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Case Notes

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CONSTITUTIONAL LAW—Freedom of Speech—Dismissal of Public School Teacher for Symbolic Expression of Political Opinion in the Classroom Held Unconstitutional. James v. Board of Education, 461 F.2d 566 (2d Cir.), cert. denied, 409 U.S. 1042 (1972).

Charles James, a teacher of eleventh grade English, entered his classroom with a black armband around his sleeve as a symbol of his opposition to the Vietnam war. After repeated disobedience of orders to remove the armband, he was suspended.[1] Having appealed to the New York State Commissioner of Education, James, a probationary teacher, was granted an informal hearing before the Commissioner, who backed the Board of Education in the dismissal decision. In federal district court[2] James asserted a violation of the Civil Rights Act,[3] claiming that the school authorities had infringed his first amendment freedom of expression.[4] The district court granted the defendants' motion for summary judgment. On appeal, the United States Court of Appeals for the Second Circuit unanimously reversed.[5]

The circuit court dispensed with the appellees' res judicata argument rather quickly. Appellees had argued that the matter was already decided

1. James received a letter from the Board of Education of the district granting him permission to return to class with the proviso that he "engage in no political activities while in the school." He returned wearing his symbol of protest and was again suspended and subsequently dismissed under N.Y. Educ. Law § 3013(1)(a) (McKinney Supp. 1972). In relating the facts of the case without comment, the court of appeals noted the statement of the Commissioner of Education that while no reason need be offered for the dismissal of a probationary teacher, such dismissal must be "consistent with our basic Constitutional framework." James v. Board of Educ., 461 F.2d 566, 570 n.7 (2d Cir. 1972).

2. The action was initiated by James in the District Court for the Western District of New York against the Board of Education of Central District No. 1, the District Principal, the school Principal, and the President of the School District Board of Trustees. The decision was unreported.

3. 42 U.S.C. § 1983 (1970) provides: "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

4. The court disposed of the case without ever reaching the appellant's freedom of religion or equal protection claims. 461 F.2d at 571 n.12.

5. Id. at 576.

by the Commissioner of Education of New York State, a "judicial officer." The district court also concluded that James could not relitigate the matter because he had failed to appeal to the New York courts. Both reasons were found wanting. The circuit court ruled that appellant had exhausted state administrative remedies as required[6] and was not required to exhaust state judicial procedures.[7]

The Supreme Court has firmly held that freedom of expression is not an unqualified right:[8]

> The rights of free speech and assembly, while fundamental in our democratic society, still do not mean that everyone with opinions or beliefs to express may address a group at any public place and at any time.[9]

Furthermore, the early Supreme Court standard for permissible restriction of the freedom was weighted heavily in favor of the state. If the legislature had reason to believe that some particular expression would tend to conflict with a government objective, it could be prohibited.[10] Since this test afforded practically no protection to the individual from government interference with his freedom of speech, it was abandoned.[11] Its replacement was the "clear and present danger" test enunciated by Mr. Justice Holmes in *Schenck v. United States*:[12]

> The question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent.[13]

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6. Eisen v. Eastman, 421 F.2d 560 (2d Cir. 1969), cert. denied, 400 U.S. 841 (1970).

7. 461 F.2d at 570 citing Monroe v. Pape, 365 U.S. 167 (1961); Rodriguez v. McGinnis, 456 F.2d 79 (2d Cir. 1972) (en banc); Sostre v. McGinnis, 442 F.2d 178, 182 (2d Cir. 1971) (en banc), cert. denied, 404 U.S. 1049 (1972).

8. Chaplinsky v. New Hampshire, 315 U.S. 568 (1942) (upheld state law which as construed by state courts forbade utterance of fighting words in public); Schenck v. United States, 249 U.S. 47 (1919) (affirmed conviction for urging obstruction of the draft in wartime).

9. Cox v. Louisiana, 379 U.S. 536, 554 (1965).

10. Gitlow v. New York, 268 U.S. 652 (1925). Emerson, Toward a General Theory of the First Amendment, 72 Yale L.J. 877 (1963) contains a history and appraisal of first amendment tests [hereinafter cited as Emerson].

11. Dennis v. United States, 341 U.S. 494, 507 (1951).

12. 249 U.S. at 52.

13. Accord, Whitney v. California, 274 U.S. 357, 378-79 (1927) (Brandeis and Holmes, JJ., concurring), overruled per curiam, Brandenburg v. Ohio, 395 U.S. 444, 449 (1969) (overruling as to results but not as to "clear and present danger" type first amendment test). In Schenck v. United States, the Court affirmed the conviction of defendants who distributed literature to men called for military ser-

In 1950, another approach was developed in *American Communications Association v. Douds*.[14] In that case the Court upheld a provision of the National Labor Relations Act which imposed restrictions on and denied certain statutory benefits to labor unions whose officers refused to file "non-communist" affidavits with the NLRB.[15] The statute was enacted because of congressional findings that communists had infiltrated union hierarchies and instigated obstructive strikes unrelated to union interests.[16] Upholding the statute against first amendment attack the Court described its decision-making approach as follows:

> [It is] one of weighing the probable effects of the statute upon the free exercise of the right of speech and assembly against the congressional determination that political strikes are evils of conduct which cause substantial harm to interstate commerce and that Communists . . . pose continuing threats to that public interest when in positions of union leadership.[17]

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vice during World War I, inciting them to obstruct the draft, in violation of the Espionage Act of June 15, 1917, 18 U.S.C. § 2388(a) (1970). The Court emphasized that the decision was restricted to such activities in wartime. 249 U.S. at 52.

14. 339 U.S. 382 (1950).

15. Act of July 5, 1935, ch. 372, § 9, 49 Stat. 453, repealed, Act of Sept. 14, 1959, Pub. L. 86-257, tit. II, § 201(d), 73 Stat. 525.

16. 339 U.S. at 388-89; see Hearings before the House Committee on Education and Labor on Bills to Amend and Repeal the National Labor Relations Act, 80th Cong., 1st Sess. 3611-15 (1947).

17. 339 U.S. at 400. The history of the first amendment tests related in the text is not an unfailingly steady progression. For example, the Schenck case establishing the "clear and present danger" test was decided in 1919 prior to the less rigorous test set out in Gitlow v. New York. However, the "clear and present danger" test did become pre-eminent subsequent to the standard used in Gitlow. "Clear and present danger" is not dead, though the balancing test now predominates. A majority of the Court rejected the "clear and present danger" test in Dennis v. United States, 341 U.S. 494 (1951), but "[t]here is still some blood remaining in the doctrine, and it has continued to be used in certain types of situations." Emerson, supra note 10, at 912 (footnote omitted). See e.g., Wood v. Georgia, 370 U.S. 375 (1962). Before 1950, during the period of the "clear and present danger" test, some cases did not employ it. E.g., De Jonge v. Oregon, 299 U.S. 353 (1937), Stromberg v. California, 283 U.S. 359 (1931). Furthermore, there are tests other than the major ones discussed in the text. For example the gravity of the harm to be anticipated from the speech balanced against the likelihood that it will occur, which is somewhere between the "clear and present danger" test and the balancing test (Emerson, supra note 10, at 911); the view that freedom of speech is absolute, meaning not that it may never be controlled, but rather that the inquiry should be shifted to definitions of "abridge" and "freedom of speech" rather than a full re-weighing of all governmental and social objectives and indi-

Although very indefinite and offering few guidelines to courts in deciding the extent of first amendment protections, the balancing test probably does accord freedom of speech more weight than did the previous tests.[18] Under the "clear and present danger" standard, the asserted governmental objective was not held up to judicial scrutiny so much as was the alleged probability that the effects of the utterance in question would clash with that objective. Under the balancing test, the government's objective as well as the reasonableness of its apprehensions regarding the effects of an individual's expression are subject to review in court.[19]

The question of which first amendment test the Court would apply was at one time of little importance as far as public employees were concerned—the Court had placed them in their public capacities outside the protection of the first amendment.[20] Mr. Justice Holmes' dictum as a state court judge that a citizen has a constitutional right to talk politics

vidual rights in each case. Emerson, supra note 10, at 914. This quite undefined approach "has never commanded a majority of the Supreme Court" according to Emerson. Emerson, supra note 10, at 915. The "absolute" test can be found in the opinions of Mr. Justice Black dissenting in Braden v. United States, 365 U.S. 431, 438-46 (1961); Mr. Justice Douglas concurring in Speiser v. Randall, 357 U.S. 513, 536-37 (1958); Mr. Justice Douglas dissenting in Scales v. United States, 367 U.S. 203, 262 (1961).

18. There are times, however, when the "clear and present danger" test might seem to be more favorable to first amendment freedoms than the balancing test. That might be true when the apprehensions of the legislature are justifiably grave, the infringement of speech slight, and the danger that the evil consequences will occur is not clearly imminent. In fact, the unions in Douds asked for the application of the "clear and present danger" test. However, it might be suggested that some of the school first amendment cases implicitly incorporate a "clear and present danger" consideration into the balancing process with regard to potential disruption of school discipline. See, e.g., Tinker v. Des Moines Independent Community School Dist., 393 U.S. 503 (1969) and its bearing on the principal case, infra note 30 and accompanying text. See also note 17 supra.

19. Cf. Emerson, supra note 10, at 910-14. "It is not entirely clear whether the test is meant to be one of general application to all first amendment issues . . . ." Id. at 912.

20. United Public Workers v. Mitchell, 330 U.S. 75 (1947) (holding that the dismissal of a federal worker who violated the Hatch Political Activities Act was constitutional); Bailey v. Richardson, 341 U.S. 918 (1951) (upholding the dismissal of a civil servant based on her allegedly doubtful loyalty). Both cases are cited in Grossman, Public Employment and Free Speech: Can They Be Reconciled?, 24 Admin. L. Rev. 109, 109-10 (1972) (reviewing history of constitutional rights of public employees) [hereinafter cited as Grossman].

but not to be a policeman,[21] captured the tenor of the early cases on the constitutional rights of public employees. Since public employment was considered by the Supreme Court to be a privilege and not a right, the first amendment did not shield such an employee from dismissal for his associations or words.[22] This, however, is no longer the law.[23]

Pickering v. Board of Education[24] exemplified the change in the law as applied to public school teachers. Pickering was dismissed as a high school teacher in the Illinois school system because in a letter to a newspaper he had criticized the raising and use of public funds by the Board of Education. The Supreme Court upheld his first amendment claim, ruling the dismissal unconstitutional. The Board's unsupported allegation that the publication of the letter was by its nature a hazard to the efficient operation of the system was deemed insufficient to justify punishing participation of a teacher in public debate.[25] The Court described its approach to such cases succinctly:

> The problem in any case is to arrive at a *balance* between the interests of the teacher, as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees.[26]

It would seem then that public employees, including public school teachers, are subject to the same free speech test as other individuals, but

21. McAuliffe v. City of New Bedford, 155 Mass. 216, 220, 29 N.E. 517 (1892).

22. See cases cited supra note 20.

23. Grossman, supra note 20 at 110-11. Slochower v. Board of Educ., 350 U.S. 551 (1956) was one of the earlier cases to conclude that public school teaching jobs were not privileges which could be revoked arbitrarily. The Court reversed the New York Court of Appeals which had upheld a public college professor's dismissal for refusing to answer questions before a congressional committee regarding his Communist Party membership several years in the past. The Supreme Court, finding that New York already had the information from its own hearings twelve years earlier and that there was no showing of any relationship between the college duties of the professor and the questioned association, declared: "This case rests squarely on the proposition that 'constitutional protection does extend to the public servant whose exclusion pursuant to a statute is patently arbitrary or discriminatory.' " 350 U.S. at 556 (citation omitted).

24. 391 U.S. 563 (1968).

25. See Van Alstyne, Constitutional Rights of Teachers and Professors, 1970 Duke L.J. 841, 848-54 for a full discussion of the case [hereinafter cited as Van Alstyne].

26. 391 U.S. at 568 (emphasis added).

that circumstances peculiar to their positions will be taken into consideration.[27]

It is just this balancing process that the Court uses in the principal case to arrive at its conclusions.[28] The same state objective of preventing disruption of the smooth functioning of the school is again balanced against the interest of free speech. While courts have recognized that the educational process cannot be conducted with any effectiveness in the midst of disorder, the precise manifestations of disorder that are necessary to justify limitations on first amendment rights of students and teachers has been a difficult question.[29] In *Tinker v. Des Moines Independent Community School District*[30] the Supreme Court held that the school administration's fear of disruption was not sufficiently founded to warrant a ban on student armbands representing opposition to the Vietnam war. In his dissent, Justice Black noted that, according to the record, the armbands provoked warnings by other students, counter-warnings from students supporting the protesters, taunts, and the upset of a mathematics lesson by disputes between a teacher and a protesting pupil.[31] Furthermore, the majority opinion quoted part of the record as stating that there were in the school friends of a former student who died in Vietnam, and that threats had been made by students opposing the

27. For example, the problems of indoctrination and disruption in the school environment.

28. The James court incorporates the quote into its opinion, 461 F.2d at 572. In James, the court under the balancing test requires the school authorities to carry the burden of showing adequate justification for their ruling. Id. at 574-76. Tinker v. Des Moines Independent Community School Dist., 393 U.S. at 507-14 (1969) demands the same. But see Mr. Justice Harlan's dissent in Tinker, 393 U.S. at 526. He suggests that to protect both free expression and the state's right to maintain school discipline, those attacking the rules should be required to show that they serve other than legitimate school ends. For a collection of school first amendment cases classified according to which party is required to carry the burden of satisfying the balancing test, see Comment, 45 N.Y.U.L. Rev. 1278, 1281-82 (1970).

29. Guzick v. Drebus, 431 F.2d 594 (6th Cir. 1970) (upholding suspension of student for failing to obey high school regulation forbidding the wearing of any symbol unrelated to school affairs). In cases decided the same day, the United States Court of Appeals for the Fifth Circuit upheld a prohibition on the wearing of "freedom buttons" by students in one school because of disruptions, and enjoined a similar regulation in another school because of a failure to show any resulting disorder. Compare Blackwell v. Board of Educ., 363 F.2d 749 (5th Cir. 1966) with Burnside v. Byars, 363 F.2d 744 (5th Cir. 1966).

30. 393 U.S. 503 (1969).

31. Id. at 517-18.

symbolic protest to wear symbols of their own.[32] Nevertheless the Court, in striking down the school directive, declared:

> [I]n our system, undifferentiated fear or apprehension of disturbance is not enough to overcome the right to freedom of expression.[33]
>
> . . . .
>
> [T]he record does not demonstrate any facts which might reasonably have led school authorities to forecast substantial disruption of or material interference with school activities . . . .[34]

If the school's fear of disruption was insufficiently founded in *Tinker*, then it is utterly without objective support in *James*. In *James* the Board of Education's apprehensions would seem to be based on the potentially volatile nature of both the war controversy[35] and political protest in general, since no actual manifestations of tempers or disruption are evinced by the record.[36] Appellees failed to make even a respectable showing on the basis of the disruption test restated by the *James* court:

> Any limitation on the exercise of constitutional rights can be justified only by a conclusion, based upon reasonable inferences flowing from concrete facts and not abstractions, that the interests of discipline or sound education are materially and substantially jeopardized, whether the danger stems initially from the conduct of students or teachers.[37]

Clearly then, disruption of school discipline is not the basic issue in

32. Id. at 509 n.3.
33. Id. at 508.
34. Id. at 514.
35. 461 F.2d at 569 n.3.
36. Id. at 569.
37. Id. at 571. But cf. Guzick v. Drebus, 431 F.2d 594 (6th Cir. 1970) where a student was suspended for failing to obey a high school regulation against wearing any symbol not related to school affairs. He had worn an anti-Vietnam war button. The rule had always been uniformly enforced. Originally it was intended to halt the divisiveness of rival fraternities and later to diminish racial polarization in the racially mixed school. The Court of Appeals for the Sixth Circuit upheld the school's enforcement of the rule. The case is analyzed in Comment, 45 N.Y.U.L. Rev. 1278 (1970). The author finds an inadequate showing of the likelihood of disturbance under the standard of Tinker. Also, though the court never clearly decided who had the burden of proof, the author reasons that it was the plaintiff's burden to show that the school's reasons for the regulation were not justified—a contrast with most of the school cases where the court recognized that first amendment rights were in the balance. Therefore, the Guzick case also stands in contrast to the statement made in note 18 supra. regarding the use of a "clear and present danger" consideration in school first amendment cases. In Guzick the "clear and present danger" test would have protected the student's rights better than the balancing test did.

James. Rather, the opinion is significant in what it says about the limitations on school control of non-disruptive classroom expression.

The court in *James* acknowledges the validity of the appellees' argument that a teacher may by the strength of his position indoctrinate students with his opinions:[38]

> [T]here is merit to appellees' argument that *Tinker* does not control this case, because a teacher may have a far more pervasive influence over a student than would one student over another . . . . teachers cannot be allowed to patrol the precincts of radical thought with the unrelenting goal of indoctrination . . . .[39]

One possible solution presents itself—a classroom that is an entirely neutral arena for the presentation of ideas and facts, completely free of any advocacy by anyone.[40] This concept was rejected in its application to the students in *Tinker* who "wore [black armbands] to exhibit . . . their advocacy of a truce, to make their views known, and, by their example, to influence others to adopt them."[41]

James v. Board of Education rejects the neutral classroom as far as the teacher's behavior is concerned,[42] noting the allegation in Mr. James' complaint that another teacher "without incurring any disciplinary sanction, prominently displayed the slogan 'Peace with Honor' on a bulletin board in his classroom,"[43] and recognizing the likelihood that the school's real reason for censoring James was that it disliked his views.[44] It would seem that a combination of positive and negative factors motivated the court's decision: the first amendment rights of the teacher and the danger that the "school authorities . . . might permit

38. See generally, Note, Developments in the Law—Academic Freedom, 81 Harv. L. Rev. 1045, 1053 (1968); see also Van Alstyne, supra note 25, at 856.

39. 461 F.2d at 573.

40. See note 47 infra and accompanying text; cf. Epperson v. Arkansas, 393 U.S. 97, 111 (1968) (Black, J., concurring). Mr. Justice Black suggested that the legislative elimination of topics from discussion simply because of their controversial nature might be constitutional. But cf. text accompanying note 54 infra.

41. 393 U.S. at 514.

42. "It would be foolhardy to shield our children from political debate and issues until the eve of their first venture into the voting booth. Schools must play a central role in preparing their students to think and analyze and to recognize the demagogue." 461 F.2d at 574.

43. "Peace with honor" generally indicated opposition to immediate withdrawal from the Vietnam war and support for continuation of the fighting until a satisfactory conclusion was reached. Id. at 575.

44. "The Board's actions . . . would indicate that its regulation against political activity in the classroom may be no more than the fulcrum to censor only that expression with which it disagrees." Id.

prejudices of the community to prevail"[45] if they had unrestricted discretion to ban political expression.

