id.* at 2362.

28. "I have no doubt about the validity of the initiative or the referendum as an

asserted that this conclusion should result regardless of the "legislative" label affixed to the activity by the state court.[29] Justice Stevens concluded that as an adjudicative mechanism, the referendum is an inappropriate device for disposition of the rezoning request because of its inherent inability to afford the applicant requisite procedural safeguards.[30]

Plaintiff's due process claim arose out of a line of Supreme Court cases starting with *Eubank v. City of Richmond*.[31] In *Eubank* the Court invalidated a city ordinance that permitted a limited number of neighboring property owners to mandate, by petition, the establishment of a building line, a line beyond which the owner could not build, on a specific parcel.[32] The unreasonableness of the ordinance, the Court found, rested in the ability of a few persons to exercise unchecked "control" over the property rights of another, control that might be occasioned by selfishness or whimsy.[33] The transfer of land use planning authority to area residents was thus stricken because of the small number of residents who could selfishly impose restrictions—an arrangement that has been disparagingly termed "an expression of neighborhood preference for restraints."[34]

Five years after *Eubank*, the Court decided *Thomas Cusack Co. v. City of Chicago*,[35] which added another dimension to the due process analysis. In *Cusack* the Court upheld a city ordinance that permitted a percentage of neighboring property owners to waive a billboard ban previously imposed by another provision of that ordinance.[36] Responding to plaintiff's assertion that *Eubank* was controlling precedent, the Court distinguished the neighborhood imposition of land use prohibitions from the neighborhood removal (or waiver) of such prohibitions.[37]

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appropriate method of deciding questions of community policy. I think it is equally clear that the popular vote is not an acceptable method of adjudicating the rights of individual litigants." *Id.* at 2371.

29. *Id.* at 2368.

30. These safeguards include a resolution "on the merits by reference to articulable rules" as well as an "impartial and qualified" decisionmaker. *Id.* at 2371.

31. 226 U.S. 137 (1912).

32. *Id.* at 141.

33. *Id.* at 144.

34. Southern Alameda Spanish Speaking Org. v. Union City, 424 F.2d 291, 294 (9th Cir. 1970).

35. 242 U.S. 526 (1917).

36. *Id.* at 527-28.

37. The former left the establishment of the building line untouched until the lot owners should act and then made the street committee the mere automatic register of that action and gave to it the effect of law. The ordinance in the case at bar absolutely prohibits the erection of billboards . . . but permits this

After *Cusack* then, both the nature of popular participation—waiver or imposition of restraints—and the number of persons allowed to participate are relevant due process concerns. Substantial tension exists, however, between these two factors. While the *Eubank* Court decried the potential for selfishness under the building line ordinance, the *Cusack* Court in upholding the billboard ordinance allowed such selfishness to prevail.[38] Furthermore, the ordinance in *Eubank* was viewed as an unreasonable exercise of the city's police power in part because of the city-wide inconsistency in land use policy that would result.[39] There is nothing to suggest less inconsistent results from the exercise of neighborhood power under the *Cusack* procedure.

Cusack may be seen as the pivotal case on the due process issue raised in *Eastlake*. To the extent that the imposition-waiver distinction drawn in *Cusack* is still good law,[40] it could be dispositive, since plaintiff in *Eastlake*, like plaintiff in *Cusack*, was arguably requesting the removal of a prohibition.[41] To the extent, however, that the *Cusack* Court contradicted *Eubank* by endorsing neighborhood land use policy-making *because* neighbors are those most affected, it suggests that a referendum on such a localized issue would be uniquely inappropriate: negotiation is impracticable and those who are affected in fact may not be able to control the decision.[42]

The vitality of *Eubank* and *Cusack*, however, has been drawn into question by another line of Supreme Court cases that applied the

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> prohibition to be modified with the consent of the persons who are to be most affected by such modification . . . . This is not a delegation of legislative power, but is . . . a familiar provision affecting the enforcement of laws and ordinances.

Id. at 531.

