Journal of Air Law and Commerce

Volume 43 | Issue 3 Article 6

1977

Case Notes

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Case Notes

TORTS—RESTATEMENT (SECOND) OF TORTS SECTION 402A AND STATE OF THE ART EVIDENCE—An Aircraft Manufacturer Is Not Liable for Damages Arising from the Crash of an Aircraft It Had Manufactured in 1952 on the Theories of Negligence, Implied Warranty or Strict Liability for Alleged Defects in the Adequacy of the Seat Fastenings and the Lack of Fire Protection When There is No Showing that the Ordinary Consumer Would Expect a 1952 Aircraft To Have the Safety Features of One Manufactured in 1970. *Bruce v. Martin-Marietta Corp.*, 544 F.2d 443 (10th Cir. 1976).

This consolidated appeal arose from a United States District Court Order[1] granting defendant-appellee's motion for summary judgment. Plaintiffs' decedents were passengers and representatives of passengers on a Martin 404 aircraft which had been chartered to transport the Wichita State University football team and a number of supporters to a football game. On October 2, 1970, the Martin 404 crashed into the mountains, first striking treetops and then continuing for 425 feet before coming to rest. The impact caused a number of the seats to be torn loose from their floor attachments and thrown to the front of the aircraft thereby blocking the exit. The initial impact and ensuing fire resulted in the death of thirty-two of the forty persons on board. Plaintiffs brought suit against Martin-Marietta Corporation, the manufacturer of the aircraft, and Ozark Airlines, the intermediate owner and seller of the plane.

The plaintiffs did not contend that any action of either defendant caused the plane to crash. Their claims were that the defendants failed to design, manufacture, or maintain the plane in crashworthy condition and thereby caused the deaths or enhanced the injuries of the passengers.[2] The primary claim alleged the in-

[1] Bruce v. Martin-Marietta Corp., 418 F. Supp. 829 (W.D. Okla. 1975).

[2] Bruce v. Martin-Marietta Corp., 544 F.2d 443, 444 (1976) [hereinafter cited as *Bruce*].

adequacy of the seat fastenings.[3]

The plaintiffs sought to recover on the theories of negligence, implied warranty, and strict liability in tort. The defendants sought summary judgment, asserting there was no genuine issue as to any material fact. The district court concluded that the laws of Maryland applied to determine the liability of Martin and those of Missouri to determine that of Ozark, and this was not challenged by either party on appeal.[4] The district court granted defendant's motion for summary judgment and dismissed the case. On appeal, the Tenth Circuit affirmed the lower court's order. *Held, affirmed*: An aircraft manufacturer is not liable for damages arising from the crash of an aircraft it had manufactured in 1952 on the theories of negligence, implied warranty, or strict liability for alleged defects in the adequacy of the seat fastenings and the lack of fire protection when there is no showing the ordinary consumer would expect a 1952 aircraft to have the safety features of one manufactured in 1970. *Bruce v. Martin-Marietta Corp.*, 544 F.2d 443 (10th Cir. 1976).

I. Background of Strict Liability and State of the Art Evidence

The concept of strict liability was an American reaction to an 1842 decision by the English Court of Exchequer in *Winterbottom v. Wright*[5] which held that privity between buyer and seller was a necessary ingredient in a cause of action sounding in tort[6] against the seller or supplier of a product.[7]

A celebrated assault upon the doctrine of privity was made by Justice Cardozo, then sitting on the New York Court of Appeals,

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[3] *Id.*

[4] *Id.* at 444-46. In diversity cases the federal courts apply conflict of law rules which conform to those prevailing in the state courts in which the federal court is located. Klaxon Co. v. Stentor Electric Mfg. Co., 313 U.S. 487 (1940). The Oklahoma Supreme Court has adopted the "significant contacts" test for conflict of law questions in tort cases. Brickner v. Gooden, 525 P.2d 632 (Okla. 1974).

[5] 10 M. & W. 109, 152 Eng. Rep. 402 (Ex. 1842).

[6] The plaintiff contended that due to the defendants' contract with the coach owner to keep the coach in good repair, the defendants owed a duty to the plaintiff coachmen.

[7] 10 M. & W. at 114, 152 Eng. Rep. at 405.

in 1916. In *MacPherson v. Buick Motor Co.*,[8] the plaintiff was allowed recovery in his negligence action against the manufacturer of a defective automobile without establishing privity. Although significant, the case was not a panacea for consumers, since it did not abolish the requirement of privity when the theory of recovery was breach of warranty.

It was not until 1960 that a court extended the holding of *MacPherson* to recoveries based on warranty. In that year, the landmark case of *Henningsen v. Bloomfield Motors, Inc.*[9] held that public policy demanded the abolition of the privity requirement. The result was that a manufacturer could now be liable if he put a defective product on the market and expected it to reach the consumer, and the product did, in fact, injure a consumer. The warranty was no longer impeded by the lack of privity.

The true impetus for modern strict liability theory was espoused in *Greenman v. Yuba Power Products*[10] by Justice Traynor in 1963. The court stated that a manufacturer is strictly liable in tort when an article he places on the market, realizing that it is to be used without inspection for defects, proves to have a defect that causes injury to a person.[11] The basic approach of the *Greenman* decision was incorporated in the Restatement (Second) of Torts Section 402A, which is now the basis for strict liability in many jurisdictions.[12] The rapid development of the doctrine undoubtedly created

[8] 217 N.Y. 382, 111 N.E. 1050 (1916).

[9] 32 N.J. 358, 161 A.2d 69 (1960).

[10] 59 Cal. 2d 57, 377 P.2d 897, 27 Cal. Rptr. 697 (1963) (hereinafter cited as *Greenman*).

[11] 377 P.2d at 900.

[12] RESTATEMENT (SECOND) OF TORTS § 402A (1965), (hereinafter cited as § 402A). The Restatements are a series of statements of rules of law in certain subjects, adopted and promulgated by the American Law Institute. The statement of a rule is entitled to weight as a product of expert opinion and as of the expression of the law by the legal profession. *See* Poretta v. Superior Dowel Co., 153 Me. 308, 137 A.2d 361, 373 (1957).

The following jurisdictions have either adopted § 402A or cited it with approval: Alabama, Casrell v. Altec Indus., 335 So. 2d 128 (Ala. 1976); Arizona, Rix v. Reeves, 23 Ariz. App. 243, 532 P.2d 185 (1975); Colorado, Hiigel v. Gen. Motors Corp., 544 P.2d 983 (Colo. 1975); Connecticut, Rossignol v. Danbury School of Aeronautics, Inc., 154 Conn. 549; 227 A.2d 418 (1967); Delaware, Martin v. Ryder Truck Rental, Inc., 353 A.2d 581 (Del. 1976); Florida, Mattes v. Coca Cola Bottling Co., 311 So. 2d 417 (Fla. Ct. App. 1974); Hawaii, Stewart v. Budget Rent-a-Car Corp., 470 P.2d 240 (Hawaii 1970); Idaho, Shields v. Morton Chemical Co., 95 Idaho 674, 518 P.2d 857 (1974); Illinois, Collins v. Musgrave, 28 Ill. App. 3d 307, 328 N.E.2d 649 (1975); Indiana, Ayr-Way

much of the confusion and vagueness that currently surrounds it.[13] One of the several areas that creates such confusion is the state of the art doctrine. Two aspects of the doctrine seem to present a problem: the nature of the doctrine itself and the relationship it has to Section 402A. The first area of confusion is eliminated when it is realized that there are actually two separate, yet interrelated, doctrines that are often referred to by the phrase, "state of the art."

A. *State of the Art as the Prevailing Custom in the Industry*

In an ordinary negligence action it is not uncommon for the defendant to assert that he has complied with the customs of the community or industry, and that since he is acting as all others do under like circumstances, he has conformed to the community's definition of reasonable conduct and, hence, is not negligent. This is a recognized, legitimate defense.[14] However, the standard of care

Stores, Inc. v. Chitwood, 261 Ind. 86, 300 N.E.2d 335 (1973); Iowa, Hawkeye-Security Ins. Co. v. Ford Motor Co., 174 N.W.2d 672 (Iowa 1970); Kansas, Brooks v. Dietz, 545 P.2d 1104 (Kan. 1976); Kentucky, Dealers Transp. Co., Inc., v. Battery Distrib. Co., 402 S.W.2d 441 (Ky. 1966); Maryland, Phipps v. General Motors Corp., 278 Md. 337, 363 A.2d 955 (1976); Minnesota, McCormock v. Hankscraft Co., 278 Minn. 322, 154 N.W.2d 488 (1967); Mississippi, State Store Mfg. Co. v. Hodges, 189 So. 2d 113 (Miss. 1966), *cert. denied*, 386 U.S. 912 (1966); Missouri, Williams v. Ford Motor Co., 411 S.W.2d 443 (Mo. 1967); Montana, Brandenburger v. Toyota Motor Sales, 513 P.2d 268 (Mont. 1973), Nebraska, Kohler v. Ford Motor Co., 187 Neb. 428, 191 N.W.2d 601 (1971); Nevada, General Elec. Co. v. Bush, 498 P.2d 366 (Nev. 1972); New Hampshire, Bellotte v. Zayre Corp., 352 A.2d 723 (N.H. 1976); New Jersey, Turner v. International Harvester Co., 133 N.J. Super. 277, 336 A.2d 62 (1975); New Mexico, First Nat'l Bank v. Nor-Am Agricultural Prods., Inc., 88 N.M. 74, 537 P.2d 682 (N.M. App. 1975); North Dakota, Johnson v. American Motors Corp., 225 N.W.2d 57 (N.D. 1974); Ohio, Burkhard v. Short, 28 Ohio App. 2d 141, 275 N.E.2d 632 (1971); Oklahoma, Kirkland v. General Motors Corp., 521 P.2d 1353 (Okla. 1974); Oregon, Heaton v. Ford Motor Co., 248 Ore. 467, 435 P.2d 806 (1967); Pennsylvania, Webb v. Zern, 220 A.2d 853 (Pa. 1966); Rhode Island, Ritter v. Narragansett Elec. Co., 109 R.I. 176, 283 A.2d 255 (1971); South Dakota, Engberg v. Ford Motor Co., 87 S.D. 196, 205 N.W.2d 104 (1973); Tennessee, Ford Motor Co. v. Lonon, 217 Tenn. 400, 398 S.W.2d 240 (1966); Texas, McKisson v. Sales Affiliates, 416 S.W.2d 787 (Tex. 1967); Vermont, Zaleskie v. Joyce, 133 Vt. 150, 333 A.2d 110 (1975); Washington, Haugen v. Minnesota Mining & Mfg. Co., 15 Wash. App. 379, 550 P.2d 71 (1976); Wisconsin, Dippel v. Sciano, 37 Wis.2d 443, 155 N.W.2d 55 (1967). Other jurisdictions either rely on § 402A for interpretive purposes, have not addressed the issue, have statutory authority on point, or have rejected the section.

[13] In the wake of *Greenman*, the law was changing so quickly that the Restatement provision, *supra* note 12, was actually drawn three times. First, it was made applicable only to food and drink; then it was extended to products for "intimate bodily use;" and finally, it was made applicable to all products.

[14] Low v. Park Price Co., 95 Idaho 91, 503 P.2d 291 (1972); Day v. Barber-

established by the custom is not conclusive.[15] Justice Holmes stated the rule to be: "What usually is done may be evidence of what ought to be done, but what ought to be done is fixed by a standard of reasonable prudence, whether it usually is complied with or not."[16] In a negligence action, therefore, a defendant may establish a prima facie defense by showing his compliance with the custom (or state of the art). The plaintiff then is obligated to prove that the industry's custom is negligent.[17]

In strict liability cases, the custom variety of state of the art evidence has often met stiff resistance.[18] An Illinois court bluntly stated that a defendant could not avoid strict liability by showing that it had conformed to the industry custom.[19] The logical integrity of this holding is readily apparent. Under Section 402A, a manufacturer may be liable despite the standard of care he has used. Therefore, the custom-type state of the art evidence is irrelevant when introduced to establish a defendant's standard of care in a products liability action.

B. *State of the Art as the Limit of Technological Capability*

Scientific knowledge may, at any time, limit the ability of a manufacturer to develop a safer product. Evidence introduced to

Colman Co., 10 Ill. App. 2d 494, 135 N.E.2d 231 (1956); Murphy v. Messerschmidt, 41 Ill. App. 3d 659, 355 N.E.2d 78 (1976).