Yet paradoxically, the *James* court approved in the abstract an indoctrinative function of the school to imbue pupils not just with educational basics, but also with the "basic values of the community."[46] However, in view of the holding in the case and prior Supreme Court opinions discussed below, any school indoctrinative function beyond basic subjects should be considered very limited. In striking down a West Virginia public school requirement that the flag be saluted, the Court in *Board of Education v. Barnette* endorsed political neutrality in public education.[47] Furthermore, *Meyer v. Nebraska*,[48] an early Supreme Court foray into this area of state control of classroom expression, struck down a statute intended not directly to impress children with specific local community values, but by indirect means to make them more receptive to the pervasive values of the larger community of the nation. *Meyer* involved a Nebraska criminal statute[49] forbidding the teaching of modern foreign language to children below the eighth grade. The reason for this post-World War I law was to make sure that children of strongly ethnic European homes learned the English language as their mother tongue and became instilled with American ideals before any foreign language or culture reached them. The Court found the conviction of a teacher for instructing German to be an infringement of rights of expression and thought, violating the due process clause of the fourteenth amendment.[50]

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45. Id.

46. Id. at 573. See Note, Developments in the Law—Academic Freedom, 81 Harv. L. Rev. 1045, 1053-54 (1968). But cf. Van Alstyne, supra note 25, at 856-58.

47. "Free public education, if faithful to the ideal of secular instruction and political neutrality, will not be partisan or enemy of any class, creed, party, or faction." 319 U.S. 624, 637 (1943).

48. 262 U.S. 390 (1923).

49. Though the criminal nature of the statute involved in Meyer distinguishes it from most of the other cases on teachers' first amendment rights cited in this note, that fact is somewhat neutralized by an observation of the Supreme Court in Keyishian v. Board of Regents: "Whether or not loss of public employment constitutes 'punishment' [thus making it as unconstitutional as criminal punishment of mere Communist Party membership] there can be no doubt that the repressive impact of the threat of discharge will be no less direct or substantial." 385 U.S. 589, 607 n.11 (1967) (citation omitted).

50. 262 U.S. at 402. One commentator characterizes Meyer as follows: "The case is interesting because it in effect acknowledges a constitutional right to teach free from arbitrary restraints; the action having been brought by a schoolteacher.

Forty-five years later the Court confronted a similar problem in *Epperson v. Arkansas*[51] and declared unconstitutional a statute which prohibited the teaching of evolution in Arkansas schools. Dictum in the case is cited by the court in *James* for the principle that states are entitled to control the curriculum.[52] But the concurring opinion of Mr. Justice Stewart in *Epperson* sheds some light on what limited form school indoctrination may take:

> It is one thing for a State to determine that "the subject of higher mathematics, or astronomy, or biology" shall or shall not be included in its public school curriculum. It is quite another thing for a State to make it a criminal offense for a public school teacher so much as to mention the very existence of an entire system of respected human thought. That kind of criminal law, I think, would clearly impinge upon the guarantees of free communication contained in the First Amendment.[53]

Following Mr. Justice Stewart's logic[54] and the import of the opinions in *Meyer* and *James*, the state is on constitutionally safer ground in seeking to imbue children with the value system it approves through general curricular prescription rather than by proscription of the communication of disfavored ideas.

The indoctrinative function of the school is further limited by the growing recognition of a very special outgrowth of freedom of expression —"academic freedom," which is a first amendment guarantee of "free communication" applicable to the classroom.[55] "Free communication"

Furthermore, it illustrates how the prime rights: those of the children and parents, can at times be vindicated before the Supreme Court in actions brought by others." 1 C. Antieau, Modern Constitutional Law 91 (1969). Antieau finds more in the case than a limit on legislative methods of imbuing children with uniform values. His comment indicates that he finds suggestions of a constitutional right to teach and to learn in the case.

51. 393 U.S. 97 (1968).

52. 461 F.2d at 573.

53. 393 U.S. at 116. Mr. Justice Fortas, writing for the Court, based the decision on the "establishment of religion" clause of the first amendment. However, the Arkansas State Chancery Court was affirmed in its result, and its reasons were set out in the Supreme Court opinion with no indication of approval or disapproval. The state court had found a violation of the first amendment in that the statute tended to "hinder the quest for knowledge, restrict the freedom to learn, and restrain the freedom to teach." Id. at 100.

54. Mr. Justice Black expresses a similar view in his concurring opinion. Id. at 111.

55. The term "free communication" was used by Mr. Justice Stewart in Epperson. Id. at 116. See also Tinker v. Des Moines Independent Community School Dist., 393 U.S. 503 (1969); Keyishian v. Board of Regents, 385 U.S. 589

is particularly apt because it suggests an exchange—concomitant rights to express ideas and to receive them. In *Keyishian v. Board of Regents*,[56] the New York Feinberg Law[57] requiring teachers to certify that they were not communists or subversives within the meaning of the statute was declared unconstitutional for "overbreadth." The fear of the Court was that potential dismissal under such a law would chill the intellectual enthusiasm of teachers and encourage them to avoid certain lawful as well as unlawful expression and associations.[58] A similar point can be made in a *James* type situation. It is arguably difficult for a teacher to conduct a current events lesson that is at all sophisticated or stimulating, with the discussion of alternative viewpoints, if he fears the intrusion of punishable expressions of political opinion. The same might be said of history and literature classes if the relevance of the subject matter to the current world is to be considered a goal of education. Evidently the Court does consider this to be an important goal. The Court wrote in *Keyishian*:

> The Nation's future depends upon leaders trained through wide exposure to that robust exchange of ideas which discovers truth "out of a multitude of tongues, [rather] than through any kind of authoritative selection."[59]

Sweezy v. New Hampshire[60] considered academic freedom to be so important and vulnerable that it sustained the first amendment right of a teacher to withhold the content of his lectures from a state internal security investigation. Writing for four Justices, Chief Justice Warren declared:

> Teachers *and students* must always remain free to inquire, to study and to evaluate, to gain new maturity and understanding . . . .[61]

(1967); Shelton v. Tucker, 364 U.S. 479 (1960); Sweezy v. New Hampshire, 354 U.S. 234 (1957); Wieman v. Updegraff, 344 U.S. 183, 195 (1952) (Frankfurter, J., concurring). See also Van Alstyne, supra note 25, at 856-58.

56. 385 U.S. 589 (1967).

57. N.Y. Educ. Law § 3022 (McKinney 1970). N.Y. Educ. Law § 3021 (McKinney 1970) and N.Y. Civ. Serv. Law § 105(1), (3) (McKinney 1959) were declared unconstitutional as implemented by § 3022.

58. 385 U.S. at 601, 604.

59. Id. at 603 (quoting from United States v. Associated Press, 52 F. Supp. 362, 372 (S.D.N.Y. 1943)).

60. 354 U.S. 234 (1957).

61. Id. at 250 (emphasis added). The age of the pupils involved in any case would seem to be a consideration in deciding whether academic freedom is being abused. While most of the cases involve junior high school grades and above, the age or maturity factor is often mentioned. E.g., Keefe v. Geanakos, 418 F.2d 359, 361-62 (1st Cir. 1969); Parducci v. Rutland, 316 F. Supp. 352, 356 (M.D.

James similarly recognized the policy consideration of exposing children nearing voting age to political debate.[62]

The decision in a recent case is noteworthy for its treatment of the persuasion of students—one of the variables in classroom situations when teachers express their opinions. In *Hanover v. Northrup*[63] a teacher of seventh and eighth grade was ordered reinstated to her job after dismissal for remaining seated at her desk and refusing to lead her class in the Pledge of Allegiance. Her actions were motivated by a belief that the words "with liberty and justice for all" were an untrue statement of present fact about the nation. The court found that Mrs. Hanover's silent expression was protected by the first amendment against school disciplinary action, saying "It does not matter whether some of her students, who also refrained from recitation of the Pledge were persuaded to do so because of the plaintiff's conduct."[64] Taking *James* and *Hanover* together it would seem that neither the spread of partisan expression in classrooms,[65] nor the effectiveness of the teacher's expression in converting students, is a consideration in finding a rational basis for school restraints on the expression of political opinions in the classroom.

Aside from situations where school discipline is disrupted, there are two probable guidelines for the acknowledged "discretion of local school authorities in setting classroom standards"[66] with regard to permissible restraints on a teacher's speech. One was involved in the *Goldwasser v.*

Ala. 1970). In granting the relief sought by the dismissed teachers, both of these opinions remarked that high school children are of sufficient maturity to cope with the vulgarisms and sexual references in the literature under discussion. Cf. Parker v. Board of Educ., 237 F. Supp. 222 (D. Md. 1965) (discussed in note 68 infra).

62. 461 F.2d at 574 (quoted in note 42 supra).

63. 325 F. Supp. 170 (D. Conn. 1970). Accord, Russo v. Central School Dist. No. 1, 469 F.2d 623 (2d. Cir. 1972) (dismissal of high school teacher for refusing to recite the Pledge of Allegiance with her class held to be a violation of the first amendment).

64. 325 F. Supp. at 173. The Court in Keyishian drew a distinction between "one who merely advocates . . . doctrine in the abstract" and one who attempts "to indoctrinate others . . . ." 385 U.S. at 599.

65. James wearing his armband and another teacher writing his blackboard slogan are likely to encourage an increase in this sort of activity.

66. 461 F.2d at 575; Burnside v. Byars, 363 F.2d 744, 748 (5th Cir. 1966); Blackwell v. Board of Educ., 363 F.2d 749, 753 (5th Cir. 1966); N. Edwards, The Courts and the Public Schools 592 (3d ed. 1971).

Brown[67] decision of the Court of Appeals for the District of Columbia. That court upheld the discharge of a teacher hired by the Air Force to instruct foreign military officers in English. He had repeatedly used classroom hours to expound on his feelings about anti-Semitism in America and the war in Vietnam. The denial of the teacher's first amendment challenge was based on his failure to discharge the teaching responsibilities for which he was hired, class time having been diverted to his political and social commentaries. Therefore, when a teacher's classroom expression has a distinctly adverse effect on the performance of his proper function, school restrictions may be imposed.[68] The second instance in which restrictions are constitutionally permissible is the case of a teacher's coercive proselytizing. This may be inferred from the language used by the *James* court in emphasizing the inoffensiveness of the teacher's conduct:

> [T]he record is barren of a scintilla of evidence indicating . . . that the armband constituted more than a silent expression of James's own feelings . . . .[69]
>
> . . . .
>
> [W]e cannot countenance school authorities arbitrarily censoring a teacher's speech . . . . This is particularly so when that speech . . . . is not coercive. . . .[70]
>
> [C]learly there was no attempt by James to proselytize his students.[71]

Therefore, an effort to pressure a class to adopt a partisan viewpoint, rather than a submission of the opinion to group discussion and judgment, might be subject to prohibition by school authorities. However, as the *Hanover* court indicates, impermissible indoctrination of students by a teacher may not be inferred from the mere fact that some of them come to agree with his or her expressed opinion.

When the teacher does use the captive nature of his audience, an un-

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67. 417 F.2d 1169, 1177 (D.C. Cir. 1969), cert. denied, 397 U.S. 922 (1970).

68. 461 F.2d at 574-75 & n.21. Cf. Parker v. Board of Educ., 237 F. Supp. 222 (D. Md.), aff'd per curiam on other grounds, 348 F.2d 464 (4th Cir. 1965) (probationary public high school teacher's contract not renewed after his teaching of the novel "Brave New World" provoked parental protest. The county board's instructions to teachers had been to consider the maturity of students and community mores in assigning books. The board's action was upheld in part because the first amendment does not protect indiscreet expression by the teacher amounting to a kind of incompetence). See also note 72 infra, quoting from James.

69. 461 F.2d at 569.

70. Id. at 573.

71. Id. at 574.

balanced presentation of information, or the threat of the sanctions available to inculcate his political opinions in the minds of his students, the courts might well permit the state or local governments, or their agencies to control his classroom expression.[72]

ENVIRONMENTAL LAW—Rivers and Harbors Appropriations Act —Private Persons May Not Sue in Qui Tam Without Explicit Legislative Grant of Permission For Citizen Suits. Connecticut Action Now, Inc. v. Roberts Plating Co., 457 F.2d 81 (2d Cir. 1972).

Individual plaintiffs brought a *qui tam* action, alleging that defendant was in violation of section 13 of the 1899 Rivers and Harbors Appropriations Act[1] [Refuse Act] by reason of a discharge of waste materials from its metal finishing plant into navigable waters without the required

72. Van Alstyne, supra note 25. See 461 F.2d at 576, wherein the court stated: "[W]e disclaim any intent to condone partisan political activities in the public schools which reasonably may be expected to interfere with the educational process."

1. Section 13 is codified in 33 U.S.C. § 40 (1970) as follows: "It shall not be lawful to throw, discharge, or deposit, or cause, suffer, or procure to be thrown, discharged, or deposited either from or out of any ship, barge, or other floating craft of any kind, or from the shore, wharf, manufacturing establishment, or mill of any kind, any refuse matter of any kind or description whatever, other than that flowing from streets and sewers and passing therefrom in a liquid state, into any navigable water of the United States, or into any tributary of any navigable water from which the same shall float or be washed into such navigable water; and it shall not be lawful to deposit, or cause, suffer, or procure to be deposited material of any kind in any place on the bank of any navigable water, or on the bank any tributary of any navigable water, where the same shall be liable to be washed into such navigable water, either by ordinary or high tides, or by storms or floods, or otherwise, whereby navigation shall or may be impeded or obstructed: Provided, That nothing herein contained shall extend to, apply to, or prohibit the operations in connection with the improvement of navigable waters or construction of public works, considered necessary and proper by the United States officers supervising such improvement or public work: And provided further, That the Secretary of the Army, whenever in the judgment of the Chief of Engineers anchorage and navigation will not be injured thereby, may permit the deposit of any material above mentioned in navigable waters, within limits to be defined and under conditions to be prescribed by him, provided application is made to him prior to depositing such material; and whenever any permit is so granted the conditions thereof shall be strictly complied with, and any violation thereof shall be unlawful."

permit. Plaintiffs sued to enjoin further discharge of such waste and sought the informer's one-half interest in the monetary penalty prescribed by the Act.[2] The United States District Court for the District of Connecticut granted defendant's motion to dismiss;[3] the United States Court of Appeals for the Second Circuit affirmed,[4] holding that private persons cannot sue in *qui tam*, even though the Justice Department fails or refuses to initiate proceedings in accordance with the Refuse Act, and further holding that such persons are also barred from suing on behalf of the public to enjoin violations of the Refuse Act.

Contemporary concern over the problems created by man's negligent use of his environment has permeated almost every phase of human activity. The apparent potential of the legal system as a means of preventing pollution has resulted in the use of a plethora of legislative and other legal devices to enforce compliance with anti-pollution laws.[5] One

2. 33 U.S.C. § 411 (1970) codifies § 16 of the Act as follows: "Every person and every corporation that shall violate, or that shall knowingly aid, abet, authorize or instigate a violation of the provisions of sections 407, 408, and 409 of this title shall be guilty of a misdemeanor, and on conviction thereof shall be punished by a fine not exceeding $2,500 nor less than $500, or by imprisonment (in the case of a natural person) for not less than thirty days nor more than one year, or by both such fine and imprisonment, in the discretion of the court, one-half of said fine to be paid to the person or persons giving information which shall lead to conviction."

3. Connecticut Action Now, Inc. v. Roberts Plating Co., 330 F. Supp. 695 (D. Conn. 1971).

4. Connecticut Action Now, Inc. v. Roberts Plating Co., 457 F.2d 81 (2d Cir. 1972).

5. Co-existing with the Refuse Act is the regulatory activity of the Water Pollution Control Division of the Environmental Protection Agency, established under Reorganization Plan No. 3, 35 Fed. Reg. 15623 (1970). In its comprehensive program of quality control, the legislation, embodied in the Federal Water Pollution Control Act, 33 U.S.C.A., §§ 1251-1376 (Supp. 1973) is a compilation of six major amendments. The Federal Water Pollution Control Act Amendments of 1972, Act of Oct. 6, 1972, Pub. L. No. 92-500, 86 Stat. 816; the Water Quality Act of 1970, Act of Apr. 3, 1970, Pub. L. No. 91-224, 84 Stat. 91; the Clean Water Restoration Act of 1966, Act of Nov. 3, 1966, Pub. L. No. 89-753, 80 Stat. 1246; the Water Quality Act of 1965, Act of Oct. 2, 1965, Pub. L. No. 89-234, 79 Stat. 903; the Federal Water Pollution Control Act Amendments of 1961, Act of July 20, 1961, Pub. L. No. 87-88, 75 Stat. 204; the Federal Water Pollution Control Act Amendments of 1956, Act of July 9, 1956, Pub. L. No. 84-660, 70 Stat. 498. For an analysis of all but the most recent provision, see Kramon, Towards a New Federal Response To Water Pollution, 31 Fed. B.J. 139 (1972). The newest and most comprehensive scheme of dealing with water pollution, the Federal Water Pollution Control Act Amendments of 1972, will be discussed at notes 54-61 infra.

such recent example has been the initiation of *qui tam* actions[6] against violators of anti-pollution statutes.

Connecticut Action Now, Inc. v. Roberts Plating Co. is distinguished from prior environmental suits in that, for the first time, the court proposes an exit from the legal *cul-de-sac* in which plaintiffs bringing *qui tam* actions based on the Refuse Act have found themselves. The opinion suggests that the solution lies in legislative action which will facilitate proceedings such as attempted in the case at bar and others which preceded it.[7] The instant decision agrees with prior holdings that the Refuse Act does not give plaintiffs the informants' right to sue, even

6. By definition: "An action brought by an informer, under a statute which establishes a penalty for the commission or omission of a certain act, and provides that the same shall be recoverable in a civil action, part of the penalty to go to any person who will bring such action and the remainder to the state or some other institution, is called a 'qui tam action' because the plaintiff states that he sues as well for the state as for himself." Black's Law Dictionary 1414 (Rev. 4th ed. 1968). This definition has been recognized in a significant number of cases dealing with the provisions of the Refuse Act. For a collection of cases see 457 F.2d at 84 n.4.

7. See, e.g., Lavagnino v. Porto-Mix Concrete, Inc., 330 F. Supp. 323 (D. Colo. 1971) (a complaint under the Refuse Act must allege the effect of the damage upon navigation, not upon the plaintiff's property); Bass Anglers Sportsman's Soc'y v. Scholze Tannery, Inc., 329 F. Supp. 339 (E.D. Tenn. 1971) (conservation organization, not having any special status, does not have standing to bring private civil action against polluters for alleged violation of statutory prohibition of refuse deposit in navigable waters); Enquist v. Quaker Oats Co., 327 F. Supp. 347 (D. Neb. 1971) (plaintiff does not have a private right to sue an alleged violator of the Refuse Act); United States ex rel. Mattson v. Northwest Paper Co., 327 F. Supp. 87 (D. Minn. 1971) (statute prescribing a penalty for the wrongful deposit of refuse and providing for payment of moiety to the informant can be enforced only by government prosecution); Durning v. I.T.T. Rayonier, Inc., 325 F. Supp. 446 (W.D. Wash. 1970) (33 U.S.C. § 411 (1970) intended to reward the informant, not to provide a means of recovery from the violator); Bass Angler Sportsman Soc'y v. United States Steel Corp., 324 F. Supp. 412 (N.D., M.D., S.D. Ala. 1971), aff'd, 447 F.2d 1304 (5th Cir. 1971) (a statute allowing an informant to share in any fine imposed upon conviction of a violator does not imply any private right of enforcement but rather creates criminal liability which can be enforced only by the government); Bass Anglers Sportsman's Soc'y v. United States Plywood-Champion Papers, Inc., 324 F. Supp. 302 (S.D. Tex. 1971) (no express or implied statutory authority for private parties to bring the qui tam action); Reuss v. Moss-American, Inc., 323 F. Supp. 848 (E.D. Wisc. 1971) (statute prohibiting the deposit of refuse in navigable waters and prescribing a penalty thereto enforced only by government prosecution, not by private qui tam action). See also Comment, The Refuse Act of 1899: Its Scope and Role in Control of Water Pollution, 58 Calif. L. Rev. 1444 (1970).

in situations when the Justice Department fails or refuses to initiate proceedings in accordance with the Act.[8]

A determination of the rights and liabilities created by the Refuse Act can be made by considering a group of actions brought by the Bass Angler Sportsman's Society.[9] In *Bass Angler Sportsman's Society v. United States Steel Corp.*,[10] plaintiff sought the imposition of fines against the corporate defendant and also named the government as a defendant for aiding such violations by refusing to bring criminal proceedings against the corporation.[11] The federal district court held that the Refuse Act does not imply the existence of a private right of enforcement against parties depositing refuse in navigable waters.[12] The statute creates only criminal liability, and its provisions can be enforced only by governmental authorities.[13]

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8. See, e.g., Lavagnino v. Porto-Mix Concrete, Inc., 330 F. Supp. 323, 325 (D. Colo. 1971).