38. The concession by the Court that some land use planning decisions are most appropriately handled on an informal, neighborhood basis suggests that *Eubank* was wrongly decided. In both cases the relevant statutory schemes may be seen as providing a legal framework within which neighborhood negotiation may take place. *See* Ellickson, *Alternatives to Zoning: Covenants, Nuisance Rules, and Fines as Land Use Controls*, 40 U. CHI. L. REV. 681, 709-10 (1973).

39. 226 U.S. at 144.

40. At least one commentator has questioned the vitality of the *Cusack* holding. *See* Comment, *supra* note 1, at 98-99. *See also* text accompanying notes 43-54 *infra*.

41. *See* note 18 *supra*.

42. Both the Ohio and United States Supreme Courts included Washington *ex rel.* Seattle Title Trust Co. v. Roberge, 278 U.S. 116 (1928), in the line of early due process cases. Although both courts treated *Roberge*, in essence, as an affirmance of the *Eubank* decision, it is questionable whether the *Roberge* Court believed itself to be confronted with a similar due process issue. The zoning ordinance challenged by plaintiff in *Roberge* was struck down as a denial of due process. 278 U.S. at 122 (citing *Eubank*). In support of its statement that the ordinance permits constitutionally infirm motives to enter into neighborhood decisionmaking, however, the Court relied on Yick

former decisions in analyzing due process challenges to congressional delegations of authority. In *Carter v. Carter Coal Co.*[43] the Court, citing *Eubank* as primary authority,[44] struck down as an unlawful delegation of legislative authority an act[45] that gave a portion of the employers and employees in a single industry and in a defined district unchecked authority to set wage and hour standards for the entire industry in that district by vote.[46] The administrative authority with oversight responsibility was required to accept the resulting standards.[47]

Three years later, in *Currin v. Wallace*,[48] the Court, citing *Cusack*, upheld an act[49] that also required industry participation in the regulatory process, but that permitted referendum proceedings on specific decisions only *after* they were approved by the administrative authority.[50] The Court dismissed *Carter* as precedent, stating: "This is not a case where a group of producers may make a law and enforce it upon a minority . . . ."[51] In likening the *Currin* scheme for participation to the scheme involved in *Cusack*, the Court attempted to distinguish the *Carter* provisions on the basis of *Cusack*'s imposition-waiver dichotomy.[52] But this distinction is unpersuasive since industry participation was related to imposing restraints on the subject industry in both *Carter* and *Currin*. Rather, the difference rests in the control by the administrative authority of the alternatives that may be selected by industry vote. In *Currin*, unlike *Carter*, industry participation is limited to the approval of alternatives previously adjudged to be reasonable.[53]

Wo v. Hopkins, 118 U.S. 356 (1886). The ordinance struck down in *Yick Wo* was held invalid on *equal protection* grounds. 118 U.S. at 374. That the Court in *Roberge* was in actuality concerned with the particularly harsh treatment accorded the plaintiff is further borne out by the language of the ordinance, which appears to single out plaintiff's particular use for harsher treatment than other uses with which it was grouped before the ordinance was amended. 278 U.S. at 120 (footnote).

43. 298 U.S. 238 (1936).

44. *Id.* at 311-12.

45. Bituminous Coal Conservation Act, ch. 824, sec. 4, 49 Stat. 991 (1935). One purpose of this Act was to "stabilize the . . . industry and promote its interstate commerce . . . ." 298 U.S. at 278.

46. *Id.* at 283-84.

47. *Id.*

48. 306 U.S. 1 (1939).

49. Tobacco Inspection Act, ch. 623, sec. 5, 49 Stat. 731 (1935) (current version at 7 U.S.C. §§ 511-517 (1970)). This Act was designed to bring stability into the interstate tobacco market and thereby protect producers. The Act conferred on the Secretary of Agriculture the power to designate warehouses for tobacco inspection. 306 U.S. at 5-6.

50. *Id.* at 6.

51. *Id.* at 15-16.