[15] *See* Southern New England Tel. Co. v. D'Addario Constr. Co., 33 Conn. Sup. 596, 363 A.2d 766 (1976); Broadview Leasing Co. v. Cape Central Airways, 539 S.W.2d 553 (Mo. App. 1976); Marsh Wood Prods. Co. v. Babcock & Wilcox Co., 207 Wis. 209, 240 N.W. 392 (1932).

[16] Texas & Pac. Ry. v. Behymer, 189 U.S. 468, 470 (1903). Stated differently: "[I]t is not of itself negligence to use a particular design or method in the manufacture or handling of a product . . . which is reasonably safe and in customary use in the industry, although other possible designs . . . might be conceived which would be safer . . . ." Day v. Barber-Colman Co., 10 Ill. App. 2d 494, 135 N.E.2d 231, 238 (1956).

[17] Judge Learned Hand stated in The T.J. Hooper, 60 F.2d 737, 740 (2d Cir. 1932), that though customs may be evidence of the reasonable standard of care, "courts must in the end say what is required; there are precautions so imperative that even their universal disregard will not excuse their omission."

[18] *See* Blohm v. Cardwell Mfg. Co., 380 F.2d 341 (10th Cir. 1967); Atkins v. American Motors, Corp., 335 So.2d 134 (Ala. 1976); Matthews v. Stewart, 20 Ill. App. 3d 470, 314 N.E.2d 683 (1974).

[19] "[D]efendants in the instant case [cannot] avoid the issue of strict liability by attempting to show merely that they had done what the rest of their industry had done to make their products safe." Gelsumino v. E.W. Bliss Co., 10 Ill. App. 3d 604, 609, 295 N.E.2d 110, 113 (1973). *See* Karasik, *State of the Art of Science: Is it a Defense to Products Liability?*, 60 ILL. B.J. 348 (1972).

show that such a constraint exists is the second variety of state of the art evidence. Unlike the custom-type of state of the art evidence, most courts have not hesitated to accept this evidence in strict liability actions,[20] the primary exception to this rule being the State of Illinois.[21]

The Supreme Court of Illinois firmly held in *Cunningham v. MacNeal Memorial Hospital* that the practical or scientific impossibility of discovering or removing a defect from a product is not a defense to an action based on strict liability.[22] For this reason, state of the art evidence is wholly irrelevant to the consideration of the defendant's liability. Contrary to the Illinois decisions, most courts will not impose liability on a manufacturer who has used all available skill and knowledge to manufacture his product.[23]

C. *The Incorporation of State of the Art Evidence into Section 402A*

Section 402A provides that a manufacturer may be liable even when he has "exercised all possible care in the preparation and sale of the product."[24] This phrase notwithstanding, there are two methods developed by the courts to incorporate state of the art evidence into a Section 402A case.

1. *The "Comment K" Approach*

The first approach is to give an expansive reading to the exception provided in the section for unavoidably unsafe products.[25] As

[20] Hines v. St. Joseph Hosp., 86 N.M. 763, 527 P.2d 1075 (1974); Phillips v. Kimwood Mach. Co., 269 Or. 485, 525 P.2d 1033 (1974).

[21] *See* Cunningham v. MacNeal Memorial Hosp., 47 Ill.2d 443, 266 N.E.2d 897 (1970) (hereinafter cited as *Cunningham*) and Gelsumino v. E.W. Bliss Co., 10 Ill. App. 3d 604, 295 N.E.2d 110 (1973).

[22] 266 N.E.2d at 897. *See* Karasik, *supra* note 19.

[23] E. R. Squibb & Sons, Inc. v. Stickney, 274 So.2d 898 (1973), *cert. denied*, 416 U.S. 961 (1974); Hines v. St. Joseph Hosp., 86 N.M. 763, 527 P.2d 1075 (1974); La Monica v. Outboard Marine Corp., 48 Ohio App. 2d 43, 355 N.E.2d 533 (1976).

[24] § 402A, *supra* note 12.

[25] Comment k to § 402A reads:

> There are some products which, in the present state of human knowledge, are quite incapable of being made safe for their intended and ordinary use. These are especially common in the field of drugs. An outstanding example is the vaccine for the Pasteur treatment of rabies, which not uncommonly leads to very serious and damaging consequences when it is injected. Since the disease

stated in Comment k to Section 402A, the primary purpose of the exception is to exempt the drug industry from the section.[26] In *Hines v. St. Joseph Hospital*,[27] the New Mexico Court of Appeals was confronted with a factual situation practically identical to the one presented to the Illinois Supreme Court in *Cunningham*. Not only did the *Hines* court refuse to impose liability on the defendant, it severely criticized the *Cunningham* opinion.[28] In *E. R. Squibb & Sons, Inc. v. Stickney*,[29] the court held that a fifteen percent failure rate in a bone transplant product did not warrant the imposition of liability on the defendant when the manufacturing process represented the highest degree of reliability attainable at the time of manufacture.[30] Comment k has also been used in non-drug cases when, "commercial products [possess] both unparalled (sic) utility and unquestioned danger."[31] This approach of incorporating state of the art evidence is somewhat restricted by the comment's imposition of a duty to warn the recipient of the danger involved.[32]

> itself invariably leads to a dreadful death, both the marketing and the use of the vaccine are fully justified, notwithstanding the unavoidable high degree of risk which they involve. Such a product, properly prepared, and accompanied by proper directions and warning, is not defective, nor is it *unreasonably* dangerous. The same is true of many other drugs, vaccines, and the like, many of which for this very reason cannot legally be sold except to physicians, or under the prescription of a physician. It is also true in particular of many new or experimental drugs as to which, because of lack of time and opportunity for sufficient medical experience, there can be no assurance of safety, or perhaps even of purity of ingredients, but such experience as there is justifies the marketing and use of the drug notwithstanding a medically recognizable risk. The seller of such products, again with the qualification that they are properly prepared and marketed, and proper warning is given, where the situation calls for it, is not to be held to strict liability for unfortunate consequences attending their use, merely because he has undertaken to supply the public with an apparently useful and desirable product, attended with a known but apparently reasonable risk.

[26] *Id.*

[27] 86 N.M. 763, 527 P.2d 1075 (1974).

[28] 527 P.2d at 1077.

[29] 274 So. 2d 898 (Fla. Dist. Ct. App. 1973). This case is based upon breach of an implied warranty, not on Section 402A; however, there is little practical difference between the two theories.

[30] *Id.* at 901.

[31] Borel v. Fibreboard Paper Prods. Corp., 493 F.2d 1076, 1088 (5th Cir. 1973), *cert. denied*, 419 U.S. 830 (1974).

[32] *See* cases cited *supra* note 21.

2. *The "Defective" Approach*

The other approach used by the courts is to allow the introduction of state of the art evidence to establish that the product was not defective.[33] The ease with which this is done depends to a great extent on the court's definition of "defective." The necessity of developing a definition which will be easily applied to the facts of any case was recognized by the Oregon Supreme Court in *Phillips v. Kimwood Machine Co.*[34]

a. *Definition of "Defective" as Derived from Section 402A*

As the Oregon Supreme Court has aptly noted, courts have continuously floundered in their attempts to develop a workable definition for defective.[35] One definition used is derived from the comments to the Restatement and describes "defective" in terms of the ordinary consumer's expectation.[36] This approach is illustrated in *Dunham v. Vaughan & Bushnell Mfg. Co.*,[37] wherein the court stated "those products are defective which are dangerous because they fail to perform in the manner reasonably to be expected."[38]

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[33] *See* Phillips v. Kimwood Machine Co., 269 Or. 485, 525 P.2d 1033 (1974). *See also* Baker v. Chrysler Corp., 55 Cal. App. 3d 710, 127 Cal. Rptr. 745 (1976); Hamilton v. Hardy, 549 P.2d 1099 (Colo. App. 1976). *See* Murray, *The State of the Art Defense in Strict Products Liability*, 57 MAR. L. REV. 649 (1974).

[34] 525 P.2d 1033.

[35] *Id.* at 1035.

[36] Comment g to § 402A defines "defective condition" by stating in part:

"The rule stated in this Section applies only where the product is, at the time it leaves the seller's hands, in a condition not contemplated by the ultimate consumer, which will be unreasonably dangerous to him."

Comment i, in defining "unreasonably dangerous," states: "The article sold must be dangerous to an extent beyond that which would be contemplated by the ordinary consumer who purchases it, with the ordinary knowledge common to the community as to its characteristics."

There is a significant relationship between the two Comments since they both define their respective phrases in terms of the "contemplation of the ordinary consumer."

The "terms 'defective condition' and 'unreasonably dangerous' are essentially synonymous." Reyes v. Wyeth Laboratories, 498 F.2d 1264 (5th Cir. 1974), *cert. denied*, 419 U.S. 1096 (1974).

[37] 42 Ill. 2d 339, 247 N.E.2d 401 (1969).

[38] 247 N.E.2d at 403. Similarly, Jackson v. City of Biloxi, 272 So. 2d 654, 656 (Miss. 1973) stated the principle of law that, "Ordinarily, . . . 'defective condition' means that the article . . . did not function as expected." (quoting State Stove Mfg. Co. v. Hodges, 189 So. 2d 113, 121 (Miss. 1966)).

b. *Definition of "Defective" as Developed by Wade*

Dean John Wade has proposed an alternative definition for defective which consists of seven considerations that should be balanced in what is primarily a benefit-risk analysis to determine the presence or absence of a manufacturer's liability.[39] These considera-

[39] Dean Wade proposed that the term "not reasonably safe" should be used instead of "defective." However, this paper will attribute Dean Wade's analysis to the term "defective" since it is not the term used to describe the condition of the product that is important, but the definition of the condition.

Dean Wade's definition consists of the following factors:

> (1) the usefulness and desirability of the product, (2) the availability of other and safer products to meet the same need, (3) the likelihood of injury and its probable seriousness, (4) the obviousness of the danger, (5) common knowledge and normal public expectation of the danger (particularly for established products), (6) the avoidability of injury by care in use of the product (including the effect of instructions or warnings), and (7) the ability to eliminate the danger without seriously impairing the usefulness of the product or making it unduly expensive.

Wade, *Strict Tort Liability of Manufacturers*, 19 Sw. L.J. 5, 17 (1965) [hereinafter cited as Wade].

In a later article, Professor Wade explained that the test used is similar to negligence except that scienter is conclusively presumed. Wade, *On the Nature of Strict Tort Liability for Products*, 44 Miss. L.J. 825, 834-35 (1973). The question then becomes "whether the magnitude of the risk created by the dangerous condition of the product was outweighed by the social utility attained by putting it out in this fashion." *Id.* at 835. To help in this determination, Wade, once again, presents his seven points in a slightly altered style:

> (1) The usefulness and desirability of the product—its utility to the user and to the public as a whole.
>
> (2) The safety aspects of the product—the likelihood that it will cause injury, and the probable seriousness of the injury.
>
> (3) The availability of a substitute product which would meet the same need and not be as unsafe.
>
> (4) The manufacturer's ability to eliminate the unsafe character of the product without impairing its usefulness or making it too expensive to maintain its utility.
>
> (5) The user's ability to avoid danger by the exercise of care in the use of the product.
>
> (6) The user's anticipated awarness of the dangers inherent in the product and their avoidability, because of general public knowledge of the obvious condition of the product, or of the existence of suitable warnings or instructions.
>
> (7) The feasibility, on the part of the manufacturer, of spreading the loss by setting the price of the product or carrying liability insurance.

Id. at 837-38.

Other authors have also addressed the problem, including: Keeton, *Product Liability and the Meaning of Defect*, 5 St. Mary's L.J. 30 (1973); Keeton, *Manufacturer's Liability: The Meaning of "Defect" in the Manufacture and Design of Products*, 20 Syracuse L. Rev. 559 (1969); Fischer, *Products Liability—The Meaning of Defect*, 39 Mo. L. Rev. 339 (1974).

tions include: (1) the usefulness and desirability of the product, that is, its utility to the user and to the public as a whole;[40] (2) the safety aspects of the product, that is, the likelihood that it will cause injury, and the probable seriousness of the injury;[41] (3) the availability of a substitute product which would meet the same need and not be as unsafe;[42] (4) the manufacturer's ability to eliminate the unsafe character of the product without impairing its usefulness or making it too expensive to maintain its utility;[43] (5) the user's ability to avoid danger by the exercise of care in the use of the product;[44] (6) the user's anticipated awareness of the dangers inherent in the product and their avoidability, because of general public knowledge;[45] and (7) the obvious condition of the product, or of the existence of suitable warning or instructions.[46]

Each of the factors listed above has received some recognition in the courts. A recent federal district court decision, *Bowman v. General Motors*,[47] treated the entire analysis at length, while other courts have embraced aspects of it with differing degrees of emphasis.[48] In *Dorsey v. Yoder*,[49] the court cited Section 402A as well as Dean Wade and concluded that the Wade approach provided a more distinct solution.[50] Against the background of various factual settings, several state courts have likewise adopted the Wade definition.[51] Less comprehensive applications and treatments of the Wade approach or similar approaches can be found in other opinions.[52] State of the art evidence would seem to be implicitly

[40] *See* Hoppe v. Midwest Conveyor Co., 485 F.2d 1196 (8th Cir. 1973).