9. Bass Anglers Sportsman's Soc'y v. Scholze Tannery, Inc., 329 F. Supp. 339 (E.D. Tenn. 1971); Bass Angler Sportsman's Soc'y v. United States Steel Corp., 324 F. Supp. 412 (N.D., M.D., S.D. Ala. 1971); Bass Anglers Sportsman's Soc'y v. United States Plywood-Champion Papers, Inc., 324 F. Supp. 302 (S.D. Tex. 1971).

10. 324 F. Supp. 412 (N.D., M.D., S.D. Ala. 1971).

11. It was alleged that the government's failure to prosecute amounted to aiding and abetting the violator, thus constituting a violation of the Act. Id. at 414. For the text of § 16, see note 2 supra.

12. 324 F. Supp. at 415-16: "The court concludes that no authority exists for the plaintiff to maintain this action to recover fines provided by sections 407 and 411. These sections create a criminal liability. No civil action lies to enforce it; criminal statutes can only be enforced by the government. A qui tam action lies only when expressly or impliedly authorized by statute to enforce a penalty by civil action, not a criminal fine. The express mandate of section 413 in placing enforcement of sections 407 and 411 in the Department of Justice prevents any interpretation creating a private right of action to recover the specified fines."

13. Another recent case based on the Refuse Act, United States ex rel. Mattson v. Northwest Paper Co., 327 F. Supp. 87 (D. Minn. 1971), likewise holds that the statute can be enforced only by government prosecution, not by private qui tam action. The court held that the language of the statute reveals no intent to confer on an individual citizen the right to initiate proceedings qui tam when the government fails to act: "[I]t must have been that Congress contemplated in 1899 that the initiative to prosecute violators should reside exclusively in the government, and that the informer's right would arise only after successful prosecution, assessment of a fine (or imprisonment in the court's discretion) and if a fine were imposed, an award of one-half of such to the informer. Until that point the informer's interest in the fine, the right upon which he here predicates standing to sue, is only hypothetical." Id. at 91.

The most helpful authority for the plaintiffs is perhaps found in Mr. Justice Black's dictum in *United States ex rel. Marcus v. Hess*[14] wherein he recognizes an implied authorization for individual action: "Statutes providing for a reward to informers which do not specifically either authorize or forbid the informer to institute the action are construed to authorize him to sue."[15] This statement has frequently been criticized as too broad,[16] although many courts, including the court in *Connecticut Action*, have considered it in reaching their decisions.[17]

The court's decision in *Connecticut Action* turned on the interpretation of the language of the Refuse Act in accordance with the legislative intent of Congress. Since there is no common law right to maintain a *qui tam* action,[18] a comprehensive examination of the statute is necessary to determine if such a right has been created. The court in *Connecticut Action* pointed out that previous rulings which upheld a private right to sue found that the statute in question "expressly stated or clearly implied that the informer could begin the proceeding without waiting for governmental action."[19] However, in enacting the Refuse Act, Congress imposed a criminal penalty to be sought by the United States Attorney General. Congress neither stated nor suggested that the informer could proceed independently against the violator prior to the successful completion of a criminal prosecution by federal authorities.[20]

The discretion of the Attorney General in his decision whether or not to initiate or abandon any given prosecution is considered absolute.[21]

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14. 317 U.S. 537 (1943).

15. Id. at 541 n.4 (citation omitted).

16. In particular, the Bass Angler cases have affirmatively stated that the qui tam action depends entirely on statutory authorization and that such action has never found its way into the common law.

17. 457 F.2d at 84-85. The Refuse Act, like all statutes, embodies the ideals and aspirations of its creators which must be acknowledged and possibly re-evaluated at each encounter. Application of this particular statute forces examination of one of the basic tenets of American governmental process, to wit, governmental exercise of discretion. In the Connecticut Action case this point is raised by the question of the injunction. Other cases sharpen the challenge by actually naming the government as co-defendant for failure to prosecute.

18. See notes 15-16 supra.

19. 457 F.2d at 84.

20. Id. at 84-85. For the legislative history of the Act, see U.S. Code Cong. & Ad. News, Mar. 3, 1899. Recently, however, the Water Pollution Control Act has been amended to provide for citizen suits. See text accompanying notes 54-61 infra.

21. 457 F.2d at 35. See also United States v. Cox, 342 F.2d 167 (5th Cir.

The decision to prosecute has far-reaching effects. Its ramifications may, for example, include increased cooperation between state and federal government units resulting from a federal decision to leave prosecution to the state involved.[22] A 1970 decision[23] concluded that the motivating purpose in the enactment of the Refuse Act was to reward those whose assistance as informers led to the conviction of violators; it was not to sanction individual civil actions against the violators to recover the fine which might have been imposed had the government elected to initiate criminal proceedings.[24] Necessarily, a court could not be forced to establish a priority between criminal prosecution by the United States Attorney and a civil suit under the same statutory provision by an informant.[25]

In addition to suing for the statutory penalty, plaintiffs in *Connecticut Action* also sought injunctive relief against further waste deposit in the Naugatuck and Housatonic Rivers by the defendant corporation. The Refuse Act empowers the Attorney General to sue for the statutory penalty and to seek injunctions against violators of the Act.[26] But the existence of this governmental power to obtain such an injunction does not mean that private citizens may do so.[27] The court reasoned that plaintiffs in *Connecticut Action* are merely members of the general public despite their claim to be "surrogates for the public over and above

1965): "Although as a member of the bar, the attorney for the United States is an officer of the court, he is nevertheless an executive official of the Government, and it is as an officer of the executive department that he exercises a discretion as to whether or not there shall be a prosecution in a particular case. It follows, as an incident of the constitutional separation of powers, that the courts are not to interfere with the free exercise of the discretionary powers of the attorneys of the United States in their control over criminal prosecutions." Id. at 171.

22. Smith v. United States, 375 F.2d 243, 247 (5th Cir. 1967).

23. Durning v. ITT Rayonier, Inc., 325 F. Supp. 446 (W.D. Wash. 1970).

24. Id. "This Court concludes that Congress in enacting this criminal statute intended to reward an informant for information leading to the conviction of the wrongdoer and not to provide a means by which an informant may proceed to recover against the violator of the criminal statute the amount he might otherwise receive from a fine which 'might' be imposed after conviction of the defendant in a criminal proceeding." Id. at 447.

25. Id.

26. See, e.g., Wyandotte Transp. Co. v. United States, 389 U.S. 191 (1967); United States v. Republic Steel Corp., 362 U.S. 482 (1960); United States v. Florida Power & Light Co., 311 F. Supp. 1391 (S.D. Fla. 1970).

27. Bass Angler Sportsman's Soc'y v. United States Steel Corp., 324 F. Supp. 412 (N.D., M.D., S.D. Ala. 1971).

the normal and official representative of the public interest."[28] Consequently, they are not entitled to injunctive relief.[29]

The plaintiffs in *Connecticut Action* relied on several cases[30] involving other statutes in attempting to establish their right to sue, but the court pointed out that none of the cases involved a provision like section 413 of the Refuse Act, and that all of the decisions challenged administrative action by federal officers.[31] Although such challenge is implicit in *Connecticut Action*,[32] the thrust of the argument differs. The cases relied on by the plaintiffs sought judicial scrutiny of action undertaken by the government. They were not, as in *Connecticut Action*, instances wherein a citizen brought suit on behalf of the public against an individual who had harmed him no more than the general public. A citizen who has been specifically injured by improper refuse deposit may have other legal means of redress, although the *Connecticut Action* court preferred not to comment on this possibility.[33] Moreover, plaintiffs herein were able to show no such injury.

It is well established then that an action in *qui tam* against an alleged violator of the Refuse Act will not lie so long as the existing law remains unchanged.[34] Regardless of the form of relief sought by plaintiffs in *qui tam* actions prior to *Connecticut Action*—whether it was a share in the fine, the granting of an injunction, or the establishment of standards[35] for the issuing of permits in accord with the Act[36]—such attempts have

28. 457 F.2d at 90.

29. Id. at 81. The determination that conservation groups are not elevated to a position above the general public is not without authority. See, e.g., Bass Anglers Sportsman's Soc'y v. Scholze Tannery, Inc., 329 F. Supp. 339 (E.D. 1971) wherein the court held that conservation groups have no special status with respect to the exclusive power to enforce federal statutes traditionally vested in the Justice Department. Hence, as the Connecticut Action court determined, they enjoy only the rights of individual citizens.

30. Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402 (1971); Association of Data Processing Service Organ. v. Camp. 397 U.S. 150 (1970); Scenic Hudson Preservation Conf. v. FPC, 354 F.2d 608 (2d Cir. 1965), cert. denied, 384 U.S. 941 (1966).

31. 457 F.2d at 89.

32. See note 11 supra and accompanying text.

33. E.g., riparian landowners may have common law remedies. 457 F.2d at 89.

34. The court stated that any change which is made should be the product of the legislature, not the judiciary. Id. at 90.

35. E.g., Bass Angler Sportsman's Soc'y v. Scholze Tannery, Inc., 329 F. Supp. 339 (E.D. Tenn. 1971).

36. 33 U.S.C. § 407 (1970). See note 1 supra for text of statute.

failed. The plaintiffs' right to sue has been denied by reason of the specific statute in question and the general rule that a private person has no right to enforce a penal statute.[37] Additionally, the decision of the Justice Department not to initiate criminal proceedings is not subject to judicial review.[38]

Plaintiffs in *Connecticut Action* argued that the mode of recovery of the fines prescribed for violation of the Refuse Act is not specifically outlined;[39] the court pointed out however, that the fine referred to in section 411 of the Refuse Act is not a civil but a criminal fine to be imposed in a criminal proceeding.[40]

In announcing its decision to follow the preceding cases in point, the court suggested that, because of the restrictions inherent in the Refuse Act, any change which is made should be the product of legislative enactment rather than judicial decision.[41] The court refers to one such recently enacted statute, The Clean Air Act of 1970,[42] whereby an individual citizen may commence a civil action on his own behalf against violators of emission standards and limitations, or against administrators for failure to perform in accordance with the statute.[43]

37. United States v. Standard Oil Co., 384 U.S. 224 (1966); Smith v. United States, 375 F.2d 243 (5th Cir. 1967); Lavagnino v. Porto-Mix Concrete, Inc., 330 F. Supp. 323 (D. Colo. 1971).

38. Administrative Procedure Act, 5 U.S.C. §§ 701-06 (1970) outline the specifics of judicial review. Section 701 states: "This chapter applies, according to the provisions thereof, except to the extent that (1) statutes preclude judicial review; or (2) agency action is committed to agency discretion by law."

39. 28 U.S.C. § 2461(a) (1970) provides: "Whenever a civil fine, penalty or pecuniary forfeiture is prescribed for the violation of an Act of Congress without specifying the mode of recovery or enforcement thereof, it may be recovered in a civil action."

40. 457 F.2d 81, 86 (2d Cir. 1972). The court cites United States v. Claflin, 97 U.S. 546 (1878) to the effect that "if the statute by which the penalty was imposed contemplated recovery only in a criminal proceeding, a civil remedy could not be adopted." 457 F.2d at 86.

41. Id. at 90.

42. 42 U.S.C. § 1857h-2 (1970).

43. Id. The section provides: "(a) Establishment of right to bring suit. Except as provided in subsection (b) of this section, any person may commence a civil action on his own behalf—

(1) against any person (including (i) the United States, and (ii) any other governmental instrumentality or agency to the extent permitted by the Eleventh Amendment to the Constitution) who is alleged to be in violation of (A) an emission standard or limitation under this chapter or (B) an order issued by the Administrator or a State with respect to such a standard or limitation, or

The solution to the problem posed by *Connecticut Action* lies in the enactment of new legislation, either expressly authorizing the *qui tam* action, or permitting the private right to sue for legal and equitable relief. In the case of *qui tam,* the grant must be specific, since the *qui tam* action by definition has no existence apart from explicit statutory provision.[44] The right arises not from the statutory right to a share in the imposed penalty, but rather from an express or implied statutory grant of authority to maintain the action.[45] Moreover, the penalty must be a civil, not criminal, fine since the proceeding is civil in nature.[46]

An important consideration in the creation of such legislation and in the administration of citizen suits pursuant to this legislative grant involves consideration of justiciability,[47] that is to say, whether the con-

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(2) against the Administrator where there is alleged a failure of the Administrator to perform any act or duty under this chapter which is not discretionary with the Administrator.

The district courts shall have jurisdiction, without regard to the amount in controversy or the citizenship of the parties, to enforce such an emission standard or limitation, or such an order, or to order the Administrator to perform such act or duty, as the case may be."

44. United States ex rel. Marcus v. Hess, 317 U.S. 537 (1943). See also note 6 supra.

45. Bass Angler Sportsman's Soc'y v. United States Steel Corp., 324 F. Supp. 412, 415 (N.D., M.D., S.D. Ala. 1971). Such interpretation of the Refuse Act is consistent with decisions involving other similar statutes which impose penalties and provide for payment of a moiety to an informer. See, e.g., Rosenberg v. Union Iron Works, 109 F. 844 (N.D. Cal. 1901). But cf. Williams v. Wells Fargo & Co. Express, 177 F. 352 (8th Cir. 1910) (no qui tam permitted where statutory provision incorporated by reference into federal procedure statute prohibiting qui tam action).

46. 324 F. Supp. at 416. The qui tam action has long been a part of the American legal system. See, e.g., Adams v. Woods, 6 U.S. (2 Cranch) 336 (1805). Since the right to maintain a qui tam action does not exist outside the limits of statutory provision, the language of those statutes invoked as originative of the right to maintain a specific qui tam action must necessarily be subject to thorough interpretive investigation. The language of the Refuse Act itself has repeatedly been determined to preclude any qui tam action. The informer is entitled to part of the fine only upon conviction. The court in Bass Anglers Sportsman's Soc'y v. United States Plywood-Champion Papers, Inc., 324 F. Supp. 302 (S.D. Tex. 1971) pointed out that the informer's rights are dependent upon a criminal proceeding, a conviction, and a fine. This same conclusion is pointedly set forth in the Connecticut Action case. 457 F.2d at 86. But cf. notes 37-38 supra.

47. See, e.g., Baker v. Carr, 369 U.S. 186 (1962) for an analysis of the requisites for justiciability.

troversy is properly before the court and asserted by one who has a sufficient interest in the claim. Clearly, legislation authorizing a citizen suit for violation of federal environmental standards must be structured in accordance with the mandates set out by the Supreme Court in *Sierra Club v. Morton*[48] wherein the Court held that a person has standing to institute a civil suit[49] only if he can show that he himself has suffered or will suffer injury, whether economic or otherwise. The Court pointed out that: "[P]alpable economic injuries have long been recognized as sufficient to lay the basis for standing, with or without a specific statutory provision for judicial review."[50] The Court stressed that there must be more than injury in fact; the party instituting the suit must have sustained injury.[51] The principle that the Sierra Club asked the Court to establish would have authorized a party to institute suit merely to vindicate its own value preference.[52] So stated, the petitioners' position clearly fell outside the purview of the Court.[53] *Sierra* makes the common law principle that one cannot secure an injunction unless his injury is greater than that of the general public applicable to environmental citizen suits. This mandate can be readily effected by a provision in the statute clearly stipulating standards relating to injury.

In October, 1972, Congress, declaring as a national objective the

48. 405 U.S. 727 (1972).

49. 5 U.S.C. §§ 701-706 (1970). Section 10 of the Act [5 U.S.C. § 702] provides that a person who suffers legal wrong or is adversely affected or aggrieved by agency action within the meaning of a relevant statute may seek judicial review.

50. 405 U.S. at 733-34.

51. Id. at 735.

52. Id. at 740.

53. Mr. Justice Douglas, in his dissent in Sierra, suggests a way of avoiding this dead end by giving the inanimate object in question the standing to sue: "The critical question of 'standing' would be simplified and also put neatly in focus if we fashioned a federal rule that allowed environmental issues to be litigated before federal agencies or federal courts in the name of the inanimate object about to be despoiled, defaced, or invaded . . . where injury is the subject of public outrage. Contemporary public concern for protecting nature's ecological equilibrium should lead to the conferral of standing upon environmental objects to sue for their own preservation." 405 U.S. at 741-42. Mr. Justice Douglas points to inanimate objects which are sometimes parties in litigation, e.g., ships, which have a legal personality, a useful fiction in maritime law. Mr. Justice Blackmun also dissented on the ground that Sierra is not an ordinary case; preservation of the environment is a problem of such consequence that rigid law and inflexible procedural concepts must be reevaluated. Id. at 755-56.

restoration and maintenance of the chemical, physical and biological integrity of the nation's waters, enacted what may prove the most pervasive and comprehensive scheme to date to stem water pollution—The Federal Water Pollution Control Act Amendments of 1972.[54] In amending the Federal Water Pollution Control Act,[55] Congress established comprehensive programs for water pollution control under the direction of the Administrator of the Environmental Protection Agency.[56] The Act provides a five step approach in preventing, reducing, and improving the sanitary condition of surface and underground waters—research and related programs (Title I), development and implementation of waste treatment management plans and treatment works (Title II), standards and enforcement (Title III), certification of facilities through permits and licenses (Title IV), and administrative procedure and judicial review (Title V).

Title V of the Act provides for civil suits,[57] to include a *qui tam* action, by any citizen on his own behalf. Section 505(a) provides:

> Except as provided in subsection (b) of this section, any citizen may commence a civil action on his own behalf—
>
> (1) against any person (including (i) the United States, and (ii) any other governmental instrumentality or agency to the extent permitted by the eleventh amendment to the Constitution) who is alleged to be in violation of (A) an effluent standard or limitation under this Act or (B) an order issued by the Administrator or a State with respect to such a standard or limitation, or
>
> (2) against the Administrator where there is alleged a failure of the Administrator to perform any act or duty under this Act which is not discretionary with the Administrator.
>
> The district courts shall have jurisdiction, without regard to the amount in controversy or the citizenship of the parties, to enforce such an effluent standard or limitation, or such an order, or to order the Administrator to perform such act or duty, as the case may be, and to apply any appropriate civil penalties under section 309(d) of this Act.[58]

Subsection (b) establishes that a citizen must give notice of intent to maintain suit sixty days prior to the institution of such suit against a "person," as defined in (a), and further provides that no action may be commenced if the Administrator or State has commenced a civil or

54. 33 U.S.C.A. §§ 1251-1376 (Supp. 1973). For a legislative history of the Act, see U.S. Code Cong. and Ad. News, 92d Sess. 3668 (1972).