52. *Id.* at 15; *see* text accompanying notes 35-41 *supra.*

53. *Cf.* McManus v. CAB, 286 F.2d 414, 419 (2d Cir.), *cert. denied*, 366 U.S. 928

These cases suggest an alternative to the imposition-waiver due process analysis of *Cusack*: a "supervised participation," under which popular participation in land use planning is acceptable, even if use restraints result, as long as it is controlled to insure that the decisions reached are consistent with an externally established policy. The *Eastlake* case provided the Supreme Court with an excellent opportunity to rule on the applicability of supervised participation as an alternative due process approach in the area of land use decisionmaking and to delimit the minimum acceptable standards for such practices.[54]

In recent years the Supreme Court has twice considered the constitutionality of mandatory referenda.[55] Since both cases involved equal protection challenges, however, the Court, while speaking favorably of the referendum as a land use planning device, has not been required to confront squarely the due process claim raised by plaintiff in *Eastlake*. A similar claim did confront the Ninth Circuit Court of Appeals in *Southern Alameda Spanish Speaking Organization [SASSO] v. Union City*.[56] In *SASSO* plaintiffs challenged a permissive[57] referendum that nullified the rezoning of a parcel that would have permitted the construction of federally financed low income housing.[58] The circuit court upheld the validity of the nullifying referendum,[59] distinguishing in broad terms the referendum process from the neighborhood preference cases.[60] The court thus adopted the *Eubank* due proc-

(1961) (administrative authority to disapprove agreements made between industry members).

54. *Eastlake* provides an excellent test case. Under the ordinance, referenda do not occur until the city council has approved the request; there is thus found the element of supervision. Council control is limited, however, because the ordinance does not provide for relief from the referendum process when the present zoning status of the parcel has become unreasonable due to changed circumstances. Therefore it is *not* within the council's supervisory powers to prevent a referendum from defeating what it believes to be a constitutionally compelled approval of a rezoning request. 96 S. Ct. at 2363; *see* note 12 *supra*. *See also* Hunter v. Erickson, 393 U.S. 385, 392 (1969); Spaulding v. Blair, 403 F.2d 862, 864 (4th Cir. 1968).

55. James v. Valtierra, 402 U.S. 137 (1971); Hunter v. Erickson, 393 U.S. 385 (1969); *see* text accompanying notes 74-78 *infra*.

56. 424 F.2d 291 (9th Cir. 1970).

57. A permissive referendum, unlike its mandatory counterpart, requires the presentation of a petition, signed by a specified number of qualified persons, for each specific issue on which a referendum is desired. *See, e.g., id.* at 293 n.3. There may be significant differences in terms of due process between a permissive and a mandatory referendum procedure. *See* Comment, *supra* note 1, at 98. This distinction, however, was overlooked by the Supreme Court in the *Eastlake* decision.

58. 424 F.2d at 291.

59. Appellants in *SASSO* also mounted an unsuccessful equal protection challenge to the referendum. *Id.* at 295-96.

60. *Id.* at 294.

ess measure—the number of persons participating—but ignored the *Cusack* waiver-imposition distinction as well as the supervised participation approach from the *Carter* and *Currin* cases, under either of which the permissive referendum might not have fared so well.[61]

Against this backdrop of multiple, and arguably conflicting, due process tests for the constitutionality of direct citizen participation in land use planning, the majority opinion in *Eastlake* is analytically inconclusive. Chief Justice Burger placed primary reliance on his interpretation of the Ohio Constitution to dispose of the Ohio Supreme Court's contention that an unlawful delegation occured under the Eastlake ordinance.[62] This interpretation provided the Court with a vehicle for disposing of the case without delimiting the utility or vitality of the various available due process tests.