[41] *See* Robbins v. Alberto Culver Co., 210 Kan. 147, 499 P.2d 1080 (1972).

[42] Sutkowshi v. Universal Marion Corp., 5 Ill. App. 3d 313, 281 N.E.2d 749 (1972).

[43] Finnegan v. Havir Mfg. Co., 60 N.J. 413, 290 A.2d 286 (1972).

[44] *See* David v. Wyeth Labs., Inc., 399 F.2d 121 (9th Cir. 1968).

[45] Schemel v. General Motors Corp., 384 F.2d 802 (7th Cir. 1967).

[46] *See* Zambrana v. Standard Oil Co., 26 Cal. App. 3d 209, 102 Cal. Rptr. 699 (1972).

[47] 427 F. Supp. 234 (E.D. Pa. 1977).

[48] *See* notes 40-46 *supra.*

[49] 331 F. Supp. 753 (E.D. Pa. 1971), *aff'd*, 474 F.2d 1339 (3d Cir. 1973).

[50] *Id.* at 760.

[51] Roach v. Kononen Ford Motors Co., 269 Or. 457, 525 P.2d 125, 128 (1974); Byrns v. Riddell, Inc., 113 Ariz. 264, 550 P.2d 1065, 1068 (1976); Johnson v. Clark Equip. Co., 274 Or. 403, 547 P.2d 132, 136-37 (1976).

[52] Borel v. Fibreboard Paper Prods. Corp., 493 F.2d 1076 (5th Cir. 1973), *cert. denied*, 419 U.S. 830 (1974); Welch v. Outboard Marine Corp., 481 F.2d

considered under the Wade definition, especially the availability of safer substitute products.[53]

In *Borel v. Fibreboard Paper Products*,[54] the Fifth Circuit found the two approaches to be interrelated. The court stated that the "fulcrum for this balancing process [Wade] is the reasonable man as consumer or as seller."[55] This blending of approaches instills the theoretical "ordinary consumer" with some practical analytical tools and allows the application of the Wade approach to enjoy a presumption of legitimacy by its association with Section 402A.

To summarize, most courts allow the introduction and consideration of state of the art evidence in strict liability actions. Comment k to Section 402A provides one method of entry; the requirement of a "defective" product provides another. When a court incorporates state of the art evidence by the "defective" route, the definition used for "defective" determines the method of assimilation.

II. Analysis of Bruce v. Martin-Marietta Corporation

Against this background the Tenth Circuit rejected the assertions advanced by the planitiffs. The plaintiffs' first contention was that the defendant had not manufactured the aircraft so as to minimize the possibility of fire occurring after a crash.[56] In an affidavit submitted in support of their motion for summary judgment, Martin set forth specific precautions the company had taken to diminish the possibility of fire. Since the plaintiffs did not respond to this affidavit the court disposed of their contention on procedural grounds.[57]

The plaintiffs' second contention was that the seats and seat fastenings in the aircraft were not designed or manufactured to

252 (5th Cir. 1973); Helene Curtis Indus. Inc. v. Pruitt, 385 F.2d 841 (5th Cir. 1967), *cert. denied*, 391 U.S. 913 (1968); Phillips v. Kimwood Machine Co., 269 Or. 485, 525 P.2d 1033 (1974).

[53] *See* note 39 *supra*.

[54] 493 F.2d 1076 (5th Cir. 1973), *cert. denied*, 419 U.S. 830 (1974).

[55] *Id.* at 1088.

[56] 544 F.2d at 446.

[57] "When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him." Fed. R. Civ. P. 56(e).

withstand a crash.[58] The plaintiffs relied principally upon the opinion of their expert witness which indicated that the crash would have been survivable if seats in common use on October 2, 1970, had been installed in the airplane.[59] Plaintiffs argued that the availability of safer aircraft seats eighteen years after the manufacture of the Martin 404 established the fact that the plane was defective at the time it was manufactured, absent an alteration of the plane when the new seats became available. In support of this position, plaintiffs relied upon the decisions in *Pryor v. Lee C. Moore Corp.*[60] and *Mickle v. Blackmon.*[61] The court summarily dismissed these cases as irrelevant.[62] The court then noted that the decisions in *Cunningham*[63] and *Gelsumino v. E. W. Bliss Co.*[64] supported the plaintiffs' contention that state of the art evidence is not relevant to a strict liability claim. The court refused to adopt these decisions, however, noting that the states whose law applied to the instant case had not followed the Illinois courts.[65] The court proceeded to analyze the different burden of proof requirements established by various jurisdictions for Section 402A cases.[66] From the numerous authorities and the Restatement, the court gleaned a general requirement that a defective product be dangerous beyond the expectation of the ordinary consumer. The court then held that state of the art evidence had been properly received and considered in that it was helpful in determining the expectation of the ordinary consumer.[67]

After it decided to allow state of the art evidence in the consideration of the case, the court resorted to the Restatement for a definition of "defective." The court explained its reasoning process in the application of state of the art evidence as follows:

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[58] 544 F.2d at 445-46.

[59] *Id.* at 446.

[60] 262 F.2d 673 (10th Cir. 1958).

[61] 166 S.E.2d 173 (S.C. 1969).

[62] 544 F.2d at 447. The court stated that "these cases hold that prolonged safe use of a product is evidence of lack of defect but is not conclusive. We have no quarrel with the rule but have no need to apply it here." *Id.* at 447.

[63] 47 Ill. 2d 443, 266 N.E.2d 897 (1970).

[64] 10 Ill. App. 3d 604, 295 N.E.2d 110 (1973).

[65] 544 F.2d at 447.

[66] *Id.* at 448.

[67] *Id.* at 447.

> State-of-art evidence helps to determine the expectation of the ordinary consumer. A consumer would not expect a Model T to have the safety features which are incorporated in automobiles made today. The same expectation applies to airplanes. Plaintiffs have not shown that the ordinary consumer would expect a plane made in 1952 to have the safety features of one made in 1970.[68]

In so explaining itself, the court followed the decisions which rely on the Restatement and ignored the definition for "defective" developed by Dean Wade and most recently embraced by the *Bowman* court.[69] The court held that because the plaintiffs had not submitted proof which was sufficient to establish that the ordinary consumer would expect a plane manufactured in 1952 to have safety features of one manufactured in 1970, the defendant's motion for summary judgment had been properly granted.[70]

The "ordinary consumer's expectation" definition of "defective" has not been without its critics.[71] Although various criticisms have been voiced, there appears to be an underlying impression that the term is subject to misconstruction. The Tenth Circuit's use of state of the art evidence in conjunction with the "ordinary consumer" definition[72] adds a new dimension to the confusion already present.

The court's Model T illustration quoted above is agreeable. The "ordinary consumer . . . with the ordinary knowledge common to the community"[73] probably could describe differences he would expect in a 1970 car and a Model T. However, most cases presented to the courts today more closely resemble the instant case; the questions are much more complex. The "ordinary consumer" probably has no idea what safety features to expect in aircraft from one year to the next. To correct this problem, the Tenth Circuit imputes to the "ordinary consumer" technological data regarding the intricacies of aircraft design. Given the technological information, which may exceed the knowledge of any particular

[68] *Id.* at 447.

[69] It should be noted that the *Bowman* opinion was entered subsequent to the *Bruce* decision.

[70] 544 F.2d at 448.

[71] *See* Fischer, *Products Liability—The Meaning of Defect*, 39 MO. L. REV. 339, 349 (1974); Keeton, *Manufacturer's Liability; The Meaning of "Defect" in the Manufacture and Design of Products*, 20 SYRACUSE L. REV. 559, 572 (1969).

[72] 544 F.2d at 443.

[73] § 402A, Comment i, *supra* note 36.

expert, the ordinary consumer is now ready to form his expectation. The distortion of the term "ordinary consumer" is obvious. The reason for the distortion is anything but obvious. On the heels of distortion comes confusion, which possibly explains a recent interpretation of the *Bruce* case. The author stated that the court was satisfied the aircraft was not unreasonably dangerous according to the state of the art of aircraft manufacture in 1952, "even though today's consumer might reasonably expect safer designs and conditions."[74]

It is submitted that it is time to rid ourselves of the fictitious perspective attributed to the "ordinary consumer." The imposition of state of the art evidence on the consumer overloads the term "ordinary" to an extent that stretches credibility.[75] It is not that the fiction, in practice, is necessarily unmanageable, for an adept court can reach a valid judgment by using it. But it seems pointless to perpetuate the resulting confusion and vagueness when Dean Wade's objective factor approach offers a suitable substitute.[76]

Implicit in the Wade formula is the consideration of the technological state of the art. If the technology required to make a safety change advocated by a plaintiff is non-existent at the time of manufacture, it is obvious that the manufacturer does not pos-

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[74] W.H. Quirk III and R.K. Harrison, *Recent Developments in Aviation Law*, 43 J. AIR L. & COM. 349 (1977) [hereinafter cited as Quirk]. Mr. Quirk was a speaker at the 1977 Journal of Air Law and Commerce Symposium. In his oral elaboration on the case, he commented that he could not understand how the Tenth Circuit reached the decision it did.

[75] The classic example of a term stretched to the point of nonrecognition is "foreseeability." In each case, the courts are faced with the same policy decision; namely, the extent to which liability will be extended.

[76] It should not be assumed that this author believes Dean Wade's approach to be the only substitute. *See* note 39 *supra*.

Mr. Justice Marshall's comments on the wisdom of using unarticulated tests are well stated in the context of an equal protection case.

> But there are problems with deciding cases based on factors not encompassed by the applicable standards. First, the approach is rudderless, affording no notice to interested parties of the standards governing particular cases and giving no firm guidance to judges who, as a consequence, must assess the constitutionality of legislation before them on an *ad hoc* basis. Second, and not unrelatedly, the approach is unpredictable and requires holding this Court to standards it has never publicly adopted. Thus, the approach presents the danger that . . . relevant factors will be misapplied or ignored.

Massachusetts Bd. of Retirement v. Murgia, 427 U.S. 307, 321 (1976) (Marshall, J., dissenting).

sess the "ability to eliminate the unsafe character of the product," one of the Wade considerations.[77] It is not so obvious that the "ordinary consumer" perspective would yield as clear an illustration.[78]

Conclusion

The application of the Wade analysis will probably render few changes in actual result. It is possible to assume that the courts have always balanced many, if not all, of Dean Wade's factors in their determination of the "ordinary consumer's" expectations.[79] The Wade formula, however, has a number of distinct advantages. First, it would add some needed precision to the presentation of a products liability case. It is arguably much simpler to gather, organize, and present the facts of a case on the basis of the Wade definition than from the perspective of the "ordinary consumer." Additionally, the very wording of the factors tends to eliminate the confusion between the custom and technological varieties of state of the art evidence. Finally, it properly presents the problem as a social policy question. The ultimate question then becomes, at what point will society decide that a product must be made safer?

There appears to be no compelling reason for the courts to continue to work behind the guise of the ordinary consumer. The confusion and imprecision generated by this perspective far outweigh any real or imagined benefits gained. The mere fact that this approach has been embodied in the comments to Section 402A should in no way inhibit the courts from adopting a healthier approach to a cause of action sorely in need of remedy.

J. Mitchell Bell

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[77] Wade, *supra* note 39. Sutkowshi v. Universal Marion Corp., does, in fact, incorporate technological state of the art evidence with an analysis similar to the Wade approach.

[78] Quirk, *supra* note 74. To aid in the analysis of the *Bruce* case, it should be noted that the deposition of plaintiff's expert witness disclosed that the seats referred to in the affidavit were not available in 1952.