55. 33 U.S.C.A. §§ 1251-1376 (Supp. 1973).

56. 33 U.S.C.A. § 1251(d) (Supp. 1973).

57. Id. § 1365. Subsection (a) provides the right, qualified only by the procedural requisites of (b).

58. Id. § 1365(a). Cf. note 43 supra.

criminal proceeding against the violator.[59] The section further provides that a court may award costs of litigation to include counsel and expert witness fees and grant temporary injunctive relief.[60] Furthermore, nothing in the section restricts any right which the aggrieved party may have under statute or common law to seek enforcement or relief, including any *qui tam* penalty provided for by either state or federal statute.[61]

This most recent federal enactment would appear to meet the requisites posed by the United States Court of Appeals for the Second Circuit in *Connecticut Action*, in that a private right to sue is both preserved and permitted by statute. More importantly, the fact that the recent amendment expressly provides for a private right to sue the polluter directly or to sue the government for failure to comply with duties prescribed by the Act may well obviate the need for *qui tam* actions in environmental suits. Given the application of *Sierra Club* standing principles, the citizen may now pursue a course of action directly and on his own behalf, rather than bringing suit in a representative capacity, or relying on the discretion of administrative agencies for assistance. While the statute has received early criticism for "effectively repealing the Refuse Act of 1899 as it applies to ongoing industrial discharges,"[62] its multi-phased approach and guaranty of citizen suits alleviates much of the morass of environmental litigation.

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59. Id. § 1365(b). It provides: "No action may be commenced—(1) under subsection (a) (1) of this section—(A) prior to sixty days after the plaintiff has given notice of the alleged violation (i) to the Administrator, (ii) to the State in which the alleged violation occurs, and (iii) to any alleged violator of the standard, limitation, or order, or (B) if the Administrator or State has commenced and is diligently prosecuting a civil or criminal action in a court of the United States, or a State to require compliance with the standard, limitation, or order, but in any such action in a court of the United States any citizen may intervene as a matter of right. (2) under subsection (a) (2) of this section prior to sixty days after the plaintiff has given notice of such action to the Administrator, except that such action may be brought immediately after such notification in the case of an action under this section respecting a violation of sections 306 and 307(a) of this Act. Notice under this subsection shall be given in such manner as the Administrator shall prescribe by regulation."

60. Id. § 1365(d).

61. Id. § 1365(e).

62. 168 N.Y.L.J. 1 (1972). U.S. Attorney Whitney North Seymour, Jr., in a speech before Natural Resources Defense Council, while generally commending the comprehensive nature of the national abatement program, complained that the new amendments involve complex administrative procedures which shelter industrial polluters from the reach of U.S. Attorneys, in that "a

The number of judicial decisions suggesting the strong need for a legislative rather than judicial response to the problems of the environment point to the fact that a responsible legislative delegation of authority may indeed make significant inroads in dealing with environmental protection suits. In particular, while the authority for enforcing environmental standards is vested in federal regulatory agencies,[63] little progress will be achieved if the shield of official governmental discretion in prosecuting violators remains the ultimate standard. Legislation authorizing citizen suits will not only provide an effective vehicle to insure adherence to environmental standards, but may well initiate the beginning of a participatory concept whereby citizen involvement would supplement the efforts of administrative enforcement in attempting to stem what has proved a complex and unrestrained societal concern.

LANDLORD-TENANT LAW—Summary Proceedings to Oust—Tenant Has No Seventh Amendment Right to Jury Trial When Counterclaiming for Breach of Implied Warranty of Habitability. Pernell v. Southall Realty, 294 A.2d 490 (D.C. Ct. App. 1972).

On July 20, 1971 the landlord filed a complaint under section 16-1501 of the District of Columbia Code[1] seeking possession of real property due to the tenant's failure to pay three months' rent in the amount of $375. No claim for rent in arrears was made. In his answer the tenant claimed a setoff in the sum of $389.60 for repairs the tenant made and counterclaimed for $75 for the landlord's alleged violation of local housing regulations in regard to the leased property. The court, in a non-jury trial, entered judgment granting possession to the landlord.

On appeal, the tenant maintained that a summary proceeding is in the nature of the common law action of ejectment, that his counterclaim

polluter can now be hauled into court only when the Administrator . . . completes his administrative proceedings . . . ." Id.

63. See note 5 supra.

1. D.C. Code Ann. § 16-1501 (Supp. V 1972) states: "When a person detains possession of real property without right, or after his right to possession has ceased, the Superior Court of the District of Columbia, on complaint under oath verified by the person aggrieved by the detention, or by his agent or attorney having knowledge of the facts, may issue a summons to the party complained of to appear and show cause why judgment should not be given against him for the restitution of possession."

for a breach of the implied warranty of habitability was also an action at law and that under the seventh amendment[2] he was entitled to a jury trial.[3] The District of Columbia Court of Appeals held that no constitutional right to a jury trial could be invoked.[4]

The seventh amendment[5] limits the right to jury trial to "[s]uits at common law."[6] A basic problem is to determine whether the amendment refers to the common law of England as it existed in 1791 or the

2. U.S. Const. amend. VII provides: "In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law."

3. More than a theoretical constitutional question, the resolution of who the trier of fact will be—a lay jury or a professional judge—may very well determine the outcome of the suit. A lay jury is likely to be composed of at least some tenants and is therefore less anxious to enforce many of the archaic property laws which in many instances are clearly unfair to tenants. Thus it follows that if the tenant is able to present his case to a jury his chances of success will be improved. This by no means runs contrary to our system of justice. In fact "one of the purposes of the jury system is to permit the jury to temper strict rules of law by the demands and necessities of substantial justice." Edelman, A Trial Brief on Behalf of the American Jury System, 3 Trial Lawyers Quarterly 26, 33 (1965-66).

4. Pernell v. Southall Realty, 294 A.2d 490 (D.C. Ct. App. 1972).

5. The seventh amendment applies to the federal courts (Pearson v. Yewdall, 95 U.S. 294 (1877)), United States territories (Kennon v. Gilmer, 131 U.S. 22 (1888)) and to the District of Columbia (Capital Traction Co. v. Hof, 174 U.S. 1 (1898)). The amendment has not been applied directly to the states. Palko v. Connecticut, 302 U.S. 319 (1937); Wagner Elec. Mfg. Co. v. Lyndon, 262 U.S. 226 (1923); Minneapolis & St. L. R.R. v. Bombolis, 241 U.S. 211 (1916); Williams v. Williams, 13 N.C. App. 468, 186 S.E.2d 210 (1972). State courts, in construing their own constitutional provisions for jury trials in civil cases, have often found federal construction of the seventh amendment persuasive if not controlling. See, e.g., Dudley v. Harrison, McCready & Co., 127 Fla. 687, 173 So. 820, rehearing denied, 128 Fla. 338, 174 So. 729 (1937) (persuasive); Fedoryszyn v. Weiss, 62 Misc. 2d 889, 310 N.Y.S.2d 55 (Sup. Ct. 1970) (controlling). The right to a jury trial referred to in many state constitutions is held to refer to the right as it existed in the territory when the Consitution was adopted. Kuhl v. Pierce County, 44 Neb. 584, 62 N.W. 1066 (1895); State v. Greenwood, 63 N.M. 156, 315 P.2d 223 (1957). If the state, before obtaining statehood, had been a United States territory, it was, as noted above, governed by the United States Constitution. At least one state has reached the conclusion that unless amended, the state constitution is in essence preserving the seventh amendment right. Maryland Nat'l Ins. Co. v. District Court, 455 P.2d 690 (Okla.), cert. denied, 396 U.S. 25 (1969).

6. U.S. Const. amend. VII.

common law of the states as of that date. Since jury practices in the states were diversified at the time the amendment was passed,[7] to interpret the amendment as referring to the common law of the states would require each district court to apply a different standard, depending on the state law involved. This would result in a federal constitutional right having a different meaning from state to state. Also, if the amendment referred to the common law of the states as it stood in 1791, it would be difficult to determine the extent of the right in states admitted to the Union after 1791.[8] Thus, the settled law is that the common law to which the amendment refers is the common law of England as it existed in 1791.[9]

The amendment preserves the right to a jury trial in all suits to settle legal rights which are not of equity or admiralty jurisdiction.[10] Thus, for the tenant in *Pernell* to be entitled to a jury trial, he would have to show that a summary proceeding is in essence an action at law.

In *Pernell*, the tenant contended that a summary proceeding brought under section 16-1501 is in the nature of an action in ejectment, which was triable by jury at common law.[11] Therefore, the issue is whether the action is to be treated as an ejectment proceeding requiring a jury trial or as another type of proceeding which would permit a non-jury trial.

An action in ejectment has been defined as:

> [A]n action to recover possession of real estate, in which the plaintiff's title may or may not become an issue; that it is not automatically in issue, and is not in issue at all unless the defendant challenges it.[12]

While there is authority that the issue of title is always present in an action in ejectment,[13] this is probably because title usually does become

7. Partly because each colony originated at a different stage of the English historical development, the law varied in style and emphasis in each. Henderson, The Background of the Seventh Amendment, 80 Harv. L. Rev. 289, 299 (1966). For example, some states readily used procedural devices for controlling a jury while others subjected the jury to little or no control. The possibility of a special verdict or procedure for securing a new trial differed from state to state. Id. at 310-17.

8. Id. at 336.

9. Baltimore & C. Line, Inc. v. Redman, 295 U.S. 654 (1935); Capital Traction Co. v. Hof, 174 U.S. 1 (1898); Damsky v. Zavatt, 289 F.2d 46 (2d Cir. 1961).

10. Ross v. Bernhard, 396 U.S. 531 (1970).

11. 294 A.2d at 492.

12. Shapiro v. Christopher, 195 F.2d 785, 792 (D.C. Cir. 1952).

13. McArthur v. Porter, 31 U.S. (6 Pet.) 205, 211-12 (1832).

an issue.[14] In essence, ejectment is an action to recover possession of real property.[15]

At common law, ejectment was not the only method by which a landlord could regain possession of leased premises. The landlord had a right to re-enter immediately and take possession of the rented premises upon expiration of the lease.[16] He could regain possession by use of force without being liable in tort provided he used "no more force than necessary,"[17] and used a degree of force short of that which threatened death or caused serious bodily harm.[18] This common law right to obtain possession by force has been replaced in many jurisdictions by statutes of forcible entry and detainer which provide for a summary proceeding to oust.[19]

One purpose of the summary proceeding is to obviate resort to self-help and prevent possible resulting breaches of the peace.[20] It provides an expeditious remedy for a landlord, who may be deprived of income to meet expenses due to a tenant who dishonestly and wrongfully holds over.[21]

In view of this historical background, the court in *Pernell* appears to be following the weight of authority by holding that a summary proceeding is not in essence an action in ejectment and therefore the right to trial by jury does not attach.[22] Although the issue raised and

14. Shapiro v. Christopher, 195 F.2d 785, 792 (D.C. Cir. 1952).

15. Staffan v. Zeust, 10 App. D.C. 260 (Ct. App. 1897).

16. "It would seem that at common law the landlord had the right, after the expiration of the tenant's term, to immediately re-enter and take possession of the rented premises, and that in so doing a resort to force was legal, provided no more force was used than was actually necessary to eject the tenant." Entelman v. Hagood, 95 Ga. 390, 391, 22 S.E. 545 (1895); see also Smith v. Reeder, 21 Ore. 541, 28 P. 890 (1892).

17. The Supreme Court of Oregon found: "[B]y the decided weight of authority, he may enter and expel the tenant by force, without being liable to an action of tort for damages, either for his entry upon the premises, or for an assault in expelling the tenant, provided he uses no more force than is necessary and does no wanton damage." Smith v. Reeder, 21 Ore. 541, 546, 28 P. 890, 891 (1892); Entelman v. Hagood, 95 Ga. 390, 22 S.E. 545 (1895).

18. Lindsey v. Normet, 405 U.S. 56, 71 (1972).

19. See, e.g., Fla. Stat. Ann. §§ 82.01-.101 (Supp. 1973); Iowa Code Ann. § 648.1 (1950); Ore. Rev. Stat. §§ 105.105-.160 (1971).

20. Lindsey v. Normet, 405 U.S. 56, 71 (1972); Shorter v. Shelton, 183 Va. 819, 33 S.E.2d 643 (1945).

21. Lindsey v. Normet, 405 U.S. 56, 72-73 (1972); Frazee v. Bratton, 26 S.C. 348, 2 S.E. 125, 127 (1887).

22. Cameron v. United States, 148 U.S. 301 (1893); Brown v. Slater, 23

remedy sought are often the same—the right to possession of real property—the historical origins of the two remedies differ and as a result, under the seventh amendment, the right to a jury trial attaches to one but not the other.

The tenant in *Pernell* further contended that he was entitled to a jury trial under the seventh amendment due to the historical background of section 16-1501. In *Urciolo v. Evans*[23] the Superior Court of the District of Columbia, in a factual situation similar to the instant case, traced the development of section 16-1501 from the writs of entry and assize which existed at common law and found that the tenant had a right to a jury trial. The *Pernell* court accepted the historical background set forth in *Urciolo*, but did not recognize the jury functions traced in *Urciolo* as those protected by the seventh amendment.[24] In reaching this conclusion the *Pernell* court relied on *Capital Traction Co. v. Hof*.[25] In that case the United States Supreme Court held that a jury trial in a civil action before a justice of the peace in the District of Columbia was not a jury trial within the meaning of the seventh amendment. Since cases of forcible entry or detainer had been brought in justice of the peace courts in the District of Columbia,[26] *Pernell* reasoned that the jury functions which the *Urciolo* court traced were not seventh amendment jury trials.[27]

As a defense to the landlord's action, the tenant asserted a setoff of $389.60 for repairs he made on the premises and a counterclaim of $75 for the landlord's failure to comply with housing regulations. Arguing that this is a legal defense based on breach of the implied warranty of habitability, the tenant claimed a right to a jury trial on his counterclaim.[28]

A few jurisdictions across the country, including the District of Columbia,[29] are beginning to imply a warranty of habitability in leases.[30]

App. D.C. 51 (Ct. App. 1904) (dictum); Reece v. Montano, 48 N.M. 1, 144 P.2d 461 (1943).

23. 99 Daily Wash. L.R. 1729 (D.C. Super. Ct. 1971).

24. 294 A.2d at 495.

25. 174 U.S. 1 (1899).

26. Act of July 4, 1864, ch. 243, § 2, 13 Stat. 383.

27. 294 A.2d at 495.

28. Id. at 497.

29. Javins v. First Nat'l Realty Corp., 428 F.2d 1071 (D.C. Cir.), cert. denied, 400 U.S. 925 (1970).

30. See, e.g., Lemle v. Breeden, 51 Hawaii 426, 462 P.2d 470 (1969); Reste Realty Corp. v. Cooper, 53 N.J. 444, 251 A.2d 268 (1969). As the Supreme Court of Wisconsin reasoned, "[t]o follow the old rule of no implied warranty

Often the standard of habitability used is that of the local housing statutes.[31] In those cases where the existence of the warranty is recognized, contract principles are applied to the lease.[32] The tenant's covenant to pay rent is held to be dependent on the landlord's honoring the warranty of habitability.[33] In jurisdictions where the warranty is recognized, when a landlord brings a summary proceeding to oust the tenant for failure to pay rent, the tenant is allowed to assert in defense the landlord's breach of the warranty of habitability.[34]

At common law, the right to a jury trial attached to an action for breach of contract.[35] Since the District of Columbia treats a lease as a contract,[36] a claim that a covenant in the lease has been breached would normally be considered an action in contract and hence a right to a jury trial would arise. However, the court in *Pernell* held that since there was no implied warranty of habitability at English common law in 1791, the warranty does not fall within the meaning of "common law" in the seventh amendment, and no right to a jury trial existed for the action.[37]

This interpretation would restrict the seventh amendment right to jury trial to those breach of contract causes of action which existed at common law in 1791. This is contrary to the generally recognized interpretation that the amendment preserves the right in all suits to settle legal rights as distinguished from those in equity or admiralty.[38] In *Ross v.*

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of habitability in leases would, in our opinion, be inconsistent with the current legislative policy concerning housing standards. The need and social desirability of adequate housing for people in this era of rapid population increases is too important to be rebuffed by that obnoxious legal cliche, caveat emptor." Pines v. Perssion, 14 Wis. 2d 590, 596, 111 N.W.2d 409, 412-13 (1961).

31. Javins v. First Nat'l Realty Corp., 428 F.2d 1071 (D.C. Cir.), cert. denied, 400 U.S. 925 (1970); Reste Realty Corp. v. Cooper, 53 N.J. 444, 251 A.2d 268 (1969).

32. Javins v. First Nat'l Realty Corp., 428 F.2d 1071 (D.C. Cir.), cert. denied, 400 U.S. 925 (1970); Marini v. Ireland, 56 N.J. 130, 265 A.2d 526 (1970).

33. Lemle v. Breeden, 51 Hawaii 426, 462 P.2d 470 (1969); Jack Spring, Inc. v. Little, 50 Ill. 2d 351, 280 N.E.2d 208 (1972).

34. Jack Spring, Inc. v. Little, 50 Ill. 2d 351, 280 N.E.2d 208 (1972); Marini v. Ireland, 56 N.J. 130, 265 A.2d 526 (1970).

35. Snell v. Niagara Paper Mills, 193 N.Y. 433, 436-37, 86 N.E. 460, 461 (1908).

36. Javins v. First Nat'l Realty Corp., 428 F.2d 1071 (D.C. Cir.), cert. denied, 400 U.S. 925 (1970).

37. 294 A.2d at 497.

38. See note 10 supra and accompanying text.

Bernhard[39] the Supreme Court, quoting from *Parsons v. Bedford*,[40] held that the seventh amendment applies to:

> [n]ot merely suits, which the *common* law recognized among its old and settled proceedings, but suits in which *legal* rights were to be ascertained and determined, in contradistinction to those where . . . equitable remedies were administered.[41]

The court in *Parsons* went on to say:

> Probably, there were few, if any, states in the Union, in which some new legal remedies, differing from the old common-law forms, were not in use; but in which, however, the trial by jury intervened, and the general regulations in other respects were according to the course of the common law. Proceedings in cases of partition, and of foreign and domestic attachment, might be cited as examples variously adopted and modified.[42]

Under this view, if the lease is regarded as a contract, the landlord's breach of warranty gives the tenant an action in breach of contract which involves a legal right and hence a right to a jury trial.[43]

Even if a lease is not regarded as a contract, at common law a tenant had a cause of action to recover damages suffered by the landlord's breach of an express covenant to repair.[44] Since the implied warranty of habitability places an obligation on landlords to make repairs, a breach of this obligation presents a legal claim.

Ordinarily, when a complaint sets forth an equitable claim, a defendant has a right to a jury trial on any legal counterclaim he may assert.[45] Thus, if breach of the implied warranty of habitability is a legal claim within the meaning of the seventh amendment, the tenant should have a jury trial on that issue.

To justify the court's result in this case an analogy could be drawn to bankruptcy proceedings which are inherently equitable proceedings to which the right to jury trial does not attach.[46] The Supreme Court, in

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39. 396 U.S. 531 (1970).

40. 28 U.S. (3 Pet.) 433 (1830).