The concept of supervised participation was the first test with which the Court attempted to deal. Responding to the Ohio Supreme Court's contention that the ordinance provided for inadequate legislative (council) control,[63] Chief Justice Burger did take note of federal court decisions concerned with congressional delegations to other authorities.[64] However, the cases to which he turned did not involve statutory requirements that make the implementation of policy decisions subject to approval by non-governmental persons, as was the case in *Currin.* Rather, the cases cited dealt more narrowly with the ability of the delegate itself to prescribe policy within definable boundaries.[65]

The majority, however, did provide more relevant commentary that evinces a pessimistic perspective on the quality of legislative supervision that would ensue, were such supervision required. Stating that requiring supervision as a matter of due process "sweeps too broadly" because the legislative body and the voters are equally likely to misapply or ignore appropriate standards,[66] the Court appears to have elimi-

61. Since a permissive referendum is not operative until after the rezoning request is granted, it is more clearly an attempt to (re-)impose a land use restraint than a referendum that is attached by statute to any rezoning approval. *See* note 18 *supra.*

62. *See* text accompanying notes 14-21 *supra.*

63. Forest City Enterprises, Inc. v. City of Eastlake, 41 Ohio St. 2d 187, 196, 324 N.E.2d 740, 746 (1975).

64. 96 S. Ct. at 2363 (citing Yakus v. United States, 321 U.S. 414 (1944), and Amalgamated Meat Cutters v. Connally, 337 F. Supp. 737 (D.D.C. 1971)).

65. Yakus v. United States, 321 U.S. 414, 419-20 (1944); Amalgamated Meat Cutters v. Connally, 337 F. Supp. 737, 743, 746-47 (D.D.C. 1971).

66. "Except as a legislative history informs an analysis of legislative action, there is no more advance assurance that a legislative body will act by conscientiously applying consistent standards than there is with respect to voters." 96 S. Ct. at 2363 n.10.

nated the very rationale relied on by the 1939 Court in distinguishing the *Currin* procedure from that held unconstitutional in *Carter*.[67] Furthermore, since the *Currin* facts suggested judicial approval of the supervised imposition of restraints, the apparent removal of the supervision requirement with respect to a city-wide referendum procedure suggests that neither the imposition *nor* the waiver of land use restraints by referendum is constitutionally infirm. That is to say, the imposition-waiver distinction drawn in *Cusack* is overruled.[68]

The Court, however, did not overrule *Cusack*. Instead, the imposition-waiver distinction was recited,[69] with Chief Justice Burger concluding that plaintiff in *Eastlake*, like plaintiff in *Cusack*, was seeking the waiver of a preexisting restraint: "No existing rights are being impaired; new use rights are being sought from the City Council. Thus, this case involves an owner seeking approval of a new use free from the restrictions attached to the land when it was acquired."[70] *Cusack*, however, did not approve of *referenda* as appropriate devices for the removal of land use restraints, but only of neighborhood decisionmaking by "the persons who are to be most affected by such modification."[71] Acceptance of the *Cusack* holding *in toto*, therefore, would seemingly require that the *Eubank* criticism of "narrow" delegations (*i.e.*, neighborhood preferences) be held inapplicable to the *Eastlake* facts.

Instead, the majority distinguished the *Eubank* neighborhood preference concept in upholding the *Eastlake* referendum procedure.[72] The Court thus ignored not only the imposition-waiver distinction it had just drawn from *Cusack*, but also the interrelationship of the *Eubank* and *Cusack* rationales.

In support of the neighborhood preference-referendum dichotomy that it invoked from *Eubank* (despite the contrary language in *Cusack*),

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67. *See* text accompanying notes 43-53 *supra*.

68. *See* text accompanying notes 35-41 *supra*.

69. 96 S. Ct. at 2364 n.12; *see* text accompanying note 37 *supra*.

70. 96 S. Ct. at 2364 n.13. In his dissenting opinion, Justice Stevens implicitly attacked the vitality of *Cusack* by arguing that the requirements of due process attach to the rezoning process with equal force whether additional restraint or additional freedom is at issue. *Id.* at 2367. *See also* Note, *Zoning—Due Process—The Adjudicative Decision Inherent in Tract Rezoning Requires the Decision-Maker to Adhere to Standards of Minimal Due Process*, 8 GA. L. REV. 254, 262 (1973).

71. 242 U.S. at 531; *see* note 38 *supra*.