[79] *See* Borel v. Fibreboard Paper Prods. Corp., 493 F.2d 1076 (5th Cir. 1973), *cert. denied*, 419 U.S. 830 (1974). *See also* Seattle-First Nat'l Bank v. Tabert, 542 P.2d 774 (Wash. 1975).

ADMINISTRATIVE LAW — INSPECTION POWERS — CAB Agents May, Without Formal Process, Inspect Only Those Records in the Possession of a Regulated Air Carrier Which Are Reasonably Relevant to an Investigation Within the CAB's Jurisdiction. *CAB v. United Airlines, Inc.*, 542 F.2d 394 (7th Cir. 1976).

In April, 1975, Civil Aeronautics Board (CAB) agents with proper credentials[1] appeared at the executive offices of United Airlines (United) in Elk Grove, Illinois, and demanded immediate access to all records and documents on the premises pursuant to section 407(e) of the Federal Aviation Act of 1958.[2] The agents refused to disclose the subject of their investigation, although they conceded when questioned that it might be at least partially concerned with illegal corporate campaign contributions.[3] During their initial contact with United, the CAB agents agreed to limit their inspection request to cover four types of files from six of United's major departments and offices.[4] After permitting the agents to begin inspecting some of these files over a period of two days, United formally objected that the inspection exceeded the agent's lawful authority, and the agents left.[5] The CAB then filed suit in the United States District Court for the Northern District of Illinois, seeking

[1] *See* 14 C.F.R. § 240.1-2 (1976).

[2] 72 Stat. 731, *as amended*, 49 U.S.C. § 1377(e) (Supp. V 1975), *formerly* Civil Aeronautics Act of 1938, ch. 601, 52 Stat. 973. Section 407(e) provides in part:

> The Board shall at all times have access to all lands, buildings, and equipment of any air carrier or foreign air carrier and to all accounts, records, and memorandums, including all documents, papers, and correspondence, now or hereafter existing, and kept or required to be kept by air carriers, foreign air carriers, or ticket agents and it may employ special agents or auditors, who shall have authority under the orders of the Board to inspect and examine any and all such lands, buildings, equipment, accounts, records, and memorandums.

[3] CAB v. United Airlines, Inc., 542 F.2d 394, 395 (7th Cir. 1976). United's chief executive officer, E. E. Carlson, had admitted making a "personal, legal" contribution of more than $20,000 to the Committee for the Reelection of the President, but denied that there had been any illegal corporate contributions by United. N.Y. Times, Apr. 25, 1975, at 45, col. 2.

[4] The agents sought to inspect reading files, subject matter files, expense reports, and memoranda from United's Finance and Planning, Law, External Affairs, and Marketing departments and offices of the Chairman and Vice-Chairman. CAB v. United Airlines, Inc., 399 F. Supp. 1325, 1325-26 nn.5-7.

[5] Brief for Appellant at 5, CAB v. United Airlines, Inc., 542 F.2d 394 (7th Cir. 1976).

through injunction to gain "immediate and unconditional access" to all of United's records.[6] At the time the district court heard cross-motions for summary judgment, the parties were in some dispute as to whether the unlimited or the limited demand was before the court.[7] Even on the basis of the limited request, however, the district court found United entitled to summary judgment and ordered the CAB's complaint dismissed.[8] The CAB appealed. *Held, affirmed*: CAB agents may, without formal process, inspect only those records in the possession of a regulated air carrier which are reasonably relevant to an investigation within the CAB's jurisdiction.[9] Because the CAB had not specified any investigative purpose in this case, no determination of reasonable relevance could be made and the CAB could not have judicial enforcement of its demands.

In seeking unconditional access to United's files without offering any explanation of its demand, the CAB prompted the first court test requiring construction of section 407(e) and consideration of any constitutional problems it might raise. The key holding of the district court was its interpretation of the phrase in section 407(e) which refers to records "kept or required to be kept"; to avoid what it termed a serious possibility of conflict with the fourth amendment,[10] the court read the statute as reaching only those documents "in the specific categories of records the CAB requires" and records which directly relate to or support those specifically required.[11] The effect of this construction was to place beyond the CAB's reach a wide variety of correspondence and memoranda not directly related to required bookkeeping.

In arriving at its narrow construction of section 407(e), the district court was able to distinguish two earlier cases which had upheld CAB investigative demands less sweeping than the one at issue

[6] CAB v. United Airlines, Inc., 399 F. Supp. at 1325. The language of the CAB's petition closely paralleled that of section 407(e), *supra* note 2.

[7] The district court based its decision on the limited request, not wishing to issue an "advisory opinion" on the propriety of a demand the CAB might not actually be pursuing. 399 F. Supp. at 1325 n.4.

[8] 399 F. Supp. at 1325.

[9] 542 F.2d 394. For elaboration of the "reasonable relevance" standard, *see* text accompanying notes 63-68 *infra*.

[10] 399 F. Supp. at 1328.

[11] *Id.* at 1327.

in the principal case.[12] The district court also pointed out that the CAB has subpoena powers under section 1004(b) of the Act,[13] and reasoned that this section would be inconsistent with section 407(e) if the reach of the latter were as broad as the CAB contended.[14]

For its controlling precedent, the district court relied on a similar holding in *Burlington Northern, Inc. v. ICC*.[15] In that case, the Interstate Commerce Commission (ICC) sought access to Burlington's confidential earnings forecasts. The ICC had attempted to obtain this information in connection with congressional committee hearings on railroad loan-guarantee legislation.[16] The ICC relied on section 20(5) of the Interstate Commerce Act,[17] which served as a model for section 407(e) of the Aviation Act.[18] As did the district court in the principal case, the Court of Appeals for the District of Columbia in *Burlington* gave a restrictive reading to the broad language: documents "kept or required to be kept" were only those included in or directly related to required financial records.[19]

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[12] CAB v. Blatz Airlines, Inc., Civ. No. 13821-61-5 (S.D. Cal. 1962), involved a request for specific documents required by law to be kept by the carrier; CAB v. Hermann, 353 U.S. 322 (1957), enforced a CAB demand in subpoena form. Neither the district court nor the court of appeals in the principal case found it necessary to discuss the CAB's interpretation of section 407(e) in Basler Flight Service, Inc. Enforcement Proceeding, CAB Order Nos. 72-4-153, 154 (Apr. 28, 1972), *cited in* Brief for Appellant at 31, which also involved a much less sweeping demand than that in the principal case, and shed very little light on the proper scope of the statutory language.

[13] 49 U.S.C. § 1484(b) (1970); *see* 14 C.F.R. §§ 305.1-.12 (1976).

[14] "It would be difficult to impute to Congress an intent to provide a formal proceeding for investigation and then to allow the CAB to conduct a complete investigation in derogation of the requirements and protections afforded by the formal procedure." 399 F. Supp. at 1327.

[15] 462 F.2d 280 (D.C. Cir.), *reh. en banc denied by an equally divided court, cert. denied*, 409 U.S. 891 (1972).

[16] 462 F.2d at 288 n.1.

[17] 49 U.S.C. § 20(5) (1970).

[18] 542 F.2d at 396.

[19] The court found that the purpose of section 20:

> is to maintain a uniform accounting system and to permit the analysis and interpretation of records which are required to be kept by carriers. The Commission's access to memoranda and other materials in the possession of carriers must therefore be confined to circumstances in which the need for information relating to or explanatory of required accounting and bookkeeping entries is evident.

462 F.2d at 287-88.

The *Burlington* court, in turn, went back to a 1915 decision for its primary support. In *United States v. Louisville and Nashville R.R.*,[20] the United States Supreme Court held that an early version of section 20 of the Interstate Commerce Act did not confer on the ICC authority to inspect the railroad's correspondence. Section 20, which at that time referred to "accounts, records and memoranda," was held to cover only those documents "such as are kept in the system of bookkeeping to be prescribed by the Commission."[21] The Court reasoned that if Congress had intended to grant a more sweeping power, one which might be of questionable constitutionality, it could have used language "adequate to that purpose."[22]

The language of section 20 has been broadened by amendment twice since 1915,[23] the first time in direct response to the Supreme Court's ruling in *Louisville and Nashville*.[24] Although the *Burlington* court conceded that these amendments brought "certain materials" within the score of the section which had previously been beyond the ICC's reach,[25] the court found that there had been no change in the "basic design and purpose" of the section since 1915.[26] The purpose of section 20 remaining unchanged, the narrow construction of *Louisville and Nashville* continued to control.[27] Only those materials which were part of or directly related to the ICC's prescribed "uniform system of accounting" were within the ICC's reach under section 20(5).[28]

This rather questionable reading of the legislative history by the court of appeals panel which originally heard the *Burlington* case was sharply challenged in an accompanying opinion on the ICC's

[20] 236 U.S. 318 (1915).

[21] *Id.* at 334.

[22] *Id.* at 336.

[23] The Transportation Act of 1920, 41 Stat. 456, 493, expanded section 20 to cover "documents, papers, and correspondence . . . kept or required to be kept." The Transportation Act of 1940, 54 Stat. 899, 917, substituted for the phrase "kept or required to be kept by carriers" a reference to materials in the possession "of any person controlling, controlled by, or under common control with" a carrier. Although section 407(e) of the Aviation Act was modeled on the pre-1940 language, neither the district court nor the court of appeals saw any distinction in this difference.

[24] H.R. REP. No. 456, 66th CONG., 1st SESS. 30 (1919).

[25] 462 F.2d at 287.

[26] *Id.*

[27] *Id.*

[28] *Id.*

motion for rehearing. Although rehearing *en banc* was denied by an equally divided court, Judge Leventhal and three of his brethren joined in a strongly worded statement as to why rehearing should have been granted.[29] Judge Leventhal argued that: 1) the decision in *Louisville and Nashville* had served to avoid a constitutional problem since resolved through much less restrictive statutory interpretations;[30] 2) Congress had specifically rejected the *Louisville and Nashville* decision;[31] and 3) the *Louisville and Nashville* decision might not control *Burlington* on the facts of the latter under any circumstances.[32] In sum, Judge Leventhal labelled the panel decision in *Burlington* "so doubtful that we think it should be vacated and reconsidered en banc."[33]

In reviewing the district court's decision in the principal case, the Court of Appeals for the Seventh Circuit adopted Judge Leventhal's criticisms of the *Burlington* decision[34] and rejected the district court's interpretation of section 407(e),[35] even though the dismissal of the CAB's complaint was affirmed.[36] Declining to choose between the virtually unlimited inspection power claimed by the CAB and the very narrow authority recognized by the district court, the court of appeals sought a middle ground. In doing so, the court concerned itself with those cases since *Louisville and Nashville* which have considered the authority of government agencies to investigate corporations and inspect their records.

The *Louisville and Nashville* decision was one of a number of cases in which the Supreme Court construed statutes so as to avoid potential conflicts with the fourth amendment while expressly reserving the question whether that amendment's prohibition against unreasonable searches and seizures may be invoked by corporations.[37] More recent cases dealing with the problem, however, were

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[29] *Id.* at 288.

[30] *See* text accompanying notes 37-41 *infra.*

[31] *See* note 24 *supra.*

[32] 462 F.2d at 289-90.

[33] *Id.* at 290.

[34] 542 F.2d at 397.

[35] *Id.* at 401.

[36] *Id.* at 403.

[37] *See, inter alia,* United States v. Morton Salt Co., 338 U.S. 632 (1950); Oklahoma Press Publishing Co. v. Walling, 327 U.S. 186 (1946); FTC v. American Tobacco Co., 264 U.S. 298 (1924).

much less restrictive than *Louisville and Nashville*, limiting government visitorial powers with respect to corporations only by imposing a requirement of reasonableness on agency demands.[38] "The gist of the protection is in the requirement, expressed in terms, that the disclosure sought shall not be unreasonable."[39] When applied to corporations, this rule of reason proved considerably less rigorous than with respect to individuals. The courts might enforce government demands for corporate records even when those demands were based on "nothing more than official curiosity,"[40] although mere "fishing expeditions"[41] would not be judicially countenanced.

It has finally been established within the past few years that the fourth amendment does apply to corporations,[42] but it appears to offer them little more protection now that it is applied than it did when it was being avoided. The same basic standard of reasonableness continues to be applied,[43] so that the practical impact of its formal recognition in this context has been minor. The controlling question in every case will still be whether the inspection power asserted by a government agency is "reasonable."