41. 396 U.S. at 533, quoting 28 U.S. (3 Pet.) at 447 (emphasis supplied by Ross Court).

42. 28 U.S. (3 Pet.) at 447.

43. Snell v. Niagara Paper Mills, 193 N.Y. 433, 86 N.E. 460 (1908).

44. Hargis v. Sample, 306 S.W.2d 564 (Mo. 1957).

45. Dairy Queen, Inc. v. Wood, 369 U.S. 469 (1962); Beacon Theatres, Inc. v. Westover, 359 U.S. 500 (1959); Thermo-Stitch, Inc. v. Chemi-Cord Processing Corp., 294 F.2d 486 (5th Cir. 1961).

46. Pepper v. Litton, 308 U.S. 295, 304 (1939); Local Loan Co. v. Hunt, 292 U.S. 234, 240 (1934).

Katchen v. Landy,[47] held that when a creditor asserts a legal claim in the summary proceedings, he is not entitled to a jury trial. This holding does not violate the seventh amendment, the *Katchen* Court reasoned, since the creditor could have brought his counterclaim in a separate action in which he would be entitled to a jury trial.[48] By filing his legal claim in the bankruptcy proceeding, the creditor has impliedly consented to the adjudication by the bankruptcy court in a summary proceeding. Since equity courts have power to grant complete relief, they may do so even if they must afford what would otherwise be legal relief.[49]

The *Katchen* Court distinguished *Beacon Theatres, Inc. v. Westover*[50] and *Dairy Queen, Inc. v. Wood*,[51] which held that defendants have a right to jury trial on legal counterclaims though the complaint sounded in equity. The latter two cases did not involve a specific statutory scheme contemplating the quick resolution of a claim without the intervention of a jury trial, as was the case in the *Katchen* bankruptcy situation.[52] The *Katchen* Court noted that both *Beacon* and *Dairy Queen* recognized there were situations where an equitable claim would be resolved first, though the result might dispose of issues involved in the legal claim.[53] The Court felt that to implement congressional intent, a bankruptcy court may summarily adjudicate a legal counterclaim voluntarily submitted.[54]

Similarly, in view of the legislative purpose to adjudicate summarily the claim for possession[55] in the statute of forcible entry and detainer and because the tenant voluntarily raised the legal issue as a defense rather than bringing a separate action on it,[56] he may be regarded as having waived the right to a jury trial on the legal claim. This view is strengthened by the fact that Rule 5(b) of the Landlord and Tenant Branch of the Superior Court characterizes tenants' defenses of recoupment, setoff or counterclaim based on credits against the rent as equitable.[57] The

47. 382 U.S. 323 (1966).
48. Id. at 336.
49. Id. at 338.
50. 359 U.S. 500 (1959).
51. 369 U.S. 469 (1962).
52. 382 U.S. at 339.
53. Id.
54. Id. at 339-40.
55. Lindsey v. Normet, 405 U.S. 56, 72 (1972).
56. Academy Spires, Inc. v. Jones, 108 N.J. Super. 395, 261 A.2d 413 (1970).
57. D.C. Super. Ct. (Landlord and Tenant Branch) R. 5(b): "In actions in this branch for recovery of possession of property in which the basis of recovery is

court, in *Pernell*, noted that the defendant's right to assert defenses rested on the rule of the court and not upon the Constitution and therefore he could only assert equitable rights in accordance with the rule.[58]

Generally, despite limitations on the tenant's defenses in summary proceedings, the tenant is not precluded from bringing another action in ejectment or trespass and suing for damages if he were ousted in the summary proceeding.[59] In this second action he would be entitled to a jury trial.[60] A summary proceeding would therefore not deprive him of the right to a jury trial on the breach of implied warranty of habitability. However, once having exercised his option by bringing the counterclaim, the court's determination is res judicata to the claim and the tenant thereafter may not bring a separate action on the claim.[61]

By tracing the roots of the summary proceeding in a forcible entry and detainer statute to the common law right of the landlord to re-enter the premises using reasonable force rather than to an action in ejectment, the court concluded that the seventh amendment does not guarantee a right to jury trial in the summary proceeding. The court's holding that the tenant was not entitled to a jury trial on his counterclaim rests on the argument that breach of warranty does not fall within the amendment's protection, because it did not exist at common law in 1791. This reasoning is erroneous since it makes the amendment applicable only to those causes of action which existed at common law rather than those involving legal rights as opposed to those in equity or admiralty. However, even though the breach of the implied warranty of habitability should be protected by the seventh amendment, the court's result is justified under a theory of waiver similar to that utilized in bankruptcy proceedings. It may be argued that the theory of warranty of habitability is based upon

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nonpayment of rent or in which there is joined a claim for recovery of rent in arrears, the defendant may assert an equitable defense of recoupment or set-off or a counterclaim for a money judgment based on the payment of rent or on expenditures claimed as credits against rent or for equitable relief related to the premises. No other counterclaims, whether based on personal injury or otherwise, may be filed in this branch. This exclusion shall be without prejudice to the prosecution of such claims in other branches of the court."

58. 294 A.2d at 498.

59. Academy Spires, Inc. v. Jones, 108 N.J. Super. 395, 261 A.2d 413 (1970); Van Vlaanderen Mach. Co. v. Fox, 95 N.J.L. 40, 111 A. 687 (Sup. Ct. 1920).

60. See note 11 supra and accompanying text.

61. Geracy, Inc. v. Hoover, 133 F.2d 25 (D.C. Cir. 1942); Antonelli v. Smith, 113 A.2d 570 (D.C. Mun. Ct. App. 1955).

the present and immediate right of use as an affirmative defense against summary proceedings. However, if a jury trial were permitted on any legal counterclaim which a tenant might assert, the proceeding would no longer be summary and conceivably, by operation of the forcible entry and detainer statute in conjunction with the seventh amendment, the landlord would be deprived of a remedy which he previously had and of which neither the amendment nor the statute intended to deprive him.

WELFARE LAW—Retroactivity of Benefits—Federal Court-Ordered State Retroactive Payments of Federally-Supported Public Assistance Funds (AABD and AFDC) Precluded by Economic Realities of Welfare Program Goals and Eleventh Amendment. Rothstein v. Wyman, 467 F.2d 226 (2d Cir. 1972).

Plaintiffs commenced this class action[1] in federal district court to challenge section 131-a[2] of the New York Social Services Law which provided for welfare payments[3] to New York City recipients at a level higher than that set for residents of seven other New York counties[4]

1. Rothstein v. Wyman, 303 F. Supp. 339 (S.D.N.Y. 1969). Litigation was initiated on behalf of all welfare recipients in a seven county area in the categories of Aid to Aged, Aid to Blind, and Aid to Disabled, [hereinafter collectively cited as AABD]. Id. at 340. A preliminary injunction was issued and four months later, in October 1969, intervention was sought on behalf of other welfare recipients (in the same geographic area) who had been beneficiaries of that category of aid known as Aid to Families with Dependent Children [hereinafter cited as AFDC], which intervention was permitted by the district court. Enforcement of the statute was thus stayed with respect to recipients in both aid categories.

2. Law of March 30, 1969, ch. 184, § 5, [1969] N.Y. Laws 217 [hereinafter cited as N.Y. Soc. Services Law § 131-a], as currently amended, N.Y. Soc. Services Law § 131-a (McKinney Supp. 1972).

3. This payment, referred to as the "Flat-Grant Pre-added" allowance, included food, clothing, personal incidentals, household supplies, school expenses, utilities and sales taxes. It did not include rent which was computed separately. New York City, N.Y. Dep't Soc. Services Info. No. 69-45 (Sept. 26, 1969).

4. The counties were Nassau and Suffolk comprising the non-New York City regions of Long Island; Westchester which borders New York City immediately to the north; Dutchess and Ulster which abut one another astride the Hudson River some 50 miles to the north of New York City, but which are not contiguous with Westchester County; Greene County which lies southwest of Albany; and Monroe County, which consists of Rochester and its surrounding environs on the southern shore of Lake Ontario, some 300 miles to the northwest of New York

upon a determination by the state welfare administrator that adequate cause existed for the differential in payment levels.[5] Plaintiffs, residents of these non-New York City counties, were recipients of the various kinds of public welfare assistance for which partial federal reimbursement is provided to the states for funds that they have expended.[6]

City. These vast geographic separations give rise to a lamentable example of judicial reiteration of prior error. In 1968, the New York State Department of Social Services divided the state into three regions and standardized aid levels for the counties it included within each region. The five metropolitan New York City counties were at that time included in the same region as the aforementioned seven. The three-judge district court chose to characterize these seven as the "surrounding counties." 303 F. Supp. at 342. The court purports to conduct a lengthy analysis of the state legislature's possible reasons for fixing New York City welfare payment levels at a higher rate than those set for a rural north Catskill Mountain area such as Greene County. Id. at 344-49. This court's examination finds no justification for such payment differentials, yet this remarkable analysis is content throughout to reiterate a profound unawareness of even the most basic elements of the state's physical geography, referring time and again to the regions involved as New York City and its surrounding "suburban communities." Id. More distressing is the fact that such an error survives to influence subsequent proceedings. Thus, in the initial remand, Judge Motley, in ordering the retroactive payments, repeats the error. Rothstein v. Wyman, 336 F. Supp. 328, 329-30 (S.D.N.Y. 1970). The court of appeals in the instant case even goes so far as to identify the seven counties as "neighboring" in finding the cost differentials unjustified. Rothstein v. Wyman, 467 F.2d 226, 229 (2d Cir. 1972). It cannot, of course, be stated with certainty that a fuller appreciation of geographic realities or a more accurate understanding of such terms as "urban," "rural," and "adjoining" as they apply to the New York counties would have guaranteed a different result in the cases at hand. It is regrettable, though, in view of different courts' stated attempts to consider the pragmatic realities of the complex issues at bar that such an egregious error was permitted to influence even one decision, let alone several.

5. On June 5, 1969, the Commissioner of Social Services, exercising the power granted him in the amendment to § 131-a, raised the monthly levels of assistance in the seven county area from $60 to $65 for single recipients, and from $183 to $191 for a family of four. This compared with New York City levels of $70 and $208, respectively. 303 F. Supp. at 342-44.

6. The "various kinds" of public assistance for which federal reimbursement may be provided to the states are set forth in the Social Security Act of 1935: 42 U.S.C. §§ 301-06 (1970) (Old Age Assistance) [hereinafter cited as OAA]; 42 U.S.C. §§ 601-44 (1970) (AFDC); 42 U.S.C. §§ 1201-06 (1970) (Aid to the Blind) [hereinafter cited as AB]; and 42 U.S.C. §§ 1351-55 (1970) (Aid for the Permanently and Totally Disabled) [hereinafter cited as APTD]. A state may elect the option of combining three of these four programs—OAA, AB, and APTD—into one composite program of aid to the aged, blind, and disabled under 42 U.S.C. §§ 1381-85 (1970) (AABD).

Asserting that section 131-a conflicted with the Social Security Act[7] and the equal protection clause of the fourteenth amendment, plaintiffs sought to have the statute declared invalid and to enjoin its enforcement. A three-judge court found that likelihood of success on the constitutional claim warranted the issuance of a preliminary injunction staying enforcement of section 131-a.[8] The court gave only minimal consideration to plaintiffs' alternative statutory claim premised upon the Social Security Act.[9] On appeal,[10] the United States Supreme Court reversed, citing its decision in *Rosado v. Wyman*,[11] and remanded for an opportunity to pass on the merits of the statutory claim.[12]

The original three-judge district court, finding that the differential set forth in section 131-a constituted invidious discrimination in violation of the equal protection clause, had decided that the proper form of relief was to enjoin further enforcement and, upon remand to a single-judge court, this choice of remedy remained essentially unaltered.[13] In submitting to the single-judge court an order which embodied this prospective injunctive relief, plaintiffs, for the first time, sought to require defendants to make retroactive payment of those monies which the state had,

7. In particular, the complaint alleged that § 131-a conflicted with 42 U.S.C. §§ 602, 1382 (1970) and with regulations issued thereunder. See, e.g., 45 C.F.R. § 233.20 (1972).

8. 303 F. Supp. at 351.

9. Id. at 350.

10. Wyman v. Rothstein, 398 U.S. 275 (1970).

11. Rosado v. Wyman, 397 U.S. 397, 402 (1970), wherein the Court held that a federal court passing on the validity of a state's welfare program should dispose of any pendent statutory claims before reaching the constitutional issues that are presented.

12. 398 U.S. at 275. In essence, the Court ruled that the district court should consider the "propriety of granting interim relief in accordance with conventional equitable principles on the basis of appellees' statutory claims, or, if the question is reached, continuing the present injunction in light of this Court's decision in Dandridge v. Williams. . . ." Id. at 276-77. In Dandridge, the Court, upholding a Maryland maximum grant regulation (which imposed an upper limit on the total amount of money any one AFDC family unit could receive) against a challenge that it violated the Social Security Act and the equal protection clause, reaffirmed the principle that in the area of economics and social welfare, a state has great latitude in dispensing its available funds. Dandridge v. Williams, 397 U.S. 471 (1970).

13. 303 F. Supp. at 347, vacated and remanded, 398 U.S. 275 (1970). On remand from the Supreme Court, the rationale for the lower court's holding was adjusted as had been instructed but the relief granted remained the same. Rothstein v. Wyman, 336 F. Supp. 328, 333-34 (S.D.N.Y. 1970).

in the plaintiffs' view, improperly withheld from the seven county area recipients.[14] Defendants proposed a counter-order omitting any provision for retroactive payments; but nearly a year later, the district court entered an order and judgment in accord with the relief suggested by plaintiffs.[15] The United States Court of Appeals for the Second Circuit reversed this judgment. It found that the statutory scheme creating the welfare programs in question embodied a cooperative approach between federal and state governments[16] and concluded that the district court had improperly exercised its equity jurisdiction in awarding the retroactive payments.[17] Finally the court found that, "in any event, federal jurisdiction to grant such relief is foreclosed by the Eleventh Amendment."[18]

The court in deciding *Rothstein* found two separate bases for denying the retroactive payments, each basis in itself sufficient to mandate the reversal of the "remedial provisions of that decree."[19] These bases were that (1) the goals of public assistance programs were in no way aided by compelling retroactive payments and that (2) the federal courts, regardless of the efficacy of such payments, could not, consistently with the Supreme Court's traditional view of the purport of the eleventh amendment,[20] constitutionally require those payments to be made.

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14. Specifically, plaintiffs petitioned that defendants be required "(1) to recompute, by reference to the New York City levels, the payments to all recipients in the seven-County area between July 1, 1969, and October 1, 1969 (AABD) and November 1, 1969 (AFDC), and to remit the differentials; and (2) to give notice to all persons who during the periods in question had applied for assistance and had been denied it for lack of eligibility under the lower schedules of § 131-a that they would now be held eligible upon application within 60 days and entitled to receive payments under the higher schedules from the date of their originally unsuccessful applications." 467 F.2d at 231.

15. Id.

16. Id. at 228.

17. Id. at 235-36.

18. Id. at 228-29.

19. Id. at 228.

20. U.S. Const. amend. XI. The eleventh amendment was adopted to eliminate an apparent breach in the protection from private suit afforded by the ancient doctrine of sovereign immunity which breach resulted from ratification of art. III, § 2 of the Constitution itself. See note 71 infra. This section appeared to establish federal courts as a forum wherein citizens of one state could sue another state without that state's consent. The eleventh amendment terminated the development of case law on this point. See C. Wright, Handbook of the Law of Federal Courts 183 (2d ed. 1970). This amendment was then judicially extended to preclude suits by a citizen against his own state. Id. Such extension may not really have been necessary since it is possible that the original art. III, § 2 could

The first of these bases exemplified a sense of pragmatism. The court examined the essential nature of the federal-state relationship characterized by the Supreme Court as a "scheme of cooperative federalism."[21] Note was made of the peculiar "strains"[22] felt by the "poorer partners"[23]—the states—in the federal system.

The states were, of course, not obligated to participate in the federal programs, but the incentives—matching grants—to do so were great, designed to encourage the states to "make generous use of their own funds to aid their impoverished citizens."[24] Historically, these incentives were provided by the Social Security Act which established in 1935 four categories of public assistance.[25] The federal government thus undertook to contribute a substantial percentage of a particular state's total aid expenditure for those needy persons meeting the requisite categorical requirements. Though federal monies were the major component of the funding totals, the administration of these programs was left to the states to be conducted through their local social service departments. The systems of allocation were to be designed by the respective state legislatures.[26] Since the states have traditionally been free "to pay as little or as much as they choose"[27] in welfare benefits, participation by a state in the federal program was not required.[28] However, those states wishing to take advantage of the federal funds available were required to comply with pertinent federal requirements in order to qualify for and assure continued receipt of such funds.[29]

The federal-state relationship created by the state's acceptance of this reimbursement is at all times a delicate one since the state does not by its mere participation surrender its traditional discretion to administer its

have been construed in a manner that would not have affected that basic sovereign right of freedom from suits from one's own citizens. See generally Mathis, The Eleventh Amendment: Adoption and Interpretation, 2 Ga. L. Rev. 207 (1968); Cullison, Interpretation of the Eleventh Amendment (A Case of the White Knight's Green Whiskers), 5 Hous. L. Rev. 1 (1967).

21. 467 F.2d at 232.

22. Id.

23. Id.

24. Id. at 235.

25. See note 6 supra for a categorical explication.

26. Policies Governing the Administration of Public Assistance and Social Services (pamphlet), New York City, N.Y. Dep't Soc. Services at 2, 63 (Nov. 1970) [hereinafter cited as Policies].

27. Rosado v. Wyman, 397 U.S. 397, 408 (1970).

28. King v. Smith, 392 U.S. 309, 316 (1968).

29. Id. at 317 n.12.

public assistance programs as it sees fit.[30] It is well settled that a state has "considerable latitude" in allocating the federal funds available to it as public assistance supplements.[31] It may protect its own economic interest by exercising its undisputed right to set its own standards of need, thereby determining who shall be eligible to receive welfare aid.[32] It may also limit its total expenditure in each individual assistance category by prescribing differing but nondiscriminatory levels of benefits for the eligible recipients in each subclassification.[33] On the other hand, the federal government, as grantor, has an understandable interest in seeing that the funds it allocates to the states are expended in accord with the conditions that Congress attached to their granting.[34] The right of the federal government to impose conditions, other than those barred by constitutional prohibition, outlining the manner in which its allotments to the states shall be further dispersed has been firmly established.[35] Therefore, any state law or regulation inconsistent with such governing federal regulations has been held invalid to the extent of that inconsistency.[36]

In endeavoring to map out the topography of the pertinent statutory and regulatory provisions in what has been referred to as this "scheme of cooperative federalism,"[37] the federal courts have functioned somewhat like a concerned relative called upon to arbitrate an increasing number

30. Dandridge v. Williams, 397 U.S. 471, 486-87 (1970).

31. 392 U.S. at 318. The Supreme Court has held, however, that under the Social Security Act of 1935, 42 U.S.C. § 402(a)(23) (1970), a state may not obscure the actual standard of need by defining it in a way that does not take into account the rising cost of living, or by substantially altering its content unless the state can demonstrate that items which it formerly included when computing the standard of need are no longer required by its recipients. A state may, however, after recomputing its standard of need, lower its payments to accommodate budgetary realities by reducing the percentage of benefits paid. Rosado v. Wyman, 397 U.S. 397, 419 (1970).