72. "[T]he standardless delegation of power to a limited group of property owners condemned by the Court in *Eubank* and *Roberge* is not to be equated with decisionmaking by the people through the referendum process." 96 S. Ct. at 2364.

the Court quoted first from *SASSO*,[73] and then from *James v. Valtierra*,[74] the latter as a confirmation by the Court of the Ninth Circuit Court of Appeals decision in *SASSO*.[75] In *Valtierra*, the United States Supreme Court upheld a provision of the California Constitution that required a referendum on all proposed low rent public housing projects.[76] However, the *Eastlake* Court's reliance on *Valtierra* is inappropriate, because plaintiffs in *Valtierra* challenged the California provision on *equal protection*, not due process, grounds. Furthermore, in so construing the *Valtierra* opinion the Court overlooked two important distinctions between the facts of *Eastlake* on the one hand and *Valtierra* on the other. The language in the latter case approving community-wide policy making was supported by a record demonstrating that the rezoning would have an economic impact on the community at large.[77] Furthermore, the mandatory referendum procedure challenged in *Valtierra* was limited to a certain class of projects.[78] The scope of the impact of plaintiff's rezoning request in *Eastlake* was not similarly supported in the record.[79] In addition, the *Eastlake* procedure was applicable to *all* requests for rezoning by amendment of the comprehensive plan.[80]

The majority nevertheless concluded that plaintiff's particular rezoning request "would likely" have an impact similar to that held sufficient to sustain the *Valtierra* referendum.[81] However, the Court neither explicitly required such a finding nor limited the operation of the referendum procedure to instances in which such a finding could be made.[82] The result is a circular due process analysis suggesting a judicial reverence not heretofore apparent for the use of referenda in land use planning: the referendum is held superior to the neighborhood preference concept because it provides for community-wide

73. " 'A referendum, however, is far more than an expression of ambiguously founded neighborhood preference. It is the city itself legislating through its voters . . . .' " *Id.* (quoting Southern Alameda Spanish Speaking Org. v. Union City, 424 F.2d 291, 294 (9th Cir. 1970)).

74. A referendum " 'ensures that *all the people* of a community will have a voice in a decision which may lead to large expenditures of local governmental funds for increased public services . . . .' " 96 S. Ct. at 2364 (quoting James v. Valtierra, 402 U.S. 137, 143 (1971)) (emphasis added by Court).

75. *See* note 73 *supra*.

76. 402 U.S. 137, 139 & n.2 (1971).

77. *Id.* at 143 n.4.

78. *Id.* at 139 n.2.

79. 96 S. Ct. at 2368 n.10 (dissent).

80. *See* note 12 *supra*.

81. 96 S. Ct. at 2362 n.7; *see* Note, *supra* note 21, at 178.

82. 96 S. Ct. at 2371 (dissent).

policy making, and since community-wide policy making is involved, the referendum is an appropriate device.

The missing logical step—that the particular question at hand is one amenable to community-wide policy making—is provided, the Court reasoned, by the Ohio court's determination that rezoning by amendment is "legislative" in nature.[83] This adherence to the label affixed by the state court was attacked by Justice Stevens as an abrogation of the Court's responsibility to pursue an independent analysis of the application of federal constitutional safeguards.[84] It has been suggested by others that the labelling of rezoning requests as "legislative," "administrative" or "adjudicative" by state courts is a matter of form that does not correspond with either the prospective impact of the requested rezoning or the kinds of information to which the decisionmaker should be exposed.[85] Indeed, the Court's reluctance to ignore the legislative label appears to be contrary to accepted methods of due process analysis in other contexts: "In the assessment, apportionment and collection of taxes upon property within their jurisdiction the Constitution of the United States imposes few restrictions upon the States. *In the enforcement of such restrictions as the Constitution does impose this court has regarded substance and not form.*"[86] The failure of the Court in *Eastlake* similarly to disregard form and analyze the primary activity involved, *i.e.*, rezoning by amendment of a comprehensive plan, leaves the protection afforded to individual property owners by the due process clause wholly dependent on the formalities of state zoning law.