There are at least two recent cases which could be read as supporting the reasonableness of the sort of sweeping inspection powers contended for by the CAB in the principal case. In *Colonnade Catering Corp. v. United States*,[44] the Supreme Court stated that although "the Fourth Amendment and its various restrictive rules apply," in the context of an industry "long subject to close super-

[38] [N]either incorporated nor unincorporated associations can plead an unqualified right to conduct their affairs in secret.

While they may and should have protection from unlawful demands made in the name of public investigation, corporations can claim no equality with individuals in the enjoyment of a right to privacy. . . .

. . . [I]t is sufficient if the inquiry is within the authority of the agency, the demand is not too indefinite and the information sought is reasonably relevant.

United States v. Morton Salt Co., 338 U.S. at 652 (citations omitted).

[39] Oklahoma Press Publishing Co. v. Walling, 327 U.S. at 208.

[40] United States v. Morton Salt Co., 338 U.S. at 652.

[41] FTC v. American Tobacco Co., 264 U.S. at 306.

[42] Colonnade Catering Corp. v. United States, 397 U.S. 72, 77 (1970); California Bankers Ass'n v. Shultz, 416 U.S. 21, 60-63 (1974).

[43] California Bankers Ass'n v. Shultz, 416 U.S. at 67; SEC v. Brigadoon Scotch Distrib. Co., 480 F.2d 1047, 1055 (2d Cir. 1973), *cert. denied*, 415 U.S. 915 (1974).

[44] 397 U.S. 72 (1970).

vision and regulation . . . Congress has broad authority to fashion standards of reasonableness for searches and seizures."[45] In that case, however, a six-member majority of the Court found that Congress had not authorized forcible, warrantless seizure of contraband from a federally licensed liquor dealer.[46]

The Court carried the reasoning of *Colonnade* a step further in *United States v. Biswell*.[47] There, the Court sustained the seizure without a warrant of illegal weapons found in the locked storeroom of a federally licensed gun dealer. The seizure had been made without any use of force under the authority of section 923(g) of the Gun Control Act of 1968.[48] The minimal weight given to Fourth Amendment considerations by the Court in this case is worthy of note:

> [I]f the law is to be properly enforced and inspection made effective, inspections without warrant must be deemed reasonable official conduct under the Fourth Amendment.
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> . . . .
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> . . . [W]here, as here, regulatory inspections further urgent federal interest, and the possibilities of abuse and the threat to privacy are not of impressive dimensions, the inspection may proceed without a warrant where specifically authorized by statute.[49]

In its appeal of the principal case, the CAB argued that a broad reading of section 407(e) would further an "urgent federal interest," and that regulated carriers are in much the same situation with respect to their fourth amendment rights as were the regulated dealers in *Colonnade* and *Biswell*.[50] The court of appeals rejected this argument, finding that the "evils at hand"[51] were "not sufficiently analogous" for those cases to control.[52]

Having thus rejected both the district court's reading of the statute and that contended for by the CAB, the court of appeals turned to its own consideration of the place occupied by section

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[45] *Id.* at 77.

[46] *Id.*

[47] 406 U.S. 311 (1972).

[48] 82 Stat. 1213, 18 U.S.C. § 923(g) (1970).

[49] 406 U.S. at 316-17.

[50] 542 F.2d at 399; Brief for Appellant at 43-44.

[51] 542 F.2d at 399.

[52] *Id.*

407(e) in the overall scheme of the Act. The court noted the placement of the section "in the midst of an enumeration of CAB's economic regulatory powers,"[53] and concluded that the purpose of the section was to further the exercise of those powers.[54] In view of the fact that the CAB's economic regulatory authority "is not plenary,"[55] the court found that authority inadequate to support a plenary inspection power.[56] Having said that much, the court also declined to adopt the district court's restrictive view of the power conferred by section 407(e): "[I]n adopting § 407(e), Congress intended to give the Board power to investigate any subject properly within its jurisdiction and to inspect any carrier records reasonably relevant to such an investigation."[57] The court thus adopted the reasoning of those cases typified by *United States v. Morton Salt Co.*,[58] applying it in this case to a regulated carrier rather than an unregulated corporation.

In reaching its conclusion as to the breadth of section 407(e), the court of appeals rejected the reasoning of the district court that a broad inspection power under section 407(e) would be inconsistent with the subpoena power granted by section 1004(b).[59] The appellate court reasoned that forcing the CAB to resort to its subpoena power "would result in delay and some loss of flexibility,"[60] and suggested that the primary purpose of the subpoena power is to enable the CAB to obtain information from persons not subject to regulation under the Act or inspection under section 407(e).[61]

Having construed section 407(e) to reach all carrier records "reasonably relevant" to a proper investigation, the court turned briefly to a consideration of the inspection procedures mandated by earlier cases elaborating this "reasonably relevant" standard.[62] Pri-

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[53] *Id.* This section of the opinion also reviews the legislative history of section 407(e), which is scant and for the most part unilluminating.

[54] *Id.*

[55] *Id.* at 401.

[56] *Id.*

[57] *Id.* at 401-02.

[58] *See* cases cited notes 37-38 *supra.*

[59] *See* text accompanying notes 13-14 *supra.*

[60] 542 F.2d at 402.

[61] *Id.* n.10.

[62] *See* cases cited note 37 *supra* and United States v. Powell, 379 U.S. 48, 57-58 (1964).

mary jurisdiction to determine what records are reasonably relevant to a CAB investigation lies with the agency.[63] Nonetheless, because a demand for inspection must relate to a "proper investigative purpose, the Board must of course have such a purpose" and "must disclose its purpose" to allow judicial review.[64] When seeking judicial enforcement of an inspection demand, the CAB "need not meet any standard of probable cause."[65] A fairly minimal showing of four basic facts will suffice: "that the investigation will be conducted pursuant to a legitimate purpose, that the inquiry may be relevant to the purpose, that the information sought is not already within the [agency's] possession, and that the administrative steps required by the [governing statute] have been followed."[66] The underlying standard is one of abuse of discretion: because the authority of the court is invoked to compel compliance with the agency demand, the court "may not permit its process to be abused."[67] The burden of showing abuse rests on the party resisting the government's demand.[68]

In the principal case, having failed to disclose what investigative purpose, if any, motivated its demand for access to United's files, the CAB had made it impossible for either the district court or the court of appeals to enforce that demand.[69] Although the court of appeals reads into section 407(e) a great deal more authority than did the district court, the power conferred by the section still falls short of a general warrant to be exercised on the CAB's *ipse dixit.*

It can be argued, however, that the statutory construction arrived at might hamper the CAB undesirably in the exercise of its mandate to monitor the economic affairs of air carriers. The requirement of "reasonable relevance" to a "proper investigative purpose" is not overly stringent on its face. Its practical impact, however, could be to frustrate the CAB in efforts to search out irregularities in the carriers' affairs.

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[63] 542 F.2d at 402 n.10 (citing Oklahoma Press Publishing Co. v. Walling, 327 U.S. at 214-16).

[64] 542 F.2d at 402.

[65] United States v. Powell, 379 U.S. at 57-58, *cited at* 542 F.2d 402 n.9.

[66] *Id.*

[67] United States v. Powell, 379 U.S. at 58.

[68] *Id.*

[69] 542 F.2d at 403.

Because under the holding of the principal case the CAB must seek judicial enforcement of any contested inspection demand and submit to judicial review of its purposes, it will always be possible for a carrier both to buy time and to learn precisely what the CAB is looking for through the simple expedient of refusing the agency's initial demand for inspection. A court which expressed concern lest it impose "delay and some loss of flexibility"[70] on the CAB might have been expected to give more weight to this practical effect of its decision.[71]

In seeking to delimit the government's authority to inspect corporate records, and especially those of regulated carriers, the courts face a difficult task of balancing competing interests. There is merit in the statement that "so long as our carrier operations are rooted in private enterprise there is a strong element of privacy"[72] in at least some types of carrier records. The Supreme Court has reminded us that the "general warrant or writ of assistance [has been] odious in both English and American history."[73] But there is also merit in the CAB's argument that in return for the privilege of engaging in regulated public transportation, carriers have surrendered much if not all of any expectation of privacy they might otherwise enjoy.[74]

It cannot be denied that corporate misconduct has become a pressing problem in recent years, with closely regulated corporations sometimes found among the most flagrant offenders. No suggestion was made in the principal case that United had attempted or might attempt to conceal or destroy evidence of wrongdoing, and none is made here. However, it may be questioned whether a regulatory agency should be compelled to go to court to explain what it is looking for and why before it can gain access to the files of a regulated corporation. The more serious the problem under in-

[70] 542 F.2d at 402.

[71] One potential set of problems was forestalled by the court of appeals' decision. The CAB had argued that if it could only inspect those records required to be kept and directly related supporting materials, it might be necessary to promulgate new regulations requiring carriers to keep "many times the number and variety" of records presently required. Brief for Appellant at 37. The statutory construction settled on in the principal case should, at least, make any such rulemaking unnecessary.

[72] Burlington Northern, Inc. v. ICC, 462 F.2d at 288 (Leventhal, J., on motion for rehearing), *quoted with approval*, 542 F.2d at 397.

[73] Oklahoma Press Publishing Co. v. Walling, 327 U.S. at 207.

[74] Brief for Appellant at 34-35.

vestigation, the greater the temptation to conceal evidence will be.

The court of appeals' decision in the principal case raises as many questions as it settles in an area where the courts have provided relatively little guidance to date. The conflict between the ruling in *Burlington Northern* and that of the principal case appears to invite resolution by the Supreme Court. At least three outcomes would appear possible: the Court might endorse the *Burlington* approach, that of the principal case, or the still broader approach of *Colonnade* and *Biswell*. The CAB, however, has chosen not to seek certiorari in the principal case.[75] Any further development thus may have to await legislative action. Congress, should it find its regulatory delegates unduly hampered by restrictive statutory interpretations, may find it necessary to legislate a clear answer to questions such as that raised by the principal case.

Martin Lowy

CONSTITUTIONAL LAW—INTERGOVERNMENTAL TAX IMMUNITY—The Imposition of the Civil Aircraft Use Tax Upon Aircraft Owned by a State and Operated for Governmental Purposes Is Unconstitutional as a Violation of the Principle of Intergovernmental Immunities. *State of Georgia, Department of Transportation v. United States*, 430 F. Supp. 823 (N.D. Ga. 1976).

The State of Georgia owned and operated a number of civil aircraft which were used exclusively for state governmental functions;[1] they were not used for the private benefit of any person or state

[75] Letter from Howard M. Schmeltzer, Enforcement Attorney, CAB, to Martin Lowy (July 1, 1977).

[1] Out of a total of forty-five aircraft, thirty-seven were used by the State Forestry Commission to aid in the detection, prevention, and treatment of forestry diseases and the detection, prevention, and control of forest fires; two were used by the State Game and Fish Commission for purposes of law enforcement, coastal patrol, and the transportation of personnel in connection with the performance of commission functions; one aircraft was used by the State Highway Department for aerial photography in connection with the design, construction, maintenance, and repair of state-aid roads and highways; five were reserved for the transportation of State officials and employees solely for functions authorized by the laws of the State of Georgia.

official, nor were they used in the production of income. In 1971, a federal tax,[2] pursuant to section 4491 of the Internal Revenue Code, of $4,304 was imposed upon these aircraft. These monies were deposited in the Airport and Airway Trust Fund which had been created by the Airport and Airway Development and Revenue Acts of 1970.[3]

Georgia sought, but was denied, a refund of the tax by the Internal Revenue Service. This action was then brought by the State in the United States District Court for the Northern District of Georgia. The State alleged that the tax was unconstitutional as a violation of intergovernmental immunities; the United States argued that the tax was a user's charge and, therefore, outside the scope of intergovernmental issues and, in the alternative, that the tax did not present an undue burden upon Georgia, thereby passing the

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[2] 26 U.S.C. § 4491 (1970).

(a) Imposition of tax—A tax is hereby imposed on the use of any taxable civil aircraft during any year at the rate of—

(1) $25, plus

(2) (A) in the case of an aircraft (other than a turbine-engine-aircraft), 2 cents a pound for each pound of the maximum certificated takeoff weight in excess of 2,500 pounds, or

(B) in the case of any turbine-engine-powered aircraft, 3½ cents a pound for each pound of the maximum certificated takeoff weight.

(b) By whom paid.—Except as provided in section 4493(a), the tax imposed by this section shall be paid—

(1) in the case of a taxable civil aircraft described in section 4492(a)(1), by the person in whose name the aircraft is, or is required to be, registered, or

(2) in the case of a taxable civil aircraft described in section 4492(a)(2), by the United States person by or for whom the aircraft is owned.