32. 392 U.S. at 318. In May 1972, the Supreme Court again reaffirmed its position that a state legislature's judgments in regard to the manner in which its federal welfare funds are disbursed are not subject to a "constitutional straitjacket" so long as they are "rational, and not invidious." Jefferson v. Hackney, 406 U.S. 535, 546 (1972). See generally Note, 1 Fordham Urban L.J. 322 (1972).

33. Id. at 549-50.

34. Rosado v. Wyman, 397 U.S. 397, 422-23 (1970). A state is, of course, in no way prohibited from using only state funds according to whatever plan it chooses providing no constitutional provisions are violated. Id. at 420.

35. 392 U.S. at 333 n.34.

36. Id.

37. 467 F.2d at 232.

of disputes in a marriage that has been shaky from the start.[38] Typically, plaintiffs have been state citizens aggrieved at actions of their respective state governments.[39] For reasons of utility or convenience, they have sought federal forums for the resolution of their grievances and they have strived to find adequate federal "levers" with which to multiply their chances of litigational success.[40] The federal courts, fully appreciative of this, have had doubts on occasion about the prudence of becoming involved in these controversies since principles of federalism continuously impose restraint upon the exercise of their jurisdictional power to interfere with the federal-state relationships in question.[41]

The Supreme Court, however, has declared in *King v. Smith* that, at least in those cases where "the constitutional challenge is sufficiently substantial,"[42] federal courts do have jurisdiction to review state welfare practices. In *King*, the plaintiffs were not obliged to exhaust the administrative remedies provided in the Social Security Act prior to bringing their action.[43] In deciding that Alabama's "man-in-the-house" regulation was inconsistent with the Social Security Act,[44] the Court, however, specifically did not answer the question of whether (or under what conditions) a suit challenging state welfare provisions merely on federal statutory (non-constitutional) grounds could be brought in a federal court.[45]

Underlying a lower federal court's concern of whether it may appropriately exercise its jurisdiction in this area has been a problem of balance. The disadvantages of imposing sanctions upon a state for noncompliance with federal standards must be weighed against the advantages of redressing the wrong done to individuals adversely affected by

38. See Dandridge v. Williams, 397 U.S. 471 (1970), wherein the Court stated: "[T]he intractable economic, social, and even philosophical problems presented by public welfare assistance programs are not the business of this Court. . . . [T]he Constitution does not empower this Court to second-guess state officials charged with the difficult responsibility of allocating limited public welfare funds among the myriad of potential recipients." Id. at 487.

39. Hans v. Louisiana, 134 U.S. 1 (1890).

40. See, e.g., Westberry v. Fisher, 309 F. Supp. 12 (D. Me. 1970).

41. See C. Wright, Handbook of the Law of Federal Courts 177-86 (2d ed. 1970).

42. 392 U.S. at 312 n.4 (1967).

43. Id.

44. Id. at 327.

45. Id. at 312 n.3. In King, the constitutional issue was at all times present but the Court found it unnecessary to resolve that matter in rendering its decision which was premised entirely upon the statutory conformance question. Id. at 313.

the non-complying misallocation of federal funds. A court must necessarily be chary of further aggravating the less than harmonious relationship that may exist between the federal and state authorities in such cases.

Federal courts have experienced no difficulty in granting declaratory relief and restraining further use of federal funds pursuant to an invalid state plan.[46] The choice is then left to the state to either assume the full burden of providing for its poor or to revise its assistance programs in accord with federal standards.[47] These remedies, however, may be seen as deficient in that they merely safeguard the public assistance recipient from future injury—nonpayment of entitled benefits. The recipient has not been compensated for monies which the state has finally, after oftentimes lengthy judicial proceedings, been determined to have unconstitutionally withheld. The question of the propriety of a federal court entertaining a suit for such monies as were withheld during this "procedural interim" has now been answered—in the resounding negative—by the Second Circuit.[48]

Prior to *Rothstein*, the right to receive welfare aid was not deemed to create a vested right to payments that had been unlawfully withheld.[49] Since public assistance payments had as their purpose the "satisfaction of the ascertained needs of impoverished persons,"[50] the present existence of such needs may be supposed to form a hypothetical precondition to welfare expenditures. In effect, welfare aid is a means of insuring survival, and the fact that a recipient is alive to protest nonpayment of these funds is "*per se* proof" of the fact that the social purpose of insuring survival has in some way been met. Thus, there is no longer the continuing requirement of guaranteeing that survival by the expenditure of public funds.[51] This principle, reflected in the operational policy of the local

46. See, e.g., Shapiro v. Thompson, 394 U.S. 618 (1969); King v. Smith, 392 U.S. 309 (1968); Gaddis v. Wyman, 304 F. Supp. 717 (S.D.N.Y. 1964).

47. See Rosado v. Wyman, 322 F. Supp. 1173, 1196 (1970). This seems no more than a mere Hobson's choice, however, for few states have either sufficient financial resources to assume the full burden or the willingness to risk the political consequences of not doing so.

48. 467 F.2d at 235-36.

49. Rosado v. Wyman, 322 F. Supp. 1173, 1196 (1970).

50. 467 F.2d at 235. See 322 F. Supp. at 1184-87 for examples of such "ascertain[able] needs."

51. A theoretical rebuttal might be offered by the provident welfare recipient —welfare's "reasonable man"—who, possessed of a good credit rating, had the foresight to borrow funds sufficient to maintain his habitual existence and who could conclusively demonstrate both the fact of such borrowing and the fact that his continued survival was made possible only by the funds generated via the

welfare department,[52] finds theoretical support in the fact that the state has a legitimate interest in protecting the financial resources which it makes available to its needy residents by providing that payments not be made to recipients whose past "need" is incapable of a present actuality and who perhaps are no longer even on its welfare rolls.[53]

The *Rothstein* court noted the effect of the passage of time upon the nature of the payment the plaintiffs sought. Judge McGowan observed that although "there may perhaps be cases in which the *prompt* payment of funds wrongfully withheld will serve that end,"[54] the time span of

loan which he is now obligated to repay. But, in Rothstein, such was not the case. There was no lowering by the state of the plaintiffs' benefits. Rather, a benefit level was postulated for the entire state. That level governed what plaintiffs received. Then it was noted simply that it costs more to maintain a given standard of living in New York City than in most of the rest of the state and an attempt was made to take realistic cognizance of this fact by paying a "high cost of living" differential to people in the areas affected. No reduction in plaintiffs' originally intended benefit levels was made. When this differential system was found to be discriminatory, the state was given two choices: (1) cut back the New York City levels to that of the rest of the state or (2) raise the state level to that of New York City. The result of either choice would have been to restore equality of payment levels to all recipients. Had option (1) been followed, plaintiffs would have received all that they were legitimately entitled to receive and the New York City welfare recipients would have been the fortuitous beneficiaries of an illegal "windfall" which, at least in "moral" theory, they would have been obligated to repay to the state. The fact that the state opted for the more humanitarian alternative—that of raising the plaintiffs' benefit levels—should not entitle plaintiffs to receive that which had never really been denied them. One can easily imagine the societal and legal chaos that would result from the adoption of the theory tendered by plaintiffs—that every governmental grant of a benefit (which a court finally determines to be illegal) to one individual or group automatically establishes a right of all not so favored to a like grant. Indeed, the net result of adopting the plaintiffs' logic would be to insure that the state would, in similar circumstances, equalize benefits by reduction rather than enlargement so as to obviate the question of any retroactive obligation on the state's part.

52. See Policies, supra note 26, at 71.

53. 467 F.2d at 234.

54. Id. at 235. A cynic might foresee a hard-eyed, cold-hearted state bureaucracy attempting to utilize the admittedly lethargic court process to its own spurious advantage. A patently illegal reduction in benefits might selectively be made. Though expecting to lose the resultant suit, the state would nevertheless be able to point with pride to all the monies it had saved by its "economy of non-retroactivity" during the time the issue took to be finally resolved (three years and two months in Rothstein, for example). In reply, it need only be pointed out that the Rothstein court freely conceded that compelling retroactive payments may well be necessary where a state acts in bad faith (see

sixteen months between the date of the last insufficient payment and the district court order compelling retroactive payments was such as to cause those payments to "become compensatory rather than remedial."[55]

The court noted two other congressional interests that might be furthered by ordering retroactive payments—deterrence of future willful "state violations of federal requirements"[56] and protection of the federal grantor's interest in the "proper use of granted funds."[57] The first of these the court deemed inapplicable because it found no evidence of bad faith on the part of the state such as to require that New York "be dramatically confronted by the minatory face of federal courts."[58] The second legitimate federal legislative interest that might be served by compulsive benefit retroactivity is viewed by the court as being "not personal to welfare recipients."[59] Indeed, since Congress expressly provided for a protection of its interests by a cutoff of federal funding, the court saw no reason to supply the additional court-generated safeguard of retroactivity.[60]

The court thus has ample reasons for its decision, but the court's willingness to follow the dictates of common sense is most forcefully evident in its rejection of the district court's order on the first of the three grounds discussed above. The court recognized the social goal of public assistance payments and readily conceded the vicissitudes of life experienced by most recipients thereof, considering itself "not insensitive to the special incremental value of money to persons living at subsistence levels."[61] But the court looked also to the larger issue and saw the concept of "present compelling need"[62] as controlling. The court appreciated that money to make the retroactive payments cannot be generated spontaneously. It must come from the public coffers, either federal or state, and the court, unsure that "persons from whom

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note 58 infra and accompanying text). In any event, the Rothstein denial of retroactivity did not involve a fact situation where one subclass had been illegally disfavored in comparison with all others, but rather where one had been specifically advantaged (see note 51 supra and accompanying text).

55. 467 F.2d at 235.
56. Id.
57. Id.
58. Id.
59. Id.
60. Id.
61. Id. at 234.
62. Id.

funds were withheld in 1969 have a present compelling need for them,"[63] believed it to be not "provident, given *existing* deprivations which might be relieved, to order the expenditure of scarce funds as compensation for past suffering which, however deplorable, cannot be undone."[64]

In this manner the court decided affirmatively that a challenge in the nature of *Rothstein*,[65] *Rosado*,[66] and *Dandridge*[67] could be decided solely on nonconstitutional grounds.[68] Realistically examining the numerous complexities, the court succeeded in weighing the interests of the relevant parties—plaintiffs, present recipients of welfare, and the authorities, state and federal. Conceding that a loss would have to be borne by someone, the court found that justice required that the plaintiffs, their present existence affirming their past survival, should bear such loss, in order that those of them still receiving assistance and others similarly situated could be assured that the funds available would truly meet "current needs."[69]

The court, however, was not content with merely upsetting the improper exercise of the district court's equity jurisdiction. Though it found the above reasons more than adequate to support its decision and thus so stressed, the court also saw a legitimate constitutional issue as to whether the district court had any jurisdiction to exercise at all. The issue involves the eleventh amendment[70] to the Federal Constitution which precludes extension of the federal judicial power to suits against a state.[71] Although not evident by its actual wording, the amendment

63. Id.
64. Id. (emphasis added).
65. 467 F.2d 226 (2d Cir. 1972).
66. 397 U.S. 397 (1970).
67. 397 U.S. 471 (1970).
68. See notes 19 and 45 supra and accompanying text.
69. 467 F.2d at 235.
70. U.S. Const. amend. XI. See note 20 supra.
71. The doctrine of sovereign immunity, long established in English common law, was adopted in America after independence despite the fact that the new government was conceived as a democracy in which the people themselves were the sovereigns. Since there was no king to whom immunity could pass, it was attributed to the United States and to each of the individual states. Until the adoption of the constitution which created a national judiciary, state courts were the only courts in existence and it was a clearly accepted principle that states were immune from suit in their own courts. See note 20 supra.

In defining the jurisdiction of the new federal courts, however, the framers of the Constitution, perhaps inadvertently, left open the possibility that suits could

has long been held to prevent a citizen of any state from employing the federal judicial forum to sue his own parent state[72] unless that state waives its immunity to such suit.[73] The court in *Rothstein* reiterated that this waiver must be express and unequivocal and rejected the plaintiffs' contention that New York had impliedly surrendered this constitutional immunity by accepting federal assistance for its welfare programs.[74] The court noted that while the federal constitution does not preclude a federal court directing a state official to comply with a federal statute,[75] a "judgment declaring a liability which must be met from the public funds of the state does come within the reach of the Eleventh Amendment; and a court will, absent the state's consent, be deemed without jurisdiction to enter such a judgment."[76] That "Congress has not explicitly conditioned the grant of such funds upon the willingness of the recipient state to waive the immunity from suit provided by the Eleventh Amendment"[77] when it readily could have done so, is conclusive to the court of the fact that Congress did not so desire. The court further observed that "retroactive payments [were not] so necessary to the effectuation of congressional policies that a waiver [arose] by implication."[78] Though

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be brought in federal court against a state by citizens of another state. U.S. Const. art III, § 2 provides: "The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution . . . between a State and Citizens of another State . . . ." Seeming almost to invite such suits, this clause threatened the rule of sovereign immunity of the states. A sequence of cases followed ratification in which individuals sought to take advantage of this loophole to recover claims against the states. See, e.g., Grayson v. Virginia, 3 U.S. (3 Dall.) 320 (1794); Chisholm v. Georgia, 2 U.S. (2 Dall.) 419 (1793). As a result of these cases, which not only challenged the states' sovereignty but seriously endangered their financial positions as well, the eleventh amendment was adopted. The amendment provides: "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." U.S. Const. amend. XI.

72. Hans v. Louisiana, 134 U.S. 1 (1890). See also Kennecott Copper Corp. v. Tax Comm'n, 327 U.S. 573, 576-77 (1946); Ford Motor Co. v. Dep't of Treasury, 323 U.S. 459, 463-64 (1945).

73. 467 F.2d at 238-39.

74. Id. at 238.

75. Ex Parte Young, 209 U.S. 123 (1908), considered this not to be truly a suit involving the state itself as a defendant.

76. 467 F.2d at 236.

77. Id. at 238.

78. Id. The court also rejected the notion that an ambiguous statement made by a New York State Department of Social Service attorney in the lower court

the plaintiffs alleged Supreme Court-affirmed precedents[79] as supporting the retroactivity they sought, the circuit court found that the Supreme Court had not "yet addressed itself specifically and authoritatively to this issue."[80] Examining the leading case, *Shapiro v. Thompson*,[81] the court in *Rothstein* found that, although the District Court for the District of Connecticut "characterized the Eleventh Amendment as no barrier to its award"[82] of retroactive payments, the issue was not raised on appeal and the Supreme Court made "no reference of any kind to that matter in [its] lengthy affirming opinion."[83]

Similarly, in *Rodriguez v. Swank*,[84] the defendant state, Illinois, was seen by the *Rothstein* court to have resisted a federal district court's order for retroactive payments on the statutory grounds that federal regulations implementing the Social Security Act made no provision for retroactive payments.[85] No mention was made of a constitutional question. Again, in *Boddie v. Wyman*,[86] defendant state officials on appeal challenged a judgment in the plaintiffs' favor but failed to contest the issue of the "corrective payments" they had been ordered to make.[87] Finally, in *Gaddis v. Wyman*, neither the opinions of the district court[88] nor the Supreme Court's summary affirmance[89] made any mention of the "remedy of retroactive payments to persons denied assistance prior to the invalidation of the statute."[90]

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proceeding concerning the feasibility of repayment could suffice to act as the requisite waiver. Id.

79. See Rodriguez v. Swank, 318 F. Supp. 289 (N.D. Ill. 1970), aff'd, 403 U.S. 901 (1971); Boddie v. Wyman, 323 F. Supp. 1189 (N.D.N.Y.), aff'd 434 F.2d 1207 (2d Cir. 1970), aff'd 402 U.S. 991 (1971); Gaddis v. Wyman, 304 F. Supp. 717 (S.D.N.Y. 1969), aff'd sub nom., Wyman v. Bowens, 397 U.S. 49 (1970); Thompson v. Shapiro, 270 F. Supp. 331 (D. Conn. 1967), aff'd, 394 U.S. 618 (1969).

80. 467 F.2d at 239.

81. Shapiro v. Thompson, 394 U.S. 618 (1969).

82. 467 F.2d at 239.

83. Id.

84. Rodriguez v. Swank, 318 F. Supp. 289 (N.D. Ill. 1970).

85. 467 F.2d at 240.

86. 323 F. Supp. 1189 (N.D.N.Y.), aff'd, 434 F.2d 1207 (2d Cir. 1970), aff'd, 402 U.S. 991 (1971).

87. See 434 F.2d 1207 (2d Cir. 1970) wherein the defendant state, New York, in its appeal, made no mention of the "corrective payments" feature of the judgment, as the Rothstein court observed. 467 F.2d at 241.

88. 304 F. Supp. 717 (S.D.N.Y. 1969).

89. Wyman v. Bowens, 397 U.S. 49 (1970).

90. 467 F.2d at 239.

Thus the *Rothstein* court notes that "the Supreme Court has not yet come to grips with the problem of retroactive public assistance payments as a remedy which federal courts either can or should order to be made"[91] and perceives a legal vacuum that the court should properly abhor in view of the continuing quandaries that have resulted from the lack of judicial or legislative resolution of this "complex and confused" issue.[92] The court clearly deems the establishment of parameters to be desirable and it feels free, in light of the Supreme Court's nonaction, to set those parameters. Thus it finds that "the Eleventh Amendment stands in the way."[93]

This desire on the part of the court to provide an answer to a previously unsettled (and possibly even purposefully avoided) question may stem in part from a wish to bring the matter to the attention of the Supreme Court for final resolution. Such a motive would explain why the decision is based upon both a pragmatic premise and a constitutional one since the former alone would have been more than sufficient. Fur-

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91. Id. at 241.

92. Id.

93. Id. Two subsequent cases have treated quite similar issues. In one of them, the district court finds itself "persuaded by, and in full agreement with" Rothstein and finds the eleventh amendment serving as a bar to its compelling retroactive payments to be made by the state. Like v. Carter, 353 F. Supp. 405, 406 (E.D. Mo. 1973). In the other, the Seventh Circuit, citing Rothstein, found itself "unpersuaded by its reasoning." Jordan v. Weaver, 472 F.2d 985, 990 (7th Cir. 1973). The Jordan court, however, focuses entirely upon the Second Circuit's evaluation of the constitutional question involved and appears completely unwilling to temper any such classical analysis with pragmatic considerations. It cites four summary (or "equivalent" thereof) Supreme Court opinions to buttress its own view. It addresses Rothstein, misreads or ignores the Second Circuit's discussion therein of what a federal court was empowered to do (467 F.2d at 235) and gratuitously pronounces that a "federal court's equitable intervention may take an effective form." 472 F.2d at 991. The Jordan court failed to make the obvious distinction in the different factual backgrounds of the two cases, which distinction would have noted that the defendant state, Illinois, violated clear and explicit federal regulations in the conduct of its AABD program, whereas New York in Rothstein had made a determined effort to work within such regulations and was found to have erred on complex constitutional bases only after a lengthy court determination. The Seventh Circuit might also have noted the significantly smaller amount of retroactive payments sought in the case it was deciding. Thus, it need not be seen as directly contradicting the essence of Rothstein. Stripped of its verbiage Jordan merely sets forth one more specific state abuse that may require corrective compulsive retroactivity—one of a class of abuses that the Rothstein court fully anticipated would be further defined (467 F.2d at 235).

thermore, a decision resting solely thereupon would have been fully in accord with the general principle that constitutional questions will not be answered (or raised and answered) by a court if such be not necessary for final determination.[94] For such action the *Rothstein* court may well be praised. The court observed a problem that had been posed in a variety of tangential manners but which had as yet defied full resolution. It saw that this question would continue to trouble state authorities, federal courts, and litigious plaintiffs. Thus the court acted, settling the question posed and insuring that its solution will either be accepted or will, if challenged either directly or indirectly,[95] lead to a final resolution in the forum appropriate to such—the Supreme Court. Such resolution may or may not be in agreement with the *Rothstein* court's own response to the problem, but by its action the Second Circuit has certainly encouraged the making of that determination.