The reluctance of the Court to come to grips with the due process problems associated with the use of mandatory referenda in land use planning is disappointing for two reasons. First, the *Eastlake* opinion leaves open the possibility of subsequent litigation of the same due process issue, particularly if the claim arises in a state whose constitution will not provide the judicial refuge so readily accepted in this case. Second, counsel who relitigate the *Eastlake* due process issue

83. *Id.* at 2362.

84. *Id.* at 2368 (dissent).

85. *See* Comment, *Zoning Amendments—The Product of Judicial or Quasi-Judicial Action*, 33 OHIO ST. L.J. 130, 133 (1972). *See generally* Comment, *supra* note 1.

86. Londoner v. Denver, 210 U.S. 373, 385 (1908) (emphasis added). For examples of similar analyses that look to the substance of the activity in question, see Bi-Metallic Inv. Co. v. State Bd. of Equalization, 239 U.S. 441, 445-46 (1915); Powelton Civic Home Owners Ass'n v. HUD, 284 F. Supp. 809, 829 (E.D. Pa. 1968). *See also* South Gwinnett Venture v. Pruitt, 482 F.2d 389 (5th Cir. 1973), *cert. denied*, 416 U.S. 901 (1974).

must again contend with the conflicting case law, having received little guidance from the Court.

Such litigation, however, may be ill advised. In failing to provide a clearer due process approach, the Court has left unscathed the separate due process tests already enumerated. In the broad approval of the *Eastlake* procedure by comparison to the procedure upheld in *Valtierra*, the Court has strongly suggested that, if required, one or more of the tests will be utilized to defeat such a challenge.

Litigation resources may be more fruitfully expended by challenging such referenda on state law grounds. One approach would be to challenge the characterization of rezoning by plan amendment as legislative. If a different characterization is adopted by the state court, the state constitution may prohibit the application of referenda. Alternatively, referenda may be attacked as contrary to the spirit of consistent decisionmaking, if not the letter of procedural requirements, found in state zoning enabling legislation.[87]

If federal law is to be invoked, the issue may perhaps be framed more appropriately in terms of the deprivation of a meaningful hearing when a referendum is required, rather than in terms of the reasonableness of the referendum provision as an exercise of the police power. It must be noted, however, that a Supreme Court majority recently decided *not* to hear an appeal in one case[88] that would have challenged rezoning by initiative as a denial of such procedural due process requirements.[89] Nevertheless, Justice White's desire to hear that appeal, together with the frequent allusions of the three dissenting Justices in *Eastlake* to deprivations of "fundamental fairness" and especially with the willingness of Justices Stevens and Brennan to declare tract rezoning an adjudicative function on federal law grounds, suggests that at least four members of the Court may be willing to reconsider a procedural due process claim when an appropriate case arises.

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87. *See, e.g.*, Township of Sparta v. Spillane, 125 N.J. Super. 519, 525-26, 312 A.2d 154, 157-58 (Super. Ct. App. Div. 1973); Elkind v. City of New Rochelle, 5 Misc. 2d 296, 301-02, 163 N.Y.S.2d 870, 876-77 (Sup. Ct. Spec. T. 1957), *aff'd per curiam*, 5 N.Y.2d 836, 181 N.Y.S.2d 509, 155 N.E.2d 404 (1958). *But see* Johnston v. City of Claremont, 312 P.2d 300, 304-05 (1957), *vacated on other grounds*, 49 Cal. 2d 826, 323 P.2d 71 (1958). *See generally* authorities cited note 85 *supra*.

88. San Diego Bldg. Contractors Ass'n v. City Council, 13 Cal. 3d 205, 529 P.2d 570, 118 Cal. Rptr. 146 (1974), *appeal dismissed*, 96 S. Ct. 3184 (1976) (Brennan, White, JJ., dissenting).

89. *See* 44 U.S.L.W. 3042 (1975) (summary of case and questions presented to the Court).

The Editors of the *North Carolina Law Review* dedicate this issue to Frank R. Strong, Cary C. Boshamer University Distinguished Professor, upon his retirement from teaching at the University of North Carolina School of Law.