26 U.S.C. § 4492 (1970).

(a) Taxable civil aircraft.—For purposes of this subchapter, the term "taxable civil aircraft" means any engine driven aircraft—

(1) registered, or required to be registered, under section 501(a) of the Federal Aviation Act of 1958 (49 U.S.C., sec. 1401(a)), or

(2) which is not described in paragraph (1) but which is owned by or for a United States person.

There is no dispute that the airplanes owned by the State of Georgia are required to be registered under § 501(a) of the Federal Aviation Act of 1958 and thus fall within the definition of "taxable civil aircraft" as used in these two sections.

[3] Airport and Airway Development Act of 1970, 49 U.S.C. §§ 1701-1703, 1711-1727; Airport and Airway Revenue Act of 1970, 84 Stat. 236 (codified in scattered sections of 4, 23, 26, 49 U.S.C.). Congress has charged that the fund is to be used to develop airports, plan and construct airports, operate and maintain air traffic control systems, air navigation, communications and other supporting services for the airway system. 49 U.S.C. § 1742.

test of intergovernmental tax immunities. *Held, judgment for plaintiff*: The imposition of the civil aircraft use tax on aircraft owned by a state and operated for governmental purposes is unconstitutional as a violation of the principle of intergovernmental immunities. *State of Georgia, Department of Transportation v. United States*, 430 F. Supp. 823 (N.D. Ga. 1976).

I. HISTORICAL DEVELOPMENT

A. User's Charge or Tax.

The seminal issue posed by *State of Georgia* is whether the aircraft registration excise tax, section 4491 of the Internal Revenue Code, is a tax or a user's fee. If the excise tax is held to be a user's fee the inquiry would then focus upon the reasonableness of the charge.[4] If it is held to be a tax, however, the issue becomes whether that tax is a violation of the constitutional principle of intergovernmental tax immunities.

The United States Supreme Court has long recognized the basic distinction between a user's charge and a tax. In *Packet Co. v. Keokuk*[5] the Court held that in collecting wharfage rates, the city of Keokuk, Iowa, was not levying a tax, which would have been a violation of the constitutional prohibition that "No State shall, without the Consent of Congress, lay any Duty or Tonnage."[6] The Court held that the city was merely imposing a charge for services rendered to steamboats mooring and landing on wharves constructed and maintained by the city. The Court said that a charge for services rendered is not a duty or tax.[7] The decision noted that building and maintaining a wharf for vessels is a service which could be provided by a state, a city, or an individual, "and when compensation is demanded for the use of the wharf, the demand is an assertion, not of sovereignty, but of a right of prop-

[4] The Supreme Court decisions concerning highway tolls are instructive. These cases establish that the states are empowered to develop "uniform, fair, and practical" standards for this type of fee, McCarroll v. Dixie Greyhound Lines, Inc., 309 U.S. 176 (1940); Interstate Transit, Inc. v. Lindsey, 283 U.S. 183 (1931); or flat fees which are not excessive, Aero Mayflower Transit Co. v. Georgia Pub. Serv. Comm'n, 295 U.S. 285 (1935).

[5] 95 U.S. 80 (1877).

[6] U.S. CONST. art. I, § 10, cl. 3.

[7] 95 U.S. at 84.

erty."[8] In short, the charge represented a quid pro quo.[9]

In a more recent Supreme Court decision, *Evansville-Vanderburgh Airport Authority District v. Delta Airlines, Inc.*,[10] the Court reaffirmed this principle. In a consolidated case, two municipal airport authorities enacted ordinances imposing charges for each passenger enplaning on a commercial airplane in order to defray the costs of airport construction and maintenance. In upholding the charge, the Court found that it was designed only to make the user of the provided facilities pay a reasonable charge. Furthermore, since there was no suggestion that the charge did not advance the constitutionally permissible objective of having interstate commerce bear a fair share of the costs, the charge was upheld.[11] The decision also noted that exemptions from the charge were based upon the degree to which the facilities were used.[12] For example, passengers were distinguished from other airport visitors because the former group required the use of runway and navigational facilities.[13]

In *State of Texas v. United States*,[14] a federal "tax"[15] was imposed

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[8] *Id.* at 85.

[9] *See also* Clyde Mallory Lines v. Alabama, 296 U.S. 261 (1935), where charges were aimed to defray the cost of insuring the safety and facility of movement of vessels of harbor, *and* Head Money Cases, 112 U.S. 580, 596 (1884), where a charge was upheld as a legitimate exercise of the commerce power and not an otherwise prohibited use of the taxing power, because the money collected did not go to the "general support of the government" and was "but a charge for services rendered."

[10] 405 U.S. 707 (1972).

[11] *Id.* at 722. Crandall v. Nevada, 6 Wall. 35 (1868), involving a state tax on passengers passing through the state on stagecoach or railroad, is distinguished on the grounds that the Nevada tax was charged without regard to whether the State provided any facilities for those travelers who were required to pay the fee. 405 U.S. at 713.

[12] 405 U.S. at 717-19. The balance of the decision dealt with the specific nature of the charge: the Court found that the charge reflected a fair approximation of the use of the facilities for whose benefit it was imposed, that it did not discriminate against interstate commerce and travel, that it was not shown to be excessive in relation to airport costs incurred by the taxing authority, and that it was not in conflict with any federal policies furthering uniform national regulation of air transportation. All of this suggests a possible analysis to be followed in determining the validity of a user's charge.

[13] 405 U.S. at 718.

[14] [1972] STAND. FED. TAX REP. (CCH) (72-2 U.S. Tax Cas.) ¶ 16,048 (W.D. Tex. 1972), *aff'd*, [1973] STAND. FED. TAX REP. (CCH) (73-1 U.S. Tax Cas.) ¶ 16,085 (5th Cir. 1973).

[15] 26 U.S.C. § 4261 (1970).

upon all passengers of commercial aircraft, including employees of the State of Texas engaged in official business. The monies from this "tax" were placed in the Airport and Airways Trust Fund.[16] Upholding this assessment, the court found that the legislative history of both the Airport and Airway Development and Revenue Acts of 1970 evidenced congressional intent that expansion and improvement of the national airport and airway system should be, to an ever increasing measure, borne by all users of the federal aviation system. The court noted that Congress' goal was for the civil part of the system to be self-sustained from air use taxes.[17] The district court endorsed the general notion that there should be a direct relationship between the use of the system and the money generated to meet the needs required by users. Furthermore, it was fitting that the direct users bear the primary financial burden.[18] The court noted that Congress specifically intended to include even those passengers who were state officials.[19] The court concluded that the "tax" was a charge for services rendered, representing a quid pro quo and, as such was outside the scope of the intergovernmental issues raised by the State.

In *Commonwealth of Massachusetts v. United States*,[20] the First Circuit Court of Appeals considered section 4491, the same section considered in *State of Georgia*, and it characterized money flowing into the Airport and Airways Trust Fund as a user's fee. The court held that a state was like any other user and should bear its share

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[16] During fiscal year 1971, Texas was to receive from this fund federal commitments of $22 million. This was out of a total of $33,785,000 available for the five state Southwestern Region and $170 million for the nation. [1972] STAND. FED. TAX REP. (CCH) (72-2 U.S. Tax Cas.) ¶ 16,048 at 86,129 (W.D. Tex. 1972).

[17] H.R. REP. NO. 601, 91st Cong., 2d Sess. 38, *reprinted in* [1970] U.S. CODE CONG. & AD. NEWS 3047, 3083 [hereinafter cited as H. REP. NO. 601].

[18] [1972] STAND. FED. TAX REP. (CCH) (72-2 U.S. Tax Cas.) ¶ 16,048 at 86,131 (W.D. Tex. 1972).

[19] *Id.* Earlier law had provided exemptions to persons using transportation furnished to the United States and to state and local governments. In terminating this exemption, the House Committee on Ways and Means indicated that:

> It did not seem appropriate to continue special exemptions for these governmental . . . organizations since this tax is now generally viewed as a user charge. In this situation there would appear to be no reason why these governmental . . . organizations should not pay their share of the use of the airway facilities.

See H. REP. NO. 601, *supra* note 17, at 46; [1970] U.S. CODE CONG. & AD. NEWS at 3091.

[20] 548 F.2d 33 (1st Cir. 1977). See note 86 *infra*.

of the cost of those facilities and services; the civil aircraft use tax was properly assessed against the State. As in *State of Texas*, the court of appeals primarily looked to the legislative history of the Airport and Airway Development Act and Revenue Act of 1970 to find that Congress had intended a user's charge. The court, in examining the essence of the assessment, decided that the term "user charge" was an apt description: "The money thus raised . . . is appropriated in advance to the users of the statute, and does not go to the general support of the government."[21] It concluded that there was no logical reason why any state user should not pay its fair portion of the costs.

This line of cases reveals the recognition that a user's fee and a tax are two distinct forms of collected revenue: the user's fee is basically devoted to support a specific activity—an activity from which the party paying the revenue derives some service and benefit; the tax is devoted to the general support of the government.

B. Intergovernmental Tax Immunities.

If section 4491 is viewed as a user's charge, the question of intergovernmental tax immunities is irrelevant; however, if it is viewed as a tax, the immunity question becomes vital. The basic principles of intergovernmental immunities have long been established: the taxing power of the United States may not be so exercised as to impair the separate existence and independent self-government of the states.[22] The reason for the immunity of instrumentalities of state government from federal taxation is found in the necessary protection of the independence of the national and state governments within their respective spheres.[23]

The leading case on intergovernmental tax immunities is *New York v. United States*.[24] The State of New York was operating a mineral water bottling plant and selling the water. A federal tax was imposed upon the profits of the operation. Announcing the judgment for the Court, Justice Frankfurter suggested that the test of state immunity from the tax should be whether the tax is discriminatory. "[S]o long as Congress generally taps a source of

[21] 548 F.2d at 36 (quoting *The Head Money Cases*).

[22] Veazie Bank v. Fenno, 75 U.S. (8 Wall.) 482 (1869).

[23] Helvering v. Powers, 293 U.S. 214 (1934).

[24] 326 U.S. 572 (1946).

revenue by whomsoever earned and not uniquely capable of being earned only by a State: the Constitution of the United States does not forbid it merely because its incidence falls also on a State."[25]

Chief Justice Stone, in a separate opinion, stressed the need for an addition to the test. He urged that the Court should also determine whether such a nondiscriminatory tax unduly interferes with the performance of state functions of government. "If it does, then the fact that the tax is non-discriminatory does not save it."[26] The Chief Justice recognized that the problem with using only the Frankfurter formula was that a tax, even though nondiscriminatory as to the subject matter, "may nevertheless so affect the State, merely because it is a State that is being taxed as to interfere unduly with the State's performance of its sovereign functions of government."[27] Therefore, according to Chief Justice Stone, because a tax has the ability to infringe upon State sovereignty, even a nondiscriminatory tax on a state must not unduly interfere with its governmental functions.

Since *New York v. United States* the doctrine of State tax immunity has been limited in scope and strength.[28] According to one commentator, by the mid-1940s the doctrine of reciprocal intergovernmental tax immunity had become an idea of questionable validity;[29] apparently very few states ever believed their sovereign status was sufficiently impaired by federal taxation to warrant the Stone distinction.

In a more recent decision by a district court on immunity issues, *City of New York v. United States*,[30] a federal excise tax was imposed upon amounts paid for the air travel of city employees engaged in official city business.[31] In upholding the tax, the district

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[25] *Id.* at 582.

[26] *Id.* at 588.

[27] *Id.* at 587.

[28] *See* Powell, *The Remnant of Intergovernmental Immunities*, 58 HARV. L. REV. 757 (1945), *and* Powell, *The Waning of Intergovernmental Tax Immunity*, 58 HARV. L. REV. 633 (1945). *See also* J. Freeland & R. Stephens, FUNDAMENTALS OF FEDERAL INCOME TAXATION 274 (1972).

[29] McCormack, *Intergovernmental Immunity and the Eleventh Amendment*, 51 N.C. L. REV. 485, 493 (1973).

[30] 394 F. Supp. 641 (S.D.N.Y. 1975), *aff'd*, 538 F.2d 308 (2d Cir. 1976).