In sum, the *Rothstein* court finds two separate grounds for rejecting plaintiffs' suit, each ground sufficient by itself to sustain the denial. It rejects the claim that all monies improperly withheld must, upon a finding of such impropriety, be reimbursed to those deprived, resisting the hasty and visceral sense of outrage that simplistically makes such claims seem "obviously right." The court painstakingly makes an unbiased analysis of the legitimate interests of the parties involved, and finds the state's interests compelling and paramount.[96] Furthermore, taking up the constitutional question to an extent greater than that to which it was minimally required, the court fashioned its decision in a way most likely to bring the vexatious eleventh amendment question to a conclusive determination. For the duality of this decision—its present and its potential effects—the *Rothstein* court may be most appropriately termed courageous.

94. Rescue Army v. Municipal Court, 331 U.S. 549 (1947); Ashwander v. TVA, 297 U.S. 288 (1936).

95. Such challenge could be posed either directly on appeal from the Second Circuit's holding in Rothstein or indirectly by virtue of the Rothstein court having established one polar position on the matter. Thus, should another circuit take an opposite stance (as has recently been the case; see note 93 supra), the issue becomes "ripe" for Supreme Court resolution.

96. See notes 51-53 and 61-62 supra and accompanying text.

ZONING LAW—Growth Restrictions—Town Ordinance Conditioning Approval of Residential Subdivision Plan on the Availability of Necessary Municipal Services Held Valid. Golden v. Planning Board, 30 N.Y.2d 359, 285 N.E.2d 291, 334 N.Y.S.2d 138 (1972).

In 1966, as a result of an extensive study of land use, demographic projections and the availability of public facilities, the Town of Ramapo, Rockland County, New York adopted a master development plan which was subsequently followed by the adoption of a comprehensive zoning ordinance.[1] A capital budget was drawn up providing for the construction of public facilities during the following six years. At the same time, as a supplement to the capital budget, the town board adopted a program calling for additional capital improvements to be made during a twelve year period following the six years covered by the capital budget.[2]

In 1969, Ruth Golden and the Ramapo Improvement Corporation which had contracted to purchase her fifty-three acres for development, submitted a preliminary subdivision plat to the town's planning board for approval to subdivide the property into forty-one lots.[3]

Six days after the preliminary proposal had been submitted to the planning board, the town board amended the town's zoning ordinance to require residential developers to obtain a special permit from the town board before plat approval could be obtained from the planning board.[4]

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1. Towns are required by law to zone in accordance with a comprehensive plan. N.Y. Town Law § 263 (McKinney 1965).

2. Golden v. Planning Bd., 30 N.Y.2d 359, 366-67, 285 N.E.2d 291, 294-95, 334 N.Y.S.2d 138, 142-43 (1972).

3. N.Y. Town Law § 276 (McKinney Supp. 1972) provides: "For the purpose of providing for the future growth and development of the town and affording adequate facilities for the housing, transportation, distribution, comfort, convenience, safety, health and welfare of its population such town board may by resolution authorize and empower the planning board to approve plats showing lots, blocks or sites, with or without streets or highways, and to conditionally approve preliminary plats, within that part of the town outside the limits of any incorporated city or village."

4. Golden v. Planning Bd., 37 App. Div. 2d 236, 237, 324 N.Y.S.2d 178, 180 (2d Dep't 1971). "The amendments did not rezone or reclassify any land into different residential or use districts, but . . . consist . . . of additions to the definitional sections of the ordinance . . . and the adoption of a new class of 'Special Permit Uses,' designated 'Residential Development Use.' 'Residential Development Use' is defined as 'The erection or construction of dwellings or [sic] any vacant plots, lots or parcels of land' . . . and, any person who acts so as to come within that definition, 'shall be deemed to be engaged in residential development which shall be a separate use classification under this ordinance and subject

Issuance of this permit was based on the town's determination of the adequacy of specified facilities and services including sewers, drainage facilities, parks, schools, roads and firehouses.[5] The town's master development plan provided for the construction of sufficient facilities by the end of the eighteen year combined capital budget and capital improvement program so that any sub-development plan which conformed to the zoning ordinance could be approved. The amendment further provided that no special permit would be issued unless the proposed residential development would contain sufficient specified facilities as set out in the zoning amendment.[6]

The amendment provided, in addition, that the developer could construct the necessary facilities himself and thus avoid having to wait for the town to construct them.[7] Likewise, the developer could expedite approval by providing the town with certain assurances of his commitment to provide the necessary facilities.[8] The town board was authorized to modify the point requirements set out in the ordinance if consistent with the overall development plan.[9] Finally, to lessen the possible economic hardship which might result from a landowner being forced to hold land for up to eighteen years before obtaining subdivision approval, the developer could apply for a reduction of the assessed value of his property pending construction of the required facilities.[10]

The preliminary plat plan was disapproved by the planning board because no special permit had first been obtained from the town board as required by the recently amended ordinance.[11] The appellants sought

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to the requirement of obtaining a special permit from the Town Board' . . . ." (footnote omitted). 30 N.Y.2d at 367-68, 285 N.E.2d at 295, 334 N.Y.S.2d at 143.

5. 30 N.Y.2d at 368, 285 N.E.2d at 295, 334 N.Y.S.2d 143-44. The similarity between these provisions and N.Y. Town Law § 263 (McKinney 1965) pertaining to the purposes of zoning regulations should be noted: "Such [zoning] regulations shall be . . . designed to lessen congestion in the streets, to secure safety from fire, flood . . . to facilitate the adequate provision of transportation, water, sewerage, schools, parks and other public requirements." N.Y. Town Law § 263 (McKinney 1965).

6. 30 N.Y.2d at 368, 285 N.E.2d at 295, 334 N.Y.S.2d at 143-44. These included adequate sewers, drainage facilities, parks and schools, roads and firehouses.

7. Id. at 368-69, 285 N.E.2d at 296, 334 N.Y.S.2d at 144.

8. Id.

9. Id.

10. Id.

11. Id. at 364, 285 N.E.2d at 293, 334 N.Y.S.2d at 140-41.

an order in Rockland County Supreme Court reviewing and annulling the board's decision. They challenged the zoning ordinance on several grounds: first, that Ramapo did not have the power to control its growth through the means adopted in the amendment; second, the amendment placed a burden on petitioners not shared by other similarly situated landowners; and third, the amendment violated the constitutional guarantee of equal protection of the law and freedom from deprivation of property without due process.[12]

The trial court held that the amended ordinance was valid and granted summary judgment to the defendants.[13] On appeal, the appellate division reversed and granted appellants' motion for summary judgment on the ground that the zoning ordinance was unconstitutional.[14] In addition, the appellate division held that the amendment exceeded the powers delegated to the town by the state and violated the constitutional requirement of equal protection.[15] Moreover, the court went beyond the pleadings of the parties and also held that any provision in a zoning ordinance which establishes time controls on land use is suspect as an attempt to seal off a community from newcomers and avoid the burdens of growth.[16] The New York Court of Appeals reversed the appellate division and held that the town's amendment to the zoning ordinance was valid.[17]

The New York legislature has provided towns with two methods of directing and regulating development. The first is by means of district zoning and the other is by requiring the submission and approval of plats to a town planning board before permits allowing subdivision development will be approved.[18]

In *Village of Euclid v. Ambler Realty Co.*,[19] the landmark Supreme Court case on the constitutionality of zoning ordinances, the Court held that the validity of zoning ordinances "must find their justification in

12. Id. at 363-64 (Points of Counsel appear only in the official reporter).

13. Golden v. Planning Bd., No. 525 (Sup. Ct., filed Nov. 13, 1970).

14. Golden v. Planning Bd., 37 App. Div. 2d 236, 244, 324 N.Y.S.2d 178, 186 (2d Dep't 1971).

15. Id. at 242-43, 324 N.Y.S.2d at 185-86.

16. Id. at 242-43, 324 N.Y.S.2d at 185.

17. 30 N.Y.2d 359, 285 N.E.2d 291, 334 N.Y.S.2d 138 (1972).

18. N.Y. Town Law, §§ 261-64, 265-a to 75, 279-81 (McKinney 1965), §§ 264-65, 267(5), 276-78, 281 (McKinney Supp. 1972).

19. 272 U.S. 365 (1926).

some aspect of the police power, asserted for the public welfare."[20] The state, the Court concluded, has a rational basis for regulating the size, type and height of buildings, so far as they directly affect the health and safety of the population. Thus, zoning ordinances were to be judged on the same basis as other exercises of state power which did not involve interference with specially protected rights—*i.e.*, an ordinance would be held unconstitutional only if it were arbitrary and unreasonable. The Court did not define what "arbitrary" or "unreasonable" meant in relation to zoning, but held that each case would have to be decided on its own merits.[21]

As a result of the *Euclid* decision upholding the broad power of the states to regulate development, "Euclidian" type zoning grew rapidly.[22] However, rather than becoming directly involved, most states decided that zoning could best be left to local government.[23] Such a course has been followed in New York State where the power to zone has been delegated to the cities, towns, and villages.[24] With respect to towns, the legislature has provided two methods of directing and regulating development:[25] (1) district zoning,[26] and (2) requiring the submission and approval of plats to a town planning board before permits allowing subdivision development will be approved.[27]

Although *Euclid* held that zoning was a legitimate exercise of the police power of the state, the New York courts have held that local governments have no inherent power to zone under the general police powers (to promote and protect the public health, safety, and welfare), and therefore whatever power the locality has to regulate zoning is derived solely from the state's delegation of such power.[28] Because of

20. Id. at 387.

21. Id. at 395, 397.

22. See 1 R. Anderson, American Law of Zoning § 2.10 (1968) [hereinafter cited as 1 Anderson].

23. Id. § 3.01.

24. N.Y. Gen. City Law § 20(24), (25) (McKinney 1968); N.Y. Town Law § 261 (McKinney 1965); N.Y. Village Law § 7-700 (McKinney Supp. 1972).

25. N.Y. Town Law, art. 16 §§ 261 et seq. (McKinney 1965), as amended (McKinney Supp. 1972) (Zoning and Planning).

26. Id. §§ 261-70. Section 262 provides for the division of the town into zoning districts each with differing zoning provisions.

27. Id. §§ 271 et seq.

28. Golden v. Planning Bd., 30 N.Y.2d at 369-70, 285 N.E.2d at 296, 334 N.Y.S.2d at 145; De Sena v. Gulde, 24 App. Div. 2d 165, 170, 265 N.Y.S.2d 239, 245 (2d Dep't 1965); Barker v. Switzer, 209 App. Div. 151, 153, 205 N.Y.S. 108, 109-10 (2d Dep't 1924).

the extensive and explicit holding in *Euclid*, subsequent litigation dealing with questions of zoning has not usually dealt with the inherent power of the state to zone, but rather with challenges of the reasonableness of specific ordinances or questions as to the constitutionality of an ordinance as applied to particular situations.[29]

As with other exercises of state police powers which do not infringe on specially protected rights, the courts, almost without exception, have held that zoning ordinances are presumptively valid[30] and that the burden "of establishing . . . arbitrariness is imposed upon him who asserts it."[31]

In recent years, the population in many suburban areas has increased rapidly as a result of the outward migration of people from the cities to the outlying areas.[32] This great increase has found many local governments unprepared, unequipped, and in some cases unwilling to handle such a major influx of new residents.[33] One technique which many communities have adopted in an attempt to stem or stop the increase in their populations has been exclusionary zoning.[34] Increasingly, exclusionary zoning is coming under attack as more and more people attempt to leave the cities and find housing in the outlying areas.[35]

As early as 1917, the Supreme Court held that it was not a proper function of zoning ordinances to exclude a particular race or ethnic

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29. 1 Anderson, supra note 22, at § 2.10. Vernon Park Realty Inc. v. City of Mt. Vernon, 307 N.Y. 493, 121 N.E.2d 517 (1954).

30. See, e.g., Cleaver v. Board of Adjustment, 414 Pa. 367-73, 200 A.2d 408-12 (1964); Shepard v. Village of Skaneateles, 300 N.Y. 115, 89 N.E.2d 619 (1949).

31. Rodgers v. Village of Tarrytown, 302 N.Y. 115, 121, 96 N.E.2d 731, 733 (1951).

32. For example, the court states that the population of the Town of Ramapo increased by 130.8 per cent between 1950-1960; 78.5 per cent between 1960-1966 and 20.4 per cent between 1966-1969, with most of the growth resulting from subdivision development. 30 N.Y.2d at 366 n.1, 285 N.E.2d at 294 n.1, 334 N.Y.S.2d at 142 n.1.

33. 37 App. Div. 2d at 240, 324 N.Y.S.2d at 183. See 84 Harv. L. Rev. 1645 (1971).

34. N.Y. Times, Aug. 16, 1971, at 1, col. 2, 35 cols. 3 & 4: "The suburbs have . . . sought to protect their development from unwanted change by controlling their most valuable resource: land . . . . Repeatedly, town boards engage in what is called, variously, upzoning, exclusionary zoning, or large-lot zoning. Whatever the name, the purpose is identical: If the only housing permitted is single family homes, and if these must be sited on half, full, or even four-acre lots at a minimum, only the middle-income and upper-income can afford to move in."

35. See notes 32-34 infra and accompanying text.

group from a community;[36] therefore, few zoning ordinances have been worded so as to expressly bar specific groups.[37] However, exclusionary zoning can be and has undoubtedly been used as a means of achieving the same ends where an ordinance appears on its face to be a legitimate exercise of the locality's power to zone for the protection of the health, safety and welfare of the population. For example, a town with a limited water supply may have a legitimate need to slow down an increase in population. However, an identical ordinance could be passed for the purpose of restricting entry to only the well-to-do. The courts are then forced to look behind the wording of the ordinance to determine what, in fact, it was intended to accomplish.[38]

Courts have, in recent years, become increasingly skeptical of the validity of any zoning ordinance which has the *effect* of freezing population levels in a community.[39] They have also had to consider what restrictions may be imposed through zoning of property before it amounts to a condemnation.[40] Generally, the courts hold that there has not been a condemnation so long as there is any reasonable use to which the land can be put. Significantly, in *Arverne Bay Construction Co. v. Thatcher*,[41] the court stated that a zoning ordinance which prohibited all reasonable use of land might still be valid if the restraint were only to last for a reasonable period of time.[42]

In addition to the power to zone, the New York legislature has pro-

36. Buchanan v. Warley, 245 U.S. 60 (1917).

37. 1 Anderson, supra note 22, at § 7.30.

38. 30 N.Y.2d at 375, 285 N.E.2d at 300, 334 N.Y.S.2d at 149. "[T]hough the issues [in this case] are framed in terms of the developer's due process rights, those rights cannot, realistically speaking, be viewed separately and apart from the right of others 'in search of a [more] comfortable place to live.'" Id. (citations omitted).

39. National Land & Inv. Co. v. Board of Adjustment, 419 Pa. 504, 508, 215 A.2d 597, 610 (1965) (four acres per building lot held invalid); Concord Township Appeal, 439 Pa. 466, 473-74, 268 A.2d 765, 773-74, (1970) (two and three acre minimum lots held invalid); Girsh Appeal, 437 Pa. 237, 242, 263 A.2d 395, 397 (1970) (no district within which apartment buildings could be constructed held invalid).

40. See Pennsylvania Coal Co. v. Mahon, 260 U.S. 393 (1922) (restriction completely destroying value of property requires compensation); Arverne Bay Constr. Co. v. Thatcher, 278 N.Y. 222, 15 N.E.2d 587 (1938) (permanent restriction on the use of property so that it cannot be used for any reasonable purpose is a taking of property).

41. 278 N.Y. 222, 15 N.E.2d 587 (1938).

42. Id. at 232, 15 N.E.2d at 592.

vided localities with another means of controlling and regulating development. By statute,[43] each town board is authorized to appoint a planning board which has the power to grant or deny approval of subdivision plats submitted by a developer.[44] In addition, the planning board can condition its approval on the provision of certain specified facilities by the developer,[45] and the court of appeals has upheld the validity of such a statute.[46]

In *Golden*, the court was confronted with a case which involved all of the problems and considerations discussed above. In addition, no case had previously been litigated involving a zoning ordinance exactly like the one passed by the Ramapo town board. The majority appears well aware of the far-reaching impact which this decision will have and exercises understandable judicial restraint in attempting to avoid tying the court's hands in future cases. Thus, it is particularly important to distinguish between what the court actually held and the broader issues involved.

The opinion begins with a discussion of the facts and the background of the case.[47] And yet, in this preliminary descriptive material, the court raised an important issue. That is, what was the town's *intent* in passing the zoning amendment?[48] While the opinion states that the question need not be investigated because the issue was not raised by the parties (and thus the amendment is presumed to have been passed for legitimate purposes)[49] the court implies that it might invalidate an ordinance passed

43. N.Y. Town Law § 271 (McKinney 1965).

44. Id. § 276 (McKinney Supp. 1972). See note 3 supra.

45. Id. § 277 provides in part: "Before the approval by the planning board of a plat . . . such plat shall . . . show in proper cases and when required by the planning board, a park . . . . In approving such plats the planning board shall require that the streets . . . be of sufficient width . . . and shall be suitably located to accommodate the prospective traffic, to afford adequate light and air, to facilitate fire protection . . . where a zoning ordinance has been adopted by the town the plots shown on said plat shall at least comply with the requirements thereof . . . that . . . water mains, fire alarm signal devices . . . sanitary sewers . . . shall be installed . . . or alternatively that a performance bond sufficient to cover the full cost of the same as estimated by the planning board or other appropriate town departments designated by the planning board shall be furnished to the town by the owner."

46. Brous v. Smith, 304 N.Y. 164, 169, 106 N.E.2d 503, 506 (1952).

47. 30 N.Y.2d at 366, 285 N.E.2d at 294, 334 N.Y.S.2d at 142.

48. Id. at 366 n.1, 285 N.E.2d at 294 n.1, 334 N.Y.S.2d at 142 n.1.

49. Id.

with the intent of blocking entry into the community.[50] However, the *Golden* court cites numerous statistics documenting Ramapo's rapid growth[51] and concludes that for lack of contrary evidence the ordinance is not invalid on its face. Thus, the court appears to reject the appellate division's assumption[52] that the amendment was passed with an exclusionary intent.

Subsequently, the court describes the varying lot size and density requirements in the residentially zoned areas of the town (another issue not raised in the pleadings) and states:

> The reasonableness of these minimum lot requirements are not presently controverted, though we are referred to no compelling need in their behalf.[53]

The court suggests that if faced with a challenge to Ramapo's minimum lot size requirements, it might well hold them invalid unless the town could sustain the burden of proving their necessity.[54]

The court next discusses whether the town had the power and authority to amend its zoning ordinance to require a developer to obtain a special permit before building could be commenced. The appellate division held that "the power to place time controls on a municipality's population expansion, as in the instant case, has not yet been delegated."[55] The

50. Id.

51. Id.

52. 37 App. Div. 2d at 242-43, 324 N.Y.S.2d at 185. " 'The question posed is whether the township can stand in the way of the natural forces which send our growing population into hitherto undeveloped areas in search of a comfortable place to live. We have concluded not. A zoning ordinance whose primary purpose is to prevent the entrance of newcomers in order to avoid future burdens, economic and otherwise, upon the administration of public services and facilities cannot be held valid.' In any event, the whole concept of phasing residential development through time controls on land use is pregnant with the notion of acceptable discrimination." Id. (citation omitted).