[31] The excise tax provision in question here is I.R.C. § 4261. This is the same tax that was involved in Texas v. United States, [1972] STAND. FED. TAX REP.

court relied upon both the Frankfurter and Stone tests from *New York v. United States.* It found no discrimination against the city since all users of air transportation facilities were subject to the tax.[32] The court also found no undue burden upon the city's sovereign functions since there had been no showing of "actual impairment"[33] of city functions resulting from the tax directly. The decision indicated that unless a more convincing demonstration of actual hindrance of state municipal instrumentalities were presented, there would be no such undue interference as to invalidate a federal tax.

It can be seen, therefore, that the immunity doctrine has largely been a difficult ground upon which to challenge a federal tax since a state carries a heavy burden in demonstrating not only that the tax is discriminatory but that it also unduly interferes or actually impairs state governmental functions.

C. National League.

State of Georgia not only reached intergovernmental tax immunity issues by treating section 4491 as a tax, but it also relied upon a recent Supreme Court case, *National League of Cities v. Usery,*[34] in finding that the tax presented an undue burden on the State and its essential functions. In that case, various governmental organizations challenged the validity of certain amendments to the Fair Labor Standards Act[35] which extended its minimum wage and maximum hour provisions to almost all employees of states and their political subdivisions. Justice Rehnquist's majority opinion held that insofar as the amendments operated to displace the states' ability to structure employer-employee relationships in areas of traditional governmental functions, they were not within the authority granted Congress by the Commerce Clause. He stressed

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(CCH) (72-2 U.S. Tax Cas.) ¶ 16,048 (W.D. Tex. 1972). The *Texas* court did not reach intergovernmental issues since it treated the tax as a user's fee.

[32] 394 F. Supp. at 646.

[33] *Id.* This standard of "actual impairment" was outlined by McCormack, *supra* note 29, at 493. In surveying intergovernmental immunities, he found "any challenge to federal taxation of a state activity would require a showing of actual impairment of state functions." The court in *City of New York* expressly relied upon this conclusion.

[34] 426 U.S. 833 (1976).

[35] 29 U.S.C. § 201 (1970).

that Congress had sought to use its power in a fashion that would impair the states' ability to function within a federal system.[36]

Thus far the application of *National League* has been cautious; rarely has it been applied to issues outside of those relating to state employment practices and the effect of federal legislation upon them.[37] Furthermore, while the Supreme Court has obstructed congressional intrusions into state employment practices, it has yet to apply similar concern for federal assaults upon principles of federalism in the area of intergovernmental immunities.[38] Finally, related to the question of the scope of *National League* is its application: does the case prohibit any federal legislation which has a direct effect upon state sovereign functions, or does it prohibit only that federal legislation which is outweighed by state interests?

The district court in *Usery v. Board of Education of Salt Lake City*,[39] one of the few courts to consider this problem, was not

[36] 436 U.S. at 844.

[37] Christensen v. Iowa, 417 F. Supp. 423 (N.D. Iowa 1976) declined to apply *National League* beyond those specific Fair Labor Standards Act amendments in approving Congress' authority under the Commerce Clause to enact other provisions under the FLSA involving discrimination in pay based upon sex with respect to city employees. In approving Congressional power to enact these equal pay amendments, Usery v. Dallas Independent School Dist., 421 F. Supp. 111 (N.D. Tex. 1976), also gave *National League* only mild importance; while conceding that the Supreme Court case "does effect a modest resurrection of State sovereignty," it strongly doubted that, in the absence of any further signals from the Supreme Court, *National League* "is intended to generally and fundamentally alter the balance of state and federal power." *Id.* at 114. It added that the case "should be applied very conservatively in overturning social and economic policies of Congress."

[38] In Elrod v. Burns, 427 U.S. 347 (1976), Chief Justice Burger, in dissent, pointed to the Court's refusal to apply the principles underlying *National League*. He regarded *National League* as an attempt "to arrest the denigration of the States to a role comparable to the departments of France, governed entirely out of the national capital." 427 U.S. at 375. Burger accused the majority of supplying "inroads on the powers of the States to manage their own affairs" which would only "complicate our system and centralize more power in Washington." In Fitzpatrick v. Bitzer, 427 U.S. 445 (1976), Justice Rehnquist declined to find an infringement of State sovereignty in Congress' provision for private suits against States or state officials to enforce the Civil Rights Act of 1964. In so deciding, he approved the language of Ex parte Virginia, 100 U.S. 339 (1879), which supported the expansion of congressional power with the corresponding general diminution of state power:

> The prohibitions of the Fourteenth Amendment are directed to the States, and they are to a degree restrictions of State power. Indeed, every addition of power to the general government involves a corresponding diminution of the governmental powers of the States.

Id. at 346.

[39] 421 F. Supp. 718 (D. Utah 1976).

entirely certain which approach to adopt. At the onset it rejected the direct effect theory, reasoning that if *National League* were so interpreted this would "undermine constitutionally and statutorily recognized and protected individual rights in employment merely because the federal legislation affects, in some manner, an integral state function."[40] Such an absolute interpretation, it added, would "derogate from the federal system by unduly restricting congressional power" in areas such as individual rights.[41] The court then balanced the interests and found the national interest in preventing arbitrary employment discrimination on the basis of age to prevail.[42] Later in the opinion, however, the court retreated from its otherwise strong approach and addressed the alternative rationale. It found that because of the nature of the federal legislation in question, there was no "direct" displacement of the state's freedom to structure integral state operations.[43]

In *Brown v. County of Santa Barbara*,[44] the direct effect test was slightly more significant in the court's analysis. The test was to ask what function the federal legislation attempted to regulate, and if it was something essential to a state's separate and independent existence then the federal legislation may be invalid. The case found no such effect upon something essential, and it upheld the federal legislation which "merely"[45] affected state decisions to pay employees unequally on the basis of gender. Imposing the obligation not to discriminate in wages based on sex "has a decidedly less direct and intrusive impact on State governmental functions" than the FLSA amendments in *National League* which touched an area "essential to [the State's] separate and independent existence."[46] By so holding, the court actually seemed to be balancing with a special awareness of the subject matter involved, although couched in terms of directness.

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[40] *Id.* at 719.

[41] *Id.*

[42] *Id. See also* Aaron v. Davis, 424 F. Supp. 1238 (E.D. Ark. 1976).

[43] 421 F. Supp. at 720.

[44] 427 F. Supp. 112 (C.D. Cal. 1977).

[45] *Id.* at 113.

[46] *Id.*

II. STATE OF GEORGIA, DEPARTMENT OF TRANSPORTATION v. UNITED STATES

A. Tax.

By addressing intergovernmental immunity issues, the court in *State of Georgia* impliedly held that section 4491 is a tax. The United States argued, however, that the civil aircraft tax is not a tax in the traditional sense, but instead a charge for services rendered, and as such, is outside the scope of intergovernmental tax immunity issues.[47] The United States stressed the same points made in *State of Texas*[48] and *Commonwealth of Massachusetts*:[49] Congressional intent is clear; section 4491 is a user's charge based on the premise that all aircraft should pay a basic fee to use a system from which they derive a benefit.[50] Furthermore, the cost of developing and maintaining an improved air transportation system should be assumed by the direct users, whether they be private, educational, or governmental.

The United States emphasized that there is a fundamental and constitutional difference between a tax designed to produce federal revenues for the general support of governmental benefits and a user's charge designed to recoup part of the cost of governmental facilities and services directly from those who benefit from them;[51] section 4491 was in the latter category. To ensure that the air user charges were expended solely for the expansion, maintenance, and improvement of the air transportation system, the United States demonstrated that the monies collected from the State were deposited into a special trust fund; while Georgia would have to pay a user charge of some $4,300, it would receive close to $15 million from that same trust fund.[52]

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[47] Brief for Defendant at 12-14, State of Georgia v. United States, 430 F. Supp. 823 (N.D. Ga. 1976).

[48] *See* text accompanying notes 14-19 *supra.*

[49] *See* text accompanying notes 20-21 *supra.*

[50] *See* H. REP. No. 601, *supra* note 17, at 40; [1970] U.S. CODE CONG. & ADM. NEWS at 3085.

[51] Brief for Defendant, *supra* note 47, at 13-14.

[52] Supplemental Brief for Defendant on the Legal Question of Undue Interference at 5. The United States maintained that the Second Annual Report of Operations under the Airport and Airways Development Act for fiscal year 1971 discloses that the $15 million figure was composed of planning grants and Airport Development Aid Program grants.

Neither the State of Georgia in its brief nor the Court in its opinion mentioned this issue. No response was given to the United States' contention that underlying section 4491 is a quid pro quo outside intergovernmental immunity issues. The court, without explanation, simply began to discuss intergovernmental immunities.

B. Reliance Upon National League.

As to the issue of whether *National League*—a case principally concerned with the Commerce Clause— should be controlling in a tax immunity case, the State found *National League*'s applicability from the actual language of the Supreme Court. The State pointed out that Justice Rehnquist applied principles of intergovernmental immunities to the area of interstate commerce with such "striking force and clarity"[53] as to leave no doubt that such principles are applicable in all respects to the area of federal taxation of states.[54] The State added that an analysis of the opinion makes it clear that the instant tax, section 4491, imposed by the federal government upon the State exceeds the federal government's authority under the federal system.[55] Justice Rehnquist had, for instance, recognized that the whole purpose of the immunity doctrine is to protect the "essential role of the States."[56] To that end, the State argued that there was no reason to limit the immunity docrine to Congressional exercise of its Commerce Clause authority. The State urged that the principles enunciated in *National League* applied with equal force to the federal taxing power.[57] In addition, the State asserted

[53] Supplemental Brief for Plaintiff on National League of Cities v. Usery at 2, State of Georgia v. United States, 430 F. Supp. 823 (N.D. Ga. 1976).

[54] Such language includes:

> This Court has never doubted that there are limits upon the power of Congress to override state sovereignty, even when exercising its otherwise plenary powers to tax or regulate commerce which are conferred by Art. I of the Constitution.

426 U.S. at 842. Justice Rehnquist also recognized that the whole purpose of the immunity doctrine is to protect the "essential role of the States in our federal system." *Id.* at 844.

[55] Supplemental Brief for Plaintiff, *supra* note 53, at 2.

[56] 426 U.S. at 844.

[57] Supplemental Brief for Plaintiff, *supra* note 53, at 5. However, not all the language in *National League* supports the State's position:

> We express no view as to whether different results might obtain if Congress seeks to affect the integral operations of state governments by exercising authority granted it under other sections of the

that the Supreme Court embraced "whole-heartedly the immunity doctrine"[58] by using *New York v. United States* as strong authority for the proposition that even a general nondiscriminatory tax imposed upon citizens and states alike could not be constitutionally applied to a state's capitol, state-house, public school, revenue from state taxes or school lands, or aircraft.

Absent from the United States' argument is the issue of whether *National League* should apply at all to tax immunity issues. The court as well apparently accepted the role of *National League* in defining the undue interference of a federal tax, by noting that, "[T]he parties seem to concede *sub silentio* that the *National League of Cities* decision is dispositive of the instant action."[59] In so relying upon *National League*, the court declined to apply *City of New York*, which had demanded a showing of "actual impairment," finding that because *City of New York* was decided before Justice Rehnquist's opinion in *National League*, the *City of New York* reasoning was no longer applicable.[60] *State of Georgia*, in questioning whether the state was immune from the federal tax turned to the tests presented by *New York v. United States*; since there was no question that the tax did not discriminate, attention was centered about Justice Stone's "undue interference" test, which the court found to be defined entirely in terms of *National League*.[61]

C. Undue Interference

The issue actually discussed by *State of Georgia* is how "undue interference"—the Stone addition to the tax immunity test—is to be defined. The State argued that the test of undue interference of a federal tax upon state property or activities is the directness of

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Constitution such as the Spending Power.

426 U.S. at 825 n.17. Presumably the same analysis would apply to the taxing power. *But cf.* 426 U.S. at 843 n.14:

> Surely the federal power to tax is no less a delegated power than is the commerce power: both find their genesis in Art I, § 8. Nor can characterizing the limitation recognized upon the federal taxing as an "implied immunity" obscure the fact that this "immunity" is derived from the sovereignty of the States and the concomitant barriers which such sovereignty presents to otherwise plenary federal authority.

[58] Supplemental Brief for Plaintiff, *supra* note 53, at 4.

[59] 430 F. Supp. at 824-25.

[60] *Id.* at 824 n.1.

[61] *Id.* at 825.

such interference; since section 4491 imposed a direct burden and effects a direct increase in costs to the State in performing its governmental functions, it is unconstitutional. The degree of the interference is insignificant, the key is whether such interference exists at all.