53. 30 N.Y.2d at 367 n.2, 285 N.E.2d at 295 n.2, 334 N.Y.S.2d at 143 n.2 (citations omitted).

54. Id. Here again, the court appears to imply that if it were shown that Ramapo was intentionally excluding nonwhites, or even if it were shown that the town was not making some effort toward integrating the community, the town's zoning ordinance would not be permitted to stand. However, the town's commitment to bi-racial housing may not be as strong as the court suggests. See Farrelly v. Town of Ramapo, 35 App. Div. 2d 957, 317 N.Y.S.2d 837 (2d Dep't 1970). This memorandum decision states that the "bi-racial low-income" housing referred to above by the court of appeals was to consist of 120 units: 90 units for the elderly and only 30 units for the non-elderly!

55. 37 App. Div. 2d at 244, 324 N.Y.S.2d at 186.

court of appeals admits that the zoning enabling section of the Town Law *does not specifically authorize* the timing controls (*i.e.*, approving subdivision plats only as essential services become available) adopted by the town.[56] However, the court suggests that an argument could be made (which had been raised but was rejected by the appellate division)[57] that the powers given to the town by section 261 of the Town Law[58] *do* include the authority to predicate approval of development plans on the construction of certain services and facilities. In a footnote the court states:

> [T]here would appear to be a direct correlation between population density, the demand for municipal services in the form of school, water, sanitary, police and fire protection facilities. . . . To the extent that the subject regulations seek to insure provision of adequate facilities, they too may be identified as forms of density controls.[59]

However, the court does not draw from this a corollary that regulation of necessary services is a legitimate method of restricting the density of population.

Rather than rely on the above line of argument, the court follows another route and holds that in determining the extent of the delegated power, all sections of Article 16 of the Town Law (Zoning and Planning) must be considered together. The court once again recognizes that all zoning power must be founded upon a legislative delegation[60] but it points out that the powers listed in section 261 are not the only zoning powers upon which the towns can draw.[61] This is shown, the court holds, by the fact that the powers stated in section 261 are not coterminous with the stated police power objectives listed in section 263.[62] Although

56. 30 N.Y.2d at 369, 285 N.E.2d at 296, 334 N.Y.S.2d at 145.

57. 37 App. Div. 2d at 242, 324 N.Y.S.2d at 185.

58. N.Y. Town Law § 261 (McKinney 1965) provides in part: "For the purposes of promoting the health, safety, morals, or the general welfare of the community, the town board is hereby empowered by ordinance to regulate and restrict the height, number of stories and size of buildings and other structures, the percentage of lot[s] that may be occupied, the size of yards, courts, and other open spaces, the density of population, and the location and use of buildings, structures and land for trade, industry, residence or other purposes . . . ."

59. 30 N.Y.2d at 370 n.3, 285 N.E.2d at 296 n.3, 334 N.Y.S.2d at 145 n.3 (citations omitted).

60. See note 28 supra and accompanying text.

61. See note 58 supra.

62. 30 N.Y.2d at 370, 285 N.E.2d at 296-97, 334 N.Y.S.2d at 145.

the section 261 powers have traditionally been considered less extensive,[63] the powers enumerated in that section are listed only to give constitutional validity to the state's delegation of the zoning power to the towns.[64] In fact, suggests the court, *towns have the implied power to carry out all of the purposes* (listed in section 263) *for which zoning can be passed.*[65] Therefore, the amendment in question is valid as far as the issue of delegated power is concerned because it is directed at a legitimate zoning purpose listed in section 263.[66]

The court intimates that this interpretation leads one far astray from the traditional concept of zoning:

> Of course, zoning historically has assumed the development of individual plats and has proven characteristically ineffective in treating with the problems attending subdivision and development of larger parcels, involving as it invariably does, the provision of adequate public services and facilities. To this end, subdivision control (Town Law' §§ 276, 277) purports to guide community development in the directions outlined here, while at the same time encouraging the provision of adequate facilities for the housing, distribution, comfort and convenience of local residents . . . . And though it may not, in a definitional or conceptual sense be identified with the power to zone, it is designed to complement other land use restrictions, which, taken together, seek to implement a broader, comprehensive plan for community development.[67]

The court declines to draw any specific conclusion. The most superficial interpretation of what the court is intimating might be merely that since zoning and plat approval are two tools available to a town for use in the control and regulation of growth and development, they do not constitute two distinct functions. However, it is possible that the dissenting opinion is correct and that the majority had something more abstruse in mind.[68] What the court appears to hold is that since the broad purposes of zoning and subdivision control are the same (*i.e.*, control and regulation of land use) the town board has the *implied power* to carry out the legitimate purposes of zoning and, in addition, the purposes of plat ap-

63. Id.

64. Id.

65. Id.

66. I.e., "to facilitate the adequate provision of transportation, water, sewerage, schools, parks and other public requirements." N.Y. Town Law § 263 (McKinney 1965).

67. 30 N.Y.2d at 372, 285 N.E.2d at 298, 334 N.Y.S.2d at 147 (citations omitted).

68. Id. at 386, 285 N.E.2d at 306, 334 N.Y.S.2d at 158-59.

proval listed in section 276.[69] It is important to note how far afield this interpretation is from the express language of the statutes.[70]

In sections 261 and 263, the legislature expressly empowers the *town board* to pass zoning ordinances for specified purposes. Section 262 defines the form that zoning is to take. The board is empowered to divide the town into districts and designate the uses to which each district can be put. On the other hand, section 271 provides for the creation of a *planning board* by the town board. This planning board can, *inter alia*, prepare a master plan for the town,[71] and approve or disapprove plats submitted to it by developers who wish to subdivide[72] and can make approval conditioned on the subdivider providing certain specified facilities.[73] The statute requires that plats conform to the zoning ordinance before they can be approved by the planning board.[74] For example, if the area in question were zoned "one acre-residential," the planning board could not approve a plat which provided for half-acre subdivision.

Ramapo appears to be relying on this provision of section 277 to support the lawfulness of its amended zoning ordinance which requires a subdivider to obtain a special permit confirming that its plat conforms to the *zoning ordinance* before the planning board can approve the plat. However, the criteria upon which the amended ordinance authorizes the town board to find that a plat does not so conform do not appear to have been provided either expressly or by implication in the Town Law.[75] Under Ramapo's ordinance, the town board has veto power over considerations which the statute specifically states are to be decided by the planning board. The planning board has no opportunity to review any plat submitted until the town board has first given its approval. Plat approval is thus almost entirely in the hands of the town board—an

69. Id. at 370, 285 N.E.2d at 296-97, 334 N.Y.S.2d at 145-46.

70. See N.Y. Town Law §§ 261, 263 (McKinney 1965). See also notes 5 & 59 supra.

71. N.Y. Town Law § 272-a (McKinney 1965) provides in part: "The planning board may prepare and change, a comprehensive master plan for the development of the entire area of the town, which master plan shall show desirable streets, bridges and tunnels and the approaches thereto, viaducts, parks . . . zoning districts . . . and such other features existing and proposed as will provide for the improvement of the town and its future growth, protection, and development, and will afford adequate facilities for the public housing, transportation, distribution, comfort, convenience, public health, safety and general welfare of its population."

72. Id. § 276 (McKinney Supp. 1972). See note 3 supra.

73. Id. § 277. See note 45 supra.

74. Id.

75. Id. §§ 261, 263 (McKinney 1965). See notes 5 & 58 supra.

arrangement which certainly appears to do violence to the express language of article 16.

In approving the challenged amendment, the court never squarely confronts the significant issue of the power of the town board to assume a function specifically delegated to another body. Rather, the court relies on an integration of sections 261 and 263 which deal exclusively with the powers and purposes of zoning and do not concern the planning board at all.

The court next turns to petitioners' contention that the timing controls are invalid because they in effect prohibit the subdivision development pending some action by the town over which petitioners have no control. The court agrees that although the "Planning Board is not in an absolute sense statutorily authorized to *deny* the right to subdivide,"[76] but points out that the true issue at bar is, rather, "whether development may be conditioned pending the provision by the municipality of specified services and facilities."[77]

There are at least two arguments to refute petitioners' contention, and the court discusses both. First, the town's restrictions on development are closely tied with its eighteen year capital program. If the plan progresses as scheduled, by the end of the eighteenth year sufficient facilities will have been completed so that any plat submitted which conformed to the zoning ordinance would be approved.[78] Although there is no guarantee that the town will adhere to its development plan, in the absence of contradictory evidence "we must assume not only the Town's good faith, but its assiduous adherence to the program's scheduled implementation."[79] The court adds that should the town fail to provide the services and facilities specified in the plan, the petitioners would then have the opportunity to challenge the constitutionality of the ordinance as it applies to the property in question.[80]

76. 30 N.Y.2d at 373, 285 N.E.2d at 298, 334 N.Y.S.2d at 147 (emphasis added).

77. Id. at 374, 285 N.E.2d at 299, 334 N.Y.S.2d at 148. The court possibly obfuscated the issue at bar. While the court is referring to the power of the planning board, the amendment in question deals with the power of the town board which had the effect of abrogating the power of the planning board to rule on plat proposals. If the court was treating these two bodies synonymously, it certainly does extreme violence to the explicit language in the statute. See note 43 supra.

78. 30 N.Y.2d at 373 n.7, 285 N.E.2d at 298-99 n.7, 334 N.Y.S.2d at 148 n.7.

79. Id.

80. Id.

Secondly, Ramapo's ordinance provides that should the developer not wish to wait for the town to construct the required facilities, he can expedite plat approval by building them himself at his own expense—a procedure upheld in *Brous* and specifically authorized in section 277.[81] Thus, the court rejects the argument that the amendment amounted to a blanket prohibition against subdivision.[82]

The court next addresses itself to the problem of zoning generally and implicitly rebuts an argument set forth in the dissent.[83] Both the majority and minority of the court agree that zoning policy is far from perfect. With the great shift in population from the cities to the suburbs, the court, along with many planners, agrees that land use planning would be better handled on at least a regional level. The majority points out, however, that while zoning might better be handled on a regional basis, today only local governments have the power to zone.[84] While local solutions are far from ideal, they are the only ones currently available and authorized by the legislature.[85] The court is well aware that zoning can easily lead to the exclusion of outsiders:[86]

> There is, then, something inherently suspect in a scheme which, apart from its professed purposes, effects a restriction upon the free mobility of a people until sometime in the future when projected facilities are available to meet increased demands.[87]

The court concludes it is equally unrealistic to close one's eyes to the problems that arise from uncontrolled growth, and that Ramapo's solution, although limited, is "a first practical step toward controlled growth achieved without forsaking broader social purposes."[88]

The court points out that the ultimate test, to determine which restrictions are permissible is not whether other methods of planning would be preferable, but rather through an analysis of both the purposes of the restriction and its impact,[89] and this can be done only on a case-by-case

81. N.Y. Town Law § 277 (McKinney Supp. 1972). See note 45 supra.

82. 30 N.Y.2d at 373 n.7, 285 N.E.2d at 298 n.7, 334 N.Y.S.2d at 148 n.7.

83. Id. at 385, 285 N.E.2d at 306, 334 N.Y.S.2d at 158 stated, "Generally, there is the view that the conflict [between the movement of people to the suburbs and the desire of municipalities to control it] requires solution at a regional or State level, usually with local administration, and not by compounding the conflict with idiosyncratic municipal action" (citations omitted).

84. 30 N.Y.2d at 375, 285 N.E.2d at 300, 334 N.Y.S.2d at 149.

85. Id. at 374-75, 285 N.E.2d at 299-300, 334 N.Y.S.2d at 148-49.

86. Id. at 375, 285 N.E.2d at 300, 334 N.Y.S.2d at 149-50.

87. Id. at 375, 285 N.E.2d at 300, 334 N.Y.S.2d at 149.

88. Id. at 376, 285 N.E.2d at 301, 334 N.Y.S.2d at 150.

89. Id. at 378, 285 N.E.2d at 302, 334 N.Y.S.2d at 152.

basis. The question is not whether the regulation will affect the type of growth which would occur absent the regulation (which it inevitably will) but rather whether the regulation is reasonable and arguably necessary.[90]

"What we will not countenance, then, under any guise, is community efforts at immunization or exclusion."[91] The court concludes that neither the purpose nor the impact of Ramapo's zoning ordinance is exclusionary.[92]

Lastly, the court turns to petitioners' contention that the ordinance amounts to confiscation without compensation in violation of both the federal and state constitutions. The town points out that the challenged amendment does not prevent petitioner from building a house on the land. The response is that the land with only one house is worth only a small fraction of its worth with forty-one houses, and thus the restriction does amount, in effect, to a confiscation of the property. While admitting that the restriction may be substantial, the court follows prior holdings that a restriction which is not absolute does not amount to a confiscation of property.[93] The court also suggests that the addition of municipally supplied services and facilities might, in the long run, actually increase the petitioners' property value, and points out that in the interim the ordinance provides for a reduction in the assessed value of the property so affected, thus reducing the tax burden. In so holding, the court is not creating new law but rather is extending principles decided in numerous prior decisions.[94]

The dissent discusses two primary objections to the amended zoning ordinance. First, it subscribes to the appellate division's holding that towns have not been delegated the power necessary to validate Ramapo's ordinance.[95] In support of this argument, a number of decisions in other jurisdictions are cited. However, those decisions deal with the problem of the illegitimate and unreasonable exercise of zoning power—not with the extent to which such power may be validly delegated to localities.

Secondly, the dissent suggests that zoning should properly be carried on at the regional level and implies that the Ramapo ordinance is de-

90. Id. at 377-78, 285 N.E.2d at 301, 334 N.Y.S.2d at 151-52.

91. Id. at 378, 285 N.E.2d at 302, 334 N.Y.S.2d at 152.

92. Id.

93. Id. at 382, 285 N.E.2d at 304, 334 N.Y.S.2d at 156. "The proposed restraints, mitigated by the prospect of appreciated value and interim reductions in assessed value, and measured in terms of the nature and magnitude of the project undertaken, are within the limits of necessity." Id.

94. See notes 7-10 supra and accompanying text.

95. 30 N.Y.2d at 384-85, 285 N.E.2d at 306, 334 N.Y.S.2d at 157-58.

signed to insulate the town from the pressures of an expanding population.[96] However, this seems to beg the question. Both the majority and the minority in *Golden* agree that zoning could not be used as a way of avoiding increases in the town's population. The real question presented, and the one to which the minority never addresses itself is: what were the purposes and effect of the zoning amendment passed by Ramapo?

The court of appeals never discusses the constitutional requirement of equal protection, an issue raised by the lower court.[97] This issue may provide future litigants with the greatest opportunity for obtaining a court decision holding a Ramapo-type zoning ordinance invalid.

Under section 261,[98] the town board is empowered to pass zoning ordinances to regulate and restrict the height of buildings, the minimum size of land, parcels, and the uses to which such building can be put. Section 263 sets out the purposes for which such restrictions can be enacted.[99] Section 262 provides that rather than zone the entire town homogeneously, the town board may divide the town into districts, each having different zoning provisions.[100] However, section 262 specifically provides: "All such regulations shall be uniform for each class or kind of buildings, throughout such district . . . ."[101]

In *Golden*, the district in question was zoned for rural residential use with a minimum lot size of 50,000 square feet. As noted above, the court held that the amendment did not change the permissible uses to which the land could be put, but added a provision that the use of any land for purposes of the construction of dwellings was prohibited in the absence of a special permit from the town board.[102] Petitioners' plan was to subdivide the fifty-three acres in question into forty-one plots. Assuming that all plots were of equal size, each would be approximately 56,300 square feet—substantially larger than the minimum 50,000 square feet required by the zoning ordinance. It would appear, therefore, that petitioners are being denied equal protection of the law since anyone holding 50,000 square feet or more of land could build a single

96. See note 16 supra and accompanying text.

97. 37 App. Div. 2d at 243, 324 N.Y.S.2d at 185.

98. N.Y. Town Law § 261 (McKinney 1965). See note 58 supra.

99. N.Y. Town Law § 263 (McKinney 1965). See note 5 supra.

100. N.Y. Town Law § 262 (McKinney 1965).

101. Id.

102. Id. § 276 (McKinney Supp. 1972). See notes 4 & 5 supra and accompanying text.

residence on his land, while petitioners are being denied approval to build residences on even larger tracts of land. Thus, at least the application of the zoning amendment appears to violate the section 262 requirement that all zoning regulations be uniform throughout a zoning district.[103]

On the other hand, it might be argued that the town avoided this problem by providing that residential development is a separate use. If this is the case, then the town has made the "act" of subdivision a "use" in the same way that "residential" and "commercial" are uses. This raises the question as to whether the term "use" as applied in zoning ordinances under the delegated powers given to the town can legitimately be applied to a transitory method or means of construction in addition to its more traditional meaning. The court of appeals never resolves this problem because it merely states that "The amendments did not *rezone* or *reclassify* any land into different residential or use *districts*. . . ."[104] While this is true, the court fails to mention that the amendment did create a new land use—residential development.[105] Neither section 261 nor section 263 refers, even by implication, to the *methods* employed in the process of construction of a building but only provides for regulation of the type of finished structure which can be constructed and the uses to which that finished structure can be put. In *Golden*, there is no question that the homes which are being proposed for construction would conform to the type of structure and lot size requirements of the zoning ordinance. What blocks construction of the conforming houses is a zoning ordinance which regulates under what *conditions* conforming houses can be built. It is certainly arguable that the town board's actions were not within the scope of the powers delegated by the legislature to the town board. The court's failure to confront this issue may be explained at least partially by its frequent obfuscation of the statutory differences between the town board and the planning board.[106]

In conclusion, the court of appeals has significantly expanded the methods which a town may legitimately utilize to control the rate and direction of growth. It has held that a town board can approve subdivision plats conditioned on the availability of necessary public facili-

103. See note 100 supra.

104. 30 N.Y.2d at 367, 285 N.E.2d at 295, 334 N.Y.S.2d at 143 (emphasis added) (footnote omitted).

105. Id. at 368, 285 N.E.2d at 295, 334 N.Y.S.2d at 143.

106. See note 77 supra and accompanying text.

ties so long as the town can demonstrate that it is making a good faith effort to supply these facilities and has a viable plan for their construction within a reasonable time. However, this power is limited in several respects. The restrictions cannot be intended nor have the effect of insulating a community from expansion and growth. In addition, the methods utilized must not have the effect of foreclosing all reasonable use of land for an indefinite period of time. And lastly, the court reaffirms the right of towns to take reasonable steps to control growth and to protect themselves from excessively rapid development which would place an unacceptable burden on public facilities. Unless invalid on their face, restrictions on development are presumed reasonable.

In order to find that the towns are empowered to impose such restriction under the Zoning and Planning article of the Town Law, the court is forced into several tortuous interpretations of the statutory delegation of power, and it is in this area that legitimate questions are left unanswered by the court's decision.