In support of its position, the State pointed out that Justice Rehnquist's opinion in *National League* contained a great deal of language which spoke in terms of directness. For instance, in recalling the broad scheme of the federal system embodied in the Constitution, he held that insofar as the challenged FLSA amendments "operate to directly displace the States' freedom to structure integral operations in areas of traditional governmental functions," such authority is not granted Congress by the Commerce Clause.[62]

The State asserted that the quantity of financial burden is not the key to whether a particular attempted assertion of power by the federal government over the state is invalid. It also stressed that the danger of the tax on its civil aircraft is that the federal government, if authorized to impose any tax at all on an essential state function, could impose one large enough to force relinquishment by the State of important governmental activities.[63] The question is simply whether the federal government is regulating in an area traditionally reserved for the State's exclusive discretion.[64] Not only does the literal language of *National League* support this proposition, but the State maintained that the Supreme Court's refusal to remand *National League* to determine the actual impact of the FLSA amendments upon the states and cities further indicates specific facts are unimportant.[65] The "dispositive factor" was that Congress had attempted to exercise its authority in such a

[62] 426 U.S. at 852. Justice Rehnquist's opinion added at 855:

> Congress may not exercise that [commerce] power so as to force directly upon the States its choices as to how essential decisions regarding the conduct of integral governmental functions are to be made.

[63] Supplemental Brief for Plaintiff, *supra* note 53, at 6.

[64] Again the language of Justice Rehnquist seems to support an affirmative answer: "Quite apart from the substantial costs imposed upon the States and their political subdivisions, the Act displaces state policies regarding the manner in which they will structure delivery of those governmental services which their citizens require." 426 U.S. at 847.

[65] In referring to remand, the Court said: "We do not believe particularized assessments of actual impact are crucial to resolution of the issue presented." 426 U.S. at 851.

manner as to regulate states in their "capacities as sovereign governments."[66]

The United States, on the other hand, argued that the test presented by *National League* was quantitative and that the tax must not be viewed in isolation but rather must accommodate other factors in determining whether on balance the interference created by the tax is in fact "undue." As recognized in *State of Georgia*, "a great deal of Justice Rehnquist's analysis is based upon the substantially increased cost which would be visited upon the states"[67] as the result of the federal legislation.

Beyond the Supreme Court's discussion of increased costs, the United States asserted that the Court would find undue interference only when the federal tax is so substantial that it operates to directly displace the state's freedom to control essential areas. The United States argued that the substance of *National League* indicates that undue influence exists only when there is a significant impact on the functioning of the governmental bodies, which in turn could cause "the forced relinquishment" of important state governmental rights.[68] No evidence of such "relinquishment" was made by the State, and the United States claimed that this failure was a "potent indicator" that the tax was not so substantial as to be "undue."[69]

The United States also insisted that the $4,300 tax be viewed in light of both the total state budget and the benefits conferred upon the state by federal expenditures in the area of aviation. Such federal funds were derived from the Airport and Airway Trust Fund and amounted to some $15.2 million of benefits to the State

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[66] 426 U.S. at 852.

[67] 430 F. Supp. at 825.

[68] For instance, Justice Rehnquist devoted a great deal of attention to the impact of the FLSA amendments upon California's highway patrol training program in terms of increased costs of close to $750,000 per year. He noted that such federal wage regulation would increase state costs and effect "a compromise undoubtedly of substantial importance to those whose safety and welfare may depend upon the preparedness of the California Highway Patrol." He also cited two local governmental entities who would be forced to pay some $938,000 extra for fire and police protection without any proportional increase in services rendered. 426 U.S. at 846-47.

[69] *See* Response to Plaintiff's Supplemental Brief on the Legal Question of Undue Interference at 1 & 2.

of Georgia.[70] When "undue interference" is viewed in a quantitative light of balancing these economic considerations, added the United States, the tax cannot be said to unduly interfere with the operations of the State.

The United States argued that a balancing approach is further advanced by the way in which Justice Rehnquist distinguished his holding in *National League* from his earlier decision, *Fry v. United States*,[71] which upheld the Economic Stabilization Act as applied to State employers. *Fry* involved an "emergency measure" designed to counter serious economic problems, and Justice Rehnquist weighed such factors as the degree of federal intrusion into state matters, the exigent national circumstances of an emergency justifying such an intrusion, and the traditionally local nature of the state activities that were to be nationally regulated. The United States claimed that distinguishing *Fry* on the basis of an emergency situation supported its argument that the Court will balance the respective interests of federal and state governments in regulating economic activity.

In further support of its position, the United States pointed to Justice Blackmun's concurring opinion in *National League*, in which the Justice said that the Court's opinion was essentially adopting a balancing approach. Here the state's interest prevailed, but in other areas, according to Justice Blackmun, such as environmental protection, there would be no similar denial of federal power, since the federal government has a demonstrably greater interest, and state compliance with the federal standards would be essential.[72]

In finding the tax unconstitutional as applied to the State's civil aircraft, *State of Georgia* did not accept the State's invitation to define undue interference as any direct effect. Nor did it follow the United States' suggestion to balance the amount of the tax against the state budget and the benefits received by Georgia from the trust fund into which the tax was paid. The court recognized that *National League* "does not lend a great deal of light to the

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[70] *See* Supplemental Brief for Defendant on the Legal Question of Undue Interference at 5.

[71] 421 U.S. 542 (1975).

[72] 426 U.S. at 855.

distinction which the instant parties propound."[73] Instead, the court engaged in a balancing analysis which relied entirely upon Justice Blackmun's concurring opinion. The decision focused upon his illustration of environmental protection as an instance where adherence to federal standards is essential in finding that the balancing test involved qualitative determinations as opposed to the defendant's proposed monetary weighing. Commenting upon the Blackmun example, the court said "the federal interest in uniformity in environmental regulation would exceed the state interest in promulgating its own standards," and such would hold true notwithstanding "the monetary impact which the federal statute or regulation could have upon the states."[74] According to the court, the essence of the problem is whether or not Congress has the power to tax the entities through which a state carries forward its essential functions. In the absence of certain circumstances such as an economic emergency or the need to protect a pre-eminent federal interest such as environmental preservation or discrimination, there is no such power. "The question of whether or not this power exists is not a question of degree. The power to tax in a particular subject matter either exists or it does not exist."[75]

With this test in mind, the court in *State of Georgia* could "perceive no federal interest of such magnitude warranting the imposition of a federal tax on the State."[76] A federal tax on the state civil aircraft, advanced the court, does not rise to the level of a pre-eminent federal interest. "Although the federal government does have a peculiar interest in controlling the number and spacing of incoming and outgoing flights, there exists no parallel overriding federal policy in terms of being able to tax each and every flight."[77] Failure to uphold the tax would not "destroy the efficacy of an entire federal program."[78]

Despite its use of the balancing test, at one point the decision did turn away from its Blackmun approach and looked at the possible impact of section 4491 upon the State. It found that while

[73] 430 F. Supp. at 825.

[74] *Id.* at 825 n.3.

[75] *Id.*

[76] *Id.* at 826.

[77] *Id.*

[78] *Id.*

$4,300 could not stop the use of civil aircraft and carried only a "modest pecuniary force," it still could be "significant enough to affect the State's basic policy choices as to whether or not air travel is the most efficacious means through which to accomplish its governmental obligations."[79] In its conclusion, however, the court returned to its former basis and held that when a negligible federal interest is balanced against the potential to affect State policy and the ability to structure its own essential functions, "such power does not exist."[80]

State of Georgia is unsettling in several respects. Presently on direct appeal to the United States Supreme Court,[81] the decision presents several issues for the Court to review. One is the absence of any mention by the court of the tax or user's charge issue. This is a problem not to be passed over, especially in light of the previous decisions which held similar and even the identical tax to actually represent a quid pro quo and not a tax. This question presents a probable ground of appeal. Not only is there firm precedent for finding the "tax" a user's fee,[82] but reliance on the user charge presents a more orthodox basis upon which to decide the case than intergovernmental immunities. Furthermore, the Supreme Court might not feel the issues of intergovernmental tax immunities are fully justiciable or ripe:[83] few cases have raised these questions, and disposing the case on user fee grounds may well be a way to once again avoid the issue.

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[79] *Id.*

[80] *Id.* at 825 n.2.

[81] United States v. Georgia, No. 77-16 (filed July 1, 1977).

[82] State of Texas v. United States, [1972] STAND. FED. TAX REP. (CCH) (72-2 U.S. Tax Cas.) ¶ 16,048 (W.D. Tex. 1972); Commonwealth of Massachusetts v. United States, 548 F.2d 33 (1st Cir. 1977).

[83] In Ashwander v. Tennessee Valley Authority, 297 U.S. 288, 347 (1936), Justice Brandeis, in a concurring opinion, set forth a number of instances where the Supreme Court will avoid passing upon those issues which are within its jurisdiction. Among those was:

> 4. The Court will not pass upon a constitutional question although properly presented by the record, if there is also present some other ground upon which the case may be disposed of. This rule has found most varied application. Thus, if a case can be decided on either of two grounds, one involving a constitutional question, the other a question of statutory construction or general law, the Court will decide only the latter.

See also Light v. United States, 220 U.S. 523, 538 (1910); Siler v. Louisville & Nashville R. Co., 213 U.S. 175, 199 (1908).

Another problem is *State of Georgia*'s "sub silentio" acceptance of *National League* as dispositive of a tax immunities case. This too presents an outstanding feature in light of the vast collections of district court cases which have declined to apply *National League* even beyond the limited scope of the FLSA amendments. Such acceptance is not likely to pass unquestioned by the Supreme Court. This could provide an excellent ground upon which to dispose of a potentially controversial outcome. Should *National League* be rejected as dispositive there would perhaps be a return to the *City of New York* approach of demanding a showing of "actual impairment." This would effectively negate any contribution *National League* might have made to the analysis of the tax immunity doctrine. On the other hand, should the Supreme Court agree that the case does apply to these issues, the door will be open for states to assert strong defenses against any federal intrusions.

The manner in which *State of Georgia* relies upon *National League* is almost as confusing as the Supreme Court's opinion in *National League* itself. The district court seemed to willingly adopt a Blackmun-balancing approach, but then it speculated upon the actual impact which may directly touch the State. Perhaps it was merely being cautious and deciding in the alternative to reach the same conclusion. Also troubling is the court's balancing, since there does not seem to be traditional weighing of one interest against the other. Rather there seems to be simply a search for a pre-eminent federal interest. The analysis seems to run as follows: if there is to be any federal regulation of an essential state function, it must involve an area where the federal interest is pre-eminent. The analysis clusters around the nature and subject matter of the federal legislation, not the nature of the federal legislation compared to the nature of the essential state function. The degree of intrusion is then unimportant; where there is no federal interest, no intrusion can exist in the face of a regulation upon an essential State function. One wonders whether the converse can be true: when the federal interest is in fact pre-eminent and the federal power does exist, can federal regulation exist to such a gross extreme that the federal government could obliterate essential state functions?

State of Georgia is not faced with this question of extreme use of federal power. Perhaps new protections for states will have to

be fashioned should this situation arise. In any event, *State of Georgia's* basic adoption of the Blackmun approach seems sensible since it manages to accommodate both the state's fundamental interests and federal objectives.[84] This approach effects "a new tool of analysis which allows recognition of renewed federalism and protects the states from dominance by Congress."[85] A court can seek to balance the congressional interest against the states' tenth amendment right to freedom of decision-making in certain areas. When states are regulated in such a manner that an essential state function might be touched, the court could balance the states' tenth amendment interests against whether "the federal policy sought is crucial or essential to the protection of valid constitutional guarantees."[86]

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[84] Federal policies such as those in pollution, as suggested by Justice Blackmun in *National League*, and age discrimination, as in Brown v. County of Santa Barbara, 427 F. Supp. 112 (C.D. Cal. 1977), will certainly prevail.

[85] Beaird and Ellington, *A Commerce Power Seesaw: Balancing National League of Cities*, 11 GA. L. REV. 35, 73 (1976).

[86] *Id.*

Since this issue went to print, the Supreme Court decided Commonwealth of Massachusetts v. United States, 548 F.2d 33 (1st Cir. 1977), and found § 4491 to be a user's fee. 46 U.S.L.W. 4280 (March 29, 1978). The effect of this decision will be to overrule the holding of the district court in State of Georgia, Dep't of Transp. v. United States.

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